COMMERCIAL ARBITRATION

ANNUAL REVIEW **2015**

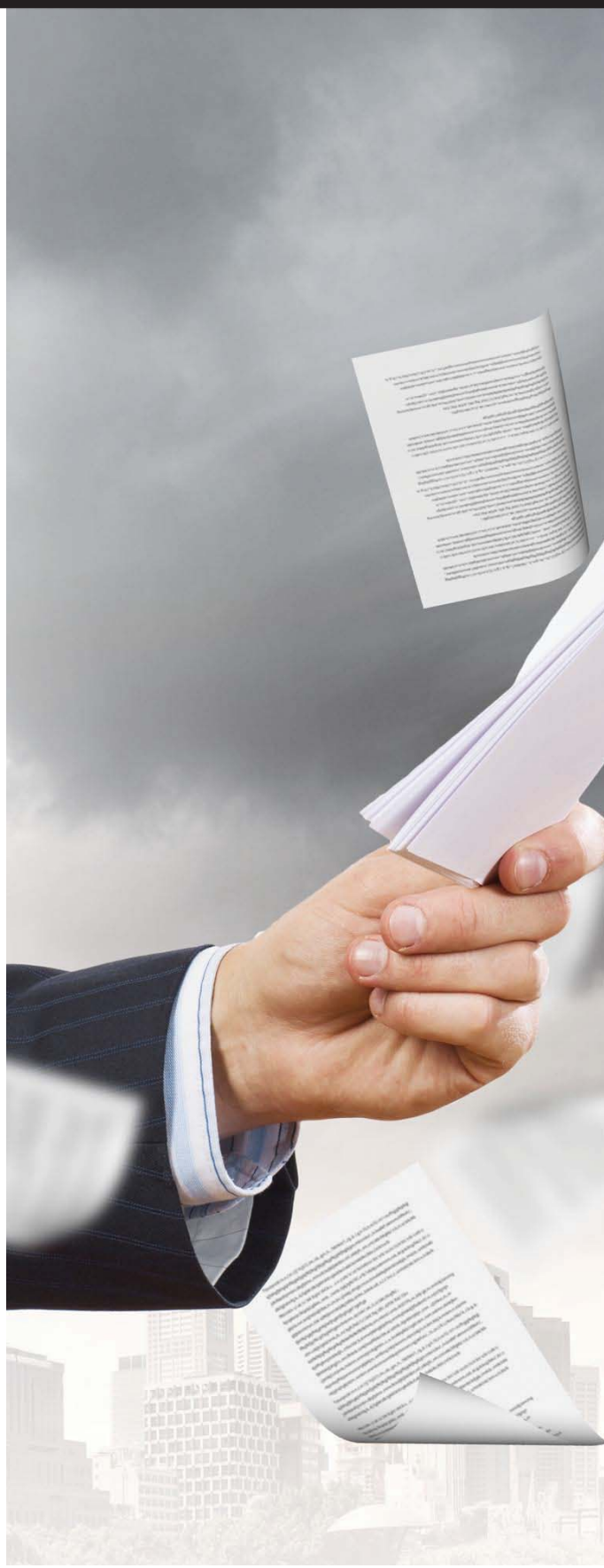
FINANCIER WORLDWIDE corporatefinanceintelligence

Published by
Financier Worldwide
23rd Floor, Alpha Tower
Suffolk Street, Queensway
Birmingham B1 1TT
United Kingdom

Telephone: +44 (0)845 345 0456
Fax: +44 (0)121 600 5911
Email: info@financierworldwide.com

www.financierworldwide.com

Annual Review • April 2015
Commercial Arbitration



Commercial Arbitration

APRIL 2015 • ANNUAL REVIEW

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in commercial arbitration.

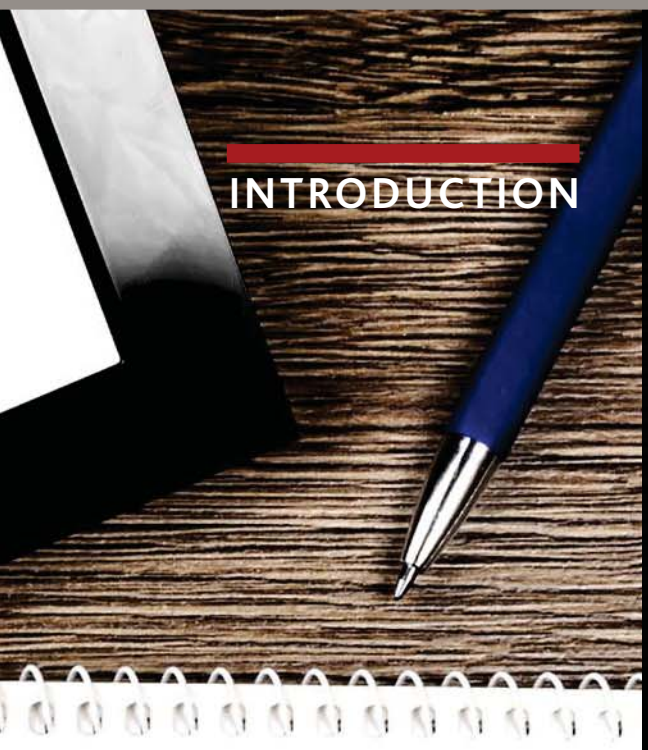
Contents

www.financierworldwide.com

Commercial Arbitration

APRIL 2015 • ANNUAL REVIEW

Contents



INTRODUCTION

We have come to embrace an era where international commercial arbitration is globally accepted by both the wider business community and states as a primary dispute resolution mechanism. The evolution of arbitration is one that seems to have organically grown to meet the needs of businesses and the globalisation of economies.

In recent years we have seen the steady promotion of international trade and foreign direct investment covering a broad range of industry sectors.

However, this complex interaction poses both opportunities and risks for investors. The dynamics and complexities of international trade relationships often require protection not fully supported through the use of traditional legal systems of individual nation states. As a result, we now see a greater preference for the engagement of international arbitration as a one stop solution for commercial disputes. This is evident through the increasing number of countries ratifying the 'New York Convention'. Since coming into force in 1959, the Convention currently boasts over 150 signatories and this is expected to rise in the coming years.

Rebalancing the global economy post-recession has led to the remarkable advancement of emerging economies as investment wells. And as arbitration continues to drive the confidence of corporates in respect that should a dispute arise there are provisions in place to manage this effectively, often with little reputation damage, this has led to a surge in arbitral institutions across the globe. From Singapore, Hong Kong, UK to Brazil, the battle of ADR hubs is set to continue. Having said that, as practitioners, institutions, professional bodies and academics work to promote the added value of arbitration, new trends and developments will emerge helping to bolster the credibility of this distinguished method of dispute resolution.

Waj Khan, Associate Director of ADR Operations

CIArb

ROMANIA

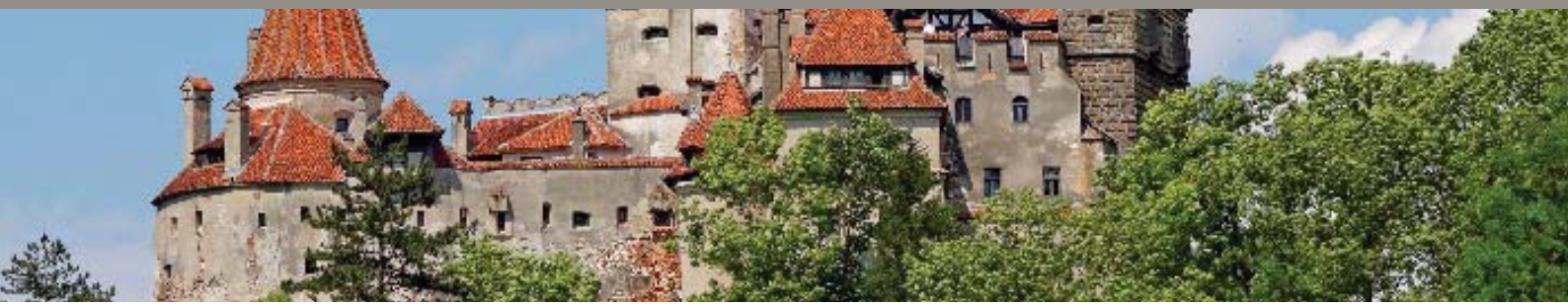
FLORIAN NITU
POPOVICI NITU & ASOCIATII

Q HOW WOULD YOU DESCRIBE THE APPETITE FOR COMMERCIAL ARBITRATION AS A MEANS OF RESOLVING DISPUTES? HOW DOES IT COMPARE TO LITIGATION AND MEDIATION, FOR EXAMPLE, AS A PREFERRED METHOD?

NITU: Arbitration, and particularly international commercial arbitration, remains the key alternative to the state judiciary, at least in disputes involving concurrent applicable laws and jurisdictions. There are certain sectors prone to arbitration, such as concessions, the construction industry, public-private arrangements and corporate joint-venture type of investment schemes. Predominantly, these sectors continue to favour arbitration over litigation or mediation. This is primarily due to the complexity of these types of matter and the intricacies of cross-border commercial disputes, where experienced international arbitrators are better placed and equipped to deal with all relevant issues. National judges, on the other hand, would normally only be qualified on certain segments of the dispute, limited to the local law. Secondly, it is the neutrality advantage offered by an international body of arbitrators as opposed to a judge in one country which – irrespective of its experience and reputation – would be seen ultimately as a 'national' judge. And thirdly, it is the right to appoint an arbitrator, guaranteed in most of the systems, which gives the users a level of confidence in arbitration as alternative solution to dispute resolution.

Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES AND PROCESSES IN ROMANIA? IF SO, HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS GOING FORWARD?

NITU: Globally, the most notable recent changes relate to the LCIA Rules now transposing a number of former 'soft law' guidelines in relation to conflict of interests, statements of impartiality and availability. Also the introduction of rules regarding the removal of counsel has brought significant benefits to institutionalised arbitration. These changes came after the 2012 ICC Rule amendments, which have also showed significant additions, such as the emergency arbitrator procedure or the time of joinder of third parties. Both LCIA and ICC Rule amendments



actually prove the same key points – arbitration needs diversity at all levels, including among arbitrators and counsel, and a higher degree of institutionalisation, as well as the harmonisation of standards. In Romania, following a totally uninspired experience of appointment of arbitrators only by or through an Appointing Authority of the Arbitration Court of the Romanian Chamber of Commerce, which fortunately was in effect for only two years, a new set of arbitration rules were adopted in 2014. Under the 2014 Arbitration Rules, the arbitrants, in front of the Arbitration Court of the Romanian Chamber of Commerce, have been restored the right to select and appoint their arbitrator and only if they fail to do so may the Appointing Authority make this decision for them.

Q HAVE THERE BEEN ANY RECENT COMMERCIAL ARBITRATION CASES OF NOTE? WHAT INSIGHTS CAN WE DRAW FROM THEIR OUTCOME AND WHAT IMPACT MIGHT THEY HAVE ON OTHER CASES?

NITU: It is difficult to offer insights on particular cases, but some trends may be distinguished based on recent practice. First, we are increasingly seeing arbitration tribunals playing an active role throughout the proceedings. This is really positive, assuming it does not mingle with the facts and merits of the case. Secondly, we have seen a markedly lower number of arbitrators behaving as equitable judges and more as judges. This is less positive. And thirdly, we have seen many poorly drafted awards, which of course is very bad.

Q THERE HAVE BEEN RECENT DEBATES ON THE RISING COST OF ARBITRATION. WHAT ADVICE CAN YOU OFFER TO PARTIES ON MANAGING THIS ASPECT OF THE PROCESS, WHERE POSSIBLE?

NITU: This is a greatly debated subject. However, arguably the problem is not the cost of arbitration, but rather the 'average' cost of arbitration. Complex arbitrations, involving many jurisdictions and applicable laws, numerous experts and witnesses, technical standards, financial surveys and sophisticated assessment methodologies and immense volumes of data, all in relation to hundreds of millions in claims, would end up with a cost which is low, even in these circumstance. Simple demand for payment claims of huge values could end-up with an outrageously high arbitration cost. Therefore, the institutions administering arbitration must first find a way to correct these imbalances, by, for example, setting up adjustable cost structures. As for counsel and experts, their fees are very likely to be corrected by the very competitive arbitration related legal services market.

Q WHAT HURDLES MIGHT PARTIES FACE WITH REGARD TO THE ENFORCEMENT OF AWARDS? WHAT OTHER OBSTACLES AND CHALLENGES TEND TO SURFACE DURING ARBITRATION PROCESSES IN ROMANIA?

NITU: Romanian courts have consistently shown pro-arbitration enforcement conduct. Unless we are in exceptional situations of egregious violations of due process rights or of the most fundamental values protected under the public policy regime, an arbitral award made by a properly vested arbitral tribunal under a valid arbitration agreement is enforced by the Romanian courts.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

NITU: Opting out of the national judicial system in favour of arbitration is a key decision. Often this is made without proper consideration. And often the choice to opt for arbitration proves to be an inadequate or simply wrong decision. In abstract, arbitration is a better choice, mainly because of neutrality and the right to appoint the arbitrator, because of the experience and commercial understanding of arbitrators, and because of the level of expertise that could be made available for the proper resolution of a case. But all these advantages would remain only

"Romanian courts have consistently shown pro-arbitration enforcement conduct."

theoretical or even become disadvantages if the arbitration agreement or clause is not drafted following a proper assessment by arbitration specialists, and takes into account the likely disputes it aims to cover. The good news is that big corporations appear to have understood this argument well and apply it when opting for arbitration.

Q WHAT FINAL ADVICE DO YOU HAVE FOR PARTIES ON MAXIMISING THEIR CHANCES OF A SUCCESSFUL OUTCOME WHEN UNDERTAKING ARBITRATION IN ROMANIA?

NITU: Consider this: an arbitration starts at the time one negotiates the arbitration clause and finishes at the time the award is effectively enforced. Between these two moments, each and every opportunity to make an argument, be it procedural or only related indirectly to the future or existing case, will likely be utilised.

POPOVICI NIȚU & ASOCIAȚII
Attorneys at Law

Florian Nitu

Managing Partner
Popovici Nitu & Asociatii
+40 21 317 85 02
florian.nitu@pnpartners.ro

Florian Nitu is the managing partner of Popovici Nitu & Asociatii and the head of the firm's mergers & acquisitions, real estate and international arbitration practices. He is recognised as one of the most experienced transactional lawyers and claim managers in the Romanian legal services market. He has significant expertise in arbitration proceedings before domestic and international courts of arbitration under the rules of ICC Paris, ICSID, the Court of International Commercial Arbitration pertaining to the Chamber of Commerce and Industry of Romania.

www.financierworldwide.com