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Romania

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Introduction

Romania is a jurisdiction with a longstanding tradition in terms of arbitration: its first modern civil procedure code, dated 1865, comprised an entire chapter dedicated to arbitration proceedings (preserved until 1993) which encompassed some of the main arbitration-related aspects that are regulated in today's law systems (e.g. arbitration agreement, appointment and revocation of arbitrators, arbitration rules, enforcement of arbitral awards, etc.).

However, this type of dispute resolution existed long before the modern civil procedure code, references thereto being encountered, for instance, in Romanian regulations dating back to 1817[1].

During the communist period, when the number of trade-related disputes decreased dramatically due to the lack of private undertakings, arbitration-related provisions as well as the arbitration process itself nonetheless survived, being used between Romanian state-owned undertakings as well as between these and their international counterparts, when it came to international trade.

Later on, when Romania saw a revamping of its trade legislation after the fall of communism, arbitration-related provisions within the civil procedure code dated 1865 were modernised and the country emerged as an arbitration-friendly jurisdiction. This was due to a number of factors, including arbitration law and court practice on the recognition and enforcement of arbitral awards, Romania's accession to various treaties on international arbitration, Romanian arbitration institutions, and private parties' arbitration culture.

Arbitration law

Although not based on UNCITRAL Model Law on International Commercial Arbitration, the first Romanian arbitration law to follow the communist regime (dated 1993) contained all necessary tools to enable the choice of arbitration and proper unfolding of arbitration proceedings seated in Romania, as well as a smooth enforcement of arbitration awards, which were given by law the force of final court decisions, and could only be set aside for a limited number of procedure-related grounds.

In February 2013, Romanian arbitration law was further modernised with the enactment of a new civil procedure code (hereinafter "NCPC"), which has substantially modified previous provisions on arbitration in an attempt to keep pace with the latest trends in the field. NCPC has thus brought notable amendments to the system, such as: (i) distinct rules for international arbitration as opposed to domestic arbitration; (ii) enhanced support granted by the courts of law throughout the arbitration, similarly to the *juge d'appui* instituted by the French arbitration law; (iii) further clarity as to the arbitrability of disputes involving State entities; (iv) express acknowledgment of arbitrators' capacity to rule on

transfer of real rights over immovable assets; and (v) express implementation of the 1958 New York Convention principles on recognition and enforcement of foreign awards, etc.

Despite the good intentions, a number of contradictions and grey areas in the new law, coupled with rather questionable provisions concerning some of the aspects, may deter parties from resorting to arbitration in Romania[2]. One can therefore only hope that future legislative amendments and/or court decisions will bring some clarity and adjust solutions in line with international practice, so that the merit of an otherwise commendable initiative is fully preserved.

Having said that, it is nonetheless noteworthy that current arbitration law deals with most of the main topics required for an arbitration-friendly jurisdiction, as further detailed in the sections below[3].

Arbitration-friendly court practice

Courts are generally arbitration-friendly, being open to enforcing valid arbitration agreements, e.g. by recognising the competence of arbitral tribunals or, as the case may be, by authorising enforcement of national or international arbitration awards[4].

Moreover, legal actions to set aside (arbitral awards) are only sparingly upheld, and in any case they are normally not admitted if grounded on challenges pertaining to the (substantive) merits of the awards.

That said, while main arbitration principles are in the vast majority of cases preserved, there is still some degree of inconsistency between various court judgments when it comes to interpreting the various provisions of the arbitration law in detail.

Arbitration dedicated court

As per the NCPC, the second degree court ("tribunal" in Romanian language) may be called to offer support in removing any obstacles that may occur throughout the arbitration. To this end, the tribunal shall give priority to any such application, which shall be trialled by means of an expedited procedure ended with a judgment that may not be challenged in any way.

International treaties on arbitration

Romania is a long-time party to the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards ("New York Convention") and has applied the main principles enshrined thereby consistently after the fall of communism in 1989.

It is nonetheless noteworthy that Romania has made two reservations to the New York Convention: (i) the condition of reciprocity applicable for recognition and enforcement of arbitral awards issued in a non-contracting state; and (ii) confinement of the scope of application of the New York Convention to disputes arising from contractual or non-contractual relationships which are considered "commercial" under Romanian law.

Romania is also a party to the European Convention on International Commercial Arbitration (Geneva, 1961) and to the ICSID Convention, as further detailed below.

Provisions concerning recognition and enforcement of arbitral awards are also included in some of the bilateral treaties concerning legal assistance in civil and commercial matters entered into by Romania with various countries such as Algeria (1979), China (1992), Cuba (1981), Macedonia (2004), Morocco (1973), Republic of Moldova (1997), Syria (1979) and Tunisia (1972).

Arbitration institutions

Romania has a wealth of arbitration institutions, which are usually set up under the auspices of the various chambers of commerce at national and local level (such as the Chamber of

Commerce and Industry of Romania and chambers of commerce of the various counties), as well as under those of bilateral chambers of commerce.

The most popular (i.e. most resorted to) Romanian arbitration institution is, by far, the International Commercial Arbitration Court affiliated to the Romanian Chamber of Commerce and Industry ("CCIR"). Obviously, the recourse to CCIR arbitration rules is most frequent in domestic contracts, however there are also cases where it can be found in contracts with international flavour (e.g., where one of the parties is a foreign resident).

In 2014, the CCIR Rules of Arbitration, which were in great need of modernisation due to major flaws (such as parties not being able to appoint arbitrators, arbitration procedure being conducted more or less in the same way as a customary court trial, mandatory list of arbitrators, etc.) were completely reformed and brought in line with international practice.

Parties' arbitration culture

Partly fuelled by corruption concerns and the lengthy timespan of court trials, partly by the specific need for particular skills and expertise in certain fields, and partly by the absorption of practices promoted by global or multinational corporations, arbitration has come to be a widely known and often chosen dispute resolution method in Romania.

Moreover, the "arbitration culture" is not confined to parties of international origin and to deals/matters where these are involved, arbitration agreements being nowadays also frequently encountered in contracts between purely domestic parties.

International arbitration

As mentioned above, the NCPC comprises separate provisions concerning international arbitration and the effects of international arbitration awards. As opposed to NCPC provisions governing domestic arbitrations, those on international arbitration are much less extensive and more flexible.

The NCPC qualifies as "international" the arbitrations arising from legal relationships encompassing a foreign element. As per its provisions, the NCPC governs any international arbitration seated in Romania, provided that either of the parties was a foreign (i.e. not Romanian) resident upon the conclusion of the arbitration agreement. The parties may, however, agree (in writing) to eliminate the application of the NCPC.

Arbitration agreement

According to the NCPC, the arbitration agreement is to be made in written form (which shall include any communication mode able to evidence the agreement via text) and shall be considered valid in Romania in case it meets the conditions set out under either of the following laws: (i) the law chosen by the parties; (ii) the law governing the subject matter of the dispute; (iii) the law governing the contract that comprises the arbitration clause; or (iv) the Romanian law.

The NCPC chapter concerning domestic arbitration also provides that arbitration agreements concerning disputes on the transfer or establishment of ownership or other real right over an immovable asset must be made via notarised form, otherwise they are null and void. Although this provision is neither reiterated nor referred to in the chapter concerning international arbitration, for good measure international arbitration agreements to be seated in Romania or concerning immovable assets located in Romania should equally observe this requirement.

The NCPC expressly provides for the separability (autonomy) of the arbitration agreement, stating that the validity thereof may not be challenged on grounds of invalidity of the main

contract. In addition, one may not challenge an arbitration agreement on grounds that it concerns a dispute that is not yet born.

Validity left aside, the law does not expressly set out the cases where an arbitration agreement could be deemed as inoperative. However, Romanian court practice is very much in favour of preserving arbitration agreements, unless there are serious issues – such as, for instance, the case of clauses indicating both the competence of the State courts and dispute resolution by arbitration, without any further indications as to the type of disputes falling under each such category.

Arbitration agreements may concern any disputes on rights that parties are entitled to dispose of freely, unless the law governing the seat of arbitration assigns the dispute to the exclusive jurisdiction of a court of law.

It is noteworthy in this respect that the NCPC forbids a State or State-controlled entity or organisation from invoking its own laws with a view to challenging its capacity to stand in arbitration. However, this provision is likely to become inefficient bearing in mind that the NCPC excludes at the same time from the scope of the international arbitration agreements any disputes that are, as per the law at the seat of arbitration, within the exclusive jurisdiction of State courts.

The NCPC also enshrines the *kompetenz-kompetenz* principle, expressly stating that the arbitral tribunal shall rule on its own competence. As per the NCPC, jurisdiction-related pleas are to be raised before any defence on the merits. In ruling on jurisdiction, the arbitral tribunal is not to take into consideration claims on the same subject matter between the same parties that are pending before a State court or arbitral tribunal, unless duly justified grounds call for the staying of the procedure. Such grounds may, for instance, occur in case of an insolvent respondent, since as per Law 85 of 25 June 2014 on insolvency prevention and insolvency proceedings, all in- or out-of-court claims seeking to recover a receivable or enforce a right against a debtor undergoing insolvency proceedings are to be stayed throughout the duration of the insolvency.

Where a claim that should make the object of an arbitration agreement is filed before a Romanian court, the latter shall not verify its competence at its own motion, but only if requested to do so by a party relying on the arbitration agreement.

Where the arbitration rules chosen by the parties do not contain provisions regarding third party joinders, State court procedure provisions regarding the same shall apply accordingly, but (save for joinders made exclusively with the aim of supporting a party's position within the limits of such party's defence) only provided that all parties and the relevant third party agree to the joinder.

Arbitration procedure

Arbitration rules

The parties are free to carve out the arbitration rules in detail themselves or to refer to a pre-established set of rules (of an arbitration institution, or that set out by a procedural law, such as the NCPC). Should parties fail to proceed to the same, the procedure shall be established in the same manner by the arbitral tribunal, which is bound to guarantee the parties' rights to equal treatment and right to be heard in an adversarial procedure.

As per the NCPC, any aspects regarding the arbitration procedure that are not regulated by the parties and which are not entrusted thereby to the arbitral tribunal are to be handled in accordance with the NCPC provisions on domestic arbitration (provided that any terms set

out thereunder shall double in an international arbitration).

Seat of arbitration

The seat of arbitration is to be chosen by the parties or, failing same, by the arbitration court designated by either of the parties or by the arbitrators, as the case may be. The second degree State court ("tribunal" in Romanian language) whose jurisdiction encompasses the seat of arbitration shall be the one to offer support throughout various instances of the arbitration procedure, as set forth in the NCPC.

Language

As per the NCPC, the procedure shall be held in the language chosen by the parties. Where the parties fail to choose, the language shall be that of the contract giving rise to the dispute, or a widely spoken language to be decided by the arbitral tribunal.

Administration of evidence

The evidence is administered by the arbitral tribunal. However, if the intervention of a court is required to such end, the arbitral tribunal or the parties (with the arbitral tribunal's agreement) may request the assistance of the second degree State court ("*tribunal*" in Romanian language) whose jurisdiction extends over the seat of arbitration.

Unless other evidence-related rules are expressly referred to within the arbitration rules chosen by the parties or the tribunal (such as IBA Rules on the Taking of Evidence in International Arbitration, which are expressly referred to, for instance, within the current Arbitration Rules of the International Commercial Arbitration Court affiliated to the Romanian Chamber of Commerce and Industry), administration of evidence is to be made as per the provisions applying to domestic arbitration. The said provisions include rules for witness and expert testimony, instances where State courts may intervene to support administration of evidence, and arbitral tribunal powers regarding same, etc.

Pleadings

Pleadings are to be held as per the procedure agreed by the parties or by the arbitral tribunal or, in lack thereof, as per the NCPC proceedings concerning domestic arbitration. In the latter case, pleadings shall be both written and oral, and procedure shall unfold similarly to a trial before a State court.

Disclosure, privilege and confidentiality

The NCPC is silent on disclosure both when it comes to arbitration and State court proceedings, and disclosure *per se* is not an institution familiar to Romanian civil procedure.

Likewise, NCPC provisions do not deal with either privilege or confidentiality within arbitration proceedings.

Costs

Pursuant to the NCPC, unless the parties agree otherwise, arbitrators' fees and travel expenses are to be borne by the party that has made the appointment. The fees and travel expenses of the sole arbitrator or of the chairman of the arbitral tribunal are to be borne by the parties in equal shares.

Where a respondent refuses to pay the arbitration costs, the advances on arbitrators' fees and costs will have to be borne by the claimant, remaining for the latter to recover same from the respondent based on the arbitration award, as the case may be.

As to other arbitration costs (lawyer fees, arbitration administration costs, expert fees and travel expenses, witnesses' expenses, etc.), unless the parties have agreed otherwise, NCPC provisions regarding domestic arbitration may come into play. According to the

said provisions, arbitration costs are to be borne by the party against whom the award is made (either entirely or partially, depending on the percentage of the claims awarded/ dismissed in the award).

It is also worthy of note that, as per the NCPC provisions regarding domestic arbitration (which may become applicable to international arbitration as mentioned above), parties may address State courts with a view to reconsider and decide, via judgment that is not subject to appeal, the amount of the arbitration expenses (including arbitrator's fee) and allotment thereof between the parties.

Arbitrators

The arbitrators' appointment, revocation and replacement are to be made pursuant to the procedure elected by the parties. In the absence of such procedure, the tribunal having jurisdiction over the seat of arbitration may proceed to the same in accordance with the rules concerning domestic arbitration.

Appointment

Unless parties have decided otherwise, arbitrators are to be appointed by the parties (with the chairman to be elected by the party-appointed arbitrators) or by the tribunal having jurisdiction over the seat of arbitration.

Revocation and replacement

An arbitrator appointment may be challenged where: (i) the arbitrator does not hold the qualifications agreed by the parties; (ii) there is a reason to be challenged amongst those set forth by the rules of arbitration adopted by the parties or the arbitrators, as the case may be; or (iii) there are circumstances that give rise to a legitimate doubt as to the arbitrator's independence and impartiality.

A party may not however challenge an arbitrator appointed thereby unless such party has become aware of the grounds for challenge after the appointment.

Where the parties have not agreed on the procedure for challenging an arbitrator, the tribunal having jurisdiction over the seat of arbitration shall rule on the same.

As regards arbitrators' replacement, such may not take place, according to the NCPC, unless in duly justified cases strictly related to an objective impossibility for an arbitrator to fulfil his/her role.

Interim relief

According to the NCPC, the arbitral tribunal has the capacity to order interim or conservatory relief upon a party's request, unless the contrary is stated in the arbitration agreement. If the concerned party does not observe the relief thus ordered by the arbitral tribunal, the latter may call for the intervention of the relevant State court, which shall rule in accordance with its governing law. The interim and conservatory relief sought by the parties may be conditioned by the arbitral tribunal or relevant court on the setting up of a security of corresponding amount.

Arbitration award

The arbitration award is rendered pursuant to the procedure chosen by the parties. In lack of such choice, the award is rendered pursuant to the vote of the majority of the arbitrators. In case of parity, the award shall be drawn up pursuant to the solution favoured by the chairman of the arbitral tribunal.

The award must be made in writing, it must be reasoned, dated and signed by all arbitrators. Unless otherwise stated in the arbitration agreement, the tribunal may render partial awards.

The award is binding and enforceable as of the date of its being communicated to the parties.

If not set out in the arbitration rules chosen by the parties, NCPC provisions on domestic arbitration shall apply with respect to instances where an arbitral tribunal may be asked to clarify, modify or supplement the award (i.e., where award provisions are not clear or are contradictory or where the arbitral tribunal has omitted to resolve part of the claims).

Also, unless otherwise agreed by the parties, NCPC provisions regarding the caducity (or perishability) of domestic arbitration may come into play. In such case, and if either of the parties declares at the beginning of the arbitration that it intends to avail itself of the arbitration caducity, the arbitration award would be valid only if rendered within 12 months as of the constitution of the arbitral tribunal (subject to extensions in several cases).

Challenge of the arbitration award

International arbitration awards may be challenged only by action to set aside, on one of the following grounds:

(i) the dispute was not arbitrable;
(ii) the arbitral tribunal has resolved the dispute in the absence of an arbitration agreement or based on a null or inoperative arbitration agreement;
(iii) the constitution of the arbitral tribunal has infringed the rules set out in the arbitral agreement;
(iv) a party was absent from the final hearings on the merits and was not duly subpoenaed;
(v) the award was rendered after the caducity term and a party declared that it would avail itself of the arbitration caducity, unless parties agreed to continue the arbitration in accordance with the NCPC;
(vi) the arbitral tribunal has awarded more than was claimed or what was not claimed;
(vii) the award does not contain the reasoning and dispositive parts, does not mention the date or place of the award, or is not signed by the arbitrators; and
(viii) the Constitutional Court has ruled on the unconstitutionality of an enactment or part of an enactment that made the object of an unconstitutionality plea raised throughout the relevant arbitration, or other parts of the said enactment provided that the unconstitutional provisions may patently and objectively not be dissociated from the ones that made the object of the plea.

One may not invoke as grounds for setting aside an award: (i) any circumstances that can be remedied by a mere clarification, modification of or by a supplement to the award as mentioned above; and (ii) any pleas that are subject to estoppel as per NCPC provisions.

In an action to set aside, one may not use any new evidence other than documentary evidence.

No waiver of the right to file an action to set aside may be made unless after the arbitral award has been rendered.

Enforcement of the arbitration award

Domestic and national awards

According to NCPC provisions regarding domestic arbitration, arbitration awards are considered writs of execution and are to be enforced in the same manner as a State court judgment. Although not expressly provided, it may be inferred from NCPC provisions concerning recognition and enforcement of foreign awards that awards rendered in

Romania are to be deemed as "national" and enforced in the same manner as domestic awards.

Foreign awards

The NCPC qualifies as "foreign" any domestic arbitration or international arbitration awards which are rendered in a foreign State and may not be otherwise deemed as "national" awards.

Such foreign awards may be recognised and enforced in Romania either in accordance with the New York Convention (where it applies) or in accordance with NCPC provisions.

As per the NCPC, recognition and enforcement are granted if the relevant dispute is arbitrable as per Romanian law and the award does not comprise provisions infringing the Romanian international private law public order.

The recognition and enforcement application is trialled by the "tribunal" at the place of residence of the respondent or by Bucharest Tribunal, where no such place can be determined. When ruling on the recognition and enforcement of the award, the court may not examine the merits thereof.

One may apply either solely for recognition of the award, so that one can raise *res judicata* arguments in respect thereof in Romania, or for both recognition and enforcement. Recognition of the award may be equally requested incidentally, within a different procedure.

Recognition and enforcement of the award may be denied by the court if the respondent proves either of the following:

- the parties did not hold the requisite capacity to enter into the arbitration agreement as per the law governing the latter (such law is to be determined as per the law of the State where the award was rendered);
- the arbitration agreement was not valid according to the governing law chosen by the parties or, in lack thereof, according to the law of the State where the award was rendered;
- the respondent was not duly informed with regard to the arbitrators' appointment or the arbitration procedure, or it was impossible for it to defend itself within the arbitration procedure;
- the constitution of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' agreement or the law at the seat of arbitration, where there is no such agreement;
- the award concerns a dispute that was not contemplated by the arbitration agreement or that exceeded the limits set out therein, or the award comprises provisions that exceed such limits; if such provisions may be separated from the rest, only enforcement thereof shall be denied, whilst the remainder of the award shall be given effect; or
- the award is not yet binding on the parties or has been annulled or suspended by a relevant authority within the State wherein or by whose law the award has been rendered.

The court may stay the recognition and enforcement procedures where the annulment or staying of the award is requested in the State wherein or by the law of which the award was rendered. In such case, the party seeking enforcement and recognition of the award may request the court to order the other party to set up a cash collateral.

The judgment concerning recognition and enforcement of the award may be challenged by single appeal.

Investment arbitration

Romania has concluded throughout the years over 80 bilateral investment treaties and is also a party to several multilateral investment treaties such as the ICSID Convention, the Energy Charter Treaty and MIGA (Multilateral Investment Guarantee Agency) Convention.

Due to a rather unstable legislative framework and increasing corruption in the early years following the fall of communism, as well as revocation of many investment incentives following Romania's accession to the European Union, investment treaty arbitration against Romania has somewhat flourished.

Starting in 2001 when the first investment arbitration claim was filed and until the present, the ICSID has registered 11 cases against Romania. However, out of the six cases concluded so far, only one (i.e., Ioan Micula, Viorel Micula and others, ARB/05/20) has resulted in a successful award, with compensation of US$250m having been granted in favour of the investor (deemed one of the largest in ICSID history). At this date, the enforcement of the said award is stayed further to annulment proceedings filed by Romania under the ICSID Convention, which proceedings are still pending.

* * *

Endnotes

1. *Arbitrajul este un mod de solutionare a litigiilor patrimoniale agreat de operatorii economici din România,* Prof. Brandusa Stefanescu, published in Pandectele Romane magazine, issue 8 of 31 August 2013.
2. *Romanian arbitration law – one step forward, two steps back*, Alina Popescu and Alexandru Oana, Arbitration Newsletter of the International Bar Association, February 2014.
3. Given the nature of this publication, this chapter is confined to rules applicable to international arbitration.
4. In Romania forced execution proceedings are subject to previous approval of the court, aiming to ensure that proceedings rely on a proper writ of execution, such as a court judgment or an arbitration award.

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Alina Popescu has extensive practice in top tier Romanian law firms, being at the forefront of some of the largest commercial and investment arbitrations involving Romanian counsels, including ICSID Case ARB/05/20 Ioan Micula, Viorel Micula and others. She thus holds substantial expertise in international commercial and investment arbitration proceedings as well as enforcement and setting aside of arbitral awards, being acknowledged for her ability to identify the core legal issues to be addressed and approaches to be tackled with a view to building strategies for success. Alina's expertise equally extends to amicable settlement of disputes as well as the configuration of clients' pre-litigation conduct, having obtained in this respect notable and cost-saving results. She is currently co-managing partner of Maravela & Asociații, an independent Romanian law firm recently shortlisted for Law Firm of the Year: Romania award at the Lawyer European Awards 2015.

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A former judge, Linklaters London associate and top tier Romanian law firm equity partner, Gelu Maravela been a counsel in a large number of high-value international commercial and investment arbitrations, including ICSID Case ARB/05/20 Ioan Micula, Viorel Micula and others, and has worked for an outstanding number of high-profile corporations as well as for many public authorities. Gelu equally holds wide-ranging expertise in mergers & acquisitions, including privatisations and all forms of private dealings in the field, and holds solid insight of capital market regulations. He also has extensive experience in pharmaceuticals and healthcare matters, having worked for an impressive portfolio of international clients including 9 of the top 12 medicine and medical devices manufacturers worldwide, as well as in energy & natural resources matters, having recently been awarded as 2014-2015 Energy Law Lawyer of the Year by Best Lawyers International.

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