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ARBITRATION IN ROMANIA: LOOKING GOOD, HOPING FOR MORE

Summary

This paper provides a current overview of the arbitration legal framework in Romania, analysing the historic development of an arbitration friendly jurisdiction. The paper goes on to describe the implementation of the expected international arbitration pillars, and illustrate some novel and progressive legal provisions on arbitration relating, inter alia, to, applicable law, parallel proceedings and arbitrators' liability. It provides a critical commentary on certain persistent 'arbitration unfriendly' terms in the Romanian national arbitration law and take on two very recent legislative developments involving investment arbitration and regulation of institutional arbitration. It also pinpoints the need for construction disputes to be settled by appropriate fora such as specialist construction courts or in arbitration, and the need for the current expert practice with respect to the evaluation of time extensions and additional payment (which are, at present, reflecting the common law approach) to be adapted to the civil liability principles enshrined in the Romanian Civil Code.

Keywords: arbitration legal framework, real estate disputes, construction arbitration, FIDIC, construction disputes.

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ARBITRAŽA U RUMUNIJI: IZGLEDA DOBRO, NADAMO SE DA ĆE BITI BOLJE

Sažetak

Ovaj rad je deo zbirke radova o izazovima i perspektivama arbitraže u jugoistočnoj i centralnoj Evropi i usmeren je na pregled pravnog okvira za arbitražu u Rumuniji. U tom smislu, u radu se analizira istorijski razvoj arbitraže, opisana je implementacija očekivanih rešenja u kontekstu međunarodne arbitraže i ilustrovane su neke nove i progresivne zakonske odredbe, paralelni postupci i odgovornost arbitara. Autori daju kritički komentar određenih „neprijateljskih" uslova za arbitražu još uvek postoje u rumunskom zakonu, sa osvrtom na investicionu arbitražu i način na koji je regulisana. Autori takođe ukazuju na potrebu da se građevinski sporovi rešavaju na odgovarajućim forumima, kao što su specijalizovani građevinski sudovi i arbitraže, kao i na potrebu za prilagođavanjem prakse u pogledu procene produženja rokova i pitanja dodatnog plaćanja (koji su, u ovom trenutku, odraz common law pristupa) sa principima građanske odgovornosti sadržanim u rumunskom Građanskom zakoniku.

Ključne reči: arbitražni pravni okvir, sporovi o nepokretnostima, razvoj arbitraže, FIDIC, građevinski sporovi.

1. Setting the Stage

As a civil law jurisdiction and EU Member State since 1 January 2007, Romania has a history of arbitration going back to early XIX Century, which is French and Swiss inspired, and which has resisted through the XX century conflicts and communist regime to recover in the early 1990's with the UNCITRAL Model Law inspired legislation. Romania is an early signatory to the Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (hereinafter: New York Convention),[1] the European Convention on International Commercial Arbitration of 1961 (hereinafter: Geneva Convention),[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1975 (hereinafter: ICSID Convention).[3]

[1] Ratified by Romania through State Decree No. 186 published in Official Gazette of 24 July 1961.

[2] Ratified by Romania on 16 August 1963.

[3] Ratified by Romania through State Decree on 7 June 1975.

In 2010, Romania undertook a comprehensive reform of its Civil Code and Civil Procedure Code. The arbitration reform departed from the UNCITRAL Model Law whilst staying compatible with and inspired by the French, Italian and German Codes of Civil Procedure and the Quebec Province Code of Civil Procedure (see: Baias, 2016, pp. 10-28). The Law 134/2010 on the New Civil Procedure Code ("NCPC") entered into force on 15 February 2013 (as established by Law no. 76/2012 on implementation of Law no. 134/2010 on the Civil Procedure Code), and was subsequently amended on a significant number of occasions, two times impacting the arbitration framework. The NCPC provides for different regimes for domestic arbitration (Book IV - "On Arbitration") and international arbitration (Book VII, Title IV- "On International Arbitration and the Effects of Foreign Arbitral Awards"), containing separate sections on institutional arbitration and on recognition and enforcement of foreign arbitral awards (see: Smeureanu &. Hickman, 2013, pp. 1-24).

Institutional arbitration has existed in Romania since the interwar period, within chambers of arbitrators attached to each exchange that had jurisdiction to resolve disputes under the 1929 Exchange Law (see: Baias, 2016, pp. 10-28; Stoica, 2016, pp. 287-315). After WWII and during the communism period, the idea of arbitration was somehow taken over in the communist legislation: Decree No. 259/1949 established the 'State arbitration' for settling disputes between 'Romanian socialist organizations'. The State arbitration functioned until 1985, when disputes falling within its jurisdiction were transferred under Decree No. 81/1985 to national courts. An institutional arbitration form was organized during the very first years of communism (1953) to settle disputes between Romanian foreign trade organizations and their foreign partners, attached to the Chamber of Commerce of Romania. This type of arbitration had a spectacular development, and thus, several legal professionals specialized in this matter, and a doctrine was dedicated to the field as "being the only form of non-state arbitration in Romania, an islet where the 1887 Commercial Code and, generally, the trade legislation continued to be consistently applied (…). (…) our commercial case law had developed, serving as the source of several valuable papers on foreign trade law." (Băcanu, 1994, p. 15). This institution had a not so straightforward development, its name and structure having been modified on several occasions both during the communist period and subsequently, when the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA CCIR") was created under Article 13 of Decree No. 139/1990 on Chambers of Commerce and Industry of Romania.

Presently, institutional arbitration in Romania is attached to organizations of an associative nature. Under Article 616, para. 1 NCPC, all institutions organizing arbitration enjoy autonomy and are of public utility nature, acting as not-for-profit legal entities.

The CICA CCIR is currently the leading permanent arbitration institution in Romania, continuing the tradition of the former arbitral institution, created more than seventy years ago.[4] There are three other main institutionalized arbitration options in Romania: the Court of Arbitration of the Romanian-German Chamber of Industry and Commerce (AHK Court), the Bucharest International Arbitration Court (BIAC), and the Romanian Chapter of the European Court of Arbitration.

The most popular international arbitration institutions for Romanian parties and Romanian arbitration disputes, both domestic or international, are the ICC, VIAC, LCIA, SCC Arbitration Institute, and the Swiss Arbitration Centre (Tăbârță, 2021, pp. 47-67).

2. Romania as an Arbitration Friendly Jurisdiction

2.1. Arbitrability

As a rule, Romanian arbitration law follows the principle that disputes are arbitrable to the extent the parties may dispose of the concerning disputed right.

For domestic arbitration, Article 542 NCPC sets out the rules applicable to objective arbitrability (*ratione materiae*) in paragraph 1, and subjective arbitrability (*ratione personae*) in paragraphs 2 and 3, as follows: "Article 542 - Subject matter of arbitration (1) Persons with full legal capacity may agree to resolve disputes between themselves through arbitration, except for those disputes concerning personal status, personal capacity, inheritance, family relations, as well as those rights of which the parties cannot freely dispose. (2) The State and public authorities have the right to enter into arbitration agreements only if authorized by law or by international conventions to which Romania is a party. (3) Legal entities of a public nature whose scope of activity includes entering into economic transactions may conclude arbitration agreements, unless their statute or bylaws provide otherwise".

For international arbitrations[5] seated in Romania, Article 1112 NCPC on arbitrability sets out the following rules: (1) Any dispute pertaining to an economic

[4] Under the NCPC provisions on institutional arbitration and the Chamber law, the Court does not have its own legal personality, but is independent of the Chamber with full separation of the domestic and international arbitration activity carried out based on the Court's rules of arbitration adopted by the Chamber following approval by the Court management.

[5] The definition of what is regarded as an international arbitration under the Romanian arbitration law may be found in Chapter I, International Arbitration Proceedings, Article 1111, NCPC – Definition and Scope, as follows: "(1) Under this title, an arbitration that takes place in Romania is considered international if it arises from a private law relation with a foreign element. (2) The provisions of this chapter shall apply to any international arbitration if the place of

interest (*cauza de natură patrimonială*) is arbitrable provided it concerns rights of which the parties may freely dispose and the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the courts. (2) If one of the parties to the arbitration agreement is a State, a State-owned enterprise or an organization controlled by the State, this party cannot invoke its right to contest the arbitrability of a dispute or its capacity to be a party in the arbitral proceedings."

Therefore, in the case of domestic arbitration, all disputes that concern any rights that the parties may freely dispose of[6] may be resolved through arbitration seated in Romania, irrespective of whether they pertain to patrimonial and non-patrimonial rights save for those: (i) reserved for the exclusive jurisdiction of Romanian national courts (e.g. insolvency procedure, certain corporate disputes under Company Law No. 31/1990 as amended,[7] petty offences, eviction from unlawfully used or occupied estates, contentious administrative disputes, rights acquired based on acquisitive prescription (*usucapio – uzucapiune* in Romanian),[8] and (ii) expressly excluded by Article 542 NCPC (i.e., concerning personal status, personal capacity, inheritance, family relations).

For international arbitration seated in Romania, the same rule on arbitrability *ratione materiae* linked to rights that the parties may freely dispose of applies, with the additional requirements that such rights must have a patrimonial character (to encompass an economic interest), and that they are not reserved to the exclusive jurisdiction of national courts (in Romania or in other jurisdictions).

As in most jurisdictions, arbitrability rules are deemed mandatory and falling under public policy at the seat of arbitration, thus affecting also the validity of any arbitration agreement having as subject matter a dispute that is not arbitrable under Romanian law, in line with the New York Convention and the Geneva Convention.

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arbitration is in Romania and at least one of the parties, at the time when the arbitration agreement was concluded, did not have its domicile or its habitual residence or, respectively, its headquarters in Romania, unless the parties have excluded their application in the arbitration agreement or thereafter in writing. (3) The place of arbitration shall be determined by the parties or by the arbitral institution."

6 Some examples of Romanian law for rights that the parties cannot freely dispose of include: disputes concerning goods that are taken out of the civil circuit and inalienable, according to Article 135 of the Romanian Constitution, disputes regarding individual labour conflicts or those pertaining to social insurance, as they involve rights which the parties cannot waive.

7 For example cases regarding social creditors' opposition to decisions concerning amendments to the articles of incorporation, winding up of the company, action in nullity of the company, challenging GMS decisions, actions requesting exclusion or withdrawal from the company.

8 For more details on arbitrability under Romanian law see: Briciu, 2016, pp. 85-96.

2.2. Separability. Competence-Competence. Law Applicable to the Arbitration Agreement.

As the Romanian arbitration law, in its the fundamental arbitration pillars, expressly recognizes *separability* of the arbitration agreement (Article 550, para. 2, NCPC – for domestic arbitration, and Article 1113, para. 3, NCPC – for international arbitration) and *competence - competence* (Article 579, NCPC – for domestic arbitration, and Article 1119, NCPC – for international arbitration), arbitrability is tested by national courts and arbitral tribunals.

The public policy provisions at the national and EU levels are mandatory for the arbitral tribunals seated in Romania (as an EU Member State) for determining the validity of the arbitration agreement (capacity of the parties and the subject matter) under the law applicable to the arbitration agreement considering that for international arbitrations seated in Romania the NCPC specifies (similar to the Swiss Federal Statute on International Private Law) the law applicable to the substance of the arbitration agreement in absence of a choice by the parties, under Article 1113, para. 2, NCPC as follows: "(2) As to its substance, the arbitration agreement shall be valid if it meets the requirements prescribed by one of the following laws: a) the law chosen by the parties; b) the law governing the subject matter of the dispute; c) the law governing the contract containing the arbitration clause; d) Romanian law."

2.3. Setting Aside

Public policy considerations at the national and EU levels are obviously relevant also for setting aside, as Article 608, para. 1, NCPC, in line with the Geneva Convention (and the UNCITRAL Model Law), includes amongst the grounds for setting aside also breach of public policy or mandatory law at the seat of arbitration (ltem h), as well as the case when the dispute is not capable of resolution by arbitration (Item a), or the arbitral award was rendered based on an inexistent, null or inoperative arbitration agreement (Item b).[9]

[9] Article 608 NCPC - Action for annulment: "(1) The arbitral award may only be set aside through an action for annulment for one of the following reasons: a) The dispute was not capable of resolution by arbitration; b) The arbitral tribunal resolved the dispute in the absence of an arbitration agreement or based on an agreement that was null or inoperative; c) The arbitral tribunal was not constituted in accordance with the arbitration agreement; d) The party was not present at the oral argument and the notification procedure was not legally fulfilled; e) the award was made after the expiry of the time limit for the arbitration specified in Article 567, even if at least one of the parties declared that it understood that it may invoke its lapse (*caducitatea* in Romanian), and the parties did not agree to continue the proceedings pursuant to Article 568 (1) and (2); f) The arbitral tribunal dealt with matters not requested by the parties or awarded more than it was requested; g)

An interesting provision in the Romanian arbitration law on the procedure for setting aside/annulment is to allow, subsequent to the arbitral award being set aside, if both the parties expressly request so, for the competent national court (Court of Appeal) to rule on the merits of the dispute *ex aequo et bono* if such express authorisation for arbitration *ex aequo et bono* was initially granted by the parties to the arbitral tribunal. This is specified in Article 613, para. 3, Item b) NCPC: "(3) On finding the action for annulment admissible, the court of appeal shall annul the arbitral award and shall: a) in the cases specified in Article 608(1) (a), (b) and (e), remand the dispute for resolution to the competent court, in accordance with the law; b) in all other cases specified in Article 608(1), remand the dispute to the arbitral tribunal, if at least one of the parties expressly so requests. Otherwise, if the dispute is set for resolution, the court of appeal shall decide the merits within the scope of the arbitration agreement. If, however, the court of appeal needs new evidence to decide the merits, the court shall render a decision after the administration of such evidence. In this latter case, the court shall first render the annulment decision and then, after the evidence is administered, shall decide the merits, and, if the parties expressly agreed that the dispute shall be resolved by the arbitral tribunal *ex aequo et bono*, the court of appeal will decide in that manner."

As for waiver of the right to set aside (action for setting aside/annulment), the Romanian arbitration law does not allow *ex ante* waiver, such preclusion being expressly included in Article 609 NCPC: "(1) The parties cannot waive their right to file an action for setting aside/annulment of the arbitral award in their arbitration agreement. (2) This right can be waived only after the award is made."

2.4. Recognition and Enforcement of Foreign Arbitral Awards in Romania

Under Article 1125 NCPC, a foreign arbitral award[10] shall be recognized and may be enforced in Romania if the underlying dispute can be resolved through

The arbitral award does not contain the dispositive part and the reasoning, does not indicate the date and place of issuance, or is not signed by the arbitrators; h) The arbitral award infringes public order (*ordine publică* in Romanian), good morals or the mandatory provisions of the law; i) If, after the award is made, the Constitutional Court decides on an objection raised in that case, declaring unconstitutional a law, a government ordinance or a provision of a law or an ordinance that was the subject of that objection, or other provisions from being dissociated from the provisions mentioned in the action for annulment. (2) The irregularities that have not been raised pursuant to Article 592 (1) and (3) or that can be remedied under Article 604 cannot be relied on as grounds for annulling the award. (3) Only documents can be used as new evidence to prove the grounds for annulment."

[10] Where foreign arbitral awards are defined by the Romanian arbitration law as: "Any domestic or international arbitral awards rendered in another state, and not considered national awards in Romania are foreign arbitral awards." (Art. 1123, NCPC).

arbitration in Romania and the award does not infringe any public order (*ordine publică* in Romanian) provisions of Romanian private international law.

Romania is a signatory to both the New York Convention and the Geneva Convention, and therefore an arbitral award annulled at the seat of arbitration may be recognized and enforced in Romania if the said award was set aside for grounds other than those included in Article IX (1) of the Geneva Convention, since Article IX (2) of the Geneva Convention limits the application of Article V (1) (e) of the New York Convention.

The New York Convention grounds for refusing recognition and enforcement have been transposed in the Romanian arbitration law in Article 1129 NCPC, with an unfortunate translation error, i.e., the *pro exequatur* "may be refused" of Article (1) in the New York Convention was improperly translated into "shall be refused" as follows: "(1) Recognition and enforcement of foreign arbitral awards shall be refused if the party against whom the foreign arbitral award is invoked proves the existence of one of the following circumstances: a) The parties did not have the capacity to conclude the arbitration agreement under the law applicable to each of them in accordance with the law of the State where the arbitral award has been made; b) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the arbitral award was made; c) The party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrators or the arbitration proceedings or was otherwise unable to present its defence in the arbitration; d) The constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, was not in accordance with the law of the place where the arbitration took place; e) The arbitral award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement. If, however, the decisions contained in the arbitral award that concern matters submitted to arbitration can be separated from those not so submitted, the former may be recognized and enforced; or f) The arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

3. Examples of Advanced Regulatory Framework for Arbitration

The advanced/progressive examples of the Romanian regulatory framework for arbitration include:

3.1. Plea for Unconstitutionality Raised in Arbitration Proceedings

One important point specific to the Romanian jurisdiction is recognizing the right of the parties to raise a plea for unconstitutionality of a law, a provision of law, or a government ordinance that pertains to the merits and is relevant for the dispute before arbitral tribunals as well, in either domestic or international arbitrations seated in Romania.

This right is recognized in the Romanian Constitution (Article 146, Item d)) and in the Law on Constitutional Court (Article 29), and is duly reflected in the NCPC provisions on arbitration, where arbitral tribunals (as do national courts) act as initial filters deciding on the admissibility of such a plea for unconstitutionality through a procedural order that can be separately challenged with setting aside within 5 days (Article 594, NCPC) and without the obligation to stay the arbitral proceedings until the Constitutional Court has ruled on the respective law provision.

If considered admissible and in the (rare) case the Constitutional Court issues an affirmative decision on deeming the said law provision unconstitutional, the arbitral award may be set aside within three (3) months from the publication of the relevant Constitutional Court decision in the Romanian Official Gazette (Articles 608 and 611, NCPC). Consequently, under the Romanian jurisdiction, for any tensions relating to fundamental access to justice rights (constitutionally recognized) and the right to enforce an arbitration agreement that might be affected (covering both the signatory party or the subject matter), there is an additional possibility to test this compatibility also before the Romanian Constitutional Court. This is in addition to the preliminary reference procedure before the CJEU, which can be initiated only before a national court involved in arbitration.

3.2. Parallel Proceedings in International Arbitration

In line with the International Law Association (ILA) Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration (Executive Committee of the International Law Association, 2006, Annex 1; De Ly & Sheppard, 2009, pp. 83-86), the fundamental *competence-competence* pillar has been recognized also in international arbitration with a legislative solution being put forward for parallel proceedings. Under Article

1119 NCPC, the first paragraph recognizes the principle, whilst its second paragraph allows the arbitral tribunal seated in Romania to address its own jurisdiction regardless of a parallel procedure between the same parties before a national court or another arbitral tribunal, save for justified grounds that would require suspending the arbitration proceeding, thus being an example of advanced legislation.[11]

3.3. Unlimited Voie Directe for the Law Applicable to the Merits

As to the law applicable to the merits for international arbitration under Article 1120 NCPC, the Romanian law expressly recognizes the arbitral tribunal's full discretion on deciding on the applicable law (unlimited - pure *voie directe*), which is a tailored choice of law process, without conditioning it upon the preliminary conflict of laws rule, similar to modern institutional arbitration rules, as follows: Article 1120 NCPC - Applicable law: "(1) The arbitral tribunal applies the law chosen by the parties and, if the parties have not chosen their applicable law, the law that it considers appropriate, taking into account at all times the usages. (2) The arbitral tribunal may decide *ex aequo et bono* only with the parties' express authorization."

3.4. Arbitrator's Liability Under the Romanian Law

Legislative solutions on arbitrators' liability vary in different countries, depending on their theoretical interpretation of arbitrators' status, rights and obligations. It is generally accepted that arbitrators are protected by immunity to allow them to resolve disputes calmly and, hence, impartially (Romero, 2012). There are nonetheless limits on arbitrators' immunity in national laws and under arbitration rules.

The possible legal grounds under which an arbitrator can be held liable are considered to be extraordinary circumstances and their existence will depend on the applicable national law or arbitration rules, or rarely, these would be specified in the arbitrator's terms of appointment (see: Gaillard & Savage, 1999, pp. 597, paras. 1096-1100; Born, 2009, pp. 1654-1657; Lew, 2012; ICC, 1996; Romero, 2012; Fry, Greenberg & Mazza, 2012, paras. 3-1530-3-1536). National laws vary significantly, usually providing for the arbitrator's liability only for acts or omissions in bad faith. Other jurisdictions, following the UNCITRAL Model Law, tend to be silent on this matter.

[11] See full text of Article 1119 NCPC - Jurisdiction of the tribunal: "(1) The arbitral tribunal shall determine its own jurisdiction. (2) The arbitral tribunal shall determine its own jurisdiction without taking into account any proceeding involving the same parties and the same subject matter which is already pending before a court or an arbitral tribunal, except when serious grounds compel suspension of the proceedings. (3) Any jurisdictional objection shall be raised before any defence on the merits."

In most national laws, total exclusion of liability by a contractual approach would be ineffective if the arbitrator was accused of certain particularly serious faults (deliberate or inexcusable wrongful acts or omissions). According to the ICC Commission Report on Status of Arbitrator (ICC, 1996), in the course of carrying out his or her task as arbitrator, the arbitrator is not liable for any detriment caused by his or her acts or omissions, except in the case of deliberate wrongdoing or if he or she resigns without a valid reason. The parties may withhold or claim back all or a part of the arbitrator's fees should he or she be found guilty of any of the wrongful acts or omissions.

The extraordinary circumstances usually fall under: (i) fraud; (ii) intentional wrongdoing; or (iii) gross negligence – especially if it results in a denial of justice, except when it pertains to the purpose of adjudicating the dispute.

To this end, the Romanian NCPC includes (apart from the details on conflicts of interests in Article 562, NCPC) detailed provisions on arbitrators' liability for all arbitrations seated in Romania (Article 565, NCPC – applicable also to international arbitrations as referenced in Article 1123, NCPC).

Under Article 565 NCPC – Liability of arbitrators, "[a]rbitrators are liable under law for the damage incurred if they: a) resign, without cause, after accepting the appointment; b) fail, without cause, to participate in the resolution of the dispute or do not render the award within the term required by the arbitration agreement or the law; c) fail to observe the confidential character of the arbitration, by either publishing or disclosing information acquired in their capacity as arbitrators without the parties' approval; or d) breach other duties in bad faith or gross negligence."

The Romanian civil procedure doctrine (Ciobanu & Nicolae, 2016, pp. 170-172) qualifies arbitrators' liability for damages under this Article 565 as a contractual liability, similar in its last part with that of national court judges, whilst the criteria for what constitutes "bad faith" or "gross negligence" are in line with the Superior Council for Magistrates Decision no. 1/J/20.01.2013 on judges' liability. This refers to breaches of substantive or procedural laws that are so serious that they severely influence the procedural acts rendered by a magistrate, affect their validity, and without doubt or cause severely affect the parties' rights or legitimate interests. Civil liability does not of course exclude criminal liability of arbitrators where their misconduct meets such conditions (i.e., bribery, corruption, illicit behaviour).

4. Unfriendly Characteristics of Romanian Law on Domestic Arbitration

The current Romanian arbitration law unfortunately includes two 'arbitration unfriendly' provisions, which are considered to apply exclusively to domestic arbitration seated in Romania. These two articles were not contained in the original NCPC

draft, and were subsequently incorporated during the legislative process in parliament,[12] before the NCPC was enacted, as justified at the time due to taxation purposes, and subject to pressures from the notary public community (Ciobanu & Nicolae, 2016, p. 227). Both have been unanimously criticized by practitioners and scholars in the field, and are still waiting to be repealed by the upcoming NCPC amendments.

4.1. Authenticated Form Requirement for Arbitration Agreements Pertaining to Real Rights Disputes

As a signatory of the New York Convention, Romania's arbitration law has always included the minimum requirement for the arbitration agreement from Article II, which is proposed also by the UNCITRAL Model Law, i.e., the written form. This is currently provided under Article 548, para. 1, NCPC: "(1) The arbitration agreement shall be concluded in writing, under the sanction of nullity (*nulitate* in Romanian). The written form requirement is fulfilled when the parties agree to resort to arbitration through an exchange of correspondence, irrespective of form, or through an exchange of procedural submissions."

Unfortunately, what has been added to this classic requirement is a segregation of certain types of arbitrable disputes (concerning real rights) for which the arbitration agreement should be concluded in the authenticated form in order to be considered valid and enforceable under Romanian law, as shown by the addition to Article 548, para. 2, NCPC: "(2) If the arbitration agreement concerns a dispute connected with the transfer of a property right and/or the creation of another right *in rem* related to immovable assets, the arbitration agreement must be authenticated by a notary public under the sanction of absolute nullity (*nulitatea absolută* in Romanian)."

Considering that the corresponding text on the form of the arbitration agreement relating to international arbitration (i.e., Article 1113, para. 1, NCPC) does not contain this addition, scholars and arbitration users have unanimously held that the authentication requirement is valid only for domestic arbitration (domestic disputes concerning real rights) (Leaua, 2016a, p. 103). In practice, with respect to the most often arbitrated construction agreements, the parties did not authenticate the entire agreement (due to the burdensome costs and formalities), but chose to conclude submission agreements for each type of dispute once it arose, notarizing only the said submission agreement (Leaua, 2016a, p. 101).

[12] Law no. 206/2012 approving Government Emergency Ordinance no. 44/2012 on amending Article 81 of Law 76/2012 on the implementation of Law no. 134/2010 on the Civil Procedure Code and amending other normative acts published in *Official Gazette* no. 762 of 13 November 2012, amending the initial text of the NCPC before the NCPC entering into force in January 2015.

4.2. Additional Scrutiny of Arbitral Awards Pertaining to Real Rights Before Being Allowed Enforcement

The other provision that impacts finality/enforcement of certain (significant) types of arbitral awards, which need to be "scrutinized" before a national court or notary public in order to become a court judgment or an authenticated notarial deed before being allowed enforcement is discussed below.

According to Article 615 NCPC: "An arbitral award is a writ of enforcement and shall be enforced exactly as a court judgment". This text was altered by Law no. 17/2017, adding a second line to Article 615 NCPC specifying: "The provisions of Article 603 para. (3) shall remain applicable."

Article 603(3) NCPC (in force since 2015) stipulates: "If the arbitral award refers to a dispute related to transfer of ownership right and/or establishment of another right *in rem* over a real property, the arbitral award shall be submitted to the court or the notary public in order to obtain a court judgment or, as the case may be, an authenticated notarial deed. After the court's or notary public's review of compliance with requirements, and after carrying out the procedures enforced by law, and after the parties have paid the real estate tax pertaining to the ownership right transfer, a Land Registry record shall be made and the relevant property shall be transferred and/or another right *in rem* shall be established over the said real estate. If the arbitral award is subject to judicial enforcement, previous formalities will be carried out by the court seized with the enforcement request."

Much to the Romanian arbitration community's regret, Article 603(3) NCPC is still considered "a text incompatible with arbitration" (Baias, 2016, p. 28) and "an unclear addition, lacking rigor, and which did not bring any positive element to the initial rule" (Leaua, 2016b, p. 192), having adverse effect on real estate arbitration (including FIDIC contracts), considering that such types of arbitral awards can no longer be registered directly in Land Registry Books (Baias & Leaua, 2012, pp. 30-51).

The text of Article 603(3) NCPC speaks for itself. It clearly degrades, and does so in a discriminatory fashion, an important category of arbitral awards ruling on matters of real estate ownership or other real rights. This provision deems such type of arbitral awards as lacking finality and enforceability until they are transformed and reviewed on form (?) or on the merits (?) by a national court, or by a notary public administering justice (?), converting the said arbitral award in an authenticated deed, with the said "requirements" subject to review entirely unregulated.

One wonders if the purpose of Article 603(3) NCPC was limited only to avoid arbitral awards ruling on real estate matters with tax evasion risks or to facilitate Land Registry registration process, could this not have been achieved by simply requesting arbitral tribunals in these cases to communicate the arbitral award to

the Tax or Land Register Authorities, or in any such simpler manner that would not affect the equivalency of enforceability between final and binding arbitral awards and national court judgements on real estate matters?

Only in 2022 did the High Court of Cassation and Justice (High Court) limit the above incongruent practice by interpreting the lacunar provisions of Article 603, para. 3, NCPC on "formalities checked" in an arbitral award concerning real rights to refer only to conditions on the form, and not on the merits (see: High Court of Cassation and Justice Decision no. 1/2022 [A] on uniform interpretation and application of Article 603, para. 3, Civil Procedure Code). However, it has failed to offer any further guidance on the other abnormalities of this provision.

As aptly argued by a reputed civil procedure author, hope remains that, until such procedural anomaly is repealed, the only practical manner is to apply Article 603(3) NCPC as restrictively as possible, by limiting all effects that such an "examination" may have on the substance and form of the arbitral award, and interpreting it as applicable only to *ad hoc* arbitration and not to institutionalized arbitration, on the ground that such latter proceedings have their particular procedural framework. Such a restrictive application would allow the notary public or enforcement court only the right to verify whether the corresponding taxation formalities have been followed for the respective real right transaction (Ciobanu & Nicolae, 2016, p. 227).

5. Recent Legislative Updates

Two recent legal developments from Romania are relevant for the world of arbitration, one concerning investment arbitration proceedings, and the other one relating to incorporation and organization of institutional arbitration in Romania, as follows.

5.1. Investment Arbitration Proceedings Involving Romania and Romanian State Authorities

On 16 April 2024, Law no. 101/2024 was passed approving two previous Government Ordinances on representing Romania or Romanian public institutions in ICSID arbitration proceedings or before other international arbitral tribunals, stating that such representation shall be reserved exclusively to the Ministry of Finance. This is valid also in the post-award stage for any potential court proceedings for recognition and enforcement in any other State. What is more, that same Law provides for an obligation of Romanian public authorities' management to take all legal measures necessary to ensure that all persons involved in the subject

matter to the international dispute (including dignitaries) shall participate in all meetings requested by the counsels representing Romania, to prepare the witness statements, take part in any oral hearings or sign any other relevant procedural act for each international litigation if Romania's counsels consider such information and documents useful for the defence.

5.2. NCPC Institutional Arbitration Definition Interpreted by the High Court

On 17 June 2024, the High Court ruled in favour of an opinion lodged by the General Prosecutor submitted to the High Court on 16 April 2024 requesting the High Court to interpret the legal requirements provided for by Article 616 (1) NCPC on the conditions for organizing institutional arbitration in Romania, stating that Romanian NGOs incorporated and functioning under Government Ordinance no. 26/2000 cannot have the organization of institutional arbitration as their scope, unless a separate law allows for such activity (see: Romanian High Court of Cassation and Justice, Decision no. 905/1/2024; Public Prosecutor's Office, Document No. 155/35TLLL-512024, 2024). This has led to the interpretation that Romanian entities that organize institutional arbitration are authorized to carry out such activities only by law and not by authorization of a national court incorporating an NGO.

On 26 August 2024, the detailed reasoning came from the High Court, published on the following day, backing up the same interpretation, i.e., that unless a specific law authorises an NGO to organize arbitration, it is not allowed to carry out such activities, leaving open the question of private NGOs organizing institutional arbitration, and also those of international institutional arbitration organizations with arbitrations seated in Romania.

In the author's opinion, such international institutions carrying out arbitrations seated in Romania should be covered by the original text of Article 616, para. 1 NCPC on the notion of institutional arbitration authorizing international institutions to handle institutional arbitration in Romania, since the High Court can only interpret and not add to a legal provision, as fundamental as the Civil Procedure Code is. Under Article 616, para. 1 NCPC: "(1) Institutional arbitration is the form of arbitration that is constituted and functions permanently under the auspices of an organization or a domestic or international institution or as an autonomous non-governmental public interest organization, pursuant to the law, based on its own rules, which are applicable to all the disputes that are brought before it for resolution under an arbitration agreement. The activity of the arbitral institution shall not have an economic character and shall not be for profit." (Vasile, 2024, pp. 169-177). Further reactions and developments from the arbitration community are expected.

6. Focus on Construction Arbitration

6.1. Construction Dispute Resolution in Romania – –an Ever-changing Landscape

Under the partnership with the European Union and to their express recommendation, under the Financing Memoranda entered by Romania with the European Commission for the grants extended under the Instrument for Structural Policies for Pre-accession for the period 2000-2002, Romania has adopted the conditions of contract issued by the FIDIC (International Federation of Consulting Engineers) – Conditions of Contract of 1987, and respectively First Edition, 1999, for its infrastructure projects.

Regardless of the contract form effectively adopted, all infrastructure contracts provided, with no amendments whatsoever, for a two-tiered dispute resolution clause essentially entailing adjudication and ICC arbitration.

The 2000-2006 period was a test period for the arbitration of disputes concerning contracts for public works, in the end of which the Romanian Government was able to draw two important conclusions: (i) statistically, state owned employers lost most of the disputes with private contractors settled by ICC arbitration, and (ii) arbitral disputes were cost-intensive when it came to arranging for the proceedings and the defence.

After Romania signed the Accession Agreement with EU on 25 April 2005, the Romanian Government decided to continue to use FIDIC contracts for their infrastructure works, nevertheless subject to an important set of amendments intended to privilege the public partner and limit the claim rights of private contractors, accordingly.

The first step in this regard was the signing of an Agreement between the Romanian Ministry of Economy and Finance ("MoEF") and FIDIC on 12 July 2006. Under this Agreement, FIDIC granted the MoEF non-exclusive rights to have the following documents translated into Romanian language and included in the domestic legislation: the Conditions of Contract for Construction, First Edition, 1999, and the Conditions of Contract for Plant and Design-Build, First Edition, 1999.

In 2010, Government Decision no. 1405/2010 ("GD 1405/2010") was issued, which was virtually a Romanian translation of the FIDIC General Conditions of Contract, First Edition of 1999, for construction contracts (the Red Book) or plant and design-build contracts (the Yellow Book). This enactment was followed in 2011 by Ministry Order 146/2011 ("OMoTI 146/2011"), providing a set of mandatory Particular Conditions of Contract including important amendments to the main terms and principles of the FIDIC suite of contracts.

This set of contractual conditions was in force between 2011 and 2017, and provided for two-tier dispute settlement: adjudication and arbitration under the ICC Rules by the Court of International Commercial Arbitration. This amendment to the arbitration clause alone led to numerous disputes regarding the arbitral institution effectively entrusted with dispute settlement. In fact, private contractors referred their disputes to the ICC, whilst public employers disputed jurisdiction of the ICC, claiming that the CICA CCIR would be in fact the competent arbitral institution "*under the ICC Rules*."

In July 2017, the Ministry of Transport and Infrastructure issued Order no. 600/2017 ("OMoTI 600/2017") repealing OMoTI 146/2011 and enforcing drastic amendments to the dispute settlement clause by completely removing the pre-arbitration adjudication clause and providing for the settlement of all disputes exclusively by national courts of law and, more specifically, by the commercial panel of the competent District Courts.

Consequently, between 2018 and 2023, all disputes arising from or in connection with the contracts incorporating the terms of OMoTI 600/2017 were referred to the national courts of law.

This exercise highlighted the fundamental flaws of that system, confirming the major concerns related to the settlement of construction disputes in litigation as opposed to arbitration.

In a nutshell, this experience demonstrated: (i) the judges' lack of specific experience with the settlement of such complex and document-heavy files, (ii) inadequacy of the civil procedural rules applicable to construction disputes as regards the time periods allowed in the NCPC for preparation of claims and defences, (iii) insufficient number of court approved experts capable to undertake proper delay and quantum analysis by using appropriate software typically used in the industry, (iv) impossibility to present such complex cases in public hearings where the parties are allowed only minutes to present their case as opposed to weeks in arbitral proceedings.

At the same time, litigation brought with it a series of major inconveniences for the contractors, pressed to debate aspects related to the confidential structure of their prices and their work methods in public hearings, considering that, under Romanian law, court filings and trial testimony are generally open to competitors in public court hearings. Furthermore, given that prior to 2018 all construction disputes had been settled in ICC arbitrations, and considering the confidential character of the awards issued in such proceedings, the lack of publicly available relevant Romanian construction case law led to even further pressures, confusion and lack of predictability, such that, in most cases, national court judges tended to identify quick "exits" such as procedural grounds to deny the file in an early stage, before entering any merits, in order to avoid ruling on such complex matters.

Statistically, during this period, unless technical expertise was allowed, most cases were ruled in favour of the public employer.

But the life of OMoTI 600/2017 was to be short, only 6 months, considering that, in January 2018, against the many grievances generated by the amendments laid down in OMoTI 600/2017, the Government issued the Government Decision no. 1/2018 ("GD 1/2018") reintroducing arbitration as a means of dispute settlement, whilst expressly providing for the exclusive jurisdiction of CICA CCIR, based in Bucharest, and for complete elimination of the pre-arbitral adjudication stage and its replacement with optional mediation.

Even though this seemed to provide a better and more adequate procedural framework for construction dispute settlement, enlarging significantly the parties' freedom regarding the administration of evidence, presentation of their cases, and, most importantly, the timeline for the procedure, construction dispute settlement in Romania still suffers from the lack of an adequate adaptation of the main principles of delay and quantum expertise (enshrined in the common-law based SCL Protocol on Delay and Disruption – which is extensively used as a reference in current arbitration procedures) to the civil law principles of contractual liability and evaluation of damages and other remedies (such as the extension of the Time for Completion).

Nevertheless, this regulatory framework was soon to be revisited, as the statutory conditions of contract included in GD 1/2018 – were further amended in March 2022, by Government Decision 375/2022 ("GD 375/2022").

This amendment introduced the right of the contracting authorities (only) to choose between litigation and arbitration, provided that such option was clearly set out in the Tender Documents. This amendment referred to Article 53 of Law 101/2016 whereby the *civil panels* of the relevant District Courts were set as the national competent courts to settle construction disputes in connection to these contracts.

This provision, as introduced by GD 375/2022, breaches the provisions of Government Ordinance 92/1997 on direct investments in Romania, as ratified by Law 241/1998, which provides in Article 4: "(1) The investments made in Romania, as well as the possession, use and disposal of a property benefit from the guarantees and facilities provided by this Emergency Ordinance. (2) Investors in Romania shall mainly benefit from the following guarantees and facilities: […] g) the right of investors to choose the competent courts of law or arbitration for the settlement of any disputes." (Government Emergency Ordinance, no. 92 of 30 December 1997 on promoting direct investments, Article 4).

We are not aware of any actions taken by international contractors present in the Romanian market to request in court cancellation of GD 375/2022, despite an express right to do so.

In September 2022, Law 101/2016 was itself amended by Law 208/2022 to provide that any disputes arising from or in connection with public procurement contracts (including construction disputes) were to be referred to *the contentious administrative panel* of the competent District Courts.

In this case, in addition to the main concerns and inconveniences related to litigating in relation to construction disputes described above, in international projects, generally, local courts are not always trusted to be unbiased in their determination of disputes. With the jurisdiction transferred from the *civil panels* to the *contentious administrative panels* of the District Courts such concerns are even more likely to rise.

In addition, rather than consolidating the experience already gained by the civil panel court judges with settlement of complex construction cases (which could have been a step towards establishing specialized construction courts), the transfer of jurisdiction to the contentious administrative panels adds further unpredictability to the already shaking ground of construction litigation in Romania.

7. Conclusion. Current Status of Construction Disputes Jurisdiction in Romania

While construction disputes are most adequately settled in international arbitration, the fluctuating legislative framework in Romania still does not seem to have decided firmly which way to take, and leaves, in practical terms, the decision regarding the jurisdiction and the related procedural framework in the exclusive hands of the public employer (entitled to choose between national courts or CICA CCIR institutional arbitration) - seeding uncertainty and lack of predictability for private contractors.

Regardless of whether construction dispute settlement will continue to be referred to international arbitration administered under the Rules of CICA CCIR in Bucharest, the fundamentals of construction disputes still require the attention of the relevant fora.

While the construction forms of contract originally imported in Romania in the early 2000s were based on common law principles, and came along with a series of customary approaches typical for this legal system, no steps have been taken by the relevant government authorities to adapt these principles to the Romanian local civil law legislation.

Despite the formal abandonment of the FIDIC Conditions in 2018 by the enactment of GD 1/2018, Romania still refers, as part of these conditions, to concepts with no equivalent in the Romanian legal system and to causation systems that are not confirmed as prevailing by the existing civil law doctrine and case law on contractual liability.

Similarly, common law trained experts who assist parties in arbitration procedures in relation to GD 1/2018 based contracts still use the common law principles in determining the compensable delays and disruptions and evaluating time-related costs in delay and disruption claims.

For all the above reasons, the authors believe that clear measures should be adopted shortly to bring clarity and predictability in relation to construction dispute settlement by considering all related specifics. Until and unless specialized courts and specific procedures are established to settle construction cases, construction disputes should be referred to international arbitration as opposed to litigation.

In addition, the Romanian professional associations should get more involved in adapting the current methods for evaluating the impact of delays and disruptions in construction contracts to the civil law principles or in developing alternative assessment methods in light of the civil law jurisdiction.

De lege ferenda, a new and more robust form of statutory contract must be considered by the Romanian legislator alongside a Construction Code regulating (at the very least) the situation of public construction projects. Such codification should harmonize all relevant provisions related to design - including potential changes to the feasibility studies/tender design - permitting, price structure, archaeology, expropriation, utility relocation, time extensions and additional time-related payments, and introduce clear procedures for variations within the limits and with due observance of the public procurement legislation.

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