

GUIDE TO ARBITRATION PLACES (GAP)

ROMANIA

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Romania has a history in commercial arbitration, including international arbitration: arbitration has been regulated in Romania since 1865 (under the old Civil Procedure Code and now under the new Civil Procedure Code, which entered into force on 15 February 2013). Romanian legal provisions applicable to domestic and international arbitration are compatible with the UNCITRAL Model Law as they are based on the same main principles, but without following the text of the Model Law. Due to the modern legal framework, more and more investors and state entities are choosing arbitration to settle disputes in Romania. Below are some key aspects of Romanian arbitration law.

Key places of arbitration in the jurisdiction?	Bucharest.
Civil law / Common law environment? (if mixed or other, specify)	Civil law. It is important to note that EU law is considered to be part of the national order.
Confidentiality of arbitrations?	Although not expressly provided, the arbitrators have the obligation to keep the proceeding confidential, otherwise they can be held liable.
Requirement to retain (local) counsel?	No legal obligation to hire counsels.
Ability to present party employee witness testimony?	There are no restrictions, but the relationship would be relevant to the evidentiary weight granted.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes.
Availability of interest as a remedy?	The arbitral tribunal can award interest if requested and if the law applicable to the merits allows it.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Under Romanian law, lawyers are not allowed to conclude pure " <i>quota litis</i> agreements", but contingency arrangements (known as " <i>success fees</i> ") are allowed to supplement regular fees.
Party to the New York Convention?	Yes.
Compatibility with the Delos Rules?	Generally compatible, but tribunal decisions may only be taken by majority.
Default time-limitation period for civil actions (including contractual)?	3 years.
Other key points to note	ϕ

World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?	72.2
World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2022, if available?	0.65

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	2013. The main body of law applicable to arbitration in Romania is set out in Book IV "On Arbitration" and in Book VII, "On International Arbitration and the Effects of Foreign Arbitral Awards", of the new Civil Procedure Code.
UNCITRAL Model Law? If so, any key changes thereto?	Although the International arbitration provisions are not based on the UNCITRAL Model Law, it is in line with its principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The arbitration related matters are handled by the municipal civil courts (<i>Tribunal</i>) or by courts of appeal (<i>Curte de Apel</i>).
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Arbitral tribunal's right to rule on its own competence is upheld. Furthermore, the court, when seized with a dispute in relation to which there is a valid arbitral agreement will decline competence.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes, this occurs regularly.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	<p>Awards can notably be annulled in the following circumstances:</p> <ul style="list-style-type: none"> - the award was rendered after the expiry of the mandatory time to deliver the award, unless the parties had agreed with the continuation beyond the set time; - the award did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators; - the award is in breach of public order, good morals or mandatory provisions of the law; - after the award was rendered, the Constitutional Court renders a decision on an unconstitutionality objection raised in the course of the arbitral proceedings, declaring unconstitutional the law or piece of legislation or provision which formed the subject of the objection.
Do annulment proceedings typically suspend enforcement proceedings?	Only on motion by a party.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under the new provisions, both recognition and enforcement may be suspended or rejected if the foreign award had been subject to annulment at the seat.

If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	Possibly, if it affects due process protections, including "equality of arms".
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	There is no immunity from enforcement for public bodies. There are specific rules for enforcing against the Government.
Is the validity of blockchain-based evidence recognised?	Untested.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	Untested.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	The test is for the arbitration agreement and the award to be in writing. It is untested whether blockchain records meet that test.
Other key points to note?	Access to the Constitutional Control for arbitral tribunals: this takes place by means of objection as to the unconstitutionality of a law or a provision of the law.

JURISDICTION DETAILED ANALYSIS

1. Legal framework

Emerging economies, such as Romania, perhaps more than developed markets, require arbitration friendly legislation and arbitration sympathetic courts to provide investors with efficient ways for settling commercial disputes and encourage engagement with new and relatively challenging markets.

Both the main body of private law and procedural law in Romania has seen significant changes in the past few years, including a new Civil Procedure Code ("NCPC") enacted in 2013.

Since 2013, the main body of law applicable to arbitration in Romania is set out in **Book IV "On Arbitration"** ("Domestic arbitration provisions") and in Book VII, "*On International Arbitration and the Effects of Foreign Arbitral Awards*", of the NCPC ("International arbitration provisions").¹ Although the International arbitration provisions are not considered to be based on the UNCITRAL Model Law,² they are generally in line with its principles.

The Domestic arbitration provisions provide the legal default and mandatory rules applicable to Romania-seated arbitrations in general, while international arbitration provisions provide additional and derogatory rules for proceedings involving foreign elements.

2. The arbitration agreement

The *arbitration agreement* is what permits parties to use binding arbitration as a lawful and legally recognized means of dispute resolution. Under general contract and construction rules in Romanian law, an arbitration agreement may generally be defined as the consensus of the parties with regards to the settling of particular disputes through arbitration. We note that neither the Domestic arbitration provisions nor international arbitration provisions contain any further legal definition of the arbitration agreement.

2.1 Formal requirements (general)

Under the NCPC, the arbitration agreement may take the form of an *arbitration provision* included in the principal contract (or in a separate agreement incorporated by reference therein), or that of a *submission agreement*,³ i.e., a separate legal instrument, independent of the main contract. Furthermore, the arbitration agreement may be deemed to result from the written agreement of the parties expressed before the arbitral tribunal.

Except otherwise stipulated, an *arbitration clause* will cover all disputes arising out of or in connection with the contract containing it.

By means of a *submission agreement* the parties may agree to resolve a certain, already existing, dispute that has arisen between them through arbitration. A distinct submission agreement must be concluded for each dispute.⁴ The submission agreement must refer to a contract, to a contractual package and/or to another legal relationship (e.g. tort liability) to be valid.

¹ According to art. 1109 (1) NCPC "*An arbitration that takes place in Romania is considered international if it arises from a private law relation with a foreign element. (2) the provisions of this chapter (n.a International arbitration proceedings) shall apply to any international arbitration if the place of arbitration is in Romania and at least one of the parties, at the time when the arbitration agreement was concluded did not have its domicile or its habitual residence or, respectively, its headquarters in Romania, unless the parties have excluded their application in the arbitration agreement or thereafter in writing.*"

² Status of such legislation based on the Model Law is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

³ In Romanian: *compromis*.

⁴ C. Leaua, Flavius Baias (ed) *Arbitration in Romania. A Practitioner's Guide*, Wolters Kluwer, 2016, p. 98

2.2 Requirements for a valid arbitration agreement

Under the Domestic arbitration provisions, the arbitration agreement must (i) fulfil the validity conditions of a contract,⁵ (ii) refer to a dispute that can be the subject matter of arbitration, and (iii) in case of *ad hoc* arbitration, indicate the procedure for appointing the arbitrator(s).

The Domestic arbitration provisions require that a valid arbitration agreement be in writing. This condition will be met if the parties agree to resort to arbitration by exchange of correspondence, irrespective of form, or through exchange of procedural submissions.

If the arbitration agreement concerns a dispute related to the transfer of a property or to the creation of *real* rights in *immovables*, then the arbitration agreement must be *authenticated*, by a Notary Public. In practice, a contract constituting rights in *immovable* property is likely to be in authentic (notarial) form in any event and therefore the question might be of reduced practical importance.

Reflecting international practice, international arbitration provisions uphold the valid arbitration agreement if it complies with the substantive requirements of *any* of: (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 International arbitration provisions further spell out that the writing requirement may be fulfilled by telegram, telex, scan, electronic mail or any other means of communications that can be evidenced by text. No requirement as to any mandatory authentic form is reiterated.

2.3 Seat of the arbitration

In the absence of an express designation of a “seat” in the arbitration agreement or by the parties at the time of the formation of the tribunal, it is for the arbitration tribunal to determine it.⁶ We are not aware of any significant case-law on the distinction between a legal place of arbitration and a mere “venue”. Note however that courts may refuse to set-aside arbitral tribunal decisions finding that the tribunal lacks competence, where such decisions are not dispositive of the merits.⁷

2.4 Law governing the arbitration agreement

The law applicable to the substantive requirements of an international arbitration agreement can be determined by either the parties themselves, or by the arbitrators. First, the parties are permitted to freely determine the law applicable to the arbitration agreement. However, in the absence of the parties’ choice, the law that governs the arbitration agreement is left to be determined by the appointed arbitrators, between (a) the law governing the subject matter of the dispute, (b) the law governing the contract containing the arbitration clause or (c) Romanian law.

2.5 Arbitrability of disputes

An important substantive requirement for a valid arbitration agreement is the *arbitrability* of the dispute. Only arbitrable disputes can form the subject matter of an enforceable arbitration agreement.

An arbitral tribunal seized with a dispute which is deemed not arbitrable, must decline jurisdiction over it.

Arbitrability assessment is two-pronged: as regards the object of the dispute (*ratione materiae*) and as regards one or more of the parties (*ratione personae*.)

⁵ The Romanian Civil Code states that agreements are valid if the following conditions are met: the parties have legal capacity to conclude the agreement; the consent of the parties is free from any coercion or undue influence; and the subject matter and the causa of the agreement are in accordance with the applicable law.

⁶ Art. 544 (3) NCPC.

⁷ Decision 105/2011 of 26-09-2011, Bucharest Court of Appeal.

A dispute may be non-arbitrable *ratione materiae*, under the Domestic arbitration provisions, either where (i) the dispute relates to rights of which parties cannot freely dispose, or (ii) the dispute relates to a matter over which the State has reserved exclusive jurisdiction, or (iii) the dispute relates to the 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),⁸ *provided* that the dispute concerns rights of which the parties can dispose of and that the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the state courts.

The *ratione personae* arbitrability is connected to the possibility that certain legal entities may be prohibited from resorting to arbitration. Under the Domestic arbitration provisions, the State and public authorities may conclude arbitral agreements and two presumptions operate with respect to such capacity. First, the State and public authorities have the capacity to conclude arbitration agreements only if they are authorized to do so by law or international agreements to which Romania is a party. On the other hand, other bodies governed by public law that have as their authorised line of business also economic activities, are presumed to have to have capacity to conclude arbitration agreement, *unless* the law or their constitutional document provides otherwise.⁹

However, where the arbitration is *international*, if one of the parties to the arbitration agreement is the State (including a State-owned or -controlled enterprise), such party cannot invoke the right to contest the arbitrability of a dispute on this ground or its own capacity to be a party in arbitral proceedings.

Disputes arising from contracts with consumers, or individuals purchasing goods or services outside of a trade, are in principle arbitrable, in that they adjudicate rights of which the parties may dispose, which is the legal test of arbitrability *ratione materiae*. However, while this may not be technically an *arbitrability* point, it is worth noting that exclusive arbitration provisions in consumer contracts may be vulnerable under consumer protection legislation as “abusive terms” (Law 193/2000, which implements the Council Directive 93/13/EEC on consumer contracts).

2.6 Separability doctrine and competence-competence

The NCPC provides expressly for a separability principle by stipulating that the validity of the arbitration agreement may not be challenged on the grounds of invalidity of the contract containing it.

As regards both international arbitration and domestic arbitration, the principle of *competence-competence* applies and arbitral tribunals rule on their own jurisdiction. The tribunal's discretion to rule on its own competence is retained even if identical disputes are pending before the courts or other arbitral tribunals and the tribunals may decide to assume or decline jurisdiction or stay proceedings, if deemed necessary.

As to the timing of any jurisdictional objection, the parties must plead jurisdictional matters before any pleading on the merits.

2.7 Joinders

Except where the arbitration agreement provides otherwise, third parties are entitled to participate in arbitration proceedings only if they consent and with the consent of all other parties. The consent of all the parties in the arbitration is not requested if a third party joins the arbitration proceedings only to support the position of one of the existing parties.¹⁰

⁸ In Romanian : *de natura patrimoniala*.

⁹ Arts. 542 (2) and (3) CpC.

¹⁰ In Romanian: *interventie accesorie*.

There is no Romanian law doctrine permitting forceable extension of arbitral jurisdiction to parties who do not consent to it by way of an arbitration agreement or through submission to the jurisdiction.

3. Intervention of domestic courts

Under the NCPC, the execution of an arbitration agreement excludes the jurisdiction of the courts over the same subject matter. However, Romanian courts remain present in assisting with the arbitration procedure, as further discussed below.

3.1 The general role of Courts of Law in arbitration proceedings

The intervention of courts is permitted in order to remove obstacles in the organization and running of arbitral proceedings, as well as to fulfil other court functions in pending arbitral proceedings. The intervention is triggered by a request to the court in the jurisdiction in which the arbitration takes place, by an interested party. At first instance, the request is heard by a single judge sitting and proceedings are carried out with priority through expedited procedure. Decisions are subject to appeal.

In this context, it is important to note that under Romanian arbitration doctrine, arbitration tribunals are not subservient to the courts, but there must be a partnership between courts and arbitrators in which each one has a different role to play, at different relevant times.

According to legal commentary on the subject,¹¹ there are two key reasons for this partnership between the arbitrators and the judges: firstly, in order to promote the right to a fair trial and the maintenance of public policy rules; and, secondly, since the authority of the arbitral tribunal is contractual in nature and it extends only so far as the scope of the arbitration agreement, the courts are required to intervene in order to remove any impediments to the organization and running of the arbitral proceedings, as well as to fulfil other court functions. Absent such court intervention, third parties, such as experts, witnesses, persons in possession of assets or evidence relevance to the arbitral proceedings, are under no enforceable obligation to comply with an arbitral tribunal order.

3.2 Specific cases of court intervention during arbitral proceedings

At the beginning of the arbitration, national courts have the task of enforcing the agreement to arbitrate against the party seeking to avoid it. At the request of any of the parties referring to an arbitration agreement, domestic courts are required to decline jurisdiction when seized with a dispute in relation to which an arbitration agreement has been concluded.

If the arbitration agreement provides for an institutional arbitration, the court declines jurisdiction “*in favour of*” the organization or arbitral institution. Under this procedure, the court decision declining jurisdiction requires that the arbitral institution take the necessary steps to constitute the tribunal by direct reference from the declining court. If reference is made to a place of arbitration outside Romania, the courts usually reject the request¹² to decline “*in favour of*” arbitration, as not falling under the domestic court’s jurisdiction. Similarly, in case of *ad hoc arbitration*, the court regularly rejects the request to send the matter to arbitration as falling outside its remit. The court must nevertheless dismiss the case on jurisdictional grounds, but, in order to commence subsequent arbitration, the interested party must initiate it *de novo* in accordance with the arbitration agreement and any applicable arbitration rules, otherwise the case is simply dismissed.

At the conclusion of arbitral proceedings, national courts enforce the arbitral award, where the losing party is not willing to comply with it voluntarily.

During the proceedings, it is for the arbitral tribunal to take charge of all aspects of the proceedings, set time limits, organize meetings and hearings, issue procedural orders, consider the arguments of facts and law and render the award. However, if a party or the tribunal itself so requests, the national courts can decide on

¹¹ Ilias Bantekas, *An introduction on International Arbitration*, ed. Cambridge, p.132.

¹² Bucharest Tribunal, Civil Sentence no 3189/2016 from 25.05.2016, rendered in Case file no 45773/3/2015 (not published).

specific issues only, as mentioned above, for the purposes of removal of any impediments to the arbitral proceedings.

Further, during the proceedings, courts can be asked to assist with provisional measures, such as attachment orders.

When issuing any decision in the context of arbitration, the domestic courts are bound by domestic as well as EU law and CJEU Case law.

There have been some recent developments on the choice of Institutional rules and the scope of court powers to intervene.

We note that a mandatory reference to a particular arbitral institution is still applicable as at the time of this writing. Under a Government Order of 2018 (HG 1/2018) which regulates standard contract terms for public procurement and public contracts for works of high value, the public procurement award procedure includes a standardised contractual document that stipulates by way of arbitration clause reference to the *Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania*. The clause does not appear to be among the clauses which the parties are permitted to negotiate after the award by way of contract particulars. While technically in favour of one form of arbitration (as opposed to public courts), the policy choice of mandating a particular arbitration clause (including a reference to a particular set of rules) continues to raise issues with the basic tenet of arbitration as a creature of the parties' negotiated compromise over the needs of specialism or national neutrality in their dispute management.

We have not identified in any set aside proceedings over the past 12 months alleging a lack of effective consent to the arbitration agreement by reason of the non-negotiated nature of the clause regulated by this policy.

4. The conduct of the proceedings

4.1 Representation

There is no limitation or restriction as to the representation of the parties in arbitral proceedings. Parties may exercise their procedural rights directly (self-represented) or through outside representatives. Such representatives may be assisted by other specialists.

4.2 Arbitrators

The arbitral tribunal is appointed in accordance with the institutional rules in case of institutionalized arbitration and in accordance with the parties' agreement in an *ad hoc* arbitration. If parties fail to regulate the appointment of arbitrators the provisions of NCPC will apply.

Rules for the appointment of arbitrators are common to domestic and international arbitration. In general, unless otherwise regulated by the arbitration clause or the rules of the relevant arbitration institution, parties are free to appoint arbitrators of their choosing.

Where the parties disagree with regard to the appointment of a sole arbitrator, or of the presiding arbitrator (in a multi-person panel), or if a party fails to make an appointment allotted to it, the parties can request the court to make the appointment. If so seized, the court must decide within 10 days, and its decision is subject to appeal.

The parties can challenge an arbitrator, in a manner similar to the challenge to the sitting judges in regular courts. A challenge must be raised within 10 days from the date when the aggrieved party becomes aware of the appointment or, as the case may be, from the occurrence of the ground for challenge. The challenge must be determined within 10 days and the decision is not subject to appeal. The parties and the challenged arbitrator must be heard before the court makes a determination. For a challenge to be successful it is sufficient to cast doubt upon the arbitrator's independence and impartiality.

Arbitrators are bound by a positive obligation to disclose grounds for his/her challenge, if known to them, and must inform the parties and the other co-arbitrators before accepting an appointment (so that the parties can make an informed choice) and he or she must inform the parties if such circumstances arise after appointment as soon as they are discovered.

4.3 Interim measures

An interim measure is a temporary measure the purpose of which is to address an urgent situation prior to the issuance of the award on the merits. The NCPC stipulates that before or during the arbitration any party may address the domestic court to issue conservatory and provisional measures related to the subject matter of the dispute or to acknowledge certain factual circumstances. During the proceedings the arbitral tribunal may also issue conservatory and provisional measures and it may acknowledge certain factual circumstances. If the parties refuse to comply, the domestic court may be seized to take enforcement measures.

Parties may prefer interim measures ordered by the national court in situations where third parties need to be involved or where there is a strong possibility that a party will not voluntarily comply with the arbitral tribunal's order.

Arbitral tribunal may order interim measures only after it has been constituted. Also, any orders by the arbitral tribunals will only bind the parties to the arbitration agreement. Notably, interim measures ordered by the arbitral tribunal are not deemed final awards under the New York Convention.

Technically, conservatory measures should also be available by means of the general mandate of courts to secure assets and income pending ongoing arbitration, just as it would be available in case of pending court litigation. This avenue would be open to parties, but not necessarily to the tribunal, where security is sought pending the obtention of an *enforceable title* by a creditor.¹³ The availability of this procedural routes depends, however, on the openness of lower courts¹⁴ to treat commencement of arbitration (whether domestic or international) as a commenced suit within the meaning of the relevant civil procedure rule.

4.4 Arbitral proceedings

Both Domestic and International arbitration provisions stipulate that parties to an *ad hoc* arbitration can set out their own arbitration rules or they can refer to a pre-existing set of rules: of an arbitration institution or those set out by a procedural law.

If parties fail to do so, the arbitral tribunal will determine the procedural rules for the arbitration using either their own set of rules, or a pre-existing set of rules.

However, in both institutional and *ad hoc* arbitration, as a matter of public order, the arbitral tribunal must observe the due process principles such as equality of treatment of the parties, respect their right to defence and the principle of hearing both parties on all issues in dispute.

Although not expressly provided, the arbitral proceedings, under the NCPC are, by default, confidential.¹⁵ Two provisions of the NCPC provide grounds for this default confidentiality rule: the first states that "*arbitration is an alternative jurisdiction having a private character*"; and the other institutes liability for arbitrators for failure to observe the confidential character of the arbitration, which suggests an implicit rule on confidentiality of 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, recognition and enforcement, etc. In such cases, the rule of confidentiality in arbitration is

¹³ Art. 952 CpC.

¹⁴ In Romanian: judecatorii

¹⁵ For more discussion of the confidentiality principle in arbitration, see B. Oglinda, *The Principle Of Confidentiality In Arbitration, Application And Limitations Of The Principle*, available [here](#).

replaced by the principle of publicity of the hearings and by the condition of rendering a decision in public session. Although case law is scant on the matter, it is assumed that the principle of party autonomy will also include a waiver principle, whereby if a party chooses to make disclosures, it also waives the right to invoke confidentiality if the other party responds in a similar fashion.

Arbitration hearings can be organised in venues located in jurisdictions other than the seat of arbitration. The venue of any hearing may be agreed by the parties or, in the absence of such agreement, determined by the arbitral tribunal. There are no legal restrictions in this regard.

Except where parties otherwise agree in the arbitral agreement or where the parties agree to a judgement made solely on written submissions, oral hearings are organised. The procedural rules are for the parties, or in their absence, the tribunal, to determine. Remote and virtual hearings, providing they conform with the requirement of simultaneous interaction, are normal and provided by institutional rules. However, in determining the procedure, a tribunal remains bound by the obligation to respect the “equality” of arms between the parties, and therefore, if the use of video conferencing is mandated to the unfair detriment of a party, then the procedure may be found in breach of mandatory rules.

The time limit for rendering a final award is six months, for domestic arbitration, and one year in international arbitration, which may be extended by a maximum of three (3) months by the tribunal. The time limit operates provided that no ground for extension is applicable and provided that the parties have not agreed otherwise. Absent such procedural cures, the consequence of the expiry of the time limit for a decision is the lapse of the arbitration proceeding.

However, in order for the lapse to operate, the parties must make a reservation in writing declaring the intention to make use of the defence no later than at the first hearing. The tribunal cannot move *ex officio* to terminate the arbitration once the time limit lapses in the absence of such reservation. The reservation may be cured/overridden by the parties’ subsequent agreement to continue the proceedings.

As a general rule, evidence is ordered and taken by the arbitral tribunal, which has exclusive power to determine the materiality, relevance and weight of the evidence put forth by the parties. There are no formal restrictions as to the presentation of testimony by a party’s employee or other related persons.

However, the arbitral tribunal cannot compel or sanction witnesses, experts or public authorities for failure to appear or produce documents, and the intervention of a court is required to impose any sanctions. In this situation, the arbitral tribunal or the parties (with the ascent of the arbitral tribunal) may request the assistance of the courts, acting in accordance with domestic law.

When rendering the award, the arbitral tribunal can award interest if requested and if the law applicable to the merits allows it.

Regarding costs, the NCPC defers to party autonomy in a first phase and cost are allocated in accordance with the parties’ agreement. Absent such agreement, the losing party bears all costs, if the request is accepted entirely, or proportionally to such part of its claim that has been granted. The same applies to partially successful counterclaims.

In *ad hoc* international arbitrations where parties fail to agree otherwise in the arbitration agreement, the rule regarding costs is different. Each party bears the fees and expenses of its appointed arbitrator (in a panel) or, if the dispute is referred to a single arbitrator, and in the case of a presiding arbitrator in a panel, the costs are split equally between the parties. Caution must be exercised therefore in using *ad hoc* arbitration which may be qualified as *international* by expressly referring to more modern principles of allocation of costs.

4.5 Liability

Arbitrators do not benefit from immunity with regard to the award, but they can only be held liable if: (i) they resign after accepting the appointment; (ii) they fail to attend the hearings or present their decision within

the deadline provided in the arbitration agreement or the law; (iii) they fail to observe the confidential nature of the arbitral proceedings; or (iv) they breach their duties with bad faith or gross negligence.

Also, under Romanian law, arbitrators can face criminal liability for fraud or corruption.

5. The award

The arbitral tribunal shall resolve the dispute in accordance with the terms of the main contract and the applicable law or, if the parties agree, *ex aequo et bono*.

In domestic arbitration, following deliberations on the award, minutes must be drafted to briefly summarise the dispositive part of the award and indicate dissenting opinions, if any. The international arbitration provisions do not stipulate the obligation of drafting such minutes, therefore reference must be made to the parties' agreement.

5.1 Form requirements

The minimum requirements as to the form of the award are expressly provided by the NCPC. In both international and domestic arbitration, the award must state the reasons for any decision. Importantly, if an award does not contain reasons, the award may be set aside. Lack of adequate reasons is an often attempted set-aside ground, but courts have consistently and explicitly rejected spurious attempts to obtain review of a tribunal's decision by recasting it as inadequate reasoning or a related breach of the 'contradictoriness principle'.¹⁶

Under the Domestic arbitration provision the award must be in writing and must include: (i) the names of the arbitrators; (ii) the place and the date of the award; (iii) the name and address of the parties, the name of their counsels and other persons having attended the hearings; (iv) an indication of the relevant arbitration agreement; (v) the object of the dispute and a summary of the parties' arguments; (vi) the factual and the legal grounds of the award; if the arbitration was decided *in equity*, the award should equally comprise the reasoning of the decision; (vii) the dispositive part of the award; and (viii) the signatures of all arbitrators and, where there is a tribunal secretary or "assistant arbitrator",¹⁷ that person's signature as well.

In International arbitration, the minimum formal requirements consist of: (a) the written form; (b) provision of reasoning; (c) date of the award; and (d) the signature of all arbitrators.

If the dispute is related to the transfer of immovable property or to the establishment of other property rights over *immovables*, then the parties must follow a special procedure in order to enable the registration with the Land Registry of such transfer. In this regard, the award must be passed before a public notary or before the court of justice who will render a notarized deed or a court decision authenticating the award. This requirement is often criticized by legal scholarship as impractical.

5.2 Aspects of set aside procedure

After the award is communicated to the parties, the award becomes final and binding, and therefore it may no longer be appealed on the facts.

The arbitral award may only be set aside by means of an "action for annulment" for one or more expressly stated grounds. Parties can effectively waive their right to file an action for annulment only after the award is rendered, not during the arbitral proceedings and not by means of the arbitration agreement.

The arbitration award can be challenged within one month to the Court of Appeal, on the following grounds:

¹⁶ For instance Sentinta civila no 48/2020 of the Bucharest Court of Appeal.

¹⁷ The "assistant arbitrator" refers to a member of staff at an arbitral institution (i.e. employed by the institution) that assists the tribunal in the manner that a tribunal secretary would. They are retained by the institution rather than by the tribunal.

- (a) the dispute was not arbitrable;
- (b) the arbitral tribunal decided the dispute in the absence of an arbitration agreement or on the basis of a void or inoperative agreement;
- (c) the arbitral tribunal was not constituted according to the arbitration agreement;
- (d) the party challenging the award was absent on the hearing on the merits and the summoning procedure was not legally fulfilled;
- (e) the award was rendered after the expiry of the mandatory time to deliver the award, unless the parties had agreed with the continuation beyond the set time;
- (f) the arbitral tribunal decided on matters not requested, or awarded more than was requested;
- (g) the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators;
- (h) the arbitral award is in violation of public policy, good morals or mandatory provisions of the law; or
- (i) after the award was rendered, the Constitutional Court rendered its decision on the unconstitutionality objection raised in the arbitration, declaring unconstitutional the law or piece of legislation or provision thereof which formed the subject of the objection. (In this situation, the time limit for challenging the award is three (3) months from the publication of the Constitutional Court decision in the Romanian Official Journal). 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 by the posting of adequate security.

A review of recent set-aside decisions by appellate courts, reveals that many challenges will attempt to lump challenge reasons under one or more of the grounds above, particularly arbitrability, the absence of (adequate or sufficient) reasons, or item (h) above, particularly the tribunal's breach of 'mandatory provisions' of the law. This last ground presents some complexities for it appears to go beyond the 'public policy' grounds familiar from the New York Convention. Courts have recently provided some clarification on the notion of 'mandatory provisions' for the purposes of this set-aside ground, which we discuss briefly below.

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 on 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.

A much-used legal rule invoked as 'mandatory' has been the Romanian equivalent of *pacta sunt servanda*.¹⁸ The courts have now consistently rejected this approach and it is now safe to say that this provision of Romanian law may not serve as a set aside ground.

More controversially, rules related to computation of time limitations (i.e. rules barring a party from seeking redress after the expiry of a period of time since trigger circumstances), have been invoked in this context, where the arbitral awards have been challenged on account of mistakes in the computation of time-limitations by tribunals. In one case¹⁹ such a mistake was deemed sufficient grounds for challenge. However, the case also involved issues of lack of a determinable arbitration clause and privity as well as references to now applicable law now largely replaced by Civil Code provisions and therefore may provide a poor guide to future decisions. Multiple Bucharest Court of Appeal decisions have reiterated in this regard the dominant

¹⁸ Now captured by Art. 1270 of the Civil Code which refers to the parties' agreement as the 'law of the parties'.

¹⁹ Sentinta civila no 50, Curtea de Apel Iasi.

understanding that rules on limitation period under the Civil Code are matters of ‘private’ order from which the parties may depart by agreement and therefore may not constitute grounds for set-aside.²⁰

Notably, in a series of cases²¹ arising out of the similar fact pattern involving private parties bringing arbitration proceedings against brokers for failure to timely divest of financial instruments, both the capital market legislation (domestic and European) and consumer protection legislation was not rejected outright as potentially constituting sources of ‘mandatory law’ for the purposes of set aside, but a breach of such norms was not found in the circumstances.

Overall, therefore, it is advisable that the scope of Romanian ‘mandatory law’ be borne in mind in arbitral proceedings seated in Romanian or applying Romanian law by parties and tribunals alike.

5.3 Enforcement of arbitral awards

Unlike domestic arbitral awards, which are treated as regular court decisions for the purposes of enforcement, *foreign* arbitral awards must first be granted recognition and enforcement by the Romanian courts. Consistently with the provisions of article 1 of the New York Convention, any domestic or international arbitral award made in another state and which is not considered a national award, is a foreign arbitral award.

Foreign arbitral awards can be recognised and enforced in Romania, under the Civil Procedure Code, by domestic courts, if the following two conditions are met: (i) the dispute is arbitrable in Romania; and (ii) the award does not infringe “public order” as recognised by the Romanian private international law. The reference to “public order” in this context means those rules of Romanian law which could be invoked to dislodge the application of a foreign law, under the Romanian conflict of law rules.²²

The proper court to be seized with a request for recognition and enforcement of an arbitral award is the municipal court (in Romanian: *Tribunal*) and a petition must enclose the original award and the original arbitration agreement, or authenticated copies thereof. Under the New York Convention the party seeking recognition or enforcement of an arbitral award must enclose the original award an arbitration agreement or duly certified copies. If the award or the arbitration agreement are not in Romanian, a certified translation must also be provided, also in accord with the New York Convention.

Upon receiving the request and the enclosed documents, the parties will be summoned to present their position before the court, except for the cases where the respondent agreed with the relief sought in the request for arbitration.

The Romanian law does not provide for an express statute of limitation for the enforcement of the foreign arbitral awards. Absent such provision, the time limit for the domestic arbitral award has been applied, which is three (3) years from the award. A special limitation of ten years applies if the award deals with the transfer of a property rights over *immovables*.

Recognition and enforcement of a foreign award may be refused, if any or more of the following are shown:

- (a) the parties lacked capacity to conclude the arbitration agreement in accordance with the provisions applicable to each party, as determined by the law of the State where the award was rendered;
- (b) the arbitration agreement was void in accordance with the law governing such agreement as such law is determined by the parties’ choice or, absent such choice, in accordance with the law of the State where the award was rendered;

²⁰ See for instance Curtea de Apel Bucuresti, Sentinta Civila nr 6/2020; Curtea de Apel Bucuresti, Sentinta Civila nr 11/2020.

²¹ For instance, Curtea de Apel Bucuresti, Sentinta Civila nr 38/2020.

²² Curtea de Apel Constanta, DECIZIA CIVILĂ NR. 348/2016.

- (c) the party against which the award is invoked was not duly notified of the appointment of arbitrators or of the arbitral proceedings, or was prevented from mounting a defence thereto;
- (d) the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, absent such agreement, with the law of the place of arbitration;
- (e) the award resolves a dispute that exceeds the arbitration agreement. Nevertheless, if certain elements of the award are in accordance with such arbitration agreement and such aspects can be separated from the remaining aspects, the award can be partially recognised; or
- (f) the arbitral award has not become binding for the parties, or it was set aside or suspended by a competent authority of the State where it was rendered or in accordance with the law of such State.

In ruling on the recognition and enforcement of the foreign awards, Romanian courts cannot proceed to analysing the merits of the dispute.

Where a request for setting aside the award or a request for suspending the award have been filed to the competent authority of the State where such award was rendered, the domestic court can stay the recognition and enforcement proceedings. To this end, the party seeking enforcement and recognition of the award may request the court to ask the other party to provide security.

Once the decision on the recognition and enforcement of the arbitral award is rendered, the interested party can request the *enforcement*²³ of the arbitral award in the same manner as that of a domestic court judgment.

In our experience, Romanian courts enforce foreign arbitral awards in line with the New York Convention. Recognition, and enforcement is sought under the Code of Civil Procedure and the New York Convention 1958 and we have not seen a discriminatory treatment of awards rendered in the EU (or Europe at large) versus other foreign seats. Note however that it is theoretically possible that, under the European Convention on International Commercial Arbitration of 1961, a set aside of an award rendered in states which are members of that convention may not constitute valid ground for refusal of enforcement unless the set aside was for the reasons listed in Article IX of that Convention. That list may be narrower than specific domestic arbitration laws. In that case, if enforcement is objected on the grounds that the award was in the meantime set aside, the party seeking enforcement may invoke the European Convention to limit the scope of the objection.

6. Funding arrangements

Under the 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 from case to case for compliance with the local law.

7. Arbitration and technology

Blockchain technology is yet to be widely tested or adopted in Romanian administration, including the justice system. A positive development is signalled by recent adoption of the technical framework for the recording of electoral vote counts in blockchain technology by means of HASH records.²⁴

While blockchain records may not receive specific treatment in relation to the recording of an arbitration agreement or award, the question of authentication by reference to blockchain is at this time circumscribed

²³ In Romanian: *executare silita*.

²⁴ You can visualize vote count records of last elections at <https://voting.roaep.ro/>.

by the minimal formal requirements of an arbitration agreement or award, namely 'writing' and the formalities related to form and minimal content of an award, including signature.

At this time, electronic signature has seen increased attention in public administration and it is now both legally unambiguous²⁵ and relatively common that procedural communications in court be conducted by means of electronic communication and that case records be made available in electronic data rooms. Importantly, by a 2019 decision, the Supreme Court has clarified²⁶ that qualified electronic signature must be recognised as equivalent to authentic hand signature for the purposes of party-issued procedural communications.

On the question of court decision or arbitral awards, the specific rules regarding the requirement of signature do not distinguish between 'under-hand' or ink-on-paper and electronic signature and therefore, under the general treatment of electronic signatures in the Romanian law²⁷ there would be no legal basis for denying recognition of an award (or court judgment) by reason of its bearing qualified electronic signature as opposed to ink-on-paper signature. However, to our knowledge, this is yet to be tested in the courts.

8. Changes in the arbitration law in the near future

Given the relatively recent overhaul of the legal framework, it is unlikely that the arbitration rules in the NCPC will be amended in the near future.

9. Compatibility of the Delos Rules with local arbitration law

In our analysis, the Delos Rules are generally compatible with the local arbitration law. Note, however, that under the local rules, tribunal decisions are taken by majority only.

10. Further reading

Crenguta Leaua, Flavius A. Baias (ed), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International, 2016

²⁵ For instance, Government Ordinance nr 38/2020 on the use of electronic signature in public administration.

²⁶ Intalta Curte de Casatie si Justitie, Decizia nr 520/2019.

²⁷ Law 455/2001.

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> with offices and a case team?	ϕ
Main arbitration hearing facilities for in-person hearings?	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania AHK Romania Bucharest International Arbitration Court (BIAC)
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	In-house
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	ϕ
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	http://www.champollion.ro/
Other leading arbitral bodies with offices in the jurisdiction?	ϕ