Investment Treaty Arbitration 2022

Contributing editors
Stephen Jagusch QC and Epaminontas Triantafilou

LEXOLOGY
Getting The Deal Through

© 2021 Law Business Research Ltd

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

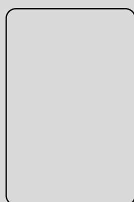
Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and October 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2013
Ninth edition
ISBN 978-1-83862-677-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Investment Treaty Arbitration
2022

Contributing editors
Stephen Jagusch QC and Epaminontas Triantafilou
Quinn Emanuel Urquhart & Sullivan LLP

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Investment Treaty Aribitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Stephen Jagusch QC and Epaminontas Triantafilou of Urquhart & Sullivan LLP, for their continued assistance with this volume.

London
October 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2021
For further information please contact editorial@gettingthedealthrough.com

© 2021 Law Business Research Ltd

Contents

Austria 3
Miloš Ivković
OBLIN Rechtsanwälte GmbH

Bangladesh 9
Junayed Ahmed Chowdhury and Maliha Ahmed
Vertex International Consulting

Belgium 15
Xavier Taton and Guillaume Croisant
Linklaters LLP

China 21
Lijun Cao, Sylvia Jiang and Angela Yan
Zhong Lun Law Firm

Egypt 30
Girgis Abd El-Shahid and Inji Fathalla
Shahid Law Firm

European Union 39
Nicholas Lawn, Isabelle Van Damme and Quentin Declève
Van Bael & Bellis

Japan 46
Yoshimasa Furuta and Aoi Inoue
Anderson Mōri & Tomotsune

Malaysia 53
Tan Sri Dato' Cecil W M Abraham, Dato' Sunil Abraham and Syukran Syafiq
Cecil Abraham & Partners

Romania 58
Cristiana Irinel Stoica, Irina Andreea Micu, Daniel Aragea and Alin-Gabriel Oprea
STOICA & Asociații

Switzerland 65
Kirstin Dodge, Nicole Cleis and Gabrielle Nater-Bass
Homburger

Ukraine 70
Olexander Droug
Sayenko Kharenko

United Kingdom 82
Stephen Jagusch QC and Epaminontas Triantafilou
Quinn Emanuel Urquhart & Sullivan LLP

United States 88
David M Orta, Julianne Jaquith, Athina Manoli and Thalia Lamping
Quinn Emanuel Urquhart & Sullivan LLP

© 2021 Law Business Research Ltd

Romania

Cristiana Irinel Stoica, Irina Andreea Micu, Daniel Aragea and Alin-Gabriel Oprea

STOICA & Asociații

BACKGROUND

Foreign investment

1 | What is the prevailing attitude towards foreign investment?

After the fall of the communist regime in 1989, Romania developed its policies to encourage foreign direct investment (FDI), to create and strengthen a viable market-oriented economy and to reduce the economic discrepancies between its regions. Romania worked towards creating an appropriate legal framework for the development of projects by foreign investors and adopting a national strategy in this field.

Its strategic position as a member of the European Union and its location close to the Commonwealth of Independent States, its rich natural resources (agricultural land, oil and gas, hydropower infrastructure) and its population (the sixth largest in the European Union) are some of the key elements that attract FDI. In 2020, Romania registered a gross domestic product (GDP) decrease of 3.9 per cent, being affected by the difficulties created by the covid-19 pandemic and by the establishment, at a national level, of the state of emergency and alert. In the second quarter of 2021, GDP increased by 1.8 per cent and the final GDP growth for 2021 is expected to be around 7 per cent.

Although sometimes confronted with red tape and difficulties in communicating with the authorities, foreign investors consider Romania a reliable partner because of its improving business climate. According to the World Bank, in 2021, Romania was ranked 91st out of 190 nations in the Doing Business rankings for 'greenfield investments' – lower than its ranking of 55 in 2020.

Once documentation is completed by a newly created company (registration forms, by-laws, statements, etc), it takes an average of five to eight days to complete its registration. Foreign investors benefit from a cost-competitive business environment as follows:

- a flat corporate tax rate of 16 per cent;
- tax exemption in the case of reinvested profits;
- a 19 per cent value added tax (VAT) standard rate; and
- a reduced 9 per cent VAT rate for some specific products and services (ie, foodstuffs, medicines, hotel accommodation, fertilisers, pesticides and other services in the agricultural sector).

The government decided to reduce the VAT rate from 9 per cent to 5 per cent for high-quality products such as eco, traditional and mountain products.

The reduced 5 per cent VAT rate also applies to hotel services and accommodation in specific units, including the land used for camping accommodation.

While most European Union countries only apply a reduced VAT rate to main foodstuffs (ie, milk and bread), in Romania the 9 per cent VAT rate is applied overall (even including non-alcoholic beverages). A significant part of the Romanian labour force is located abroad, in particular in other EU countries. Romania is starting to import more EU labour in sectors such as construction and agriculture. In 2021, the minimum gross wage was around €460 per month.

2 | What are the main sectors for foreign investment in the state?

According to the Romanian Central Bank, at the end of 2019, the main sectors for FDI in Romania were:

- manufacturing (29 per cent);
- construction and real estate (16.9 per cent);
- trade (16.6 per cent); and
- financial services and insurance (11.5 per cent).

3 | Is there a net inflow or outflow of foreign direct investment?

In Romania, there is a net inflow of FDI. In 2019, FDI rose to €88.3 billion.

Investment agreement legislation

4 | Describe domestic legislation governing investment agreements with the state or state-owned entities.

State legislation does not provide specific requirements – over the substance or the form – with respect to investment agreements concluded with the state or state-owned entities. Such agreements, whether concluded with national or foreign investors, must generally comply with domestic laws on the valid conclusion of contracts. The applicable provisions may vary, depending on, for example, whether the state institutions are engaged in agreements as private law partners or make use of their public authority; or, regarding the applicable procedures and formalities for the selection of the contracting parties, such as public procurement agreements and public-private partnerships.

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

5 | Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Romania has entered into 98 bilateral investment treaties (BITs), and as at 2021, 74 were in force. The European Union has also entered into 71 investment treaties with investment provisions (that are not BITs) with other states, of which 56 are in force. In June 2015, the EU began infringement proceedings against five member states, including Romania, requesting them to terminate intra-EU BITs between them owing to the existence of provisions that were considered incompatible with EU laws. As a consequence, according to the provisions of Law No. 18/2017, which entered into force on 24 March 2017, the Romanian state has undertaken the termination, either by mutual agreement or by

© 2021 Law Business Research Ltd

unilateral termination, of 22 BITs with EU member states. The Ministry of Foreign Affairs publishes the date when the BITs are to terminate in the Official Gazette. No such calendar has been published so far. In addition, after the Court of Justice of the European Union (CJEU) issued the *Achmea* decision in Case C-284/16 on 6 March 2018, the Declaration of the Member States on the legal consequences of the *Achmea* judgment and on the protection of investments was published on 15 January 2019, which stated that all member states must be committed to terminate all intra-EU BITs. The European Commission also welcomes the fact that the majority of member states are committed to undertake action to ensure that the Energy Charter Treaty (ECT) cannot be used as a basis for arbitration between investors and EU member states.

On 5 May 2020, Romania and 22 other EU member states signed the Agreement on the Termination of Bilateral Investment Treaties concluded between EU member states. Some of the adopted measures could be considered surprising – namely the termination of sunset clauses – as this could be considered a change of perspective in terms of protecting foreign investments. The Agreement was published in the Official Journal of the European Union, series L 168/1 of 29 May 2020.

On the other hand, a foreseeable measure contained in the Agreement provides for the termination of the EU BITs (listed in Annex A). Article 4 of the Agreement confirms that member states do not have recourse to arbitration for intra-EU disputes, regardless of the arbitration rules governing arbitration. By contrast, the termination of the sunset clauses by the Agreement – both those in the BIT terminated by the Agreement and those in a series of BITs already terminated (listed in Annex B) – is a less predictable measure.

In the absence of any provision on the institutions competent to settle investment disputes after the entry into force of the Agreement, investors will have the option to refer to national courts to resolve such disputes.

All EU investors benefit from the same protection afforded by EU rules (eg, non-discrimination on the grounds of nationality).

Romania is a signatory to the ECT, which aims to strengthen cooperation on energy issues by creating a unitary set of rules to be observed by the participating countries to enhance, among others, the management of the risks generated by the energy-related investments. The ECT was ratified by Law No. 14/1997 of the Romanian Parliament and has been in force in Romania since 16 April 1998.

Romania also became a member of the Multilateral Investment Guarantee Agency by signing the Convention Establishing the Multilateral Investment Guarantee Agency in Seoul on 11 October 1985, which is aimed at promoting and insuring foreign direct investment (FDI) in developing countries to facilitate economic growth.

6 | If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Romania has no overseas territories.

7 | Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

Romania is a signatory party to the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union from 5 May 2020. The President of Romania signed Decree No. 920 on 6 August 2021, and, in accordance with the Romanian Constitution, submitted the Agreement for Parliament's ratification.

8 | Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Romania enacted Law No. 18/2017, whereby the termination either by mutual agreement or by unilateral termination of 22 BITs with EU member states was approved. Romania is also a signatory party to the Agreement on the Termination of Bilateral Investment Treaties concluded between EU member states. The ratification of the Agreement is pending before Parliament.

9 | Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Romania is party both to bilateral and multilateral investment treaties and, as such, overlapping membership may occur. For instance, Romania is a party to the ECT, to which member state parties are also parties to BITs. Romania is also a member of the Comprehensive Economic and Trade Agreement entered into between the European Union and Canada. Where overlapping membership exists and the successive treaties do not relate to the same subject matter, those treaties shall continue to operate in parallel. Otherwise, when two successive treaties between two parties cover the same subject matter, this calls for an interpretation of the will of member states. Romania is not a party to the Vienna Convention on the Law of Treaties 1969, which deals with such a situation under article 30. Following the issuance of the *Achmea* decision, the compatibility of intra-EU BITs with EU law is likely to be disputed, both from a substantive and a procedural law perspective. The European Commission, in particular, has always been of the opinion that following the accession to the EU of the Central and Eastern European States, their BITs, which are now qualified as intra-EU BITs, have become obsolete as most of their regulatory content has been replaced by EU law. In fact, the Commission regarded them as an 'anomaly within the EU internal market', which, because of their bilateral protection standards, leads to its fragmentation as well as to discrimination on the basis of nationality, and thus to an infringement of article 18 of the Treaty on the Functioning of the European Union (TFEU). Also, arbitration clauses would interfere with the exclusive jurisdiction of the CJEU enshrined in articles 267 and 344 TFEU.

ICSID Convention

10 | Is the state party to the ICSID Convention?

Romania signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) 1965 on 6 September 1974 and deposited the instruments of ratification on 12 September 1975. On ratification, Romania made a declaration in relation to the provisions of article 70 of the ICSID Convention. The ICSID Convention entered into force with respect to Romania on 12 October 1975 and it has been invoked in several arbitral disputes.

Mauritius Convention

11 | Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Romania is not a party to the Mauritius Convention.

Investment treaty programme

12 | Does the state have an investment treaty programme?

The first BIT signed by Romania was with the United Kingdom in 1976 (this treaty was replaced with a new BIT, signed by Romania and the

© 2021 Law Business Research Ltd

United Kingdom in 1995). Before 1989, other BITs were signed by Romania, mostly with African or Asian countries, such as Sudan (1978), Cameroon (1980), Senegal (1980), Sri Lanka (1981) and Malaysia (1982). After the fall of the communist regime and the transition to the democratic system and market economy, the number of BITs signed by the Romanian government increased significantly. Among the first countries that signed BITs with Romania after 1989 were Italy (1990), Uruguay (1990) and Greece (1991).

Most BITs were signed in the 1990s, such as those signed with the United States (1992), China (1994) and India (1997), and illustrate the government's objective to enhance its investment policies. Romania also signed BITs after 2000, with notable examples being new investment treaties with Turkey (2008), Canada (2009) and Kazakhstan (2010). The main objectives pursued through Romania's investment treaty programme refer to the promotion and protection of investments in view of stimulating the business initiative, by creating a core of rules applicable to the signatory parties of the BIT, such as:

- fair, equitable and non-discriminatory treatment of the investors;
- effective means of asserting claims and enforcing rights related to investments;
- transparency of the laws and regulations applicable to investments; and
- full repatriation of capital and profits.

In any case, outside these treaties, considering Romania's membership of the EU, European Law provides for comprehensive protection of investors, namely through the prohibition of discrimination on grounds of nationality (article 18 TFEU), the freedom of establishment (article 49 TFEU), and the free movement of capital (article 63 TFEU). Also, the liability of member states for damages resulting from infringements of EU law has been established. EU internal market law is accompanied by human rights protection. In particular, article 1.1. of the Protocol to the European Convention on Human Rights provides for compensation for expropriation; and the Charter of Fundamental Rights of the European Union provides for the right to property and to fair compensation in case of expropriation in the public interest (article 17), the right to good administration (article 41), and the right to effective remedies and a fair trial (article 47). At the same time, the EU provides for a specific balance between the fundamental freedoms and investor protection on the one hand and other (codified and uncodified) public interests on the other, including a huge body of secondary law.

At present, Romania's efforts are directed towards the continuous development of a business-friendly environment, reflected in the national legislation and by the continuous improvement of its judiciary or of other alternative disputes proceedings.

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

13 Does the state have a foreign investment promotion programme?

The Ministry of Economy, Entrepreneurship and Tourism operates the InvestRomania website, a 'one-stop shop' for foreign investors, assisting and advising international companies for project implementation in the country. It is divided into six sections:

- Why invest;
- Doing Business;
- Life in Romania;
- Newsroom;
- About us; and
- Contact.

Applicable domestic laws

14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Foreign investment in Romania is generally treated similarly to any type of national investment. Foreign investors can make investments in any domain and under any legal form provided by the law and they benefit from equal treatment like local investors, irrespective of whether they are a resident or a non-resident in Romania.

The state's concern to protect and promote foreign direct investment (FDI) is reflected in national laws that provide for a general framework regarding guarantees and facilities applicable to foreign investors. In this respect, Government Emergency Ordinance No. 92/1997 (which is still in force, except for the provisions relating to fiscal and customs facilities, which fall under European Union competency) sets forth foreign investors' main rights, which include:

- the possibility to freely manage the company with full ownership rights;
- full repatriation of capital and profits;
- full protection against expropriation and nationalisation;
- access to state aid and EU funds; and
- the possibility of employing foreign citizens.

Government Emergency Ordinance No. 92/1997 provides that a company, a resident or non-resident legal entity can acquire any rights regarding real estate, to the extent necessary for the development of its activity, with the observance of the laws in this field. Law No. 312/2005, which entered into force on 1 January 2007, partially put aside the previous interdictions related to the real estate ownership by foreign nationals and set forth that EU citizens and legal entities can acquire ownership rights over real estate under the same conditions as nationals.

Prior to 2007, before Romania's accession to the EU, foreign citizens and legal entities, either based in an EU member state or elsewhere, were not entitled to own any real estate in Romania. This restriction continues to apply to other countries that are not EU or European Economic Area (EEA) members. In such cases, owning real estate in Romania is difficult given that the law demands a specific international treaty and condition of reciprocity.

Further, as of 1 January 2012, citizens not residing in Romania and non-resident legal entities belonging to an EU or EEA member state can acquire ownership rights over real estate serving as a secondary residence and secondary company headquarters. In addition, as of 1 January 2014, citizens and legal entities belonging to an EU or EEA member state can acquire ownership rights over agricultural lands and forests. The sale and purchase of agricultural land are subject to certain restrictions, such as observing the rights of first refusal and the other procedural steps laid down in Law No. 17/2014 on certain measures for the acquisition of agricultural lands.

There are no special restrictions for foreign investors when setting up a new business in Romania. The procedure of creating a new company requires the fulfilment of some legal formalities, such as (without limitation):

- choosing the company's object of activity and of its legal form (eg, an SA (joint-stock company), an SRL (limited liability company) or an SCA (company limited by shares));
- submitting evidence regarding the verification of the company's name availability and reservation of the selected name (online procedure);
- establishing the headquarters (compulsory supporting legal documents);
- preparing the company's by-laws and statutes;

© 2021 Law Business Research Ltd

- submitting evidence regarding the required bank deposit (social capital);
- registration of the company with the Romanian Trade Registry;
- registration for VAT purposes;
- establishing the signature specimen;
- registration of the employment contracts with the Territorial Labour Inspectorate; and
- obtaining relevant authorisation for operational purposes, depending on the type of activity.

In addition, for most of the activities, additional authorisation is needed for any investor, including foreign ones (eg, for running registered and secondary businesses, for employment protection or for environmental legal obligations).

For some activities, which usually relate to highly regulated markets, specific authorisations, formalities and conditions are required (eg, banking, telecommunications, supply of water, energy or gas-related services, gambling, insurance or customs-related services).

When conducting their business, all investors, including foreign ones, must comply with national and EU norms that regulate competition issues, such as anti-competitive practices, economic concentrations and unfair competition.

The Romanian Competition Council monitors the observance of the competition rules and conducts numerous investigations to identify and sanction the breach of these rules.

Relevant regulatory agency

15 | Identify the state agency that regulates and promotes inbound foreign investment.

Since November 2018, the main objective of the General Directorate of Foreign Investments within the Ministry of Economy, Entrepreneurship and Tourism is to attract and to facilitate FDI in Romania, offering professional support and consultancy to foreign investors coming to the country. One of its main missions is to increase inward FDI by promoting Romania's business opportunities worldwide and assisting foreign investors to accomplish their projects in Romania.

Relevant dispute agency

16 | Identify the state agency that must be served with process in a dispute with a foreign investor.

In the case of disputes before a regular jurisdiction (the state courts), the state is represented by the Ministry of Public Finance, which must be served with process, except for specific situations when the law grants to another authority the power of representation on behalf of the state.

However, regarding foreign investments, the law provides that the state or its public institutions are represented before International Centre for Settlement of Investment Disputes (ICSID) tribunals by the institution or the public authority that managed the issues in the dispute regarding the mutual protection of the investments. Where those issues were managed by more institutions or public authorities, the competence of representation before an ICSID tribunal is established by the government.

To ensure the representation of Romania before an ICSID tribunal, the competent public institution or authority selects lawyers specialised in international disputes, either from Romania or abroad, with the observance of the public procurement legislation.

In other arbitrations that are not based on BITs but on privatisation agreements of state-owned companies, the institution usually served with the process is the Authority for the Administration of State Assets (AAAS). The AAAS exercises all rights and obligations deriving from the state's capacity as a shareholder in relation to the management, restructuring, privatisation or liquidation of the state-owned companies.

INVESTMENT TREATY PRACTICE

Model BIT

17 | Does the state have a model BIT?

Romania does not have a model bilateral investment treaty (BIT). Nonetheless, analysis of the BITs signed by Romania after 1990 illustrates that many of the clauses inserted therein are similar to most BITs, reflecting the country's interest in ensuring uniform protection of the foreign investors in Romania, as well as offering comparable business conditions for national investors in foreign countries.

Preparatory materials

18 | Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Romania has a central repository of treaty preparatory materials, as well as treaties and agreements to which the country is a signatory party, at the Diplomatic Archives, in Bucharest. One of its sections – the Fund of the Historic Archives – also holds records of documents related to the state's foreign policy, some of which date back to the beginning of the 19th century.

The documents, which consist of preparatory files, correspondence between governments and diplomatic reports, can be consulted on site, upon request. Some of the documents are available in electronic form, although most can only be accessed in physical form.

However, some of the available data is classified and, pursuant to Law No. 16/1996 on the National Archives, can only be consulted by the public upon the expiry of a certain deadline (usually, a 50-year term).

Interested persons can obtain copies from non-classified documents, free of charge, after prior approval of the archives of the Ministry of Foreign Affairs. Personnel can help in searching and identifying relevant documents.

In addition, some materials concerning the state's foreign relations with other countries – including documents dating back to the 17th century – are available for on-site consultation at the National Library of Romania.

The BITs applicable to Romania are available on the United Nations Conference on Trade and Development website. Moreover, the bilateral and multilateral treaties to which Romania is party, which apply to many domains, are available on the Ministry of Foreign Affairs' website.

Scope and coverage

19 | What is the typical scope of coverage of investment treaties?

Investments falling under the scope of the BITs concluded by Romania cover a wide range of assets, including movable and immovable property and other property rights such as mortgages, shares, bonds and other kinds of legal interests in companies, intellectual property rights, receivables, business concessions conferred by law or under contract, claims to any activity having an economic value. The protection is offered to any foreign investor, understood, as a general rule, as any citizen of a contracting party or as any legal entity incorporated under the laws of the state where its headquarters are located.

From a general perspective, the main scope of the BITs concluded by Romania with other states is to promote and protect the investments and to offer sufficient guarantees to investors for a safe business climate in the contracting parties' jurisdictions.

© 2021 Law Business Research Ltd

Protections

20 | What substantive protections are typically available?

BITs concluded by Romania offer a bundle of protections to foreign investors, such as:

- protection against expropriation or equivalent measures;
- the right to fair and equitable treatment;
- the right to repatriate incomes and other funds;
- a full protection clause; and
- a guaranteed treatment, in line with that granted by the host state to its most favoured nation or to its own nationals.

Dispute resolution

21 | What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

In addition to submitting a dispute to the International Centre for Settlement of Investment Disputes (ICSID), a number of BITs concluded by Romania provide for other options, such as referring the dispute to the domestic courts of the contracting party's state on whose territory the investment was made or to an ad hoc arbitral tribunal established under United Nations Commission on International Trade Law rules of arbitration, as in the case of:

- the Treaty between the Government of Romania and the Government of the United States of America on Mutual Encouragement and the Safeguarding of Investments, of 28 May 1992;
- the Agreement between the Government of Romania and the Government of the Republic of Peru for the Promotion and Safeguarding of Investments, signed in Lima on 16 May 1994; or
- the Agreement between the Government of Romania and the Government of the Republic of Kazakhstan on the Promotion and the Safeguarding of Investments, of 2 March 2010.

However, no information is available regarding the use of these dispute resolution options in the case of litigation arisen from BITs signed by Romania.

As far as the settlement of disputes by the ICSID is concerned, Romania has been involved in several disputes settled under the ICSID Convention. The ICSID is, therefore, the most commonly used dispute resolution option for investment disputes.

However, as a result of the quoted *Achmea* ruling, submitting an intra-EU BIT-based case to an investment court of arbitration might entail certain legal risks, because arbitral tribunals could simply decline jurisdiction for future proceedings brought under intra-EU BITs. On the other hand, if an arbitral tribunal decides not to decline its jurisdiction and it renders an arbitral award, the further enforcement of the award in the EU could be deprived of legal effects. For instance, if the award is issued pursuant to the ICSID rules, such rules do not provide legal grounds for challenging the award before member state courts (domestic courts). Thus, member states would be under an international obligation to enforce such awards. Nonetheless, from the perspective of EU member states, EU law would have primacy over any conflicting international obligations of the member states. Therefore, if an EU member state enforced such an award, the European Commission could either launch an infringement case or oblige the member state to recover the amount paid as compensation to the investor, on the basis of a violation of the EU's state aid rules.

Confidentiality

22 | Does the state have an established practice of requiring confidentiality in investment arbitration?

No information is available regarding confidentiality in investment arbitration. In spite of this, the awards concerning Romania are generally publicly available, whereas other documents, such as expert opinions, memorials and hearings transcripts, are not subject to disclosure.

Insurance

23 | Does the state have an investment insurance agency or programme?

At present, there is no specific investment insurance programme for foreign investments; therefore, there is no special insurance for investors. Nevertheless, the investor may conclude private insurances in connection with their investments.

For deploying certain activities, Romanian law may impose mandatory insurance coverage. For example, the providers of healthcare services, medicine or medical devices, when concluding contracts with the public health authority, are obliged to hold insurance policies against malpractice.

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

24 | How many known investment treaty arbitrations has the state been involved in?

To date, Romania has been involved in 18 investment treaty arbitrations, of which nine are concluded and nine are still pending.

Notable cases involving Romania were disputes initiated by a major private oil company, a company operating commercial venues in airports and individual investors owning a group of companies in a disfavoured region. The most recent arbitration action was initiated in September 2020 by several citizens from Italy, Greece and the Czech Republic and companies from Italy, Luxembourg, Germany, Turkey, the Czech Republic and Cyprus regarding a renewable energy generation enterprise. The instrument invoked was the Energy Charter Treaty. No information is publicly available regarding investment treaty arbitrations organised outside the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Industries and sectors

25 | Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Investment arbitration involving Romania has concerned various specific industries, such as duty-free shops, newspaper distribution, the investment sector or the oil sector. Numerous disputes were initiated following investments made during the privatisation period after 1990.

Selecting arbitrator

26 | Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

In cases involving Romania, the arbitral tribunal is composed of three arbitrators, one appointed by each party and the chairman appointed by both parties and, failing that, using the default mechanism under the ICSID Convention. As a rule, the selection of arbitrators is based on the general principles of selection, which primarily concern independence

© 2021 Law Business Research Ltd

and impartiality, good knowledge of mechanisms and legislative provisions, as well as experience gained in similar international disputes. Both Romanian and foreign professionals have been selected.

Defence

27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Broadly speaking, the defence against investment claims is administered by means of cooperation between the in-house lawyers of the Romanian government or government department, as the case may be, and the specialised law firms, either domestic or foreign, whose services are contracted to serve this purpose.

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Romania adheres to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) by Decree No. 181/1961 of the State Council published in the Official Gazette No. 19 of 1961. Romania has made declarations and reserves under article I (3) of the Convention.

Award compliance

29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

There has been one unfavourable award rendered against Romania, and adjacent proceedings were opened in connection with this unfavourable award, including a state-aid investigation by the European Commission. The Romanian government decided, in the end, to comply with the award. If there are other cases where unfavourable awards were rendered against Romania, they were most likely voluntarily implemented.

Unfavourable awards

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

The Romanian state generally uses all international and domestic appeals against an unfavourable award.

Provisions hindering enforcement

31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

First, foreign awards should be divided between awards rendered and those not rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). For the first category, the provisions of the ICSID Convention dealing with the enforcement of awards are incidental, while for the latter their enforcement is governed by the New York Convention or the Romanian Civil Procedure Code.

Second, to have the awards enforced, leave by the court has to be granted based on an application by the concerned party, pursuant to article 1126 of the Romanian Civil Procedure Code.

STOICA & Asociații

SOCIETATE CIVILĂ DE AVOCAȚI - ATTORNEYS AT LAW

Cristiana-Irinel Stoica
istoica@stoica-asociatii.ro

Irina-Andreea Micu
amicu@stoica-asociatii.ro

Daniel Aragea
daragea@stoica-asociatii.ro

Alin-Gabriel Oprea
aoprea@stoica-asociatii.ro

Opera Center II
Dr Nicolae Staicovici Street, No. 2, 2nd floor
050558 Bucharest
Romania
Tel: +40 21 402 0930
Fax: +40 21 402 0931
www.stoica-asociatii.ro

Third, the principle enshrined in article 1125 of the Civil Procedure Code is that any foreign arbitral award may be recognised and enforced in Romania insofar as the dispute may be subject to arbitration in Romania and as long as the award has no provision inconsistent with Romanian public policy. Failure to comply with the two requirements implies a refusal to enforce the award.

Lastly, as far as other impediments to enforcement are concerned, the Civil Procedure Code of Romania provides under article 1129 the following cases when enforcement of a foreign arbitral award may be hindered:

- the parties were under an incapacity to conclude the arbitration agreement, according to their own law, established pursuant to the law of the state where the award was rendered;
- the arbitration agreement was void pursuant to the law elected by the parties or, failing such election, pursuant to the law of the state where the award was rendered;
- the party against which the award is enforced was not duly informed on the appointment of the arbitrators or on the arbitration proceedings or it was unable to defend in arbitral dispute;
- the appointment of the arbitral tribunal or the arbitration proceedings violated the convention of the parties or, failing such convention, the law of the place of arbitration;
- the award deals with a dispute not provided by the arbitration convention or outside the limit set out by such convention or comprises provisions exceeding the terms of the arbitral convention. However, as long as the provisions from the award dealing with the aspects subject to arbitration may be separated from those regarding aspects not subject to arbitration, the former are to be recognised and enforced; and
- the award is not yet binding on the parties or it was set aside or stayed by a competent authority from the state where or pursuant to which it was rendered.

© 2021 Law Business Research Ltd

UPDATE AND TRENDS

Key developments of the past year

32 Are there any emerging trends or hot topics in your jurisdiction?

Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No. 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules was published in the Official Journal of the European Union, Series L 49 of 12 February 2021.

The former regulation, Regulation (EU) No. 654/2014, enabled the Union to suspend concessions or other obligations under international trade agreements after dispute settlement proceedings are concluded.

The World Trade Organization (WTO) Dispute Settlement Body has been unable to fill the outstanding vacancies on the WTO Appellate Body. The WTO Appellate Body was no longer able to fulfil its function from the moment there were fewer than three WTO Appellate Body members left. Until that situation was resolved and to preserve the essential principles and features of the WTO dispute settlement system and the Union's procedural rights in ongoing and future disputes, the Union had been asked to agree to interim arrangements for appeal arbitration pursuant to article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. That approach was endorsed by the European Council on 27 May 2019, 15 July 2019 and 15 April 2020 and supported in the European Parliament resolution on 28 November 2019 on the crisis of the WTO Appellate Body. If a WTO member was refusing to enter into such an arrangement and was filling an appeal to a non-functioning WTO Appellate Body, the resolution of the dispute was effectively blocked.

The new Regulation should ensure the coherent application of the enforcement mechanism in trade disputes relating to international trade agreements, including regional or bilateral agreements. The enforcement mechanism of the Trade and Sustainable Development chapters of the Union's international trade agreements forms an integral part of the Union's trade policy and this Regulation will apply to the suspension of concessions or other obligations and the adoption of measures in response to breaches of those chapters, if and to the extent that such measures are permitted and are warranted by the circumstances.

To that end, the Union is now able to expeditiously suspend concessions or other obligations under international trade agreements, including regional or bilateral agreements, if effective recourse to binding dispute settlement is not possible because the third country does not cooperate in making such recourse possible. It is also set out that where measures are taken to restrict trade with a third country, such measures should not exceed the nullification or impairment of the Union's commercial interests caused by the measures of that third country, in line with the Union's obligations under international law.

The Regulation entered into force on 13 February 2021.

© 2021 Law Business Research Ltd

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Digital Business
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-677-8

© 2021 Law Business Research Ltd