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Jurisdictional Considerations: A Global Guide To Arbitration, Europe

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Commentary

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As discussed in *Jurisdictional Considerations: A Global Guide to Arbitration, the Americas*, when faced with the decision of where to seat an arbitration, a huge number of factors come into play. These include the conventions and treaties operating in each jurisdiction, as well as the relevant domestic arbitration framework in force at a potential seat, and the interpretation of such framework by its judiciary. Such considerations also extend to enforcement options and risks, as well as to any available protections afforded by operating bilateral investment treaties.

In Europe, arbitration is a well-established mechanism of dispute resolution. Indeed, the continent boasts some of the most popular arbitration institutions, for example in London and in Paris – the latter of which is the home of the International Chamber of Commerce, the world's leading arbitral institution, which filed 810 cases in 2017 with a collective value of some US$ 30 billion. It is of no surprise, therefore, that Europe houses many States which constitute attractive options as seats of arbitration. Given that arbitration in now an established form of dispute resolution across Europe, many European States in fact boast a great history of arbitral awards, both rendered and enforced, and the majority of such States also possess well-regarded domestic arbitration laws.

The New York Convention

The New York Convention (the **"Convention"**) is commonplace amongst European States, reflecting the great presence of arbitration across the Continent. Moreover, this is not a new phenomenon: Montenegro was the most recent State to accede, some twelve years ago. Of the 33 states in Europe which have an arbitration capability, every State has acceded to the Convention. Interestingly, only a minority of States – including Macedonia, Switzerland, Latvia, Italy and Estonia – have acceded on an unconditional basis. In the other States, the Convention will only be applied to recognise and enforce awards on a conditional basis, such as if the award in question has been made in the territory of another contracting State. This is the case, for example, in Belgium, Germany and the United Kingdom. The same conditionality applies in Poland, which will enforce foreign awards provided that the underlying dispute arose out of legal relationships that are considered commercial under the national law.

In Ukraine and Russia, the Convention is only applied on the basis of reciprocity. As to Belarus and Bulgaria, the same is true subject to the award being made in the territory of a non-contracting state. Some jurisdictions do, however, caveat the application of the Convention further. Such caveats are of paramount

importance when assessing jurisdictional considerations in arbitration. By way of example, in order to enforce an award in Romania under the Convention, the award must have been made in another contracting State and, in the event the award was not made in another contracting State, it will only be applied on the basis of reciprocity established by the joint agreement as between the parties. Further, the dispute must have arisen out of a legal relationship that is considered commercial under national law.

Whilst the Convention is commonplace across Europe, with each and every State having acceded to it, it is therefore essential to note that its application will nevertheless vary, and will not be uniform across the region.

Investment Treaty Arbitration

On 6 March 2018, the European Court of Justice delivered its verdict in the case of *Slowakische Republic v Achmea BV*[1]. This case has far reaching implications, the extent of many of which are still unknown. What is certain is that the judgement extends far beyond the Slovakia-Netherlands bilateral investment treaty which was in question in that case. The *Achmea* judgment paints a troubling outlook for investment treaty arbitration in Europe, with the ECJ concluding that an arbitration clause in an international agreement as between Member States (that is, member states of the European Union), allowing for an investor-state arbitration, was incompatible with two Articles of the Treaty on the Functioning of the European Union. Specifically, Articles 267 and 344 were deemed incompatible with any such clauses. Given the United Kingdom's rapidly approaching withdrawal from the European Union, the decision in *Achmea* poses difficult questions as to the operation of the United Kingdom's bilateral investment treaties and, more generally, across the Continent on the whole.

ICSID Convention

The ICSID Convention has been ratified by 154 contracting states across the world. With regard to Europe, it has been ratified by all but two states with an arbitral presence: Russia and Poland. Whilst Russia signed the ICSID Convention back in 1992, it has still not been ratified and there has been no suggestion that this is likely to change in the near future. That said, Russia does have provisions in several of its bilateral investment treaties – including with Japan, China and Singapore – that allow for disputes to be referred to ICSID. Aside from this, Poland is the only country to have neither signed nor ratified the ICSID Convention.

UNCITRAL Model Law On International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration (1985) (the **"Model Law"**) has been adopted, at least in part, by 23 states in Europe. For example, Austria, Bulgaria, Croatia, Germany and Lithuania have all adopted the Model Law in full. Whereas France, Czech Republic and Italy have not adopted the Model Law. It is however the case that France's arbitral framework, while not based on the Model Law, does not substantially depart from the Model Law. Likewise, the Italian arbitral framework does not materially differ from the Model Law.

Domestic Arbitration Law In Europe

One of the more complex considerations with regard to jurisdiction in any arbitration is the relevant domestic arbitration law. Even with the adoption of the Model Law in certain jurisdictions, it is necessary to understand if and how this model template was tailored or tweaked when incorporated into a particular state's domestic legal framework. Each jurisdiction's governing law is, of course, different and every nuance has to be considered when looking into questions of jurisdiction. For example, issues such as the availability of summary procedures and partial awards are issues that should be thought about.

In England, Wales and Northern Ireland, arbitral proceedings are governed by the well-established Arbitration Act 1996, which came into force in January 1997. The Act goes far beyond the scope of the Model Law with an extremely comprehensive statement as to the English Law on arbitration. At its core, it is user friendly and has a logical structure. The Act allows for a high level of autonomy between the parties to decide how their arbitration will be conducted, and generally grants wide powers to the arbitral tribunal, with relatively limited opportunity for judicial intervention. In addition, the Act emphasises that parties are to avoid incurring unnecessary costs and delay, reflecting the wider litigation principles in place in England. With such a comprehensive body of law governing arbitral proceedings, it is of no surprise that England is a popular choice as a seat of arbitration.

In 2011, the French arbitration law, for both domestic and international arbitrations, was extensively revised and updated and is now largely found in the Code of Civil Procedure. Whilst there is much flexibility as to the procedural rules for the parties, several key mandatory provisions apply. For example, the deliberations of the tribunal must remain secret; the award will be final and binding; and the tribunal has the jurisdiction to decide its own competencies. While France has not adopted the Model Law per se, French arbitration law does not substantially depart from it.

In Spain, all arbitral proceedings are governed by the Spanish Arbitration Act (60/2003) and Spanish Courts have generally acted in a pro-arbitration fashion. As such, ordinary courts are prevented from settling any dispute that has been referred for arbitration provided that one of the parties to the arbitration agreement has initiated the corresponding arbitration process. Whilst the Spanish Arbitration Act was drafted in light of the Model Law, there are several noteworthy differences. For example, if the arbitration agreement does not expressly provide for the number of arbitrators, the default rule is one arbitrator; arbitration will be confidential, unless otherwise agreed; and a dispute is only eligible for arbitration if the parties are free to contract.

Arbitration is a long-standing tradition in Germany. The local arbitration law is contained within the German code of civil procedure (that is, *Zivilprozessordnung*) and is heavily based on the Model Law. It should be noted that the German Parliament has deployed a working group to consider whether the arbitral framework needs updating. Parties to an arbitration governed by the German Civil Code are at liberty to seek interim relief with either the courts or the arbitral tribunal unless the parties have opted out of doing so. Such interim relief can include, for example, pre-award attachment to secure a monetary claim, a preliminary injunction to secure any other claim as well as a procedure to preserve evidence.

Arbitral proceedings in Russia are governed by *the Law of the Russian Federation dated July, 7, 1998 No. 5388 On International Commercial Arbitration.* Heavily based on the Model Law, for example with reference to the rules governing the arbitration agreement, the procedure and the arbitral award, arbitration is a popular form of dispute resolution within this jurisdiction. Often, in State courts, judges do not have significant experience in resolving cross-border disputes, whereas the same is not true of arbitral proceedings given that arbitrators from different regions, and/or with specific experience, can be selected. In addition, given that all commercial courts in Russia make judgements and hearings public, arbitration provides a means of dispute resolution that is confidential and private. However, arbitration in Russia has tended not to be as expeditious as it is throughout the rest of the continent and, in comparison to litigation, is in fact often more expensive.

The nuanced differences between the various domestic arbitration laws in force across Europe can be of paramount importance. It is therefore important to consider the detail of a State's domestic arbitration law, as well as its judicial practice in terms of the enforcement of domestic and foreign arbitral awards, before coming to a decision with respect to whether or not to select it as an arbitral seat.

Conclusion

Arbitration is a well-established means of dispute resolution throughout Europe, with some 33 States throughout the Continent being signatories to the New York Convention and possessing established arbitration laws. That said, the picture is far from uniform across the region. Each and every State applies arbitral procedures in a nuanced manner, as well as the conventions and laws they are subject to. The future of investor-state arbitration is also unclear. In any event, Europe is likely to continue as a pre-eminent venue for arbitration, with some of the most respected and sought after institutions based in this region.

Endnotes

1. Case C-284/16. ■

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