ROMANIA

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Romanian arbitration law – one step forward, two steps back

On 15 February 2013, a new Civil Procedure Code (the 'Code') entered into force in Romania. The Code governs the conduct of domestic and international arbitration, as well as the recognition and enforcement of foreign arbitral awards, and it has been generally welcomed as a step forward in the field of arbitration. The Code was intended to enhance the legal framework for arbitration in Romania with several notable amendments, such as (i) distinct rules for international arbitrations as opposed to domestic arbitration; (ii) provisions regarding the support granted by the state courts throughout the arbitral proceedings, similar to the *juge d'appui* in France; (iii) further clarity as to the arbitrability of disputes involving State entities; (iv) express acknowledgement of arbitrators' capacity to rule on the transfer of rights over immovable assets, subject to certain formalities and (v) implementation of New York Convention principles on recognition and enforcement of foreign awards.

Nonetheless, the legislator's declared intention of turning Romania into a user-friendly seat for arbitration may be undermined by several loopholes in the new rules due to several questionable solutions enshrined in the new provisions dealing with key legal aspects of arbitration (such as the definition of international arbitration, arbitrability, validity of arbitration agreements, procedural rules, costs, and enforcement of certain awards). These issues may thus deter rather than encourage parties' choice of seat in Romania. Some of these difficulties are discussed below.

Scope of the international arbitration provisions

According to the Code, arbitrations carried out in Romania are to be deemed as international where they have arisen from a private law matter encompassing a 'foreign element'. This general definition comes from the previous code of civil procedure and would allow a multitude of disputes to fall under the flexible framework of the provisions governing international arbitration. This approach is in line with the French law approach, which broadly refers to arbitrations involving 'international trade interests'.

However, despite the broad introduction, the Romanian legislator has in fact drastically reduced the scope of this framework in a subsequent paragraph (which is new as compared with the former code) by stating that international arbitrations seated in Romania are those where at least one of the parties does not have its habitual residence or registered office in Romania at the time of execution of the arbitration agreement. This clearly excludes a number of situations which could have otherwise qualified as international, such as cases where a substantial part of the obligations at stake were to be performed outside Romania or where the subject-matter of the dispute is most closely connected to a country other than Romania.

Based on the wording of these two paragraphs, the scope of 'international arbitration' remains unclear, there being several possible interpretations. For instance, it may be inferred that there are two cumulative conditions in order for the international arbitration framework to apply. The first would be either party's foreign habitual residence or foreign registered office. The second is that there be another foreign element, otherwise the first paragraph could be deprived of its effect, since a party's foreign residence is in itself a 'foreign element'.

Likewise, it may further be that the framework for international arbitration applies only where the criterion of either party's habitual residence or registered office abroad at the date of the arbitration agreement is met (there being no need for an additional 'foreign element'). In either of these cases, however, a wide array of disputes that could reasonably be deemed as international would

be subject to domestic arbitration rules. It could also be argued that is sufficient for a dispute to either meet the residence criterion or to have arisen in connection with a private law matter encompassing any other 'foreign element', but this seems to be the less likely interpretation based on a plain reading of the current text of the Code.

Arbitrability of international disputes

In respect of international arbitration, the Code provides that states and state-controlled companies and organisations may not avail themselves of national laws in order to challenge their capacity to participate in an arbitration. However, the definition of international arbitration, which is confined to disputes arising from 'private law matters', has the potential of narrowing the scope of this provision to the extent that contracts entered into with State entities could be deemed to encompass public law matters.

Furthermore, the 'private law matter' condition, which was not included in the previous code, will likely further fuel discussions and pleas regarding the non-arbitrability of various matters which, although arising between private parties, can be deemed to encroach on domains regulated as a matter of public policy.

Separately, it is noteworthy that the Code has preserved for international arbitrations only the condition set out in the previous code that a dispute subjected to arbitration must be of a patrimonial nature. Although certain Romanian courts have extended the patrimonial feature of an arbitration to include any rights which may be deemed to have an economic/monetary value,[1] it is still expected that several categories of disputes will be subject to uncertainty from this perspective due to the thin line between patrimonial and non-patrimonial claims and the inconsistency adopted in Romanian judgments on this issue.

Arbitration agreements

A discrepancy between the Code provisions is likely to give rise to challenges regarding the validity of arbitration agreements for ad hoc proceedings that fail to designate the terms of the arbitrators' appointment. One provision simply states that any such arbitration agreement shall be deemed as void. However, a subsequent provision directs parties in such cases to carry out the appointment of the tribunal in accordance to the provisions dealing with the mandatory number of arbitrators in the absence of an agreement. This subsequent provision implies that the arbitration agreement is valid. Unless this discrepancy is quickly remedied, a necessary precaution (as well as good practice) for all ad hoc arbitrations in Romania is for arbitration agreements to set out the terms of the arbitrators' appointment.

Procedural rules in international arbitration

The Code broadly provides at Article 1122 that, with respect to international arbitration, any aspects regarding the constitution of the arbitral tribunal, the arbitral procedure and the award that have not been set out by the parties or thereby entrusted to the arbitral tribunal, shall be governed by the Code provisions pertaining to domestic arbitration.

This is a departure from the French law on arbitration, which sets out a clear list of provisions governing domestic arbitration that shall also apply to international arbitrations (unless parties have agreed otherwise and only subject to the provisions regarding international arbitration).

Hence, pursuant to this article, a whole range of more formalistic and restrictive provisions could become applicable in an international arbitration. Further, Art.1122 of the Code is inconsistent with Art.1113(2) of the Code which states that, as regards international arbitration, where parties have failed to establish the arbitral procedure, the procedure shall be established by the arbitral tribunal. Finally, there is no direction regarding the timing or the manner whereby the parties should regulate the international arbitration procedure or entrust it to the tribunal in order to avoid the application of the rules regarding domestic arbitration.

Arbitral awards and *res judicata*

The wording of the Code introduces a further ambiguity between domestic and international arbitrations in relation to the binding force of awards. The Code states in the domestic arbitration section that an arbitral award is 'final and binding' and that it shall be subject to forced execution as if it were a court decision; however, in the international section, the Code merely states that an arbitral award is enforceable and binding. There is no mention of the *res judicata* authority of the awards rendered pursuant to an arbitration

seated in Romania. Although it would be unreasonable and contrary to international arbitration practice (as well as to Romanian arbitration practice conducted based on the previous code) to deny the *res judicata* effect of an international arbitral award, the omitted language, coupled with the provision allowing parties to set out the effects of the awards rendered in international arbitrations, is ambiguous and may leave room for a certain amount of discussion.

Arbitrations concerning rights *in rem* over immovable assets

The Code provides that awards concerning a dispute related to the transfer of ownership and/or the creation of other rights in rem over an immovable asset are to be submitted to a court of law or to a public notary with a view to obtaining a court decision or a notarised deed, respectively, which may then be recorded in the real estate registry records. However, such a decision or deed can only be issued following the court's/notary's verification that the conditions and procedures set out by the law have been duly met.

To the extent that no further indications are given regarding conditions and procedures to be verified (eg, is the court or the notary allowed to consider the merits of the award?), these provisions dealing with the registration of rights over immovable property may prove to be unpredictable in practice.

Arbitration costs

As per Article 598 of the Code, in domestic arbitrations (or international arbitrations subject to rules governing domestic arbitrations) either party may request a court of law to 'verify' the arbitrators' fees and other costs. The court sets the amount of the fees by a decision which, according to the Code, is not subject to appeal. Such a provision (as well as the Romanian courts' trend of reducing attorney fees to be borne by the party who lost the case), may have the result of deterring arbitrators from accepting appointments unless parties waive such rights to refer costs issues to the courts.

Conclusions

Overall, unless these loopholes are remedied, the expected positive effect of the new provisions may be substantially hindered. Parties are unlikely to opt for a Romanian seat or for arbitration altogether if they will face substantial uncertainties or the formalistic and restrictive framework of domestic arbitration. Accordingly, rather than being a step forward, the new law on arbitration may rather prove to be a step backward.

Notes

1 See Bucharest Court of Appeal, 5th Commercial Section, Commercial Decision no. 1398 of 16 December 2008 published on www.portaljust.ro; for types of claims that may be deemed to have a monetary value; see also Decision no 32 of 9 June 2008 of the High Court of Cassation and Justice, United Sections, published in the Official Gazette, Part I, no 830 of 10 December 2008).

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Conflicting approaches to arbitrability in Russia

General comments on the non-arbitrability of certain disputes

International arbitral awards are enforceable in the Russian Federation. Their enforcement is regulated by international treaties and Russian law.

More specifically, Russia is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') and the European Convention on International Commercial Arbitration 1961. The Russian Federal Law 'On International Commercial Arbitration' dated 1993 (which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model law) sets forth general principles for the enforcement of international arbitral awards.