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The International Comparative Legal Guide to:

International Arbitration 2017

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A practical cross-border insight into international arbitration work

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The arbitration agreement must observe the validity requirements of any binding agreement under the Civil Code regarding the validity of object and cause and the parties' capacity and consent. The specific requirements of the arbitration agreement are provided in the Civil Procedure Code ("CPC"). A distinction must be drawn between domestic arbitration and international arbitration.

In domestic arbitration, the written form of the arbitration agreement is mandatory and generally sufficient, unless it covers disputes related to the transfer of ownership rights or the creation of another property right over a real estate asset, in which case the notarisation is a condition to the arbitration agreement's validity. The arbitration agreement need not be incorporated into a contract as *instrumentum* (e.g., it may be contained in an exchange of correspondence). Also, the parties can conclude it within the main contract or a separate agreement, or confirm their agreement to submit the matter to arbitration directly to the established arbitral tribunal. The CPC distinguishes between the compromissory clause regarding future disputes and the arbitration submission agreement regarding actual, arisen disputes. In the second case, the subject matter of the dispute must be defined therein under the penalty of the nullity of the arbitration submission agreement. In *ad hoc* arbitration, the compromissory clause must state the method of nominating the arbitrators, while the arbitration submission agreement must specify the arbitrators' names or the method of their appointment, under the sanction of nullity. If institutional arbitration is opted for, the institution's rules shall apply. As to the substantive requirements, we mention that the CPC provides that only parties with full legal capacity may conclude an arbitration agreement, while with regard to the object of the arbitration agreement, it is required that the dispute be arbitrable (see the answer to question 3.1 below). It is noteworthy that, according to the Civil Code, *standard* compromissory clauses (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) are considered "unusual clauses" and must be accepted expressly and in writing by the other party (article 1.203).

In international arbitration, the written form of the arbitration agreement, contained in a written document, telegram, telex, e-mail or other forms of communication, is also required under the penalty of the nullity of the agreement. The legal provisions are more flexible with regard to substantive requirements. Thus, an arbitration agreement is valid if it fulfils the terms imposed by any of the following laws: the law designated by the parties; the law governing the subject matter of the dispute; the law applicable to the contract incorporating the arbitration agreement; or the Romanian law.

The principle of separability of the arbitration agreement is recognised in both domestic and international arbitration.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In general, other elements which ought to be incorporated are the seat of arbitration, the choice between *ad hoc* and institutional arbitration and the procedural norms to be followed by the arbitral tribunal (for the case of institutional arbitration, a simple reference to the designated arbitral institution will suffice), the substantive law of the dispute, the language of the arbitration proceedings, the allocation between the parties of the arbitral costs. The limits to the parties' autonomy in determining the content of the arbitration agreement are the public policy, good morals and the legal mandatory provisions.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Romanian courts have consistently shown a degree of pro-arbitration enforcement conduct. Providing the arbitration agreement observes validity fundamental requirements and the Romanian public policy, and to the extent the dispute is arbitrable, the national courts respect the will of the parties and proclaim that the agreement has the force of law among them.

While Romanian courts generally interpret pathological clauses so as to give effect to the parties' will to arbitrate, some clauses, such as the ones where the elected arbitral institution could not be identified, have been found truly inoperative.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The CPC regulates the enforcement of domestic arbitration awards and recognition and enforcement of foreign arbitration awards (e.g., articles 612, 614–615, 1.124–1.133 and Book V on *Enforcement*).

Also, Romania ratified the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"), which has been in force since

1961. Romania also ratified the Geneva Convention on International Commercial Arbitration (1961) ("1961 Geneva Convention on International Commercial Arbitration").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Both domestic and international arbitration are regulated by the CPC, but in distinct sections thereof. Thus, the provisions of domestic arbitration are found in Book IV on *Arbitration*, articles 541 to 621, while those governing international arbitration are in Book VII on *International Civil Trial*, Title IV on *International Arbitration and the Effects of Foreign Arbitral Awards*, articles 1.111 to 1.133. However, some provisions (regarding the tribunal's constitution, procedure and award) applicable to domestic arbitration shall apply also to international arbitration, being incorporated by reference, unless the parties provided otherwise or entrusted such matters to the arbitral tribunal (article 1.123).

The international arbitration regime diverges from the domestic arbitration regime mainly in that the rules governing international arbitration are more flexible. For instance, while an arbitration agreement under domestic arbitration is valid only if it meets the Romanian law requirements, in international arbitration the same is valid in accordance with a variety of choice of law options. A notable difference is that in international arbitration the time limits for various procedural steps provided in Book IV are doubled (article 1.115).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The CPC dedicates an entire section to international arbitration under articles 1.111–1.133, which are in line with the UNCITRAL Model Law, though not exclusively. In fact, the Romanian law governing international arbitration overarches a plethora of pre-established general rules and principles of both civil procedure and civil law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The rules of public policy, core constitutional principles and mandatory legal provisions cannot be derogated from in international arbitration proceedings sited in Romania. A non-exhaustive compilation of such mandatory rules as provided by the UNCITRAL Model Law is taken up in Romanian legislation. Such rules include the separability of the arbitration agreement and the requirement that it shall be made in writing (article 1.113 CPC).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Yes, the CPC precludes certain subject matters from being referred to arbitration. The general approach in determining the objective arbitrability of a dispute is based on: (i) its patrimonial nature (i.e., it must concern an economic value) – with explicit types of pure non-patrimonial disputes being excluded from domestic arbitration (limited to civil status, capacity, inheritance, family relations); and (ii) the nature of the rights involved (i.e., the parties may dispose of said rights) (articles 542 and 1.112).

For an international dispute to be arbitrable, the CPC expressly provides that the *lex fori* must not assign exclusive jurisdiction to State courts for said dispute (article 1.112 CPC). The Romanian courts retain exclusive jurisdiction in cases related, *inter alia*, to: the insolvency procedure – opening and conduct of the insolvency procedure; competition – challenge of decisions issued by the Competition Council; administrative disputes; and intellectual property – mainly annulment of trademarks, patents and designs.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The competence-competence principle is regulated by the CPC in both its positive (the arbitrators' jurisdiction to decide over their own jurisdiction) and negative effect (a court vested with an arbitral claim will defer it to arbitration) (articles 554, 579, 1.119 and 1.069).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

In the presence of an arbitration agreement, courts are likely to take a proactive role in examining their jurisdiction and defer the dispute to arbitration. According to the CPC (articles 554 and 1.069), if one of the parties invokes the arbitration agreement, the court will examine if it lacks jurisdiction and, in the affirmative, will defer the dispute to the relevant arbitral institution or, in the case of *ad hoc* arbitration, will dismiss the claim for the lack of the court's jurisdiction (the negative effect of the competence-competence principle).

Although the former CPC (abolished in 2013) did not expressly require a court to decline its jurisdiction in such a case (but just to acknowledge lack of competence), the courts' practice, mainly grounded on general provisions regarding jurisdiction and active role, developed in the sense of express declination of jurisdiction. The courts' approach is now codified under the new CPC, hence a court shall decline jurisdiction in the circumstances.

The court will hear the merits of the case if: (a) the respondent has presented its defence on the merits of the case without invoking the arbitration agreement or, in the case of international arbitration, the objection to jurisdiction has not been raised by the respondent until the first hearing date; (b) the arbitration agreement is null or, in the case of international arbitration, obsolete or, in both cases, is invalid; or (c) the arbitral tribunal cannot be constituted due to the respondent's manifest fault.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Firstly, the courts will address the issue of the jurisdiction and competence of the arbitral tribunal in the circumstances presented above in the answer to question 3.3, in the context of examining their own jurisdiction. The court's standard of review is a *prima facie* one, while the tribunal's standard of review is an *in extenso* one. Furthermore, the courts will address this issue within the proceedings for setting aside the arbitral award on grounds of the tribunal's lack of jurisdiction (article 608 CPC).

A tribunal's decision acknowledging its own jurisdiction can be challenged only with the application for setting aside the arbitral award and, of course, within the *exequatur* procedure. Conversely, if the tribunal finds that it lacks jurisdiction and defers the dispute to the competent court, the award cannot be challenged through the setting-aside procedure (article 579 CPC).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Although the CPC does not provide the arbitral tribunal's right to assume jurisdiction over individuals or entities which are not themselves party to an arbitration agreement, it is generally accepted that non-signatories will be bound by the arbitration agreement in cases such as: the assignment of contract; oblique (indirect) actions; and 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 in the case of group contracts, agency or proxy agreements and in certain exceptional cases of the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry ("Court of International Commercial Arbitration"), the tribunals assumed jurisdiction over non-signatories.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no special limitation periods for the commencement of arbitrations under Romanian law. The Civil Code sets out the general limitation period of three years, but other periods may apply depending on the subject matter of the case. The rules governing the limitation periods are substantive ones and, as such, the arbitral tribunals will apply limitation periods in accordance with the law governing the merits of the case (article 2.663 of the Civil Code).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to article 75 of the Insolvency Law no. 85/2014, upon opening of insolvency proceedings against a debtor, all judiciary, extrajudiciary (including arbitration) and other enforcement procedures concerning receivables against the debtor's estate shall be stayed. After the decision on the opening of insolvency proceedings becomes final, all said procedures shall be discontinued.

National courts' case law confirms that the stay provided by the insolvency law is mandatory in local arbitrations and, as such, arbitral awards issued in cases administered by local courts of arbitrations have been set aside for breaching this public policy rule. We have not identified case law that would indicate the stay measure is applicable in international arbitration.

We note, however, a recent decision rendered by the Bucharest Tribunal whereby the national court admitted the recognition and enforcement of an arbitral award issued in a case administered by LCIA, despite the fact that insolvency proceedings had been commenced in Romania against the respondent during the arbitral proceedings. The court considered that the arbitral tribunal did not breach the Romanian private international law public policy by not staying the proceedings pursuant to the Romanian insolvency law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Under article 1.120 of the CPC governing international arbitration, the arbitral tribunal will apply the law designated by the parties and, in the absence thereof, the law it deems to be appropriate, taking into consideration the usages and professional rules. Notably, article 1.120 does not expressly require the tribunal to resort to a specific conflict of law rule when deciding the applicable law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under article 2.564 of the Civil Code, the application of foreign law (chosen by the parties) is removed if it violates the Romanian private international law public policy. The Romanian legislator considers that such violation occurs to the extent that the application of foreign law would lead to a result incompatible with the fundamental principles of Romanian law or European Union law and with fundamental human rights. One should add here that the concept is strict and limited. In the same vein, according to article 1.125 of the CPC, the Romanian courts may refuse to give effect to a foreign arbitral award (i.e., an award issued by an arbitral tribunal seated outside Romania) if such award breaches the Romanian private international law public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to article 1.113 of the CPC, the arbitration agreement is valid if it fulfils the substantive requirements imposed by either the law designated by the parties, the law governing the subject matter of the dispute, the law applicable to the contract incorporating the arbitration agreement or the Romanian law.

Pursuant to the provisions of the New York Convention, incorporated in the CPC, within the recognition and enforcement proceedings of the arbitral awards, the Romanian courts will check whether the arbitration agreement was validly concluded under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

According to the CPC, any natural person with full legal capacity may be appointed as arbitrator, with the observance of the parties' arbitration agreement (articles 555 and 558). There are, however, certain categories of professionals who are not allowed to serve as an arbitrator, such as judges and prosecutors, court clerks, Competition Council members. The parties may appoint a sole or any uneven number of arbitrators and if they have not determined their number, the dispute shall be heard by three arbitrators – two party-appointed who will select the chairman. In the case of multiple claimants or respondents, the parties with common interest shall name only one arbitrator (article 556).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In the case of the parties' misunderstanding on appointing the sole arbitrator, if one party does not select an arbitrator or if the two party-appointed arbitrators do not agree on the chairman, the party wishing to refer the dispute to arbitration may request the tribunal at the seat of the arbitration to appoint the arbitrator or, as the case may be, the chairman. The tribunal will summon the parties and issue a non-appealable decision within 10 days as of the claim being lodged (article 561 CPC).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, please see the answer to question 5.2 above.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The arbitrator's independence, neutrality and/or impartiality in domestic arbitration are listed in the CPC under the arbitrators' incompatibility, which may be questioned in cases such as: lack of necessary qualification or other requirements provided in the arbitration agreement; the arbitrator's interest in the dispute; the arbitrator's prior involvement in the dispute, either as counsel to one of the parties or as a witness; and any other circumstances giving rise to doubts as to the arbitrator's independence and impartiality (articles 562 and 42 CPC).

In international arbitration, the arbitrator may be challenged if he/she does not have the necessary qualifications as agreed by the parties for those circumstances provided by the applicable procedural rules, or if there is a legitimate doubt as to his/her independence and impartiality (article 1.114 CPC).

The Rules of Arbitration of the Court of International Commercial Arbitration ("2014 Rules of Arbitration") contain similar conduct rules and requirements regarding the arbitrator's independence and impartiality. We note that the IBA Guidelines on Conflicts of Interest in International Arbitration are often applied as best practice within arbitration proceedings conducted in Romania.

Before accepting to serve as an arbitrator, the proposed candidate who is aware of a situation that may affect his/her independence or impartiality must inform the parties and the other arbitrators. Should such a situation arise after accepting the appointment, they must be reported forthwith as of their occurrence (article 562 CPC).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

If the parties do not provide within the arbitration agreement the applicable procedural rules, or if the arbitral tribunal is not requested to establish such rules and to the extent that certain issues are not covered by the parties' agreement or the tribunal's decision, the provisions of the CPC shall apply. Should the parties decide to conduct the arbitration under the rules of a specific institution or organisation, the respective rules shall apply (articles 576, 619 (3), 1.115 and 1.123 CPC).

The rules on international arbitration apply to arbitral disputes arisen out of private law relationships with a foreign element if the seat of arbitration is Romania and if at least one of the parties did not have, at the time of concluding the arbitration agreement, its domicile or regular residence, or headquarters, respectively, in Romania. In addition, the parties must not have excluded through the arbitration agreement or subsequently, in writing, the application of such rules (article 1.111 CPC).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Under the former CPC, a highly-debated topic was the arbitrability of summary payment claims. This issue was subject to conflicting arbitral awards and court decisions, mainly because the law regulating summary payment claims, including means of challenge, derogated from the common procedural rules. It has been argued that, should the arbitral tribunal retain jurisdiction over a summary payment claim, it should follow the specific procedural rules provided by said special law. Under the new CPC, such a particular procedural step would be the creditor's obligation to issue a prior notice to the debtor, requesting payment within 15 days. Lacking such a notice may result in the inadmissibility of the claim.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The counsel practising in Romania is subject to Law no. 51/1995, the Lawyers' Statute and the CCBE Code of Conduct for European Lawyers. No separate code of conduct for counsel in arbitral proceedings seated in Romania exists. Article 13 (6) of Law no. 51/1995 states that the same regulations apply to counsel from another jurisdiction while exercising the legal profession in Romania. The CCBE Code of Conduct for European Lawyers applies to Romanian counsel when practising in another Member State of the European Union, with the reserve that counsel may also be subject to the rules of the host State.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The powers and duties of arbitrators under the CPC are similar to those contained in the UNCITRAL Model Law. The powers include the competence to rule over the tribunal's jurisdiction or the ability to order interim measures, while the duties encompass the obligation to disclose conflict of interest or to render the award in light of the rules chosen by the parties.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Law no. 51/1995 imposes tight restrictions concerning the

involvement of foreign lawyers before any other judicial and jurisdictional bodies, including national courts and domestic arbitration proceedings. However, article 13 (4) clearly provides that foreign lawyers may practise law in international arbitration proceedings seated in Romania.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The arbitrators' liability is contractual in nature, and can only be triggered for their partial or total failure to perform their duties as arbitrators, and not for their decisions rendered in the resolution of the dispute. Article 565 of the CPC provides the conditions under which arbitrators are personally liable for the damage they cause (i.e., the arbitrators, without justification, resign from their function, do not participate in the arbitral proceedings or do not render the award within the required timeframe, fail to observe the confidentiality of the arbitration, breach other duties acting in bad faith or gross negligence). Similar provisions comprise the 2014 Rules of Arbitration, whereby arbitrators can be held personally liable for wilful or grossly negligent misconduct, but only within the limit of the fees received. Arbitrators may not be found liable for an error of law or, in general, for improper awards.

Romanian scholars have argued that the exclusion or limitation or the arbitrators' liability *ante factum* would be void, as the eventual damages resulting out of the arbitrators' illicit conduct would not be able to be determined.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

National courts may assist the arbitral tribunal in procedural matters where the tribunal lacks jurisdiction or the law expressly provides for the court's intervention. For instance, the arbitral tribunal itself cannot coerce a party to execute an order for interim relief, but must submit the matter to the national courts for the measure's effect to be ensured.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

In domestic arbitration, during the course of proceedings, courts and arbitral tribunals have alternative jurisdiction to grant precautionary and interim measures, as well as to ascertain factual circumstances. The State courts have exclusive jurisdiction for these types of relief prior to the commencement of the arbitration proceedings and they may also intervene if the measures taken by the tribunal are not complied with by one of the parties (article 585 CPC).

The arbitral tribunal in an international dispute may grant interim or conservatory measures, absent contrary provisions in the arbitration agreement. If the concerned party resists said measures granted by the tribunal, the latter may seek assistance of the competent State court. Awarding such measures may be subject to the court's own assessment on the appropriateness of the measure and, potentially, to payment of an appropriate security (article 1.117 CPC).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, the court is entitled to grant preliminary or interim relief – please see the answer to question 7.1 above. The court's intervention in such cases is limited to preliminary or interim relief; hence, it does not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

When faced with requests for interim relief submitted by parties to arbitration agreements, courts generally retain jurisdiction and hear the merits of the request, on grounds of the alternative jurisdiction provided by the CPC to courts and arbitral tribunals.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The CPC does not provide the courts' right to issue anti-suit injunctions in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

No, there is no provision under Romanian law allowing for the national court and/or arbitral tribunal to order security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

If the parties resist the arbitral tribunal's decision granting precautionary or interim measures or by which it ascertains factual circumstances, enforcement can only be obtained with the intervention of national courts. However, in general, parties directly request the national courts to grant such measures, upon filing the request for arbitration (see the answers to questions 7.1 and 7.3).

A more debated topic is whether the national courts may enforce partial arbitral awards, specific to international arbitration. It should be noted first that the CPC regulates the arbitral tribunal's right to render partial awards only in international, not domestic arbitration (article 1.121). Although a solid trend of the national courts cannot be identified, there have been instances where courts refused to enforce ICC partial arbitral awards rendered in relation to non-final DAB decisions, on the grounds of the arbitral award not being final and that enforcing it would breach Romanian procedural rules. We also note a recent decision rendered by the Romanian High Court of Cassation and Justice whereby an ICC partial arbitral award in relation to a non-final DAB decision was annulled.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The rules of evidence, as part of the procedural rules applicable to a dispute, are primarily those agreed between the parties in the arbitration agreement or those established by the arbitral tribunal. If the parties have submitted their dispute to an arbitral institution, its procedural rules shall apply. If the parties have not agreed on or if the arbitral tribunal has not been requested to establish the rules of evidence, as well as for those circumstances not covered by the arbitration agreement or by the tribunal's decision in this respect, the rules of evidence provided in the CPC shall apply (articles 576, 1.115 and 1.123).

The 2014 Rules of Arbitration of the Court of International Commercial Arbitration provide the arbitral tribunal's right to apply in international arbitrations, with the parties' consent, the IBA Rules on the Taking of Evidence (article 81).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Although the concept of disclosure of documents is not regulated *per se* in Romanian law, the CPC nevertheless provides that the arbitral tribunal may order the parties to submit a piece of evidence under their possession and that it may request public authorities to grant information or provide documents relevant to the dispute (articles 588 and 590). However, if the public authority refuses to comply, the parties or the arbitral tribunal may seek the assistance of State courts.

Also, if a witness of fact or expert witness refuses to testify, the arbitral tribunal does not have the authority to constrain or fine them, but the parties must seek the court's assistance to apply such measures (article 589 CPC).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As mentioned above in the answer to question 8.2, the court may intervene in cases of witness testimony or of requests to produce addressed to public authorities which refuse to cooperate. State courts may intervene, at parties' request, in any other case where the course of the arbitration is obstructed (article 547 CPC). In international arbitration, the CPC provides the right for the arbitral tribunal or for the parties, in agreement with the arbitral tribunal, to request, when needed, the court's assistance for administering any type of evidence (article 1.118).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The production of written and/or oral witness testimony is regulated by the CPC (please see the answer to question 8.1). Witnesses of fact and expert witnesses will testify without taking an oath. They may also testify at their domicile or workplace, in which case the tribunal will also ask the witness to provide written answers to the tribunal's questions. Although not expressly regulated, cross-examination is generally used in arbitration. If the witness refuses to testify, he/she may be constrained or fined by only the State courts (article 589 CPC).

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

As far as attorney-client privilege is concerned, in Romania this concept falls under the attorney's obligation to ensure confidentiality concerning any aspect of the case. This obligation pertains to public order, is unconditional and unlimited in time and extends to all the attorney's activities, of its associates, collaborators, employees and to the relationship with other attorneys. Communications between attorneys or between attorney and client cannot, as a rule, be brought as evidence in justice and they may not be divested of their confidential nature. The client may not absolve the attorney of its confidentiality obligation (article 11 of Law 51/1995, articles 8 and 9 of the Lawyers' Statute).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Arbitral awards must be issued in written form and contain (article 603 CPC):

- the composition of the arbitral tribunal, place and date of rendering;
- the parties' name and basic identification data;
- mention of the arbitration agreement;
- object of the dispute and the parties' claims in brief;
- reasons in fact and in law;
- the disposition; and
- the signature of every arbitrator and, as the case may be, of the arbitral assistant.

Dissenting opinions will be drafted and signed separately and will contain reasons.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

In domestic arbitration, the CPC provides the parties' right to request the arbitral tribunal to clarify the disposition of the arbitral award or to eliminate contradictory provisions included therein. Also, if the arbitral tribunal omitted to render its decision on a head of claim, a related or incidental claim, the parties may request the amendment of the arbitral award. Material errors or other apparent errors that do not change the merits of the decision, as well as computation errors may be corrected at the request of the parties or *ex officio* (article 604).

The parties will not bear the costs pertaining to the clarification, amendment or correction of the arbitral award.

The 2014 Rules of Arbitration of the Court of International Commercial Arbitration comprise similar provisions to the ones found in the CPC (articles 69 to 72).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The arbitral award may only be challenged by way of an application for setting aside, on grounds similar to those provided by the UNCITRAL Model Law (article 608 CPC):

a) the subject matter of the dispute is not capable of settlement by arbitration;

b) the award was rendered in lack of, or under a null or invalid arbitration agreement;

c) the composition of the arbitral tribunal was not in accordance with the arbitration agreement;

d) a party was not present and was not given proper notice of the hearing;

e) the award was rendered after the arbitration term had lapsed;

f) the award contains decisions on matters beyond the scope of the submission to arbitration (*extra* or *ultra petita*);

g) the award contains no disposition and reasons, does not indicate the date and place of rendering or is not signed by the arbitrators;

h) the award is in conflict with public policy, good morals or imperative provisions of law; or

i) if, after the award was rendered, the Constitutional Court found that a law, ordinance or a provision thereof 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.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may waive the right to file the application for setting aside the arbitral award only after it has been rendered and not *a priori*, through the arbitration agreement (article 609 CPC).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the CPC does not provide the parties' right to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The application for setting aside must be filed before the Court of Appeal at the seat of the arbitration, within one month of communication of the award (articles 610 and 611 CPC). For those claims grounded on the Constitutional Court's decision (see the answer to question 10.1 above), the application for setting aside must be filed within three months as of the publication of said decision in the Official Gazette.

The statement of defence is mandatory and, in support of the grounds for setting aside the arbitral award, the parties may only bring documents as new evidence (articles 608 and 613 CPC).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Romania has ratified the New York Convention through Decree no. 186/1961, entering two reservations, in that it will apply the Convention:

a) only to disputes resulting out of contractual or non-contractual relationships, considered as commercial under its legislation; and

b) 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 a joint agreement between the parties.

The relevant national legislation is to be found in the CPC, Book VII, Title IV, Chapter II on *The Effects of Foreign Arbitral Awards*.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Romania has ratified the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, through Law no. 50/1931 and the 1961 Geneva Convention on International Commercial Arbitration, through Decree no. 281/1963.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Domestic arbitral awards are enforceable titles and can be enforced just like court decisions (article 615 CPC). The obligation to have arbitral awards vested by the national courts with writ of execution is no longer in force as of February 2016.

In what regards foreign arbitral awards, they are subject to the recognition and enforcement procedure (*exequatur*) before they can be enforced (article 1.126 CPC). Romanian national courts – in the spirit of the New York Convention – have a pro-recognition and enforcement approach.

The parties must file the request before the tribunal in which jurisdiction the domicile or the headquarters, respectively, of the respondent is located. If the competent tribunal cannot be determined, the Bucharest Tribunal shall retain jurisdiction.

With the request, the interested party must submit the arbitral award and the arbitration agreement, subject to superlegalisation (article 1.128 CPC). It should be noted that Romania has ratified the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents. Also, should it be the case, a certified translation in Romanian of said documents (in their entirety, not excerpts) must be provided. The aforementioned legal requirement should not apply to the arbitration agreements under private signature.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Although the CPC only provides that arbitral awards are final and

binding (article 606), it is unanimously acknowledged by scholars and courts that arbitral awards, be they national or foreign, are subject to the *res judicata* principle. The *res judicata* has (i) a positive effect, in that the solution given to the issues in dispute cannot be contradicted by subsequent court decisions or arbitral awards, and (ii) a negative effect, in that the dispute may not be re-heard between the same disputing parties before a national court or arbitral tribunal. For the negative effect, the courts will apply the so-called "triple identity" test, consisting of the same parties, object of dispute and cause (basis) of the claim between the arbitral dispute and litigation. These conditions do not apply to the positive effect of the *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

It is a very high standard, as the Romanian courts' approach has consistently been pro-arbitration enforcement. Indeed, according to Romanian law, the recognition and enforcement of an arbitral award may be refused on the grounds of public policy if and to the extent that it would lead to an outcome that is incompatible with the fundamental principles of Romanian law, of European Union law or of the fundamental human rights (article 2.564 of the Civil Code). As such, unless we are in exceptional situations of egregious violations of due process rights or of the most fundamental values protected under the public policy regime, an arbitral award made by a properly-vested arbitral tribunal under a valid arbitration agreement is enforced by the Romanian courts.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Romanian law governing international arbitration follows the directions of the UNCITRAL Model Law, which left the matter of confidentiality to the parties' express agreement or choice of institution. Nevertheless, the CPC provides in article 565 that arbitrators are liable for any damage caused by breaking confidentiality. In this respect, the 2014 Rules of Arbitration of the Court of International Commercial Arbitration provide that the arbitration file is confidential and that the Court, the tribunal and all personnel have the obligation not to disclose any information therein without the parties' prior consent.

Confidentiality agreements are protected by article 53 of the Romanian Constitution, whereby the exercise of rights or liberties can be restrained only in specific circumstances.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Once the parties have made the arbitration proceedings confidential, only by their agreement can the information thereby disclosed be used for other purposes. However, the 2014 Rules of Arbitration of the Court of International Commercial Arbitration provide in article 7 that the awards may, for scientific or academic purposes, be published in part without revealing the name of the parties or prejudicial data. It is not unusual for awards so published to be used by parties in subsequent proceedings, predominantly for proving matters of law.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no specific provisions in the CPC limiting the types of remedies that are available in arbitration. Therefore, all the remedies that are available in litigation are also available in arbitration (e.g., 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). As a note, within enforcement proceedings, punitive damages are excluded under article 907 of the CPC.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If the parties provided for a late payment interest, the rate stipulated in the contract will be applicable. In the absence thereof, the applicable rate will be the legal one, to be determined according to the provisions of Government Ordinance no. 13/2011. The legal interest rate may be different depending on the parties to the dispute as well as on whether the parties' juridical relationship has an international element or not. The National Bank of Romania's official rate is used to determine the legal interest rate, save for international legal relationships where the Romanian law is applicable and the payment is provided for in foreign currency, where the rate is of 6%/year.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The consecrated general rule in domestic arbitration is that the parties have full autonomy to reach an understanding on how the fees, costs and expenses related to the arbitration may be allocated. Lacking an agreement, all such amounts shall be in the responsibility of the losing party, if the other party's claim was admitted on all accounts, or by both parties proportionally, according to the extent to which the partial award was in the other's favour (article 595). Except as otherwise agreed, parties to an international arbitration have to cover the fees and expenses of their appointed arbitrator, or split those of the sole arbitrator or the chairman equally (article 1.122), unless they submit the dispute to the Court of International Commercial Arbitration as the 2014 Rules of Arbitration follow the rules applicable in domestic arbitration.

Nonetheless, the 2014 Rules of Arbitration provide that a party who incurred unnecessary costs may recover them as damages from the party whose fault caused them. Additionally, Romanian arbitral case law was found to shift part of the costs related to counsel fees back to the party whose claim was admitted, to the extent that the costs had been incurred disproportionally.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

It depends on the nature of the amount awarded and the circumstances under which the award is issued. For instance, in general, if compensation in the form of damages is awarded, such may be subject to income tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no specific explicit restrictions on third parties funding claims in Romania. With regard to lawyers' profession, however, according to the provisions of the Lawyers' Statutes, the lawyers are prohibited to establish their fees on a *pactum de quota litis* basis whereby their fees entirely depend on the outcome of the case (article 130). Notwithstanding the above, success fees are allowed. To our knowledge, there are no "professional" funders active in the Romanian market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Romania ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) by the State Council Decree no. 62/1975.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Romania is currently party to Bilateral Investment Treaties (BITs) with about 85 States, of which almost all have ratified the agreement as of March 2016. At the request of the European Commission, the Romanian Parliament passed Law no. 18/2017, in force as of 24 March 2017, approving the termination of 22 BITs Romania concluded with EU Member States. Romania is also party to the Energy Charter Treaty, which it ratified in 1997 through Law no. 14/1997.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Romania has worded the treaties concluded with non-EU Member States so as not to be incompatible with the exigencies of European Union law. Some of the pre-existing treaties, such as those with the United States and Israel, had to even be amended for this purpose. In order for the treaties to be compliant with the EU principles of free movement of services and freedom of establishment, the provisions pertaining to "most favoured nation" were worded so as not to "oblige one Contracting Party to extend to the investors and investments of the other Contracting Party the advantages resulting from" circumstances akin to being a Member State of the European Union. Similarly, Romanian BITs include provisions not limiting its ability to impose performance requirements or restrictions to the movement of capital as demanded by the security interests of one party.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Romanian Supreme Court and lower courts have generally (especially in non-commercial disputes) upheld the foreign States' immunity regarding jurisdiction and execution in light of the consecrated principle *par in parem non habet jurisdictionem*. While Romania is not party to the 1972 European Convention on State Immunity, it ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that a State cannot invoke the defence of State immunity before a court of another State which is competent in a proceeding relating to a dispute arising from an arbitration agreement wherein the former State is a Contracting Party. Nevertheless, the Convention has yet to enter into force, and the Supreme Court denied its application in a case not related to arbitration. There is currently no reported Romanian case law in connection with investor-State arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Ensuring expedition of the arbitral proceedings and facilitating access to the users by establishing moderate arbitral fees have been among the main goals pursued by the arbitral institutions and users in recent years. Also, following a totally uninspired experience of the appointment of arbitrators only by or through an Appointing Authority, the 2014 Arbitration Rules restored the parties in their right to select and appoint their arbitrator, thus aligning themselves with the standards of international arbitration institutions.

Arbitration, and particularly international commercial arbitration, remains the key alternative to the State judiciary, at least in disputes involving concurrent applicable laws and jurisdictions. There are certain sectors prone to arbitration, such as concessions, the construction industry, public-private arrangements and corporate joint-venture type investment schemes. Predominantly, these sectors continue to favour arbitration over litigation or mediation. This is primarily due to the complexity of these types of matter and the intricacies of cross-border commercial disputes, where experienced international arbitrators are better placed and equipped to deal with all of the relevant issues.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Along with the 2014 Rules of Arbitration, an entire new set of rules, regulations and norms has been adopted within the reorganisation process undertaken by the Court of International Commercial Arbitration, aiming, *inter alia,* at ensuring time and cost-effective arbitral proceedings. Indeed, the Schedule for arbitral fees and expenses adopted in 2014 provides for lower administrative taxes than applicable beforehand, especially for large disputes. The 2014 Rules of Arbitration intend to achieve expedition by providing measures to effectively stimulate the participants to the arbitral proceedings, a clearer procedural framework and a more efficient taking of evidence. The Arbitration Rules of the Court of International Commercial Arbitration are currently undergoing structural reform, so that they will have a state-of-the-art approach across the most successful jurisdictions in international arbitration. Enhancing party-autonomy, procedural flexibility and simplification, transparency and efficiency, time- and cost-wise, are key objectives of the upcoming arbitration rules, which are expected to enter into effect in 2017.

The reorganisation process has continued in 2015 and 2016, with the new 2016 Regulation for the organisation and functioning of the Court of International Commercial Arbitration providing for, *inter alia*, the establishment of a Scientific Council with an advisory role to the Court's Board, comprising highly-reputable law practitioners and experts.

Acknowledgment

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