

# INVESTMENT TREATY ARBITRATION

## Romania



LEXOLOGY

Getting The Deal Through

Consulting editor

*Quinn Emanuel Urquhart & Sullivan  
LLP*

# Investment Treaty Arbitration

Consulting editors

**Epaminontas Triantafilou, Stephen Jagusch KC**

*Quinn Emanuel Urquhart & Sullivan LLP*

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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Generated 27 October 2022

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# Table of contents

## BACKGROUND

Foreign investment

Investment agreement legislation

## INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

ICSID Convention

Mauritius Convention

Investment treaty programme

## REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Applicable domestic laws

Relevant regulatory agency

Relevant dispute agency

## INVESTMENT TREATY PRACTICE

Model BIT

Preparatory materials

Scope and coverage

Protections

Dispute resolution

Confidentiality

Insurance

## INVESTMENT ARBITRATION HISTORY

Number of arbitrations

Industries and sectors

Selecting arbitrator

Defence

## ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Award compliance

Unfavourable awards

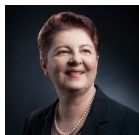
**Provisions hindering enforcement**

**UPDATE AND TRENDS**

**Key developments of the past year**

## Contributors

### Romania



**Cristiana-Irinel Stoica**  
istoica@stoica-asociatii.ro  
*STOICA & Asociații*



**Andreea Stoica (Micu)**  
amicu@stoica-asociatii.ro  
*STOICA & Asociații*



**Daniel Aragea**  
daragea@stoica-asociatii.ro  
*STOICA & Asociații*



**Alin-Gabriel Oprea**  
aoprea@stoica-asociatii.ro  
*STOICA & Asociații*

## BACKGROUND

### Foreign investment

#### 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 2021, Romania's economy grew above expectations, and GDP reached a record level of €240 billion despite the economic crisis. In 2022, GDP was €21 billion higher than in 2021 (which was €218.9 billion) when the economic crisis caused by the pandemic was at its peak. Thus, Romania ended 2021 with an economic growth of around 5.9 per cent. The Russia–Ukraine conflict continues to negatively affect the EU economy, pushing it towards lower growth and higher inflation compared to the spring forecast, such that the final GDP growth for 2022 is expected to be around 3.9 per cent.

According to official information published by the National Institute of Statistics:

- In the period from 1 January to 30 June 2022, turnover in wholesale trade (excluding trade in motor vehicles and motorcycles) increased in nominal terms compared with the period from 1 January to 30 June 2021, both as a gross series and as a working-day and seasonally adjusted series, by 28.7 per cent and 27.7 per cent respectively.
- In the period 1 January to 30 June 2022, the volume of construction works increased, compared to the period 1 January to 30 June 2021, by 4.3 per cent in the gross series and by 1.9 per cent in the working-day and seasonally adjusted series.
- In the period from 1 January to 30 June 2022, turnover from market services supplied mainly to businesses increased in nominal terms compared to the period from 1 January to 30 June 2021, both in gross terms and in working-day and seasonally adjusted terms by 26 per cent and 25 per cent respectively.
- In the period 1 January to 30 June 2022, turnover in market services to households increased compared to the period 1 January to 30 June 2021, both in gross terms by 36.7 per cent and in working-day and seasonally adjusted terms by 40 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. The updated version of the report is not available at the moment, as according to a statement published on 16 September 2021, after data irregularities on Doing Business 2018 and 2020 were reported internally in June 2020, World Bank management paused the next Doing Business report and initiated a series of reviews and audits of the report and its methodology.

Once documentation is completed by a newly created company (ie, 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 profits reinvested in some class of assets;

- 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. According to Government Ordinance No 16/2022, as from 2023 the VAT rate will increase from 5 per cent to 9 per cent for accommodation in the hotel sector or sectors with a similar function, including the rental of camping sites.

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 2022, the minimum gross wage was around €520 per month.

*Law stated - 20 August 2022*

### What are the main sectors for foreign investment in the state?

According to the Romanian Central Bank, at the end of 2020, the main sectors for FDI in Romania were:

- manufacturing (29.2 per cent);
- trade (17.2 per cent)
- construction and real estate (16.9 per cent); and
- financial services and insurance (11.8 per cent).

*Law stated - 20 August 2022*

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

In Romania, there is a net inflow of FDI. As of 31 December 2020, the total FDI balance stood at €90.773 million. The decrease in the value of net FDI inflows in 2020 compared to previous years, mainly due to the negative economic effects of the health crisis, also influenced the growth rate of the FDI balance. Thus, at the end of 2020 it recorded an increase of only 2.8 per cent compared to 8.9 per cent at the end of 2019 and 7 per cent in 2018. Undoubtedly, the main cause for this situation was the international pandemic situation generated by the emergence of the SARS-COV-2 coronavirus, which significantly influenced the economic environment during 2020. The declaration of the pandemic by the World Health Organization on 11 March, following the spread of the virus in over 150 countries and, subsequently, the declaration of a state of emergency in Romania were the main causes for recording a negative net FDI inflow during the first quarter of 2020.

*Law stated - 20 August 2022*

### Investment agreement legislation

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.

*Law stated - 20 August 2022*

## INTERNATIONAL LEGAL OBLIGATIONS

### Investment treaties

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 at the time of writing, 60 are in force. The European Union has also entered into 61 investment treaties with investment provisions (that are not BITs) with other states, of which 58 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. Therefore, 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 unilateral termination, of 22 BITs with EU member states. 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 most 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).

Recently, at the national level, Law No. 2 of 4 January 2022 on the ratification of the Agreement on the Termination of Bilateral Investment Treaties between Member States of the European Union, signed in Brussels on 5 May 2020, was adopted. According to the sole article of this law, the Agreement on the Termination of Bilateral Investment Treaties between Member States of the European Union, signed in Brussels on 5 May 2020, is ratified as of January 2022.

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.

*Law stated - 20 August 2022*

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.

*Law stated - 20 August 2022*

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. Recently, Law No. 2 of 4 January 2022 on the ratification of the Agreement on the Termination of Bilateral Investment Treaties between Member States of the European Union, signed in Brussels on 5 May 2020, was adopted. According to the sole article of this law, the Agreement on the Termination of Bilateral Investment Treaties between Member States of the European Union, signed in Brussels on 5 May 2020, is ratified as of January 2022.

*Law stated - 20 August 2022*

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 Parliament ratified the Agreement in January 2022.

*Law stated - 20 August 2022*

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 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.

*Law stated - 20 August 2022*

## ICSID Convention

### 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.

*Law stated - 20 August 2022*

## Mauritius Convention

### 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.

*Law stated - 20 August 2022*

## Investment treaty programme

### 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 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 to 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. 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 uncoded) 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.

*Law stated - 20 August 2022*

## REGULATION OF INBOUND FOREIGN INVESTMENT

### Government investment promotion programmes

Does the state have a foreign investment promotion programme?

The Ministry of 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.

*Law stated - 20 August 2022*

### Applicable domestic laws

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;
- 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 anticompetitive 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.

*Law stated - 20 August 2022*

### **Relevant regulatory agency**

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

Since November 2018, the main objective of the Foreign Investment General Directorate within the Ministry of 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. At the same time, the Foreign Investment General Directorate is responsible for assessing the requests for granting technical expertise on the foreign investors' business plan in order to obtain a long-stay visa in Romania for the purpose of carrying out commercial activities.

*Law stated - 20 August 2022*

### **Relevant dispute agency**

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.

*Law stated - 20 August 2022*

## INVESTMENT TREATY PRACTICE

### Model BIT

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.

*Law stated - 20 August 2022*

### Preparatory materials

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 .

*Law stated - 20 August 2022*

### Scope and coverage

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 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.

*Law stated - 20 August 2022*

## Protections

### 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.

*Law stated - 20 August 2022*

## Dispute resolution

### 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, based on a violation of the EU's state aid rules.

On 21 March 2022, the ICSID Administrative Council approved extensive amendments to the Arbitration Rules and Procedures. These amendments are of interest as they entered into force on 1 July 2022. Thus, in general, new arbitral cases initiated after that date will be conducted in accordance with these new amended rules. Article 41 of the new ICSID Arbitral Rules removes any ambiguity by making it clear that the procedure allows for early dismissal of claims that are manifestly unfounded, either in terms of the subject matter of the claim or in terms of the jurisdiction of the ICSID or the arbitral tribunal. It is not excluded that in the future we will see the application of this new direction when it comes to the submission of an intra-EU BIT-based case.

*Law stated - 20 August 2022*

## **Confidentiality**

**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.

*Law stated - 20 August 2022*

## **Insurance**

**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.

*Law stated - 20 August 2022*

## **INVESTMENT ARBITRATION HISTORY**

### **Number of arbitrations**

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

To date, Romania has been involved in 22 investment treaty arbitrations, of which 10 are concluded and 12 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 June 2022 by a Dutch company regarding a construction project. The



instrument invoked was the 1994 Romania–Netherlands BIT. 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).

*Law stated - 20 August 2022*

### **Industries and sectors**

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.

*Law stated - 20 August 2022*

### **Selecting arbitrator**

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 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.

*Law stated - 20 August 2022*

### **Defence**

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 and the specialised law firms, either domestic or foreign, whose services are contracted to serve this purpose.

*Law stated - 20 August 2022*

## **ENFORCEMENT OF AWARDS AGAINST THE STATE**

### **Enforcement agreements**

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.

*Law stated - 20 August 2022***Award compliance**

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.

*Law stated - 20 August 2022***Unfavourable awards**

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.

*Law stated - 20 August 2022***Provisions hindering enforcement**

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.

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.

*Law stated - 20 August 2022*

## UPDATE AND TRENDS

### Key developments of the past year

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

In June 2022, The Bucharest Court of Appeal handed down a landmark ruling on the non-recognition of an arbitral award that violates the public policy of Romanian international law. From the public information available to date, given that the decision has not yet been drafted and fully reasoned, it appears that the national court ruled that the provisions of a foreign law are incompatible with the public policy of Romanian private international law, which rightly leads to the refusal of recognition and enforcement of foreign court or arbitral awards in Romania. The decision is final and was rendered in a case concerning the recognition and enforcement of a Chinese arbitral award for a major Romanian cosmetics manufacturer. The decision of the Bucharest Court of Appeal refers to the fact that in recognition and enforcement proceedings, the court is required to make an analysis of the validity of the arbitration clause independently of the findings of the arbitral tribunal. The Romanian court is also obliged to interpret the foreign law invoked by the parties relevant to the determination of the arbitration clause and even to strike out any provision of the foreign law that leads to a result incompatible with the public policy of Romanian private international law.

In the context of globalisation, expansion into a new market outside the European Union involves a number of contractual trade-offs, such as imposing foreign substantive law as the law of the contract and accepting the jurisdiction of foreign courts or arbitral tribunals.

In 2015, a major Romanian cosmetics manufacturer, wishing to enter the Chinese market, entered into a product distribution contract with a Chinese company, majority controlled by the Chinese state, governed by Chinese substantive and procedural law. Subsequently, but separately from the contract, the Chinese company also concluded an agency contract with a third party by which it was mandated by the latter, as an agent, to carry out the distribution activity on the Chinese market.

In 2019, the Romanian company notified the Chinese company, in accordance with the provisions of the distribution contract, of the termination of the contract. Subsequently, the Romanian company was called before an arbitration tribunal in China by the third party on the grounds that the Chinese economic operator was its agent, as it was in fact the real beneficiary of the distribution contract. In its request for arbitration, the third company challenged the notice of termination of the distribution contract and sought to order the Romanian company to pay certain sums of money.

Despite the fact that there was no arbitration clause between the Romanian company and the third party that referred the case to the arbitral tribunal, the Chinese arbitral tribunal admitted the arbitration claim and the Romanian economic agent was obliged to pay a significant amount of money to the claimant in the arbitration case.

The arbitral tribunal based its decision on the reasoning that the arbitration clause also applies to the third party company as a result of the mandate granted by the Agency Agreement under the Chinese Contract Law. It essentially provides that if the third party knows of the agency relationship between the agent and the principal at the time of the conclusion of the contract, the Agency Agreement, including the arbitration clause, will be directly binding on the principal and the third party.

In 2021, an application for recognition and enforcement of the arbitral award on Romanian territory was registered by the third party company with the Bucharest Court. Before the Bucharest Court, several grounds for refusal of recognition and enforcement of the arbitral award were invoked, including violation of the public order of Romanian private international law. However, the Bucharest Tribunal admitted the request for recognition and enforcement of the arbitral award on Romanian territory.

Recently, however, in a landmark decision, the Bucharest Court of Appeal upheld the Romanian manufacturer's appeal, annulled the decision of the Bucharest Tribunal and refused to recognise and enforce the arbitral award in Romania. The decision of the Bucharest Court of Appeal is final. As a consequence, the arbitral award cannot be enforced and has no legal effect in Romania.

*Law stated - 20 August 2022*

## Jurisdictions

	<b>Bangladesh</b>	Vertex International Consulting
	<b>Belgium</b>	Linklaters LLP
	<b>Canada</b>	Wasel & Wasel
	<b>China</b>	Zhong Lun Law Firm
	<b>Egypt</b>	Shahid Law Firm
	<b>European Union</b>	Van Bael & Bellis
	<b>France</b>	Laborde Law
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Malaysia</b>	Cecil Abraham & Partners
	<b>Romania</b>	STOICA & Asociații
	<b>Russia</b>	BGP Litigation
	<b>Switzerland</b>	Schellenberg Wittmer
	<b>United Kingdom</b>	Quinn Emanuel Urquhart & Sullivan LLP
	<b>USA</b>	Quinn Emanuel Urquhart & Sullivan LLP
	<b>Uzbekistan</b>	Putilin Dispute Management
	<b>Vietnam</b>	LNT & Partners