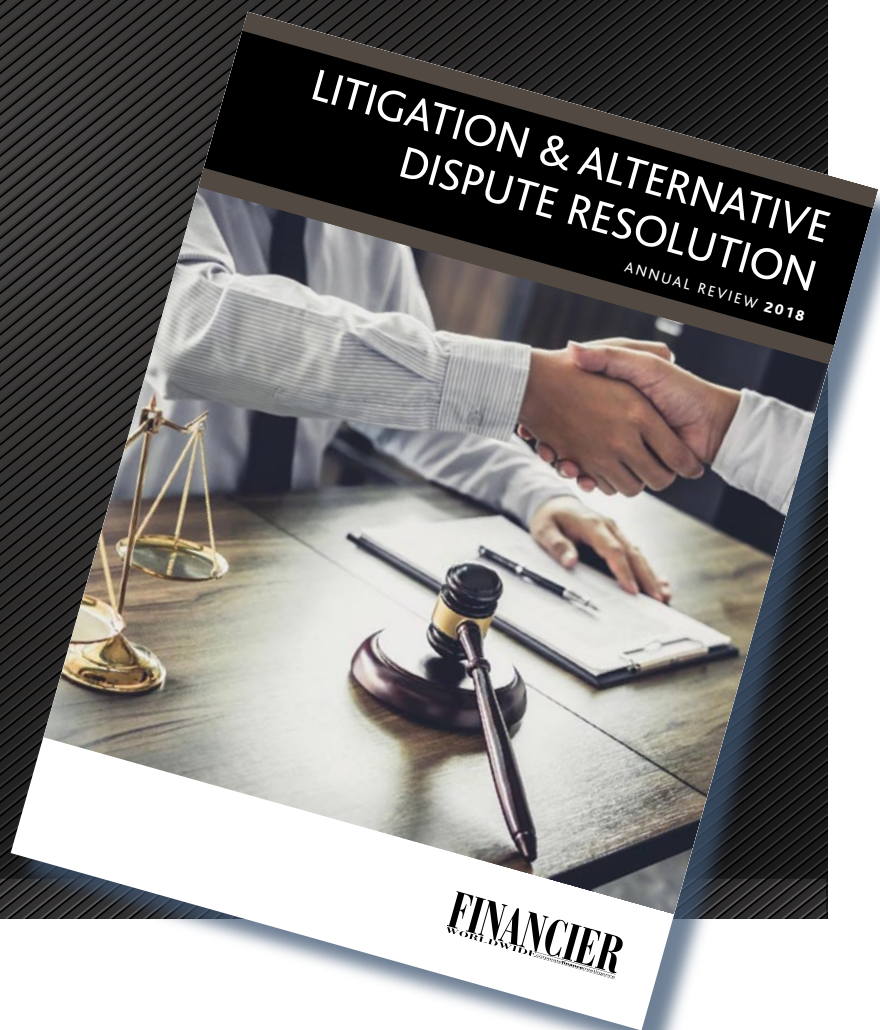


ANNUAL REVIEW

Litigation & alternative dispute resolution

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Florian Nitu is the managing partner of Popovici Nitu Stoica & Asociatii and head of the firm's mergers & acquisitions, real estate and international arbitration practice groups. He is largely recognised as one of the most experienced transactional lawyers and claims managers in the Romanian legal services market. He has significant expertise in arbitration proceedings before domestic and international courts of arbitration under the rules of ICC Paris, ICSID, the Court of International Commercial Arbitration pertaining to the Chamber of Commerce and Industry of Romania.

Romania

■ Q. Could you outline some of the current market challenges at the centre of commercial disputes in Romania?

NITU: Length of proceedings, limited efficiency of injunctive relief tools, enforcement and execution hurdles remain major preoccupations. Nevertheless, the functioning of the judicial system in Romania has improved notably in recent years. Structurally, and more generally, state courts and their two-level, sometimes three-level, review procedures are ill-equipped to administer justice in commercial disputes. More economic and time-efficient dispute resolution platforms are needed to serve businesses in their disputes and arbitration – particularly sole-arbitrator, fast track or online processes look more suitable for this purpose.

■ Q. What general advice can you offer to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

NITU: Start with a conscious and strategically planned option. Many businesses still leave this matter to default rules and, in many cases, this

proves to be unfortunate. They end up with a dispute in a court that is unsuitable or inefficient in deciding their particular case. Since The Hague Choice of Court Convention came into effect in 2015, businesses may opt in, not only in the arbitration system, but also in a different state judiciary system. All options are on the table: ADR, litigation in various state jurisdictions, arbitration, as well as various hybrid alternative dispute resolution systems. A SWOT analysis of all reasonably available dispute resolution facilities is needed before entering into any legal project, transaction or claim of a certain complexity, and more so when a cross-border element is involved. In my experience, a SWOT analysis considers a number of ADR forms, locally or internationally, as potentially viable options, while the decisive criteria for opting in or out often refer to how fast, impartial, expert, pragmatic, legally effective and economically efficient dispute resolution processes are.

Q. To what extent are companies in Romania likely to explore alternative dispute resolution (ADR) options before engaging in litigation?

NITU: ADR solutions are taken more seriously in the region and particularly in Romania where legal profession rules and regulations, but also judicial proceedings statutes, encourage parties and their counsel to attempt ADR before going to court. Notably, among professionals, bespoke ADR processes are designed and agreed in advance, and transaction advisory experts are becoming increasingly aware of the need to factor such processes into their transaction documents.

Q. How would you describe arbitration facilities and processes in Romania? Are local courts supportive of the process?

NITU: Romania has a long and consistent tradition in commercial arbitration, locally and internationally. Always a viable alternative to the state judiciary, commercial arbitration has benefitted from strong institutional arbitrations, closely linked to the large European arbitral centres and their institutions in Paris, London, Geneva or Frankfurt. Private businesses, and notably foreign investors, are still inclined to arbitrate their commercial disputes in Romania, instead of using local courts, as arbitration, at least under the authority of the International



Chamber of Commerce of Romania and its 2018 Arbitration Rules, meets all transnational standards, guarantees the impartiality and independence of arbitrators and provides effective fast-track proceedings, as well as time and cost effective arbitration management tools. Romania also offers properly functioning machinery for arbitral award enforcement, being an early member of all relevant international treaty instruments concerning recognition and enforcement of arbitral awards.

Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?

NITU: I would list three categories. First, cases depending on certain procedural devices, such as special summoning regimes in disputes involving a high number of parties or cases requiring interim measures, seizures or injunctions. Also, claims benefitting from a stamp duty with a more favourable status in court and summary proceedings as well. Second, cases prone to public interest intervention, such as those related to, for example, insolvency, antitrust, consumer and financial regulations. Third, all those arbitrability-sensitive cases, mainly on the edge of administrative law.

Q. What practical challenges need to be dealt with when undertaking complex international, multijurisdictional disputes in Romania?

NITU: Disputes involving two or more jurisdictions can become complex when the interface between jurisdictions is governed by distinct and different international treaty instruments. These usually include claims

involving entities domiciled outside the EU, with those in jurisdictions operating in Asia Pacific raising difficult issues. Otherwise, a transnational dispute within the European Union involving numerous national legal systems, multiple parties and different claims may still remain easy to manage under the framework set by the comprehensive EU legal setting, such as the Brussels I and II regulations.

Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?

NITU: In my view, at least in matters concerning investments, transactions and concessions in Romania, international commercial arbitration remains a preferred method of resolving disputes. When opting in for international arbitration, parties should choose an arbitral institution depending on their own home jurisdiction, award annulment and enforceability risks, and this is obviously based on the ability of an institution to administer the whole process properly. Equally, at least in terms of potential investment claims, businesses will always consider bilateral investment treaties (BITs) and multilateral investment treaties (MITs) with Romania when framing their investments in the local market, so that proper treaty claims solutions are preserved. ■

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Popovici Nitu Stoica & Asociatii is a leading Romanian independent law firm. Established in 1995, as one of the first incorporated partnerships, the firm brings together strong local resources, with exceptional credentials, outstanding records and distinguished careers in law, business and academia. The Bucharest office houses 90 qualified lawyers and tax advisers. For decades, significant investment and acquisitions projects in the local market have been carried out with the assistance of Popovici Nitu Stoica & Asociatii.

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