

Three myths about arbitration in Romania

By Daniel Burghilea, LL.M., avocat (attorney at law RO)

While it is common knowledge for law professionals that parties bound by commercial contracts have, according to Romanian law, the legal option to defer their contractual disputes to arbitration as an alternative to state courts, such option remains rather unknown to the Romanian business environment. This explains why a number of misconceptions and myths about arbitration have appeared in time and - sadly - continue to deprive business entities from a method of commercial dispute resolution which can be competent, flexible, confidential, and efficient.

Considering its advantages over court litigation, arbitration is recognized and supported by the Romanian state as a private jurisdiction and as a method of alternative dispute resolution. This is done mainly by way of the norms of the Romanian Civil Procedure Code, drafted in accordance with international arbitration conventions to which Romania has adhered, with special regard to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, from 1958. However, the laws of arbitration, as any laws, are a useful tool only in the hands of those who know how they work and how to use them.

With that in mind, we have chosen to briefly comment on and hopefully raise doubt over three of the most commonly encountered myths about arbitration in Romania, as an invitation to further reflection on the opportunities that this dispute resolution method offers to the local business as well as to foreign investors.

Myth no. 1 – Arbitration is more expensive than state court litigation

It is commonly perceived that arbitration taxes and fees are higher than the taxes paid to the state for court litigation. This is because in the eyes of many, remunerating arbitrators and arbitration institutions means remunerating a private, lucrative service performance, supposed to make solid profit margins, while the state court taxes are destined to fund the public service of justice. While that line of thinking may seem reasonable in theory, it is frequently proven wrong, especially where high value commercial disputes come into question. After making simple calculations and comparing figures, it becomes clear that there are significant scenarios in which arbitration taxes and fees altogether are actually considerably lower than litigation taxes in Romanian courts. What these calculations actually show is that the taxes and fees in arbitration often depend, in reality, on two variables: the number of arbitrators forming the arbitral tribunal and the institution that administers the relevant arbitration case, if any.

For example, given the current Romanian regulation of court taxes as per the Romanian Civil Procedure Code (Ro: *Codul de Procedură Civilă*), if a dispute deferred to state courts is worth 10 million RON, the Claimant has to pay a tax of approximately 103 thousand RON.

If the parties were to choose arbitration administered by International Commercial Arbitration Court of the Romanian Chamber of Commerce and Industry in Bucharest, and the arbitral tribunal consisted of a single member (sole arbitrator), under the current regulations of such institution, the administrative tax and arbitrator fees would add up, in the aggregate, to just 68 thousand RON.

In addition to such calculations, at an overall assessment of cost efficiency of litigating in court versus arbitrating, one should always keep in mind that, according to applicable norms regulating litigation tax, a state court decision of first instance may usually be subject to two rounds of appeal, which may trigger significant additional litigation taxes. If one takes into account a first appeal only, without adding up further second appeal costs, such first appeal is taxed for half of the value contested. In contrast, arbitration delivers a final and binding award, with no possibility of appeal or second appeal. Such award may only be subject, in certain circumstances, to an extraordinary action of annulment in a competent state court, yet such action triggers only a small cost consisting of a fixed fee of 100 RON per each legal ground of annulment.

Furthermore, one should also consider that deferring a dispute to arbitration instead of litigation means avoiding further costs for legal assistance and representation in an appeal as well as in a second appeal. These costs are usually smaller and less likely to be triggered, given the rare, specific cases when such extraordinary action of annulment is actually admissible.

Myth no. 2 – Arbitration is a long and complicated process

It is commonly believed that arbitration implies a long, complicated, and sometimes unclear procedure. This perception is misled and is equally misleading when perpetrated. It may only be correct in exceptional cases, usually when arbitration is not subject to the administration of a specialized arbitral institution or when the arbitral tribunal lacks the experience or knowledge necessary for a proper management of the case. Such perception is often created by entities having experienced long arbitration processes caused by the very complicated nature of the merits and/or by the complex evidentiary issues of their case, and not by the arbitral procedure itself. Actually, the legal framework regulating arbitration in Romania, as in any other modern legal system, is designed to ensure flexibility and efficiency to an extent that is quasi-impossible in regular state courts. The regular flexibility of the arbitral procedures allows cases with complex nature of merits and with complicated evidentiary issues to be solved with better results in terms of time and cost efficiency as well as in what regards the issuance of an informed and well-considered resolution of the dispute.

The myth of long, complicated arbitration can be in fact easily contradicted by simple reference to the national law and arbitral rules of various arbitral institutions. The Romanian Civil Procedure Code stipulates that if the parties have not agreed otherwise, the arbitral tribunal must issue its arbitral award in the following 6 months from the date on which it was legally constituted; otherwise the arbitration becomes lapsed. It is the parties that may derogate from such rule by agreement and thus prolong the arbitration as they find it necessary. This means

that from a strictly legal perspective, arbitration generally lasts as much as the parties make it last or allow it to, which directly contradicts the myth of arbitration being a long process, *per se*.

Also, the limitation of the term of the arbitration process is commonly regulated in the arbitration rules of various arbitral institutions. Generally, deadlines set by such limitation are reasonably short. For example, under the arbitration rules of the International Commercial Arbitration Court of the Romanian Chamber of Commerce and Industry in Bucharest, the arbitral tribunal must issue its award within 5 months from its constitution. Under the ICC Rules of Arbitration, the deadline is 6 months from the date of the last signature on the Terms of Reference of the case.

Myth no. 3 – There can be no reliance on the impartiality of the arbitrators.

Many consider arbitration as not being a reasonable and real alternative to state courts, because the arbitrators are perceived as being part of niche professional communities (e.g. construction lawyers and engineers, capital markets or insurance consultants, shipping industry specialists) in which they are well known and well connected. In turn, it is believed that such connections make arbitrators subject to conflicts of interest with parties of the arbitration, their affiliates or their counsel, which affect the arbitrator's impartiality.

Perpetrators of this myth neglect the articulate and coherent procedural mechanisms that the national laws and the regulations of arbitral institutions have created to enforce the principle of the impartiality of the arbitrators as effectively and as rigorously as possible. A correct application of such mechanisms doubled by the very common practice of parties selecting, proposing and appointing arbitrators with high ethics and professional reputation, represents, in an overwhelming number of cases, a fully efficient defense against conflicts of interest in arbitration.

To discourage such myth even more, it is always worth mentioning that the parties of arbitration have at their disposal the possibility to convene over the application of an internationally recognized standard, namely the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration. Such Guidelines are the result of a long experience accumulated in international arbitration by highly reputed professionals.

Conclusion

Myths may often be based on a number of random facts or circumstances. Half-truths extracted from such random facts or circumstances facilitate propagation and popularity of such myths. However, this does not make them true, which is without a doubt the case for the myths briefly criticized above.

The arbitral procedure may be expensive if the parties chose an expensive institutional arbitration to administer their case, or make their option for ad-hoc arbitration without establishing a clear leverage for the limitation of arbitral fees. Also, arbitration is a process that

may be lengthy if the merits of the arbitrated case are very complicated or if the parties or the arbitral tribunal establish an ambiguous or inefficient arbitral procedure. Finally, arbitrators may lack impartiality and be conflicted if the parties fail to exercise their legally guaranteed rights to avoid conflicts of interest or if they do not use internationally recognized standards to prevent conflicts of interest.

Except for particular situations that can be easily prevented by the parties and by the arbitral tribunals, arbitration remains, in reality, a dispute resolution method that is, in many cases, shorter and more cost-efficient than litigation in Romanian courts, while the impartiality of the arbitrators is not actually an issue.

However, dismantling myths is just a step towards the benefits that arbitration brings to business. Decisive steps in such direction imply, inter alia, careful preparation of relevant arbitration agreements or arbitration clauses between contracting parties and efficient representation in the arbitral process, activities which require the expertise of experienced lawyers.

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