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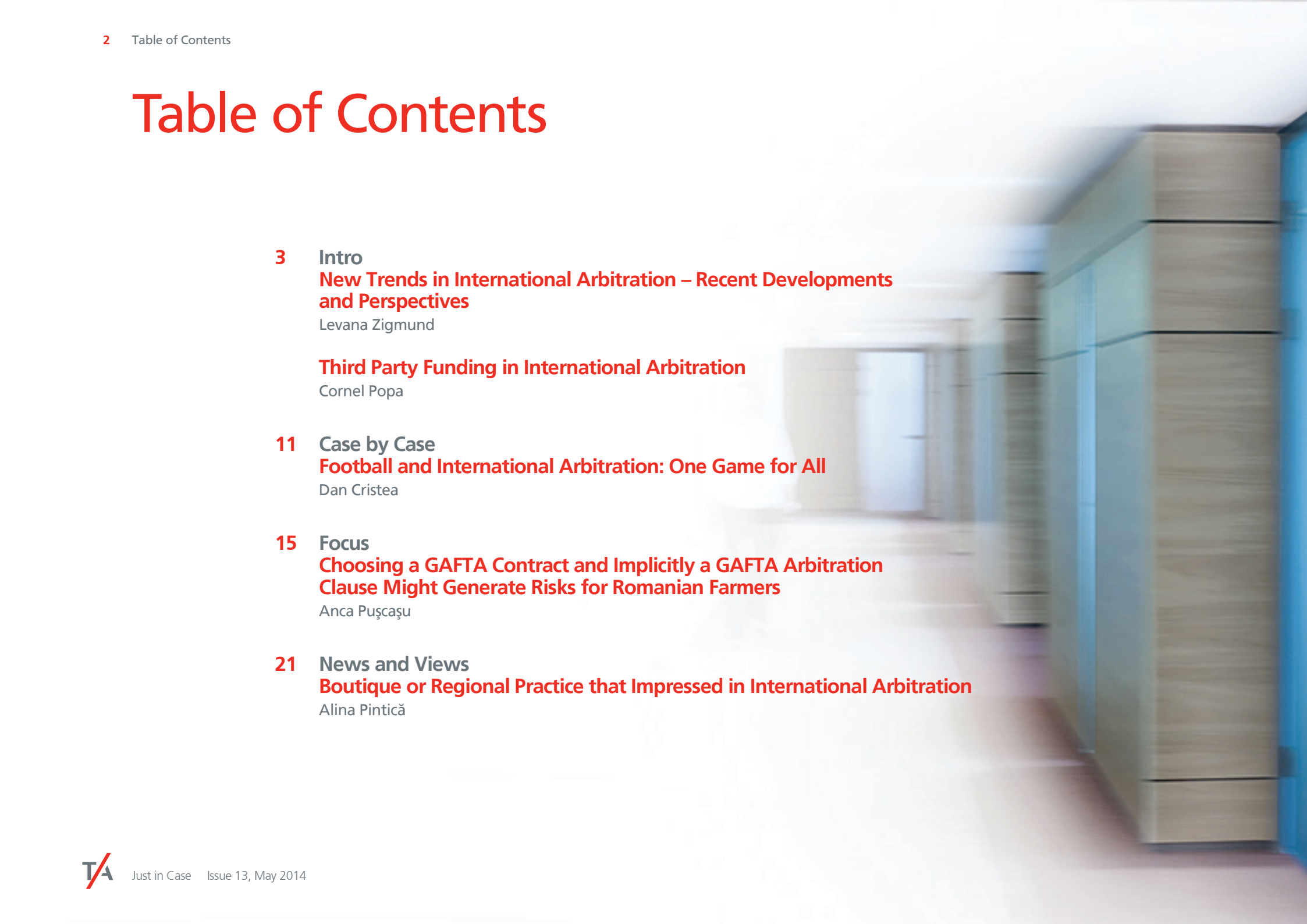

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New Trends in International Arbitration – Recent Developments and Perspectives

The briefest browse on the internet yields reassuring conclusions from prominent experts that commercial arbitration is ever increasing in popularity, while the number of investor-state treaty arbitration has grown exponentially, reaching 459 cases under the ICSID Convention and Additional Facility Rules by the end of 2013. All is well in international arbitration.

However - and fortunately, one might think – things are much more exciting than that. International arbitration, be it commercial or public law, is a constantly changing environment where new trends, new ideas are always at play. To summarize only the past few years, one hears commentators speak of the "Americanization" of international commercial arbitration; of arbitration having become the "new litigation" and mediation appearing more and more as the new rising star of alternative dispute resolution; of the fragmentation of international law into a blur of overlapping institutions, ambiguous instruments and alternative venues; of a "new constitutionalism" placing the rules of free movement of transnational capital outside the reach of nation states through the agency of investment treaties etc.

It is therefore a difficult task for anyone to pinpoint in just a few paragraphs the most engaging or most important new trends. This article proposes itself as a mere appetizer for anyone interested in the current state of international arbitration.

Investment-State Arbitration and EU Law

All EU Member States have concluded Bilateral Investment Treaties (BITs) intra- and/or extra-EU. A 2010 count shows a grand total of 1407 BITs involving EU Member States, 569 of which concluded prior to their respective accession. Article 351 of the EU Treaty (307 of the EC Treaty) attempted to settle potential issues by recognizing the primacy of pre-accession treaties over the EU Treaty while concomitantly requiring member States to eliminate their mutual incompatibilities. But the actual implementation of this task is much more difficult than might have initially seemed. Hurdles arise from both substance and procedure.

Free movement of capital clauses, for example, which are present in most if not all BITs, may conflict with EU restrictions. Also, EU investors originated in Member States>

that have concluded inter-se BITs have access to investor-state dispute resolution which is not available to investors from Member States lacking such treaties, raising issues of discrimination and risks of distortion of equal treatment within EU, mainly because BIT arbitration primarily offers damages awards, rather than non-monetary public law remedies.

The Treaty of Lisbon, reserving express and exclusive competencies for EU in matters of foreign investment, as part of a Community regime on commercial policies, deals with such incompatibilities only for the future, while the pre-accession BITs continue to generate difficulties.

Admitting, as many commentators do, that the internal EU jurisprudence cannot impede BIT arbitrations, Member States are facing extensive BIT claims when they implement EU obligations within their respective territories. Quite recently, in a case brought against Romania under its BIT with Sweden, the question was posed to the tribunal whether a partial withdrawal in 2000 of certain investment incentives supposed to run until 2009 (preferential subsidies and tax exemptions aimed at spurring development in certain areas) on grounds of complying with EU state aid prohibitions, constituted or not a violation by Romania of its international law obligations under the BIT. While not directly confronting the issue, the ICSID tribunal found that the applicable BIT was not incompatible with EU law and, while admitting that Romania's decision to revoke the incentives had been reasonably tailored to the pursuit of a rational policy (specifically, EU accession), and that there had been an appropriate correlation between that objective and the measure adopted to achieve it, the tribunal decided that the manner in which Romania carried out that termination was insufficiently transparent to meet the fair and equitable treatment standard. On these grounds, Romania was found to have violated the investors' legitimate expectations.

While an analysis of the relevant case-law reveals that an arbitral tribunal has yet to find an express conflict between a Member State's obligations under a European law provision and a provision of an intra-EU BIT, there is at least one tribunal that has signaled that European requirements will prevail. In the AES Summit Generation Ltd.v Hungary case, following a European Commission decision in 2008 concluding that the Power Purchase Agreements concluded by Hungary in the 1990s with various foreign investor-backed power generators did constitute state aid contrary to European law and compelling Hungary to abstain from providing such aid, the AES tribunal found that the reintroduction by Hungary of the administrative tariff scheme did not breach any of the investor's legitimate expectations as it pursued a rational public policy objective.

Other, more radical views are also to be found. In an informal note sent to the Economic and Financial Committee (EFC), referenced in The European & Middle Eastern Arbitration Review (2010) as well as in Investment Treaty News (2007), the European Commission took the position that the European law should, in effect, override the provisions of the BITs concluded by the joining states prior to their accession. While the EFC did not entirely agree with the Commission, the acceding Member States tried to argue, following the Commission's assessment, that their intra-EU BITs have been implicitly terminated once they joined the EU, under Article 59 of the Vienna Convention. A tribunal of the Stockholm Chamber of Commerce faced with this argumentation by the Czech Republic in a dispute brought by a Dutch investor, evaded a firm answer by observing that the EU Commission had not initiated any infringement proceedings against either Netherlands or the Czech Republic – nor against any other Member State, for that matter – for having failed to terminate their BITs. However, as commentators point out, even if the EU Commission initiated such infringement proceedings, the effect they would have on the tribunals' jurisdiction to entertain BIT cases remains uncertain.

More broadly, the debate around the incompatibilities between BITs and the European law brings into focus issues of applicability of the Vienna Convention and, ultimately, issues of the nature of the EU Treaties of the EU itself. In a 1963 case,>

the European Court of Justice declared the EU legal framework as "new legal order of international law", distinguished from both the domestic law of its members and the "ordinary international treaties", with the EU Commission having the unique capacity to bind Member States into international agreements with third countries. However, and despite occasional voices arguing that EU is in the nature of a federation, the EC Treaty establishing the EU was, after all, concluded in the form of an international treaty, governed as such by the Vienna Convention on the Law of Treaties.

It has been suggested that Article 27 of the Vienna Convention, which codifies the international customary rule that prohibits states from referring to their international law in order to justify violations of an international obligation, applies to EU on the basis that the EU legal order constitutes domestic law for all Member States (which further compels the idea that EU should be collectively presumed as a state).

In this view, the EU Member States would not be able to justify a violation of their BITs in light of the obligations incumbent upon them under the European law.

The jury is still out on equating the European law (seen as law made by an international organization) to the domestic law of the Member States, as the debate, started in the 1980's, is still open today.

CANADA-EU Comprehensive Economic and Trade Agreement (CETA)

Were the picture not complicated and unclear enough, a recent development seems to open new questions as to just how difficult the ultimate harmonization of the foreign investor legislation in the EU will be.

EU and Canada are contemplating the conclusion of a free economic and trade agreement (CETA) aimed at removing the trade barriers between the two and creating the premises for a development of a new market in services and investments. Under CETA, the Canadian nationals will have their investments protected all across the territory of EU, while the EU investors will benefit of the same protection for their investments in Canada. Negotiations for the conclusion of CETA have begun in 2009 and the treaty is expected to enter into force this year. Among others, CETA will most likely include provisions specific to investment treaties such as: a broad definition of the fair and equitable treatment standard, protection against indirect expropriation, dispute settlement via arbitration, and particular time limits for initiating claims.

The entry into force of CETA has already generated substantial debates on the contents of some of the rights afforded to investors under the treaty, which could lead to a proliferation of investment arbitration claims grounded especially on the fair and equitable treatment clause which has been described as "the most open ever concluded". (In light of the ongoing debate about the nature of EU and its legislation, question may arise whether all of the Member States, if left to their own devices, would have concluded an investment treaty with such bold standards.)

If the harmonization of the existing BITs with the European law is still a goal that seems far from reach, how would the BITs, the European law and CETA interplay is all the more uncertain. Many BITs include Most Favorable Nation (MFN) clauses; in light of the broadness of scope and high standard of treatment afforded investors under CETA, will investors protected under MFN clauses in Member States' BITs be able to elevate the standards applicable to them to the CETA standard? Would they try to "import" those standards though the MFN clause, to use a coined phrase? This is just one of the many complex questions facing Member States after the entry into force of the CETA agreement.

Bilateral Investment Treaties (BIT) and Bilateral Arbitration Treaties (BAT)

Inspired by the arbitral practice developed around BITs, international law specialists have proposed that states conclude Bilateral Arbitration Treaties (BATs) making arbitration the default mechanism for resolution of international commercial disputes between nationals belonging to different states. >

While, by allowing them direct claims against the host state taken as a whole, BITs spare the foreign investors the complications – and the limitations - of having to deal with questionable measures taken by the local authorities in the domestic courts and by the domestic laws, under the BATs foreign companies would enjoy the comfort of not having to settle their private law disputes before domestic and potentially biased courts. The adoption of a model treaty is under preparation and is expected to be issued this 2014.

As expected, the BAT concept has already generated intensive debates. Supporters of the idea argue in favor of the BATs as instruments guaranteeing a more unitary legal framework for settling international commercial disputes and facilitating enforcement of the awards – a step towards a more integrated global legal order to better reflect a more economically and politically integrated, globalized world.

On the other side, reputed international arbitration professionals criticize BATs for contradicting the voluntary nature of arbitration by enforcing arbitration procedures against parties that have not explicitly consented to it. Local courts would see their jurisdictional powers diminished. Another chip in an ever eroding sovereignty, some critics are warning.

As with so many other issues in international arbitration today, one is tempted to say that, for the BATs as well, only time will tell. Reason the more to keep an eye on the developing trends in international arbitration – everything else aside, one could never get bored.

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Third Party Funding in International Arbitration

Introduction

In the space of just a few years, third party funding of the costs of an international arbitration has become a remarkable feature of the industry and has come to represent a sensible solution for claimants who are not in the position or do not wish to advance the costs of an arbitration from their own resources. In this small analysis of the phenomenon, we shall briefly review a few practical issues which arise in connection with third party financing in the context of international arbitration.

We shall begin by sketching an answer to the question of what is third party funding and why (and by whom) is it needed. We will go on by presenting a list of a few important (but inherently incomplete) issues which the parties need to consider when they structure a third party financing. After that, we will attempt to determine if third party funding is allowed under Romanian law, and give a short presentation of the issues which arose in connection with third party funding of an investment arbitration case in which the Government of Romania featured as a respondent.

What Is Third Party Funding and Why Is It Needed?

In many situations, parties which are involved in a dispute which may lead to international arbitration are intimidated by the relatively high costs of the procedures. For a 5 million USD claim in the context of an arbitration submitted to the rules of the International Chamber of Commerce, the likely advance on costs will be of approximately USD 300,000, for a tribunal constituted of three arbitrators or USD 130,000 for a single-member tribunal. In addition to that, the parties will have to expect lawyer and expert fees, travel expenses, etc.

Here comes to rescue a fairly new development in the field of international arbitration, which is the financing of the costs of arbitration by a third party which is unrelated to the parties in dispute. In terms which are very simple and broad, a third party financier underwrites the claimant's prosecution costs expecting in return a share of any recovery from the respondent in the dispute. If the claim fails, the costs remain to the funder's account alone, generally with the notable exception of the respondent's legal costs, for which the claimant will continue>

to bear the onus, if such costs will be awarded by the tribunal.

There are two main categories of claimants which might be interested in finding a third party financier for their claims.

First, there are obviously the claimants whose claims are meritorious, but they simply lack the financial resources which are needed to support the arbitral proceedings.

Second, there may be also claimants who can afford the costs of an arbitration, but are inclined to offload the risk and cash drain.

More rarely, respondents in arbitration cases may have recourse to third party financing, in particular in cases where they wish to file counterclaims against the original claimant.

Certain Practical Issues Concerning Third Party Funding

In typical conditions, the party to a legal dispute is almost always entitled to determine the strategy of the case, to choose freely its counsel, to exercise or not the right to file challenges against the court decisions or arbitral awards and to arrive at the amicable settlement of the issues in dispute with the other party.

All these change when a third party financier is involved. The latter will naturally wish to have its investment fully protected against negligent or malevolent behavior of the party to the dispute, and ensure that the funded party will act with the utmost care and diligence in order to vindicate its position in arbitration and to maximize the compensation likely to arise under the arbitral award.

A minimal list of issues to be considered when an agreement to finance an arbitration is made would have to consider the following aspects:

- The method for the selection of lawyers. The wise selection of experienced and well qualified lawyers is often essential for the success of the case. It is therefore natural that the financier would wish to be able to either appoint the lawyers or, in order to avoid more delicate issues of conflict of interest, at least be permitted to veto the choices made by the funded party or make recommendations from which the funded party to make its decision.
- Make clear to whom are owed the responsibilities of the lawyers acting in the dispute. In principle, lawyers are expected to protect the interests of their clients and refrain from being involved in situations where conflicts of interest arise. While predictably the interests of the financier and of the funded party will coincide in many situations, important points of divergence may occur more frequently and sooner than expected during the arbitration. For example, in the event that the parties to the arbitration enter settlement discussions, the third party financier may have different ideas and rebuff entirely any idea of settlement, or press for different settlement terms.
- The making of strategy choices regarding the procedure. Along the way of the arbitration there will be numerous decisions to be made regarding the constitution of the arbitral tribunal, the substance, timing and form of presentation of the arguments of the case, the selection and production of evidence, etc. The financier will be naturally interested.
- The disclosure of documents and information. Before making the decision to invest, the financier will be naturally interested to obtain a full disclosure of all data which may be relevant for the assessment of the reasonableness of the dispute. Also the parties may have to consider the likelihood of being required or ordered to disclose the financing agreement to the arbitral tribunal, the other party or (in the case of listed companies) to the general public.
- Coverage for adverse cost decisions. For obvious reasons, third party financiers will choose to be involved in cases where the chances of success are highest. The initial optimism may however prove unjustified, and rather than obtain a return on their investment, the parties to a financing agreement may be in the end in the situation where not only the claims are>

rejected, but they will have to bear the cost of arbitration incurred by the other party. The parties would be therefore well advised to determine in advance their methods of choice to deal with such circumstances.

- Dealing with possible conflicts of interest. Typically, arbitrators are expected to disclose any possible connections which they have either with the parties in dispute, or the counsel thereof, in order to avoid any suspicion of absence of neutrality. The existence of third party financier expands the sphere of the actors regarding which an arbitrator must maintain neutrality.

Is Third Party Funding Allowed under Romanian Law?

There is no general prohibition in Romanian law of third party funding of the cost associated with filing and prosecuting a claim before the courts of law or arbitration tribunals.

In the particular case of third party funding granted by lawyers, the latter are not allowed to conclude arrangements whereby the totality of their fees would be determined by reference to the outcome of the proceedings (the so-called "quota litis pact").

The rules specific to the legal profession permit the application of a mixture of retainer and success fee.

Case Focus: the S&T Oil v. Romania Case

In 2007, S&T Oil filed a claim against Romania arising from alleged breaches of the bilateral investment treaty concluded with the United States. As the claimant lacked the financial resources needed to support the cost of the proceedings in this case, it entered in 2008 an agreement with a third-party funder, Juridica Investment Ltd., whereby the latter agreed to pay for part of the arbitration costs in exchange for a percentage of the proceeds. In addition, Juridica obtained an assignment of S&T's rights in a Romanian company and the right of access to all confidential information between claimant and its attorneys.

In 2009, Juridica asserted that S&T Oil made material misrepresentations about the facts underlying the case and refused further funding. Later, in December 2010, Juridica filed an action against S&T Oil and one of the original investors in the company, accusing them of having breached their contractual obligations, and seeking repayment of an amount in the region of 3.5 million USD.

The investors in S&T Oil reportedly defended successfully in the LCIA arbitration against Juridica and obtained an order for the reimbursement by Juridica of the amount of 396,333 USD incurred in legal fees and expenses. Accordingly to one of the latest pieces of public information released about the case, the investors in S&T Oil demanded in U.S. courts the confirmation of the LCIA award.

Concluding Remarks

Third party financing represents a new and valuable solution for claimants who cannot or do not wish to incur the cost burden of an arbitration. For entities having the financial means and the expertise needed to assess the likelihood of success of a claim, the financing of arbitration claims is an interesting business opportunity. While the case law regarding third party funding in international arbitration is still not fully developed or consolidated, the likely evolution is towards both larger acceptance of the phenomenon and greater transparence.

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Case by Case

- Football and International Arbitration: One Game for All

Football and International Arbitration: One Game for All

In football, as in any other sporting game, unity of rules is key. One of the biggest worries of international sports bodies is that certain events of the game will be interpreted differently for identical circumstances – which could lead to legitimate claims of non-equal treatment from the competitors, arbitrary application of agreed rules, and, ultimately, decline of public interest in the phenomenon. As Michel Platini, President of the Union of European Football Associations (UEFA), put it "Ask yourselves, what would happen if the rules were interpreted differently in Madrid, Rome and Brussels?"

But unity of rules cannot only be ensured through the requirement that all national football associations implement the statutes adopted by the international federation. What equally matters is that these statutes be interpreted and applied in identical fashion in various national jurisdictions, with judging panels settling sports disputes on a single voice irrespective of the place where the dispute came about.

How to achieve that? Football overseers rely on international arbitration. UEFA elected a sole international arbitration body, the Court of Arbitration for Sport headquartered in Lausanne, Switzerland, as the final jurisdictional body to resolve football disputes. In the language of the UEFA Statute (Article 59): "(1) Each Member Association shall include in its statutes a provision whereby it, its league, clubs, players and officials agree to respect at all times the Statutes, regulations and decision of UEFA, and to recognise the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland), as provided in the present Statutes; (2) Each Member Association shall ensure that its leagues, clubs, players and officials acknowledge and accept these obligations; (3) Each participant in an UEFA competition shall, when registering its entry, confirm to UEFA in writing that it, its players and officials have acknowledged and accepted these obligations".

In keeping with this rule, the National Statute of the Romanian Football Federation (RFF) expressly provides for any affiliate member's obligation to acknowledge the final jurisdiction of the CAS in respect of any disputes that may arise between different football entities. According to relevant statutory provisions, such a dispute will first>

undergo a national system of jurisdictional committees, with the final appeal to be judged by the CAS.

Against this background enter Romania's largest sports litigation of the last decade. The parties: F.C.U. Craiova, first Romanian team ever to reach the semifinals of a European football competition (UEFA Cup, 1982-1983), four times winner of the Romanian Premiership, and Victor Pițurcă, ex-Craiova coach and current national team trainer. Object of litigation: an over 7 million EUR compensation claim made by Pițurcă for unilateral termination of contract by the Craiova club. Both RFF's national jurisdictional bodies (the Chamber for Dispute Settlement and the Appeals Committee) render decisions admitting Pițurcă's claim for compensation, with a final appeal to be submitted under the abovementioned rules to the CAS in Lausanne.

Craiova decides to ignore the CAS jurisdiction and challenges the Appeals Committee's decision with the national ordinary courts, while protesting the unlawfulness of the provision in the RFF Statute requiring the club to address its appeal at the CAS. As a result, pursuant to statutory norms sanctioning „serious breach of Statute", the RFF moves to exclude F.C.U. Craiova from the Federation, with players relinquished from their contractual agreements with the club. The exclusion prompts F.C.U Craiova to claim hundreds of million euros in damages resulting from loss of its players, of television rights and other profits.

In the midst of this highly publicized affair, the Bucharest Court of Appeals renders its decision: the RFF Statute provision imposing the CAS as the sole final jurisdiction body in football litigation matters is unlawful. In its reasoning, the Court retains a breach of constitutional provisions ensuring free access to justice, and argues that a conventional norm making it impossible for an affiliate member to address a Romanian court of law constitutes an inadmissible limitation to the right to justice. While taking note that the provision in the RFF Statute was imposed by FIFA and UEFA, the Court finds that such norms cannot be held superior to those in the Romanian Constitution.

The decision, open to final appeal at the Romanian High Court of Cassation and Justice, caused a backlash against the RFF. After all, if the norms requiring members to avoid ordinary courts in favor of the CAS were unlawful, why was one of the most popular clubs in Romania excluded from all competitions? How could the RFF still argue the lawfulness of its decision while the very rule it was based on has been declared abusive by a court of law?

It was at this point that the RFF sought the assistance of our team of lawyers, who were given mandate for the preparation, submission and oral pleading of the final appeal against the decision of the Bucharest Court of Appeal. This final appeal was deemed both a decisive factor in a future high-profile ruling on the legality of the RFF decision to exclude Craiova from the association, and a national jurisprudential milestone on the question of the CAS jurisdiction in sports matters.

The final appeal was predicated on the nature of the CAS as an international arbitration tribunal. Every member upon joining the Federation consented to the statutory provision instituting the CAS as the mandatory final jurisdiction body, which makes this provision into a perfectly valid arbitration clause. Consequently, with the CAS being an arbitral tribunal, the central question is whether an appeal to an international arbitration tribunal as sole remedy is or not permitted by constitutional provisions guaranteeing access to justice. In support of the constitutionality of the rule we have quoted a number of decisions of the Constitutional Court ruling that arbitration constitutes a valid exception from the rule of state court settlement of disputes, once it is established that the parties have lawfully consented to an arbitration clause. The Constitutional Court maintained that the availability of a challenge for the annulment of an arbitration award in front of a state court constitutes sufficient safeguard for free access to justice.

Our legal team also argued that the jurisdiction of the Swiss Federal Tribunal in settling the challenge for the annulment of a CAS award did nothing to alter the>

applicability of the Romanian Constitutional Court's existing decisions, since this tribunal does offer the guarantees of independence and impartiality required by Article 6 of the European Convention on Human Rights.

In addition, there are several other cases where Romanian courts have accepted the sole jurisdiction of an international arbitration tribunal over certain disputes – examples including FIDIC public procurement contracts, or privatization contracts. It is up to the parties to decide whether they will undergo ordinary court procedure or will opt for a specialized international arbitration entity.

The Romanian High Court of Cassation and Justice granted the final appeal submitted by the RFF, overturned the decision of the Bucharest Court of Appeal, and upheld the lawfulness of the norms instituting the CAS jurisdiction over sports matters. The High Court conducted an "independence and impartiality" test on both the CAS and the Swiss Federal Tribunal and concluded that both courts completely satisfied criteria of due process. It also found no reason to depart from existing Constitutional Court jurisprudence regarding compatibility of arbitration with access to justice safeguards, and, to the satisfaction of the RFF, found that the statutory provision recognizing the sole jurisdiction of the CAS "is imposed by the specifics of sporting activities and the objective need to ensure a common and unitary regulation for all national football federations that have opted for a special international jurisdiction".

High Court of Cassation and Justice, Administrative and Fiscal Disputes Division, Decision No. 5465/28.05.2013

The High Court decision was greeted with cheers by international sports bodies; FIFA expressed "relief" at the news. In the yet foggy overlap between global sports regulations and national law specific provisions, the defenders of a unitary interpretation of the rules of the game won another round.

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Focus

- Choosing a GAFTA Contract and Implicitly a GAFTA Arbitration Clause Might Generate Risks for Romanian Farmers

Choosing a GAFTA Contract and Implicitly a GAFTA Arbitration Clause Might Generate Risks for Romanian Farmers

Farmers need to pay more attention to the legal aspects of the contracts they conclude with foreign, contractually far more experienced partners.

What is GAFTA?

GAFTA ("The Grain and Feed Trade Association") is not a new name in Romania. Many Romanian farmers, big and small, have signed "GAFTA contracts". Even so, it seems they did so without much knowledge about what GAFTA actually means, at best based on merely cursory information about this organization and, more importantly, about the legal features of the contracts they concluded under its aegis.

Very briefly, GAFTA is an international organization seated in London which can trace its origins back to 1878 and whose members are professional traders of agricultural products – mostly commodity traders and brokers and less so farmers. The purpose of the organization, as set forth in its own statutes, is the promotion of international trade for agricultural products: cereals, animal feed, grain, rice and more recently spices and other products. GAFTA provides its members with standard contracts they should use for the protection of their commercial interests, especially sale-purchase contracts – the so-called "GAFTA contracts".

Statistics indicate that approximately 80% of the sale-purchase contracts concluded on the international grain market are GAFTA contracts. It is highly likely, therefore, that a foreign trader seeking to buy grain from a Romanian farmer would propose a GAFTA standard for the sale-purchase contract, regardless of the size of the local producer and even where the local producer is an individual farmer, or an association of such small individual farmers.

What Lies Behind the Clauses of a GAFTA Contract?

While signing GAFTA contracts seems to have become a practice for local farmers, the>

meaning of their clauses is rarely known.

There are reasons for this alarmingly widespread lack of information, from the absence of specialized advisors to assist the farmers when they intend to conclude a GAFTA contract to GAFTA itself being a closed, caste-type organization which only discloses full information about its regulations and contract to its own members. Not knowing what the clauses in the GAFTA contract actually mean, the Romanian farmer will be placed in a vulnerable position in relation to his more knowledgeable contractual partner, who is a GAFTA member.

Romanian farmers must be aware of at least two of the characteristics of a GAFTA contract before signing it.

First, they must know that a GAFTA contract is as a rule governed by the English, rather than the Romanian law. This essentially means that, even in those unfortunately scarce cases where he seems to be assisted by a legal counsel, the Romanian farmer would be unable to grasp the true significance of certain clauses in the GAFTA contract. Having a foreign law governing his contract constitutes as a source of instability and insecurity for the farmer.

Second, the Romanian farmers must be aware that a GAFTA contract will include an arbitration clause under which the parties agree to submit any dispute arising between them from that contract to a tribunal formed of GAFTA arbitrators. The tribunal will be seated in London and will settle the dispute under the English law, in the English language, and by the special arbitration rules of the GAFTA association.

Force Majeure in the GAFTA Contracts – Risks and Limitations

In addition to the above-mentioned two features that render the GAFTA contract rather risky for the less knowledgeable farmer, the actual form of the contract might raise issues as well.

GAFTA contracts normally look like forms with blanks where the parties insert the specifics of their transaction – quantities, price, date and place of delivery etc. This manner of presentation of the contract leads the unaware party to believe that the contractual clauses are predetermined and cannot be supplemented or modified.

This is not the case, not entirely. The farmer can ask for the contract to be supplemented or amended and can negotiate his proposals with the foreign partner. It is even recommended that he does so, as certain clauses included in the usual form of the contract might be to his disadvantage. One good example of such potentially harmful clause, which exists as a rule in the GAFTA contracts among the apparently predetermined clauses that do not require – or permit – the parties' input, and which more often than not goes entirely unnoticed, is the Force Majeure clause.

The Force Majeure clause is especially important in all those sale-purchase contracts where the seller is the producer himself. This is all the more the case where the producer is a Romanian farmer, whose crop is threatened by draught - given the shortcomings of the irrigation system – and other natural phenomena such as floods, frost or hail, which often affect the countryside in most regions of Romania.

GAFTA contracts are usually concluded up to one year prior to the harvest. Within this interval, the crop may suffer damage from any of the natural causes mentioned above leaving the farmer unable to meet the contractual terms and conditions for delivery. This would normally be a case for the farmer to rightfully uphold force majeure as reason for his failure to deliver the contracted quantities. However, GAFTA contracts are governed by the English law, not by the Romanian law, and the English law only permits a party to invoke force majeure if the contract provides for it, and only within the limits, for the cases, and with the effects provided in the contract. This is a particularity of the legal regime of force majeure under the English law which is not expressly stated in the GAFTA contract, and of which farmers are not normally aware.

To exemplify, some of the standard GAFTA contracts stipulate a limited notion of force majeure, which does not include the so-called "Acts of God", which are extreme and unpredictable natural phenomena – precisely the type of phenomena which, in practice,>

may damage the crop. Moreover, even where the "Acts of God" are included in the notion of force majeure in the contract, it is debatable whether or not they include draught, for example. Only unpredictable natural phenomena that are realistically impossible to prevent qualify in principle as "Acts of God", while draught, even though endemic in certain regions in Romania, is curable, albeit with significant investments. More recently, even insurers refuse to cover the risk of draught in Romania, as they see it more like a certainty than a risk. The Romanian chambers of commerce still qualify draught as force majeure, but such certification has no power in the eyes of GAFTA, unless the contract provides that draught is a case of force majeure.

Concretely, if the Romanian farmer sees his crop destroyed by draught or flood and the GAFTA contract does not, implicitly or explicitly, qualify the phenomenon as a force majeure event, he will remain obliged to deliver the grain to his contractual partner within the agreed timeline, even if he will have to buy the quantities from a third party in order to do so. Failing to deliver, the farmer faces damages. Either way, the farmer already affected by the natural calamity will have to reach for his pocket in order to satisfy the claims of his contractual partner – sometimes risking bankruptcy.

This being said, one needs to always negotiate the contents of the Force Majeure clause in the GAFTA contract in view of including in it, expressly, the types of natural phenomena that are most likely to affect the area in which the crop is located. The same recommendation applies to other clauses in the GAFTA contracts as well, which must be carefully studied before signing in all cases.

In Short about GAFTA Arbitration

As mentioned above, any dispute arising between the parties of a GAFTA contract is to be settled, exclusively, by a tribunal formed of GAFTA qualified arbitrators. GAFTA arbitration is traditionally a trade-orientated arbitration and consequently the arbitrators are predominantly people engaged in the trade rather than legal professionals. While a direct knowledge of the technicalities of the matter at hand is always useful, the lack of legal training may be looked at as deficiency of the system, as the trade have substantially changed since GAFTA's establishment and became increasing complex and sophisticated in terms of contractual law and other legal issues.

GAFTA Arbitration Rules provides for a two-stage arbitration. At the first tier, the parties can either agree to the appointment of a sole arbitrator by GAFTA, or they may each appoint an arbitrator from GAFTA's list of arbitrators, while the third arbitrator, as chairman, will be appointed by GAFTA. If any party is dissatisfied with the first tier award they may lodge an appeal with GAFTA. A board of appeal formed of either three or five arbitrators, depending on number of arbitrators ruling in the first tier procedure, will be appointed by GAFTA.

The procedure in each stage is carried out mostly in writing. The parties exchange written submissions along with evidences via GAFTA. As a peculiarity of the system, in each of the two stages the last word belongs to the party initiating that particular tier of the process, either by the statement of claims or by the appeal. Therefore, such party will always be entitled to file one submission more than the other party, which may raise questions as to whether the overall procedure observes the widely applicable legal principle of "equality of arms".

Another peculiarity of the GAFTA arbitration refers to the parties' representation at the oral hearing. An oral hearing, not a mandatory stage of the GAFTA arbitration procedure, may be established for the parties and/or their representatives, at the request of one party or of the tribunal, and is normally to be held at the GAFTA's offices in London (if the parties do not agree on a different place). For the purpose of the oral hearing, each party may be represented by a GAFTA qualified arbitrator or other representative (an employee or a manager), but they may not be represented by a lawyer or other legally qualified advocate, unless legal representation is expressly agreed by both parties. This is highly unusual, to say the least.

In practice, parties rarely agree to allow legal representation, because most often than not one of the parties is a GAFTA member>

having good connections with a GAFTA qualified arbitrator who may very well ensure the necessary representation to the hearings. In addition, it may happen that at least one of the parties might not be interested in a thorough examination of the case from a legal perspective. There were voices from among the GAFTA members claiming that the rule should be changed by allowing the tribunal to decide itself on accepting legal representation in more complex cases, even if one party is opposing.

While arbitrations conducted consensually between professionals fall outside the ambit of the human rights legislation, the principles of those rights do not, and leaving the right to be represented by a lawyer in legal proceedings to the mercy of the other party's consent may raise issues of potential violation of these general rights. Moreover, the rule prohibiting legal representation violates the right of any party to be represented in court by a lawyer at its choice which is guaranteed by the Romanian Constitution. At least from this perspective, one might question the enforceability of a GAFTA decision passed in breach of the party's right to a proper defence on the territory of Romania.

Advice for a Good Practice in Performing a GAFTA Contract

Once become a party to a GAFTA contract, the Romanian farmer must observe minimal rules of contractual discipline, as the terms and conditions of the contract are strict and any error or delay may lead to severe consequences. Farmers more often than not tend to base their contractual partnerships on certain customs, which rarely involve precise deadlines or the drafting of documents and are instead predicated on tradition and long-lasting cooperation. But this does not prevent a party from invoking the contractual clauses, if the case arises. It is, therefore, strongly recommended for the farmer to pay much attention to the terms, conditions and procedures provided in the contract, not only at the signing, when he can request and negotiate amendments, but also afterwards, throughout performance. In any case, GAFTA arbitration as means of settling a dispute arising out of the contract is to be avoided, having in mind the shortcomings described in the previous section.

While Romania's great agricultural potential is very much in focus lately, and various solutions for growing productivity are discussed, the second and as important component of this potential, namely selling the produce, especially on markets abroad, seems to raise less public concern. However, such sales do take place very often under the terms of GAFTA contracts and, for such contractual relations to be successful, the local farmers must pay careful attention to the legal side of their business. Tempted to close a good deal, the farmers may decide to undertake certain contractual risks; but in all cases they should at least be aware of such risks existing, and of the impact such risks might have on their business. In other words, farmers must undertake what the current jargon refers to as a "risk management analysis".

investors held off starting their projects until the support scheme had come into effect (due to uncertainties related to its enforcement), it may be concluded that renewable energy investors benefited from the support scheme only for a very short period of time, especially given the significant value of the investments involved and their average depreciation duration.Moreover, some of the measures adopted through the GEO may be deemed to be in breach of important commitments to the protection of foreign investments, which were undertaken by Romania through bilateral agreements and through the Energy Charter Treaty. In fact, we have already noticed increased interest from investors in assessing the legal actions available against the Romanian state on account of these measures.

In addition to impacting existing investors, the measures adopted by the Government will, obviously, lead to a decrease in future investments in the renewable power sector, which appears to be, in fact, the main purpose of the GEO. The worst affected technology will be photovoltaic energy, as it is subject to the greatest limitations (the highest number of postponed green certificates, highest reduction in the event of overcompensation and exclusion from the support scheme if>

developed on agricultural land). The decrease in investments will not derive solely from the fact that the renewable power sector will become less attractive to foreign investors (due to the high risks involved in the support scheme and its lack of predictability and stability), but also from the difficulties in securing finance for projects in this sector.

And although the aim of the GEO is limited to discouraging investments in the renewable power market, the volatility of the legislation governing the sector may be seen as an indication of the instability and unpredictability of the overall Romanian investment environment. Hence, the red light effect of the GEO may extend to foreign investors interested in other sectors of the Romanian economy.

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News and Views

- Boutique or Regional Practice that Impressed in International Arbitration

Boutique or Regional Practice that Impressed in International Arbitration

International Accolade for Țuca Zbârcea & Asociații: the Firm's International Arbitration Practice, praised by Global Arbitration Review

On February 20th, 2014, on the occasion of GAR's fourth awards ceremony held in Paris, Țuca Zbârcea & Asociații picked up the "Boutique or Regional Practice that Impressed" Award - one of the most prestigious awards in the field of international arbitration granted by an international legal directory.

For the first time, Global Arbitration Review (GAR), the world's leading resource on international arbitration news and community intelligence, decided on a Romanian law firm to win a GAR Award.

The sold-out event at the luxury Four Seasons Hotel George V was GAR's largest annual awards ceremony yet, with some 275 attendees from the world of international arbitration.

The night was also graced with a special guest, 91-year old Egyptian diplomat and former United Nations secretary general Boutros Boutros-Ghali.

The master of ceremonies was Sebastian O'Meara, one of the directors of GAR's publisher Law Business Research, who explained how proceeds from the event will benefit the Swawou School, which provides free education to disadvantaged girls in Sierra Leone. The GAR Awards will provide over half the funds needed to support the school for the coming year.

The category "Boutique or Regional practice that impressed" saw a number of contenders, including six other private practices from Italy, France, Brazil, Egypt, South Korea, Singapore specialising in international commercial disputes.

Romania's cases before ICSID were not overlooked either, two of the most recent ICSID decisions being put up to a public vote for the award for the "Most important published decision of 2013", namely: Micula v. Romania and Rompetrol Group v. Romania.>

ICSID Case Book

As a reminder, the team of lawyers of Țuca Zbârcea & Asociații has acted on several BIT-related cases brought before the International Centre for Settlement of Investment Disputes (ICSID) by various foreign investors and they have successfully defended the Romanian government, as follows:

- Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11 - Muşat şi Asociații (the lawyers having represented Romania are part of Țuca Zbârcea & Asociații) and White & Case;
- EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13 – White & Case and Țuca Zbârcea & Asociații;
- S&T Oil Equipment & Machinery Ltd. v.Romania, ICSID Case No. ARB/07/13 – White & Case and Țuca Zbârcea & Asociații;
- Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22 - Țuca Zbârcea & Asociații and Freshfields Bruckhaus Deringer LLP.

The winners from across all nine categories of the GAR Awards 2014 were selected from a shortlist comprising 134 finalists, among successful firms being renowned international arbitration powerhouses.

The GAR team picked Romanian outfit Țuca Zbârcea & Asociații as the winner of the "Boutique or Regional Practice that Impressed" Award, on the back of its work successfully defending the Romanian government in a string of ICSID cases, as co-counsel with the likes of Freshfields and White & Case. Partner Cornel Popa collected the trophy on behalf of his firm. This accolade is all the more important as the firm co-managed by Florentin Țuca and Gabriel Zbârcea has also achieved a first-time ranking into the GAR 100 (the annual ranking of world's most active international arbitration practices).

> "The award is an incredible recognition of the firm's arbitration capabilities. There has been visible growth in the complexity and volume of cases that our team has handled in recent years – both for investors and state authorities.

Țuca Zbârcea & Asociații Makes the Final Rankings of GAR 100

A widely-respected publication and a leading resource on international arbitration news and community intelligence, Global Arbitration Review (GAR) hosts an annual awards ceremony with some 300 attendees from the world of international arbitration – representatives of international arbitration institutions, arbitrators and lawyers of renowned international law firms such as Arnold & Porter LLP, Baker & McKenzie; Berwin Leighton Paisner/BLP; Cleary Gottlieb Steen & Hamilton; Cuatrecasas, Gonçalves Pereira; Curtis Mallet-Prevost Colt & Mosle LLP; Freshfields Bruckhaus Deringer LLP; Garrigues; Herbert Smith Freehills; Hogan Lovells; Jones Day; K&L Gates; King & Spalding LLP; Norton Rose Fulbright; Shearman & Sterling LLP; Weil Gotshal & Manges LLP etc.

Also, the latest GAR 100 / GAR 30 rankings (the annual ranking of world's most active international arbitration practices) are unveiled on the night with trophies awarded to each leading firm.

This year, Țuca Zbârcea & Asociații made the final rankings of GAR 100, thus being recognised as one of the leading practices in international arbitration.

The international arbitration group at Țuca Zbârcea & Asociații covers international commercial disputes, and has acted successfully on disputes flowing from breaches of bilateral investment protection treaties. The team has an in-depth working knowledge of various arbitration procedural rules such as ICC, ICSID, GAFTA, the Romanian International Chamber of Commerce and UNCITRAL, while also taking part in hearings before the Permanent Court of Arbitration in The Hague.

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/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

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