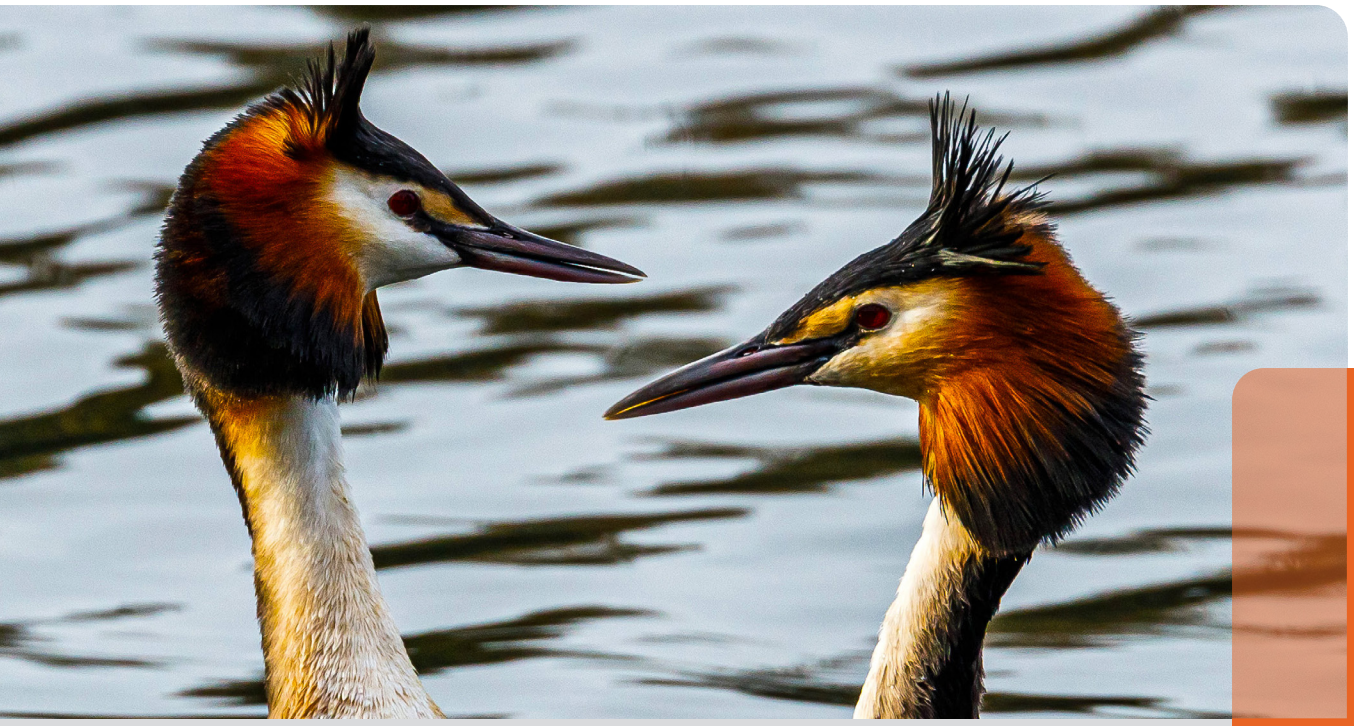
International
Comparative
Legal Guides



International Arbitration

2024

21st Edition

Contributing Editors:
Steven Finizio & Charlie Caher
Wilmer Cutler Pickering Hale and Dorr LLP

CDR Commercial Dispute Resolution
glg Global Legal Group

Preface

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

International Comparative Legal Guides

Romania


Adrian Iordache


Lucian Ilie

Consortium Legal / Outer Temple Chambers

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

In domestic and international disputes, the arbitration agreement must be concluded in writing, under sanction of nullity. The arbitration agreement is deemed valid if it meets the conditions of any of the following laws: (i) the law chosen by the parties (*lex voluntatis*); (ii) the law governing the dispute (*lex causae*); (iii) the law of the agreement that comprises the arbitration clause (*lex contractus*); or (iv) Romanian law.

The substantive validity conditions of an arbitration agreement are subject to general contract law rules, which require, *inter alia*: (i) a valid object; (ii) a valid cause; (iii) full exercise capacity of the parties; and (iv) valid consent. Where the dispute concerns the transfer of land, the arbitration agreement must be in "authentic" notarial form.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement must refer to a dispute and, in the case of an arbitration clause, to the disputes arising from or in connection to the underlying contract to the resolution by arbitration, specifying the means of appointing the arbitrators. It is also sufficient to refer to an institution or institutional rules.

The arbitration agreement may also contain provisions regarding: (i) the scope of the arbitration; (ii) the choice of the law on the merits as well as the applicable law to the arbitration agreement itself; (iii) whether the arbitration is *ad hoc* or institutional; (iv) the seat of arbitration; (v) the number of arbitrators; (vi) the rules for the composition and constitution of the arbitral tribunal; and (vii) the language of the arbitration.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Generally, national courts recognise and enforce valid arbitration agreements.

According to the Romanian Civil Procedure Code (hereinafter referred to as the "CPC"), a court seized of a dispute governed by an arbitration agreement must decline jurisdiction if at least one of the parties invokes the agreement to arbitrate. However, the court shall maintain jurisdiction if the defendant submits its defence on the merits of the dispute without making any reservations with respect to the arbitration agreement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The CPC governs both domestic and international arbitration, including the enforcement of arbitral awards. The CPC ensures an appropriate setting for *ad hoc* arbitration proceedings seated in Romania, while also applying as *lex arbitri* in institutional arbitration proceedings.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The CPC regulates both domestic and international arbitration, in separate sections. Domestic arbitration falls under Book IV of the CPC (Articles 541 to 621), while international arbitration provisions can be found under Book VII of the CPC (Articles 1111 to 1133). By virtue of Article 1123, the domestic arbitration provisions related to: (i) the constitution of the arbitral tribunal; (ii) the arbitral procedure; and (iii) the award may also be applicable to international arbitration proceedings, provided the parties do not derogate from them.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The CPC follows the general principles of the UNCITRAL Model Law without formally adopting it. However, some areas of the Romanian arbitration law, such as applications for preliminary orders and interim relief, are significantly less regulated than in the UNCITRAL Model Law.

Conversely, in some other areas, the Romanian arbitration law provides for more detailed regulation than the UNCITRAL Model Law (for example, the CPC lists the cases whereby the arbitrator is considered to have breached the standard of impartiality and independence).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

As a general rule, under Romanian law, the arbitration will be governed by the arbitration agreement, through which the parties can regulate the procedure. However, parties cannot

derogate from public order and imperative provisions (Article 541 of the CPC), or from general procedural principles such as due process, the right to be heard and the adversarial principle (Article 576 of the CPC).

In international arbitration, if the parties have not determined the procedural rules, the arbitral tribunal will establish them directly, or by reference to institutional rules or various procedural laws. In any case, the arbitral tribunal must guarantee the equality of arms and the parties' right to be heard in adversarial proceedings (Article 1115 of the CPC).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

A dispute may be non-arbitrable *ratione materiae* under the domestic arbitration provisions, either where: (i) the dispute relates to rights of which the parties cannot freely dispose; (ii) the dispute relates to a matter over which the State has reserved exclusive jurisdiction; or (iii) the dispute relates to personal status, personal capacity, inheritance or family relations.

In international disputes, a dispute is arbitrable *ratione materiae* where it concerns an economic interest (a so-called *patrimonial* dispute), provided that the dispute concerns rights of which the parties can dispose, and that the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the State courts.

In respect to the *ratione personae* arbitrability, the CPC identifies the following categories of persons that can be party to an arbitration agreement: (i) natural persons and legal persons of private law; (ii) the State and public authorities expressly authorised by law or by international conventions to which Romania is a party; and (iii) legal persons of public law, provided that they also perform economic activities and the law or the articles of incorporation do not prohibit arbitration. However, where the arbitration is international, if one of the parties to the arbitration agreement is the State (including a State-owned or -controlled entity), such party cannot contest the arbitrability of a dispute on such ground.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

As regards both domestic and international arbitration (Articles 579 and 1119 of the CPC), the principle of competence-competence applies, allowing arbitral tribunals to rule on the question of their own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Local courts take a pro-arbitration stance by dismissing claims for lack of court jurisdiction if one of the parties relies on a valid arbitration agreement. National courts will retain jurisdiction only in circumstances such as where: (i) the arbitration agreement is null or invalid; (ii) the respondent has pleaded on the merits without invoking the arbitration agreement; and (iii) the arbitral tribunal cannot be constituted due to the manifest fault of the respondent.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The issue of the jurisdiction of an arbitral tribunal can be addressed by a national court when a party to an arbitration proceeding challenges an arbitral award in accordance with Article 608(1) of the CPC. Regarding jurisdictional objections, the national court will check whether: (i) the dispute is not arbitrable; or (ii) the arbitral tribunal rendered the award without an existing arbitration agreement, or under a null and void or ineffective arbitration agreement. The review of its own competence by the court will not go beyond what is necessary in *prima facie* weighing the merits of the case.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

As a rule, Romanian law only recognises arbitration based on agreement, and it does not allow for an arbitral tribunal to assume jurisdiction over individuals or entities that are not part of an arbitration agreement. Further, third parties may take part in arbitral proceedings only if such third party and all the parties agree. An exception to such requirement concerns accessory joinder claims where a third party voluntarily joins an ongoing procedure solely to support the position of one of the parties. A third party may also submit to the arbitration in the usual course in the absence of a prior arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The general limitation period for bringing a claim is three years for both litigation and arbitration matters (Article 2517 of the Civil Code). The Romanian Civil Code also provides special limitation periods depending on the subject matter of the case (e.g. Articles 2518 to 2521 of the Civil Code).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

As a rule, enforcement actions against a debtor undergoing insolvency proceedings are suspended by law. Due to lack of relevant case law, whether arbitration proceedings must also be automatically stayed is unclear. It could be argued that, in international arbitration, the arbitral tribunal may order the stay of the proceedings only if and to the extent that continuing the arbitration would breach Romanian public policy.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In domestic arbitration, arbitrators may render their award by applying the applicable law or (if specifically permitted by the

arbitration agreement) as "amiables compositeurs" (i.e. *ex aequo et bono*), depending on the provisions of the arbitration agreement. If the parties have not specified the applicable law in their arbitration agreement, nor stated that the dispute shall be decided *ex aequo et bono*, then the arbitral tribunal shall apply the rules of law substantiated by the parties during the proceedings or determined by the arbitrators in application of the local rules on private international law provided by the Romanian Civil Code.

In international arbitration, arbitrators may render their award by applying the applicable law or as "amiables compositeurs" (i.e. *ex aequo et bono*), depending on the provisions of the arbitration agreement. If the parties have failed to determine the applicable law, the arbitral tribunal is entitled to determine the applicable law according to the conflict of laws rules that it deems applicable, including by taking into consideration customs and business practices.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Pursuant to Article 2564 of the Civil Code, the application of the foreign law (chosen by the parties) should be disregarded if it violates Romanian public policy or is incompatible with the fundamental principles of European Union law. In the same vein, according to Article 1125 of the CPC, the Romanian courts may refuse to give effect to a foreign arbitral award (i.e. an award issued by an arbitral tribunal seated outside Romania) if such award breaches Romanian public policy ("ordre public").

Romanian courts have distinguished between "mandatory" and "dispositive" legal provisions variously by reference to public interest *versus* private order, but more consistently by reference to the logical test as to whether on the face of the provision, the parties are able to contract out of the prohibition or mandate contained in the law. If the parties can so "derogate", then the provision is a "dispositive" one that may not be used to challenge the legality of an arbitral award. If the parties cannot derogate from the provision, then the provision could in theory ground a challenge.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The law of the arbitration agreement can be different from the law applicable to the underlying contract (as a consequence of its independence) and, unless expressly stated, may be determined by the arbitral tribunal to be either: (i) the law chosen by the parties (*lex voluntatis*); (ii) the law governing the dispute (*lex causae*); (iii) the law of the agreement that comprises the arbitration clause (*lex contractus*); or (iv) Romanian law. The validity of the arbitration agreement cannot be contested based solely on the validity of the main contract, given the severability of the two agreements.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree whether disputes should be submitted to a sole arbitrator or an arbitral tribunal. If the parties fail to agree, there will be three arbitrators: each party can appoint one arbitrator, and those two arbitrators shall appoint a presiding arbitrator. 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.

The CPC provides for the nullity of the arbitration clause, which allows one of the parties privileged participation in the nomination of the arbitrator, or provides a party's right over the other party to nominate the arbitrator or to have more arbitrators than the other party.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

According to Article 561 of the CPC, where the parties disagree with regard to the appointment of a sole arbitrator or of the presiding arbitrator, or if a party fails to make an appointment, the parties can request the court (at tribunal level) with territorial jurisdiction to appoint the arbitrator/presiding arbitrator. The appointment by the court is final (i.e. not subject to appeal) within 10 days of the filing of the request and after the hearing of the parties.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Article 561 of the CPC provides that local courts may intervene in the selection of arbitrators by appointing an arbitrator or the presiding arbitrator in cases where the parties do not agree on the appointment of the sole arbitrator, a party fails to nominate an arbitrator, or, in the case of a three-panel arbitral tribunal, the two arbitrators do not agree on whom should they appoint as presiding arbitrator. The local courts will render a decision regarding the appointment of the arbitrators after hearing the parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Both under the CPC and local institutional rules, the arbitrator is required to be independent, impartial and to disclose any conflicts of interest. The scope of these concepts is determined in relation to the practice of the courts on a case-by-case basis. An arbitrator who is aware of an issue of incompatibility has a legal duty to notify the parties and the other arbitrators before accepting the appointment, and if such causes occur after acceptance, as soon as he or she becomes aware of it. Failing to disclose such incompatibility may result in a challenge to and even annulment of the award.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The relevant provisions governing the procedure of arbitration may be found within the arbitration-related chapters of the CPC, namely Book IV (national arbitration proceedings) and Book VII, Title IV (international arbitration proceeding).

These provisions represent the general law and are applicable: (i) in *ad hoc* arbitration where the parties or the arbitral tribunal have not agreed to or established other applicable rules; or (ii)

whenever the procedural rules of an institutional arbitration do not provide otherwise.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to establish in their arbitration agreement the procedural rules to be applied in the course of the arbitration. The parties also refer to arbitral institutions (such as the Permanent Court of Arbitration of the German-Romanian Chamber of Commerce and Industry ("PCA-AHK"), Bucharest International Arbitration Court ("BIAC"), Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania ("CICA-CCIR"), International Chamber of Commerce ("ICC"), Vienna International Arbitral Centre ("VIAC") or London Court of Arbitration ("LCIA")).

Irrespective of the applicable procedural rules, Article 575 of the CPC provides that the fundamental principles of civil trials must be observed, including: (i) ensuring the parties can exercise their procedural rights equally and without discrimination; (ii) exercising procedural rights in good faith and according to their legally recognised purpose; (iii) ensuring the parties' right to defence; (iv) the parties' right to decide the object and limits of the arbitration, while the arbitral tribunal cannot decide a matter if not asked; and (v) ensuring the parties' right to be heard in adversarial proceedings.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules governing the conduct of counsel in arbitral proceedings. Generally, where counsel comprises regulated legal professionals, they are subject to the ethical obligations under Romanian law regulating lawyers' practice, the statute of the legal profession and by the Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers adopted by the Council of Bars and Law Societies of Europe.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators enjoy the powers agreed by the parties, subject to the limitations provided under the applicable arbitration law (*lex loci arbitri*). The CPC empowers arbitrators to: (i) decide on his or her own jurisdiction; (ii) assess the case according to his or her "intimate belief"; (iii) determine the place of arbitration and the law applicable to the substance of the dispute, in the absence of the parties' agreement; and (iv) determine the language of arbitration, in the absence of the parties' agreement.

Regarding statutory duties, an arbitral tribunal is obliged to determine a dispute within six months of its constitution (although this time limit may be re-adjusted). Further, the arbitrator has a duty to act impartially and independently and must disclose any circumstances that may prevent him or her from doing so.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The law does not specifically mandate representation by legal counsel. In practice, however, legal professionals are retained for legal representation before arbitral tribunals in Romania. Strictly speaking, pleading before an arbitration tribunal is not a legally restricted activity requiring a legal practice licence. However, to the extent that the work would entail legal advice, it would fall within the rules regarding the practice of law.

Law no. 51/1995 on the organisation and exercise of the legal profession specifically allows foreign lawyers to practise law in international arbitration proceedings seated in Romania.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Article 565 of the CPC provides that arbitrators are to be held liable for the damage incurred as a result of the following actions: (i) if they resign after accepting the appointment; (ii) if they fail to attend the hearings or present their decision within the timeframe specified in the arbitration agreement or the law; (iii) if they fail to observe the confidential nature of the arbitration proceedings; or (iv) if they breach their duties through bad faith or gross negligence. Also, under Romanian law, arbitrators can face criminal liability for fraud or corruption.

While it is widely accepted in practice that arbitrators are not liable for awards themselves (subject to the above), there is no express legal protection setting out arbitrator immunity.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Local courts can intervene, on an interested party's request, to assist in matters obstructing the course of the arbitral proceedings. The CPC provides for specific areas in which courts can intervene, such as: (i) the constitution of the arbitral tribunal; (ii) challenge of arbitrators; (iii) obtaining provisional or interim measures; and (iv) the taking of evidence.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

In domestic arbitration, arbitral tribunals have alternative jurisdiction to grant preventive and/or interim measures, as well as to ascertain factual circumstances. The local courts have exclusive jurisdiction for these types of relief prior to the commencement of the arbitration proceedings, and they may also intervene during the arbitration proceedings if the measures taken by the arbitral tribunal are not complied with by one of the parties (Article 585 of the CPC).

In international arbitration, arbitral tribunals may grant interim or conservatory measures, absent contrary provisions in the arbitration agreement. If the concerned party resists implementing the measures granted by the tribunal, the latter may seek assistance from the competent State court. Awarding

such measures may be subject to the court's own assessment on the appropriateness of the measure and, potentially, to payment of an appropriate security (Article 1.117 of the CPC).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

National courts are entitled to grant preliminary or interim relief (see question 7.1 above). As a rule, the court's intervention in such cases is limited to preliminary or interim relief, as the case may be, and has no effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, when faced with requests for interim relief, courts generally retain jurisdiction to hear the merits of the request on grounds of the alternative jurisdiction provided by the CPC to courts and arbitral tribunals. In practice, national courts will grant such requests if all of the following requirements for the admissibility of an interim relief are met: (i) urgency; (ii) semblance of merit; and (iii) that the measure is provisional (i.e. until the final award is rendered).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not prohibited. There are, however, no specific legal provisions in the CPC on this point.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The CPC does not cover the legal 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. Romanian courts do not normally grant such measures.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

If a party resists implementation of the arbitral tribunal's decision granting interim measures, enforcement can only be obtained with the intervention of national courts. However, in practice, parties directly request the national courts to grant such measures in the first instance. A more debated topic is whether the national courts may enforce partial arbitral awards, specific to international arbitration. There have been instances in which courts have refused to enforce ICC partial arbitral awards rendered in relation to non-final dispute adjudication board decisions, on the ground that the arbitral award is not final and that enforcing it would breach Romanian procedural rules. However, we also note a recent case (Curtea de apel Bucuresti, Sentinta Civila nr. 2F of 21 January 2022) where the binding force of partial or interlocutory decisions was reaffirmed in the context of an application to set aside an interlocutory decision under the CACI Rules.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

In arbitral proceedings seated in Romania, the applicable rules of evidence are those provided by Romanian law as *lex loci*, namely the CPC. As a matter of principle, the rules on evidence are flexible when it comes to international arbitration. Parties are allowed to choose the means for administering the evidence in addition to those provided under the CPC. As such, parties have the possibility of using 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 ("IBA"). The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CACI") Rules of 2018 actually stipulate that the arbitral tribunal, following the parties' agreement, may apply the Rules on the Taking of Evidence in International Arbitration adopted by the IBA.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

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

Moreover, the arbitral tribunal can order a party to produce certain evidence but it cannot order the production of documents from non-parties (Articles 588 and 589 of the CPC); however, it may seek assistance from the court to compel production of documents by authorities (Article 590).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As mentioned above in question 8.2, the local courts may intervene in support of the arbitration. State courts may intervene, at the parties' request, in any case where the course of the arbitration is obstructed (Article 547 of the CPC). In international arbitration, the CPC provides the right for the arbitral tribunal or for the parties, in agreement with the arbitral tribunal, to request the court's assistance when needed for administering any type of evidence (Article 1118 of the CPC).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The production of written and/or oral witness testimony is regulated by the CPC. A particular rule in arbitration is that witnesses are not heard under oath, as would be the case before a local court. Although not expressly regulated, cross-examination is generally used in arbitration. If the witness

refuses to testify, he/she may be constrained or fined only by State courts (Article 589 of the CPC).

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In Romania, privilege is regulated under the attorney's obligation to ensure confidentiality concerning any aspect of the case. This obligation pertains to public order, is unconditional and unlimited in time and extends to all of the attorney's activities, to his/her associates and employees, and to his/her relationship with other attorneys. Communications between attorneys or between attorney and client cannot, as a rule, be brought as evidence in justice and they may not be divested of their confidential nature.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

According to Article 603(1) of the CPC, the arbitral award shall be in writing and include the:

- name of the arbitrators, seat and date of the award;
- name and address of the parties, parties' representatives as well as of other persons who attended the arbitration;
- arbitration agreement based on which the arbitration was initiated;
- subject-matter of the dispute and summary of the parties arguments;
- factual and legal reasons upon which the award is based, and where the arbitral tribunal decides *ex aequo et bono* the reasons for such decision;
- decision; and
- signatures of all arbitrators (unless it is an award by majority), and, if any, the signature of the secretary of the arbitral tribunal).

In domestic arbitration, the award must be rendered within six months of the constitution of the arbitral tribunal, unless the parties have agreed otherwise (Article 567(1) of the CPC), provided however that the party raising the point has first raised or reserved the right to invoke the time limitation on the first hearing for which they had been legally summoned. With respect to international arbitration, the pronouncement of the award must be made within one year from the constitution of the tribunal (Article 1115(4) of the CPC).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Where clarifications are necessary regarding the meaning, extent or application of the award, a failure to rule on a main or incidental claim, or where the award contains conflicting provisions, any party to the arbitration may ask the arbitral tribunal to clarify the operative part or redress the conflicting provisions by means of a separate award (Article 604 of the CPC).

An interesting matter worth mentioning is that, in terms of exequatur proceedings, the Bucharest Court of Appeal clarified that an award must be recognised as it was granted, and that the exequatur court cannot change the currency of the amounts mentioned in an award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Pursuant to Article 608(1) of the CPC, an arbitral award rendered in domestic or international arbitral proceedings can be challenged on the following grounds:

- the dispute was not arbitrable;
- the arbitral tribunal decided the dispute in the absence of an arbitration agreement or on the basis of a void or ineffective agreement;
- the arbitral tribunal was not constituted according to the arbitration agreement;
- lack of proper notice;
- the decision was rendered after the expiry of the agreed timeframe, although an objection to the time limitation was raised by the parties;
- the arbitral tribunal decided on matters not requested or awarded more than was requested;
- the award does not include the reasons, does not state the date and place of the award, or has not been signed by the arbitrators;
- the award is in violation of public policy, good morals or mandatory provisions of the Romanian law; or
- after the award was rendered, the Romanian Constitutional Court has rendered a decision on an unconstitutionality objection raised in the arbitration, declaring unconstitutional the law that formed the subject of the objection.

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 tribunal).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties cannot agree to refrain from setting aside proceedings in the arbitration agreement. However, the parties may withdraw an application for setting aside after it has been introduced (Article 609 of the CPC).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There is no such possibility for the parties to agree to expand the scope of appeal of an arbitral award beyond the grounds available under Article 608(1) of the CPC.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Arbitral awards cannot be appealed as such. The only available remedy to challenge an award is a setting-aside claim. However, the court may, on a setting-aside claim, retain the case and proceed to dispose of it on its merits.

A request to set aside the arbitral award may be filed before the competent Court of Appeal within 30 days of the service of the award on the parties, unless the request is grounded on the subsequent issuance of the Constitutional Court, where the time limit is three months after publication of that decision.

If an action for annulment is filed, on request only, the court can suspend enforcement of the award pending a decision on the annulment action. Suspension of enforcement may be conditioned on the posting of adequate security.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

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 New York Convention only to:

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

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Romania signed and ratified the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards through Law no. 50/1931, and the 1961 Geneva Convention on International Commercial Arbitration through Decree no. 281/1963. Romania has also ratified the 1961 European Convention on International Commercial Arbitration.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The local courts take a pro-arbitration approach as regards the recognition and enforcement of arbitration awards by rarely refusing the recognition and enforcement requests, namely if the award was set aside by a court at the place of arbitration, on arbitrability grounds, or if the award breaches Romanian public policy.

Of note in this context are a series of cases pertaining to arbitral awards against insurance companies that were recognised not on the basis of an arbitration agreement but on purported rights granted under administrative decisions of the Romanian Financial Supervisory Authority ("ASF") to consumers to request the resolution of disputes with insurance companies by arbitration, which was deemed to be a derogation from the requirement of an arbitration agreement (Curtea de apel Craiova, Sentinta nr. 1/2022, 13 January 2022).

However, a recent decision of the Supreme Court, no. 1951 rendered on 5 October 2023, established that the ASF rules do not compensate for the lack of arbitration agreement. More specifically, ASF Rules are not derogating from common law in the sense of having allowed the arbitral tribunal to consider itself competent to settle the dispute, even in the absence of a party's agreement. Such a hypothesis would have been found if there had been a legal text which would have allowed that, in a situation similar to that at issue before the arbitral tribunal, it could be settled by arbitration in the absence of an arbitration agreement.

In order to be granted the recognition and enforcement of an arbitral award, the parties must comply with the following certain formal requirements: (i) file a request to this effect before the competent court (at the tribunal level); and (ii) attach legalised or apostille-certified copies of the translated award and arbitration agreement. The tribunal will not review the merits of the dispute, its examination being limited to the grounds for refusal of recognition and enforcement as set out in the CPC in line with the New York Convention.

The decision of the tribunal can be appealed within 30 days from the communication of its decision.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Although the CPC only provides that arbitral awards are final and binding (Article 606 of the CPC), it is unanimously acknowledged by scholars and courts that arbitral awards, whether national or foreign, are subject to the *res judicata* principle (Articles 1132 and 1133 of the CPC). *Res judicata* has (i) a positive effect, in that the solution given to the issues in dispute cannot be contradicted by subsequent court decisions or arbitral awards, and (ii) a negative effect, in that the dispute may not be reheard between the same disputing parties before a national court or arbitral tribunal. For the negative effect, the courts will apply the so-called "triple identity" test, consisting of the same parties, object of dispute and cause (basis) of the claim between the arbitral dispute and litigation. These conditions do not apply to the positive effect of *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The public policy exception to recognition and enforcement of arbitral awards is narrowly interpreted, as Romanian courts have consistently been pro-arbitration enforcement. The recognition and enforcement of an arbitral award may be refused on grounds of public policy if and to the extent that it would lead to an outcome that is incompatible with the fundamental principles of Romanian law, of European Union law or of fundamental human rights (Article 2564 of the Civil Code). As such, unless there are exceptional situations of egregious violations of due process rights or of the most fundamental values protected under the public policy regime, an arbitral award rendered by a properly vested arbitral tribunal under a valid arbitration agreement will be enforced by the Romanian courts.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Although not expressly provided, arbitral proceedings under the CPC are, by default, confidential. Article 541 of the CPC states that "arbitration is an alternative jurisdiction having a private character". Moreover, Article 565(c) of the CPC institutes liability for arbitrators for "failure to observe the confidential character of the arbitration". These CPC provisions suggest an implicit rule on confidentiality of arbitral proceedings.

The confidentiality of arbitration proceedings is subject to several exceptions, such as: party autonomy; the intervention of domestic courts for interim measures; setting aside proceedings; and recognition and enforcement, etc.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Subject to the confidentiality restrictions discussed above, evidence or pleadings may be invoked in subsequent proceedings, but the evidentiary value may be limited, especially in the case of pleadings and testimony not adduced on oath.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

All remedies that are available in litigation are also available in arbitration (e.g. monetary compensation, including money due under a contract or damages, specific performance, annulment or termination of a deed, restitution, declarative remedy, interest and liquidated damages), subject to the arbitrability of the dispute. Within enforcement proceedings of injunctive decisions, punitive damages are excluded under Article 907 of the CPC.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The arbitral tribunal may award interest, on request, if permitted by the substantive law.

If the parties provided for a late payment interest, the rate stipulated in the contract will be applicable. In the absence thereof, the applicable rate will be the legal one, to be determined according to the provisions of Government Ordinance no. 13/2011. The legal interest rate may be different depending on the parties to the dispute as well as on whether or not the parties' juridical relationship has an international element or not.

Currently, under Romania substantive law, if the interest rate is not contractually agreed, the interest rate is 6% *per annum* for agreements including a foreign element or expressed in foreign currency.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The legal costs of arbitral proceedings are incumbent on the parties according to their arbitration agreement. In the absence of any such agreement, the legal costs are incumbent on the losing party in proportion to the admission/rejection of the claim/defence.

With respect to the arbitrators' fees and expenses, in international arbitration, according to Article 1122 of the CPC – unless the parties have agreed otherwise – each party will bear the costs of its appointed arbitrator, whereas the costs incurred by the sole arbitrator or by the presiding arbitrator are to be equally shared by the parties.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Generally, an award of damages is not subject to direct tax and does not give rise to VAT. However, the award must refer to damages going beyond the enforcement of the specific performance obligation to pay a price, for instance. Conversely, if the award is merely for the payment of the contractually agreed price, it may give rise to both direct tax and VAT (provided all other conditions are met for VAT to apply to that payment).

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Under Romanian law, lawyers cannot conclude *pactum de quota litis* with their clients. However, the parties to the legal assistance contract can agree on any combination of fixed or hourly fees and success fees. Third-party funding is not regulated in Romania; therefore, such funding arrangement may be possible, but the legal structure of the arrangements should be examined case by case for compliance with the local law.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Romania ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) by State Council Decree no. 62/1975.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Romania is party to 92 BITs, of which 62 are still in force (a comprehensive list can be found on the Romanian Ministry of Foreign Affairs website: http://www.mae.ro/en). Romania is also party to the Energy Charter Treaty, which it ratified in 1997 through Law no. 14/1997.

On 4 January 2022, Law No. 2/2022 was adopted by the Romanian Parliament for the ratification of the Termination Agreement, which was promulgated by the President of Romania by Decree No. 11/2022. Starting on 24 March 2022, Romania's Intra-EU BITs were terminated. The sunset clauses contained in these Intra-EU BITs were also terminated (i.e. shall not produce any legal effect, although investors are likely to challenge this position).

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

In order for investment treaties to be compliant with the EU principles of free movement of services and freedom of establishment, the provisions pertaining to "most favoured nation" were worded so as not to "oblige one Contracting Party to extend to the investors and investments of the other Contracting Party the advantages resulting from" circumstances akin to being a Member State of the European Union. Similarly, Romanian BITs include provisions not limiting its ability to impose performance requirements or restrictions to the movement of capital as demanded by the security interests of one party.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Romanian Supreme Court and lower courts have generally (especially in non-commercial disputes) upheld foreign States' immunity regarding jurisdiction and execution in light of the consecrated principle *par in parem non habet jurisdictionem*. While Romania is not party to the 1972 European Convention on State Immunity, it ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that a State cannot invoke the defence of State immunity before a court of another State which is competent in a proceeding relating to a dispute arising from an arbitration agreement wherein the former State is a contracting party. Nevertheless, the Convention has yet to enter into force, and the Supreme Court denied its application in a case not related to arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

Arbitration, and particularly international commercial arbitration, remains the key alternative to the State judiciary in business disputes. There are also specific sectors in which arbitration is increasingly present, such as the construction industry, public-private arrangements and investment; there are also specialist arbitration schemes in specific domains, such as in consumer credit disputes.

However, concern over potential fraudulent awards issued by improperly constituted "permanent arbitration courts" in recent years has prompted the Romamian Office of the Public Prosecutor ("Ministerul Public") to lodge an appeal in the interest of the law ("recurs în interesul legii") requesting a Romanian Supreme Court preliminary ruling on whether private associations and foundations, as opposed to chambers of commerce established by law, should be permitted to organise institutional arbitration under Article 616 para. (1) of CPC, given conflicting lower court rulings on the issue. The Supreme Court has published its decision in brief on 17 June 2024 adopting the view that "For the uniform interpretation and application of the provisions of Article 616 para. (1) of the Code of Civil Procedure, […] entities subject to the regulations of Government Ordinance No 26/2000 on associations and foundations […] may include in their statutes, as a purpose and/or objective, the organisation of activities specific to institutionalised arbitration only if they are authorised by the legislature to exercise institutionalised arbitration." The full judgment had not been handed down up to the date of this publication, and therefore it is currently unclear how this ruling will impact the development of institutional arbitration seated in Romania.

In another notable development, a bill has been introduced before the Romanian Parliament (PL-x nr. 422/2023) proposing to eliminate the appeal on a point of law, which is now possible in respect of set-aside decisions in respect of arbitral awards (now available under Article 603 (4) of the Civil Procedure Code). The elimination of this means of challenge would render set-aside decisions in respect of arbitral awards final, without the possibility of further scrutiny by the Romanian Supreme Court.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The 2018 CICA Rules of Arbitration introduced the emergency arbitrator procedure, in line with leading international arbitration centres. The parties can use such procedure when they need interim remedies before the arbitral tribunal is constituted. However, recent case law of the Bucharest Court of Appeal annulled an order for an emergency arbitrator appointed for that purpose on the ground that the mandatory provisions of Article 585 of the CPC dictate that before the commencement of arbitration, only the national courts have jurisdiction to hear requests for interim or conservatory measures. Such development is likely to reinforce the need to modernise the CPC.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

While no provisions *per se* have been implemented with respect to the use of technology in the conduct of arbitration, the Romanian arbitral institutions *de facto* embraced the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic with respect to various aspects, such as the service of documents and various notifications, organisation of virtual hearings, etc.

The past three years have proved that Romania's arbitral institutions and actors are perfectly capable of adapting rapidly to the new normal brought about by the COVID-19 pandemic, with all ongoing proceedings being shifted online, virtual hearings and fully electronic submissions becoming the rule, and in-person encounters and hard copies turning into much-coveted exceptions.

Adrian Iordache is a leading corporate and commercial lawyer with wide experience in international contracting, new technologies, energy law, aviation and international arbitration. Adrian is a Fellow of the Chartered Institute of Arbitrators ("FCIArb"), New York State Bar Association and listed arbitrator at the BIAC.
Adrian conducts disputes and sits as arbitrator in both the UK and Romania, with recent mandates involving court and arbitration disputes in the aviation and construction sectors.
Adrian is active in the energy sector, where he has recently assisted in transacting in excess of 1.5GW of renewable energy projects, and corporate finance and venture capital transactions, with particular focus on innovation and new technologies.

Consortium Legal
Central Court, 25 Southampton Buildings
London WC2A 1AL
United Kingdom

Tel: +44 791 679 9587
Email: adrian@consortium.legal
LinkedIn: www.linkedin.com/in/aaiordache

Lucian Ilie is a specialist in international law, with particular expertise in international arbitration (investment and commercial) and private/public international law issues (including rules of jurisdiction, conflict of laws, enforcement of foreign judgments/awards, State immunity, extradition and ECHR law). Combining experience of civil law culture with common law know-how, Lucian has advised and represented parties throughout Europe, the Middle East and the Commonwealth of Independent States countries: (i) in investment and commercial arbitration matters in various industry sectors (including construction, telecoms and energy) under different arbitration rules (including ICSID, UNCITRAL, PCA, SCC, ICC, LCIA and SAC); and (ii) before a number of international courts (including the European Court of Human Rights ("ECtHR") and European Court of Justice ("ECJ")). He is admitted to practise law in England and Wales (first as solicitor advocate, and then as barrister) and in France and Romania (as a member of the Paris and Bucharest Bars). In addition to his counsel work, Lucian acts as arbitrator, being listed as arbitrator at several arbitration institutions.

Outer Temple Chambers
222 Strand, Temple
London WC2R 1BA
United Kingdom

Tel: +44 207 353 6381
Email: lucian.ilie@outertemple.com
LinkedIn: www.linkedin.com/in/lucianili

Consortium Legal specialises in international commercial law and disputes and joins two offices in London and Bucharest, where it trades under the name Iordache Partners. Its lawyers are licensed to practise in New York State, England and Wales and Bucharest, and have been advising and representing international companies and entrepreneurs since 1992.
The firm regularly represents clients before UK and Romanian courts and in arbitration under the principal institutional arbitration rules, as well as in *ad hoc* proceedings under the Romanian Civil Procedure Code, and in adjudication and arbitration under the Scheme for Construction Contracts (England and Wales) Regulations 1998. The firm is currently involved in representing clients in construction, international transportation and aviation-related disputes, including cross-border enforcement proceedings and provisional and security measures.

www.consortium.legal

Outer Temple Chambers is a global and entrepreneurial set of barristers with expertise in commercial disputes and international arbitration. With over 90 members (including 65 juniors and 25 QCs), the team is diverse with common and civil law backgrounds, and has a wide range of expertise, which allows the set to offer exceptional legal services in the most complex disputes. It has offices in London and Dubai, and its members are based around the world in London, Dubai, KSA, Hong Kong, New York, Australia, New Zealand, Russia and India, handling disputes in different languages across Europe, the Middle East, Asia-Pacific and US. As such, members appear in a range of courts and tribunals both in England and overseas, and cases frequently involve foreign law and complex conflict of laws and jurisdiction issues. This work spans a range of sectors, including finance, technology, energy & natural resources, transport (aviation, shipping, and travel), retail, property, construction, media, insurance and sport.

www.outertemple.com

International Comparative Legal Guides

The **International Comparative Legal Guide** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

International Arbitration 2024 features six expert analysis chapters and 32 Q&A jurisdiction chapters covering key issues, including:

- Arbitration Agreements
- Governing Legislation
- Jurisdiction
- Choice of Law Rules
- Selection of Arbitral Tribunal
- Procedural Rules
- Preliminary Relief and Interim Measures
- Evidentiary Matters
- Making an Award
- Challenge of an Award
- Enforcement of an Award
- Confidentiality
- Remedies / Interests / Costs
- Investor-State Arbitrations

The International Comparative Legal Guides are published by: glg Global Legal Group