Preface

Central European Member States are the litmus paper of investment arbitration in Europe. On the one hand, as capital-importers, they are popular targets of investment claims: the overwhelming majority of the cases against EU Member States are proceedings launched against countries from the region. On the other hand, they, arguably, may be characterized by intensive intervention in the market, the state’s strong regulatory role and the entrenched social status of public services, which, by their nature, may interfere with the economic interests of foreign investors.

Unfortunately, notwithstanding its relevance as a battlefield of investment arbitration, Central European experiences have not been analysed in a comprehensive manner. Investment protection disputes are fairly complex: arbitral tribunals judge measures that are part of the core of national regulatory sovereignty, such as national privatizations, protection of public health, regulation of prices and curbing of monopolies. Although the complexity of investment disputes makes the proper understanding of the context essential, observers not “fluent” in the local jurisdiction may, at times, face unsurmountable difficulties grasping the factual, economic, political and regulatory background.

The unique edge of this volume is that it brings to the light the core of the European experiences on investment arbitration with a contextual analysis addressing the economic perspectives, the political background and the national regulatory environment. It is the first to present the Central and Eastern European case-law of investment arbitration in a comprehensive manner to make the experiences of Europe’s investment law battlefield fully accessible for practitioners and scholars alike.

The volume is made up of 14 national chapters covering Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Slovakia, Slovenia and Serbia and Montenegro and reporting on the Central European experiences from an insider’s perspective.

The purpose of the national chapters is to give a comprehensive overview of the national experiences on investor-state arbitration in terms of treaty landscape, domestic legislation and (first and foremost) case-law. Given that they are written by “native speakers” of the local jurisdiction, they use sources less accessible for the wider international community. The added value of the national chapters emerges from the circumstance that investment disputes are very complex and have several political, economic and regulatory aspects which often cannot be grasped in the absence of local expertise and the command of the local language. Hence, investment arbitration cases, much more than other controversies, can be grasped only on the basis of the totality of the aspects of the matter, which are normally not fully reproduced in the award and not fully perceivable for experts coming from foreign jurisdictions. National chapters provide such an “insider’s” contextual analysis.

The first section of the national chapters covers the policy and treaty landscape, extending to the reasons advanced for recourse to investor-state arbitration, the country’s attitude towards investor-state arbitration, the eventual political or scholarly criticism advanced in this regard.
and the patterns used by investment treaties (e.g. some BITs have the tendency of limiting the arbitral tribunal’s jurisdiction to genuine expropriation cases, while excluding fair and equitable treatment claims, while others confer full jurisdiction on arbitral tribunals but may require the exhaustion of local remedies or contain a fork-in-the-road clause).

The second section analyses the domestic legal status of investor-state arbitration and extends to the status of public-private arbitration at large, the characterization of investor-state arbitration (public law or civil-law mechanism), the eventual special rules in national law governing investor-state arbitration and the recognition and enforcement standards and mechanisms.

The third section is, in terms of length and relevance, the backbone of the national chapters and provides a detailed and in-depth analysis of the national case-law from an “insider’s perspective”. The approach of this section is informed by the notion that investment arbitration cases necessitate the proper comprehension of the factual, economic, political and regulatory background and call for local expertise and the command of the local language.

The national chapters’ concluding sections assess the national experiences concerning investor-state arbitration and inquire whether the social and economic context of the disputes is properly grasped by arbitral tribunals, whether investor-state arbitration is perceived to unreasonably curb national regulatory autonomy and to be excessively interventionist or excessively generous to investors in the light of the constitutional principles of the country and whether the protection afforded to foreign investors is considerably stronger than the legal protection of domestic investments and investors.