Dispute Resolution in Romania -
Before and After Accession to the European Union

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1. Legal System

Romania, like most of the European countries, is a civil law jurisdiction. The main sources of Romanian law are the Constitution, the Acts of the Parliament, international treaties having direct effect in the Romanian legal system, decrees made by various state authorities (e.g. Government, various ministries, local governments).

Romania is a member state of the European Union (EU) since January 1st 2007 and so is bound by some of the regulations, directives and decisions of the EU which have already been incorporated into Romanian law.

The Constitution prevails over all laws. In addition, the main international conventions concerning human rights are incorporated into Romanian law and prevail over laws. If a particular provision of a law is not consistent with the Constitution or with the international convention concerning human rights, the courts of law may apply to the Constitutional Court for that provision to be nullified.

The legal concept of precedent is unknown to Romanian law, and therefore previous decisions are binding only for the parties to the respective proceedings. Nevertheless, case law plays an important informal role, since, in practice, judges in the lower courts tend to follow case law developed in higher courts.

2. The State Courts

The main courts are the Local Courts, the District Courts, the Courts of Appeal and the High Court of Justice. In the courts there are also “specialist departments” for labour law, social security, administrative and tax law, intellectual property law.

There are two or three instances available, depending on the area of law or the circumstances of the case.

3. Arbitration

Both domestic and international arbitration are broadly used in Romania. Romania acceded to a number of international conventions on arbitration: Geneva Protocol on Arbitration Clauses (1924), Geneva Convention on the Execution of Foreign Arbitral Awards (1927), Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965).

Arbitration is ruled by the provisions of the Romanian Civil Procedure Code, which contains rules for both ad hoc and institutional arbitration. Romanian Civil Procedure Code applies to both domestic arbitration and international arbitration conducted under the Romanian procedure rules.
The Romanian law allows parties to refer to arbitration for the settlement of their domestic or international patrimonial disputes, except for rights concerning which the law does not allow to conclude a compromise.

Arbitration can take place if the parties have concluded an arbitration agreement. The written form of the arbitration agreement is mandatory but this requirement can be fulfilled in many ways, such as by oral statements written down in the record of the session or by tacit acceptance (e.g. by submitting the statement of claim or by making a statement of defence which does not invoke the lack of jurisdiction of the arbitral tribunal).

Both ad hoc and institutionalised arbitration are possible under the Romanian law. The main arbitration permanent institutions are the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania and Bucharest, the Arbitration Commissions organised at approximately half of the county chambers of commerce and industry, solving mainly domestic cases, the Arbitration Commission of the Arbitral Chambers organised attached to the Stock Exchange and with the Commodity Exchange.

The arbitration procedure shall follow the rules established by the parties in their arbitration agreement or, in institutionalised arbitration, by in the Rules of the arbitral institution. In the absence of such rules, the arbitral tribunal shall set the rules, and if also the arbitral tribunal failed to set these rules, the provisions of the Civil Procedural Code apply.

The hearings are conducted in the language provided by the arbitration agreement or by the agreement of the parties. Should the parties fail in reaching an agreement in this respect, the arbitration shall be conducted in the language of the contract the dispute has arisen from or in a language of international use decided by the arbitral tribunal. The services of a translator may be used at any time.

The arbitral dispute is settled on the basis of the main contract and of the applicable rules of law, also taking into consideration commercial usages, where applicable. The arbitral tribunal may settle the dispute ex aequo et bono only if the parties reached to an express agreement of the parties.

There is no legal provision setting any special requirements for the arbitrators’ appointment or relative to their qualifications or experience. However, under the Romanian law, certain professions generate, according to special laws, an incompatibility with the arbitrator capacity – e.g., under the legislation currently in force, being a judge or a public prosecutor is incompatible with being an arbitrator. In case of arbitral institution, there is a list of recommended arbitrators, but parties are still free to decide also no appoint arbitrators off list. In international arbitration both Romanian and foreign arbitrators may be appointed.

4. Relationship between the State Courts and Arbitral Tribunals

Courts may intervene in connection with arbitral proceedings in some circumstances:

- in ad hoc arbitration, if the parties fail to agree upon the nomination of the arbitrators, the court of law shall be the appointing authority; in institutionalised arbitration, the appointing authority are not the courts of law, but the authority designated in the Rules of the Arbitration Court.
in ad hoc arbitration, courts of law have jurisdiction on solving the petitions for challenging the arbitrators; in institutionalised arbitration, the authority designated in the Rules of the Arbitration Court has the jurisdiction for solving such petitions.

- before or during arbitration either party may ask the competent court-of-law to approve conservatory and interim measures regarding the subject matter of the dispute or to preserve evidences; the arbitral tribunal has also jurisdiction for such measures, but due to the fact that the arbitral tribunal cannot resort to means of coercion or apply sanctions on witnesses or experts, for such measures parties may request the court-of-law to enforce such measures.

- courts of law have jurisdiction for setting aside an arbitral award. An arbitral award is final and binding to the parties, and it can be set aside only for certain specific reasons: (a) the dispute was not arbitrable; (b) the absence of an arbitration agreement or the arbitral agreement was void or inoperative; (c) the arbitral tribunal was not constituted according to the arbitration agreement; (d) the party was not present on the date when the dispute was heard and the summoning procedure was not legally fulfilled; (e) the decision was rendered after the expiry of the agreed time limit; (f) the arbitral tribunal has decided on matters not requested or failed to decide on which a decision was requested or awarded more than it was requested; (g) the decision does not include the reasons, does not state the date and place where it was rendered, is not signed by the arbitrators; (h) the decisional part of the award includes provisions that cannot be carried out; (i) the arbitral award is in violation of public policy, good morals or mandatory provisions of the law.

5. Alternative Dispute Resolution (ADR)

There is little legal provision on ADR, but the absence of very complex legislation does not prevent the conduct of any form of ADR agreed upon by the parties.

In commercial disputes which can be evaluated at a monetary value, a prior conciliation is mandatory. There are also some mandatory rules on the conduct of the conciliation, and on the document recording the outcome of the conciliation. These provisions does not apply to arbitration, therefore there is no mandatory conciliation before an arbitral case.

Currently, mediation is set by law for solving disputes among the members of various professional bodies or for certain public services. Apart of such mediation, There are no legal provision concerning the mediators and other neutrals in ADR procedures, but a draft law on mediation of civil and commercial litigation is being discussed by the Parliament. According with this draft law some conditions for practising the mediator profession in a way that would assure a certain quality standard in his/her work shall be required. Among those requirements, an important one, subject of an intense debate, is the knowledge of Romanian language.

The main private bode specialised in ADR activities is the Centre for the Mediation of Commercial Disputes (CMCD) attached to the Chamber of Commerce and Industry of Romania and Bucharest.

In all forms of ADR, unless the final settlement is not written and included into a court decision or signed before a public notary, it is not enforceable as such.
6. Recognition of foreign judgements Romania

Foreign judgements are enforceable against foreigners in Romania either under the conditions of various bilateral treaties, or, in the absence of such treaties, should they meet cumulatively the conditions of Law No. 105/1992 for the Settlement of Private International Law Relations (LPILR), i.e.: (a) the award is final according to the law of the state where it was made; (b) the tribunal that made it had, under such law, the jurisdiction on settling the case; (c) there is reciprocity with respect to the effects of foreign awards between Romania and the state of the tribunal that made the award; (d) the award may be granted leave of enforcement under the law of the tribunal that rendered it; (e) the right to ask for leave for enforcement is not barred by limitation under the Romanian law.

Recognition of the foreign award may be refused in one of the following cases: (a) the award is the result of a fraud in the procedure followed abroad; (b) the award is contrary to the public policy of Romanian private international law; such a ground for refusing the recognition is the breach of the provisions of LPILR on the exclusive jurisdiction of the Romanian jurisdiction; (c) the action was settled between the same parties by a decision, even if not final, of a Romanian court-of-law or was being judged before such court on the date the foreign arbitration was started.

Foreign awards whereby conservatory measures were granted and those with provisional execution may not be enforced on the territory of Romania.

A special procedure is granted for the recognition and enforcement of EU state members courts' awards (which is not applicable to arbitration awards issued in such states).

Recognition of foreign arbitral awards in Romania is subject of the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (1958) conditions, as Romania ratified this convention. When international arbitral awards are made in countries Romania is not bound to by the above mentioned convention or by some special bilateral agreements, LPILR applies.

7. Arbitral procedure regarding the contracts financed by EU

For the implementation of the pre accession European programs, ISPA and PHARE, managed by Ministry of Economy and Finance – Central Finance and Contracting Unit from Romania were used three types of contracts such as: technical assistance contracts, supervision contracts, works contracts and supply contracts. All those contracts are part of an ISPA or PHARE measure.

For several years, there was a certain hesitation as to the arbitrability of disputes of such contracts. At the time the Law on administrative litigation no. 554/2004 entered into force in January 2005, there was a strong possibility for the contracts for public works financed by pre-accession founds to be construed as an administrative contracts. Such definition would have lead to the compulsory exclusive jurisdiction of the state courts. Being a matter of public policy, this issue arose at the initiative of the Ministry of Economy and Finance in several cases. Later, the Bucharest Court of Appeal decided on the arbitrability of such disputes, decision that was later confirmed by the High Court of Cassation and Justice.

On July 1st, 2008, the Government decided to implement the FIDIC form of contracts as a mandatory form of contracts for public authorities.
The set of rules and procedures are based on the provisions of the General Conditions FIDIC (yellow and red). The contracts are structured in two, respectively, General Conditions and Particular Conditions. Regarding General Conditions these contain the provisions of the Practical Guide and the provisions of the national legislation. Depending on each type of contract the General Conditions can be amended through the Particular Conditions.

Regarding the contractual provisions for the dispute settlement General Conditions stipulates:

**Amicable dispute settlement**

40.1 The Parties shall make every effort to settle amicably any dispute which may arise between them. Once a dispute has arisen, the Parties shall notify each other in writing of their positions on the dispute and any solution which they consider possible. If either Party deems it useful, the Parties shall meet and try and settle the dispute. A Party shall respond to a request for amicable settlement within 30 days of such a request. The maximum period laid down for reaching such a settlement shall be 120 days from the commencement of the procedure. Should the attempt to reach an amicable settlement fail or a Party fail to respond in time to requests for a settlement, either Party shall be free to proceed to the next stage of the dispute-settlement procedure by notifying the other.

40.2 If the amicable dispute-settlement procedure fails, the Parties may, in the case of decentralised contracts, agree to try conciliation through the European Commission. If no settlement is reached within 120 days of the start of the conciliation procedure, each Party shall be entitled to move on to the next state of the dispute-settlement procedure.

**Article 41 Dispute settlement by litigation**

41. If no settlement is reached within 120 days of the start of the amicable dispute-settlement procedure, each Party may seek:

   a) either a ruling from a national court
   b) or an arbitration ruling in accordance with the Special Conditions of the contract.”

Those contractual provisions are corroborated with the provisions of the Romanian Civil Procedure Code which contains specific provisions regarding the matters which are arbitrable and on the procedure to be followed. Romanian Civil Procedure Code allow parties to refer to arbitration for the settlement of their domestic or international patrimonial disputes, except for rights which cannot be an object of a settlement.

Currently, most of the litigation arising from these type of contracts are settled by either DAB, or arbitration.