

ARBITRATION OF FOREIGN INVESTMENTS AND ROMANIA

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***Abstract:** The purpose of this paper is to present a general overview on the settlement of disputes between foreign investors and host states by arbitration, as well as the situation of the arbitral clauses inserted in the investment treaties signed by Romania and the main cases Romania was or still is currently confronted with.*

***Keywords:** Arbitration, Investors, Legal Instruments, Convention.*

***JEL Classification:** K29*

1. Introduction

In the last 15 years, foreign investments in Romania has grown constantly, as a result of the encouragements of such investments by various laws and, also, by specific legal instruments such as the national laws on investments and the bilateral investments treaties Romania ratifies with more than 82 countries.

Moreover, while becoming more and more profitable, one can notice that even some of Romanian companies started to invest abroad. The transfer of part of the labor force to various other EU countries provided some Romanian companies with the opportunity to open subsidiaries in those countries. The perspective of EU integration is also encouraging Romanian companies to consider investing in other countries in the European geographical area, as well.

This is one of the aspects of the globalization and Romania does not isolate itself anymore of the trends of the worldwide economy.

2. The Legal Framework of Arbitration of Foreign Investments Disputes between Individual and States

In the attempt to find another solution to settle disputes than the concerned state courts, several international conventions were adopted worldwide providing for a an arbitration for solving disputes between a foreign investor and the state who hosted its investment.

The main convention in this law area is “Convention of Settlement of Investment Disputes between States and National of other States”, knows as ICSID Convention (Washington, 1965). Romania ratified this convention by Decree no. 62/1975, in force since October 12, 1975. ICSID Convention refers to the states have decided to establish an arbitral center called International Centre for Settlement of Investment Disputes, based at the principal office of the World Bank.

In other various treaties, signatory states have agreed on the settlement of the disputes between the states and foreign investors by the way of arbitration, e.g. – The Energy Charter Treaty, ratified by Romania by Law no. 14/ 1997, entered into force on February 18, 1997, or the North American Free Trade Agreement (NAFTA) treaty, where Romania is not a signatory part.

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Additionally, a large number of bilateral investment treaties were signed between the state, most of them providing for arbitration as the way for solving disputes between the foreign investors and the states.

3. Types of arbitration for foreign investments disputes

Most of the treaties of bilateral convention providing for mechanism for settlement of disputes between foreign investors and states do provide for institutionalized arbitration, but ad hoc arbitration is also one of the possible choices.

As far as the institutionalized arbitration is concerned, The International Centre for Settlement of Investment Disputes (ICSID) based in Washington, by the World Bank, handles the largest number of investment disputes, but in addition to this institution, but numerous other cases are settled by International Chamber of Commerce (ICC) Paris, the London Court of International Arbitration (LCIA) Stockholm Chamber of Commerce, the American Arbitration Association (AAA), the German Arbitration Institute (DIS) and CIETAC (China). In other situations, where parties agreed on ad hoc arbitration, institution do are sometimes involved, mainly in the role of the appointing authority of the arbitrators (e.g. the Secretary General of the Permanent Court of Arbitration in The Hague, Netherlands) or providing for secretariat services necessary in order to administrate the arbitral case.

4. Procedural Applicable Law

In case signatory states have chosen, in the bilateral investment treaties, an institutionalized arbitration, procedural applicable rules are the rules provided by the concerned arbitral institutions, if the signatory states did not agreed otherwise. In case of ICSID arbitration, parties do follow primarily the ICSID Convention and the ICSID Arbitration Rules. In certain situation, where such rules are allowing parties to decide, parties may agree on additional rules. Also, if there are no specific rules for a situation, the arbitral tribunal will have the discretion to decide on the procedure as it considers best for an efficient conduct of the case, taking into consideration both international best practices and upon consultation with the parties.

If the bilateral investment treaties provided for ad hoc arbitration, the most common situation is the choice of Arbitration Rules of the United Nations Center for International Trade Law (UNCITRAL). Parties may also agree upon the set of procedural rules to govern the arbitration proceedings.

5. Law Applicable to the Substance of the Dispute

Almost all arbitration rules contains provisions regarding the law applicable to the substance of the disputes - the most common situation is to respect the choice of the parties, but in absence of such choice, the arbitral tribunal decides for the most appropriate law.

In most of the situations, the law applicable shall be the national law of the host state of the investment but, according with art. 42 of the ICSID Convention, in addition to such law, rules of public international law may become applicable. These rules may be found not only in the applicable bilateral investment treaty, but also in the customary international law mainly as far as liability of states and expropriation for which the International Law Commission of the United Nations (ILC) has provided extended rules.

6. Parties in Foreign Investment Arbitration

The most frequent situation in foreign investment arbitration is for one party to be a private enterprise and the other party to be the host state of an investment, but there are cases when a state institution or a state enterprise are involved, as well.

7. Case Study – Romania

As mentioned before, Romania ratified the ICSID Convention, with no reservations, and signed bilateral investment treaties with more than 82 countries and also ratified the Energy Charter

Treaty. Text of the treaties is published in the Official Gazette (Monitorul Oficial al Romaniei) when the Parliament ratifies them¹.

All treaties contain arbitration clauses, but in many cases the investor has the right to choose between the state courts jurisdiction and the arbitration (whether ad hoc or institutionalised arbitration).

81 of the bilateral investments treaties signed by Romania refer to ICSID rules². However, according the above mentioned Treaties, ICSID arbitration is only one of the options the investor has when choosing the jurisdiction. The treaties signed with France, Jordan, Camerun, Italy, Senegal are mentioning only the ICSID arbitration. The treaty with Germany makes only a reference to the ICSID Convention. The other are mentioning either a choice between state courts and arbitration or are makinf reference to UNCITRAL rules for ad hoc arbitration³.

Romania also ratified the Energy Chart Treaty, implying ICSID or UNCITRAL rules, under art. 26 of the Treaty. In this treaty, reference is made to ICSID, UNCITRAL or Arbitration Institute of the Stockhom Chamber of Commerce. Romania is mentioned in list ID/Annex 6 in respect with the reserve of art. 26 subparagraph 3(b) (i).

All Treaties Romania signed with other countries provide for a initial phase of attempt of amicable settlement of the disputes, except the Treaty with Bangladesh which makes no such express reference.

Romania has been or still is subject to several claims under various bilateral treaties, such as:

Noble Ventures Inc. (United States) vs. Romania

This was arbitration under the Rules of ICSID (Case No. ARB/01/11).

The dispute raised out of a privatization agreement concerning the acquisition, management, operation and disposition of a substantial steel mill with associated and other assets, Combinatul Siderurgic Reșița (CSR), located in Reșița, Romania. The Share Purchase Agreement (“SPA”) was made between Noble Ventures and the Romanian State Ownership Fund (SOF). After the acquisition of CSR by Noble Ventures a number of problems arose.

Noble Ventures alleged that Romania violated the bilateral investment treaty signed between Romania and The United States of America, in that Romania’s actions and omissions constituted a failure to provide international law standards of treatment, such as good faith, fair and equitable treatment and full protection and security as required by the bilateral investment treaty and international law and in that Romania’s actions and omissions were an arbitrary and discriminatory measure which prevented Noble Ventures from exercising its rights to manage and control the Romanian investment.

Noble Venture’s primary claim in this case centers on the judicial reorganization. According to Noble Ventures, Romania breached its obligation under the SPA to restructure CSR’s budgetary

¹ Translation of some of the texts of the Treaties in foreign languages may be found on the following web site: http://www.unctadxi.org/templates/DocSearch_779.aspx.

² Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium–Luxembourg, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, Chile, China, Croatia, Cuba, Cyprus, Czech, Denmark, Ecuador, Egypt, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, Republic of Korea, Popular Democratic Republic of Korea, Kuwait, Latvia, Lithuania, Lebanon, Macedonia, Malaysia, Mauritania, Mauritius, Moldova, Mongolia, Morocco, Netherlands, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippine, Poland, Portugal, Qatar, Russian Federation, Senegal, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, United Arab Emirates, Uruguay, Uzbekistan, Vietnam.

³ UNCITRAL rules are mentioned in the following bilateral investment treaties signed by Romania: Albania, Algeria, Argentina, Armenia, Azerbaijan, Belarus, Bolivia, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cuba, Czech, Denmark, Ecuador, Egypt, Finland, Georgia, Germany, Ghana, Greece, Hungary, India, Indonesia, Iran, Italy, Kazakhstan, Latvia, Lithuania, Lebanon, Macedonia, Malaysia, Mauritania, Mauritius, Moldova, Mongolia, Netherlands, Nigeria, Pakistan, Paraguay, Peru, Poland, Portugal, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan, Vietnam.

debt, and then used this debt as the basis to initiate the judicial reorganization proceedings, which Noble Ventures asserts was part of a scheme “to rescind the Privatization Agreement and allow Romania to take back control of CSR.” Noble Ventures argues that the judicial reorganization was arbitrary, discriminatory, unfair, and expropriatory.

Romania argued that reorganization did not and could not “take” CSR from Noble Ventures. During the reorganization period, Noble Ventures retained its majority share ownership in CSR. A court-appointed, private administrator managed the company. Far from using the organization to seize control of the company, Romania facilitated the early termination of the judicial reorganization proceedings to allow Noble Ventures to reassert management control of CSR, which it did in January 2002. The temporary loss of management control occasioned by a lawfully instituted and conducted judicial reorganization under municipal law simply does not constitute a violation of Romania’s obligations under the US-Romanian bilateral investment treaty.

Noble Ventures also stressed that, in his view, Romania did not provide reasonable nor adequate protection and security for Noble Ventures in Reșița. As a result of unlawful strikes and occupations, Noble Ventures’ premises were repeatedly occupied, its files and cash accounts were pilfered, facilities and equipment were sabotaged and members of its management were confined and, in some cases, beaten.

Finally, Noble Ventures alleged that Romania failed to honor the terms of a settlement agreement entered into between it and Noble Ventures in 2002 as a result of Romania’s failure to assist with the establishment of the final credit facility for Noble Ventures.

The Romania’s perspective was different stating that, whether out of arrogance or ignorance, Noble Ventures refused to accept and respect the limits of the deal it struck with the SOF to purchase CSR as set forth in the SPA. It is common ground that, when CSR was privatized, CSR was saddled with budgetary debt. Understandably, Noble Ventures wanted SOF to forgive this debt. Under Romanian law, however, SOF did not have that authority, and it so advised Noble Ventures during the negotiations leading to SPA. As SOF explained to Noble Ventures, the best SOF could do was to assist Noble Ventures’s efforts to negotiate debt relief with the budgetary creditors, namely, ministries of the Romanian Government. SOF fully complied with its obligations to assist Noble Venture’s efforts to obtain debt restructuring. Through no fault of SOF’s, Noble Ventures failed to obtain the debt restructuring it wanted.

Noble Ventures simply stopped paying the workers’ wages and refused to invest the capital in CSR that Noble Ventures knew was vital to turning CSR into a profitable venture. The results, predictably, were disastrous. CSR effectively shut down. The workers blamed Noble Ventures and the Government in equal measure. Noble Ventures fanned the flames of discontent by blaming the Government in the hope that union pressure would force Romania to restructure CSR’s budgetary debt regardless of the provisions of the SPA. While CSR workers suffered, Noble Venture’s agents lived well, drawing lavish salaries for questionable services rendered and taking foreign vacations at company expense. The Government could not stand idly by. Although not required to do so, the Government authorized substantial debt restructuring for CSR in May 2001. Noble Ventures rejected the restructuring package, thereby further exacerbating the situation in Reșița. Confronted with a financial and social meltdown in Reșița, the Government was wholly justified in supporting the filing of a judicial reorganization petition by CSR’s budgetary creditors in July 2001 as a temporary measure to stabilize CSR and calm the crisis that Noble Ventures had created.

On October 12, 2005, the Arbitral Tribunal rendered an award dismissing the claims raised by the Noble Ventures and providing for each party to bear the expenses incurred by it in connection with the arbitration. The arbitration costs, including the fees of the members of the Tribunal, were borne by the parties in equal shares.

Pol Am Pack S.A. (Poland) vs. Romania

The issue in dispute was the legal consequences of the fulfillment of the parties’ obligation under the privatisation contract (stock purchase agreement). This was an ad hoc arbitration which was finalised by a transaction during the procedures pending at the Permanent Court of Arbitration

in the Hague (file PCA AA171) . By the transaction Romanian Government accepted to waive some of the investor's obligation in the privatisation contract (penalties and obligations to invest), by acknowledgment of the fact that the non fulfilment of investor's obligation was independent of its will. As a result, Pol Am Pack accepted to withdraw the claim.

EDF Services LTD vs. Romania

This is a case involving the Romania – Germany and Romania – Israel, bilateral investment treaties. EDF Services LTD is complaining for the expropriation of its investment by Romania, following the termination of a partnership who was formed with TAROM and International Airport Bucharest – Otopeni, who resulted in the company EDF Asro SRL. EDF Asro SRL administrated for a certain period the duty-free shops in Bucharest Airport. The Romanian custom authorities suspended, in 1998, the authorisation of EDF company for bookkeeping irregularities, and in 2001 TAROM ended the partnership. Claimant also alleges that it was prejudiced by the fact that Romanian government issued an emergency ordinance ceasing all duty free activities in the airport. The case was filed with ICSID (Case No. ARB/05/13), being currently pending.

Micula Ioan, Micula Viorel and others vs. Romania

Micula Ioan and Micula Viorel, Swedish citizens, filed a claim with ICSID (Case No. ARB/05/20) as a result of Romanian authorities annulment of fiscal facilities previously granted to European Drinks companies owned by Micula brothers. The case is based on the provisions of the bilateral investment treaty signed between Romania and Sweden. The case is still pending.

Romp petrol NV vs. Romania

This is also an pending ICSID arbitration case (Case No. ARB/06/3) , based on the bilateral investment treaty between Romania and The Netherlands. Claimant alleges that Romania discriminatorily and unfairly treated the foreign investor, mainly by the conduct of the criminal investigation n of the administrators of Rompetrol NV, a dutch company, who bought the shares of a Romanian company, but also by numerous controls performed by different state entities to the Romanian company.

Spyridon Roussalis vs. Romania

In this case filed also with ICSID (Case no ARB/06/1). Claimant, who is a Greek investor in Romania considered that he was expropriated of his investment in Romania – the company Marine Continental, following the enforcement of some of the clauses of the privatisation contract signed when buying the shares of a Romanin company. The case, involving the bilateral investment treaty signed between Romania and Greece, is still pending.

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