

New Romanian Arbitration Law: what is really new?

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A new Code of Civil Procedure (CCP) including two separate sections on domestic and international arbitration entered into force in Romania on 15th of February. With this step, Romanian law continues to differentiate between domestic and international arbitration and to allow for a flexible regime for international arbitration. The very purpose of the new arbitration regulation is explicitly described by the Ministry of Justice in the accompanying report: *“to transform this alternative dispute settlement mechanism [arbitration] into an attractive and modern procedure that, through time-efficiency and flexibility, will lead to reducing the courts’ case-load.”*

While maintaining to a great extent the general principles of arbitration from the previous legislation, most of which are consistent with the UNCITRAL Model Law, the new CCP brings a number of notable changes. Some of these changes are very positive and will most certainly help develop arbitration in Romania. Other changes have already raised a few eyebrows in the Romanian arbitration community and will, hopefully, be the subject of future review.

Leaving it to the readers of this post to comment these changes, we will simply signpost some of the most relevant ones. In all, even though there are still some aspects that need to be fine-tuned, the new provisions on arbitration in the new

CCP are surely a step in the right direction and carry the potential of making Romania a suitable seat for international arbitrations.

Parallel judicial review of jurisdictional awards. While recognizing the competence-competence principle, the new CCP excludes parallel judicial review of positive jurisdictional awards. Contrary to other jurisdictions, such as most of the UNCITRAL Model Law countries, the new CCP requires that such review be made at the annulment stage. There are nevertheless other instances, such as the tribunal's rulings on provisional measures, where parallel judicial review is allowed. However, in such instances, the new CCP clearly provides that such review does not result in a suspension of the arbitral proceedings.

Courts intervention in aid of arbitration. According to the new CCP, when state courts are asked to intervene in aid of domestic or international arbitrations they have to treat the matter with great urgency and issue a decision that is not subject to any appeal.

Institutional arbitration. The new CCP introduces, for the first time in Romania, a number of special provisions regulating institutional arbitration. These provisions state that the parties' choice of an arbitration institution triggers the automatic application of the rules of arbitration of *that* institution. Moreover, it is explicitly stated that the parties cannot opt-out of this rule, unless the arbitration institution decides that the circumstances of the case allow the application of *other* arbitration rules.

Arbitration of disputes pertaining to immovable assets. The new CCP states that any arbitration agreement regarding disputes pertaining to the transfer of property rights over immovable assets (e.g. buildings, real estate etc.) shall, as a matter of formal validity, be authenticated by a notary public. In a similar fashion, arbitral awards dealing with these kinds of disputes shall be presented for enforceability reasons to a notary public, or to a court judge who confirms the validity of the award and ensures that all taxes due in connection with the transfer of immovable assets have been paid.

Arbitral tribunals and the Constitutional Court. The Romanian Constitution gives arbitral tribunals the power to request the Constitutional Court to verify the constitutionality of certain Romanian law provisions relevant to the arbitration proceedings. In this regard, the new CCP introduces several provisions that clarify

the impact of the Constitutional Court's decisions on arbitral proceedings. These provisions state that the decisions of the Constitutional Court that find the non-constitutionality of a legal provision relevant to the arbitration proceedings or the final award is grounds for setting aside proceedings. Moreover, the arbitral tribunal decision on the request to open parallel proceedings with the Constitutional Court is subject to setting aside proceedings. Such proceedings can be filed separately from the proceedings to set aside the final award, but cannot result in a suspension of the arbitration.

Recognition and enforcement of foreign arbitral awards. The new CCP provides for a faster enforcement procedure of the arbitral awards by reducing the length of such procedure with almost one year. As such, the state courts' decision on claims of enforcement and recognition of foreign arbitral awards are subject to only one appeal, rather than two as in the previous legislation.

The new CCP also incorporates the grounds for refusing recognition and enforcement of foreign arbitral awards listed by Article V of the New York Convention, except for the public policy ground. The absence to a specific reference seems to suggest that the violation of Romania's public policy will not be grounds to refuse recognition and enforcement of foreign arbitral awards in Romania in light of the more-favorable-right provision of Article VII(1) of the New York Convention. It remains to be seen if the Romanian courts will agree to such an arbitration-friendly interpretation and application of the new CCP. In any event, even though Romania ratified the New York Convention in 1961 and the Romanian courts constantly apply it when dealing with recognition and enforcement of foreign arbitral awards, having the grounds for refusing recognition and enforcement of foreign arbitral awards as part of the new CCP is a welcomed development that will ensure the transparency of the process.

Finally, as far as the formal requirements are concerned, the new CCP is consistent with Article II (1) of the New York Convention when stating that the party seeking to recognize and enforce a foreign arbitral award in Romania shall provide the court with both the award and the arbitration agreement. However, in addition to the New York Convention, which only states that the party seeking enforcement shall submit the "duly authenticated" original or "duly certified" copy of the award and of the arbitration agreement, the new CCP explicitly describes the certification procedure these documents must undergo before recognition and enforcement of a foreign award can be granted. Such procedure is two-prong: first, the arbitration

institution or the arbitral tribunal (in case of ad-hoc arbitration) must certify the authenticity of the award and a notary public must certify the authenticity of the arbitration agreement; second, the Romanian consulate or diplomatic mission from the seat of arbitration must certify the authenticity of the award and of the arbitration agreement. This certification procedure, however, is not applicable when the award is rendered in a country party to the Hague Convention (1961). In such case, the arbitration agreement and the award must undergo the Hague Apostille certification. Even though, at first glance it may seem that such formality requirements will over-complicate the recognition and enforcement process of foreign awards in Romania, in fact, having an explicit provision prescribing in detail these requirements enhances the transparency of the entire process, ensures a more uniform case-law of the Romanian courts and increases the predictability of the courts' decisions.