The Dispute Resolution Review

Fourth Edition

Editor

Richard Clark

Law Business Research

The Dispute Resolution Review

THE DISPUTE RESOLUTION REVIEW

Fourth Edition

Editor
Richard Clark

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
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: 978-1-907606-28-1

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:

AFRIDI & ANGELL

APPLEBY

APPLEBY (CAYMAN) LTD

APPLEBY (ISLE OF MAN) LLC

ARTHUR COX

ASHTAR ALI & CO, ADVOCATES AND CORPORATE CONSULTANTS

ASHURST AUSTRALIA

ASTERS

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUFETE HERNÁNDEZ-ROMO

BUGGE, ARENTZ-HANSEN & RASMUSSEN (BA-HR)

CRAVATH, SWAINE & MOORE LLP

CROCI, SILVA & CAJINA ABOGADOS

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

ELVINGER, HOSS & PRUSSEN

FONTES & TARSO RIBEIRO ADVOGADOS

FULBRIGHT & JAWORSKI LLP IN ASSOCIATION WITH MOHAMMED AL-GHAMDI LAW FIRM

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

HOET PELÁEZ CASTILLO & DUQUE

HOMBURGER

HUTABARAT HALIM & REKAN

JUN HE LAW OFFICES

K&L GATES LLP

KBH KAANUUN LIMITED

LANSKY, GANZGER & PARTNER (LGP)

ŁASZCZUK & PARTNERS

LOGAN SABAPATHY & CO

LOYENS & LOEFF

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MARVAL, O'FARRELL & MAIRAL

MCGRIGORS

MOTIEKA & AUDZEVIČIUS

NISHIMURA & ASAHI

OXFORD & BEAUMONT SOLICITORS

PELLEGRINI & URRUTIA

POTAMITISVEKRIS

QUEVEDO & PONCE

RUDOLPH, BERNSTEIN & ASSOCIATES INC

SCHRECK LAW OFFICES

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TASSOS PAPADOPOULOS & ASSOCIATES LLC

TOMAIER LEGAL ADVOKÁTNÍ KANCELÁŘ S.R.O.

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first three editions of this work, the fourth edition now extends to some 56 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 2012.

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. Some insolvency and employment practitioners have had busy years with the fallout from the credit crunch beginning to trickle down into the wider economy. At the time of writing, dark clouds hang over the EU in

particular as the Member States strive to save the euro from collapse and 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 advisors 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
March 2012

Chapter 43

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 challenge filed by the General Prosecutor or the colleges of the courts of appeal seeking

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.

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 2010 amendment to the mediation law that requires the courts to recommend mediation to litigating parties.

II THE YEAR IN REVIEW

The legal highlight of the year is the entry into force, on 1 October, of the New Civil Code, an ample and systemic overhaul of all aspects of substantive civil law. Although a new Civil Procedure Code is yet to come into force, the enactment of the New Civil Code has already impacted Romanian dispute resolution procedures on a number of counts.

Firstly, the New Civil Code has introduced rules that allow for new types of claims to be filed with Romanian courts. Among the most important are that:

a parties will henceforth be able to ask the court to supplement their concluded agreements;

b courts will be able to adapt or re-evaluate a contract's performance due to changes in the circumstances taken into account at signing; and

c co-owners of an asset will no longer be held to acting in unanimity as claimants/defendants in trials regarding such asset.

The new Civil Code regulates for the first time certain institutions (such as trusts and time-share ownerships, or the parties' permission to set prescription terms for their obligations within certain limits), removes previous interdictions (for instance, it permits the sale with repurchase option) or changes the effects of certain legal actions (such as recognising land book registration as a constitutive rather than a publicity effect). All these novelties and modifications create new legal grounds for claims in court, and will increase the number, variety and complexity of cases.

Secondly, by repealing a long-standing distinction between civil and commercial matters, a pinnacle of the former legislation, the New Civil Code called forth several changes in court jurisdiction. While previously jurisdiction over a certain civil or commercial claim was allocated to either the district court or the tribunal by reference to the value of the claim, two different thresholds being set respectively for civil commercial claims, now the distinction between commercial and civil matters has been removed. A single 500,000 lei threshold has been set for all civil cases; all claims under this value fall in the jurisdiction of district courts, while all claims over this value are to be settled by tribunals. In addition, in terms of territorial jurisdiction, courts may no longer retain jurisdiction by reference to the place where a commercial debt was created or where payment was to be performed.

A third consequence of the amendment is that the new Civil Code has fundamentally altered the structure of Romanian courts by eliminating a prior separation into commercial and civil divisions within the civil jurisdiction; rather, specialised panels within the unified divisions will rule upon various categories of civil cases.

The new Civil Code also aims at establishing, in a two-phase process, the 'court of tutorship', a specialised structure for family law matters and cases involving minors to be created for all jurisdictional levels, either as a separate court or as a new division within the existing civil courts. Its jurisdiction will include matters such as divorce, custody, tutorship and protection of minors. The creation of this specialised court furthers a commendable strategy of distinguishing case matter involving minors from the ordinary sphere, in compliance both with fundamental principles provided by the UN Convention on the Rights of the Child and with legislation of EU Member States. A first step toward this specialisation was taken by the creation, in 2004, of the only existing tribunal for minors and family matters, which is located in Brasov.

Late in 2011, the Constitutional Court dismissed as unconstitutional a legal provision prohibiting lawyers from pleading in front of courts where spouses or close relatives perform judging or prosecution duties. The Constitutional Court's decision has raised serious criticism from the Romanian State Department on Justice Affairs, lawyers' associations and NGO's acting in the field, all of which are concerned with its effects on the impartiality of procedures.

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.[3] 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.

3 http://legislatie.just.ro.

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 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.[4]

In 2007,[5] 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.

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

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

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

mission or consulate in that country, depending on the provisions of the international conventions in place between Romania and the relevant jurisdiction.[6]

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

Since 2007,[7] 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.

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.[8] 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.

---

6 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).

7 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.

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

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.

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.[9]

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

In Romania, lawyers are prohibited by statute[10] 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,[11] 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

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

10 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.

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

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.

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.

A recent 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.[12]

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 not members of the Bar, but employees of the client. 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

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

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 adversary 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.

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.[13] 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.

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

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,[14] a new regulation aiming to the same effect is currently underway in the Romanian Parliament, raising an outcry from 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,[15] as enacted on 25 March 2010, 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 parties may agree to have one arbitrator or a tribunal formed of two or more arbitrators. If the parties fail to provide the number of arbitrators, the tribunal shall be formed of three arbitrators, two appointed by the parties and a president appointed by the arbitrators.

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

15 http://arbitration.ccir.ro.

Unless the parties otherwise agree, arbitral tribunals must deliver the award within six 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 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.[16] 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,[17] 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.

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

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

The public awareness on mediation is relatively limited and the practice is still in an incipient stage. The entry into force, in March 2010, of a legal amendment to the mediation laws requesting all judging and arbitration panels, as well as any other jurisdictional authorities, to present and recommend mediation to disputing parties[18] was expected to increase the assimilation of mediation as an efficient 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.

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 July 2012, 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

18 Law No. 370/2009 published in the OGR No. 831 of 3 December 2010.

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