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Trends and Developments

Contributed by Zamfirescu Racoti Vasile & Partners Attorneys at Law

Zamfirescu Racoti Vasile & Partners Attorneys at Law is a leading law firm in Romania, assuring both business and dispute resolution support and representation. ZRVP manages the biggest national and international arbitration portfolio in Romania, handling arbitrations conducted under the auspices of numerous arbitral bodies or rules, including the ICC International Court of Arbitration Paris (ICC), the London Court of International Arbitration (LCIA), the Camera Arbitrale Nazionale et Internazionale di Milano (CAM), United Nations Commission on International Trade Law (UNCITRAL), and the International Cen-

tre for Settlement of Investment Disputes (ICSID). ZRVP also offers legal assistance and representation services in multimillion-value disputes held under the auspices of The Court of International Commercial Arbitration attached to The Chamber of Commerce and Industry of Romania. The practice includes a wide array of disputes in the following areas: construction and infrastructure projects, energy, privatisation, engineering, insolvency, maritime law, media, banking and finance, distribution and transport, production, real estate and others.

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Cosmin Vasile is managing partner of Zamfirescu Racoti Vasile & Partners and head of the firm's Arbitration Practice Group. He has extensive experience of more than 15 years in handling cross-border disputes and boasts already an outstanding track-record of around 100 international arbitration proceedings as counsel and arbitrator conducted under various laws and sets of arbitration rules. Cosmin has successfully co-ordinated an impressive number of significant and mission critical disputes for his clients, often in the glare of media attention. As one of the leading experts in construction, capital markets, privatisation and energy arbitrations in Romania, Cosmin is called upon to provide legal counsel to both government institutions and private companies. In court, Cosmin has an impressive record, being popular among major domestic and international corporations for advice in high-profile commercial, administrative-contentious and public procurement disputes.



Alina Tugearu is a partner and co-ordinator of the Intellectual Property Litigation practice, and specialises in civil and commercial litigation, with a focus on international arbitration and administrative/contentious disputes. She has solid experience in trying arbitration cases before national and international arbitral panels in arbitration proceedings held under the auspices of the ICC, LCIA, VIAC, the Court of International Commercial Arbitration (Bucharest) and under the UNCITRAL arbitration rules in ad hoc arbitration, in complex projects involving construction disputes, including matters regarding FIDIC contracts, post-privatisation-related disputes and energy-related disputes.

General

In an era of continuous change, Romania is one of the most dynamic markets when it comes to international arbitration disputes.

International arbitration has been gaining significant ground in Romania for some time now, with an increase in its use resulting predominantly from disputes related to the various infrastructure projects started by the public authorities in Romania with the help of European financing (from pre-adhesion and post-adhesion funds). International arbitration is based on the International Federation of Consulting Engineers (FIDIC) General Conditions of Contract, which includes the standard International Chamber of Commerce (ICC) arbitration clause. At one stage, a government decision was issued to regulate the use of the FIDIC General Conditions of Contract against the particularities of the infrastructure works conducted in Romania, which led to the adoption of a slightly adapted version of the FIDIC Condition of Contract (both in terms of General Conditions and Particular Conditions) which was to be used mandatorily in large transport-infrastructure projects financed from public funds.

Subsequent amendments in 2018 to the national legislation regulating a broader category of publicly financed projects subject to public procurement procedures has led to the replacing of the FIDIC Conditions of Contract by new forms of public procurement contracts that are mandatory for public works. The new conditions of contract bring significant changes to the claims/dispute resolution procedure, including the removal of the Dispute Adjudication Board (DAB) from the contractual mechanism for dispute settlement and the referral of the dispute to the national arbitration court – the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA) as the arbitral institution within the standard arbitration clause.

Besides under the CICA rules, international arbitration disputes in Romania are currently carried out under the auspices of the ICC, the Vienna International Arbitral Centre (VIAC), the London Court of International Arbitration (LCIA), and the Swiss Chamber of Commerce (SCC), but also under German and Italian institutions of arbitration (the German Institution of Arbitration (DIS), the Court of Arbitration attached to the German-Romanian Chamber of Commerce and Industry (AHK), mainly used by German/Italian companies and investors).

Against this background, it is self-evident that both international and domestic arbitration is well-established in Romania, with now a steady-paced growth in numbers of arbitration cases per year.

Key Industries

The main sector experiencing international arbitration activity has been, and continues to be, the construction industry. According to unofficial statistics covering the first half of 2019, more than 50% of the existing international and domestic arbitration cases relate to construction disputes. Besides the publicly financed construction infrastructure projects where arbitration is automatically applicable, there is a visible tendency to resort to arbitration as a preferred method for the settlement of the most various construction-related disputes, due to its generally accepted advantages.

There are also other industries opting for arbitration in view of settling various contractual disputes, such as, for example, energy-related disputes, but the extent to which resort is made to arbitration is not even close to the level of utilisation in construction-related disputes.

New Arbitration Rules Adopted by the Most Frequently Used International Arbitration Institution

The results of the 2018 Queen Mary Survey, which highlighted time and cost as the most fervid complaints respondents had regarding arbitration, has led to lively debates amongst practitioners, including with regard to the need for reform in domestic and international arbitration. In order to address these issues, a series of measures have been implemented by major international arbitral institutions in recent years in order to counteract significant delays as well as excessive expenses.

The most frequently used and important international arbitration institution in Romania, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA), has adopted a new set of modern rules starting from 1 January 2018. This significant revision aligns the new rules to the existing rules of the ICC and other similar institutions and makes the arbitral proceedings more flexible for the parties, enabling the parties to dispose of their dispute in a more efficient manner. This much-awaited upgrade follows a series of efforts to revive the flexibility and efficiency of arbitration in Romania after previous versions of the Rules severely damaged the principle of party autonomy. This counts as one step further in the endeavour to make this method of disputes settlement more appealing to corporate clients, an outcome thoroughly targeted by the young team of professionals managing the Bucharest-based Court of International Commercial Arbitration starting with 2015.

The rules have now been simplified and a series of concepts from the rules of the most established international arbitral institutions have been implemented (eg, emergency arbitrator, bifurcation, partial awards etc), in response to the needs of those corporate clients most familiar with international arbitration. Such a change is expected to help maintain the

steady growth trend of national and international arbitration before the Court of International Commercial Arbitration.

The good news is that, less than a year after its adoption, there is a growing tendency for recourse to the Emergency Arbitrator, an institution which was neither known nor used in Romania before the 2018 revision of the CICA Rules (except for maybe isolated occasions whereby Bucharest in Romania was the place of arbitration in an ICC arbitration). The Emergency Arbitrator is provided for under Annex II of the 2018 Rules. The President of CICA decides upon the jurisdiction of CICA and proceeds to appoint an emergency arbitrator within 48 hours of receipt of the application. After two days following his or her appointment, the emergency arbitrator establishes a procedural timetable to be followed by the parties, with a decision being rendered within ten days of his or her designation. One particularity pertains to the impossibility of *ex parte* proceedings, the request for an emergency arbitrator having been communicated to all the parties in dispute.

Specialisation of Domestic Courts in Settling Arbitration-related Disputes

Domestic courts have been constantly engaged in settling arbitration-related disputes (eg, claims for setting aside arbitral awards or requests for interim measures in relation to pending arbitration proceedings). However, as the most important international arbitration cases relate to disputes stemming from publicly financed projects subject to public procurement procedures (which have the legal nature of administrative contracts), for the past decade the settlement of these claims (including the arbitration-related disputes) has been affected by a legislative ping-pong regarding jurisdiction to settle such claims. Jurisdiction thus oscillated periodically from the contentious administrative sections to the commercial/civil sections of the domestic courts and vice-versa. This back-and-forth movement evidently affected the possibility of the domestic courts to specialise properly in settling such complex disputes.

However, starting with mid-2018, an important reform of the contentious administrative and public procurement laws was enacted which, amongst other, has settled the jurisdiction issue once and for all and ruled that all disputes related to execution of the administrative contracts are to be settled by the commercial/civil sections of the courts. This includes claims for the setting-aside of arbitral awards issued in respect of administrative contracts which include an arbitration clause or requests for interim measures in relation to related pending arbitration proceedings. The clear advantage is that the commercial sections have thus had the possibility to specialise in settling complex construction disputes based on the FIDIC Conditions of Contract or variations thereof, which in its turn led to a stabilisation of the related case law and therefore to predictability regarding the potential solutions to be adopted by the domestic courts.

BARD

2019 has been a prolific year also in terms of exchanges of professional experience in international arbitration. For the first time, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has organised the Bucharest Arbitration Days (BARD), an arbitration conference which promises to be the precursor of more to come in the future.

The conference has tackled the issue of a need for a reform in international arbitration, against the backdrop of the landmark European Court of Justice ruling in the Achmea case and of the trends of unveiling confidentiality currently impacting the international arbitration scene. The two days dedicated to the event have set the perfect scene for academic debate and professional exchange, to the benefit of the participants who got the chance to pick the brains of keynote speakers coming from the most renowned international arbitration practices in the world. Amongst the international arbitration specialists present were Prof Loukas Mistelis – Director, School of International Arbitration and Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration, Queen Mary University of London and Dr Markus Burgstaller, an international arbitration partner at Hogan Lovells in London, who acted for the Slovak Republic in its successful challenge of a EUR22 million arbitration award in favour of Achmea BV, a Dutch insurer, whereby the Court of Justice of the European Union (CJEU) ruled that the arbitration clause in question was incompatible with EU law.

This conference is just one of the many channels through which Romanian companies involved in international arbitration have the possibility to interact and become acquainted with the trends and developments in international arbitration. The presence of Romanian law firms in the main directories covering international arbitration is proof that Romania is already a major player on the market, setting the trends and developments.

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