

Romanian court of second instance denies arbitral jurisdiction in interim injunction case based on tacit waiver and inoperability of the arbitration clause

by Daniel Burghilea, LL.M.

In a recent case, the Timiș County Tribunal decided that, where material issues of tacit waiver and inoperability of an arbitration clause occur, the mere insertion of such arbitration clause in the relevant agreement does not exclude the jurisdiction of state courts for interim injunction requests.

Background

The Timiș County Tribunal pronounced, as a court of second instance, a decision¹ that set aside a lower court sentence (namely, a sentence given by the Timișoara Court of Law) by which an interim injunction (rom. *ordonanță președințială*) requested before the latter court had been denied. Such denial had been triggered by a jurisdictional challenge raised by the defendant in the court of first instance based on the existence of an arbitration clause inserted in an agreement. Given the existence of the arbitration clause, the lower court had denied its own jurisdiction for the interim injunction.

The case

The litigation is related to a dispute over access rights arising out of an agreement for purchasing assets (land) concluded by the parties in dispute. The requested interim measure in the analysed case was to compel the seller by court to immediately stop forbidding access through its land for the freight trucks of the buyer. The buyer's demarche to request the interim measure was based on the provisions of the purchase agreement which, together with the property transfer from seller to buyer, established the buyer's right to access the purchased land through the land of the seller.

The decision

The decision of the Timiș County Tribunal is final and binding and leads to the re-trial of the interim injunction request in the lower court, without the possibility of the latter court to further deny its own jurisdiction. Even though in Romania judicial precedent is not a source of law, the said decision casts light upon the vision of a notable Romanian court in matters less commonly approached by Romanian jurisprudence, such as the application of arbitral jurisdiction over requests for interim measures.

The reason for the set-aside of the sentence of first instance by the Timiș County Tribunal was that the latter court found article 488 paragraph 1 point 5 of the New Romanian Civil Procedure Code as becoming applicable in the matter, namely that the lower court had committed breaches of procedural rules which are, individually, of nature to render the sentence of the lower court null and void.

¹ decision no. 62 of 31.08.2017 in case file no.12074/325/2017 (unpublished)

First Reason: Wrong establishment of jurisdiction

A first breach of the procedural rules found by the Timiș County Tribunal was that the Timișoara Court of Law established arbitral jurisdiction over the interim injunction considering solely the mere existence of an arbitral clause inserted in the purchase agreement, while disregarding aspects of the matter in dispute that, according to the higher court's interpretation of the law, prevailed over the effects of the arbitration clause.

Specifically, the higher court found that the Timișoara Court of Law ignored that: (i) its own jurisdiction over the trial of the merits of the case (as a separate case file) had been previously and validly established, as an effect of the respondent's initial choice not to challenge the Timișoara Court of Law's jurisdiction on such merits (i.e. to tacitly waive arbitration); and also that (ii) the Timișoara Court of Law's jurisdiction over the merits of the case attracts the jurisdiction of the same court over the interim measures. By ruling so, the lower court was found in breach of article 998 of the Romanian Civil Procedural Code. Such article stipulates that the request for a *presidential [court] ordinance* (which is the legal expression used by the Romanian Civil Procedure Code for the interim measure that is relevant in the case at hand – Romanian: „*ordonanță președințială*”) shall be filed with the court that has jurisdiction to rule as a court of first instance on the merits of the right [in dispute].

Second Reason: inoperative arbitration clause

A second breach of procedural law that, according to the higher court's ruling, renders the sentence of the lower court null and void -independently from the first breach - was that the lower court gave effect to an arbitration clause that was inoperative, apparently due to the pathological wording of such clause. The higher court found that, contrary to the lower court's view, such wording of the arbitral clause within the purchase agreement could not legally be interpreted in any way that might lead to conclusively establishing arbitral jurisdiction (specifically, an “ICC jurisdiction”) over disputes arising out or in connection to such agreement. The ruling of the lower court was thus found as being made in violation of article 554 of the Romanian Civil Procedure Code (an equivalent of the current Article 8 of the UNCITRAL Model Law on International Commercial Arbitration) which, in paragraph 2 letter b, stipulates: “the court [of law] shall retain the matter for ruling over it, if the arbitration agreement is void or inoperative”.

Specifically, the verbatim translation from Romanian of the wording of the relevant arbitration clause is as follows:[...] *all disputes occurring in the context of performing the Agreement shall be resolved according to the Rules of conciliation and arbitration of the International Chamber of Commerce by arbitration undertaken by three arbitrators appointed as per the said Rules. [...] Arbitration shall take place in Bucharest, Romania. The works of the Court of Arbitration shall be held in English and the Court of Arbitration shall decide by the vote of the majority. The award of the Court of Arbitration shall be final and binding for both parties.*

With regard to such arbitral clause, the higher court generally found that: *it is true that by article 18 of the agreement the parties have provided that the disputes occurring in the context of performing the [said] agreement shall be resolved in Bucharest by arbitration undertaken by three arbitrators appointed according to the Rules of conciliation and*

arbitration of the International Chamber of Commerce, [but] it is to be retained that the wording of the arbitration clause is ambiguous, one cannot be drawing the conclusion that the parties had in mind – as the respondent wrongly argues – the International Court of Arbitration of the International Chamber of Commerce. For the mentioned reasons, the Tribunal holds that the arbitration clause is inoperative, as one cannot determine which was the arbitral court that the parties had in mind [when concluding the agreement][...].

The Timis County Tribunal does not provide any further explanation on its ruling on the matter of the inoperability of the arbitral clause. However, based on the arguments submitted by the parties' counsels on this topic, the possible reasons for such ruling could still be speculated upon to a certain extent, yet the court's line of reasoning in that direction falls short of the scope of this analysis and would be an inviting subject for a future article

Conclusion

A couple of important ideas for professionals and corporate entities involved in arbitration may be retained from the decision analysed in this article, in spite of the (too) concise manner of the Timis County Tribunal's ruling.

A first idea would be that, in Romania, the respondent's tacit waiver of its right to arbitrate a dispute on merit is likely to trigger the regular state courts' jurisdiction over presidential court orders requests seeking an interim injunction in the same dispute.

Secondly, parties agreeing to arbitrate their disputes should aim to carefully word arbitration clauses or agreements, in ways that cast no doubt over matters of jurisdiction, thus leaving no room for state courts to restrict access to arbitration based on the argument of the inoperability of arbitration provisions.

Contact and further information:



STALFORT Legal. Tax. Audit.
Bucharest – Bistrița – Sibiu

Office Bucharest:

T.: +40 – 21 – 301 03 53

F: +40 – 21 – 315 78 36

M: bukarest@stalfort.ro
www.stalfort.ro