The Brief

March 2013 - No. 1

South-East Europe - Legal Update

Arbitration

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EDITORIAL

HUNGARY

General investment climate and recent restrictions to arbitration

Hungary is traditionally considered to be an attractive destination for foreign investment thanks to its open economy, high-quality infrastructure, skilled labour force and strategic geographic location in South-East Europe. However, in its efforts to recover from the economic crisis, the country has recently enacted measures aimed at boosting national production and protecting national assets that are likely to have a negative impact on foreign investment.

In the area of arbitration, which is the focus of this first issue of our SEE Group Newsletter, two new restrictions were introduced into the Arbitration Act in 2012 (Act LXV of 2012, which entered into force on 13 June 2012). Both provisions are intended to limit the freedom of resorting to arbitration when the dispute concerns assets which are closely linked to Hungary - either because they are real assets situated on the Hungarian territory or because they are considered to be part of Hungarian national property. Due to the fact that no case law has yet applied these provisions and that they were introduced without extensive parliamentary preparatory work, their exact scope of application is uncertain. Therefore, the possibility of arbitrating disputes arising from transactions involving private foreign investors in Hungary remains unclear.

The first restriction (section 3(1) of the Arbitration Act) provides that parties may only resort to a Hungarian arbitration institution and that proceedings must be carried out in the Hungarian language if three conditions are met: (i) the registered seats or business establishments of both parties are in Hungary, (ii) the dispute arises out of a contract concerning *in rem* rights or lease rights related to properties located in Hungary, and (iii) the law governing the contract is Hungarian law. In such cases, resorting to an *ad hoc* or foreign arbitration tribunal is prohibited. Foreign companies that conduct activities in Hungary via a local subsidiary are concerned by this measure, which, if interpreted broadly, could apply to a very large number of transactions. Indeed, the wording "*contracts concerning in rem rights or lease rights*" is highly imprecise expression, with doubts as to whether it encompasses financing contracts related to the purchase of property in Hungary.

Using a similarly broad wording, the second restriction (section 4 of the Arbitration Act) prohibits the recourse to arbitration for those disputes that concern "*national property*", defined in the Law on National Assets as "*any property value to which the State and local governments have a right*" (section 1(1)). A number of State-owned companies, such as Magyar Posta (post), Tiszamenti Regionàlis Vizmuvek (water utility), Magyar Allamvasutak (railroads), Szerecsejàték (betting), are explicitly listed by the law (in an Appendix) as being part of Hungary's national property. This implies for example that disputes arising from the sale by the State of its shares in these companies cannot be submitted to arbitration. But does this also mean that arbitration is automatically excluded from all the transactions involving these companies, independently of the object of the transaction and of the fact that these companies are only a party to and not the object of the said transaction?

This somewhat protectionist legislative trend, which can be observed in several areas of Hungarian business law, has triggered proceedings challenging the conformity of recent laws with the Hungarian Constitution, EU-regulations as well as with the bilateral investment treaties signed by Hungary.

On 18 December 2012, a procedure was initiated before the Hungarian Constitutional Court against the recent modifications to the Hungarian Arbitration Act, based on their alleged non-conformity with international treaties signed by Hungary (because of the restriction of the scope of disputes which may be subjected to arbitration) as well as on an alleged non-conformity with the principle of legal certainty (because the retrospective application of these provisions may render arbitration agreements concluded before 13 June 2012 void and null).

Hungary is also the object of several infringement procedures initiated by the European Commission regarding alleged violations of freedom of establishment and freedom to provide services, as well as de facto discriminations against foreign companies. For instance, the recent introduction of so-called "crisis taxes" in the areas of telecommunications and retail, triggered proceedings before the ECJ and the EU Commission respectively, the decisions of which are still pending. These taxes are suspected of being discriminatory as they are in practice for the most part supported by foreign-owned companies, due to the market structure. Other current proceedings include the alleged illegal allocation of State aids, for example to MOL (of which the Hungarian State is the main shareholder), which is exempt of a tax increase on mining activities.

Several investors have recently initiated arbitration procedures against Hungary before the International Centre for the Settlement of Investment Disputes of the World Bank, founding their claims on the bilateral investment treaties signed between their State and Hungary.

At a time when several countries of the SEE region are contemplating entering the European Union, hence opening their borders and accepting into their legal framework the European *acquis*, the recent Hungarian developments follow a different dynamic. The example of arbitration perfectly illustrates this discrepancy. While Bosnia and Herzegovina and Montenegro are in the process of developing their local arbitration practice and are encouraging international investment arbitration (Montenegro signed the ICSID Convention in July 2012; Bosnia and Herzegovina has been an ICSID member since 1997), other countries are at a more advanced stage in the field of arbitration, which is being actively promoted through recent legislation and practice. In Croatia for example, enforcement of foreign arbitral awards was recently simplified, while in the Czech Republic arbitration is the preferred method of dispute resolution when it comes to investments in the area of renewable energy. ■

BOSNIA AND HERZEGOVINA

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Existing framework for the development of arbitration

Bosnia and Herzegovina offers the necessary legal framework and institutions to allow the settlement of disputes through arbitration. However, arbitration remains underdeveloped, mainly due to the attractiveness of better-known foreign arbitration courts, and because arbitration is not yet a popular way of resolving domestic disputes.

One example of arbitration before a foreign arbitration court is the ongoing case before the ICC in Paris, instigated by a foreign investor, the Croatian-Hungarian consortium INA-MOL, against the Federation of BIH (one of Bosnia and Herzegovina's territorial entities). INA-MOL became a majority owner of the leading BIH oil company, "Energopetrol" from Sarajevo, by entering into a recapitalisation agreement with the Federation of BIH in 2006. Under this agreement, the Federation of BIH agreed to meet all employee claims based on events prior to the investor's entrance into the company. These claims – currently estimated at around EUR 10 million, but which could potentially climb to EUR 32 million – are being addressed by the employees to Energopetrol. INA-MOL is now asking the Federation of BIH to take responsibility for them, as specified in the recapitalisation agreement. This request triggered the arbitration procedure, which is currently on hold until August, while the Federation and INA-MOL attempt to settle the case by mutual agreement.

Within Bosnia and Herzegovina, arbitration is regulated separately in the territory's three jurisdictions (Republic of Srpska, Federation of BIH, and Brcko District). Since there is no special legislation on arbitration, it is regulated by the Civil Procedure Code of each jurisdiction. These different legal acts set out the same rules for arbitration, the matter therefore being governed by the same rules in all parts of Bosnia and Herzegovina.

These rules allow a wide range of disputes to be submitted to arbitration, and ensure the enforceability of arbitral awards. The parties may choose arbitration to resolve a specific dispute, or as a method for resolving all disputes that may arise out of the contractual relationship they entered into. The arbitration agreement, which must be made in writing, may apply to all disputes arising between the parties, save for certain situations where the parties may not dispose of their rights (e.g. status matters, intellectual property and competition law matters). The arbitral award has the same legal validity and force as a court judgment, and is therefore binding and enforceable. A final arbitral award can only be challenged, i.e. annulled before the court, under limited conditions set out by the law (e.g. if no arbitration agreement was concluded, if the arbitration agreement was invalid or ineffective, if the arbitration tribunal exceeded its powers, or if the award is contrary to the Constitution of Bosnia and Herzegovina or one of its entities).

The country's openness to arbitration is further guaranteed by the existence of institutional arbitration tribunals. A permanent arbitration tribunal is attached to the Foreign Trade Chamber of Bosnia and Herzegovina. The arbitration tribunal is an independent body, responsible for resolving commercial disputes, provided that this type of dispute is not under the exclusive jurisdiction of a state court. The Chamber of Commerce of the Republic of Srpska also has formed arbitration tribunals for both foreign trade and domestic business relations.

Despite the possibility of resorting to arbitration from a legal and institutional point of view, arbitration remains underdeveloped in Bosnia and Herzegovina. This is partly due to the fact that arbitration is not yet commonly used as a way to settle disputes between domestic entities. Another explanatory factor is that a large part of the foreign investment in Bosnia and Herzegovina comes from countries in which arbitration is not a widely accepted means of dispute resolution. According to the Central Bank data, most investments in 2011 came from Russia, Serbia and Austria, and over the last fifteen years, the largest investors also included Croatia and Slovenia. Except for Austria, these countries do not have a tradition of arbitration, which may explain the lack of arbitration proceedings.

In the future however, considering the ongoing talks between Bosnia and Herzegovina and the European Union, diversification may be expected not only in the origin of the investments, but also in the types of operations (privatisations and/or PPPs), which may in turn lead to more arbitration proceedings in the country. ■

CROATIA

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Enforcement of foreign arbitral awards under the new Enforcement Act

The new Enforcement Act entered into force in Croatia on 15 October 2012. By providing for a more efficient enforcement procedure of decisions issued by the Croatian courts, the Act also indirectly makes the enforcement of foreign arbitral awards significantly easier and faster than before.

In order to benefit from this new procedure, the claimant must initiate the *procedure for recognition of equivalence of the*

foreign award, which is carried out before the County Court in Zagreb, or before the Commercial Court in Zagreb in cases where the subject of the award relates to commercial matters (i.e. if the dispute derives from a relationship between businesses). Once the court has verified that the award meets the conditions for recognition, it issues a decision recognising the equivalence of the foreign arbitral award, meaning the claimant will have a title carrying the same force as if it were a decision issued by the Croatian courts. The new recognition process takes about two months.

Prior to 15 October 2012, if the claimant's intention was to enforce the award in Croatia, he/she was required to initiate two consecutive procedures. The claimant had to first obtain the recognition of the award by a Croatian court, and then initiate an enforcement procedure based on the issued decision on recognition of equivalence. The enforcement procedure was carried out before the Commercial Court or the County Court in Zagreb. Three to six months were generally required to receive an enforcement order providing the basis for the settlement of the outstanding receivables. Finally, the enforcement order had to be delivered to FINA (the Croatian Financial Agency), an administrative body tasked with the execution of decisions issued in enforcement procedures. FINA is empowered to perform money transfers from debtor's accounts in favour of the creditor's bank account based on the chronological order of submitted claims.

Since the new Enforcement Act came into force, the procedure for claimants to obtain payment of outstanding receivables has been simplified. It is based on the foreign award and the decision issued by the Croatian court on the recognition of its equivalence. No supplementary enforcement procedure is required. If the decision issued by the Croatian court is final and enforceable, the claimant may submit the request for payment directly to FINA, which then issues an order to all banks in which the debtor maintains bank accounts or deposits to seize funds from such accounts. The debtor is informed of FINA's actions, and if no complaint is filed by the debtor against the direct enforcement by FINA within 30 days from the day on which it received the request, the transfer of funds from the debtor's to the creditor's account is performed.

The enforcement procedure remains useful if debtors do not have sufficient funds available in Croatian banks to satisfy their payment obligations, as it enables claimants to seize other assets. Indeed, the enforcement order, once it becomes final and enforceable, allows claimants to pocket receivables from the amount gained by selling the debtor's assets (both tangible and intangible).

The new Enforcement Act has made obtaining the payment of receivables deposited in Croatian bank accounts on the basis of a foreign arbitral award more efficient and faster. This should contribute to the development of resorting to arbitration in disputes concerning receivables in Croatia, and to improving trust in arbitration as a means of dispute resolution. ■

CZECH REPUBLIC

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2012 Arbitration Act amendment increasing consumer protection

One of the statutory out-of-court settlement methods in the Czech Republic is arbitration. Arbitration is regulated under Act No. 216/1994 Sb. on Arbitration and the Execution of Arbitral Awards ("**Arbitration Act**"). All actionable property disputes may be arbitrated. Disputes involving public non-profit health care institutions, disputes related to the execution of decisions, disputes incidental to insolvency and composition proceedings, and disputes that may not be resolved by judicial conciliation (family law, typically) may not be arbitrated.

Arbitration generally works well in the settlement of business disputes in the Czech Republic, though problems have appeared in arbitrating consumer disputes in recent years. The Arbitration Act Amendment, effective as of April 2012, introduced certain consumer protection mechanisms in order to prevent any misuse of arbitration.

These new provisions do not apply to arbitration clauses in business-to-business relations, but apply to those between businesses and consumers. The most significant changes aimed at consumer protection are:

- for consumer contracts, the duty to sign arbitration agreements by means of a separate instrument is introduced, in order to prevent the execution of arbitration clauses in adhesion contracts (such as general terms and conditions);
- the extension of the required contents of arbitration clauses executed with the consumer by statutorily prescribed information, such as specifying the identity of the arbitrator (it must be an arbitrator registered in the relevant register of the Ministry of Justice - the criteria for registration have been made more strict) or determining a permanent arbitration court as the arbitrator;
- the duty to notify the consumer in advance about the possible consequences of executing the arbitration clause and the estimated cost of arbitration;
- the extension of the consumer's procedural advantages (broader range of admissible objections, the duty to provide reasons for the delivered arbitral award, reviewability, the arbitrator's duty to notify the parties before the arbitration as to whether he/she has arbitrated a dispute involving any of the present parties within the last three years);
- limitation of the possibility to arbitrate disputes by the principles of equity;
- partial invalidation of the principle of non-reviewability of arbitral awards by general courts.

It may therefore be concluded that the 2012 Arbitration Act Amendment gives the consumer a significantly stronger position in arbitration, and makes the conditions for the execution of arbitration clauses in consumer contracts stricter.

Renewable energy investments and related investment arbitrations against the Czech Republic

In 2010, the Czech Parliament quickly passed a rather surprising amendment to Act No. 180/2005 Coll., effective as of 1 January 2011. This amendment introduced a "withholding tax" on the sales of electricity produced by solar power plants ("**PV plant**") put into operation between 1 January 2009 and 31 December 2010. The tax rate is 26% or 28%, depending on the form of investment subsidy initially granted, and is to be paid for sales in 2011, 2012 and 2013. The Czech Government introduced this measure, passed within a few months of the first debate, in order to mitigate the increase in the consumer price for electricity caused by an exponential increase in new solar power plants connected to the grid during this period**.**

The introduction of this new selective withholding tax substantially worsened the economic operation of PV facilities, and investors having invested in the construction or purchase of PV plants have been seeking ways to protect their investments.

Protection based on international public law, especially bilateral investment treaties or the Energy Charter Treaty, could prove to be efficient for foreign owners.

The Czech Republic is party to over 70 such treaties. Although they all employ slightly different wording, most of them provide effective instruments for protection against state intervention with respect to investments in PV plants. Investment treaties protect investors against indirect expropriation. The investment tribunals' case law clearly shows that excessive taxation may be considered as a form of expropriation. Investment treaties also guarantee fair and equitable treatment of investments. Protection against Host State interventions in international investment law is based on the concept of the investor's legitimate expectations. If, at the time of making the investment, the investor could rely on feed-in tariffs guaranteed by the law, the investor's legitimate expectations were strong, and they should receive a high level of protection.

Another possible protection instrument is the Energy Charter Treaty, which was signed by a number of countries, including all the EU Member States. This Treaty grants energy project investors a level of protection comparable to bilateral investment treaties. It may be expected that many photovoltaic project investors will seek protection under the Treaty as it firstly allows them to proceed jointly, i.e. it allows a number of investors to file a joint action regardless of their domicile, which is usually not easy under bilateral investment treaties and, secondly, it extends its protection to investors from states that have not signed a bilateral investment treaty with the Czech Republic.

As far as the considerations of the PV plant investors seeking remedy are concerned, it should be added here that the Czech Constitutional Court reviewed the constitutionality of the selective withholding tax in 2012 and found it constitutionally acceptable, i.e. it rejected the motion to abolish the relevant law. This decision of the Constitutional Court cannot directly influence the outcome of international arbitration, but it does provide motivation for the affected investors to turn to international arbitration, since there is still the possibility (however hypothetical) of the Czech Republic extending the effective period of the withholding tax.

Considering the high cost of international arbitration, some foreign investors have formed an 'arbitration group' and plan on filing the first arbitration action at the beginning of this year. Most other investors are either waiting for the results of ongoing negotiations with the Czech government, or for the outcome of the first arbitration.

In summary, foreign PV plant owners can defend themselves against the selective withholding tax through international arbitration, seeking not only compensation for the loss of profit, but also a ban with regard to the Czech Republic's potential extension of this form of excessive taxation. ■

MONTENEGRO

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First investment disputes involving Montenegro before the ICSID

Montenegro recently faced its first investment dispute settlement before the ICSID tribunal, which is competent since Montenegro signed the ICSID Convention on 19 July 2012. The case was initiated by Netherlands-based MNSS and an affiliate (Recupero Credito Acciaio) claiming EUR 72 million for supposed breaches by the Montenegrin state of the Netherlands-Montenegro bilateral investment treaty (BIT) and of Montenegrin foreign investment law. The background of the case derives from the privatisation of the Montenegrin steel company ("Željezara Nikšić"), whose majority owner was MNSS, before the company went bankrupt in 2011. According to publicly available information, the alleged breaches of investment law and BIT were related to "the Government of Montenegro constantly interfering in the operations and management of the Niksic steel company, and treating the company in an illegal and discriminatory way."[1]

[1] http://www.cdm.me/ekonomija/mnss-trazi-72-miliona-eura-vlada-tvrdi-da-je-sve-ispostovala

Another potential case that could, as formerly announced in the media, receive its epilogue through international arbitration is the dispute between Montenegro and the Russian owner of the Podgorica Aluminium Combine ("KAP"), wherein the State argues that the Russian investor breached the privatisation agreement and deeply indebted KAP. According to publicly available information, the indebtedness and poor financial condition of KAP have led the Montenegrin government to redefine models for power supply in order to maintain KAP's production and avoid potential bankruptcy. The government of Montenegro is also negotiating with Turkish and German partners interested in taking over KAP from the Russian owner, but no agreement has yet been reached. According to the media, if the Russians do not follow the Montenegrin government's request to sell KAP, arbitration will be inevitable. This case could therefore soon be brought before the ICSID.

It remains to be seen how Montenegro, a "young" country considered to be friendly to investors, will settle these unresolved cases.

Apart from developing arbitration regarding bilateral investment treaties between investors and the State, Montenegro also offers the necessary legal framework and institutions to allow the settlement of disputes between private entities through arbitration.

Arbitration in Montenegro is regulated by the Civil Procedure Code. The conditions for resorting to arbitration are non-restrictive. Disputes may be resolved either through foreign arbitration, where at least one party is a natural person residing abroad, or a legal entity headquartered abroad, or domestic arbitration, where both parties are situated in Montenegro. As is the case in most legal systems, the object of the dispute must concern rights that the parties may freely dispose of, save for disputes that are under the exclusive jurisdiction of domestic courts.

Arbitral tribunals can also operate in Montenegro. Opting for arbitration under Montenegrin law allows the dispute to be resolved by a special arbitration tribunal, either ad hoc or permanent. Arbitrators are, in principle, appointed by the parties or by a third person, and if an arbitrator is not appointed in time, the court will appoint arbitrator(s) upon the party's proposal. Traditionally for the region, permanent arbitration tribunals are established within the Montenegrin Chamber of Commerce, the most important being the Foreign Trade Arbitration Tribunal.

The enforceability of arbitral awards is also foreseen by Montenegrin law. Unless otherwise agreed between the parties, the arbitral award has the same legal effect as a final and binding court judgment. An arbitral award can only be challenged, i.e. annulled before the court, for limited reasons set out in the law. If an arbitral award is annulled for reasons other than those related to the existence or validity of the arbitration agreement, the arbitration agreement remains a valid legal basis for a new arbitration in respect of the same dispute.

Despite the existing framework and institutions, arbitration as an alternative to judicial dispute resolution remains underdeveloped in Montenegro. Well-known institutionalised arbitrations abroad are more frequently used, even in disputes that are essentially related to Montenegro. The recent signing of the ICSID Convention by Montenegro, however, is a sign in favour of the development of arbitration, which, in the future, will certainly concern not only investment arbitration but also a wider range of disputes. ■

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Arbitration due to the failed privatisation process of Belgrade Beer Industry (BIP)

In October 2012, the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce rendered a final decision in the case of the Serbian Privatization Agency vs. Alita and United Nordic Beverages. The Court upheld the claim of the Serbian Privatization Agency against the consortium consisting of Alita AB Lithuania and United Nordic Beverages AB Sweden, buyers of Belgrade Beer Industry (BIP).

After entering into a share purchase agreement (SPA) as part of the BIP privatisation procedure in July 2007, the consortium acquired nearly 52% of the shares in BIP. However, a breach of their contractual obligations by the buyers under the SPA led the Privatization Agency to terminate the agreement in February 2010.

According to public statements, the Privatization Agency terminated the SPA on the grounds that the consortium failed to perform the main obligations provided for under the SPA. First, it did not carry out its investment commitments as envisaged under the investment programme for BIP. Second, the buyers did not perform their obligation to purchase the company's remaining shares (ca. 48%) in order to complete the privatisation process. Moreover, the consortium failed to settle the company's tax liabilities, causing enforced collection through the sale of company fixed assets, this disposal of company assets being contrary to the provisions of the SPA.

After the SPA was terminated, the Privatization Agency activated the arbitration clause and filed an arbitration request against the buyers before the Foreign Trade Court of Arbitration, claiming payment of EUR 68.3 million in liquidated damages.

The Foreign Trade Court of Arbitration rendered an award in this case, declaring the respondents liable for the payment of the following amounts to the Privatization Agency: (i) EUR 5.1 million in liquidated damages due to the failure to perform obligations under the investment programme they committed to, with an interest of 1.95% per annum, (ii) EUR 11.75 million in liquidated damages due to the failure to meet their contractual obligations not to lead the company into liquidation, bankruptcy or enforced collection through the sale of company assets, with interest of 1.95% per annum, and (iii) RSD 23.5 million (approx. EUR 210.000) as compensation for the costs of arbitration proceedings.

Early 2012, Alita initiated a procedure before the Commercial Court of Belgrade, requesting that the arbitral award be set aside. The request was based on the following reasoning:

- Back in 2009, Alita separated its operations into two companies: Alita Group took over the alcoholic drink production facilities, while Alita remained in charge of the investment in Serbia (Alita was later renamed ALT Investicijos and has since gone bankrupt);
- The arbitral award included both Alita companies as respondents, although Alita Group was no longer in charge of the investment in Serbia;
- Alita Group thus claimed that the Foreign Trade Court of Arbitration of Serbia did not have the jurisdiction to deal with disputes arising from the privatisation process, as Alita Group was not involved in the BIP privatisation.

According to publicly available information, the Serbian Commercial Court of Belgrade granted Alita's request and annulled the arbitral award in September 2012. The case is not yet closed, given that the Privatization Agency has appealed the case and taken it to the higher instance.

BIP is currently undergoing a restructuring procedure in order to clear a path for the future sale of the company through a public tender or public auction. The Privatization Agency should finalise a detailed restructuring programme shortly, encompassing a list of measures aimed at revitalising the company and making it attractive for potential buyers.

The restructuring process will have to be carried out rapidly, as, through recent amendments to Serbian Privatisation Law, the Serbian government has set a deadline of 30 June 2014 for the restructuring of companies. The goal is to accelerate privatisation procedures in Serbia, which started back as early as 2002. According to the State Secretary of the Ministry of Finance and the Economy, Aleksandar Ljubic, there are currently 171 businesses restructuring in Serbia, employing some 60,000 people. Arbitration could prove to be a useful dispute resolution method should problems arise in other privatisation procedures, given that it is considerably faster than procedures before State courts. ■

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Slovakia loses BIT arbitration case - questions about investment protection persist

In December 2012, The Slovak Republic lost an arbitration case brought against it by Achmea BV (formerly known as Eureco BV), a Dutch insurer, and was ordered to pay EUR 22 million damages plus EUR 3 million in costs.

The story began in 2007, when the populist government under Prime Minister Robert Fico introduced a ban on profit distribution by private healthcare insurance companies in Slovakia. Under the controversial law, any profit reported by healthcare insurers was to be used to cover healthcare costs, and the insurers in question were banned from distributing such profits to shareholders.

Achmea BV, the shareholder in healthcare insurer Poistovna Union, launched arbitration proceedings against the Slovak Republic, claiming a breach of the Bilateral Investment Treaty (BIT) between the Slovak Republic and the Netherlands.

The BIT in question calls for the resolution of investment protection cases by an *ad hoc* arbitration tribunal under UNCITRAL procedural rules. The Slovak Republic became a party to this treaty as a legal successor of Czechoslovakia.

The Slovak Republic challenged the jurisdiction of the arbitration tribunal claiming, among other things, that the BIT from 1991 expired upon Slovakia's entry into the European Union. The claim was based on prior opinions voiced by the European Commission that Intra-EU BIT arbitration proceedings may infringe the principles of European Law. The principle of non-discrimination, expressed in the Treaty on the European Union, is allegedly infringed by the existence of Intra-EU BITs. The Slovak Republic claimed that allowing the arbitration of investment protection disputes between investors and certain Member States constitutes a potential discrimination against investors from other Member States that may not have concluded a BIT with respective host states.

Under this logic, the Slovak Republic filed a jurisdictional objection, which was denied by the arbitration tribunal in 2011. As the arbitration took place in Germany, the Slovak Republic filed a claim before the Frankfurter Higher Regional Court for the annulment of the decision of the arbitration tribunal. The request was denied by the Frankfurter Higher Regional Court, which argued, among other things, that although the limitation of BIT protection for investors from certain countries may be discriminatory within the EU framework, this discrimination cannot be remedied by denying investors the right to arbitrate under BIT in contrast to their legitimate expectations.

The court further observed that, in order to avoid the discrimination of investors from Member States that have not entered into a BIT with the particular host state, such host state could offer the same protection to all investors (irrespective of whether such investors come from a country that has concluded a BIT with the host state). This new opinion, should it be recognised as a new doctrine, would likely spark an exponential increase in investment arbitration within the EU.

The Slovak Republic (seeming to hold an unlimited budget for legal services in this case) decided to appeal the decision of the Frankfurter Higher Regional Court to the German Supreme Court. The case is pending and its outcome may shape investment arbitration in the EU for years to come.

Aside from gaining interest among academics and arbitration practitioners, the conduct of the Slovak Republic has also gained notoriety for its ineffective use of public funds. The Slovak Republic was ordered to pay the costs of the proceedings, some EUR 3 million, to Achmea. It became clear during the proceedings, however, that the Slovak Republic spent over EUR 18 million defending itself from the Achmea claim, a striking example of the glaring difference of effectiveness in legal services between the private and public sectors. ■

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Using arbitration to resolve commercial disputes

Arbitration in Slovenia is governed by the Arbitration Act of 2008. With its enforcement, certain provisions of the Civil Procedure Act, which previously contained the majority of provisions governing arbitration, were modified or replaced. The new Arbitration Act, which has unified all the provisions governing arbitration, is an enactment of the UNCITRAL Model Law on International Commercial Arbitration. Its adoption was considered an important step toward modern arbitration legislation, which would create favourable conditions for the settlement of commercial disputes by arbitration, raising the number of legal disputes solved without court interference.

Among Slovenian arbitration institutions, the most important remains the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia. The Permanent Court of Arbitration is an autonomous and independent arbitration institution providing a comprehensive range of services in international commercial arbitration. It was established in 1990 and has its own CCIS arbitration rules and list of domestic and foreign arbitrators, including many renowned legal experts. Apart from the Permanent Court of Arbitration attached to the CCIS, Slovenia has several other arbitration institutions.[1] Nonetheless, despite the existence of these institutions, arbitration is not (yet) a well-spread and popular mode of dispute resolution in Slovenia.[2]

With the establishment of the Permanent Court of Arbitration attached to the CCIS, the popularity of arbitration among Slovenian undertakings increased significantly. Following this initial success, however, the number of cases being resolved has gradually decreased. Despite the institution's efforts to reach or exceed its former popularity, Slovenian undertakings usually only use arbitration in international commercial disputes, and commonly decide on the services of one of the renowned arbitration institutions abroad.[3] This may also be ascribed to the Permanent Court of Arbitration and the CCIS, which have failed to present arbitration in Slovenia as an attractive mode of dispute resolution to domestic undertakings and businessmen.

In Slovenia, judicial delays and the slow development of judicial proceedings represent a major difficulty. The government has invested significant efforts and funds into tackling this problem. The efforts have recently begun to show initial results. Certainly, obtaining a definitive judgement is now much swifter. However, the adoption of austerity measures due to the financial crisis has caused a significant number of redundancies among court personnel, and the courts have already communicated that an increase in judicial delays are (again) expected in the near future.

A combination of financial cuts in the Slovenian judiciary and their consequences on the efficiency of state courts, the potential new entry of additional foreign investors and the recent establishment of a first private arbitration institution, whose efforts for promotion are significant, may well bring about the start of a new era for arbitration in Slovenia. Arbitration may finally be recognised as an attractive way of quickly and efficiently resolving disputes. ■

[1] Latest institution which provides services in arbitration has been formed in year 2012
[2] One of the main reasons is mediation, which is well spread, because it is free
[3] For instance in Paris, Zurich, Vienna

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