Arbitration procedures and practice in Romania: overview

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A Q&A guide to arbitration law and practice in Romania.

The country-specific Q&A guide provides a structured overview of the key practical issues concerning arbitration in this jurisdiction, including any mandatory provisions and default rules applicable under local law, confidentiality, local courts' willingness to assist arbitration, enforcement of awards and the available remedies, both final and interim.

Use of arbitration and recent trends

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and recent trends

Commercial disputes, particularly in sectors such as construction, concessions, public-private arrangements and corporate joint-venture type investment schemes, finance-banking, transport and information technology, are increasingly submitted to alternative dispute resolution mechanisms such as arbitration.

The use of commercial arbitration is prevalent as a means to resolve disputes with a foreign element. The cross-border commercial disputes are generally submitted before tribunals composed of experienced international arbitrators, better placed and equipped to tackle the complexities of international business transactions. For example, according to the ICC Dispute Resolution Statistics for 2018 and 2019 (*https://iccwbo.org/publication/icc-dispute-resolution-statistics/*), Romanian parties are the third most represented in ICC arbitration disputes from among those in central and eastern Europe.

Much progress has been made throughout the years to facilitate access to arbitration. The New Civil Procedure Code (CPC), which entered into force on 15 February 2013, significantly improved domestic and international arbitration regulation. The core changes aimed at expediting arbitral proceedings enhance party autonomy and safeguard the integrity of the process. Further, in continuation of the reform process that started with the 2014 Rules of Arbitration, the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (CICA-CCIR) adopted a new set of arbitration rules on 17 November 2017, which entered into force on 27 December

2017 (*http://arbitration.ccir.ro/wp-content/uploads/2018/05/Arbitration-Rules-of-the-Court-of-International-Comercial-Arbitration-attached-to-CCIR.pdf*) (*2018 CICA Rules of Arbitration*).

The 2018 CICA Rules of Arbitration reflect and align with international standards of best practice. They steer the arbitral process away from the national courts' formalism and seek to enhance flexibility and efficiency. The introduction of a fast-track arbitration procedure (a default simplified procedure under a certain value threshold) and of emergency arbitrator provisions aim to further cater to the specific circumstances of the parties' dispute.

At the beginning of 2018, the General and Specific Conditions (*http://anap.gov.ro/web/wp-content/uploads/2018/02/Hot%C4%83r%C3%A2rea-nr-1-din-10-ianuarie-2018-pentru-aprobarea-condi%C5%A3iilor-generale-%C5%9Fi-specifice-pentru-anumite-categorii-de-contracte.pdf*) for construction works contracts financed by public funds over about EUR5 million were approved (*Government Decision no. 1/2018*). These conditions replace the FIDIC-based former default conditions applied for public procurement construction contracts. They provide a CICA-CCIR arbitration clause, replacing the former jurisdiction of the International Chamber of Commerce's (ICC) Arbitration Court.

Finally, new Romania-based arbitration institutions have been established, such as the Bucharest International Arbitration Court (2016) and the Permanent Court of Arbitration of the Romanian-German Chamber of Commerce and Industry (2011), for domestic and international arbitrations.

Advantages/disadvantages

The parties' right to freely appoint the arbitrators is the underpinning advantage of selecting arbitration over court litigation. Further, compared to Romanian courts, arbitrations seated in Romania provide the parties with more flexibility in organising the proceedings. The stringent procedural requirements of national courts, primarily related to rules of evidence and tight deadlines for submissions, are considered less suitable for complex disputes, for which arbitration may be more appropriate.

On the other hand, with greater flexibility comes the tendency of the parties to prolong the arbitral proceedings, and therefore increase the overall cost of resolving their dispute. However, local arbitral institutions have started taking measures to expedite the arbitral proceedings, cost- and time-wise. For example, the 2018 CICA Rules of Arbitration provide various arbitration tools such as fast-track arbitration, bifurcation, consolidation, long distance communication mechanisms, and preliminary conferences to determine the organisational aspects of the hearing.

Further, the cost of the arbitration can be a compelling advantage when compared to national court litigation, particularly for large disputes (that is, over EUR15 million to EUR20 million).

Legislative framework

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The CPC (entered into force in 2013, with subsequent amendments and completions) regulates both domestic and international arbitration, in separate sections. Domestic arbitration falls under Book IV of the CPC (*Articles 541 to 621*), while the international arbitration provisions can be found under Articles 1111 to 1133. By virtue of Article 1123, the domestic arbitration provisions related to the constitution of the arbitral tribunal, the arbitral procedure and the award may also be applicable to international arbitration proceedings, provided the parties do not derogate from them. These provisions of the CPC ensure an appropriate setting for ad hoc arbitration proceedings seated in Romania, while also acting as *lex arbitri* in institutional arbitration proceedings.

The CPC follows the general principles of the UNCITRAL Model Law, without formally adopting it. However, some areas of the Romanian arbitration law, such as applications for preliminary orders and interim relief, received significantly less regulation than as provided in the UNCITRAL Model Law. Conversely, in some other areas, the Romanian arbitration law provides for more detailed regulation than the UNCITRAL Model Law (for example, the CPC lists the cases where the arbitrator is considered to have breached the standard of impartiality and independence).

Recent significant departures from the provisions of the UNCITRAL Model Law include:

- In domestic arbitration, the arbitration clause covering a dispute relating to the transfer of ownership rights or the constitution of a real right over a real estate asset must be concluded in notarised form, under the sanction of absolute nullity (*Article 548(2), CPC*). Correspondingly, the award rendered in such a dispute must be presented to the court or the notary public for the observance of local formalities (*Article 603 (3), CPC*).
- A case in which the Romanian Constitutional Court declared the legal subject matter of an invoked plea unconstitutional, after the award had been rendered, under Article 608 of the CPC.

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

The Romanian arbitration law is generally arbitration-friendly, mainly containing provisions that are applicable only lacking the parties' agreement. However, the parties must follow certain provisions which the legislator has reserved as mandatory. These include:

- Prohibiting certain types of disputes from being resolved by arbitration (*see Question 4*).

- The requirement that the arbitration agreement be in writing (*Article 548 and Article 1113, CPC*).
- Observing the fundamental principles of civil trial throughout the proceedings (*Article 575, CPC*).

4. Does the law prohibit any types of dispute from being resolved through arbitration?

Both domestic and international arbitration provisions of the CPC impose limitations on the types of disputes which are arbitrable (*Article 542 and 1112, CPC*).

The general approach in determining the objective arbitrability of a dispute is based on:

- Its patrimonial nature, with specific types of pure non-patrimonial disputes being excluded from domestic arbitration (which is limited to marital status, the parties' capacity, inheritance rights and family relations).
- The nature of the rights involved (that is, the parties can dispose of the rights (Romanian case law and doctrine have established that disputes regarding individual labour conflicts or social insurance fall within this description, so they are not arbitrable).

Further, as a general rule, disputes for which the law of the seat has reserved exclusive competence to the state courts are precluded from arbitration. The Romanian courts retain exclusive jurisdiction in cases related to, among other things:

- Insolvency procedures, for example the opening and conduct of the insolvency procedure.
- Competition, for example challenging decisions by the Competition Council.
- Administrative disputes.
- Intellectual property, for example annulment of trade marks, patents and designs.
- Corporate disputes, for example annulment of resolutions of the general meeting of shareholders.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

Under Romanian law, limitation periods are the same for both litigation and arbitration, and are governed by substantive provisions (*Article 2663, Civil Code*). The limitation period is three years (*Article 2517, Civil Code*).

The Romanian legislator also prescribed special limitation periods, depending on the subject matter of the case (see, for example, Article 2518 to 2521 of the Civil Code).

The limitation period generally runs from the moment the right holder knew or should have known of the right's existence (*Article 2523, Civil Code*). Romanian law also provides for particular rules, depending on the subject matter of the case. For example:

- The right to demand specific performance of an obligation to give or to do, which runs from the date the obligation becomes exigible (*Article 2524, Civil Code*).
- The right to demand restitution of the performance executed on the basis of an agreement which is voidable or rescinded, running from the date when the court decision voiding the agreement has become final, or when the rescission declaration has become irrevocable (*Article 2525, Civil Code*).

Article 2537 of the Civil Code provides a non-exhaustive list of factors which interrupt the limitation period. Most relevant in the context of commercial arbitration are:

- A voluntary act of performance or acknowledgement of the right subject to limitation, made by the party in favour of which the period runs.
- Filing a request for arbitration.
- Any action putting in default the party in favour of which the limitation period runs.

The interruption erases the limitation period having begun before the interruption cause, and a new limitation period starts to run (*Article 2541, Civil Code*).

The limitation period may also be suspended within a certain interval, resuming its course after the suspension cause has passed, in limited cases provided by law (*Article 2532, Civil Code*). Most relevant in the context of commercial arbitration are:

- The suspension for the entire duration of the negotiations aiming at settling the dispute amiably, provided the negotiations were held within the last six months before the lapse of the limitation period (*item 6*).
- In a case where the prospective claimant has the legal or contractual right or obligation to follow a preliminary procedure, but the suspension cannot last longer than three months from the start of the procedure if no other term has been set by contract or law (*item 7*).

For the duration of the state of emergency put in place by Presidential Decree No. 195/2020 as a result of the 2019 novel coronavirus (COVID-19) pandemic (16 March 2020 to 14 May 2020), no limitation periods could begin and, where they had already begun, they were suspended (*Article 41, Decree No. 195/2020*).

Arbitration institutions

6. Which arbitration institutions are commonly used to resolve large commercial disputes?

The following arbitration institutions are commonly used to resolve large commercial disputes with a Romanian element:

- The Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (CICA-CCIR), administering domestic (predominantly) and international arbitral disputes.
- The International Chamber of Commerce's (ICC) Arbitration Court, Paris, mostly administering international arbitral disputes.
- The Vienna International Arbitration Centre (VIAC), also administering international arbitral disputes.

Parties concluding contracts with an international component usually specify the ICC and the CICA-CCIR as the arbitration organisations to administer any dispute arising of out or in connection with the contract.

Jurisdictional issues

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The party denying the tribunal's jurisdiction to determine the dispute(s) can raise a lack of jurisdiction plea, either through its statement of defence or, in any case, no later than the first hearing date (*Article 573, CPC*). As a matter of principle, parties are barred from bringing up any objections related to the existence and validity of the arbitration agreement, the constitution of the tribunal, the limits of its mission and the procedure to date, after the first hearing date (*Article 592, CPC*).

In international arbitration, an objection to jurisdiction must be raised before any defence on the merits of the case (*Article 1119, CPC*).

In light of full regulatory recognition of the kompetenz-kompetenz principle under the CPC, the tribunal will determine the issue of its own jurisdiction. The local court will only intervene in the setting aside phase, if and to the extent it is initiated against the award by which the tribunal retained jurisdiction (*Article 579 and Article 1119, CPC*).

Arbitration agreements

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

In both domestic and international arbitration it is compulsory and generally sufficient that the arbitration agreement be in writing, under the penalty of nullity. However, the domestic arbitration provisions impose an additional formal requirement for disputes related to the transfer of a property right or the constitution of a real right (*ius in* re) over a real estate asset. The arbitration agreement covering such disputes must be notarised, to ensure its valid conclusion (*Article 548(2), CPC*).

The arbitration agreement need not be incorporated into a contract. It can be contained in a correspondence exchange (e-mail, facsimile and telex).

Further, the written form requirement is deemed to have been met if the parties' consent to submit their dispute to arbitration is contained in an exchange of procedural acts.

The CPC distinguishes between a compromissory clause regarding future disputes and an arbitration submission agreement regarding actual, arisen disputes. In the second case, the subject matter of the dispute must be defined in it under the sanction of nullity. In ad hoc arbitration, a compromissory clause must state the method of nominating the arbitrators, while an arbitration submission agreement must specify the arbitrators' names or the method of their appointment, under the sanction of nullity. In practice, however, arbitration submission agreements are almost never used.

Where the clause provides for submitting the dispute to institutional arbitration, it is sufficient to name the specific institution or refer to its rules of arbitration.

Also, the arbitration agreement must observe the substantive validity requirements of any binding agreement under the Civil Code, namely to feature a valid object, a valid cause and the parties' capacity and consent. The CPC provides that only parties with full legal capacity can conclude an arbitration agreement, while with regard to the object of the arbitration agreement, the dispute must be arbitrable.

Separate arbitration agreement

An arbitration agreement separate from the main contract is not required under the law. Article 549 of the CPC expressly allows for the parties to conclude an arbitration agreement in the main contract or through a separate agreement, or confirm their agreement to submit the matter to arbitration directly to the established arbitral tribunal.

In the case of an arbitration clause incorporated in a contract only by reference, it is generally sufficient that the main contract expressly refers to the document containing the arbitration agreement, in order for the disputes arising from the contract to be subject to arbitration. However, it is advisable that the document containing the arbitration agreement is attached to the main contract.

A standard agreement providing an arbitration clause benefiting the party proposing it is considered an "unusual clause" within the meaning of Article 1203 of the Civil Code, and must be expressly accepted in writing by the other party to be effective. Standard agreements/clauses are those agreements/clauses which are prepared in advance for general and repeated use by one party, and which are incorporated into the contract without having been negotiated with the other party (*Article 1202, Civil Code*).

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

The CPC is silent on the enforceability of unilateral or optional arbitration clauses. The practice of the Romanian courts leans towards confirming the validity of clauses whereby the claimant can submit the dispute to arbitration or to local courts. However, there have also been court decisions of a different opinion, holding that the parties' intention to arbitrate is equivocal and therefore ineffective, if the agreement establishes an alternative competence between arbitration and local courts.

Third parties

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

In domestic arbitration, parties foreign to the arbitration agreement can be joined to the proceedings subject to the conditions applicable to local court procedure, but only if they and all parties to the agreement do not object. By way of exception, parties not making any claims but simply wishing to join to support one of the parties to the dispute (through an accessory voluntary intervention), can do so without requiring the parties' approval (*Article 581, CPC*). Since this is a procedural matter, this provision also applies to international arbitration, in the absence of the parties' agreement to the contrary.

The rules relating to a third party joining the arbitration proceedings can be found under Article 61 to 77 of the CPC:

- The party must submit a request for joinder, before the conclusion of the debate on the merits before the arbitral tribunal.
- The tribunal will assess the admissibility of the request after hearing all the parties' positions.
- If admitted, the intervening party joins the proceedings as they are at that time, but it can ask to submit additional evidence.
- If applicable, the tribunal will establish when the other parties are to submit their defences.

A notable difference between the CPC and the 2018 CICA Rules of Arbitration relates to accessory voluntary intervention (that is, the request for joinder to support one of the parties to the dispute). As opposed to the general rules provided by the CPC, under the 2018 CICA Rules of Arbitration, the intervention is admissible only if the person requesting to intervene can prove the existence of an arbitration agreement concluded with all parties, or if all parties agree.

It is generally accepted that non-signatories are bound by the arbitration agreement in cases such as assignment of contract, oblique (indirect) actions, or the parties' singular or universal successors. Reputed scholars have also debated the extension of the arbitration agreement to third parties in the case of group companies and group contracts, agency or proxy agreements and, in certain exceptional cases of the CICA-CCIR, the tribunals assumed jurisdiction over non-signatories.

The 2018 CICA Rules of Arbitration provide a new procedure, under which the parties can request the joinder of their arbitration case to an existing case. The first established arbitral tribunal will grant such a request if either:

- All the parties agree to the joinder.
- All claims are formulated based on the same arbitration agreement.
- The claims, which are based on different arbitration agreements, stem from the same operation or series of operations, and in the arbitral tribunal's opinion the arbitration agreements are compatible.

When deciding on the request for joinder, the arbitral tribunal can take into consideration, among others:

- The stage of the arbitration proceedings to which joinder is requested.
- Whether the arbitration proceedings raise common issues in law or in fact.
- The efficiency and expeditious nature of the procedure.

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

The Romanian *lex arbitri* remains silent on this matter. However, it is generally accepted that in certain circumstances a party outside the arbitration agreement can compel a party to the agreement to arbitrate. Such cases mainly involve the assignment of the contract to a third party, a succession in rights or oblique (indirect) actions.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

Both in international arbitration (*Article 1113(3), CPC*) and domestic arbitration (*Article 550(2), CPC*), the principle of the separability of the arbitration agreement is fully recognised.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

Local courts are proactive in relation to arbitration agreements, and defer disputes to the relevant arbitral institution or, in the case of ad hoc arbitration, dismiss the claim for lack of courts' jurisdiction, under the condition that one of the parties relies on the arbitration agreement. As opposed to the tribunal, the court's standard of review is a prima facie one.

The court will retain jurisdiction in exceptional and limited circumstances, such as:

- A null or invalid arbitration agreement.
- The respondent has pleaded on the merits of the dispute without invoking the arbitration agreement.
- The arbitral tribunal cannot be constituted due to the manifest fault of the respondent.
- The respondent has not raised the arbitration agreement until the first hearing date to which it has been duly summoned.

(*Articles 554 and 1069, CPC*).

Arbitration in breach of a valid jurisdiction clause

Where arbitration proceedings have been initiated in breach of a valid jurisdiction clause or in the absence of any arbitration agreement, the opposing party can raise a lack of jurisdiction plea, no later than the first hearing date (*Article 573, CPC*). If the law assigns exclusive jurisdiction to state courts for the dispute, even the claimant can raise the lack of jurisdiction plea. In any case, the tribunal must analyse and decide on its own jurisdiction ex officio (*Article 579, CPC*).

If the tribunal retains jurisdiction, its decision can only be contested within the setting aside procedure initiated against the final award. The Romanian legislator has therefore departed from the provisions of the UNCITRAL Model Law, under which such a ruling can be challenged separately, within 30 days after having received notice of it. Conversely, the award by which the tribunal declines jurisdiction cannot be subject to the setting aside procedure.

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

The CPC does not regulate the court's right to grant injunctions to restrain proceedings started overseas in breach of an arbitration agreement.

Arbitrators

Number and qualifications/characteristics

15.Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction to serve as an arbitrator there?

The CPC allows for any natural person with full legal capacity to be an arbitrator (*Article 555*). However, certain regulated professions are prohibited from engaging in arbitration-related activities, including being appointed as arbitrators. For example, judges and prosecutors (*Article 8, Law no. 303/2004*), or members of the Competition Council (*Article 15(6), Law no. 21/1996*).

In 2013 the CPC departed from the requirement that domestic arbitrators must be Romanian citizens. Under the current legal regime there are no restrictions based on nationality, and one need not have a special licence to act as an arbitrator.

The 2018 CICA Rules of Arbitration do not contain provisions affecting the parties' autonomy in choosing the arbitrators, and expressly provide that the parties can choose an arbitrator who is not on the institution's approved list.

The number of arbitrators to a dispute must always be odd, and without the parties' agreement the default number is three (*Article 556, CPC*).

Independence/impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

There are many requirements under the CPC to ensure that arbitrators are independent and impartial. They include incompatibility cases which Romanian judges are subject to (*Article 42, CPC*), and additional requirements for arbitrators under Article 562 of the CPC. None of the requirements are mandatory, as the proceedings can continue if the parties have no objections and the arbitrator in question does not opt to step down. However, the law requires the arbitrator to disclose any such matters to the parties as soon as they are aware of them. The requirements provided by Article 42 and Article 562 of the CPC cover, among others, the following scenarios:

- The arbitrator does not meet the qualifications required by the arbitration agreement.
- The arbitrator is associated with a legal entity having an interest in the outcome of the dispute.
- The arbitrator has employment or direct commercial relations with one of the parties or its subsidiaries.
- The arbitrator assisted, represented or consulted one of the parties in the dispute resolution prior to the arbitration proceedings.
- The arbitrator had already expressed its position towards one of the heads of claims of the dispute.
- There is the concern that the arbitrator or one of the close relatives has an interest in the outcome of the dispute.
- The arbitrator or one of its relatives have been involved in criminal proceedings against one of the parties within five years before the dispute.
- The arbitrator or one of its close relatives have received gifts or other advantages from one of the parties, or are in dispute with one of the parties.
- The arbitrator is a relative of one of the other arbitrators of the dispute.

In international arbitration, the arbitrator can be challenged for any legitimate doubt as to its independence and impartiality (*Article 1114, CPC*).

Further, in proceedings under the 2018 CICA Rules of Arbitration, the arbitrators must sign a statement of independence and impartiality, highlighting any circumstances that may give rise to justifiable doubts with respect to their impartiality or independence, failing which they may not act as arbitrators in the dispute.

Appointment/removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

The Romanian arbitration law respects the parties' autonomy in appointing arbitrators. However, where the parties provide that one of them will have any advantages over the other in appointing the arbitrators, or that one will have the right to appoint more arbitrators than the other, such provision of the arbitration agreement is null and void (*Article 557, CPC*).

The Romanian *lex arbitri* provides default provisions if there is no parties' agreement on the specifics. Applying to both domestic and international arbitration proceedings seated in Romania, the default provisions are contained in Article 556 and 558 of the CPC.

The claimant must appoint an arbitrator or propose a sole arbitrator, and communicate its personal and professional details to the other party. In turn, the respondent must also appoint an arbitrator, or comment on the claimant's proposal of sole arbitrator, and communicate the details to the claimant. In the case of multiple parties acting as claimants or respondents, all parties with common interests must name only name one arbitrator. The parties can also propose a replacement arbitrator, if their appointed arbitrator is prevented from fulfilling its mandate. Unless the parties agree otherwise, the chairman of the tribunal must be chosen by the appointed arbitrators.

If the parties opt for institutional arbitration, the chosen institution can only have non-compulsory lists of arbitrators which the parties can choose from (*Article 618, CPC*). If the parties do not make an agreement on the sole arbitrator or any party does not appoint the arbitrator or the party-appointed arbitrators do not reach an agreement in relation to the chairman, the president of the arbitral institution is the nomination authority, unless the parties or the institutional rules provide otherwise.

The arbitral tribunal is constituted on the date the sole arbitrator or, in the case of multiple arbitrators, the last arbitrator or the chairman has accepted the mandate in writing, by communicating the acceptance to the parties within five days as of receiving the appointment proposal (*Article 559 and 566, CPC*).

Removal of arbitrators

In the case of domestic arbitration, the parties can remove the arbitrators for any reasons of incompatibility, lack of independence or impartiality (*see Question 16*). However, a party cannot remove the arbitrator appointed by it for reasons it was aware of at the time of appointment (*Article 562, CPC*).

A removal request must be submitted to the district court of the place of arbitration (*Article 563, CPC*). Under the sanction of losing the right to ask for the removal, the request must be submitted within ten days of becoming aware of the appointment of the arbitrator or the reason for removal.

In any case, the arbitrator can decide to step down voluntarily, even if the parties have expressly stated that they do not wish to remove the arbitrator for a particular reason.

Procedure

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

The default rules governing the commencement of arbitral proceedings are in Book IV - On Arbitration, Title IV - Arbitral Proceedings of the CPC.

The CPC provides a notable difference between ad hoc and institutional arbitration relating to the commencement of the arbitral proceedings. Whereas in ad hoc arbitration the first step is the establishment of the arbitral tribunal (in case the arbitrators or the sole arbitrator have not been designated through the arbitral clause), followed by the filing of the request for arbitration, in institutional arbitration the arbitration commences with the claimant's submission of the request for arbitration at the relevant arbitration institution.

Both solutions depart from that offered by the UNCITRAL Model Law, under which arbitral proceedings commence on the date on which the request for arbitration is received by the respondent (*Article 21*).

The request for arbitration must include:

- The parties' name, residence or headquarters, and other basic identification data.
- The name and capacity of the person or entity representing the claimant in the arbitration and proof of its capacity, as the case may be.
- Reference to the arbitration agreement and a copy of it.
- The object and value of the claim, as well as the calculation of the value.
- Reasons in fact and in law and the evidence on which the claimant relies.
- The name and domicile of the members of the arbitral tribunal (where they have been indicated through the arbitration agreement or if the arbitral tribunal has already been established) and the party's' signature (*Article 571, CPC*).

Another way in which arbitral proceedings can be commenced is through a minute concluded in front of the arbitral tribunal and signed by both parties, or just by the claimant and the arbitrators (*Article 571(2), CPC*).

Within 30 days from the receipt of the request for arbitration, the respondent must submit its defence which must include, notably, its objections and position in fact and in law regarding the claimant's' request, and the evidence relied on (*Article 573, CPC*).

If the respondent has claims arising out of the same legal relationship, it can file a counterclaim within the same period as the defence or, at the latest, until the first hearing date (*Article 574, CPC*). The counterclaim must observe the same requirements as the request for arbitration.

Applicable rules and powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The parties are free to establish in their arbitration agreement the procedural rules to be applied, or they can entrust this decision to the arbitral tribunal. In determining the applicable procedural rules, the parties can also refer to the set of rules under various arbitral institutions, such as the CICA-CCIR, ICC, or the VIAC.

Irrespective of the applicable rules, they cannot be contrary to public policy or to the mandatory rules of law. Article 575 of the CPC provides that fundamental principles of civil trial must be observed, including:

- Ensuring the parties can exercise their procedural rights equally and without discrimination.
- Exercising procedural rights in good faith and according to their legally recognised purpose.
- Ensuring the parties' right to defence.
- The parties' right to decide the object and limits of the arbitration, while the arbitral tribunal cannot decide a matter if not asked.
- Ensuring the parties' right to be heard in adversarial proceedings.

In international arbitration, if the parties have not determined the procedural rules, the arbitral tribunal will establish them directly, or by reference to institutional rules or various procedural laws. In any case, the arbitral tribunal must guarantee the equality of arms and the parties' right to be heard in adversarial proceedings (*Article 1115, CPC*).

Default rules

When the parties have not agreed on and if the arbitral tribunal has not established the applicable rules, the provisions of the CPC will apply (*Book IV – On Arbitration*). Similarly to when the parties or the tribunal determines the applicable rules, the fundamental principles of civil trial must be observed (*see above*).

In international arbitration, those issues not determined by the procedural rules agreed on by the parties or established by the tribunal (concerning the constitution of the arbitral tribunal, the proceedings, the award, its rectification, communication and effects) are regulated by Book IV of the CPC (*Article 1123, CPC*).

Evidence and disclosure

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitral tribunal can request either of the parties to disclose a piece of evidence and public authorities (non-parties) to submit written information concerning their activity which is relevant to the outcome of the case. However, since the tribunal does not hold coercive power, it cannot enforce such measures. The arbitrator cannot compel a non-party to the arbitration to appear at the hearing to give testimony (*Article 588, Article 589 and Article 590, CPC*).

The arbitral tribunal must refer to the competent local courts for any enforcement measures or sanctions.

Evidence

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

As a general rule, each party must submit the evidence on which its claims or defences rely (*Article 586, CPC*). However, the arbitral tribunal can request written explanations from the parties on the factual background and object of their claims, as well as administer any type of evidence considered necessary for the outcome of the case. If one of the parties is in possession of a piece of evidence, the arbitral tribunal can order that party to produce it (*Article 588, CPC*).

In practice, the scope of disclosure is broader in arbitration, especially international, than in domestic court litigation. However, considering Romania's civil law system, arbitrations seated here do not, as a rule, include broad discovery procedures. Further, the CPC does not provide for pre-trial disclosure of documents.

Validity of parties' agreement as to rules of disclosure

The parties are free to decide on the rules applicable to disclosure. The Rules on the Taking of Evidence in International Arbitration developed by the International Bar Association (IBA) have become a standard market practice in international arbitrations seated in Romania. The CICA 2018 Rules of Arbitration expressly provide that the tribunal can apply these rules, with the parties' consent (*Article 34*).

Confidentiality

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Arbitration is presumed to be confidential, especially given that arbitrators are liable for damages resulting from breaching its confidential character (A*rticle 565, CPC*). However, there are no legal provisions imposing the confidentiality of arbitration, the legislator choosing to follow the UNCITRAL Model Law's guidance and leave the matter to the parties' agreement and rules of selected institutions.

The 2018 CICA Rules of Arbitration go further, ensuring the confidentiality of the process. They name confidentiality as one of the core principles of the arbitration procedure (*Article 3 (3), 2018 CICA Rules of Arbitration*). Unless the parties agree otherwise (in writing), the confidentiality of the arbitral proceedings is protected by the court, its president, management board, and secretariat, by the arbitral tribunal and arbitral assistants, and by all those directly involved in organising the proceedings (*Article 4 (1), 2018 CICA Rules of Arbitration*).

Courts and arbitration

23.Will the local courts intervene to assist arbitration proceedings seated in their jurisdiction?

Local courts can intervene, on an interested party's request, to assist in matters hindering the course of the arbitral proceedings (*Article 547, CPC*). Apart from this general rule, the CPC also provides for specific areas in which courts can intervene, such as:

- Constitution of the arbitral tribunal (*Article 561, CPC*).
- Challenge of arbitrators (*Article 563(2), CPC*).
- Provisional or interim measures (*Article 585, CPC*).
- Taking of evidence: compelling witnesses or experts to provide testimony, or public authorities to submit information (*Article 589(3) and Article 590(2), CPC*).

The competent court to assist in issues arising during arbitral proceedings is the tribunal at the seat of the arbitration (*Article 547 and Article 1118, CPC*).

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

The court's intervention in the arbitral proceedings is limited to specific areas (*see Question 23*) and only on request by one of the parties or of the arbitral tribunal. Therefore, the risk of courts intervening to frustrate an arbitration is low and solely dependent on the parties and the arbitral tribunal.

Delaying proceedings

It is highly unlikely for arbitral proceedings to be delayed by frequent court applications made by one of the parties. The procedure applied by the court in such instances is an expeditious one and the decision rendered is non-appealable. In addition, the arbitral tribunal has sole discretion in deciding whether to suspend the proceedings for the period an application is pending with local courts.

In international arbitration, the CPC provides that the arbitral tribunal will decide on the issue of its own jurisdiction without considering a request having an identical object pending between the same parties before a local court, unless compelling reasons call for a stay of the proceedings (*Article 1119(2), CPC*).

Insolvency

25. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

As a rule, Romanian insolvency law regulates the stay of all judiciary, extra-judiciary and other enforcement procedures concerning receivables against an estate, on opening of insolvency proceedings against the debtor (*Article 75, Insolvency Law no. 85/2014*). After the decision on the opening of insolvency proceedings becomes final, all such procedures are discontinued. The stay of proceedings will therefore occur only with regard to those claims concerning receivables against the debtor, if and to the extent the debtor is a respondent in the proceedings (to a claim or counterclaim).

When addressing the effect of insolvency on ongoing proceedings, the Insolvency Law does not expressly refer to arbitration (domestic or international). However, in domestic arbitration cases, the High Court of Cassation and Justice has established that an arbitral tribunal's decision not to stay proceedings, despite insolvency being commenced against the debtor, breaches Romanian public policy.

Due to lack of relevant case law in international arbitration cases, whether such proceedings must also be automatically stayed is unclear. It could be argued that, in international arbitration, the tribunal will order the stay of proceedings only if and to the extent that continuing the arbitration would breach the public policy of Romanian private international law.

Remedies

26.What interim remedies are available from the tribunal?

Interim remedies

An arbitral tribunal can grant preventive (precautionary) and provisional measures, such as preventive attachments or preventive garnishments, or to ascertain factual circumstances (*Article 585, CPC*). In international arbitration, preventive or provisional measures can be granted by the arbitral tribunal, absent contrary provisions in the arbitration agreement (*Article 1117, CPC*).

The 2018 CICA Rules of Arbitration have broadened the spectrum of available interim remedies. The 2014 CICA Rules of Arbitration provided that the arbitral tribunal could decide on provisional measures only according to the rules of the CPC. The 2018 CICA Rules of Arbitration removed the reference to the CPC, allowing the arbitral tribunal to decide on the type of measure and procedure it finds most suitable in the circumstances (*Article 40*).

The 2018 CICA Rules of Arbitration also introduced the emergency arbitrator procedure, in line with leading international arbitration centres. The parties can use the emergency arbitrator procedure when they need interim remedies before the arbitral tribunal is constituted. On receipt of such a request, the President of the Court will appoint an emergency arbitrator within 48 hours, who will deliver a decision within ten days. If the defendant opposes the measure decided by the emergency arbitrator, the claimant must seek the national courts' assistance.

Article 40 of the 2018 CICA Rules of Arbitration allows for requests for interim or conservatory measures to be filed even before initiating the arbitration. However, recent case law of the Court of Appeal Bucharest (*Decision no. 76 of 25 July 2019*) annulled an order of an emergency arbitrator appointed for that purpose. The court's reasoning was

that the mandatory provisions of Article 585 of the CPC dictate that before the commencement of an arbitration, only the national courts have jurisdiction to hear requests for interim or conservatory measures.

Also, in light of the case law of the Court of Appeal Bucharest (*Decision no. 47 of 7 July 2018*), it is advisable for parties opting for a panel of three arbitrators to expressly provide in the arbitration clause that in the case of an emergency procedure, only one emergency arbitrator would suffice.

Ex parte/without notice applications

Neither the CPC nor the 2018 CICA Rules of Arbitration allow the arbitral tribunal to grant interim measures without notice to the other party. An award rendered in such conditions would breach the fundamental principles of equality of arms and the right to be heard in adversarial proceedings and would therefore be subject to setting aside.

Security

Although the CPC provides the arbitral tribunal's right to grant interim measures (*see above, Interim remedies*), there are no specific provisions regarding security for costs. The tribunal can, however, order the parties to consign, advance or pay any amounts necessary for the organisation and development of the arbitral proceedings. Until such an order is complied with by the parties, the arbitral tribunal can put the proceedings on hold (*Article 597, CPC*).

As the 2018 CICA Rules of Arbitration provide a broader scope of interim remedies, it may be construed that the arbitral tribunal now has the right to award security for costs.

27. What final remedies are available from the tribunal?

All the final remedies that are available in litigation are also available in arbitration (for example, monetary compensation including money due under a contract or damages, specific performance, annulment or termination of a deed, restitution, declarative remedy, interest and liquidated damages).

Appeals

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

Arbitral awards are not subject to appeal, but only to the setting aside procedure (*Article 608, CPC*).

Grounds and procedure

The grounds for setting aside an arbitral award are limited and expressly provided in Article 608 of the CPC. They are largely similar to those provided by the UNCITRAL Model Law:

- The subject matter of the dispute is not capable of settlement by arbitration.
- The award was rendered in lack of, or under a null or invalid arbitration agreement.
- The arbitral tribunal was not constituted according to the arbitration agreement.
- A party was not present and was not given proper notice of the hearing.
- The award was rendered after the arbitration term had lapsed.
- The award contains decisions on matters beyond the scope of the submission to arbitration (*extra petita* or *ultra petita*).
- The award contains no disposition or reasons, does not indicate the date and place of rendering, or is not signed by the arbitrators.
- The award is in conflict with public policy, good morals or imperative provisions of law.
- If, after the award was rendered, the Constitutional Court found that a law, ordinance or a provision of it is unconstitutional, in the context of a plea being made in this respect by one of the parties in the course of the arbitral proceedings.

The parties are prevented from relying on any setting aside grounds which were not raised during the arbitral proceedings or which can be settled through the procedure of clarifying, correcting or amending the arbitral award (*Article 608(2), CPC*).

The interested party will lodge the setting aside application with the court of appeals at the seat of the arbitration. Only documents can be submitted as new evidence and the statement of defence is mandatory.

If the application is admitted and the arbitral award is set aside, the court has the following options:

- If the grounds mentioned in bullets one, two and five above are found to apply, the dispute will be forwarded to the competent state court.
- For all the other grounds listed above, the court will forward the dispute to the arbitral tribunal for retrial, if at least one of the parties expressly requests it. Conversely, if there is no such request, the court of appeals will hear the merits of the case, within the limits of the arbitration agreement.

The decisions rendered by the court of appeals in the setting aside procedure are subject to final appeal before the High Court of Cassation and Justice (*Article 613, CPC*).

Waiving rights of appeal

The CPC expressly prohibits the parties to waive their right to set aside the arbitral award a priori, through the arbitration agreement. The waiver can be validly made only after the rendering of the arbitral award (*Article 609, CPC*).

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered inside your jurisdiction?

As a rule, an application for setting aside must be filed within one month of communication of the award. However, when the ground related to the Constitutional Court's decision is raised (*see Question 28*), the application must be filed within three months of publication of the decision in the Official Gazette (*Article 611, CPC*).

Costs

30. What legal fee structures can be used? Are fees fixed by law?

Legal fees in arbitration are not fixed by law, and can be freely established between the lawyer and the client, subject to mandatory legal provisions. Therefore, contingency based fees for lawyers are prohibited. However, success fees are permitted, but only combined with another fee structure, such as hourly rates, lump sums, or a combination of those.

Third party funding is not expressly restricted by Romanian law, but no such funding arrangements in relation to Romanian arbitrations or litigations have been publicly announced.

31. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

Costs in both domestic and international arbitration are not regulated under mandatory proceedings. The parties can agree on the allocation of costs involving the arbitration proceedings, such as the arbitrators' fees and expenses,

the parties' and witnesses' travel expenses, and the costs related to taking of evidence (*Article 595, CPC*). The arbitral tribunal must give effect and decide on the allocation of costs in accordance with the parties' agreement.

If the parties are silent on the matter of cost allocation, the arbitral tribunal must under domestic arbitration law allocate all the costs to the party that has lost the dispute on all accounts, or proportionally to the extent the partial award was in the other party's favour (*Article 595, CPC*). In international arbitration, each party must cover the costs for its appointed arbitrator, and share those for the sole arbitrator or the chairman (*Article 1122, CPC*).

Under the 2018 CICA Rules of Arbitration, the arbitral tribunal must order, on the request of a party, the payment by one of the parties of any reasonable costs incurred by the other party, taking into consideration the result of the arbitration, each party's contribution to the efficiency and expeditiousness of the process, and other relevant circumstances (*Article 51*).Cost calculation

Cost calculation

There is no express provision related to the calculation of arbitral costs in the arbitration law. However, Romanian doctrine and case law have provided useful guidance on the matter.

The Romanian Constitutional Court (Decision no. 401 of 14 July 2005), in line with the European Court of Human Rights' case law (Award of 14 December 2006 and of 29 March 2011) confirmed the judges' authority to censor legal fees proportionally with the complexity of the work performed in connection to the case. It has been argued by Romanian scholars that the same principles ought to also apply to the overall arbitral costs, so that they are awarded only if they are real, necessary and reasonable.

For arbitral proceedings administered by the CICA-CCIR, the calculation of arbitral costs is provided in the *Schedule of Arbitral Fees and Expenses* (*http://arbitration.ccir.ro/wp-content/uploads/2018/05/Schedules-of-arbitral-fees-and-expenses.pdf*), available on the institution's website.

Factors considered

According to Article 595(1) of the CPC, arbitral costs include costs related to organising and holding the arbitral proceedings, arbitrators' fees, administration of evidence and travelling of the parties, arbitrators, experts and witnesses. While not expressly regulated by that article, case law and doctrine establish that arbitral costs also include lawyers' fees and expenses.

If the parties submit the dispute to an arbitral institution, the costs for administering the proceedings, arbitrators' fees and other arbitral expenses are established according to the institution's regulations (*Article 620, CPC*).

Enforcement of an award

Domestic awards

32. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

Arbitration awards rendered in Romania are considered national awards and can be enforced just like any court decision (*Article 615, CPC*), despite any setting aside proceedings which have been initiated (*Article 635, CPC*).

Enforcement proceedings commence with an application filed by the creditor to the bailiff. Shortly after (three days at the latest), the bailiff will ask the enforcement court's permission for the enforcement procedure. The court renders a decision within seven days, without summoning the parties.

The court's decision approving enforcement is non-appealable, but it can be analysed within a challenge against the enforcement procedure, in limited and specific circumstances. A decision denying enforcement can only be appealed by the creditor, within 15 days of notification.

The competent court is the district court where the debtor is domiciled or headquartered. If the debtor's domicile or headquarters is located overseas, the district court at the creditor's domicile or headquarters has jurisdiction. If the creditor is also located overseas, the competent court is that where the bailiff has its headquarters.

Foreign awards

33. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Romania has ratified the following conventions relating to recognition and enforcement of foreign arbitration awards:

- Geneva Convention on the Execution of Foreign Arbitral Awards 1927, through Law no. 50/1931.
- Geneva Convention on International Commercial Arbitration 1961, through Decree no. 281/1963.
- The New York Convention, through Decree no. 186/1961, with two reservations:
    - it will apply only to disputes resulting out of contractual or non-contractual relationships, considered as commercial under its legislation; and
    - it will apply only to the recognition and enforcement of awards rendered in the territory of another contracting state. For those awards rendered in the territory of non-contracting states, Romania will apply the Convention only on the basis of reciprocity established by joint agreement between the parties.

- Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965, through State Council Decree no. 62/1975.

34. To what extent is a foreign arbitration award enforceable?

Foreign arbitral awards are subject to the exequatur procedure (*see Question 30*). Romanian national courts, in the spirit of the New York Convention, have a pro-recognition and enforcement approach. Recognition and enforcement are only denied in limited and extreme circumstances, such as non-arbitrability of the dispute, an invalid arbitration agreement or an egregious breach of public policy.

The interested party must file the request before the tribunal in the jurisdiction in which the respondent's domicile or headquarters is located. If the competent tribunal cannot be determined, the Bucharest Tribunal has jurisdiction.

Along with the request, the party must submit the arbitral award and the arbitration agreement, which are subject to legalisation under the terms of Article 1093 of the CPC relating to public official documents (*Article 1128, CPC*), unless there is an exemption based on the law, international treaties or reciprocity applies. Romania has ratified the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents. Therefore, for public official documents issued in member states of the Hague Convention only an apostille is necessary, except for cases where a bilateral agreement abolishing the apostille requirement is in place. Romania has concluded such bilateral agreements with states including Austria, the Czech Republic, France, Poland, Hungary or Russia.

Whether foreign arbitral awards are subject to legalisation (or apostille, as and where applicable) is disputed by scholars and in case law. Some consider that foreign arbitral awards do not need to undergo such provisions, as they are not issued by foreign public authorities, but by private individuals serving as arbitrators in purely private, out of court proceedings. Others have expressed the opinion that foreign arbitral awards are public official documents and are therefore subject to legalisation (or apostille, as and where applicable).

Correspondingly, the arbitration agreement is also subject to legalisation (or apostille, as and where applicable) if it has been authenticated by an official body. If the arbitration agreement has been concluded by private deed, no such formalities are required.

After the exequatur decision is issued, and if the debtor does not voluntarily comply with the arbitral award, the creditor can commence the general enforcement (forced execution) procedure (*see Question 30*).

35. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

Arbitration awards rendered outside Romania are considered foreign awards and are therefore subject to the exequatur procedure. There is no specific term for filing an exequatur application. However, the general rules on enforcement provide that arbitral awards can be enforced, as a rule, within a three-year period from the date when they are definitive. In the case of awards concerning ownership titles or other property rights, the limitation period for enforcement is ten years (*Article 706, CPC*).

The filing of the exequatur claim interrupts the limitation term (*Article 1127(3) and Article 1101, CPC*), after which a new limitation period will run.

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

On average, the procedure for approval of enforcement takes around one month, from the date of filing the application to the date when the court renders its decision. The CPC provides for an expedited procedure, under which the bailiff has three days to file the application for approval of enforcement, while the enforcement court has seven days to issue its order, without summoning the parties. A decision denying enforcement is appealable, within 15 days of notification.

The enforcement proceedings may last longer if challenges to the enforcement or other procedural issues are raised by the debtor, or if assets/funds to be enforced are not readily available.

Foreign awards are first subject to the exequatur proceedings, followed by the general enforcement (forced execution) proceedings if the debtor does not voluntarily comply with the arbitral award.

The exequatur proceedings take about three months from the date of filing the application to the date when the court renders its decision, if all the correct documents are submitted and no procedural issues arise. The exequatur proceedings can take a longer period to be finalised in certain situations (for example, if the court decides to stay the proceedings when the arbitral award is subject to setting aside or stay procedures).

Reform

37. Are any changes to the law currently under consideration or being proposed?

The newly enacted 2018 CICA Rules of Arbitration have been well-received by the arbitration and business communities. They sparked interest in further accommodating arbitration in Romania, and initiated debates over amending the CPC to this end.

In particular, the need to modernise the CPC was reinforced by the recent case law of the Court of Appeal Bucharest on the application of the emergency arbitrator provisions of the 2018 CICA Rules of Arbitration (*see Question 26*).

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- Representing a Romanian company in an intricate ICC arbitration arising from a works contract.
- Representing a leading Dutch company specialised in heavy lifting, transporting, installing and decommissioning of large and heavy structures in an ICC arbitration concerning a wind turbine installation contract.
- Representing the subsidiaries of the largest CEE real estate investor in multiple ICC arbitrations arising out of sale purchase agreements in relation to real estate retail, residential and development projects or lease agreements.
- Representing a property and construction company in an ICC arbitration arising from a share sale and purchase agreement and joint venture.
- Representing Hassan Awdi, Enterprise Business Consultants INC. and Alfa El Corporation in front of ICSID, under the bilateral investment treaty signed between Romania and USA. Our Firm worked with Mayer Brown and Bredin Prat.

- Legal assistance to and representation of a prominent Romanian manufacturer of vessels in an ICC arbitration deriving from a shipbuilding contract concerning the construction of several high tonnage vessels.

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Publications

- *European Competition Law in ICC International Commercial Arbitration Cases, co-author, Romanian Business Law Journal no. 6/2017.*
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