

THE INTERNATIONAL  
ARBITRATION  
REVIEW

NINTH EDITION

Editor  
James H Carter

THE LAWREVIEWS

THE INTERNATIONAL  
ARBITRATION  
REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd  
This article was first published in July 2018  
For further information please contact [Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

**Editor**  
James H Carter

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

ACCOUNT MANAGERS

Pere Aspinall, Sophie Emberson,  
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCHER

Arthur Hunter

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Anna Andreoli

SUBEDITOR

Janina Godowska

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2018 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-912228-40-9

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAWREVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW  
THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW  
THE ASSET MANAGEMENT REVIEW  
THE ASSET TRACING AND RECOVERY REVIEW  
THE AVIATION LAW REVIEW  
THE BANKING LITIGATION LAW REVIEW  
THE BANKING REGULATION REVIEW  
THE CARTELS AND LENIENCY REVIEW  
THE CLASS ACTIONS LAW REVIEW  
THE CONSUMER FINANCE LAW REVIEW  
THE CORPORATE GOVERNANCE REVIEW  
THE CORPORATE IMMIGRATION REVIEW  
THE DISPUTE RESOLUTION REVIEW  
THE DOMINANCE AND MONOPOLIES REVIEW  
THE EMPLOYMENT LAW REVIEW  
THE ENERGY REGULATION AND MARKETS REVIEW  
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW  
THE EXECUTIVE REMUNERATION REVIEW  
THE FINANCIAL TECHNOLOGY LAW REVIEW  
THE FOREIGN INVESTMENT REGULATION REVIEW  
THE FRANCHISE LAW REVIEW  
THE GAMBLING LAW REVIEW  
THE GOVERNMENT PROCUREMENT REVIEW  
THE HEALTHCARE LAW REVIEW  
THE INITIAL PUBLIC OFFERINGS LAW REVIEW  
THE INSOLVENCY REVIEW  
THE INSURANCE AND REINSURANCE LAW REVIEW  
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW  
THE INTELLECTUAL PROPERTY REVIEW  
THE INTERNATIONAL ARBITRATION REVIEW  
THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW  
THE INTERNATIONAL TRADE LAW REVIEW  
THE INVESTMENT TREATY ARBITRATION REVIEW  
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW  
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW  
THE LABOUR AND EMPLOYMENT DISPUTES REVIEW  
THE LENDING AND SECURED FINANCE REVIEW  
THE LIFE SCIENCES LAW REVIEW  
THE MERGER CONTROL REVIEW  
THE MERGERS AND ACQUISITIONS REVIEW  
THE MINING LAW REVIEW  
THE OIL AND GAS LAW REVIEW  
THE PATENT LITIGATION LAW REVIEW  
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW  
THE PRIVATE COMPETITION ENFORCEMENT REVIEW  
THE PRIVATE EQUITY REVIEW  
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW  
THE PRODUCT REGULATION AND LIABILITY REVIEW  
THE PROJECTS AND CONSTRUCTION REVIEW  
THE PUBLIC COMPETITION ENFORCEMENT REVIEW  
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW  
THE REAL ESTATE LAW REVIEW  
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW  
THE RESTRUCTURING REVIEW  
THE SECURITIES LITIGATION REVIEW  
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW  
THE SHIPPING LAW REVIEW  
THE SPORTS LAW REVIEW  
THE TAX DISPUTES AND LITIGATION REVIEW  
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW  
THE THIRD PARTY LITIGATION FUNDING LAW REVIEW  
THE TRADEMARKS LAW REVIEW  
THE TRANSFER PRICING LAW REVIEW  
THE TRANSPORT FINANCE LAW REVIEW

[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALLEN & OVERY LLP

ANJARWALLA & KHANNA

ANWALTSBÜRO WIEBECKE

AS & ASSOCIATES

ATTORNEYS AT LAW RATIOLEX LTD

BAKER BOTTS LLP

BAKER MCKENZIE

COURTENAY COYE LLP

DE BERTI JACCHIA FRANCHINI FORLANI

DENTONS

DESIERTO AND DESIERTO

DR COLIN ONG LEGAL SERVICES

ERDEM & ERDEM LAW OFFICE

FTI CONSULTING

HERBERT SMITH FREEHILLS

KIM & CHANG

LEVY & SALOMÁO ADVOGADOS

LINKLATERS LLP

MAQS ADVOKATBYRÅ

MARKIDES, MARKIDES & CO LLC

MARXER & PARTNER RECHTSANWÄLTE

MIRANDA & AMADO, ABOGADOS

MULLA & MULLA & CRAIGIE BLUNT & CAROE

PROF. HILMAR RAESCHKE-KESSLER LL.M. RECHTSANWALT BEIM  
BUNDESGERICHTSHOF

QUEVEDO & PONCE

RAJAH & TANN SINGAPORE LLP

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SRS ADVOGADOS, SOCIEDADE REBELO DE SOUSA & ADVOGADOS  
ASSOCIADOS, SP, RL

THORNDON CHAMBERS

VON WOBESER Y SIERRA, SC

WILMER CUTLER PICKERING HALE AND DORR LLP

WOLF THEISS

YKVN

# CONTENTS

PREFACE.....	vii
<i>James H Carter</i>	
Chapter 1	IMPACT OF CORPORATE TAXATION ON ECONOMIC LOSSES ..... 1
<i>James Nicholson and Toni Dyson</i>	
Chapter 2	AFRICA OVERVIEW ..... 9
<i>Jean-Christophe Honlet, Liz Tout, Marie-Hélène Ludwig and Lionel Nichols</i>	
Chapter 3	ASEAN OVERVIEW ..... 20
<i>Colin Ong QC</i>	
Chapter 4	BRIBERY ALLEGATIONS IN ARBITRATION ..... 40
<i>Anne-Catherine Hahn</i>	
Chapter 5	AUSTRIA..... 56
<i>Venus Valentina Wong</i>	
Chapter 6	BANGLADESH ..... 67
<i>Mohammad Hasan Habib</i>	
Chapter 7	BELIZE ..... 75
<i>Eamon H Courtenay SC and Stacey N Castillo</i>	
Chapter 8	BRAZIL..... 84
<i>Angela Di Franco and Rafael Zabaglia</i>	
Chapter 9	BULGARIA..... 99
<i>Anna Rizova-Clegg and Oleg Temnikov</i>	
Chapter 10	CANADA..... 109
<i>Rachel Howie, Chloe Snider and Barbara Capes</i>	



Chapter 11	CHINA.....	121
	<i>Keith M Brandt and Michael K H Kan</i>	
Chapter 12	COLOMBIA.....	131
	<i>Ximena Zuleta, Paula Vejarano, Juan Camilo Fandiño, Daniel Jiménez Pastor, Álvaro Ramírez and Natalia Zuleta</i>	
Chapter 13	CYPRUS.....	141
	<i>Alecos Markides</i>	
Chapter 14	ECUADOR.....	151
	<i>Alejandro Ponce Martínez</i>	
Chapter 15	ENGLAND AND WALES.....	155
	<i>Duncan Speller and Tim Benham-Mirando</i>	
Chapter 16	EUROPEAN UNION.....	173
	<i>Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova</i>	
Chapter 17	FINLAND.....	182
	<i>Timo Ylikantola and Tiina Ruohonen</i>	
Chapter 18	FRANCE.....	192
	<i>Jean-Christophe Honlet, Barton Legum, Anne-Sophie Dufêtre and Annelise Lecompte</i>	
Chapter 19	GERMANY.....	201
	<i>Hilmar Raeschke-Kessler</i>	
Chapter 20	HUNGARY.....	217
	<i>Zoltán Faludi and Enikő Lukács</i>	
Chapter 21	INDIA.....	226
	<i>Shardul Thacker</i>	
Chapter 22	INDONESIA.....	241
	<i>Theodoor Bakker, Sabat Siahaan and Ulyarta Naibaho</i>	
Chapter 23	ITALY.....	250
	<i>Michelangelo Cicogna and Andrew G Paton</i>	

## Contents

---

Chapter 24	JAPAN.....	271
	<i>Christopher Hunt, Elaine Wong, Ben Jolley and Yosuke Homma</i>	
Chapter 25	KENYA.....	283
	<i>Aisha Abdallah and Mohamed Karega</i>	
Chapter 26	LIECHTENSTEIN.....	293
	<i>Mario A König</i>	
Chapter 27	MALAYSIA.....	304
	<i>Avinash Pradhan</i>	
Chapter 28	MEXICO.....	320
	<i>Adrián Magallanes Pérez and Rodrigo Barradas Muñiz</i>	
Chapter 29	NETHERLANDS.....	328
	<i>Marc Krestin and Marc Noldus</i>	
Chapter 30	NEW ZEALAND.....	341
	<i>Derek Johnston</i>	
Chapter 31	NIGERIA.....	355
	<i>Babajide Ogundipe, Lateef Omoyemi Akangbe and Benita David-Akoro</i>	
Chapter 32	PERU.....	358
	<i>José Daniel Amado, Cristina Ferraro and Martín Chocano</i>	
Chapter 33	PHILIPPINES.....	367
	<i>Jan Vincent S Soliven and Lenie Rocel E Rocha</i>	
Chapter 34	POLAND.....	378
	<i>Michał Jochemczak and Tomasz Sychowicz</i>	
Chapter 35	PORTUGAL.....	387
	<i>José Carlos Soares Machado</i>	
Chapter 36	ROMANIA.....	394
	<i>Tiberiu Csaki</i>	
Chapter 37	RUSSIA.....	406
	<i>Mikhail Ivanov and Inna Manassyan</i>	

## Contents

---

Chapter 38	SINGAPORE.....	419
	<i>Kelvin Poon, Paul Tan and Alessa Pang</i>	
Chapter 39	SOUTH KOREA .....	444
	<i>Joel E Richardson and Byung-Woo Im</i>	
Chapter 40	SPAIN.....	452
	<i>Virginia Allan, Ignacio Madalena and David Ingle</i>	
Chapter 41	SWEDEN.....	466
	<i>Pontus Ewerlöf and Martin Rifall</i>	
Chapter 42	SWITZERLAND .....	474
	<i>Martin Wiebecke</i>	
Chapter 43	TURKEY.....	493
	<i>H Ercüment Erdem</i>	
Chapter 44	UKRAINE.....	502
	<i>Ulyana Bardyn, Christina Dumitrescu and Victor Marchan</i>	
Chapter 45	UNITED ARAB EMIRATES .....	518
	<i>Stephen Burke</i>	
Chapter 46	UNITED STATES .....	527
	<i>James H Carter, Sabrina Lee and Stratos Pabis</i>	
Chapter 47	VIETNAM.....	547
	<i>K Minh Dang, Do Khoi Nguyen and Luan Tran</i>	
Appendix 1	ABOUT THE AUTHORS.....	561
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	597

# PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2018

# ROMANIA

*Tiberiu Csaki*<sup>1</sup>

## I INTRODUCTION

The origins of arbitration in Romania date back to the early 19th century, when modern judicial institutions were gradually being introduced. In 1865, the rules concerning private law arbitration were laid down in Book IV of the Code of Civil Procedure enacted in 1865. The provisions were inspired by continental regulations governing civil procedure: mainly French and Swiss codes of civil procedure, but also by general principles of law. Book IV of the Code of Civil Procedure was substantially amended in 1993, and Romania's legal provisions on arbitration were brought more into line with the principles and the structure of the UNCITRAL Model Law of 1985.

On 15 February 2013, a New Code of Civil Procedure entered into force, and the provisions of the former Code regarding private law arbitration were replaced by Articles 541 to 621 of Book IV of the New Code of Civil Procedure. The rules laid down in the New Code of Civil Procedure are, by and large, a restatement of the provisions of the former Code in respect of arbitration, while certain additions are formal renditions of principles and practices commonly employed in arbitration before the enactment of the New Code.

Under the New Code of Civil Procedure, arbitration is qualified as an alternative private jurisdiction that shall be conducted in accordance with the procedural rules agreed by the parties. These rules may derogate from the provisions of common procedural law to the extent they do not conflict with public policy or with the mandatory provisions of Romanian law.

Romanian law defines an arbitration agreement as an agreement by which one or more persons are appointed by the parties, or otherwise in accordance with the terms of the arbitration agreement, to settle a dispute and to make a final and binding decision. It may be in the form of an arbitration clause inserted in a contract or in the form of a separate agreement (a submission agreement). By concluding an arbitration clause, the parties agree to settle all and any future disputes arising out of or in connection with the contract that contains the arbitration clause through arbitration proceedings. The arbitration clause shall specify the names of the arbitrators or the method of their appointment, usually by reference to specific arbitration rules, such as the Chamber of Commerce and Industry of Romania (CICA) Rules.

---

<sup>1</sup> Tiberiu Csaki is a partner at Dentons.

Under Romanian law, disputes involving matters such as the civil status of persons, collective labour conflicts, certain shareholder disputes, annulment of intellectual property rights or bankruptcy proceedings cannot be deferred to arbitration and, accordingly, arbitration agreements purporting to cover such disputes are null and void.

Arbitral awards are subject to limited review under Romanian law. They may be subject to a judicial action in annulment, and to a single level of appellate review. Both of these procedures are limited to formal grounds for review and, after any such review, an award becomes final and irrevocable.

Government Emergency Ordinance No. 1/2016, published in the Official Gazette of Romania on 4 February 2016, amended the New Code of Civil Procedure by permitting that the judicial action in an annulment of an arbitral award be subject to appellate review in both cases of the admission and rejection of the action. Before this amendment, an appeal was permitted only in the case of the admission of the action.

The rules of arbitration laid down in the New Code of Civil Procedure are designed to apply whenever the parties have not resorted to institutionalised arbitration. The Code contains a brief chapter on institutionalised arbitration.

Under the provisions of the New Code, arbitral institutions are designed as not-for-profit organisations expected to provide a service of public interest (Article 616), and arbitral activity proper is required to be autonomous from the organising institution. The rules of procedure enacted by the arbitral institution take precedence over the rules laid down in the Code.

However, arbitral bodies and institutions are prohibited from restricting the parties' choice to mandatory lists of arbitrators (any such lists drafted by the arbitral institutions shall be deemed optional).

The CICA is the most frequently used institution for arbitration in Romania. Created in 1953 for the settlement of foreign trade disputes and supervised by the Romanian Chamber of Commerce and Industry, the CICA was reorganised in 1990, after the collapse of Communism, for the purpose of managing both international and domestic arbitration, as a permanent non-corporate and non-governmental arbitration institution independent in exercising its attributions.

Besides the CICA, there are arbitration commissions in approximately half of the county's chambers of commerce and industry, hearing mainly domestic cases.

According to the Code of Civil Procedure and the Rules of Arbitration of the CICA, arbitration is considered international whenever the private law relationship between the parties involved contains a foreign element.

The arbitrators acting with the CICA are both foreign and Romanian, and they are included for limited or determined periods of time in two separate lists maintained by the CICA. As of 2018, there are approximately 100 Romanian arbitrators and more than 20 foreign arbitrators registered on the CICA lists.

Although it is not yet used on a large scale, arbitration represents an appealing alternative to litigation for dispute resolution in Romania. Arbitral awards are final, binding and enforceable on the parties, and the awards enjoy wide international recognition, as Romania is a signatory to the 1958 New York Convention. Arbitral proceedings are confidential and more expeditious than judicial proceedings, usually not lasting more than five months (if domestic) or 12 months (if international). Except for the chairperson, the litigating parties may choose the arbitrators, which is not the case in judicial proceedings, where cases are allocated to judges on a random basis.

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration

The basic framework for all forms of arbitration is included in Book IV of the Code of Civil Procedure. The rules therein apply to *ad hoc* arbitration, institutional arbitration, domestic arbitration and international arbitration, and to arbitration at law and *ex aequo et bono*. The parties may choose to appoint one or more arbitrators, or to refer their dispute for resolution to a specialised arbitral institution such as the CICA.

The New Code of Civil Procedure, which entered into force on 15 February 2013, brought about a couple of additions and clarifications to the existent framework. Irrespective of the procedural rules designated by the parties, the arbitration shall observe the main principles of civil procedure laid down in Chapter One of the New Code (principle of equality, principle of good faith, adversarial process, principle of direct examination of evidence, principle of orality).

The New Code requires, in a manner similar to the former Code, that valid arbitration clauses should be contained in a written agreement. However, the New Code allows the parties to agree a valid arbitration clause by exchanging correspondence or procedural documents. Any arbitration agreement designed to cover disputes related to the assignment of real estate rights should be authenticated by a notary public.

The scope of the arbitration clause is presumed to cover all the disputes having arisen out of the contract containing the clause, unless the parties have specifically excluded certain matters from the scope of arbitration.

The provisions of the Code of Civil Procedure are applicable to the extent the arbitral institutions handling the dispute do not provide their own rules. The CICA was expressly authorised by law to adopt its own rules of procedure, and unless otherwise provided by these rules, the provisions of the Code of Civil Procedure, the Geneva 1961 European Convention on International Commercial Arbitration as well as the 1976 UNCITRAL Arbitration Rules (Article 30 of the 2018 CICA Rules) are also applicable. The latter reference is somewhat surprising to the extent that the UNCITRAL Arbitration Rules were designed to be adopted as rules for *ad hoc* arbitration. Whenever the CICA Rules and the UNCITRAL Arbitration Rules differ, however, the CICA Rules take precedence.

The provisions of the Code of Civil Procedure apply to international *ad hoc* arbitrations if the seat of arbitration is in Romania or if the parties have chosen Romanian law as the law governing the contract. For *ad hoc* arbitrations, the following provisions must be specifically incorporated in the arbitration clause, or included in an agreement to arbitrate should a litigation be already pending in a court of law:

- a* a clear statement that the arbitration is to be *ad hoc*;
- b* a designation of the seat of arbitration. In the absence of such designation, the arbitral tribunal will fix the seat of arbitration; and
- c* an indication of the number of arbitrators. In the absence of such an indication, three arbitrators are to be appointed, with each party appointing one arbitrator, and the party-appointed arbitrators appointing a third arbitrator as chair.

The previous Rules of Arbitration stated that the CICA may provide some limited assistance in *ad hoc* arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.

Under the provisions of the New Code of Civil Procedure as well as under the CICA Rules, arbitral tribunals are granted authority to order interim or conservatory measures. In

cases where the parties do not comply with the tribunal's orders, the interested party or the tribunal can address the issue to the regular courts of law, which can bind the non-complying party to observe the tribunal's interim orders via the injunction procedure. The parties can also seek conservatory measures in relation to the arbitration directly before the local courts, in which case the result of the proceedings should be notified to the arbitral tribunal.

The New Code of Civil Procedure also implements the parties' right to seek annulment of the tribunal's interim orders. The parties can now seek annulment of the tribunal's orders with respect to interim measures or suspension of proceedings or rejection of non-constitutionality motions. Such claim for annulment of the tribunal's interim orders can be lodged within five days of the date the interim order was notified to the interested party. The claim against an order suspending the proceedings can be lodged during the entire period of suspension.

The 2013 Rules of Arbitration initially enacted by the CICA were subject to heavy criticism and negative reviews from both the local business environment and the legal community. The CICA worked on a revised edition of the Rules of Arbitration designed to redress the provisions of the 2012 and 2013 edition, most notably the rules concerning the appointment of arbitrators. As a result, on 5 June 2014 an updated version of the Rules of Arbitration was published by CICA that amended the appointment procedure of arbitrators to re-establish the parties' independence in this regard and removed the wide influence previously given to the 'nomination authority'. Starting with 1 January 2018, however, a new set of Rules of CICA entered into force (the 2018 CICA Rules). The current rules are more concise than previous rules and not as extensive as the previous ones but should overall provide a better support for the business environment and are designed to improve the functioning of commercial arbitration, in line with best European and international practices.

An important addition to the current rules refers to the possibility to have an emergency arbitrator for requests related to provisional measures. This new procedure is now expressly detailed in Annex 2 of the 2018 CICA Rules. Upon a request of either of the parties, the President of CICA will designate an emergency arbitrator. After the emergency arbitrator is designated, a bail may be established. A decision in this regard may be issued in a maximum of 10 days. The tribunal has the right to change the provisional measures established by the emergency arbitrator.

Under the 2018 CICA rules, arbitrators are appointed either through the arbitration agreement by the parties or, in accordance with Article 19 of the Rules.

If the arbitral tribunal is to be constituted of a single arbitrator, the parties are given 30 days to designate the arbitrator together. If the parties fail to nominate the arbitrator within this time limit, the arbitrator will be designated by the President of the Court within five days.

If the arbitral tribunal is to be constituted up of three arbitrators, the parties shall each appoint one arbitrator, and the third – the chairman of the panel of arbitrators – will be chosen by the two arbitrators already nominated by the parties. If either of the parties to designate the arbitrator within 10 days, or if such designated arbitrators fail to agree upon the nomination of the chairman, the respective arbitrator and the chairman shall be appointed by the President of the Court within five days.

Furthermore, for an arbitrator to be eligible to arbitrate a given case, he or she must not be found to be in one of the incompatibility cases that may affect their independence and impartiality. Article 22 of the 2018 CICA Rules lists the following cases of incompatibility:

*a* any of the cases provided by the New Code of Civil Procedure with regard to judges;



- b* the arbitrator does not meet the qualifications or conditions set out in the arbitration agreement;
- c* the arbitrator is a shareholder or a director in a legal entity with or without legal personality which has an interest in the case or is controlled by one of the parties;
- d* the arbitrator has a direct working or commercial relation with one of the parties, or with an entity controlled wholly or partially by one of the parties; or
- e* the arbitrator has assisted or represented one of the parties in that case in front of the CICA or submitted a testimony in the preliminary stages.

Article 23 of the same rules states that the recusal request with respect to an arbitrator shall be decided by the a panel of three arbitrators nominated by the President of CICA, without the parties being summoned. If the recusal request refers to the sole arbitrator, it will be settled by a panel of one arbitrator – the President of CICA or another arbitrator designated by the latter.

With respect to the intervention or introduction of third parties in the arbitration proceedings, in accordance with Article 16 of the 2018 CICA Rules, the participation of third parties is still being recognised under the conditions set out in Articles 61 to 77 of the New Code of Civil Procedure if such participation is possible based on an arbitration agreement or if the arbitration agreement's effects may be extended to other participants.

The possibility to request the amendment of clerical errors, an interpretation of the judgment or even request a supplement to arbitral decisions, as well as of the term for invoking the exception for lack of jurisdiction of the arbitration tribunal in 15 days has been maintained by the 2018 CICA Rules.

An important change is that the 2018 CICA Rules no longer provide a procedural term in which a motion raising the exception of lack of jurisdiction of the arbitral tribunal may be invoked, the rules now simply state that the tribunal will verify its jurisdiction.

Another relevant change is that current rules no longer state that the CICA may provide some limited assistance in *ad hoc* arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.

As regards the language of the procedure, Article 29 addresses the rule that, if not agreed otherwise, the language of the arbitration proceedings is Romanian. However, the parties can agree upon another language. Written documents submitted to the tribunal, however, must still be translated into Romanian in accordance with Article 29, Paragraph 3 of the 2018 CICA Rules.

## **ii Arbitration developments in local courts**

### ***Enforcement and annulment of arbitral awards***

The procedure for enforcing arbitration awards depends on whether the award is national or international.

A national award is an award that was issued pursuant to an arbitration proceeding in Romania. The basic rules on enforcement of national awards are as follows: national awards are binding upon the litigating parties; national awards are considered enforceable titles under the provisions of Article 615 of the New Code of Civil Procedure; and if a party fails to comply with an award, the aggrieved party may initiate enforcement by petitioning a bailiff.

As a matter of recent development, however, it must be pointed out that although the New Code of Civil Procedure recognises national awards as enforceable titles, the provisions of Article 615 were amended through Law No. 138/2014 published in the Official Gazette

of Romania on 16 October 2014, and as a result, the enforceable nature of arbitral awards was softened with the introduction of a condition providing that arbitral awards must first be rendered enforceable by the tribunal in whose jurisdiction the arbitration proceedings took place. More recently, through Emergency Government Ordinance No. 1/2016 published in the Official Gazette of Romania on 4 February 2016, such conditioning of the enforcement of arbitral awards has been removed, and awards are currently enforceable under the same conditions as a law court decision.

Although a national award is binding upon the parties, it may nonetheless be subject to an action in annulment filed within one month from receipt of the award by a party who wishes to challenge the award. An action in annulment will be judged by the court of appeal having jurisdiction over the seat of the arbitration. The court of appeal seized with an annulment claim may suspend the enforcement of the arbitral award until final settlement of the action in annulment.

The New Code of Civil Procedure allows court review of an arbitration award only on limited grounds mentioned in Article 608 (which by and large reiterates the same grounds indicated by Article 364 of the former Code of Civil Procedure): procedural grounds concerning possible defects in the arbitration clause, proper observance of due process and the opportunity of the party to present its case, and other strict procedural requirements; and substantive grounds – specifically, whether the award violates Romanian public policy.

With the advent of the New Code of Civil Procedure in February 2013, there is as yet no relevant case law available concerning the interpretation given by local courts to provisions regarding arbitration. Nevertheless, considering that the majority of the provisions of the New Code are restatements of the provisions of the former Code of Civil Procedure, the case law produced by local courts in interpreting the provisions of the former Code is still relevant.

The Romanian High Court of Cassation and Justice clarified, in Decision No. 1594 dated 27 March 2014, that the New Code is applicable with respect to claims for the annulment of an arbitration award introduced after the New Code came into force, even if the arbitral award was given prior to the New Code's entry into force.

In addition, the High Court established through Decision No. 1167 of 29 April 2015 that if the parties include an arbitration clause in an agreement in order to observe an applicable legal obligation, although such arbitration clause is not strictly the freely expressed will of the parties, a court may not contest the validity of such a legally imposed arbitration clause.

The Romanian High Court of Cassation and Justice also looked at the power of ordinary courts in reviewing the merits of arbitral awards. The High Court was seized with an appeal against the decision of an inferior court, which had annulled an arbitral award for breach of public policy and re-examined the merits of the dispute previously settled in arbitration. The first court initially determined that there was sufficient ground to annul the arbitral award, then proceeded to an examination of the statements of law and fact made by the parties as well as the evidence adduced before the arbitral tribunal. The decision not only annulled the award but also settled, with the power of *res judicata*, the issues in dispute before the arbitral tribunal.

The High Court of Cassation and Justice reviewed solely the first court's determinations in respect of the violation of public policy and declared it ill founded. The High Court not only set aside the first court's decision but also spelled out that the principle that the court's power to examine the merits of an arbitral award is conditional upon the occurrence of the

annulment grounds listed in Article 364 of the former Code of Civil Procedure. In absence of the grounds triggering the annulment of the arbitral award, the parties were precluded from bringing the dispute resolved through arbitration under the jurisdiction of the local courts.

The Romanian High Court has also ruled that the ground of annulment based on violation of Romanian public policy is appropriate whenever the award ignores or misapplies any Romanian mandatory legal provisions, for instance provisions on statutes of limitation.

While, under EU Regulation 44/2001, enforcement of a foreign court's judgment is a rather simple procedure, an international arbitral award will not be enforced in Romania until such award is reviewed by a Romanian court.

The same principle applies to awards issued in any EU Member States to be recognised and enforced in other Member States (including Romania). There is no EU regulation providing *de jure* recognition of such awards, nor any simplified procedure for recognition and enforcement of awards issued in Member States. The legal basis for recognition and enforcement of international arbitration awards is provided by the 1958 New York Convention, to which Romania is a party.

A Romanian court will recognise and enforce an international arbitral award, except under any of the following circumstances:

- a* the parties did not have the legal capacity to enter into a valid arbitration agreement;
- b* the party against whom the award is invoked has not been given notice of the proceedings, and did not have the opportunity to nominate an arbitrator or generally to present its case (and thus the right of defence was neglected by the arbitrators);
- c* the award exceeds the scope of the arbitration clause;
- d* the arbitral tribunal was not properly selected in accordance with the applicable law and the arbitration agreement;
- e* the award is not yet binding in the country where it was made (if the award is subject to legal challenge in such country);
- f* the subject matter of the dispute was not capable of settlement by arbitration under Romanian law;
- g* recognition and enforcement of the award would be against the public policy of Romania; or
- h* the right to obtain enforcement is time-barred under Romanian law (as a general rule, the statute of limitations to obtain recognition and enforcement is three years from the date of issuance of the award, but usually a case-by-case analysis is needed to determine the moment when this period starts to run).

Interim measures ordered by foreign arbitral tribunals cannot be enforced in Romania.

Obtaining the recognition and enforcement of an international arbitral award may take anywhere from four months to three years, depending on the level of judicial scrutiny to which it is subjected. The expediency of the proceedings will also depend on a number of other factors, such as the workload of the court where the case is brought.

### ***Capacity of public law entities in Romania to enter into arbitration agreements***

The capacity of public law entities in Romania to enter arbitration agreements and the arbitrability of public procurement contracts was a matter of debate under Romanian law. Although the state and public authorities may enter into arbitral agreements only if they are authorised by law or international conventions to do so, the New Code of Civil Procedure now clearly states that unless specifically prohibited by law or statute, public law entities

with an economic scope of activity can validly conclude arbitration agreements (Article 542). Such legislative solution of differentiating between the state and public authorities on the one hand, and public law entities with an economic scope of activity on the other, with respect to their capacity of entering into arbitral agreements, could offer grounds for continuing this debate in the future.

Romanian public authorities have commonly used the International Federation of Consulting Engineers (FIDIC) form contracts when contracting large-scale public works, especially in projects financed by foreign financial institutions. An order of the Ministry of Public Finance enacted in 2008 provided that the FIDIC forms of contract, with certain amendments, were mandatory for agreements governed by public procurement regulations. The order was, however, abrogated, with the result that contracts no longer need to follow any specific model, but parties are free to choose the FIDIC forms if the forms are suitable for their purposes.

## ii Rules of evidence

If neither the arbitration agreement nor the arbitral tribunal specify a set of rules of evidence, the general rules of evidence provided under the Code of Civil Procedure are used, subject to certain exceptions. This is also applicable to arbitration before the CICA, whose rules of evidence reflect those of the Code of Civil Procedure, as detailed in Article 57 of the new Arbitration Rules.

Romanian procedural law governing evidence is based on three main principles:

- a* each party must bring evidence in support of its claims or defences (onus probandi incumbit actori);
- b* both parties must have equal access to proffer evidence and have the right to produce counter evidence; and
- c* the judge or arbitral tribunal may decide upon the admissibility of any type of evidence permitted by law.

The main difference regarding the introduction of evidence before an arbitral tribunal as opposed to the procedure before a court of law is that an arbitral tribunal lacks the authority to take coercive or punitive measures against witnesses, experts or third parties. An arbitral tribunal must refer to a court of law for enforcing such measures against the participants in arbitration.

The Code of Civil Procedure recognises the arbitrator's authority to consider any evidence provided for by law, including the right to issue subpoenas. However, since only a court may take coercive measures against fact or expert witnesses, the arbitrator cannot take action against third parties who refuse to produce evidence in an arbitration proceeding.

Parties to arbitration may petition a court, at any time during the arbitration proceedings and even prior to the filing of the arbitration petition, to secure a piece of evidence that is in danger of being lost should its admission into evidence be postponed. This procedure allows the court to hear witnesses and expert opinions, to make a fact determination or to make any other necessary evidentiary determination. In the case of emergency, such an evidentiary procedure may take place *ex parte*.

The 2014 Rules of Arbitration also permit the arbitral tribunal, in accordance with Article 81, to apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association.

### ***Constitutionality control***

Parties to litigation before a Romanian court have the right to raise an exception of non-constitutionality and ask the courts of law to call on the Romanian Constitutional Court to rule on the matter. A modification of Law 47/1992 regarding the Constitutional Court has now clarified that this also applies to arbitral tribunals. This practice was confirmed by a decision in which the parties to arbitration successfully petitioned for the constitutional review of a legal provision.

The Code of Civil Procedure and the amendments to the CICA Rules of Arbitration also implemented a new ground for the annulment of CICA arbitral awards. Such award can now be annulled if the tribunal has based its decision on a legal provision that was found in violation of the Romanian Constitution by the Constitutional Court, as a result of a non-constitutionality motion initiated before the same arbitral tribunal. Annulment on the above ground can be requested within three months from the date on which the Constitutional Court's ruling was published in the Official Gazette.

### **iii Investor–state disputes**

In 1975, Romania signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and is currently party to over 70 bilateral investment treaties (BITs). It is also a party to the Energy Charter Treaty. Romania has been involved in several disputes before the International Centre for Settlement of Investment Disputes (ICSID).

In 2009, in *EDF (Services) Limited v. Romania*, an ICSID tribunal dismissed all the claims made by United Kingdom investor EDF (Services) Limited and, in a rare decision, ordered the reimbursement by the claimant of US\$6 million of legal costs for the benefit of the Romanian state.

In 2008, ICSID arbitral tribunals rendered two decisions on jurisdiction in cases filed by foreign investors against Romania.

In *Rompetrol Group NV v. Romania*, a case based on the Netherlands–Romania BIT, the arbitral tribunal found that it had jurisdiction to hear the claims made by the investor and decided that the place of incorporation, as opposed to shareholders' control, was the criterion that the arbitral tribunal should consider when determining jurisdiction pursuant to the BIT. The case centred on criminal proceedings against the investor's officers and managers and was concluded on 6 May 2013. The award is notable in that the tribunal found that excesses in criminal proceedings (in this particular case, carried out by the Romanian authorities) constituted a violation of the investment treaty.

In *Ioan Micula, Viorel Micula and Others v. Romania*, a case filed under the Sweden–Romania BIT, the investors sued the Romanian state in connection with the decision to revoke a set of incentives (including tax exemption) previously granted to entice investment in an underdeveloped region of Romania. The arbitral tribunal found that it had jurisdiction, and that two former Romanian citizens who became Swedish citizens were to be treated as foreign investors for the purposes of the BIT. On 17 December 2013, the tribunal ruled against Romania and awarded damages to the claimants. On 18 April 2014, Romania lodged an application for annulment of the arbitral award before the ICSID. On 26 February 2016, the tribunal rejected Romania's claims regarding the annulment of the award, citing the fact that 'among other statements, the tribunal indicated that 'it is not evident to the tribunal that the EU was requesting the revocation of [the incentives], and the record shows that it was not evident to Romania either'.

However, on 26 May 2014, the European Commission, in accordance with Article 11 of Council Regulation (EC) No. 659/1999, issued a suspension injunction against Romania, arguing that the implementation of the arbitral award would constitute an illegal form of state aid, effectively rendering the award unenforceable. A final decision of the Bucharest Court of Appeals, issued on 24 February 2015 in case file 15755/3/2014/a1, has also suspended the execution of the award, while the investors brought an action against the Commission, in Case T-646/14, to annul its decision regarding the suspension injunction. Case T-646/14 was closed through an Order of the President of the Fourth Chamber of the General Court dated 29 February 2016 as a result of the applicants' request on 2 December 2015 to discontinue the proceedings.

In 2010, two sets of proceedings were initiated against Romania before the ICSID. The first claim was registered on 16 June 2010 by Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. The investors, active in the press distribution and real estate sectors, alleged a breach of the Romania–USA BIT. The case was decided on 2 March 2015 with an award in favour of Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. As a result, Romania must pay the investors an amount of over €7 million as compensation, €480,000 as reimbursement of part of the costs incurred for gaining access to documents seized in the frame of criminal investigations, and US\$1 million as reimbursement of legal fees.

The second case was lodged on 19 November 2010 by investors active in the field of agricultural machinery and equipment enterprise (*Ömer Dede and Serdar Elhüseyni v. Romania and AVAS Privatization Agency of the Government of Romania*). The claim was dismissed on 30 August 2013 on jurisdictional grounds (the tribunal found that it lacked jurisdiction to hear the claims).

In December 2011, the *Spyridon Roussalis v. Romania* case was finalised with an ICSID tribunal rejecting all of the claims raised by a Greek investor against the Romanian state, on the basis of the 1997 Greece–Romania BIT. The case, registered in 2006, was related to the privatisation of some warehousing facilities during the late 1990s, the claimant having alleged that various state actions in response to his default under the privatisation agreements constituted expropriation and breach of the fair and equitable treatment standard. The respondent lodged a counterclaim, purporting to collect damages from the claimant. The counterclaim was also dismissed by the tribunal (although one member of the panel dissented on the decision) for lack of jurisdiction. This decision should also be noted for the tribunal's less usual approach to the allocation of arbitration costs, as it ordered the claimant to pay 60 per cent of the respondent's legal fees and expenses.

Italian investors Marco Gavazzi and Stefano Gavazzi initiated a claim against Romania<sup>2</sup> on 27 August 2012. The dispute derived from the privatisation of a steel plant and subsequent local proceedings (including arbitration with the privatisation authorities), which had allegedly caused the Italian investors damages amounting to approximately US\$39 million. The Court ruled on 18 April 2017 and awarded an undisclosed amount to the claimants as well as compound interest on the amount of compensation, as calculated on the LIBOR rate for six months denominated in US dollars, adjusted at every six months, from 1 September 2002 until the date of payment of the compensation. In 2014, the Romanian state filed a claim with an ICC tribunal against the Italian power distribution company Enel. The state failed to settle with Enel over a put option clause in the privatisation contract, according to which

---

2 ICSID Case No. ARB/12/25.

Electrica SA had the right to sell and Enel had the obligation to buy a minority stake in Electrica Muntenia Sud. The state claimed an amount of around €521 million, but the ICC tribunal decided in February 2017 that Enel must pay less: an amount of €401 million for 13.57 per cent (shares) of Electrica Muntenia Sud.

In another dispute between Enel and the state, initiated in 2013, the state claimed that Enel breached the privatisation contract for Electrica Muntenia Sud, and asked for €800 million in damages and a separate payment of €400 million. The ICC tribunal dismissed all the claims and ruled that the state will have to pay arbitration fees worth €1.5 million.

Gabriel Resources Ltd initiated before an ICSID tribunal a claim against the state<sup>3</sup> on 30 July 2015 for blocking a project regarding the Roşia Montana mining concession, stating that this was an investment in an amount of over €700 million. The case is currently pending (on 7 February 2018, following the resignation of an arbitrator, the Secretary-General notified the parties of this vacancy and the proceedings were suspended).

On 5 July 2016, Nova Group Investments BV filed an arbitral claim against the Romanian state (ICSID Case No. ARB/16/19), seeking compensation for the supposed systematic destruction of its Romanian investments resulted from the measures of the Romanian government. The claimant said that these measures consisted in the arbitrary actions of the state officials, including the allegedly unfair conviction of Mr Dan Adamescu (who became sick while being imprisoned and passed away due to alleged improper medical treatment) along with the criminal prosecution of the director of Nova Group, Mr Alexander Adamescu. The case is currently pending.

Another pending case against the Romanian government is *Alpiq AG v. Romania* (ICSID Case No. ARB/14/28) in which the claimant challenged the decision of Romanian government regarding the cancellation of two long-term energy delivery contracts concluded between claimant's local subsidiaries, Alpiq Rom Industries and Alpiq RomEnergie, and Romania's state-owned electricity utility Hidroelectrica, after the latter was declared insolvent. This case has been pending since 17 November 2014 and the current status consists of observations of the claimant related to the respondent's request from 9 February 2014.

There is another arbitral claim, filed by the Micula brothers, in the case which has come to be known as *Ioan Micula, Viorel Micula and others v. Romania* (II – a distinct claim from the one above – ICSID Case No. ARB/14/29) in which the claimants argue that the Romanian government allegedly failed to police the alcohol black market, including illicit alcohol sales and tax evasion of illegal alcohol producers, causing an alleged negative impact on claimants' licit alcohol production business in Romania. This case has been pending since 24 November 2014. On 5 February 2018, the claimants filed a request for provisional measures, which were granted by the Tribunal on 15 March 2018. The decision of the Tribunal on provisional measure has not been made publicly available thus far.

---

3 ICSID Case No. ARB/15/31.

### **III OUTLOOK AND CONCLUSIONS**

Important developments to the general rules concerning arbitration in Romania have been seen as a result of public discontent over the previous evolution of the main local arbitration body, the CICA. The substantial reform by the 2018 CICA Rules has brought about significant changes to the arbitration procedure, and has addressed the main points of dissatisfaction regarding the previous 2014 Rules.



# ABOUT THE AUTHORS

## **TIBERIU CSAKI**

*Dentons*

Tiberiu Csaki is a partner at Dentons Europe and head of the firm's international arbitration and litigation practice in Bucharest. He has over 25 years of experience in litigation and international arbitration. He represents multinational companies in a wide range of commercial disputes, before local and international arbitration institutions. He was educated at the Bucharest Law School and is a member of the Bucharest Bar.

## **DENTONS**

28 C General C Budisteanu  
Sector 1  
010775 Bucharest  
Romania  
Tel: +40 21 312 4950  
Fax: +40 21 312 4951  
tiberiu.csaki@dentons.com  
www.dentons.com

**Law**  
**Business**  
**Research**

ISBN 978-1-912228-40-9