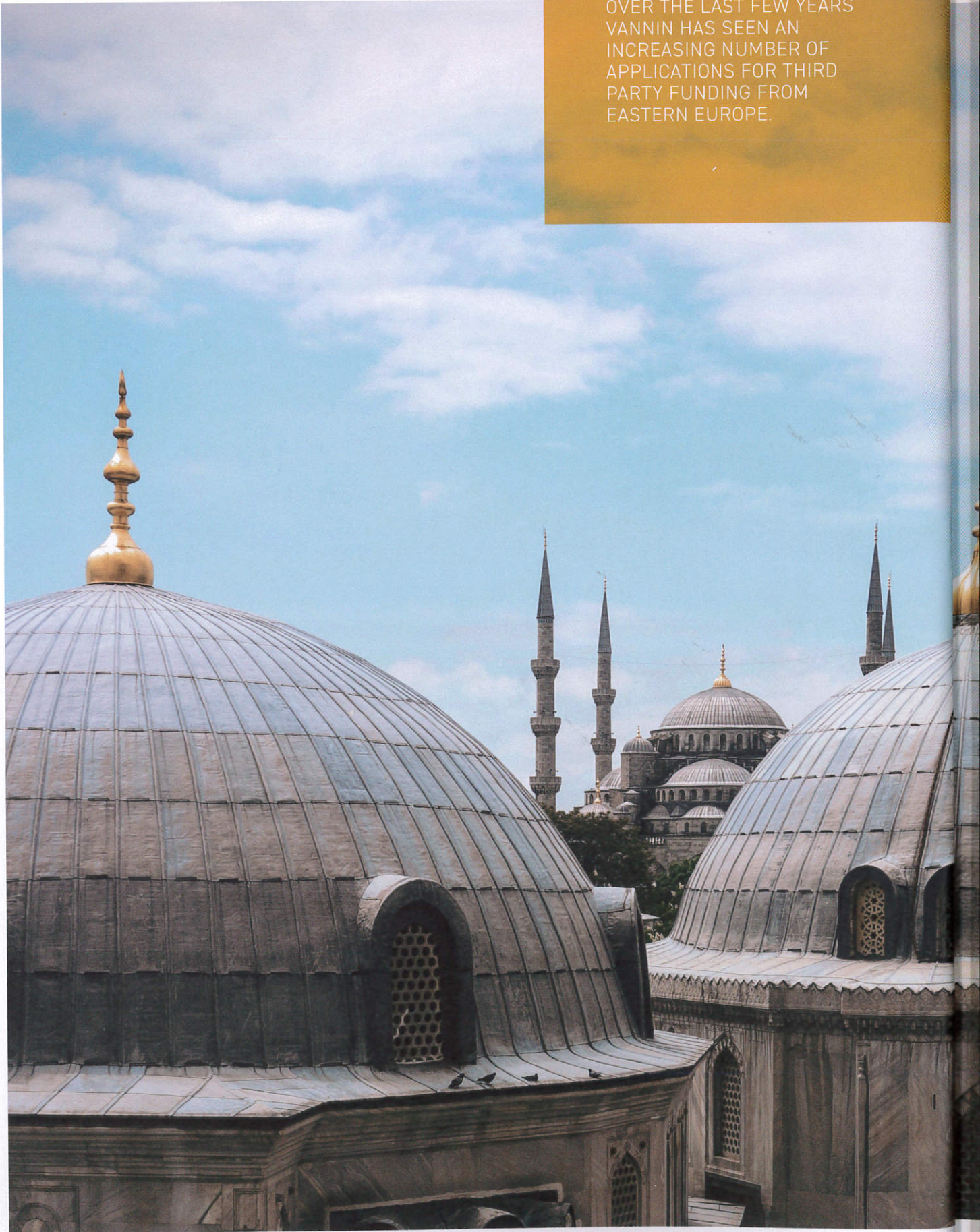


OVER THE LAST FEW YEARS  
VANNIN HAS SEEN AN  
INCREASING NUMBER OF  
APPLICATIONS FOR THIRD  
PARTY FUNDING FROM  
EASTERN EUROPE.







Iain McKenny  
Managing Director  
VANNIN CAPITAL

## WHO WINS, WHERE AND WHY? > EASTERN EUROPE

In this edition of who wins, where and why we delve into one of the largest regions of growth for the disputes market – Eastern Europe. Over the last few years Vannin has seen an increasing number of applications for third party funding from this part of the world. Through these applications and through our own research of the statistical reports published by the LCIA, SCC, ICC and ICSID and cross checking these results where possible with legal publications such as GAR and IA Reporter and the Investor State Law Review tools, we have been able to identify numerous patterns that have helped us to estimate:

- The approximate number of publically recorded arbitrations by country;
- The most popular dispute sectors by country; and
- Key leading local experts who can explain the disputes pattern per country and what the future may hold.

Our research has revealed the following findings:

- The three largest and most prevalent types of disputes are in the energy, finance and infrastructure sectors.
- There has been nearly a threefold increase in these types of disputes over the last seven years.
- From the leading local experts we have spoken to, the top three reasons for the cause of this increase in these types of disputes over the last 7 years are:
  1. a shift in social policy to populist agendas;
  2. slower than expected economic growth; and
  3. the rise of geo-political isolationism.



These findings are significant for funders, lawyers and claimants alike. Funders and lawyers are closely aligned when it comes to identifying rich sources of disputes and the sectors and jurisdictions from which they spring. These findings demonstrate in broad strokes that funders and lawyers who have developed knowledge and experience in finance/corporate, construction/mining and energy/utilities disputes have been and seem likely to continue to be engaged with a significant portion of disputes work in the region.

Funders and claimants are closely aligned when it comes to the transmutation of the hard fought and successful award through enforcement to financial recovery. These findings reveal that the causes for the disputes from these sectors in this region demonstrate that not only are there likely to be more disputes that need to be factored into business and project models as contingencies but also that they can expect enforcement to become increasingly hard fought, slower and accordingly more expensive as companies and new governments seek to obfuscate their obligations in respect of awards.

#### The methodology

This type of analysis is slow and painstaking but as with all such correlational analysis from quantitative data into qualitative assessment, parameters must be imposed for fear that the conclusions drawn may be a bridge too far from the data collated.

As always, time and resources are a factor. A deeper analysis of the litigation disputes sector of each country for instance would have been highly revealing but would have resulted in an article about each sector in each country, each year going far beyond our remit here. Instead, we limited the research to the last seven years encapsulating ongoing recovery since the height of the last recession and then reduced the number of EEG countries to those that are within the European Union.

#### EEG countries outside our study:

- Albania
- Armenia
- Azerbaijan
- Belarus
- Bosnia and Herzegovina
- Georgia
- Macedonia
- Moldova
- Montenegro
- Russian Federation
- Serbia
- Ukraine

**FUNDERS AND LAWYERS ARE  
CLOSELY ALIGNED WHEN IT  
COMES TO IDENTIFYING RICH  
SOURCES OF DISPUTES AND THE  
SECTORS AND JURISDICTIONS  
FROM WHICH THEY SPRING**



Countries analysed in our study

1. Estonia
2. Latvia
3. Lithuania
4. Poland
5. Czech Republic
6. Slovakia
7. Slovenia
8. Hungary
9. Croatia
10. Romania
11. Bulgaria







The reason for reducing the analysis to these 11 countries is two fold; (i) limited enforcement risk owing to EU membership (at least for commercial cases) and (ii) because these are jurisdictions from which we have received statistically significant funding applications for claimants with either commercial or investment treaty arbitrations.

This still produced a data set that was too unwieldy to produce statistically significant results from a funding perspective. There may be many more disputes from each one of these countries but not all would have quantum ranges that would fall within fundable parameters. Industry standard investment dictates that funding facilities are limited to a maximum of 1/10th of the realistic quantum claimed. Consequently, a claim of 30 million USD for instance would attract a maximum funding facility of 3 million USD. Given the costs typically associated with sophisticated commercial and investment treaty arbitrations, we used a quantum figure of 30 million USD as a cutoff point.

Finally, owing to the sheer volume of applications for arbitration and investment treaty disputes and the plethora of institutional reports from the main arbitral centers and the high quality of the core publications, the data set swung undeniably towards arbitration with some limited local litigation enforcement.

In summary, our analysis was conducted on these 11 countries of the EEG, using our own data pool of funding applications, statistical reports from the ICC, LCIA, SCC and ICSID and from publications from GAR, IA Reporter and the Investor State Law Review, over the last seven years and for disputes worth at least 30 million euros.

## The analysis

Number of publicly reported arbitrations within analytical parameters:

Countries	2011	2012	2013	2014	2015	2016	2017	Total per country
Estonia	3	2	3	2	2	2	4	18
Latvia	2	2	4	4	2	3	6	23
Lithuania	3	7	7	5	5	6	6	39
Poland	13	9	10	10	12	12	10	76
Czech Republic	16	25	29	33	30	33	33	199
Slovakia	6	9	10	12	12	8	9	66
Slovenia	4	4	3	5	10	10	6	42
Hungary	9	8	11	9	11	13	12	73
Croatia	3	3	21	6	12	10	14	69
Romania	10	5	10	13	15	16	18	87
Bulgaria	6	6	6	8	10	8	17	61
<b>Total per sector</b>	<b>75</b>	<b>80</b>	<b>114</b>	<b>107</b>	<b>121</b>	<b>121</b>	<b>135</b>	<b>753</b>

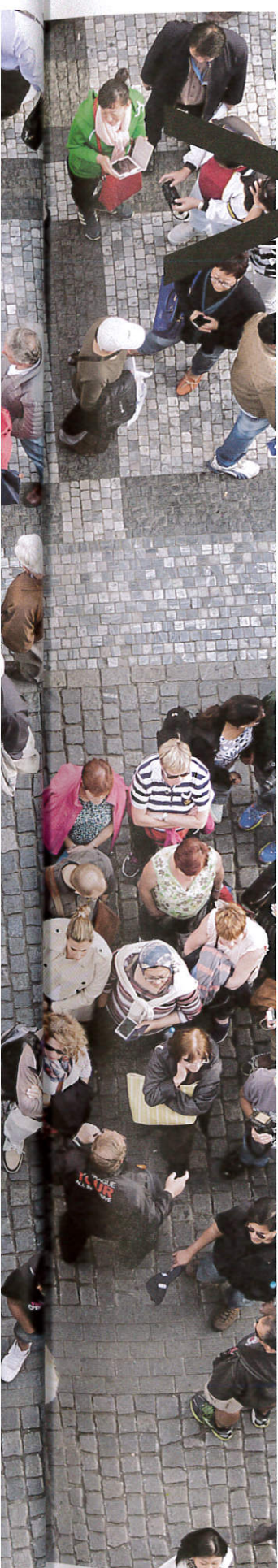
Arbitration sectors within analytical parameters:

Countries	Energy/Utilities	Infrastructure	Finance/shareholdings	Mining	Other	Total per country
Estonia	2	2	4	1	9	18
Latvia	6	3	2	1	11	23
Lithuania	10	2	2	5	20	39
Poland	8	5	20	3	40	76
Czech Republic	43	30	20	6	100	199
Slovakia	8	6	16	6	30	66
Slovenia	10	6	4	0	22	42
Hungary	19	9	7	3	35	73
Croatia	20	8	4	2	35	69
Romania	17	23	10	7	30	87
Bulgaria	8	15	4	3	30	61
<b>Total per sector</b>	<b>151</b>	<b>110</b>	<b>93</b>	<b>37</b>	<b>360</b>	<b>753</b>









## OF THE 753 IDENTIFIED DISPUTES WITHIN THE ANALYTICAL PARAMETERS FOR THESE COUNTRIES IN THE EEG ACROSS THE LAST 7 YEARS, THE CZECH REPUBLIC, ROMANIA AND HUNGARY ACCOUNT FOR ALMOST HALF OF THE DISPUTES (359)

### Conclusions

As with all statistical analysis, even under tightly defined parameters, the results are most valuably understood as a trend. An upward trend in the number of disputes, a spike of disputes in specific years and across particular sectors, for example. We cannot know the sum total of all the disputes and thus our picture of the disputes market in any one country or region or group or sector is inherently incomplete. With this qualification in mind, the trends identified are positive from a disputes market perspective.

Of the 753 identified disputes within the analytical parameters for these countries in the EEG across the last seven years, the Czech Republic, Romania and Hungary account for almost half of the disputes (359). Across the group, there is an average of almost 70 fundable cases (at least based on quantum – i.e. greater claim sizes of greater than 30 million USD for the purpose of this analysis) per year, an impressive number. Furthermore, there has been a steady rise in the number of disputes across the group increasing by approximately seven cases per year peaking this year with a total of 135 arbitrations and related processes.

Delving a little deeper into the data set, it seems that across the region, the largest single identifiable dispute sector is in energy/utilities with infrastructure a close second. These two sectors account for over a third of the disputes in the region. It seems that energy/utilities dominates the disputes market in six out of the 11 countries with infrastructure dominating the disputes markets in Romania and Bulgaria and Finance/shareholding disputes dominating the disputes markets in Slovakia, Poland and Estonia.

This type of quantitative analysis is useful for pattern recognition but for a qualitative assessment of what it means, we must turn to the experts. From the number of funding applications Vannin has received for disputes originating from this region we have noticed that the vast majority of successful claims are managed by international counsel and indispensable local legal teams working together. We wanted to know what some of the local law experts thought and the conclusions that could be drawn from our analysis.



## WHAT THE EXPERTS SAY

---

### Estonia



Arne Ots  
Partner  
ELLEX RAIDLA



Toomas Vaher  
Partner  
ELLEX RAIDLA

"Since 2006, after the enactment of the new Code of Civil Procedure in Estonia, the number of commercial arbitrations has shown a constant increase. Whereas in the beginning the procedure was new and created somewhat hesitation and the courts were not too cooperative in adapting to their role, it has become customary by now to consider arbitration as a means of solving disputes, especially in cross-border contracts and for large multinationals. When it comes to industries, arbitration is most commonly used in energy, utilities and construction sectors as well as for disputes arising from shareholders contracts. As to innovative trends – as Estonia is a leader in e-solutions and often acts as a regional startup-hub, it has also been discussed whether to create a standard in VC and startup field that arbitration is the first choice for dispute resolution in the field. As to trends in the choice of arbitration institutions –often ICC is preferred over the local institutions if the seat is in Estonia, though often the seat of arbitration is also in the nearby Nordic countries, e.g. in Finland or Sweden."

### Latvia



Daiga Zivtina  
Partner  
ELLEX KLAVINS

"During the last five years, the number of cases in international commercial and investment arbitration has a tendency to increase in Latvia. The investors have particular interest in energy/utilities and banking industries due to the recent unbundling of electricity (in 2015) and gas (in 2017) markets. Liberalisation of electricity and gas markets, as well as promotion of the renewable energy projects by the state potentially will result in new arbitration cases with involvement of the main players of these sectors. The financial institutions in Latvia have faced a stricter regulation on the part of supervisory authorities, which has led to liquidation of several banks, application of sanctions and new arbitration cases. In Latvia a considerable number of cases are, in fact, solved before arbitration is commenced or at its early stage. Settlements are very popular in Latvia and are publicly criticized by practitioners. Because of this trend the arbitral awards are rendered in a relatively small number of cases. At the same time the new state policy to actively defend its position to achieve the best possible results is a positive tendency."



---

LITHUANIA STRIVES TO BOOST ITS ECONOMY FURTHER AND IS LISTED BY THE WORLD BANK AS NO 16 OUT OF 190 COUNTRIES IN THE WORLD FOR EASE OF DOING BUSINESS

---

#### Lithuania



Ramūnas Petravičius  
Partner  
ELLEX VALIUNAS



Giedrė Aukštuolienė  
Partner  
ELLEX VALIUNAS

After joining the EU in 2004, Lithuania has made enormous progress in many areas, but its efforts put in gaining energy independence are perhaps the most apparent evidence of it. Lithuania started from being an "energy island" depended on a sole gas supplier and now it has not only successfully implemented the third EU energy package, but unique in the region liquefied natural gas (LNG) terminal operates in the port city of Klaipėda, high voltage electricity interconnectors with Poland and Sweden are in place, and Lithuania now fully complies with EU targets for renewable energy. These developments, combined with the former privatization procedures, increasing number of investments and international commercial transactions with both Eastern and Western parties, resulted in an increase of investment and complex international arbitration disputes, especially in the field of energy. This is evident from the statistics of major international and local arbitration institutions. Lithuania strives to boost its economy further and is listed by the World Bank as No 16 out of 190 countries in the world for ease of doing business. Thus, taking into account the investors' intentions to resolve the disputes in a neutral forum, the trend is expected to continue.

#### Poland



Dr Marcin Olechowski  
Partner  
SKS LEGAL

"In terms of distribution, I believe the prevalence of the "finance/shareholdings" category most likely reflects post-M&A / corporate disputes which – in our experience – tend to be the most widespread type of arbitration rather than true finance sector arbitration. Larger M&A deals in Poland usually involve a foreign party (Poland is still largely an inbound jurisdiction), with arbitration as the preferred dispute resolution mechanism (local courts are slow and not viewed as sophisticated in terms of M&A documentation or shareholder agreements). I would expect the trend to continue for the near to mid future. Infrastructure arbitration is relatively small, because the public side has been pursuing a no-arbitration policy for the last several years, insisting on Polish courts. In terms of other trends, we see increased interest in energy investment arbitration (due to both the attractiveness of the ECT and recent measures enacted by Poland in the renewables industry). In the longer term, we expect BIT arbitration to peak and then slowly wane given that the Polish government is currently implementing a programme of BIT termination."



## WHAT THE EXPERTS SAY

### Czech Republic



Marek Procházka  
Partner  
PRK PARTNERS

"Industry plays an increasingly pivotal role in the Czech economy, because it contributes the most to gross value added, around one-third, and manufacturing counts for more than a quarter. It is one of the biggest ratios in the European Union. Economic activity continued to grow in 2017 in consequence of a broad-based expansion. Foreign demand contributed strongly to growth, which is above potential. Strengthening of growth in Europe contributed to drive exports and industrial production. Household consumption also supported growth thanks to low unemployment and high wage increases.

The development of energy consumption corresponds to the economic activity. The energy efficiency index for the whole economy improved by 16.65 % during the period 2000 – 2012. The EU28 average improvement was 13.54 % in the same period. The improvement in the Czech Republic was faster than the EU28 average. The Czech government decided to use an alternative scheme to comply with Article 7 of the Energy Efficiency Directive and the selected alternative measures are mainly of financial character. Even though energy and mining industry production fell in the past year, their position remains strong.

The above-mentioned trends in the Czech economy are reflected in the distribution of major arbitration cases in energy and infrastructure as the foreign investors seek to resolve their disputes via arbitration."

### Slovakia



Lucia Raimanová  
Counsel  
ALLEN & OVERY  
BRATISLAVA, S.R.O.



Juraj Gyarfas  
Senior Associate  
ALLEN & OVERY  
BRATISLAVA, S.R.O.

"We also see a significant number of claims in the sectors identified in the research above. Energy, infrastructure and mining sectors in particular require large capital investment and are heavily regulated by the State. Many companies active in these sectors were originally State-owned and subsequently privatised. Heavy regulation, legacy issues stemming from the privatisation process, high amounts at stake and occasional heavy-handed behaviour by the State frequently lead to clashes of interests and ultimately arbitration. While the finance sector exhibits many of the same hallmarks, we have also seen a rise in disputes arising out of high value trades in derivatives and other transactions.

A stable and predictable framework for arbitration is still evolving in Slovakia. Since the early 2000s, Slovak courts have been issuing unpredictable or even arbitration-hostile judgments. Although these were frequently driven by the desire to protect consumers, they affected the use of commercial arbitration more broadly. As a result, parties provided for Vienna or another external seat in their arbitration agreements and most major disputes involving Slovak parties were therefore heard abroad. A&O Bratislava are proud to have been involved in an overhaul of the Slovak Arbitration Act that came into effect in 2015. It may still be too early to draw conclusions, but the courts' decisions are starting to be more predictable and arbitration-friendly, which may serve to boost commercial arbitration in Slovakia."



## Slovenia



Tilen Terlep

Partner

ODVETNIKI ŠELIH &  
PARTNERJI, O.P., D.O.O.

"We do not see many disputes being solved by arbitral tribunals in Slovenia nor do we see that arbitration clauses are often included in contracts (apart from M&A, construction and other contracts with a higher value, where VIAC is often opted for). On the one hand the foreign arbitrations tend to be quite expensive (and third party financing is not too common in Slovenia), whereas the domestic ones are not largely used as a substitute to judicial procedures (surprisingly as court procedures in Slovenia are rather lengthy). We have had a surge of mediation offerors in Slovenia in the past few years. It seems that this is a more budget friendly option as opposed to arbitration, which is usually a costly exercise. It tends to end so that the parties (once they reach agreement) go to the court to conclude a judicial settlement."

## Hungary



Dr. Jéger Viktor

Associate

NAGY ÉS TRÓCSÁNYI

"In the past, we have been active in commercial arbitrations in seats such as Hungary, Austria, Sweden, Moscow, and Switzerland.

Hungarian entities involved in multinational energy deals, investing in foreign infrastructure or participating in cross-border M&As tend to settle disputes with their counterparties by arbitration on neutral ground. This trend is set to continue due to the parties' need for confidential, efficient, and independent adjudication of disputes.

We have also experienced an increase in arbitration cases with a Hungarian seat arising from EU-funded infrastructure investments, where parties tailored a FIDIC contract template to regulate their legal relationship. While the largest Hungarian arbitral institution, the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, has seen a constant influx of cases, we expect this caseload to substantially increase with the new legislative and institutional reforms being enforced as of January 2018."



## WHAT THE EXPERTS SAY

### Croatia



Ivana Bačić

HANZEKOVIC &  
PARTNERS LTD



Damir Metelko

HANZEKOVIC &  
PARTNERS LTD

"In the Republic of Croatia, a trend of increase of arbitral proceedings is evident due to the opening and expanding the market of international trade of goods and services since 2001., and further to the accession of the Republic of Croatia to the European Union (on 1 July 2013). Also, in addition, in the Republic of Croatia arbitration has also been recognized as a way of resolving disputes that offers a number of advantages to resolving disputes before state courts, primarily due to the time-consuming litigation procedures of state courts in resolving cases. Although the procedural costs in proceedings before state authorities are considerably lower than arbitration costs, the advantages offered by arbitral proceedings, primarily promptness and efficiency of a final resolution of disputes, are of more importance to Croatian and international clients than the procedural costs. Based on our experience, we can say that it is also important to clients in agreements and transactions of material financial value, the exclusion of the public which is another characteristic of arbitral proceedings due to which many clients choose arbitration as a way of resolving their disputes."

### Romania



Tudor Velea

Partner  
ARCLIFFE



Edward Dobre

Partner  
ARCLIFFE

"Romania has in the past encouraged foreign investment in the hope of generating a quick inflow of capital to boost the economy and take full advantage of Romania's adhesion to the European Union. Investments were made in a politically unstable context where laws were confusing and changed rather rapidly every time a new government was put in place. In return this created a tricky business environment where any new actor could face potentially damaging lawsuits. The increase in foreign investment generated complex international arbitration disputes, especially in the field of infrastructure, oil & gas, and energy. Romania is occupying the 45th place in the World Bank's ranking of countries where it is easy to do business. As Romania is striving to attract foreign investment to continue to boost its economy, foreign investors will wish to resolve any disputes in a neutral forum. The most notable arbitration case is in the mining sector in 2017 involved Gabriel Resources, the mining company. Similarly, the energy sector has seen some increase in arbitrated cases with the highlight of 2017 being the case of TPA against Enel Investment Holding B.V. and Enel S.p.A before the International Chamber of Commerce Paris. The arbitration award was a record sum of EUR 400 million. These cases show a trend whereby major Romanian based companies seek arbitration awards rather than taking the more classic approach of national litigation."



## Bulgaria



Alexander Stefanov  
Junior Partner  
PENKOV, MARKOV & PARTNERS

"We are witnessing a trend among relatively smaller and more flexible companies (SMEs) or entities that can be governed directly with less formalities on taking important decisions – the state courts seem to be preferred than the arbitration for the reason that arbitration (even though in one instance) can be delayed as much as in court but then the arbitration award is subject to appeal before the Supreme Court where the practice is not constant and foreseeable and this creates bigger uncertainty than the courts. Last but not least, we expect a trend of increase of the arbitrations in the field of construction, which is currently booming in Bulgaria and we expect to see larger and larger projects, especially with high buildings; also, the IT sector can be expected to start resolving disputes in big and significant matters via arbitration."

"WE EXPECT A TREND OF INCREASE OF THE ARBITRATIONS IN THE FIELD OF CONSTRUCTION, WHICH IS CURRENTLY BOOMING IN BULGARIA"

ALEXANDER STEFANOV  
PENKOV, MARKOV & PARTNERS  
BULGARIA