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# International Arbitration 2022

Romania: Law and Practice and Trends & Developments  
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# ROMANIA

## Law and Practice

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## 1. GENERAL

### 1.1 Prevalence of Arbitration

International arbitration has been gaining significant ground in Romania for some time now. Its increasing use predominantly results 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). The contracts concluded for these projects follow the International Federation of Consulting Engineers (FIDIC) General Conditions of Contract, which include 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.

International arbitration is well established in Romania, with a more or less constant rise in the number of arbitration cases per year. The majority of these involve construction disputes, but various other contractual disputes are also referred to international arbitration, including energy-related disputes.

### 1.2 Impact of COVID-19

Arbitration in Romania has experienced a steady growth since 2014.

An even steadier growth of international arbitration is expected, given that the most frequently used international arbitral institution in Romania, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA), adopted a new set of rules starting from 1 January 2018 which align with the rules of the ICC and other similar institutions, such as the London Court of International Arbitration (LCIA), and which make the arbitral proceedings more flexible for the parties.

International arbitration is currently carried out under the auspices of the ICC, the Vienna International Arbitral Centre (VIAC), the LCIA and the Swiss Chamber of Commerce (SCC), but also under those of German and Italian institutions of arbitration (the German Arbitration Institute (DIS), and the Court of Arbitration attached to the German-Romanian Chamber of Commerce and Industry (AHK), mainly used by German/Italian companies and investors).

The COVID-19 pandemic did not have a major impact on the use of international arbitration or on the course of proceedings. The written phase of the proceedings carried on as planned; if the pandemic affected the parties' possibilities to gather the necessary information and documents, extensions for submitting the memorials were granted, usually following the parties' agreement, while face-to-face hearings were replaced by video conferences.

### 1.3 Key Industries

As mentioned in **1.1 Prevalence of Arbitration**, the main sector experiencing international arbitration activity has been and continues to be the construction industry. This trend is due to the fact that infrastructure projects started by the public authorities in Romania with the help of European financing are concluded in agreements based on the FIDIC General Conditions of Contract, which include the standard ICC arbitration clause. At one stage, a government decision was issued to regulate the use of the FIDIC General Conditions of Contract.

There are no particular industries experiencing decreased international arbitration activity in 2021–22 as a result of the COVID-19 pandemic. In fact, the legislative measures adopted during the pandemic generated new arbitration files.

## 1.4 Arbitral Institutions

The most frequently used international arbitral institutions in Romania are (i) the ICC, mostly for international arbitrations seated in Romania or disputes with an international component, and (ii) CICA, mainly for local arbitral disputes.

No new arbitral institutions have been established in Romania in 2021–22.

## 1.5 National Courts

There are no national courts which only hear disputes related to international or domestic arbitration matters. The national courts' intervention is limited to adjudicating claims aimed at removing impediments occurred in organising or during the arbitration (eg, aiding in the process of appointing arbitrators as detailed in **4.3 Court Intervention**, challenging arbitrators) or other claims such as issuing interim measures necessary to aid the arbitral proceedings or granting protective measures and interim relief, at the parties' request, before or during the arbitral proceedings. Such claims are adjudicated by the local tribunal whose jurisdiction covers the seat of the arbitration. National courts – namely the Court of Appeal whose jurisdiction covers the seat of the arbitration – also adjudicate the set-aside proceedings.

## 2. GOVERNING LEGISLATION

### 2.1 Governing Law

The main body of law governing international arbitration is included in the Code of Civil Procedure, which came into force on 15 February 2013. Title IV of Book VII (International Arbitration and the Effects of Foreign Arbitral Awards) sets out specific legal provisions regarding international arbitration and the effects of foreign arbitral awards, which are supplemented by a general set of provisions included in Book IV

of the Code of Civil Procedure (On Arbitration); these are applicable to international arbitration whenever the parties have not agreed on certain aspects by means of the arbitration agreement and have not vested the arbitral tribunal with settling those aspects either.

Romania does not have UNCITRAL Model Law-based legislation. However, the institutions within the newly enacted legislation follow the lines and spirit of the Model Law, but a specific analysis of each provision would have to be performed in order to determine the exact influence of the Model Law.

### 2.2 Changes to National Law

As the applicable legislation is relatively recent – the new Code of Civil Procedure was enacted on 15 February 2013 – no significant changes have been implemented in regard to international arbitration law and no reforms are expected in the near future. Discussions are ongoing around the need to broaden the scope of arbitrability of disputes. Similarly, the new CICA Rules – which align with the rules of ICC and other similar institutions such as the LCIA – entered into force starting from 1 January 2018, being applicable to disputes started after this date under the purview of CICA.

## 3. THE ARBITRATION AGREEMENT

### 3.1 Enforceability

Under Romanian law, a valid arbitration agreement must be concluded in writing. However, the Code of Civil Procedure broadly defines this requirement to include electronic communications or any means of communication establishing the text of the agreement.

As far as other requirements than the form of the contract (such as capacity to conclude agree-

ments, consent, etc), the arbitration agreement is valid provided that it fulfils the validity requirements stipulated under one of the following laws:

- the law agreed by the parties;
- the law governing the object matter of the dispute;
- the law applicable to the contract comprising the arbitration clause;
- the Romanian law.

### 3.2 Arbitrability

A dispute can be referred to international arbitration provided that:

- it is of a patrimonial nature, meaning that the dispute refers to an economic relation which can be evaluated in money;
- it deals with rights the parties may freely dispose of (this excludes, among others, disputes over personal civil status and legal capacity, inheritance and family matters, and labour law disputes); and
- it falls outside the exclusive jurisdiction of the courts pursuant to the law of the seat of arbitration.

Under these circumstances, exempt from arbitration are any disputes which are not of a patrimonial nature, such as civil status litigations, litigations in respect of capacity, inheritance litigations and family litigations, as well as litigations regarding rights that the parties cannot dispose of (for example, in matters of labour and employment litigation where the law expressly provides that a party cannot waive the legal rights established in their favour).

While the procedural rules regulating domestic proceedings may still occasionally raise questions regarding the capacity of public and state-owned bodies to conclude arbitration agreements, no such limitations are imposed in respect of international arbitration. Thus, interna-

tional arbitration parties may not seek to evade arbitration to which they have previously agreed by invoking internal law provisions that purport to prohibit entering into arbitration agreements.

### 3.3 National Courts' Approach

National courts in Romania recognise arbitration agreements and their effects. As far as is known, there are no cases of anti-arbitration injunctions or any other similar form of court denial of arbitration agreements.

Provided that the arbitration agreement meets the legal requirements of validity and 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.

The national courts usually determine the law governing the arbitration agreement in case they are vested with a dispute in respect of which an arbitration agreement has been concluded and at least one of the parties invokes the existence of the arbitration clause. If the arbitration clause is valid, the national courts decline their jurisdiction to a national arbitral institution or reject the claim as not being of the Romanian state courts' competence in case the competence belongs to an international institution. If the arbitration clause is null or inoperable, the national courts will retain jurisdiction. To determine the validity of the arbitration clause, the courts need to determine the law governing the arbitration agreement, which is the law chosen by the parties. In the absence of the parties' agreement in this respect, the courts will apply the provisions of international private law, depending on the object of the agreement, in order to determine the applicable law.

### 3.4 Validity

The Code of Civil Procedure expressly provides for the separability of arbitration agreements, to the effect that the validity of the arbitration

clause is independent from the validity of the contract containing it.

## 4. THE ARBITRAL TRIBUNAL

### 4.1 Limits on Selection

Party autonomy to select arbitrators is recognised and well established in Romania. The parties are free to agree whether disputes should be submitted to a sole arbitrator or an arbitral tribunal and also to select the arbitrators. The Code of Civil Procedure provides for the nullity of an arbitration clause which allows one of the parties privileged participation in the nomination of the arbitrator(s) or which provides a party's right over the other party to nominate the arbitrator(s) or to have more arbitrators than the other party.

### 4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, the Code of Civil Procedure provides that the interested party/parties may request the local courts to appoint the arbitrators.

The new CICA Rules provide that where the parties have not agreed on the procedure for the nomination of the arbitrator(s) or if the procedure failed, the nomination or the appointment of the arbitrator(s), as the case may be, shall be made as follows.

- Where the arbitral tribunal is to consist of a sole arbitrator, the parties shall be given 30 days to jointly nominate the arbitrator. If the parties fail to nominate the arbitrator within this time, the President of the Court shall make the appointment within five days.
- Where the arbitral tribunal is to consist of three arbitrators (which is also the default option where the parties have not agreed on the number of arbitrators), the claimant and the respondent shall each nominate an arbi-

trator and the third – the chairperson – shall be elected by those two arbitrators. Where a party fails to nominate the arbitrator within ten days, the President of the Court shall make the appointment within five days. Where the nominated arbitrators do not agree within five days on the person who shall act as chairperson, the President of the Court shall make the appointment within the same time limit.

- Where there are multiple claimants or respondents and the dispute is referred to three arbitrators, the claimants jointly and the respondents jointly shall each appoint one arbitrator.

### 4.3 Court Intervention

The Code of Civil Procedure provides that local courts, namely the tribunal whose jurisdiction covers the seat of arbitration, may intervene in the selection of arbitrators by appointing an arbitrator or the presiding arbitrator only in cases where the parties do not agree on the appointment of the sole arbitrator or a party fails to nominate an arbitrator or, in the case of a three-panel arbitral tribunal, where the two arbitrators do not agree on whom they should appoint as presiding arbitrator. The local courts render a decision regarding the appointment of the arbitrators after hearing the parties.

### 4.4 Challenge and Removal of Arbitrators

According to the Code of Civil Procedure, the parties may agree on a procedure for challenging the appointment of an arbitrator and replacing the arbitrator either by means of the arbitration agreement or subsequently. In the absence of an agreement, the parties may ask the local courts, namely the tribunal whose jurisdiction covers the seat of arbitration, to issue on the challenge or removal of arbitrators.

Pursuant to the Code of Civil Procedure, the arbitrator may be challenged on the following grounds:

- the arbitrator does not meet the qualifications provided in the arbitration agreement;
- there is a reason of challenge provided for in the rules of arbitral procedure agreed on by the parties or, in the absence of an agreement, by the arbitrators;
- the circumstances cast a legitimate doubt regarding the arbitrator's independence and impartiality.

A party may challenge an arbitrator whom it has appointed only for reasons of challenge occurring after the appointment.

Otherwise, for example, if the arbitration agreement provides for institutional arbitration, the rules of the arbitral institution will govern the whole procedure and – in the majority of cases – will cover any issues related to the challenge or replacement of arbitrators.

The CICA Rules provide for similar, yet more detailed, grounds of challenge, as detailed below.

- Cases of incompatibility, namely in case the arbitrator finds himself or herself in one of the situations of incompatibility provided for judges in the Code of Civil Procedure – for example, the arbitrator previously expressed his or her opinion in relation to the solution in the dispute he or she was appointed to settle, there are circumstances which justify the doubt that he or she, their spouse, ancestors or descendants have a benefit related to the dispute, his or her spouse or previous spouse is a relative of a maximum of the fourth degree with one of the parties, etc – or for the following reasons which cast a doubt on the arbitrator's independence and impartiality:

- (a) the arbitrator does not meet the qualifications or other requirements regarding arbitrators provided in the arbitration agreement;
- (b) the arbitrator is a partner, has a cooperation relationship with, or is a member of the management bodies of an entity without legal personality, or of a legal person that has an interest in the case, or is controlled by one of the parties, or is under joint control together with this party;
- (c) the arbitrator has employment or work relations with one of the parties or with a legal person controlled by one of the parties, or is under joint control together with this party;
- (d) the arbitrator provided advisory services to one of the parties, assisted or represented one of the parties or testified in the preliminary stages of the dispute.

#### **4.5 Arbitrator Requirements**

Under both the Code of Civil Procedure and the CICA Rules, the arbitrator is required to be independent and impartial and to disclose any conflicts of interest.

According to the Code of Civil Procedure, a person aware of a challenging ground regarding himself or herself shall be bound to inform the parties and the other arbitrators before accepting the office of arbitrator, or should such grounds occur after his or her acceptance of the office, as soon as he or she has knowledge of them. In this case, the arbitrator may not participate in the arbitral proceedings unless the parties, apprised thereof, notify the arbitral tribunal in writing that they do not intend to challenge the arbitrator. Even in this particular case, the arbitrator has the right to refrain from adjudicating the dispute.

In a similar manner, according to the new CICA Rules, within five days from the date when the appointment proposal was communicated to

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him or her, the arbitrator shall fill in and sign the statement of acceptance, independence, impartiality and availability, where he or she shall indicate any circumstances that may give rise to justifiable doubts with respect to his or her impartiality or independence. An arbitrator shall immediately inform the parties and the other arbitrators in writing if any circumstances that may give rise to justifiable doubts as to the his or her impartiality or independence arise during the course of the arbitration.

In common with other jurisdictions, Romanian law does not explicitly define these concepts but merely provides for the general principle, the case law being left to consider these matters on a case-by-case basis.

## 5. JURISDICTION

### 5.1 Matters Excluded From Arbitration

Please see **3.2 Arbitrability**.

### 5.2 Challenges to Jurisdiction

The principle of competence-competence is fully recognised under Romanian arbitration law. Once a dispute has been referred to arbitration, the arbitral tribunal is competent to decide on its own jurisdiction – and will do so even if identical disputes are pending before the courts or other arbitral tribunals, except if the arbitral tribunal finds it appropriate to suspend the proceedings. Further, the arbitral tribunal's ruling on jurisdiction may not be challenged before the courts during the arbitral proceedings, but only by means of a claim to set aside the arbitral award.

### 5.3 Circumstances for Court Intervention

A state court vested with a dispute in respect of which an arbitration agreement has been concluded will check its own competence; if at least one of the parties invokes the existence of

the arbitration clause, it will reject the claim as not being of the Romanian state courts' competence.

The state courts will also adjudicate claims to set aside the final arbitral award which may be grounded on the lack of jurisdiction of the arbitral tribunal rendering the award.

If the arbitral tribunal in an international arbitration matter decides that it lacks competence to decide on the matter, such a decision shall be subject to a claim to set aside the decision.

### 5.4 Timing of Challenge

The arbitral tribunal's ruling that it has jurisdiction may not be challenged before the courts during the arbitral proceedings. Such decision may be subject to judicial review by state courts only by means of a claim to set aside the final arbitral award. Therefore, the arbitration law provides no procedural grounds allowing a party to ask the local courts, during the arbitral proceedings, to determine whether an arbitral tribunal has jurisdiction.

### 5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Romanian law does not provide for the concepts of deferential or de novo as standards of review. Matters of admissibility and jurisdiction may be addressed by means of a set-aside claim filed against the arbitral award.

### 5.6 Breach of Arbitration Agreement

A state court vested with a dispute in respect of which an arbitration agreement has been concluded will check its own competence and will declare that it lacks competence if at least one of the parties invokes the existence of the arbitration clause. In the case of a domestic arbitration, the court will decline its jurisdiction to the arbitral institution mentioned in the arbitration agreement or will reject the claim as not being

of the Romanian state courts' competence in the case of ad hoc arbitration. In the case of an international arbitration, the court will admit the lack of competence plea and will reject the claim as not being of the Romanian state courts' competence.

The court will retain its jurisdiction in settling the dispute only in three exceptional situations, namely:

- if the respondent has submitted its defence without invoking the existence of the arbitration agreement;
- if the arbitration clause is null or inoperable;  
or
- if the arbitral tribunal cannot be constituted from causes clearly attributable to the defendant in the arbitration.

If none of the three exceptions is applicable, the court will admit the lack of competence plea.

### **5.7 Jurisdiction Over Third Parties**

As a rule, Romanian law does not allow for an arbitral tribunal to assume jurisdiction over individuals or entities that are not part of an arbitration agreement.

However, since the entering into force of the Code of Civil Procedure in 2013, a new provision was introduced stating that third parties may take part in arbitral proceedings following the general civil procedure rules on this aspect, but only if such third party and all the parties agree. Only an accessory joinder claim – meaning that a third party bearing an interest voluntarily joins an ongoing procedure to support one of the parties' positions – is admissible, even in the absence of the consent of all the other parties. However, according to the new 2018 CICA Rules, even the accessory joinder claim is admissible only if all the parties agree.

Matters such as the extension of the arbitration clause to non-signatories, either following direct involvement in the negotiation and/or performance and/or termination of a contract containing an arbitration clause, the “group of companies” doctrine, or other issues of debate in international arbitration regarding the ambit of the arbitration agreement, are subject to debate according to case law but are not addressed in any way by Romanian law.

The arbitration law does not distinguish between foreign or domestic third parties – thus, the provisions are applicable to both of them.

## **6. PRELIMINARY AND INTERIM RELIEF**

### **6.1 Types of Relief**

During the arbitration proceedings the arbitral tribunal may grant, at the parties' request, protective (conservatory) measures and interim relief, as well as acknowledge matters of fact, unless the contrary is stipulated in the arbitration agreement. This provision is similar both in the Code of Civil Procedure and in the rules of the main arbitral institution (CICA) – however, neither defines, except for protective measures, what types of relief can be awarded on a provisional basis. Despite this, taking into account the general civil procedure rules, as an interim remedy, the interested party may apply for freezing measures on goods, provisional measures or conservatory measures regarding evidence (ie, acknowledgement of matters of fact).

The new CICA Rules in force from 1 January 2018 provide for the possibility of the arbitral tribunal to bifurcate the proceedings and render partial awards as case management techniques aimed at increasing the efficiency of the proceedings by reducing the duration and costs of the arbitration.

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The protective measures and interim reliefs are merely recommended for the parties as the award issued by the arbitral tribunal is not enforceable under Romanian law. However, according to Article 1117 of the Code of Civil Procedure, the arbitral tribunal can request national courts to enforce the award regarding the protective measures and interim relief measures.

## 6.2 Role of Courts

If the parties do not comply voluntarily with the interim relief rendered by the arbitral tribunal, the arbitral tribunal may request the involvement of the state courts.

The local tribunal whose jurisdiction covers the seat of arbitration may grant protective measures and interim relief, at the parties' request, before or during the arbitral proceedings. Since a similar order for protective measures or interim relief issued by the arbitral tribunal is not enforceable under Romanian law, the courts play a significant role in obtaining such measures and are preferred by the parties for the reason that the courts issue enforceable decisions.

### Interim Relief in Aid of Foreign-Seated Arbitrations

Under Romanian law, there are no express provisions regarding the possibility of the national courts to grant interim relief in aid of foreign-seated arbitrations. The Code of Civil Procedure only regulates the possibility of granting such relief with respect to arbitration seated in Romania.

However, Book VII of the Code of Civil Procedure – International Civil Trial, Article 1075 – provides that national courts are competent to grant interim relief regarding individuals and goods located in Romania at the moment of the request, even if, according to national law, the Romanian courts are not competent to render an award with respect to the merits of the case.

Although the legal provisions do not directly address international-seated arbitrations, they can be included in the notion of international civil trial.

### Emergency Arbitrators

The Code of Civil Procedure contains no provisions with respect to emergency arbitrators.

The 2018 CICA Rules enable the parties to resort to an emergency arbitrator when they are in need of interim relief before the constitution of the arbitral tribunal. According to Article 4 of Annex 2 of the CICA Rules, upon receiving the request, the President of the Court will appoint an emergency arbitrator within 48 hours, who will deliver a decision in a maximum of ten days.

The emergency arbitrators can allow the same types of interim relief granted by the constituted arbitral tribunal: freezing measures on goods, provisional measures or conservatory measures regarding evidence (ie, acknowledgement of matters of fact); likewise, the protective measures or interim relief are not enforceable under Romanian law.

As mentioned above, if the parties do not comply voluntarily with the interim relief rendered by the emergency arbitrator, the emergency arbitrator may request the involvement of the state courts.

## 6.3 Security for Costs

The Code of Civil Procedure does not include the concept of security for costs.

Security for costs is an interim measure, although it has never been defined as such, which in practice has been granted only by arbitral tribunals. As far as is known, no Romanian court of law has ever been requested to render a decision on such a measure.

## 7. PROCEDURE

### 7.1 Governing Rules

The arbitration procedure is governed by the Code of Civil Procedure, which contains both substantive law provisions and procedural provisions with respect to arbitration.

Pursuant to the Code of Civil Procedure, parties may establish the procedure of arbitration as such or by reference to the set of rules applicable to a particular arbitral institution. The parties may also choose any procedural law to govern the procedure of arbitration. If the parties fail to establish such a procedure, the arbitral tribunal will do so.

Regardless of the chosen procedure of arbitration, the arbitral tribunal has to guarantee certain fundamental principles such as parties' equality and their right to be heard.

### 7.2 Procedural Steps

Romanian law does not provide for any specific procedural steps in respect to filing an arbitration claim.

In order to commence arbitration, a party must submit to the arbitral tribunal its written request for arbitration. If the parties have agreed on ad hoc arbitration, the first step is to establish the composition of the arbitral tribunal. If the composition is not stipulated in the arbitration agreement, the party requesting arbitration shall invite the other party in writing to proceed with the procedure to appoint the arbitrators. Where the arbitration is held under the purview of an arbitral institution, the parties shall follow the procedural rules of that institution.

In the majority of cases (including before CICA), the party that wishes to commence arbitration must first file the request for arbitration with the

secretariat of the arbitral institution. A fixed filing fee is generally required.

The parties arbitrating under FIDIC rules undergo a multi-tier dispute resolution procedure (DAB procedure, 56 days amicable settlement period).

### 7.3 Powers and Duties of Arbitrators

Arbitrators enjoy the powers agreed by the parties (eg, the power to determine the procedural rules applicable in the proceedings), but subject to the limitations provided under the arbitration law, where applicable. Regarding the powers conferred by law, an arbitrator can:

- decide on his or her own jurisdiction;
- assess the case according to his or her “intimate belief”;
- determine the place of arbitration and the law applicable to the substance of the dispute, in the absence of parties' agreement; and
- determine the language of arbitration, in certain circumstances and in the absence of the parties' agreement.

Similarly, the arbitrators' obligations may be agreed in the arbitration agreement, subject to the limitations imposed by law. Regarding statutory duties, an arbitral tribunal is obliged to determine a dispute within six months of its constitution (although this time limit may be readjusted). Further, the arbitrators have a duty to act impartially and independently and must disclose any circumstances that may prevent them from doing so.

### 7.4 Legal Representatives

There are no particular qualifications or requirements for legal representatives appearing in front of an arbitral tribunal. An authorised legal professional may duly represent a party in arbitration proceedings.

## 8. EVIDENCE

### 8.1 Collection and Submission of Evidence

As a rule, the party that files a claim has the obligation to prove it. In general, the parties submit the evidence on which they intend to rely on in limine litis (at the start of the procedure).

The most common means of proof are written records, expert reports, witness statements and cross-examination. All pieces of evidence are of equal value and subject to the court's evaluation and conviction. According to the traditional rules of evidence within the Code of Civil Procedure, evidence such as a witness statement or cross-examination is taken directly before the arbitral tribunal at the hearing and the expertise should be of a judicial nature (ie, it is carried out by an expert appointed by the arbitral tribunal).

However, the rules on evidence are flexible in international arbitration, which makes it possible in procedures such as ad hoc arbitration, under the ICC Rules or under the 2018 CICA Rules to submit written witness statements and expert reports drafted by party-appointed experts, followed by a cross-examinations of witnesses and experts by the arbitral tribunal.

A particular rule in arbitration is that witnesses are not heard under oath, as would happen before a local court. The arbitral tribunal can also order a party to produce certain evidence.

### 8.2 Rules of Evidence

In arbitral proceedings seated in Romania, the applicable rules of evidence are those provided by Romanian law as *lex loci*, namely the Code of Civil Procedure.

As a matter of principle, the rules on evidence are flexible when it comes to international arbitration and thus parties may derogate from them.

Parties are allowed to choose means of administering the evidence which are different from the ones provided by the national law (Code of Civil Procedure). As such, parties have the possibility to use any type of rules, such as the ICC Rules or the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association. The 2018 CICA Rules stipulate that the arbitral tribunal, following the parties' agreement, may apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association.

### 8.3 Powers of Compulsion

The arbitral tribunal does not have any powers to compel witnesses or experts who refuse to appear before the arbitral tribunal or to apply any sanctions. For any such measures, the parties must file a claim to this effect before the local tribunal whose jurisdiction covers the seat of arbitration.

The arbitral tribunal can also order a party to produce certain evidence. The arbitral tribunal cannot order the production of documents from non-parties. For example, the arbitral tribunal might request written information from a public authority regarding its documents and actions, but if the public authority refuses to comply with such a request and submit the information, the parties or the arbitrators have recourse to local courts to request the enforceable court's order for production of documents.

The local courts might also play a role in acknowledging certain matters of fact prior to or during the arbitration proceedings, such as the state of certain assets, or the statement of a certain witness where there is urgency due to the risk the evidence might get lost.

## 9. CONFIDENTIALITY

### 9.1 Extent of Confidentiality

Arbitration is presumed to be confidential – however, the procedural rules established by the Code of Civil Procedure leave the matter of confidentiality to the parties’ agreement or choice of institution.

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

The 2018 CICA Rules provide that the award may, for scientific or academic purposes, be published in part without revealing the name of the parties or prejudicial data. Also, the case file may be studied for academic purposes, after the award is communicated to the parties, in compliance with the confidentiality obligation.

## 10. THE AWARD

### 10.1 Legal Requirements

Article 567 of the Code of Civil Procedure stipulates that, unless the parties provided otherwise, the arbitration tribunal must render an award within six months of the constitution of the tribunal for local arbitration and, according to Article 1115, a year with respect to international arbitration.

According to the Code of Civil Procedure, the arbitral award shall be written, reasoned and dated and it shall bear the signatures of all the members of the arbitral tribunal. The provisions of Articles 602 and 605 of the Code of Civil Pro-

cedure stipulate that the delivery of the award can be delayed for a period of 21 days and require the decision to be communicated to the parties within a month of its delivery.

According to the CICA Rules, the arbitration award shall be drawn up in writing and shall include:

- the names of the members of the arbitral tribunal and of the arbitral assistant, and the place and date of rendering the award;
- the names of the parties, their domicile or residence or, as the case may be, name and registered office, as well as the names of the parties’ representatives and of the other persons who attended the hearings of the dispute;
- an indication of the arbitration agreement based on which the arbitral proceedings were initiated;
- the object of the dispute and a summary of the parties’ respective claims;
- the factual and legal grounds for the award, or, in case the arbitration was decided *ex aequo et bono*, the grounds considered by the tribunal;
- the operative part;
- the signatures of all arbitrators, as well as the signature of the arbitral assistant.

CICA Rules require the award to be delivered and drawn up within a month since the final hearing, a term that can be prolonged by the CICA President, on justified grounds. Also, the award is to be communicated to the parties within three days of its being drawn up.

### 10.2 Types of Remedies

There is no specific provision in the arbitration law as to the types of remedies available to the parties. Therefore, there is no limitation on the types of remedies that an arbitral tribunal may grant, other than the limitation imposed by the

parties' claims in the sense that the arbitral tribunal can only grant what was requested, regardless of the nature of the claim.

However, to a large extent the admissibility of the remedies depends on the substantive and procedural law applicable to the dispute. For example, if the arbitral tribunal applies Romanian procedural law, it may consider a request for a declaratory judgment (such as acknowledgement of a debt) to be inadmissible to the extent that the claimant has the option to bring a claim to enforce its rights (such as obliging the defendant to pay the debt).

### 10.3 Recovering Interest and Legal Costs

The parties are entitled to recover interest on the principal claim upon such request.

The legal costs of the arbitral proceedings are incumbent on the parties, according to their agreement. In the absence of any such agreement, the legal costs are incumbent on the party that lost the case, proportionally to the admission/rejection of the claim/defence.

With respect to the arbitrators' fees and expenses, according to the Code of Civil Procedure, unless the parties agreed otherwise, each party shall bear the costs of its appointed arbitrator, whereas the costs incurred by a sole arbitrator or by the presiding arbitrator are to be equally shared by the parties.

## 11. REVIEW OF AN AWARD

### 11.1 Grounds for Appeal

The parties may appeal an arbitral award by means of a set-aside claim, on one of the following grounds:

- the dispute was non-arbitrable;

- the arbitration agreement did not exist or was invalid or ineffective;
- the constitution of the arbitral tribunal was not in accordance with the arbitration agreement;
- the party requesting the setting aside of the award was not duly notified of the hearing when the main arguments were heard and was absent when the hearing took place;
- the arbitral award was rendered after expiry of the time limit, even though at least one party submitted its intention to object to the late issuance of the award and the parties opposed the continuation of the proceedings after expiry of the time limit;
- the award granted something which was not requested (*ultra petita*) or more than was requested (*plus petita*);
- the award failed to mention the tribunal's decision on the relief sought and did not include the reasoning behind the decision, the date and place of the decision or the signatures of the arbitrators;
- the award violated public policy, mandatory legal provisions or morality;
- subsequent to issuance of the final award, the Constitutional Court has declared unconstitutional the legal provisions challenged by a party during the arbitral proceedings or other legal provisions included in the challenged piece of legislation that are closely related to and inseparable from those challenged.

The request to set aside the arbitral award may be filed within one month of service of the award on the parties, unless the request is grounded on the subsequent issuance of the Constitutional Court, in which case the time limit is three months after publication of that court's decision. Certain reasons for setting aside an arbitral award may be deemed waived if they are not raised before the arbitral tribunal at the start of the process (particularly those relating to the jurisdiction and constitution of the arbitral tribu-

nal). A request to set aside is subject to a fixed court fee under the law.

The jurisdiction to settle the set-aside claim belongs to the Court of Appeal of the county where the arbitration took place. The ruling issued by the Court of Appeal is subject to a higher appeal.

### **11.2 Excluding/Expanding the Scope of Appeal**

The parties cannot waive the right of appeal or challenge to an award by agreement before the dispute arises. The Code of Civil Procedure provides that any agreement to the contrary is null and void. The parties may waive the right to appeal only after the award is rendered.

The parties cannot expand the scope of appeal.

### **11.3 Standard of Judicial Review**

Romanian law does not provide for the concepts of deferential or de novo as standards of review.

The merits of the case may be reviewed by the Court of Appeal subsequent to the admission of a set-aside claim in the following cases: the dispute was non-arbitrable, the arbitration agreement did not exist or was invalid or ineffective, the arbitral award was rendered after expiry of the time limit, even though at least one party submitted its intention to object to the late issuance of the award and the parties opposed the continuation of the proceedings after expiry of the time limit.

In all other cases of set-aside, the Court of Appeal will refer the litigation to the arbitral tribunal for a new judgment to take place, if at least one of the parties requests it. If not, the court will make a decision on the merits of the case.

## **12. ENFORCEMENT OF AN AWARD**

### **12.1 New York Convention**

Romania ratified the New York Convention in 1961 by means of Decree No 186/1961, which came into force on 24 July 1961.

Romania reserved the right to apply the Convention only to:

- the recognition and enforcement of awards made in the territory of another contracting state or, for the awards made in non-contracting states, only subject to reciprocity, namely to the extent to which those states grant reciprocal treatment;
- disputes arising from legal relationships – whether contractual or not – that are considered commercial under the national law.

Furthermore, Romania has signed multiple bilateral conventions with countries including Albania, Algeria, Belgium, Bulgaria, China, Cuba, the Czech Republic, France, Greece, Hungary, Italy, Moldova, Mongolia, Montenegro, Morocco, North Korea, Poland, Russia, Serbia, Slovenia, Slovakia, Syria and Tunisia.

### **12.2 Enforcement Procedure**

Domestic arbitral awards are treated and enforced in the same way as court decisions whereas foreign arbitral awards are subject to recognition and enforcement proceedings before the Romanian courts. As a matter of principle, any foreign arbitral award is recognised and may be enforced in Romania as long as the dispute is arbitrable according to Romanian law and the award does not contain measures contrary to the public order of Romanian private international law.

In order to be granted the recognition and enforcement of an arbitral award, the parties

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must comply with certain formal requirements – they must file a request to this effect before a competent court and attach legalised or apostille-certified copies of the translated award and arbitration agreement. The court vested with hearing a request for the recognition and enforcement of a foreign arbitral award is prohibited from reviewing the merits of the dispute, its examination being limited to the grounds for refusal of recognition and enforcement, as set out in the Code of Civil Procedure.

The grounds for refusal of recognition and enforcement of the foreign award provided in the Code follow those established in the New York Convention, such as the parties did not have the capacity to conclude the arbitration agreement, the arbitration agreement was not valid, or the award is in regard to a dispute which was not included in the arbitration agreement or which exceeds the limits set by the arbitration agreement.

As a matter of principle, filing a set-aside claim does not influence in any way the enforcement procedure. In other words, the enforcement procedure may be commenced and continued even if a request to set aside the award was filed. However, following a request thereto, the court may suspend the enforcement of the award challenged with a set-aside claim if the debtor is about to suffer an imminent and irreparable damage arising from the enforcement (for example, the debtor carries out a public interest activity which would be affected if the enforcement continued). The enforcement is stayed only until the ruling of the first court is issued.

### **12.3 Approach of the Courts**

The courts in Romania have a positive approach to recognition and enforcement of arbitration awards and rarely refuse recognition and enforcement requests – in these cases, refusal is generally caused by procedural non-compli-

ances rather than substantial law infringement, such as public policy grounds.

The Romanian case law is divided with respect to the recognition of partial awards enforcing DAB decisions in FIDIC disputes.

The Code of Civil Procedure refers to public policy in Article 1124, which sets out the legal ground for the public policy exception as follows. The Romanian legislature explicitly adopted the concept of international public policy, which is addressed as the “public order of the Romanian private international law”. In regard to the notion of public order of private international law, the Romanian courts overtly approach it as part of the Romanian legal order.

## **13. MISCELLANEOUS**

### **13.1 Class Action or Group Arbitration**

No provision under the Romanian arbitration law addresses class-action or group arbitration.

### **13.2 Ethical Codes**

Counsel are subject to strict requirements under Romanian legislation and codes of conduct regarding lawyers’ practice. Regarding arbitrators, there is no specific body of law or rules regarding their ethical obligations.

### **13.3 Third-Party Funding**

Third-party funding is not expressly regulated under Romanian law. Therefore, in the absence of any provision to interdict such procedure, third-party funding of the proceedings is permitted.

### **13.4 Consolidation**

Although the arbitration law does not exclude the consolidation of arbitral proceedings, it makes no specific provision for it. The traditional view is that the parties’ consent is required for

the consolidation of separate arbitral proceedings where the arbitral tribunals are constituted of different arbitration panels. Otherwise, constitution of the arbitral tribunal may be considered to breach the arbitration agreement.

The 2018 CICA Rules provide that any party may request the consolidation of the new proceeding with another existent matter during the request for arbitration or the answer to the statement of defence. The arbitral tribunal might admit the consolidation if:

- all the parties agree with the consolidation; or
- all the claims are submitted based on the same arbitration agreement; or
- the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the arbitral tribunal considers the arbitration agreements to be compatible.

In deciding whether to consolidate, the arbitral tribunal shall consult with the parties and may have regard to, inter alia, the stage of the pending arbitration, whether the arbitrations raise common legal or factual issues, as well as the efficiency and expeditiousness of the proceedings.

### **13.5 Binding of Third Parties**

Under Romanian law, the arbitration agreement and the award may not impose obligations on third parties. Debate is ongoing over the extension of the arbitration agreement to non-signatories – for example, following their direct involvement in the negotiation, performance or termination of a contract containing an arbitration clause – but existing law provides no such remedy. Conventional or legal successors of the signatory are generally bound by the arbitration agreement.

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## Trends and Developments

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### **Introduction**

Romania remains one of the most dynamic markets when it comes to international arbitration disputes, and the past year's vitality, with its rise in energy disputes, including investment claims and an ever-increasing tally of construction cases, only confirms it.

For the first time after the pandemic appeared, COVID-19 is no longer a feature of day-to-day business, although it has left significant effects, fortunately not all negative. Adaptation remains the key word: the practice of virtual hearings and electronic submissions is no longer a development to note, it is simply accepted; the capacity to avoid almost all if not any disruption to ongoing arbitration cases proved once again that the advantages of this ADR method clearly delineate it from domestic litigation; and the business community has apprehended that national courts will never have the same rapid pace in adapting to change and distress, which has boosted interest among companies in including arbitration clauses in their commercial agreements or opting to switch to arbitration.

It remains to be seen in the following months how the post-pandemic mindset will tackle the spillover effects of the armed conflict taking place in Romania's vicinity, which is bound to bring about further repercussions among a business community which was just recovering from the COVID-19 crisis.

### **General**

International arbitration has gained significant ground in Romania over the past decade and a half, with a constant increase in its use resulting

predominantly from disputes relating 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 in such projects started based on the standard International Chamber of Commerce (ICC) arbitration clause from the International Federation of Consulting Engineers (FIDIC) General Conditions of Contract but has further evolved and changed.

Starting in 2018, important legislative amendments were adopted covering a broad category of publicly financed projects subject to public procurement procedures. This led to the replacing of the FIDIC General Conditions of Contract with 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 (thus replacing the jurisdiction of the ICC International Court of Arbitration (ICC), which was applicable under the former FIDIC General Conditions of Contract).

CICA is currently the most frequently used and important international arbitration institution in Romania. Its 2018 Rules of Arbitration align with the existing rules of the ICC and other similar institutions, and seek to enhance the flexibility and efficiency of arbitration in Romania while

at the same time sidestepping the formalism of domestic courts. This change has helped maintain the steady growth trend of national and international arbitration before CICA.

Besides 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 Arbitration Institute (DIS) and the Court of Arbitration attached to the German-Romanian Chamber of Commerce and Industry (AHK), mainly used by German/Italian companies and investors).

Romania is also a party to several investor-state disputes. Publicly available information shows that to this date Romania has faced 22 International Centre for Settlement of Investment Disputes (ICSID) cases, of which 12 are still pending, four of which have been filed in the past year.

This is the context which has allowed both international and domestic arbitration to become well established in Romania, with a steady-paced growth in the number of arbitration cases per year.

## **Key Industries**

Although the construction industry has remained the main sector experiencing international arbitration activity for quite some years now, the post-pandemic political context and the ongoing energy crisis, which is manifest in the increases in the prices of fossil fuels, has led to a clear rise in energy disputes.

Disputes from energy contracts have historically generated an impressive number of commercial and investment arbitration cases, but the end

of 2021 has seen an overwhelming number of disputes caused by the energy crisis, with many disputes arising from breaches of contract following the vertiginous rise in the price of natural gas. In addition, there has been a plethora of investment claims, eight out of the 14 pending investment cases before ICSID being based on the Energy Charter Treaty (ECT), among which three were filed in the past year. Moreover, there are other investors pursuing energy-related claims against Romania.

During the first half of 2022, the arbitration community in Romania could already sense the significant impact of the case law following Achmea, Komstroy and the recent decision upholding Spain's intra-EU objection, which all make explicit that there is no place for intra-EU arbitration proceedings under the ECT. This trend is bound to influence the outcome of the many renewables-related ECT claims that Romania is currently facing.

## **Romanian Courts and Arbitration**

Following constant engagement in settling arbitration-related disputes, the Romanian courts now have a good grasp of the arbitration concepts and, during the past few years, have started to adopt an increasingly pro-arbitration approach.

Moreover, with the new CICA Rules and best practice concepts therein, the domestic courts have started to extend their experience and comprehension beyond the typical claims for enforcement and recognition of foreign arbitral awards, setting aside arbitral awards or requests for interim measures in relation to pending arbitration proceedings, with more and more cases covering emergency arbitrator proceedings.

Also, the domestic courts' grasp of complex infrastructure disputes settled through international arbitration proceedings and stemming

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from publicly financed projects subject to public procurement procedures has visibly consolidated following a mid-2018 reform of the contentious administrative and public procurement laws. This reform put a stop to previous uncertainty and ruled that all disputes relating to the execution of these contracts (which have the legal nature of administrative contracts) are to be settled by the commercial/civil sections of the courts. The commercial sections within the tribunals have thus had the possibility to specialise over these past years in understanding complex construction disputes based on the FIDIC General Conditions of Contract or variations thereof, which in its turn has led to a stabilisation of the related case law and therefore to predictability regarding the potential decisions to be adopted by the domestic courts.

### **Joining Efforts in Setting Trends in International Arbitration – Bucharest Arbitration Days 2022, third edition**

The Bucharest Arbitration Days (“BARD”) is an event dedicated to international arbitration and the necessary reforms in the field, first organised in 2019 by CICA. The third occasion of this conference in 2022 addressed the subject of “Timely Perspectives on Energy Disputes and Their Resolution Mechanism” and benefited from the in-person participation of all its speakers and a significant number of attendees (in addition to the online participants).

The post-pandemic world and the existing armed conflicts have shaped the energy market, as well as the relations and the disputes therein, which led the BARD organisers to choose “energy” as the keyword for the 2022 event.

This third conference brought together leading names representing relevant stakeholders in the energy and dispute resolution field: representatives of states, the European Commission, regulatory agencies, energy companies, counsel,

arbitrators and experts. The panels addressed topics related to energy projects and investment disputes, with a focus on infrastructure and energy projects; arbitration as a suitable dispute resolution mechanism for energy disputes; regional approaches to energy projects and dispute settlement, with a focus on the EU energy market; the ECT and its modernisation process, etc.

The keynote speaker was Prof Peter Cameron, Professor of International Energy Law and Policy, University of Dundee and Director of the Centre for Energy, Petroleum and Mineral Law and Policy, who addressed timely issues concerning competition in energy markets.

On the first day, there were three panels dedicated to: Regional Approaches to Energy Projects and Dispute Settlement: the EU Energy Market; Infrastructure and Energy Projects: Commercial Arbitration as Preferred Dispute Resolution Mechanism; and Energy Disputes: a User’s Perspective.

On the second day, the focus was on energy investments and arbitration: Energy Projects and Investment Disputes – Complex Issues; and Energy Disputes in International Context – The Energy Charter Treaty.

The participation of professionals from all over the world – France, Germany, Lithuania, Romania, Spain, Sweden, Switzerland, the UAE, the UK, Ukraine, the US – confirms that the event was truly an opportunity to join efforts in setting trends in international arbitration.

### **Young Arbitrators Romania**

One year after its launch, the Young Romanian Arbitration Practitioners (“YRAP”), the Romanian under-40 arbitration group, is keen to advance with its mission and continues to foster career opportunities in international arbitration.

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The group seeks to develop and promote a young community of Romanian international arbitration practitioners in Romania and abroad, and to connect with peers and organisations from other jurisdictions.

YRAP has recently launched the first mentoring programme for Romanian students and professionals with a maximum of three years of experience, who are interested in developing their skills and network in international arbitration.

The mentoring group will be composed of (i) a mentor, (ii) two to three mentees, and (iii) a YRAP member as a facilitator, and will last for one year starting on 30 June 2022. The activities will comprise meetings, the possibility to participate in YRAP projects and other initiatives. The mentors for this first edition are: Ioana Knoll-Tudor, Csaba Kovacs, Alina Leoveanu, Cosmin Vasile and Cornel Popa, all highly acclaimed Romanian practitioners with tremendous experience and track records in international arbitration.

# ROMANIA TRENDS AND DEVELOPMENTS

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