The dispute resolution Review

Fifth Edition

Editor

Richard clark

Law Business Research

The Dispute Resolution Review

This article was first published in The Dispute Resolution Review, 5th edition
(published in February 2013 – editor Richard Clark).

The Dispute Resolution Review

Fifth Edition

Editor
Richard Clark

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

CHIEF SUBEDITOR
Jonathan Allen

SUBEDITORS
Anna Andreoli, Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-56-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA (BA-HR)

ARTHUR COX

ASHTAR ALI & CO, ADVOCATES AND CORPORATE CONSULTANTS

ATTIAS & LEVY

ARZINGER

AZB & PARTNERS

BAKER & MCKENZIE SOUTH AFRICA

BARUN LAW

BEDELL CRISTIN

BIZLINK LAWYERS & CONSULTANTS

BONELLI EREDE PAPPALARDO – STUDIO LEGALE

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CAMILLERI PREZIOSI

CRAVATH, SWAINE AND MOORE LLP

CROCI, SILVA Y CAJINA ABOGADOS

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

FONTES TARSO RIBEIRO ADVOGADOS

FULBRIGHT & JAWORSKI LLP IN ASSOCIATION WITH

MOHAMMED AL-GHAMDI LAW FIRM

GATMAYTAN YAP PATACSIL GUTIERREZ & PROTACIO

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

HOMBURGER

HUTABARAT HALIM & REKAN

JUN HE LAW OFFICES

KBH KAANUUN

LANSKY, GANZGER & PARTNER (LGP)

ŁASZCZUK & PARTNERS

LLOREDA CAMACHO & CO

LOYENS & LOEFF

MAPLES AND CALDER

MANNHEIMER SWARTLING

MIYAKE & YAMAZAKI

MOLITOR AVOCATS Á LA COUR

MOTIEKA & AUDZEVIČIUS

OSLER, HOSKIN & HARCOURT LLP

OXFORD & BEAUMONT SOLICITORS

PELLEGRINI & URRUTIA

PINSENT MASONS LLP

PIPER ALDERMAN

PLESNER LAW FIRM

POTAMITISVEKRIS

SCHRECK LAW OFFICES

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TOMAIER LEGAL ADVOKÁTNÍ KANCELÁŘ S.R.O.

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URIA MENENDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

UTEEM CHAMBERS

YOUNG CONAWAY STARGATT & TAYLOR LLP

CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first four editions of this work, the fifth edition now extends to some 58 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2013.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. 2012 saw regulators flex their muscles when they handed out massive fines to a number of global banks in relation to alleged breaches of UN sanctions, manipulation of the LIBOR and EURIBOR rates and money-laundering

offences. The dark clouds hanging over the EU at the time of the last edition have lifted to some degree after the international efforts in 2012 saved the euro from immediate and catastrophic collapse, although the region continues to prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisers than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark
Slaughter and May
London
February 2013

Chapter 47

ROMANIA

Levana Zigmund[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Disputes in Romania are settled in court in the vast majority of cases, under procedures regulated mainly by the Civil Procedure Code ('the CPC'). The CPC has undergone reform through Law No. 202/2010 ('the Little Reform Law'),[2] a law expressly designed to introduce elements of procedural celerity in advance of the new Civil Procedure Code, which is expected to replace the CPC entirely in July 2012. The commentary here takes into consideration the procedures as currently in force. A brief outline of the main amendments to be brought to the new Civil Procedure Code is included in Section VII, *infra*.

The judicial system in Romania comprises:

a local courts;

b tribunals;

c courts of appeal (there are 15 courts of appeal in Romania, the largest being the Bucharest Court of Appeal, with 23 local courts and six tribunals); and

d the High Court of Cassation and Justice, Romania's supreme court.

The system is designed to ensure a double-level jurisdiction, with local courts and tribunals acting as first instances depending on the nature and value of the litigation, while the courts of appeal deal with first or final appeals.

The High Court of Cassation and Justice acts exclusively as a court of last resort, also settling exceptional procedural incidents (such as motions to change venue for legitimate suspicion), and the final appeal in the interest of the law, an extraordinary

1 Levana Zigmund is a partner at Țuca Zbârcea & Asociații.

2 The provisions are part of Law No. 202/2010, published in the OGR No. 714 of 25 November 2010, having entered into force upon 25 November 2011.

challenge filed by the General Prosecutor or the colleges of the courts of appeal seeking to obtain a decision, binding for all inferior courts, to unify practice on certain matters. Such decisions are published in the Official Gazette of Romania.

With the number, range and complexity of disputes dramatically increasing in past years against the backdrop of economic growth and legislative changes, especially generated by Romania's accession to the EU on 1 January 2007, parties are increasingly resorting to ADR procedures, especially arbitration, even though the vast majority of disputes are still adjudicated in courts. Mediation was only introduced in 2006 and its practice is still to be developed, helped by a July 2012 amendment to the mediation law that will require litigating parties to prove that they have taken part in an information meeting regarding the advantages of mediation.[3]

II THE YEAR IN REVIEW

The focus of the year was the entry into force of the new Civil Procedure Code, an extensive and systemic reform of all aspects of procedural civil law. While an original enactment date had been set for 1 September 2012, a government emergency ordinance issued immediately prior to this deadline postponed the moment of entry to 1 February 2013, quoting 'financial budgetary restrictions that have delayed measures of absolute necessity for the preparation of the judicial system in view of the new Civil Procedure Code'.[4] Furthermore, in view of the same rationale, the Romanian parliament has already made a case for a three-year postponement of certain new Civil Procedure Code provisions, its proposal being currently denied by the Romanian president on procedural grounds.

The ECHR has pronounced two high-profile awards with regard to controversial austerity measures taken by the government in 2010, which reduced public sector pensions by 50 to 75 per cent. On 7 February 2012, by means of a partial judgment in *Frimu and Others v. Romania*, the ECHR found such austerity measures did not amount to infringement of Article 1 of Protocol No. 1 of the European Convention on Human Rights, holding that 'national authorities are best placed, in principle, to elect adequate means for achieving a balance between expenses and public revenues, and the Court respects this choice, except in cases of an obvious lack of reasonable ground'. Subsequently, on 13 November 2012, by means of a complementary judgment in *Frimu and Others v. Romania*, the Court also rejected claims of breach related to Article 6, holding that seemingly inconsistent rulings of Romanian courts on legal challenges against decisions of pension reduction were due to different circumstances and not divergent application of the law.

3 The amendment has been introduced by Law No. 155/2012, published in the OGR No. 462 of 9 July 2010, set to enter into force on 9 January 2013.

4 Government Emergency Ordinance No. 44/2012 was published in the OGR No. 606 of 23 August 2012.

Late in the year, the Constitutional Court dismissed as unconstitutional a 2010 amendment to the Civil Procedure Code denying two degrees of jurisdiction for low-value claims falling under a 2,000 lei threshold.

III COURT PROCEDURE

i Overview of court procedure

The CPC and other legislation are made available online on various websites, among them the website of the Ministry of Justice.[5] Because of the volume and frequency of amendments to existing legislation, including the CPC, especially after 1990, laws are not always republished to include the latest changes. Therefore, texts of laws may be presented by different sources as a compilation of norms as in force at a certain date.

ii Procedures and time frames

Procedures and time frames differ depending upon the nature, object and procedural stage of the claim and the practice of different courts may vary, making it difficult to predict with accuracy the time frame of a court procedure.

Preliminary procedures to taking action are provided in certain matters, pending which the claim is to be denied as either premature or inadmissible. Most notably, in all contractual disputes between professionals the claimant must invite the respondent to direct conciliation in an attempt to private settlement before taking action. This prior procedure may be completed in 30 days. Proof that the required preliminary procedure has been completed is required in court.

Beginning on 9 January 2013, parties to litigation that can undergo mediation (civil litigation valued under 50,000 lei, labour litigation, consumer protection disputes, etc.) will have to be able to prove their participation in an information meeting on the benefits of such alternative dispute resolution procedure.

Disputes are submitted to the competent court at the seat or domicile of the respondent, as a rule. Depending on the value of the litigation – the threshold is currently set at 500,000 lei – the local court or the tribunal adjudicates in the first instance.

The CPC provides the minimal contents for claims but there are no claim forms made available or required by courts. Proof of having paid the legal stamp must be attached. Certain formal requirements may be fulfilled after the issue of the claim, within the term set by the judge. The respondent is allowed at least 15 days (five in urgent matters) between the date of service and the first hearing and must submit an answer at least five days in advance.

All evidence taken in the proceedings must be first admitted in principle by the judge and is directly marshalled by the judge. The categories of admissible evidence in court are limitedly provided by law and include documents, witnesses, interrogatory of the parties, expert reports and on-site assessments.

First instance sentences are usually challengeable by first appeal within 15 days of service; the first appeal is an ordinary challenge seeking revision on the merits. A timely

5 http://legislatie.just.ro.

filed first appeal automatically stays the enforcement of the sentence. New evidence is admissible in first appeal, hence adjudication may occasionally take as long as the first instance trial.

Decisions passed in first appeal may be challenged by final appeal within 15 days of service. The final appeal is an extraordinary challenge that may only be filed for limited reasons and does not automatically stay the enforcement of the decision under review. New evidence is usually limited to documents in final appeal, and final appeal decisions may be passed even after a single hearing.

Other extraordinary forms of legal redress are revision (for the discovery of new evidence, contrary decisions, etc.) and the motion to annul (mainly for lack of jurisdiction).

Court decisions become enforceable on being vested with executory power by the competent local court and are enforced by bailiffs, who are public officers organised under the coordination and control of the Ministry of Justice. The enforcement procedures entail that the writs of enforcement are handed over to the bailiff, who is required to obtain permission from the competent court before proceeding to enforcement.

Enforcement may be contested on formal grounds only for alleged irregularities in the enforcement procedure. The actual writ of enforcement may not be criticised within such contestation (as void or otherwise vacated) except for in expressly and limitedly provided cases. Usually contestations include a request for a stay of enforcement, admissible subject to a bond. Decisions passed on such contestations are subject to final appeal only.

Among the available urgent procedures, injunctions, with various applications, are most common. They may be filed prior to or during trial to obtain temporary measures to preserve rights, prevent, mitigate or remedy damages, or eliminate impediments that may forestall enforcement. The court may decide on the application in chambers, without summoning the parties. The injunction is to be issued by the court within 48 hours, with motivation. Injunctions may not settle the case on its merits, are enforceable immediately and are challengeable by final appeal only, within five days from service.

Urgent applications have been made available in recent years to expedite recovery of debts and alleviate the courts' caseloads. Certain, liquid and outstanding debts, deriving from works and services recognised by the debtor and ascertained by documents (agreement, invoice) may be claimed by way of a motion to pay, a very commonly used procedure introduced in 2001.[6]

In 2007,[7] the implementation of Directive 2000/35/EC on combating late payments in commercial transactions made available a new fast-track procedure: the injunction to pay, applicable to certain, liquid and outstanding debts deriving from agreements between companies or companies and authorities. The court must issue the order within 90 days from the registration of claim.

6 Introduced by Government Ordinance No. 5/2001, published in the OGR No. 422 of 30 July 2001.

7 Introduced by Government Emergency Ordinance No. 119/2007, published in the OGR No. 738 of 31 October 2007.

As interim procedures, the CPC makes available injunctions to seize tangible assets or place liens on bank accounts to preserve the rights of the creditor, as well as injunctions for the judicial seizure of litigated assets. Interim applications are filed to the court judging the case on the merits and are settled in chambers, without the summoning of the parties, by an immediately executory order challengeable only by final appeal within five days of service. The court may request the applicant to deposit a bond.

iii Class actions

The CPC recognises the right of associations with legal personality to take action, in the name of their members, to protect their collective interests, with damages being awarded to the association rather than directly to the individual members. Representative or collective actions may be filed, for instance, by the Consumer Protection Association, under the Consumer Code, by non-governmental organisations in the field of human rights against acts of discrimination that harm the interests of a community or group of people, by consumer protection associations and other non-governmental organisations, as well as by the National Authority for Consumer Protection against providers of services on the electronic marketplace, but they are still highly uncommon.

iv Representation in proceedings

Under the CPC, any individual with full legal capacity and all legal entities with legal personality may represent themselves in court proceedings. This rule is to have limitations under the new Civil Procedure Code.

v Service out of the jurisdiction

Any natural person or legal entity who is a party, a witness or a participant to a civil lawsuit in Romania may be served judiciary or extra-judiciary documents outside the jurisdiction, with the permission of the court.

Service is made through the Ministry of Justice by mail, directly to the party, or to the competent authorities in the country of residence, or to Romania's diplomatic mission or consulate in that country, depending on the provisions of the international conventions in place between Romania and the relevant jurisdiction.[8]

To avoid excessive delays, the parties are permitted by law to ensure service by express mail or courier at their own expense.

Since 2007,[9] courts are permitted to serve persons outside the jurisdiction without the intermediation of the Ministry of Justice. Judiciary and extra-judiciary documents may be served in EU countries by a notary public or bailiffs through the local courts.

8 Romania is a party to the 1954 Hague Convention and has concluded a number of bilateral conventions on the matter (among others with Belgium, France, Greece, Italy, Poland, Spain, Hungary).

9 Introduced by Law No. 189/2003, most recently amended in 2007 by Law No. 44/2007 published in the OGR No. 174 of 13 March 2007.

vi Enforcement of foreign judgments

Starting from its accession to the EU, the procedure for enforcement of foreign judgments in Romania differs depending on whether the judgment was passed in an EU or in a non-EU Member State.

For judgments delivered in EU Member States, Council Regulation No. 44/2001 on the jurisdiction, recognition and enforcement in civil and commercial matters is directly applicable in Romania. According to this simplified procedure, the interested party submits its application for enforcement to the competent local court, having attached a certificate issued by the court that passed the judgment, and the local court limits its verifications to the enforceability of the judgment.

The procedure for the enforcement of judgments delivered outside the EU requires the interested party to file a request for *exequatur* prior to enforcement.[10] The local court may not revise the judgment on its merits but will verify its enforceability in Romania according to its public policy.

vii Assistance to foreign courts

Assistance to foreign courts in civil matters may consist in service of process, transmission of legislation and information on legislation, taking of evidence and granting access to justice to foreign citizens. Assistance is provided in answer to letters rogatory from the foreign courts, directly or through diplomatic missions, addressed to the Ministry of Justice, which verifies observance of formal requirements and forwards it to the competent court and collects the answers. Courts of appeal may exchange information directly with courts of equivalent rank in EU Member States.

viii Access to court files

Hearings in Romanian courts are public as a rule, with few exceptions, and judgments are always passed in a public hearing. Information on dates set for hearings may be obtained from the national online portal of the courts or from the courts' archive offices. Written submissions and evidence in relation to ongoing proceedings are not available to the public.

After the proceedings are completed, members of the public may obtain information on the name of the parties, the object of the case and the decision passed by the court. Decisions found relevant for the application or interpretation of the law may be published in full in case-law collections, legal reviews, etc.

ix Litigation funding

Support of litigation by a third party is permitted in Romania by way of assignment of litigious rights, following which the assignor loses locus standi in trial.

Funding litigation for a share of process is not permitted, but lawyers may charge a retainer to which a success fee is added, determined *pro rata* from the proceeds.

10 Regulated by Law No. 105/1992 republished in the OGR No. 337 of 19 May 2003.

Natural persons with residence in Romania or in the EU who are unable to support litigation without jeopardising their own or their family's welfare are permitted to request public aid to fund civil litigation.[11]

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

In Romania, lawyers are prohibited by statute[12] from assisting or representing parties with adverse interests. When a conflict of interest occurs lawyers must inform their clients and abstain from revealing any confidential information they may possess. Lawyers may however provide legal assistance to clients with adverse interests if such clients, made aware of the conflict, so agree, or to help them reach settlement. Representation in court of clients with adverse interests is forbidden under any circumstances.

The law permits Chinese walls only based on the consent of the relevant clients, only provided that the law firm ensures confidentiality of information and only for legal assistance in relation to non-litigious matters.

ii Money laundering, proceeds of crime and funds related to terrorism

The law preventing money laundering and terrorism financing,[13] amended in 2008 to fully comply with EU Directive No. 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, directs lawyers to obtain identification data from their clients before entering an engagement or providing legal services, or whenever they become aware of an attempt to engage in a transaction related to money laundering or terrorism financing. Lawyers must keep the documents attesting their clients' identities and the financial transactions performed in the interest of their clients for five years and must submit a report to the National Anti-Money Laundering Office whenever they suspect that a certain financial operation is related to money laundering or terrorism financing.

iii Other areas of interest

Courts may exempt the losing party, normally ordered to bear all legal costs, from reimbursing some of the winning party's lawyers' fees when found excessive.

The legal assistance agreement concluded with the client in compliance with the statutes is deemed a writ of execution and may be enforced on being vested by the competent court.

11 Introduced by Government Emergency Ordinance No. 51/2008 published in the OGR No. 327 of 25 April 2008.

12 The professional activity of lawyers is governed by Law No. 51/1995 and by the Statute of the Legal Profession, published in the OGR No. 45 of 15 January 2005. Among other sources, see www.baroul-bucuresti.ro/home.

13 Law No. 656/2002 published in the OGR No. 904 of 12 December 2002, recently amended.

Lawyers from the EU may provide legal assistance in Romania on fulfilling formalities required by statute; however, there are certain restrictions regarding clients' representation in court.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Romanian law acknowledges a position of privilege in favour of certain categories of people (including lawyers and notaries public), based in essence on their profession or relation with the parties, and a privilege of confidentiality for certain information in consideration of its importance.

For lawyers, privilege may consist in exemptions from the obligation to testify, immunity from criminal liability for opinions expressed or submissions made during the exercise of their profession, protection from orders to divulge professional secrets and confidentiality of all correspondence.

An interdiction to intercept and record conversations between lawyers and their clients was declared unconstitutional on the grounds that, in compliance with the practice of the ECHR, interceptions may be made whenever there is plausible information that the lawyer is involved in criminal activities.[14]

Such rules of privilege apply differently to in-house lawyers only to the extent they are not members of the Bar under an exclusivity agreement with one client, but legal consultants, who are employees of the client, not members of the Bar. For such legal consultants, the obligation of confidentiality is limited in time by contract and negotiable. Similarly to lawyers, legal consultants enjoy protection by the law with regard to the professional documents in their possession, in their office or domicile, which may only be seized based on special authorisation in criminal investigations.

Lawyers who have obtained their professional qualification in EU states and who exercise their profession permanently in Romania are subjected to the same professional conduct rules as national lawyers. If their activities are only occasional, a difference exists between the case of representation, governed by the same rules as those applicable to nationals, and other services, where the rules of the state of origin will apply, with certain exceptions, such as professional secrecy, which will be governed by Romanian statutes.

ii Production of documents

Under the CPC, each party shall bring the evidence it deems necessary to support its own claims. At the request of the party, the court may order the opponent to produce documents in its possession, where possession is deemed only the physical control and not also the legal control. It is incumbent on the applicant to prove that the documents exist, that they are in the possession of the opposing party and that they are relevant to the case.

14 Decision No. 54/2009 of the Constitutional Court, published in the OGR No. 42 of 23 January 2009.

The court will verify the legality, credibility, relevance (the logical connection between the requested evidence and the facts it allegedly demonstrates) and conclusiveness of the documents requested. Even if the documents satisfy the conditions, the court will decline the request if the documents contain personal information, are qualified as confidential (for instance, parties' allegations during mediation are confidential and may not be used as evidence in subsequent litigation or arbitration) or when their disclosure could trigger a criminal investigation against a party to the dispute or against third parties. If the documents regard both parties, or have been referred to by the other party in trial, or there is a legal obligation on the party to present the document in court, the request may not be denied.

If the party refuses to produce the document, hides or destroys it, the court may deem proven the claims for which the document would have served as evidence.

The CPC does not expressly regulate a procedure for the production of documents stored overseas, electronically or otherwise. The general rules described above, however, permit the parties to request (provided they also prove that the documents exist in the possession of the other party), and the court to allow, that documents stored overseas be brought in court as evidence.

While the CPC does not address the matter of evidence held by a third party but under the control of a litigant, requests to produce may be made for documents in the possession of authorities, legal entities or natural persons not parties to the dispute.

The court decides on such request considering the relevance of the documents rather than the relation of control there might be between a party and the entity possessing the documents. If the third party fails to produce the requested documents, the court may order it to pay compensation for damages caused by delay.

Special rules regarding the production of documents under the party's control, rather than mere possession, are provided for limited situations in special laws, such as in the case of industrial drawings and designs, or in the case of trademarks.

Electronic documents were added to the list of admissible evidence in 2001.[15] Electronic documents containing an electronic signature have the same power as privately made documents or, if recognised by the party against which they are proffered, the power of authenticated documents. If the document is contested, the court may order expert investigation. A practice in this matter is yet to develop.

Romanian law does not require parties to store electronic back-up versions of their documents. A 2009 enactment required the providers of publicly available electronic services and networks to store certain data (traffic and tracking data only) for six months and to make it available based on authorisation to authorities competent to investigate, detect and prosecute serious crime. Even though this enactment was rendered ineffective by a decision of the Constitutional Court,[16] a new regulation aiming to the same effect

15 By Law No. 445/2001 published in the OGR No. 429 of 31 July 2001.

16 Decision No. 1258/2009 of Constitutional Court, published in the OGR No. 798 of 23 November 2009.

was adopted in the middle of 2012[17], among protests and public outcry from the civil society.

The costs related to the production of documents made by third parties are borne by the party who made the request. The rule is that the losing party will bear all the legal costs of the proceedings, including those related to the taking of evidence.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration is the most common ADR procedure in Romania for matters capable of settlement by arbitration, especially commercial ones. Mediation, introduced in Romania in 2006, transposing the European Council Directive 92/13 of 25 February 1992, is yet to develop a practice. Other available ADR procedures are facultative conciliation, mandatory direct conciliation and other specialised ADR procedures limited to certain disputes (labour law, public procurement).

ii Arbitration

The CPC provides the general rules under which the parties may submit disputes to arbitration either to an *ad hoc* tribunal or to one organised at a permanent court.

In *ad hoc* arbitrations, parties may choose the rules to govern the arbitration, either directly or by reference to an established set of norms, and within the confines of public policy rules.

The most used form of arbitration, however, is institutionalised arbitration carried out under the auspices of permanent courts. Most arbitration requests are referred to the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry, established in 1953 and seated in Bucharest, which handles international as well as local, commercial and civil disputes. The Arbitration Rules of the Court, available on its website,[18] as enacted on 7 February 2012, are completed by the general rules provided by the CPC. The number of arbitrators in a panel is limited to three under the Court's Rules.

The arbitration tribunal will be formed by one or three arbitrators, 'depending on the value and complexity of the claim' (Article 16 of the Rules). In contrast to previous regulations on the matter, all arbitrators will be nominated by the Court of Arbitration, with parties being denied a role in the selection procedure.

Unless the parties otherwise agree, arbitral tribunals must deliver the award within five months from constitution, with possible extensions of up to two months. During interim requests the six-month term is suspended. These terms are doubled for international arbitrations.

Arbitral awards are final and binding for the parties and may only be challenged by action for annulment, within one month of the issue of the award, for reasons provided

17 By Law No. 82/2012 published in the OGR No. 406 of 18 June 2012.

18 http://arbitration.ccir.ro.

limitedly by the CPC (such as invalidity of the arbitration clause, non-arbitrability of the matter, breach of public policy rules through the award).

The action to annul the award is filed at the immediately superior court to the court competent to settle the dispute lacking the arbitration agreement. The court settling the action for annulment may stay the enforcement of the award provided a bond is placed by the interested party. The decision of the court is challengeable by final appeal.

The number of arbitrations has significantly increased in the past years, especially in commercial matters, but arbitrations are not yet very common, due especially to the costs of the proceedings, which are perceived as exceeding the costs of a dispute in court and which, if the parties do not agree otherwise, are borne by the losing party.

Also, with limited grounds to appeal against an award, parties may prefer to issue their claims in court, where a double level of jurisdiction is available. In practice, annulments of arbitral awards are rare.

Foreign arbitral awards are recognised and enforced in Romania in compliance with the New York Convention, to which Romania has been a party since 1961, and its respective domestic law.[19] An award is deemed 'foreign' if passed outside the jurisdiction or if not domestic due to a strong preponderance of foreign elements. Foreign arbitral awards must be first acknowledged to have executory power in Romania (*exequatur*) to be enforced, but the two applications may be made concomitantly.

iii Mediation

Even though the Romanian Chamber of Commerce and Industry has provided the service of mediation since 2003, among other ADR mechanisms, mediation has been only recently regulated in Romania, in 2006,[20] in compliance with the recommendations of the European Council regarding mediation and with a view to expanding the existing legal framework of ADR procedures.

Parties may resort to mediation prior to initiating court action or by discontinuing a pending lawsuit. In both cases, agreements reached through mediation are deemed private instruments, but may be authenticated by the notary public or submitted to court to be embodied in an award, challengeable only by final appeal. Mediators have their own professional body, the Mediation Council, established in 2008.

Mediators from EU states may have their qualifications recognised in Romania by the Mediation Council, while mediators from non-EU states may practise in Romania on recognition of their qualifications by the Ministry of Education and Research or specialised training.

The public awareness on mediation is relatively limited and the practice is still in an incipient stage. The entry into force, in January 2013 of a legal amendment to the mediation laws requesting litigating parties to prove they have undergone a meeting on the benefits of mediation is expected to increase the assimilation of this ADR procedure. With no restriction in establishing mediation centres under the law, the number of associations providing and promoting the service of mediation is increasing.

19 Law No. 105/1992 published in the OGR No. 245 of 1 October 1992.

20 Introduced by Law No. 192/2006 published in the OGR No. 441 of 22 May 2006.

iv Other forms of alternative dispute resolution

Conciliation as an ADR form is available in Romania, under the Rules for Facultative Conciliation approved by the College of the Court of International Commercial Arbitration at the Romanian Chamber of Commerce and Industry in 1999.

An application of the idea of direct conciliation between the parties prior to issuing claim is provided by the CPC, which makes direct conciliation a pre-action protocol mandatory in all pecuniary disputes between professionals arising from contract, failing which the claim is denied by the courts as inadmissible.

VII OUTLOOK AND CONCLUSIONS

The Romanian dispute resolution framework is currently experiencing one of the most significant, substantial and extensive reforms of the last century, including the expected enactment of the new Civil Procedure Code alongside an already-in-force new Civil Code; the enactment of new Criminal and Criminal Procedure Codes is also under preparation. The reform seeks to put in place a legal framework able to answer the needs of contemporary developments of societal relations, with a clear view to coordination with EU law essentials.

In this context, the new Civil Procedure Code, due to enter into force in February 2013, is a syncretic regulation incorporating concepts inspired from a variety of European legislation: the French Civil Procedure Code, the Belgian Judicial Code and the Italian Civil Procedure Code rank among the most important.

Due to the ECHR's constant condemnation of Romania for failing to judge claims within a 'reasonable time' and for disrespecting court decisions, ECHR jurisprudence also had a role in prompting the reform and giving it a keen focus on the acceleration of trial proceedings. To this end, the new Civil Procedure Code is set to reform the schedule as well as the proceedings carried out in various phases of the lawsuit; for instance, the judge will now be expected to develop a preliminary written correspondence with the claimant in order to ensure the fulfilment of all validity requirements concerning his or her request, which is expected to save a great deal of delay caused by successive hearings spent for the purpose of remedying imperfect applications.

The judge will coordinate the parties' written submissions within a very strict time-frame, so that the first hearing of the case shall take place within 20 days after submission. During this first hearing, the judge will have to provide the parties with a written estimation of the duration of the trial, in compliance with courts' legal duty to settle cases within a foreseeable term. The new Civil Procedure Code eliminates the rule that the court investigation phase of the trial must be carried out in a public hearing. To the contrary, court investigations shall as a rule be carried out in judicial chambers, while only the hearing on the merits of the case shall generally have to be held in a public session, to be finalised by the court's deliberation and for rendering of the award.

Should any unjustified delays occur in the development of the trial, the parties will now be provided with a special remedy of action (i.e., the challenge against trial tergiversation). Such challenge will be available in all instances where courts have failed to act within or pay heed to an established legal deadline, and will have to be settled

within five days from application. If the challenge is granted, the court will immediately take measures to eliminate the causes of trial tergiversation.

The new Civil Procedure Code abounds in rules aiming at realising trial celerity; for instance, the reduction in number of trial hearings or the shortening of the intervals within which certain rights must be exercised pending forfeiture; the professionalisation of lawsuits by requiring that parties be assisted by a lawyer in drafting and arguing a final appeal; and by allowing attorneys only to act as special curator.

The new Civil Procedure Code also brings welcome clarification to issues raised in the vast jurisprudence and doctrine developed under the reign of the CPC; for instance, it provides better definitions to the civil action, the conditions to exercise it, the conditions to be fulfilled in order to be a party in a trial and clearer rules governing parties' representation, especially concerning legal entities. The regulation of the applicable law in the case of conflict of laws will also change, as the old principle that procedural norms are applicable immediately to all trials is eliminated and replaced with the principle that civil procedural norms will be applicable only to trials commenced after its entry into force.

The matter of the means of appeal is also to undergo important changes: the new Civil Procedure Code permits more categories of judgments to be contested by first appeal, which is the only devolutive means of appeal available to parties, while the final appeal is made into an authentic exceptional means of appeal. Parties will now have the option to agree to directly exercise a final appeal against a judgment that may be subject to first appeal. Also, a new filtering procedure is to be introduced as a preliminary admissibility check performed by a three-judge panel with a view to assess whether the application complies with formal requirements, as well as whether the final appeal is ostensibly unfounded. This screening procedure is expected to lead to a reduction in the number of final appeal cases – especially welcome at the High Court of Cassation and Justice.

The new Civil Procedure Code also incorporates certain special procedures that are currently the object of distinct regulations (such as orders for payment, divorces, declarations of the death of a person) with the purpose of clarifying the civil procedure legislation and making it more predictable and effective. It also introduces a new, fast-track, optional procedure, designed to accommodate claims valued below 10,000 lei, which is entirely written and aspires to relieve the volume of litigation courts are currently faced with.

Some of the procedures currently included in the CPC will also undergo changes. The new Civil Procedure Code enlarges the scope of the types of disputes that may be submitted to arbitration by waiving the current limitation to patrimonial disputes only. The Code also stipulates the right of public entities to take part in arbitration, upon prior authorisation by law or by international treaties to which Romania is a party, and departs from current regulations in construing the scope of the arbitration clause – in the case of doubt, the clause shall be considered to be applicable to all disputes arising out of the agreement or out of the legal relationship to which it refers. Also worth noting is the exclusion of several means of appeal against judgments taken within the arbitration procedure: judgments by which the court orders the removal of obstacles to arbitration, as well as against judgments that rule upon requests for injunctive relief remain final; so does the decision admitting the action for annulment of an arbitral award.

Also as a novelty, the new Civil Procedure Code institutes a new procedure whereby the High Court of Cassation and Justice is to pass judgments on legal matters that have generated controversial legal practice if the resolution of the dispute depends on the interpretation given to such matters. The existing procedure designated to unify jurisprudence (extraordinary appeal on legal interpretation) will be maintained but will undergo changes, especially regarding the persons entitled to file applications.

The enforcement phase of the trial will be conducted by bailiffs only, with a view to guaranteeing that the rights of the debtor are fully observed, and that enforcement procedures are carried out lawfully, efficiently and rapidly.

Appendix 1

ABOUT THE AUTHORS

LEVANA ZIGMUND

Țuca Zbârcea & Asociații

Levana Zigmund is a partner at Țuca Zbârcea & Asociații. She co-heads the firm's international arbitration practice group and is widely regarded as a prominent practitioner with impressive advocacy skills. Her expertise encompasses arbitration under the leading institution rules, such as ICC, ICSID, as well as *ad hoc* arbitration proceedings under various national laws. More significantly, she has been very active in investment treaty arbitration in relation to Romania and has built up a solid and successful practice in this area. She was directly involved, either as a team member or coordinator, in the only three successfully finalised ICSID disputes to date, and coordinates a fourth. Levana Zigmund has also acted in complex commercial, real estate, fiscal and administrative disputes.

She has represented public and private companies in joint ventures, corporate governance matters, corporate and commercial transactions, business transfer projects, cross-border investments as well as shipping and transport projects, and has extensive experience in regulatory matters.

ȚUCA ZBÂRCEA & ASOCIAȚII
4-8 Nicolae Titulescu Ave
America House, 8th Floor, West Wing
Sector 1, 011141 Bucharest
Romania
Tel: +40 21 204 88 90
Fax: +40 21 204 88 99
office@tuca.ro
www.tuca.ro