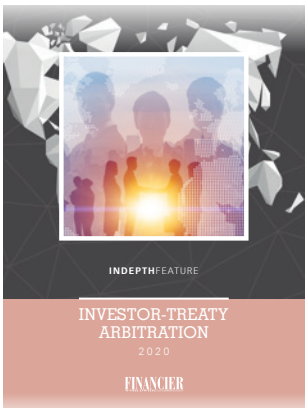

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INVESTOR-TREATY ARBITRATION

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

ROMANIA

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Respondents

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Q. Could you provide an overview of recent trends and developments in investor-treaty arbitration in Romania? How would you describe the volume of such disputes over the last 12 months or so?

A: Investment arbitration involving Romania has encompassed a number of specific industries, such as duty-free shops, newspaper distribution, energy, mining and oil & gas. Numerous disputes arose out of investments made during the privatisation period in the 1990s. Over the last 12 months, Romania has seen a significant increase in investment arbitration claims, mainly in the renewables energy sector under the Energy Charter Treaty. This development was a predictable and direct consequence of the cuts and changes made recently by the Romanian government regarding the support scheme for renewable energy. Similar legislative changes have taken place recently in Ukraine and Mexico, and in the past in Spain, Italy and the Czech Republic, which has led to some 100 investment arbitrations against these states worth billions.

Q. What are some of the common causes of investor-treaty disputes in Romania? What role are bilateral and multilateral investment treaties playing?

A: In 2019, net foreign direct investment (FDI) in Romania totalled $5.3bn. A cheap and skilled labour force, low taxes, a liberal labour code and a favourable geographical location are Romania's main advantages for foreign investors. Investors mainly come from the Netherlands, Germany, Austria, Italy and Cyprus. The main sectors for investment are manufacturing, construction and real estate, trade, financial intermediation and insurance. However, corruption is perceived to be a problem, including the government's reported inability to make good use of European Union (EU) financial support, leading some investors to complain of political instability and legislative unpredictability, and concern about a lack of judicial independence.

Q. Do you believe the current investor-state dispute settlement system works

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well? Would you recommend any reforms to the system?

A: The current investor-state dispute settlement (ISDS) system works and the number of cases is increasing year on year. The ISDS system could benefit from some modernisation, however. It is very expensive, and tribunals lack diversity, both of nationality and gender, which means that some arbitrators are overcommitted. The result is that awards can take several years to be issued. Moreover, given that there is no system of precedent, jurisprudence is inconsistent, with limited opportunities to challenge. Proposals to improve the consistency of awards, and measures to reduce the costs and duration of proceedings, would be welcomed by all interested parties. The new generation of treaties concluded since 2012, of which there are approximately 300, have incorporated many new features, such as the redefinition of 'investor' and 'investment' criteria, the limitation of the fair and equitable treatment standard, and the promotion of corporate and social responsibility.

Q. How would you characterise the challenges involved in enforcing an arbitral award against sovereign and state entities? What lessons can parties learn from recent arbitration decisions?

A: Enforcing an arbitral award against a sovereign state is potentially challenging as states typically enjoy sovereign immunity over assets held in a foreign country, and investors often need to establish exceptions to this immunity in order to enforce an arbitral award. In addition, investors need to be alive to the real difficulties of enforcing awards issued in intra-EU arbitrations within the EU, particularly following the *Achmea* decision. A perfect example is the long-running *Micula* saga, where Swedish investors sought to enforce a 2013 International Centre for Settlement of Investment Disputes (ICSID) award against Romania in several countries. After six years of enforcement proceedings in different jurisdictions, in December 2019, Romania reportedly made a payment of over $200m to satisfy the award, despite the view of the European Commission that payment would constitute illegal state aid. However, public sources suggest that the

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Micula investors are not yet satisfied and enforcement efforts continue.

Q. What steps do parties need to take in relation to structuring their overseas investments to ensure they qualify to receive investment treaty protection?

A: As a matter of Romanian law, foreign investors can make investments in any sector and under any legal form provided by the law and they benefit from equal treatment with local investors, irrespective of whether they are resident or non-resident in Romania. There are no special restrictions for foreign investors when setting up a new business in Romania. In 2016, the Ministry of Trade, Business Environment and Entrepreneurship launched a 'one-stop shop' for foreign investors, assisting and advising international companies for project implementation in the country. However, when obtaining protection at an international level, under a bilateral investment treaty (BIT) or multilateral investment treaty (MIT), it is critical to be aware of the terms of applicable investment treaties, particularly the jurisdictional requirements for 'investors'

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and 'investments', the available substantive protections, and the dispute resolution mechanism. For instance, the BIT signed with Canada includes 'investment' exclusions and 'temporal' limitations in the form of limitation periods.

Q. What essential advice would you offer to an investor embroiled in a dispute with a foreign government?

A: There are several steps that foreign investors need to take to initiate an arbitration against Romania. Firstly, notices of dispute should be addressed to the Secretariat General of the Government, a public institution that handles the activities of the Romanian government, to Romania's minister of foreign affairs and to Romania's minister of public finance, despite the fact that pursuant to Government Ordinance no 126/2005, Romania's minister of public finance represents the state before investment arbitration tribunals. Secondly, investment treaties signed by Romania often require a foreign investor to engage in negotiations during a cooling-off period prior to initiating an arbitration; 90 percent of the BITs signed by Romania contain a cooling-off period of three or six months. Thirdly, investors should be aware that, depending on the terms of the applicable BIT, they may waive their right to investment arbitration by commencing domestic litigation; for instance, the BITs signed by Romania with Argentina and Chile contain such a 'fork in the road' provision. Fourthly, investors should check if any limitation periods apply. Some BITs signed by Romania require the investor to initiate a claim within a certain period after the relevant events, failing which the claim will be time-barred. In any event, investors should assess potential claims from a broader perspective, in light of positions taken by Romania in past or other ongoing cases, including in terms of enforcement prospects.

Q. How do you predict the geopolitical and economic outlook will influence investor-treaty claims and disputes?

A: Romania's strategic position as a member of the EU and its location close to the Commonwealth of Independent States (CIS), its rich natural resources and large population make it an attractive jurisdiction for foreign investment. Historically, Romania's business culture has

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been aligned to international practice given that its legal framework accommodates all the main types of investment. There are no quotas or restrictions on foreign ownership or investment in general, and there are no minimum capital requirements specifically aimed at foreign investment. However, Romania's recent political crisis, which saw two governments collapse in 2019 following no-confidence motions, has resulted in various legislative changes that have impacted foreign investors with significant investments in the country. As a result, we expect to see a further increase in investment claims against Romania in the energy, oil & gas and real estate sectors. Another event that may trigger investment claims is the impending termination of the 22 intra-EU BITs signed by Romania, particularly in light of the termination of the 'sunset clauses', which will inevitably leave many EU-domiciled investors in Romania without the treaty protection they expected when making their investments. ❑

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