Chapter 10

Romania

Luminița Popa

Ms *Luminița Popa* has advised major foreign international corporations doing business in Romania, as well as a wide range of domestic clients and public authorities. She acted in major foreign investment projects and corporate acquisitions, advised clients in complex transactions and gained a wealth of experience in all aspects of public procurement, concessions, PPP/PFI, greenfield projects development, commercial property transactions. She has acted as a team leader in projects involving very complex permitting procedures, as well as in issues pertaining to the harmonization of the regulatory framework with the EU *acqui*.

Iuliana Craiciu

Ms *Iuliana Craiciu* has built an impressive expertise in banking and finance and capital markets matters, where she advised major international players on a wide range of projects, from acquisitions schemes structuring and negotiation, secured and unsecured loans, project and asset financing, to bank green fields and consumer finance projects. Being at the forefront of developing innovative and practical solutions to difficult issues arising in complex transactions, Ms Craiciu also achieved considerable skills in domestic and cross-border taxation matters, including direct or indirect taxation and transaction structure.

Marius Bârlădeanu

Mr *Marius Bârlădeanu* has achieved substantial expertise in real estate development, financing, construction works, as well as leasing and disposal of assets. His practice spans a broad range of legal services specific to the real estate pre and post acquisition, including purchase and sale of assets, project finance and security title ramifications relating to property, construction agreements, pre-leases and leases as well as settlement of related disputes and property portfolio restructuring. Additionally, Mr Bârlădeanu is particularly skilled in corporate and commercial matters, his experience ranging from establishment of joint ventures, corporate liability, shareholding and share capital issues, to corporate governance and restructuring, as well as other types of commercial issues specific to the Romanian real estate market.

Musat & Asociatii Attorneys at Law

For almost twenty years *Musat & Asociatii*'s name has stood for a high level of expertise in business matters. Its business is carried out by over 100 lawyers, all fully admitted to the practice, as well as a further fifty fee earners, all of them being highly regarded for their commercial approach to transactions and the profound understanding of the client's commercial goals. A major factor in Musat & Asociatii's success is the firm's legal culture where several of its lawyers have experience in both 'civil law' and 'common law' jurisdictions, which places the firm in a unique position in terms not only of its ability to providing efficient legal services, but also to proactively meet the clients' needs and the growing demand for innovative legal advice. On top of that, the ability to fully appreciate the political, economic and legislative climate of the country distinguishes Musat & Asociatii from other Romanian law firms and, from the foreign investors' perspective, represents a very important factor in an emerging market such as Romania.

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Chapter 10

Romania

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1. OVERVIEW OF PUBLIC-PRIVATE PARTNERSHIPS IN ROMANIA

1.1. MARKET CONTEXT

Fostering public-private partnerships (PPPs) is a priority for the Romanian State. Thus, the 2009–2012 Governing Program,[1] expressly encourages cooperation *regarding, inter alia*, health care (including integrated sanitary networks and non-clinical services), transports infrastructure (including rehabilitation of several railway stations), regional development (PPPs aimed at diminishing regional imbalances), energy and natural resources (including hydro projects) and youth and sports (including rehabilitation of school camps).

At the same time, specific programmes are being implemented to increase the PPP awareness amongst the relevant authorities, whether central or local,[2] through issuance of PPP manuals and tool kits and training sessions for specialized staff of the concerned authorities. The State has also set up a national data base of ongoing procurement and concession projects to help central and local governments identify optimum PPP structures for specific regions, locate technical assistance, etc.

Most of the current large-scale PPP deals are structured as concessions or provide for direct financing of the project though an investment agreement between the grantor and a private investor. Some of the current major projects include:

- EUR 5.85 billion project for construction of 435 km Pitesti – Nadlac Highway (Corridor IV European Highway);
- EUR 3.6 billion project for construction of 173 km Bucharest – Brasov Highway (concession);
- EUR 2.2 billion project for construction of 415 km Brasov – Bors Highway (Transilvania Highway);
- EUR 1.2 billion project for construction of 55 km Comarnic – Brasov Highway;
- EUR 1.56 billion project for Euro national railway extension and rehabilitation;

[1] Published in the Official Gazette of Romania No. 869 of 22 Dec. 2008.

[2] See Ch. 2.1, 'PPP Players. Contracting Authorities' for further details regarding authorities involved in the PPP field.

– EUR 526 million project for modernization and extension of Otopeni International Airport 'Henri Coanda';
– EUR 200 million project for modernization and extension of Iasi International Airport;
– EUR 126 million project for rehabilitation of urban transportation system in Bucharest;
– EUR 102 million project for the construction of Brasov Ghimbav International Airport;
– EUR 100 million project for the construction of a biomass plant and rehabilitation of thermal energy system in Brasov;
– EUR 90 million project for the modernization of Cluj International Airport;
– EUR 70.5 million project for rehabilitation of thermal energy system in Bucharest;
– construction of twenty-eight new hospitals (eight regional emergency hospitals and twenty county emergency hospitals) for improvement of health care infrastructure.

1.2. LEGAL CONTEXT

The concept of a PPP was first established in Romania in 2002, under Government Ordinance No. 16/2002 (*GO 16/2002*),[3] but various types of arrangements between public authorities and private entities, particularly with respect to concession of public assets, emerged in the mid-1990s. These arrangements became subject to regulation by law in the second half of 1990 and the beginning of 1991.

Under the 1887 Romanian Commercial Code, which remained in force even between 1947 and 1989, during the communist era, PPPs in the form of joint-venture agreements were established by local communities with private investors. Such form of cooperation was explicitly permitted under the successive laws on local public administration adopted since 1991.

Moreover, Law No. 31/1990 on companies (the *Company Law*)[4] provided for the establishment of project companies as a form of PPP, and regulated the capacity of public authorities to hold interests in companies.

Following Romania's accession to the European Union on 1 January 2007, the existing Romanian enactment regarding PPP (i.e., GO 16/2002) was repealed and other enactments impacting PPPs were issued, as to be in line with EU regulations.

The current Romanian legislation does not contain any special rules for PPPs. However, certain legislative provisions impact PPPs. Thus, if public authorities involve third parties in conducting an activity, regulations on public procurement and concessions come into play, such as: Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession

[3] Published in the Official Gazette of Romania No. 94 of 2 Feb. 2002.
[4] Published in the Official Gazette of Romania No. 126 of 17 Nov. 1990.

contracts (*GEO 34/2006*);[5] Government Emergency Ordinance No. 54/2006 on the regime of the concession contracts for public assets (*GEO 54/2006*);[6] and other related laws regarding expropriation, constructions, public administration, etc., as detailed below.

2. LOCAL LEGAL ISSUES

PPP Players: Contracting Authority

Under Romanian law, the contracting authority may be a central or local administration authority or a national or local interest company or agency set up and controlled by the central or local administration authorities to carry out social, administrative and other similar functions of social and national importance in a particular sector of industry.

Depending on the specific object of each PPP project, the relevant contracting authorities may be central, regional or local[7] as follows:

- central authorities handle projects of national importance and projects that entail the use of assets owned or administered by such authorities;
- regional[8] authorities handle projects of regional importance and projects that entail the use of assets owned or administered by such authorities.
- local authorities[9] handle projects of local importance and projects that entail the use of assets owned or administered by such authorities.

At a central level, contracting authorities are the Ministry of Public Finance as well as the other ministries and other entities controlled thereby, according to their respective fields of action. The Ministry of Public Finance has a central role in the implementation of PPP projects nationwide through the Romanian Central PPP Unit which is subordinated thereto. The Central PPP Unit is meant to facilitate the development of PPP projects by developing PPP policies and strategies (including when necessary by preparing relevant

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[5] Published in the Official Gazette of Romania No. 418 of 15 May 2006 as amended and supplemented to date; this enactment implements the following EU directives: Directive No. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Directive No. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Directive No. 1989/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Directive No. 1992/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors.

[6] Published in the Official Gazette of Romania No. 569 of 30 Jun. 2006, as amended and supplemented to date.

[7] At a regional level Romania is divided in forty-one counties each of which includes several cities and communes which represent local establishments. Counties are managed by county councils whilst cities and communes are managed by local councils and a mayor.

[8] Regional authorities are county councils and various other entities controlled thereby.

[9] Local authorities are mayors, local councils as well as various other entities controlled thereby.

legislation proposals), providing support to central, regional and local authorities in respect of PPP projects and managing the centralized PPP database.

2.1. PROCUREMENT RESTRICTIONS

Under GEO 34/2006, any business entity, legally established under its state of registration, has the right to participate in granting procedures. The Romanian law does not provide for particular rules as concerns the foreign investors, the relevant legal provisions contemplated above being applicable to all investors, irrespective of their nationality.

Participation may be individually or by consortium. However, contracting authorities are entitled to impose certain conditions restricting participation in granting procedures (e.g., conditions limiting participation only to entities working with persons with disabilities). Such participation limitations must be expressly mentioned in the tender announcement.

Contracting authorities may also apply various non-discriminative selection criteria, such as: professional qualifications, financial good standing, technical capacity, quality standards and environmental-protection standards, on a case-by-case basis. However, application of such criteria should not restrict participation to the tendering procedure.

Moreover, under GEO 34/2006, participation to public procurement procedures is prohibited to bidders/candidates in any of the following situations:

(i) convicted by final court decision in the past five years for participating in activities of criminal organizations, corruption, fraud and/or money laundry;
(ii) bankruptcy, liquidation, businesses being conducted by a judicial administrator or commercial activities suspended or subject to creditors' arrangement or similar situations;
(iii) under the process of being declared in one of the situations provided at item (ii) above;
(iv) with outstanding debts towards the public budget in the country of origin;
(v) under contractual default during the past two years;
(vi) convicted of professional misconduct/error in the past three years by final court decision;
(vii) submitting false information or failing to provide information requested by the contracting authority.

Bidders are allowed to subcontract part of the public procurement contract, but contracting authorities may require them to indicate the subcontractors. Subcontracting does not limit the liability of the contractors towards the contracting authority.

In order to facilitate competition, public procurement procedures regulated by GEO 34/2006 prohibit a bidder (i) from submitting two or more individual and/or common offers, or (ii) submitting an individual/common offer and being appointed as a

subcontractor for another offer. Failure to observe such restrictions results in disqualification of the offer and/or the offer that the bidder is associated with.

Other restrictions refer to the persons engaged in drafting the granting documentation, who are entitled to participate in the granting procedure as bidders, associated bidders, or subcontractors only if their participation in drafting the awarding documentation is not likely to affect the competition. Persons engaged to directly verify and/or assess the offers are not allowed to participate as bidders, associated bidders or subcontractors. Nevertheless, their affiliates are entitled to participate in the same procedures, but only if their participation is not likely to distort the competition.

Moreover, contractors are not entitled to employ persons engaged in the verification and/or assessment of the offers submitted during a granting procedure, during consideration of the offers, and for a period of at least twelve months after contract is awarded. Failure to comply with such restrictions will render the award contract null and void.

Contracting authorities must observe specific rules and requirements when performing the tender procedure, including the following:

- to observe the principles of non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency in using the public funds, undertaking of liability;
- to observe specific granting procedures established by the law (e.g., open tender, restricted tender, competitive dialogue, negotiation, request of offers) and to award public procurement contracts by applying the open tender and the restricted tender procedures and, only if certain conditions are met, by applying other procedures;
- to not divide the public procurement contract into several lower value contracts, and to not use computation methods which may lead to underestimating the value of the contract, for the purpose of avoiding the applicability of GEO 34/2006; and
- to ensure the confidential information provided by bidders is properly protected.

Grants of public procurement contracts may be made only by applying either the criterion of most advantageous offer from an economic perspective, or the lowest price criterion. However, if the procedure of competitive dialogue (i.e., granting procedure consisting of a Q&A session between the contracting authority and the selected entities with the view of identifying the most adequate solutions for a project) is incident, the most advantageous offer from an economic perspective is the only criterion to be considered.

2.2. THIRD PARTY RIGHTS TO CHALLENGE A PROJECT

Tender procedures and the awarding decisions may be challenged by any person who has an interest in a concession contract and suffers damages as a direct consequence of an illegal tender and/or decision of a granting authority. Challenges may be made within a fix term computed as of the acknowledgment of respective deed, by way of:

(i) administrative contestation lodged, as a rule, with the National Council for Contestations Resolution (CNSC) – such contestation may be filed in any phase of the tender and against any act of the contracting authority;
(ii) claim in front of the court in the jurisdiction where the contracting authority is seated, filled according to the provisions of Law No. 554/2004 on administrative litigation (Law No. 554/2004).[10]

In case challenges having the same object are entered both, with CNSC and with the competent court of law, such challenges are met and settled by the court.

Prior to awarding the public procurement contract based on an administrative decision, any interested party damaged by any action or deed of the contracting authority may file an administrative contestation with CNSC to request: (i) the annulment of an administrative deed; (ii) a decision compelling the contracting authority to issue a deed; or (iii) to remedy the deeds affecting the public procurement procedure, as the case may be. The contestation must be submitted in the same time with CNSC and with the contracting authority. The contracting authority has to notify the contestation to the other participants to the public procurement procedure. Thus, the other participants will have the possibility to join such contestation or to make challenges on other grounds.

CNSC is an administrative-jurisdictional body attached to the Secretariat General of the Government (SGG). The Council independently makes decisions, and it is not subordinate to SGG. The CNSC has authority to (i) settle the contestations filed during an awarding procedure, before the conclusion of the contract; (ii) asses the legality of the procedure and operations conducted by the contracting authority in a public procurement procedure; and (iii) render opinions on litigations regarding the procurement procedure submitted before courts of law, based on the court's request. The decision of CNSC is mandatory, and a contract concluded in breach of such a decision is null and void. Decisions of CNSC may be challenged within ten days as of communication, by filing a complaint in the court of appeal in which jurisdiction the contracting authority is seated. The court of appeal may, upon request, order the suspension of the granting procedure and/or a stay of the challenged decision, until the decision of the competent court of appeal becomes final and binding. The public procurement contract executed during the suspension of the procedure is null and void.

Alternatively, third parties may choose to challenge a public procurement procedure by filing a claim in a competent court of law under the general rules provided by Law No. 554/2004. In such cases, the claimant has the option of first requesting the contracting authority to revoke the damaging deed. However, this is not a prior condition to address the competent court of law.

Any action challenging granting procedures of services and/or works related to the transport infrastructure of national interest may only be brought before the Bucharest Court of Appeal, under the terms of Law No. 554/2004.

[10] Published in the Official Gazette of Romania No. 1154 of 7 Dec. 2004 as amended and supplemented to date.

Moreover, claims for compensation and actions subsequent to the execution of a public procurement contract may only be brought before a court of law. The courts may partially or entirely annul the deed or the entire awarding procedure. The court may also compel the contracting party to take other steps to eliminate the effects of the challenged deed. Decisions rendered by the courts are subject to appeal.

Claims in front of a court of law are taxed based on the value of such claim, except for the claims that cannot be pecuniarily valued, which are taxed with a fix sum.

The procedure in front of the court is accelerated, so the period of time for the respondent's statement of defence, the claimant's reply, and other proceedings leading to the final judgment are shortened.

However, while the urgent settlement of third party challenges is a priority under both the administrative procedure in front of CNSC and the court procedure, the time needed to solve such complaints varies depending on the factual background or the complexity of the evidence subject to the court's review. Nevertheless, the procedure in front of CNSC proves to be faster as complaints submitted with CNSC should be settled in a maximum of thirty days as of the receive of the procurement documents from the contracting authority, while court procedure, even if it is accelerated implies extensive proceedings and terms.

Courts of law may sanction the parties for acting in bad faith (e.g., filing obviously ungrounded requests, obtaining with mala fide the public summon of any party, failing to comply with the measures ordered or delaying the case trial, etc.). Under Romanian law, a court may dismiss a claim only after analysing it on the procedural preliminary matters and/or on the merits. There is no earlier procedure for dismissing spurious claims. The court expenses incurred by the successful party may be ordered against the other party, provided that the former duly substantiated a claim for expenses before the court.

2.3. ULTRA VIRES

A PPP may be established in two distinct forms, either as *joint venture partnership* in accordance with the provisions of the Romanian Commercial Code, or as *joint venture company* under the regulations of the Companies' Law, as detailed below in sections 2.6 and 2.7. Thus, entering into ultra vires acts is differently regulated for each form of PPP. For joint venture partnership, only the Main Partner (i.e., the partner authorized by contract to represent the joint venture) has the authority to enter into agreements with third parties and thus only the Main Partner is liable towards the latter. In case of a company, the Romanian law provides that ultra vires acts entered into by its legal representatives will be held valid in most cases, as detailed below.

Under Romanian law, the existence of companies is governed by the provisions of their Articles of Association. Such statutory document sets out the scope of business,

which should be in compliance with the Romanian CAEN[11] codes, as well as with the corporate governing rules, the rights of its shareholders and the requirements for the directors to represent the company to third parties.

In line with the EU company related legislation designed to ensure security and validity of transactions between companies, acts entered into by Romanian companies outside the limits of their scope of business will be held valid, unless it is proven by the company that third parties knew or, given the specific circumstances, should have known about such breach of its statutory requirement.

Acts entered into by a company and signed by its legal representative, exceeding its statutory powers, will be considered *ultra vires*. In such case, the law establishes a presumption that third parties are aware of the limit of the powers granted by law to the representative of the company. Even if the representation powers of a legal representative, including its powers to bind the company, are provided by law, they may be amended by the company's articles of association. Thus, if representation powers are restricted through the company's articles of association, and only because of this restriction the act is signed by a representative not entitled to do so, such act will be held valid and binding for the company.

As a matter of principle, *ultra vires* acts issued by public authorities may be rendered void if not confirmed or ratified by the competent public authority.

2.4. CORPORATE LAW

2.4.1. Joint Venture Partnership

2.4.1.1. General

An option for the grantor to participate in a PPP along with private investors would be to set up a joint venture partnership (*asociere în participațiune)*, as regulated under the Romanian Commercial Code.[12] Such joint ventures are defined as de facto partnerships, established by contract between partners, for the purpose of jointly conducting a commercial activity, or even an entire business in view of obtaining profit. To this purpose, each party makes a contribution (in the form of capital, in-kind contribution, know-how, etc.), shares the expenses, and is entitled to part of the profit resulted from the joint venture business operations.

2.4.1.2. Establishment

[11] The abbreviation stands for the Classification of Activities of the National Economy. Such Classification was implemented by Government Decision No. 656/1997 for the approval of CAEN, as updated by Order No. 601/2002 on the updating the CAEN Code Classification issued by the President of the National Institute of Statistics and is similar to NACE Classification of the European Union.

[12] Published in the Brochure of Romanian Official Gazette dated 27 Jun. 1997, as further amended and supplemented.

Joint venture partnerships lack legal personality and the grantor and the other investors have to contractually determine the rights and obligations which will govern their relationship. Thus, there are no specific formalities for establishing a joint venture partnership. However, the existence and conditions of such can only be evidenced by a written deed, namely a contract. Such contract should mention, *inter alia*, the business operations, the contributions of each partner to the joint venture business activity, the management of the business, the modality of sharing the liability toward third parties and the profit resulted from the joint venture business operations, etc.

The number of parties is not restricted, and there are no prohibitions with respect to the category of partners which may participate.

Moreover, there are no restrictions regarding the scope of the joint venture, which may envisage one or more business operations. Nevertheless, in case license or authorization for developing certain business operation is required, the Main Partner should procure such authorization or license.

2.4.1.3. Business Operations

Entering into a joint venture partnership does not create a corporate entity with a legal personality separate from the partners. To this end, third parties may face difficulties in enforcing the rights arising from the joint venture operations. In order to remedy this shortcoming, the Romanian Commercial Code provides that business operations must be carried out only by one of the partners (i.e., the Main Partner) on behalf of the partnership. In practice, the Main Partner is usually the private investor.

Therefore, although acting for the benefit of the joint venture and on behalf of the other partners, the Main Partner is the only one who has the authority to enter into agreements with third parties. All rights and undertakings that arise under contracts with third parties are assumed by the Main Partner in its own name. Accordingly, all liabilities in connection with the joint venture operations toward third parties are also incurred by the Main Partner alone.

Considering the above, the advantage of a joint venture partnership is that, secondary partners may benefit from a high degree of discretion, as the Main Partner has the option of concealing from third parties the extension of its capacity or the real beneficiaries of the business operation.

The Main Partner has to report to the other partners the agreements entered with third parties and the actions executed with the view to managing the business.

2.4.1.4. Liability

Since a joint venture partnership is not a legal entity, it cannot be held liable and it does not have the capacity to sue and be sued. As a result, any contractual claims relating to the operation of the joint venture partnership must be brought against the Main Partner.

The partners usually agree that should the Main Partner's liability be engaged by third parties, it will be indemnified by the other partners, either pro rata with their contribution to the joint venture, or in another percentage agreed to a priori.

2.4.1.5. Fiscal Regime

As the joint venture partnership is merely a contract and it does not set up a legal entity with distinct personality, it is not to be regarded as a separate entity for taxation purposes. To this extent, the revenues achieved and expenses incurred by the joint venture are distributed to the partners and each partner will be subject to a profit tax, computed as in case of companies (if the partner is a company).

2.4.1.6. Termination

Cases of termination of a contractual joint venture partnership are: mutual agreement of the parties, expiry of the term agreed a priori by the partners (if the partners omit to set a fixed term, the joint venture will be limited to the duration of the envisaged commercial activity), fulfilment of the scope of the joint venture; insolvency or winding-up of any of the partners, termination through court decision, due to non-fulfilment of major undertakings, and termination under specific cases set forth in the joint venture agreement.

Given that the joint venture partnership does not create a new legal entity, its dissolution is not followed by liquidation. However, the partners will regain the ownership right over the contributed assets under the terms agreed in the contract.

2.4.2. Joint Venture Companies

2.4.2.1. Incorporation

Under Romanian law, there are several types of companies, such as a joint stock company, limited liability company, limited partnership, limited stock partnership, or unlimited guarantee collective company. The most commonly used company for a PPP is the limited liability company (*societate cu raspundere limitata).*

Establishment of all types of companies must be authorized by the tribunal in which jurisdiction the applicant company is located. The applicant company has to submit a standard application accompanied by several documents such as: articles of association, evidence of name reservation, evidence of share capital contribution, evidence of title over the premises where the company's seat is to be located, affidavits of the shareholders and directors, etc. All documents subject to registration with the Trade Registry shall be drafted in Romanian.

Following authorization by the judge,[13] the company is registered in the Trade Register, and three business days later is issued a certificate of incorporation by the Trade Registry Office attached to the competent tribunal. Registration costs for limited liability companies amount to approximately EUR 200–300.

Generally speaking, the incorporation of a limited liability company is not subject to special approval or license, but to a standard statement that the company fulfils certain legal operating conditions. Though, a functioning authorization may be required, as from the company's establishment, for some cases when specific activities are to be carried out by the company (e.g., activities that impact the environment).

Limited liability companies may be established by one to fifty shareholders, Romanian or foreign individuals or legal entities, with no restrictions related to their nationality. However, an individual or legal entity may be a sole shareholder of only one limited liability company, and a limited liability company may not have as sole shareholder another sole shareholder limited liability company.

The capitalization of a limited liability company must be in cash or in-kind upon its establishment. In case land is contributed, the articles of association or the addendum thereto must be authenticated by a notary public.

2.4.2.2. Authorization

Starting business activities in a project may require the project company to undergo several stages of authorization, depending on the complexity and scope of the project. The first level of authorization is achieved during the incorporation of the project company. The process of gaining such endorsement does not require individual application for specific authorizations (i.e., health and sanitary authorizations, fire prevention authorizations, minimal environmental requirements, etc.), but merely a standard statement issued before the competent trade registry by which the project company declares that the minimal legal requirements necessary for opening the relevant business seat are duly observed. After incorporation of the project company, the relevant control authorities (i.e., the public health authorities, the relevant environmental authorities, etc.) are entitled to inspect the fulfilment of the obligations regarding health, environment, etc. undertaken within the aforementioned statement.

As a general rule, the project company does not need a special permit to carry out its business activities. However, in certain cases strictly determined by law (e.g., the energy sector, the banking sector), the project company is required to obtain special licenses or permits to pursue its business. Thus, this second level of authorization can generally be undergone after the incorporation of the project company, save for specific permits which are required in prior to incorporation (i.e., applicable to the incorporation of banking and

[13] For a limited period of time (six months as of 14 Jan. 2010) the establishment of companies will be decided by the director of the Trade Registry Office or by other persons nominated by the above. Such measures were taken based on GEO No. 116/2009, with the view to replace the deputy judge of the Trade Registry Office with 'trade registrators'.

insurance institutions, companies trading on the capital market or performing weapons trade, security companies and pension funds).

2.4.2.3. Taxation

Currently, profit tax applicable to Romanian limited liability companies is 16%. Taxable profit is calculated as the difference between income obtained from any source and expenses incurred for the purpose of obtaining the income within a fiscal year, from which non-taxable income is deducted and to which non-deductible expenses are added.

Under certain conditions, small and medium sized limited liability companies (microenterprises) have the option to pay a special turnover based tax amounting to 3% of the turnover for the fiscal year 2009, instead of being subject to profit tax.

2.4.2.4. Corporate Governance

Governance of limited liability companies is exercised at the management level by one or several directors that may act jointly or severally, or may act as a collegial body forming a board of directors. The governance structure has to be established by the shareholders in the company's articles of association.

There are no specific rules under Romanian law for the executive management and the financial management of the company. Such managing structures may be established by the company's article of association or by decision of the company's shareholders/directors, as the case may be. Thus, the management team is appointed and authorized either by the shareholders or by the directors, depending on the provisions of the articles of association and the powers granted to directors.

2.4.2.5. Shareholders' Rights

There are no special shareholders rights granted by law to public entities, which may generally hold shares in private entities without restrictions. Limited liability companies cannot issue different classes of shares. Shares issued by a limited liability company are called *parti sociale* and, as a rule, do not give different rights and levels of priority to their holders. Thus, each share gives its owner the right to one vote and an equal right to the distribution of the company's profit. The decision to issue new shares is made by the shareholders in accordance with the articles of association.

There is no legal protection for a minority shareholder in a limited liability company. Nevertheless, a minority shareholder can protect its interest by contractual means (e.g., by granting the minority shareholder a right of first refusal in case other shareholder intends to transfer all or part of its shareholding).

In a limited liability company, a shareholder can exit in accordance with the provisions set forth in the articles of association, or if approved by unanimous consent of the other shareholders. If the articles of association does not provide for any exit options, or

unanimous consent is not reached, a shareholder can exit only for grounded reasons (e.g., the impossibility to assign its shares to third parties) and based on a court decision.

There are no restrictions on assignment between shareholders of shares issued by a limited liability company. Assignment of shares to third parties can be made only if approved by the shareholders representing at least three-fourths of the entire share capital of the issuing limited liability company. Higher level of voting percentage/quorum or other restrictions on the admission of new shareholders may be set out in the articles of association.

Put/call options, as well as 'drag along', 'tag along' or 'piggyback' clauses are not regulated by the Romanian law, but the shareholders can agree to include such clauses in the company's articles of association.

Moreover, under Romanian law, there are no provisions for resolution of dead locks. Therefore, the shareholders can provide any type of dead lock provisions as long as such arrangements do not infringe on general law principles or a specific legal provision.

2.5. LICENSES AND PERMITS

For developing a certain project, partners in a PPP may need special licenses and permits.

The grantor may be able to transfer the licenses and permits obtained for a specific project to the project company under specials laws regulating the relevant licenses or permits. For example, the environmental permits relating to a project may be conveyed along with the project, under a more restrictive regime than the transfer of the project. To this extent, the grantor and the project company have to notify the environmental authorities that the project company will be the new legal entity responsible for operating the project. Moreover, the project company has to commit, through a written deed attesting the transfer of the project and the related environmental permit, to observe the conditions and terms under the relevant environmental permit. The transfer is valid only when it is confirmed by the environmental authority. Confirmation of the transfer may ultimately require amendment of the existing environmental permit.

Nevertheless, if the grantor is unable to transfer the project related approvals, the company has to obtain all necessary licenses and permits directly from the relevant authority.

The duration for issuance or renewal of the relevant permits and approvals is regulated by law, and it usually takes twenty – thirty business days. Failure to comply with the legal time frame to issue or renew a permit, or the refusal to issue or renew a license or permit entitles the project company to file a claim against the competent authority. Before filing a claim, the project company has to request the issuing authority or its supervising authority (if it exists) to revise its refuse to issue or renew a permit, or to issue the permit (in case of an unjustified delay during issuance). If the issuing authority fails to do so

within thirty days, then the project company can bring a complaint before the competent court of law.

2.6. ASSETS

2.6.1. General

Under Romanian law, property is classified as either private or public, each enjoying a distinctive legal regime. Assets held as private property are and shall remain in the civil circuit, that is, they may be sold or purchased with no restrictions. However, private assets may be subject to certain transfer restrictions provided by different laws, such as Law No. 18/1991 – land law[14] or Law No. 1/2000 on the reconstitution of the ownership over agricultural lands and forestlands claimed under Law No. 18/1991 and Law No. 169/1997.[15] Thus, for example, the assets that are subject to a claim on the reinstatement of the ownership right are exempted from any transaction.

Assets held as public property cannot be conveyed, pledged, mortgaged or encumbered in any other way. Public assets are not subject to foreclosure or adverse possession. Public property is owned only by the state or the local authorities. Public assets are either assets defined as public by specific law (i.e., Law No. 213/1998 regarding the public property and its legal regime[16]), or assets that are by their nature of public use or interest. Thus, public assets include *inter alia* utilities networks, subsoil natural resources, water resources, architectural monuments, etc.

Property in Romania may be held directly, either solely or jointly, but holding property by a trust is not regulated or recognized under Romanian law. Joint ownership can take two distinct forms: co-ownership and joint ownership. The two joint ownership forms are likely to impact PPPs while developing projects (e.g., in case a land is contributed to the share capital of a company, if land expropriation is necessary for developing a project, etc.). Under the co-ownership form (*proprietate comuna pe cote parti)*, each co-owner has a certain quota of property that may be freely transferred in favour of a third party. However, a unanimous decision of all co-owners is required when granting usage rights over the jointly held assets, or charging them with liens or encumbrances. The second form of joint ownership (*proprietate comuna in devalmasie)* applies to property acquired during marriage, each spouse holding an undivided and uncertain quota of the entire property, which is to be determined only upon the end of the marriage or in certain cases, upon demand of creditors

2.6.2. Real Estate Publicity

[14] Published in the Official Gazette of Romania No. 1 of 5 Jan. 1998 as amended and supplemented to date.
[15] Published in the Official Gazette of Romania No. 8 of 12 Jan. 2000 as amended and supplemented to date.
[16] Published in the Official Gazette of Romania No. 448 of 24 Nov. 1998 as amended and supplemented to date.

The current Romanian real estate publicity system has a two-fold purpose: (i) to register the ownership interest over the real estate (both land and buildings) as well as any other legal operations in relation to such real estate, for example, mortgages, easements, usage rights, litigations, any other charges over the property; and (ii) to inform interested third parties of any legal acts and the legal status or condition of the relevant property. Failure to register an ownership interest or any other related deed with the land register does not affect the validity of such deeds. However, such failure will not allow the interest holder to oppose his interest to third parties.

2.6.3. Restrictions Regarding Interest in Land

Current restrictions prohibit foreign citizens and legal entities from owning an interest in land in Romania. However, foreign citizens and legal entities may own constructions (apartments, houses, etc.), and thus enjoy the right to use the related land of the construction, for the entire duration thereof. Consequently, the project company would be required to be a Romanian company for the grantor to contribute land to its share capital.

As of the date Romania joined the European Union EU citizens and legal entities will be permitted to acquire land in the future. Relevant laws, that is, Law No. 312/2005[17] regarding the ownership right over lands of foreign citizens and entities specified that European Union citizens and legal entities set up under the laws of a EU Member State may purchase land in Romania only after expiry of a five-year term as of the date Romania joined the European Union, and in case of agricultural land, forests or forestry land, only after expiry of a seven-year term.

Foreigner citizens and legal entities belonging to states which are not members of European Union will acquire ownership rights over lands under the terms regulated by international treaties, on a mutual basis, or through legal inheritance.

2.6.4. Concession of Public Property

State and local authorities may hold assets both as private and as public property. Thus, one of the most important aspects when structuring a PPP is to identify the nature of the project assets. If the assets serving the project are held as public property, the project company can enjoy the use of such assets only by entering into a lease agreement or, more often, into a concession agreement. The assets held as private property by the state and local authorities enjoy the same regime as the assets owned by private persons and entities, in case the law does not provide otherwise.

The legal regime of the concession agreement for assets held as public property is strictly regulated by law. The grantor and the project company must identify the assets subject to the concession agreement that have to be returned to the grantor upon expiry of the concession agreement. Such assets are to be returned de jure, at no cost to the grantor

[17] Published in the Official Gazette of Romania No. 1008 of 14 Nov. 2005.

and free of any kind of encumbrance. The parties of the concession agreement has to identify also the assets which will remain vested in the project company, that is, the project companies' own assets used for the project. Accordingly, the project company's personal assets can be removed or replaced, without affecting the obligations undertook under the concession agreement.

The project company is not entitled to sub-grant the assets subject to the concession agreement, except if the project company is a national company or a company owned or controlled by a public authority.

As a particular feature of the concession agreement, it should be noted that the grantor will be entitled to unilaterally amend the provisions of the tender book and the concession agreement, with a prior notification of the project company, provided such amendment is justified by national or local interest. In such case, the project company has the right to claim compensations for the resulting damages, however, without being permitted to disregard its contractual obligations.

Moreover, concession agreements shall also specify the way environmental related liabilities and responsibilities are shared between the grantor and the project company. Under Romanian law, environmental liabilities are determined by the principle 'the polluter must pay'. Liability for pollution damages is objective in nature, regardless of polluter's fault, and in case of a plurality of polluters, the latter share a joint responsibility for the entire value of the damage. In practice, the only environmental liabilities undertaken by the grantor would be those which could arise in connection with flaws affecting the assets under concession, provided such flaws were not caused by the project company or a third party.

2.6.5. Concession of Private Property

Concession of private property of the public authorities is also permitted, although current legislation does not provide a detailed procedure and specific regulations for the concession of private property. While practice has leaned towards applying the same principles, term, and condition that apply to concessions of public property, the legal regime applicable to private property assets held by public authorities is less restrictive than the regime for public property assets. Thus, the grantor is allowed to transfer the ownership right over the relevant assets to the project company. In case of a PPP, contribution of assets to the share capital of the project company by the grantor is a common way of acquiring shares in the project company, and thus becoming involved in the operation of a project.

2.6.6. Expropriation

Romanian state and the local community administrative units that is, counties, municipalities, towns and communes may take over the ownership of private property

only for a public use purpose. Law No. 33/1994[18] establishes the general procedure for expropriation for public use purposes (Law No. 33/1994), while other incident special laws, for example, Law No. 198/2004 on preliminary measures for construction works of roads of public, county and local interest (Law No. 198/2004)[19] provide specific procedural issues.

Expropriation of real property is made through a court judgment, after the declaration of public use has been properly made and after the former owner has received a fair indemnification. The main steps of the expropriation procedure include (i) the issuance of a statement of public use for the works of national or local interest, issuance made by the competent authority depending of the work's level of interest; (ii) the performance of the publicity formalities and other preliminary measures required prior to expropriation; and (iii) the expropriation itself and the setting out of the indemnification owed to the former owners through a court decision.

The ownership over the real property is transferred when the indemnification has been paid to the entitled persons or deposited in a special bank account at their disposal, as the case may be.

The public use purpose shall be declared for works of national or local interest and, mainly, shall serve the following public use purposes: the extraction and processing of useful mineral substances, installations for the production of electricity, roads and the opening, alignment and widening of the streets, electricity supply systems, telecommunications, gas, heating, water, sewers, installations for the protection of environment, buildings and land necessary for construction of social housing and for other social objectives including education, health, culture, sport, social protection and assistance, public administration and for judicial authorities and other works expressly mentioned by law.

Former owners enjoy a pre-emption right to lease or purchase back the expropriated real estate if the expropriation purpose is delayed or could not be achieved and the authority intends to lease or sell the expropriated asset. The former owner is granted a right to claim for reinstatement if the works for which the real property was expropriated have not begun in one year as of expropriation and a new declaration of public use purpose has not been issued. Such right may be exercised within three years. The purchase price (or the amount owed in case of reinstatement) to be paid by the former owner should not exceed the updated amount received as indemnification for the expropriation.

When the expropriation of real property is required for the building of the roads and highways of national or local interest, the expropriation procedure is regulated under Law No. 198/2004 and the expropriation is decided by the Government or by the competent local public authority which will, likewise, determine the indemnification to be paid.

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[18] Published in the official Gazette of Romania No. 139 of 2 Jun. 1994.

[19] Published in the official Gazette of Romania No. 487 of 31 May 2004 as amended and supplemented to date.

2.6.7. Contribution of Assets to the Share Capital

Once an asset is contributed to the share capital, the project company has the right to use such asset, including to convey it or to charge it with mortgages, pledges, or any other encumbrance or lien, subject to the corporate approvals required by law. The shareholder contributing such assets will not have the right to regain de jure the ownership thereof upon the winding up of the project company. However, in a limited liability company, a limited partnership (*societate în comandită simplă)* and a unlimited guarantee collective company (*societate în nume colectiv)*, the asset can be returned to the contributor, the return being conditioned on (i) prior payment of all of the project company's debts; and (ii) unanimous approval by the general meeting of shareholders. A shareholders' agreement could provide, in advance, the return of the assets to the contributor in case of winding up, but its effectiveness would still depend on the payment of the debts of the project company.

2.6.8. Contribution of Assets to Joint Venture Partnerships

An important aspect of the joint venture partnership is that, in the absence of provisions to the contrary, the assets contributed to the partnership become the property of the Main Partner. The ownership right is irrevocably and unconditionally transferred to the Main Partner, in exchange for the other partners' rights to participate in the partnership's gains and losses resulting from the contemplated business. Nevertheless, under the existing laws, the grantor is permitted to contractually agree with the Main Partner to regain the ownership right over the contributed assets upon expiry or termination of the partnership. Should the re-conveyance of the contributed assets be impossible, the grantor would be entitled to claim indemnification from the Main Partner.

Contributions to the business activity of the joint venture partnerships may be in various forms, such as capital, assets, know-how and labour. Basically, any kind of work and services will represent a valid contribution. Moreover, contributions to such joint venture partnerships are not limited to ownership interests in assets, but may also be in form of rights to use certain assets. In this case, the Main Partner is entitled to use the contributed assets as it best sees fit, without having any right to dispose of the assets.

2.6.9. Tax-related Aspects

When structuring a PPP, the parties will also try to analyse other aspects which could impact on their direct involvement in a project, such as the fiscal exposure related to the property and transfer of assets or the construction related regulations and liabilities.

Under Romanian law, the sale-purchase of real estate by individuals results in the levy of a transfer tax on the seller, which ranges from 1% to 3% of the value of the purchase. For companies, the transaction is considered income and is subject to profit taxation. The purchaser of real estate also has to bear costs of the transaction, namely, the notary public's fee for authentication of the deed, stamp duty, the tax for registering its

ownership interest with the land register, as well as VAT, if applicable. The owner of a real estate or certain movable assets (e.g., vehicles, boats, airplanes, and other transportation vehicles) will also be liable for annual property tax.

2.6.10. Construction

In case of construction projects, the project company has to own the land or be granted a concession thereon, in order to use the land for the construction project. The project company can obtain a building permit based on a lease/commodatum agreement regarding the land only with the prior written approval of the interest holder and only for temporary erections.

Consequently, the project company can develop a building on private land owned by another person, thus enjoying a right to use the land underneath for the entire existence of the building. In this situation, the property over the building will be vested in the project company only if it is expressly agreed with the owner of the land. Otherwise, it is legally presumed that the owner of the land is also the owner of the building.

On the other hand, if the project company makes improvements to existing buildings, then such improvements shall remain the property of the owner of the building. Nevertheless, such aspects are generally agreed to prior to entering a concession agreement.

If the project company performs the construction works related to project, then it should consider, that pursuant to the applicable laws, all parties involved in the relevant phases of completion (i.e., designer, constructor, site manager, experts) can be held accountable for damages caused in connection with (i) any hidden flaws of the building arising within the first ten years as of delivery of the completed building, and (ii) structural flaws caused by non-observance of the regulations applicable at the date of performance of the relevant services. Such liabilities cannot be limited or waived.

2.7. GOVERNMENT SUPPORT

Implementation of a PPP project may entail the grant of certain support measures to the private partner (e.g., tax allowances, access rights, employment incentives, etc.). Problems may arise whenever such forms of support are not within the exclusive power of the contracting authority, but of another authority, acting at a different level.

2.7.1. Cooperation between Contracting Authorities

There are certain fields wherein central, regional and local authorities have joint attributions, for example, providing thermal energy produced in centralized facilities, building housing facilities for young people, managing certain items of the local road transport infrastructure, etc. In such fields, central and local/regional authorities work together in order to implement the relevant policies.

Contracting authorities may directly grant only those forms of support that fall under their exclusive jurisdiction. For instance, a central or regional authority could not grant a private partner an exemption from payment of tax on land and buildings, since such taxes go to the local budget. Moreover, the central/regional contracting authority could not require the local authority to grant an exemption from tax, since local authorities are not subordinated to the regional or central authorities. Nevertheless, in the aforementioned example, the relevant local authority has the discretion to grant a tax exemption to a private partner of a central or regional authority, usually following a request made by the central or regional authority. Thus, the cooperation principle encourages local, regional and central authorities to work together for finding adequate solutions and for developing PPPs.

There are also various enactments (i.e., GEO No. 85/2008 on investment incentives,[20] Government Decision No. 1165/2007 on stimulating economic growth by supporting investments, etc.) which provide for specific facilities that must be granted to investors by the relevant authorities irrespective of whether any contractual relationship exists between such authorities and the concerned private partner. Such facilities may consist in granting state-budget financial contributions for newly created jobs, granting non-refundable funds for purchasing material and immaterial assets, etc.

Furthermore, when a regional or local authority requires financing in order to carry out a certain project, the law provides for allocation of special funds from the state budget to county/local budgets in order to support the development of the respective project.

Finally, pursuant to the Romanian law, any devolution of power from a central authority to a regional or local authority must be accompanied by the simultaneous allocation of the financial resources which are necessary in order for the respective regional/local authorities to effectively exercise the powers and attributions delegated by the central authorities. Hence, where a PPP related attribution is devoluted, financial resources for related support measures should also be transferred to the regional or local contracting authority.

2.7.2. Constraints and Limitations

Besides the State aid specific rules, as detailed below, there are certain constraints and limitations on public authorities in their relations with private partners. These constraints and limitations are meant to ensure that public funds are spent prudently and efficiently.

Thus, no payment may be made by a contracting authority unless the payment is duly and fully authorized by its annual budget. Likewise, all multi-annual engagements made by public authorities must be broken down into yearly payments, and each yearly payment must be included in the budget for the relevant year.

[20] Published in the Official Gazette of Romania No. 474 of 27 Jun. 2008.

At the central level, financing for PPP projects must be provided within the annual state budget prepared by the Government and approved by the Parliament. At the local and regional level, financing pertaining to PPP projects must be included within the annual county/local budgets, prepared by county council presidents/mayors and approved by the county/local councils.

If the contracting authority has a contractual obligation to make a payment, but such payment is not duly and fully covered by its initial annual budget or by its subsequently rectified annual budget, the creditor could obtain a writ of execution ascertaining the amounts owed by the contracting authority. The payment obligations of public institutions, on writ of execution basis, are deducted from their approved budgeted amounts, from the particular chapter of expenses where the debt is being enclosed (the expenses stipulated in the budget are organized in chapters, sub-chapters, articles, etc. considering their specific purpose). The contracting authority has to take all necessary steps in order to fulfil its payment obligations within six months of the service of the writ of execution. If this term lapses without payment, the creditor can enforce the writ under the common procedures of the Romanian Civil Procedure Code or other incident legal provisions.

Local and regional authorities are also subject to certain limitations when guaranteeing loans contracted by undertakings under their control. The annual value of the instalments pertaining to all loans contracted or guaranteed by a county/local council (either directly or by entities under the control thereof), may not exceed 30% of the county/local council's own revenues (i.e., taxes, fees and other contributions to the county or local budget).

Advance payments may be made by contracting authorities without exceeding 30% of the contract value. The goods and services in respect of which an advance payment has been made must be provided to the contracting authority by the end of the year when the relevant advance payment has been made, otherwise, the advance payment must be recovered from the undertaking.

2.7.3. State Aid Rules

Since Romania is a member of the European Union as of 1 January 2007, any financial support that may be offered by the Romanian public bodies to private partners, be it in a direct or indirect manner, is limited by the EU level rules on State aid. Thus, private investors and institutionalized PPPs (i.e., entities jointly owned by public and private partners) can be granted State aid only if the aid is approved by the European Commission, further to individual aid notifications filed thereto, or it falls under the scope of the European Commission regulations exempting certain categories of State aid from the obligation to seek Commission approval.

Thus, there are certain general categories of State aid (e.g., aids for environment protection, for employees with handicap, for research and development, etc.) that are exempted, under certain conditions, from the obligation to seek Commission approval,

based on Regulation (EC) No. 800/2008. Such exemptions include State aid schemes enacted at the national level under certain conditions.

At present, there are few exemptions in Romania that are applicable to State aid for PPPs or other eligible projects/entities. Such exceptions concern the aid schemes regarding *inter alia*, forestry field, tourism, development of renewable energy resources, sustainable development small enterprises in the forestry products field, etc.

Nonetheless, private partners may qualify for State aid in the form of non-reimbursable grants under various other schemes. For instance, a private partner in a PPP in the field of transportation, production, distribution and supply of thermal energy could benefit from grants such as: (i) compensation for unforeseen increases in the price of fuels; (ii) full recovery of the balance between the cost of producing, transporting, distributing and supplying thermal energy and the prices invoiced locally for thermal energy supplied to the population. The European Commission's approval is necessary also in case of non-reimbursable grants, unless such grants are considered as State aid schemes exempted from such approval.

Other non-reimbursable grants concern large investment projects, small and medium enterprises, innovative start-ups, e-businesses, research, development and innovation, environmental protection, regional development, etc.

State aid schemes also have limits, established by EU rules, with regard to the intensity of aid, the duration of the aid, available budget, cumulus of aid, financial standing of applicants, maximum number of beneficiaries, etc.

2.8. SOVEREIGN IMMUNITY

The issue of the sovereign immunity of the state should be analysed in the context of the competent authorities to settle the challenges against the public procurement procedure.

Thus, under Romanian law, disputes concerning the award of public procurement contracts and their performance are within the exclusive jurisdiction of Romanian courts. These disputes cannot be settled by a foreign court, and such foreign courts do not have the power to seize the property of the Romanian state and/or its public authorities.

For public works and services concession contracts, the law gives the parties the possibility to settle the dispute in another court of law or by means of arbitration. In such cases, the sovereign immunity of the Romanian State may be limited. The State may be subject to foreign jurisdiction, and consequently, such foreign courts or arbitral panels may order preliminary injunction against the state, that is, including the seizing of State property.

Romania is a party to United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004. The Convention gives the Romanian State and its assets immunity from the jurisdiction of the courts of another State, provided that the

Romanian State does not expressly agree with such jurisdiction or does not lodge itself a claim in front of a foreign court.

2.9. DISPUTE RESOLUTION

As a general rule, parties to concession contracts and public procurement contracts may choose to settle contractual disputes in the courts or by arbitration.

The provisions of Romanian Civil Procedure Code govern enforcement of the local arbitration award. In this respect, the party that was granted an arbitration award must file a complaint requesting the relevant court of law to enforce such award.

As Romania is a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (joined to through the Decree No. 186/1961 and only in relation to commercial disputes), the enforcement of foreign arbitral awards is generally based on the conditions of this Convention, as well as on the provisions of Law No. 105/1992 on private international relations.[21]

The party seeking to enforce a foreign award in Romania must file a complaint requesting the recognition and enforcement of the award. The complaint must be accompanied by the original foreign award and by the arbitral clause agreed to by the parties. A certified (official) translation must be produced together with these documents.

In addition to the grounds mentioned in Article V of the New York Convention, the Romanian court will deny enforcement of an award if, *inter alia*, the statute of limitations of the right to request the enforcement has expired (the Romanian law provides for a general statute of limitations of three years from the day when the judgment became final and binding for most legal actions, while certain real estate related actions are subject to a ten-year limitation period).

The decision of the county court can be appealed to the Court of Appeal and then to the High Court, according to the customary civil procedure rules.

2.10. REGULATORY AND STATUTORY DUTIES

2.10.1. Sectorial Contracts

Under GEO No. 34/2006, contracts granted for the purpose of performing activities in the public utility sectors (e.g., water, energy, transport and postal services) are known as *sectorial contracts.* Sectorial contracts also include contracts to exploit a geographical area for the purpose of (i) prospecting or extracting crude oil, natural gas, coal or other solid fuels or (ii) putting at the disposal of transporters facilities like airports, maritime/fluvial ports or other terminals of transport networks.

[21] Published in the Official Gazette of Romania No. 245 of 1 Oct. 1992.

The general granting procedures for sectorial contracts are the open tender, the restricted tender, the negotiation with previous publishing of a participation announcement, the negotiation without previous publishing of such an announcement and the request of offers. The contracting authority may also use special granting procedures such as the electronic tender, dynamic acquisition system or framework agreement.

Private operators may be also granted contracts of delegating the management of public utility services. Based on such contracts, public authorities grant the management and supply of a public utility service, together with the concession of the related technical structure. Private operators may be also persons registered in an EU Member State or in another state having the necessary competency and capacity to provide a service or an activity of public utility, provided that such capacity is recognized through a license issued by a relevant national authority.

Such delegation contract is required to include a programme of investment, works for modernizations, rehabilitations, development, new objectives, current/programmed repairs, and the charges and the obligations of the parties with respect to the investment programmes, as well as with respect to their financing. Delegation contracts may also include specific provisions depending on the public utility service that is granted.

2.11. COLLECTING TARIFFS FROM CONSUMERS

Should the project company's business involve public utility services, the tariffs levied on consumers may be established by regulations issued by relevant authorities in that field, depending on the public service nature and the actual business of the project company, as briefly presented below.

2.11.1. Electricity

The electricity industry in Romania is divided into the following activity areas:

- electricity generation;
- electricity transport, which refers to the transmission of electricity via the national transport network with a nominal voltage exceeding 110 kV and which is reserved to the National Electricity Transport Operator (Transelectrica SA);
- electricity distribution, which refers to the transmission of electricity via the networks with a nominal voltage below 110 kV, which is currently carried out by state-owned or privatized electricity distribution companies which are concessionaires of the electricity distribution service within the national energy system;
- electricity trading and supply, which refers to the sale of electricity to consumers, either industrial and/or household.

As a rule, the above mentioned services are independently licensed and may not be provided by the same undertaking, while within vertically integrated groups, the performance of such activities must be operationally and legally unbundled. However,

such unbundling requirement is not applicable to undertakings providing such services to less than 100,000 consumers or to isolated systems that are not connected to the national energy system.

In consideration of the above, the electricity generation project company may either:

– sell the generated electricity to consumers via electricity trading and supply off-takers; or
– provide electricity services directly to less than 100,000 consumers via a distribution network not connected to the national energy system.

The distribution tariff is regulated by order of the National Regulatory Authority in the field of Energy (ANRE). Since opening of the electricity market in July 2007, in principle, any electricity generation project company may sell the generated electricity to any licensed trader at a freely negotiated price. By means of exception, electricity necessary in order to cover the consumption of the national electricity network of consumers which due to technical restrictions cannot freely select their supplier and of household consumers is sold at a price regulated by ANRE. The price for the electricity sold directly to consumers may be negotiated.

Regulated tariffs are set based on methodologies approved from time to time by ANRE in consultation with all involved electricity operators. Tariff methodologies are enacted by ANRE order and are not subject to negotiation or adjustment of the electricity operators. Actual tariffs are set pursuant to the electricity operators' proposals, observing the applicable tariff methodology and are subsequently approved by ANRE. Any amendment by the project company to such approved tariffs must also be previously approved by ANRE.

2.11.2. Gas

Similar to the electricity area, the gas industry is also divided, from a Romanian legal perspective, into the following activity areas:

– natural gas generation, where players are operators which have been granted a concession right for the exploitation of natural gas and oil fields by the National Mineral Resources Agency (ANRM);
– natural gas storage;
– natural gas transport, transit and dispatching, which are reserved to the National Electricity Transport Operator (Transgaz SA);
– natural gas distribution, which refers to the transmission of natural gas via the networks with a nominal pressure below six bars, which is carried out by locally licensed operators;
– natural gas trading and supply, which refers to the sale of gas to consumers, either industrial or household, carried out by nationally licensed operators.

Similar to the electricity industry, the above mentioned activity areas are also independently licensed. Moreover, the relevant services may not be provided by the same undertaking, while within vertically integrated groups, the performance of such activities must be operationally and legally unbundled. However, such unbundling requirement is not applicable in case of undertakings providing such services to less than 100,000 consumers.

Consequently, a natural gas generation project company may only sell its gas production to consumers via natural trading and supply off-takers. Tariffs are regulated by ANRE in a similar manner as in the electricity sector.

2.11.3. Public Utilities

Public utilities services may be provided directly by local authorities or may be concessioned to project companies. Such public utility services comprise the following:

- water supply;
- sewage and waste water disposal;
- heat;
- sanitation;
- public lighting;
- public transportation;
- administration of the public and private property of local authorities.

Tariffs for public utilities services are generally collected by the project company directly from consumers, based on agreements concluded in consideration of the performance of the relevant services. In case conclusion of a services agreement is not practical (e.g., public transportation), a fixed tariff is applied to consumers. Moreover, if tariffs cannot be collected directly, due to the fact that consumers are indirect beneficiaries of the relevant service, the tariff is paid by consumers via a special tax imposed by the public authority.

Tariffs are set by enactment of the local authority or of the regulatory authority competent in the relevant activity field based on actual costs incurred by the operator, and including a reasonable profit margin. Such tariffs may not be amended by the relevant project company operator without prior approval from the local authorities or from the regulatory authority.

If the utility service does not have an off-taker, the project company shall be entitled to collect tariffs directly from consumers. In such cases, if a consumer fails to pay the relevant tariff, the project company may attempt to enforce its right to collect tariffs gradually, by application of delay penalties via invoices issued for the relevant service and, eventually, by disconnection/cessation of services delivery. If the consumer does not pay the tariff, the project company shall try to recover the outstanding amounts by filing a claim before the competent court of law.

Illegal connections are generally considered criminal offences. In addition to applicable criminal sanctions, the project company is entitled to convert or disconnect illegal connections and file a court action to recover the damages incurred.

2.12. PENALTIES, SANCTIONS AND BONUSES

Under GEO 34/2006, the contracting authority is entitled to establish and pay certain bonuses to candidates/tenders to the public procurement procedure, but it has to include such bonuses when calculating the estimated value of the public procurement contract. The bonus policy has to be established before initiating the procedure for awarding the contract.

The contracting authority may also organize a design contest which is either an independent procurement procedure, with or without bonuses/payments to participants, used especially for landscaping and architectural projects, or it is part of another procedure that leads to the awarding of a services contract. In case a design contest is organized, the contracting authority has the obligation to include in the estimated value of the project the total value of the bonuses or payments that are going to be awarded to the competitors in order to comply with the principles of non-discrimination and equal treatment. Infringing such legal provisions may trigger the annulment of the awarding procedure or even of the cancellation of the contract itself.

Regarding the possibility to include the bonuses in the final consumer tariff provided by the concession contracts, the principle guiding such contracts is that of ensuring, based on optimal management, the performance of activities at an adequate level and at accessible costs for the end users. Accordingly, such bonuses may be included in the final consumer tariff, provided that the cost of the service remains accessible.

Penalties are freely negotiable between parties, but there are few cases when courts of law or arbitral tribunals have revised the amount of penalties. Such courts or arbitrators have decreased penalties to a reasonable limit or even rejected entirely the request for penalties because the amount of the penalties exceeded a reasonable limit.

Liquidated damages set out, in advance, an estimate of the amount of the damages incurred by one contractual party when the other is in breach or defaults on its obligations. Thus, generally, under Romanian law, unlike French or Italian law, the court does not have to verify the value of the damages incurred by the party not in breach in order to award the liquidated damages, and the court cannot increase or decrease the amount of such penalties. However, in certain cases, like partial performance of the obligation or abusive liquidated damages, the court would have the prerogative to decrease the amount of penalties, or void an abusive damages clause.

2.13. TRUSTS, AGENCY AND OTHER LEGAL RELATIONSHIPS

Trusts are not regulated under the Romanian law.

Agency agreements have the legal nature of a commercial mandate agreement. Under such agreement, the agent, who is always a professional, legal or natural person, is appointed permanently to (i) negotiate business matters for the mandant or (ii) to negotiate and conclude business in the name and on behalf of the mandant. Under the agency agreement, the agent must use their best efforts to fulfil the mandate in line with the assigned representation powers. Thus, the agent's obligations are to use their best efforts, not necessarily to obtain the best result. The liability of the agent shall be established in abstracto, as the agent is a professional, and the liability of the agent is higher then the liability of the mandatee as established in civil matters.

2.14. TAKING SECURITY AND INSOLVENCY

2.14.1. Restrictions and Limitations on Creation of Security Interests

The legal regime of securities is quite flexible, allowing lenders to take sufficient benefits. Thus, securities may be created over all project assets, considering however the assets' nature (immovable or movable assets). Security interests may be granted in key assets, such as: roads, power plants, airports, etc., except for those that are in the public domain of the state. Thus, public assets cannot be subject to a security interest, as such assets cannot be conveyed or charged with any encumbrance.

Pledges (i.e., security interests over movable assets) may be created over future assets, but mortgage (i.e., security interests over immovable assets, such as land, buildings) are prohibited over future immovable assets, except for mortgages securing real estate investments.

Insurance contracts may also be endorsed for the benefit of third parties, allowing lenders to receive the eventual insurance proceeds, or the contracts may be pledged as security.

Pledges on the shares of a limited liability company or a joint stock company are allowed. By enforcing a share pledge, the creditor may become a shareholder of the debtor or may sell the shares to a third party via any reasonable commercial proceedings it deems fit. Enforcement of one of the pledges that is part of the security package does not imply that the benefit of the remaining securities is lost; on the contrary, a secured lender may choose at its option to enforce any, part or all of the securities simultaneously, or in sequence against any or all obligors.

Secured creditors must take into account that during bankruptcy proceedings, the Court may cancel:

- agreements (including lending facilities or securities) fraudulently concluded within three years prior to the commencement of the insolvency procedure to the detriment of the creditors;

– securities created within 120 days prior to the commencement of the insolvency procedure for the purposes of guaranteeing a previously unsecured debt of the insolvent debtor.

Lenders may use substitute entities to step into contracts entered into by their debtors, provided such substitution is permitted under the relevant contracts. The liabilities undertaken by the lender stepping into the debtor's position in a contract shall be determined by the contract. However, step-in rights and transfer of rights and obligations to the lenders are subject to the judicial administrator/liquidator's approval, if such occur during the insolvency procedure.

2.14.2. Insolvency

Under Romanian Insolvency Law, insolvency is defined as *insufficiency of the available funds for payment of the due and payable debts*. Insolvency is assumed when the debtor has not paid its debts within at least thirty days from their maturity.

The insolvency proceedings may be triggered, *inter alia*, upon request of a creditor whose receivables against the debtor amount to at least RON 30.000 (or six average salaries for employees) and the creditor has not been paid for at least thirty days.

Opening of the insolvency procedure is ordered by court decision and the proceedings are conducted under the supervision of the syndic judge. Upon the initiation of the insolvency procedure, the syndic judge appoints an administrator or a liquidator.

The administrator/liquidator carries out the insolvency procedure until it is confirmed or replaced by the creditors' assembly or by creditors holding at least 50% of the receivables amount, upon recommendation of the creditors' committee (i.e., a structure appointed by the court or by the creditor's assembly and granted certain attributions, *inter alia*, to make recommendations on the debtor's reorganization plan, to issue reports on the measures taken by the administrator/liquidator, etc.). The decision of the creditors' assembly in respect of the administrator/liquidator's confirmation or replacement is subject to the syndic judge's endorsement.

Creditors are entitled to take actions in order to rehabilitate the debtor and restructure its business within the insolvency procedure, in order to avoid bankruptcy. Thus, within thirty days from publication of the final table of receivables, a reorganization plan may be proposed by creditors holding at least 20% of the total value of the receivables, provided they expressed their intention to propose a reorganization plan at the first meeting of the creditors' assembly. A reorganization plan may provide operational, financial and/or corporate restructuring of the debtor, the reduction of the debtor's business by liquidating certain assets, the restructuring of the debtor's debts, etc. The maximum duration of such a plan is four years.

The reorganization plan must be initially approved by the syndic judge and by a vote of at least half plus one of the receivables categories (the creditors are organized

considering the type of their receivables in so-called receivables categories), and finally confirmed by the syndic judge.

If the reorganization plan is successful, and the creditors taking part in the insolvency proceedings are paid in full, the insolvency proceedings against the debtor are ceased by order of the court.

Operators acting in fields of public interest such as: water supply, public sanitation services, energy sector, telecommunications, etc. carry out their activity based on licenses/authorizations granted by public authorities. Generally, all licenses and authorizations are suspended or withdrawn when the private operator enters the reorganization procedure, but the operator is required to continue its activity for a limited period in order to ensure continuity of the service performed. The state does not have the right to step in and take over a project prior to the actual insolvency.

In case the operator is declared insolvent and wound-up, the state will have to grant the public service to another operator, based on the specific procedure.

Receivables against a bankrupt debtor are prioritized for payment as follows:

- taxes, stamps or any other expenditure related to the insolvency procedure;
- receivables of creditors secured with movable or immovable security interests;
- receivables of employees;
- credits, interests and related expenses granted by credit institutions after initiation of the insolvency procedure, as well as receivables resulting from the debtor's activity after initiation of the insolvency procedure;
- receivables owed to the state for taxes, social contributions fines, etc;
- sums owed based on support obligations, child alimonies or payment of periodic sums destined to support means of living;
- sums established by the syndic judge for the support of the debtor (individual person) and their family;
- bank credits, related interests and expenses, receivables resulting from goods delivery, services supply or other works and leases (to the extent they are not secured);
- other unsecured receivables;
- loans granted to the debtor by its significant shareholders or a member of the economic group;
- receivables from gratuitous acts.

2.15. CURRENCY

Through a series of enactments issued in 2005 and 2006, the currency market was liberalized by the National Bank of Romania (NBR). Since the currency market is completely liberalized, non-residents are entitled to obtain, hold and use financial assets expressed either in RON or in foreign currency and such foreign currency may be freely converted through the domestic currency market. In addition, the non- residents may also

(i) open and hold accounts with credit institutions, either in RON or in foreign currency, and (ii) repatriate and transfer their financial assets.

According to the enactments in force, the payments, cashing and transfers, or any other similar operations between the residents pertaining to trade with goods and services are mainly made in national currency (i.e., RON), except for certain categories of residents which are expressly provided under law, such as, *inter alia*, residents paying and cashing proceedings arising out of external services and contracts, residents paying and cashing proceedings from foreign operations, etc.

Any capital currency operations (e.g., loans, long term investments, etc.) between residents or between residents and non-residents may be executed in RON or foreign currency with no restriction.

The exchange rate used in a transaction is subject to the negotiations and agreement of the parties. NBR only provides a reference exchange rate. Nevertheless, as a matter of practice, in the vast majority of transactions, the parties refer to the exchange rate settled by NBR for the day of the transaction.

Pursuant to Romania joining the European Union, Regulation (EC) No. 1889/2005 (on controls of cash entering and leaving the Community) became directly applicable in Romania. Accordingly, in order to prevent money laundering, any individual entering or leaving the EU with EUR 10,000 in cash has to declare such sum to the competent authorities.

Currency transfers are also subject to anti-money laundering rules. In this respect, Romania has aligned its legislation with the European Union requirements. Thus, banks are bound to report to the National Office for the Prevention and Combat of Money Laundering: (i) any suspicious transaction (i.e., the operation which, according to its nature and unusual features with respect to the activities performed by a client of a financial institution, raises the suspicion of money laundering or of terrorist acts' financing) as well as (ii) any operations with cash or external transfers whose individual or aggregate value exceeds the equivalent of EUR 15,000.

2.16. EMPLOYMENT

2.16.1. Transfer of Employees

In case the outsourcing of the facility to the project company implies a transfer of the undertaking, or of units or part thereof, as defined by the Romanian laws (i.e., Law No. 53/2003 – Labour Code[22] and Law No. 67/2006 on the protection of the employees' rights in case of transfer of the undertaking, or of units or part thereof)[23] the rights of the

[22] Published in the Official Gazette of Romania No. 72 of 5 Feb. 2003 as amended and supplemented to date.
[23] Published in the Official Gazette of Romania No. 276 of 28 Mar. 2006.

existing employees of the public entity working in the outsourced facility are protected. Thus, such employees have the right to be consulted and informed prior to the transfer and the right to continue working in the project company. Moreover, the rights and obligations of the public entity arising from the individual employment agreements and from the applicable collective bargaining agreements existing on the undertaking transfer date shall be fully transferred to the project company.

Whether outsourcing of a facility by a public entity to a project company constitutes transfer of an undertaking has to be analysed on a case by case basis, no criteria being provided by the current legislation.

If the transfer is not defined as the transfer of an undertaking, the employees may be transferred to another entity or contracting party only with their approval. In such a case, the employee has to terminate the existing individual employment agreement with the public entity and enter into a new employment agreement with the transferee entity.

There are no legal requirements or limits on how many local employees the project company must employ.

At the end of the contract with the project company, or if such contract is terminated, all or part of the employees of the project company – including both the employees transferred to the project company originally and new employees – may be transferred de jure to the public authority only if such transfer represents a transfer of an undertaking under the Romanian law.

2.16.2. Secondment

Public entities may unilaterally decide on the secondment of their employees to the project company for a period not exceeding one year. Exceptionally, the period of the secondment may be extended for objective reasons requiring the employee's presence within the project company, with the employee's consent, every six months (i.e., for a period of six months). An employer to which an employee was seconded shall grant the rights due to the seconded employee. During the secondment, the employee shall enjoy either those rights granted by the employer having ordered the secondment, or those granted by the employer to which such employee was seconded, whichever is more favourable.

Companies have to inform and consult with the trade unions/employees' representatives, *inter alia*, on decisions that may lead to collective bargaining or transfer of the undertaking or may affect the rights and interests of the employees or the work place, as detailed in the ‘Trade Unions’ section. Moreover, the obligation to inform and consult may also apply in case of the secondment of the employees to the project company.

2.16.3. Payment of Benefits

The labour legislation requires in certain cases the payment to the employees of benefits for social security, medical insurance, vacation and housing and clothing allowances. The types and value of such benefits are usually provided by the law and by the applicable collective bargaining agreements.

Thus, since infrastructure services include a large area of services which may be subject to different collective bargaining agreements, the benefits to which the employees working in the infrastructure activity are entitled to may vary and shall be analysed on a case by case basis.

The public employees transferred to a private company retain their employment benefits at law only in case of transfer of an undertaking.

Thus, the rights and obligations of the transferred employees resulting from the collective bargaining agreement in force on the date of the transfer cannot be unilaterally amended for the entire term of such agreement. However, the agreement can be re-negotiated with the new employer any time after one year from the transfer date.

Under the equal treatment for all employees rule, and excepting the case of transfer of an undertaking mentioned above, an employer can grant bonuses or incentives only to some of their employees provided that the conditions for granting such bonuses or incentives are non-discriminatory, very well defined and based on objective reasons and criteria.

2.16.4. Redeployment

A project company may redeploy existing personnel into different structures and different sectors of the project company's activities:

- by delegation, for a period which cannot exceed sixty days and which may be extended once for a maximum of sixty days, with the employee's consent.
- by provision of a mobility clause (i.e., clause stipulating that the employee will execute its obligations in various work places).

If redeployment changes the terms of the individual employment agreement of the existing personnel (e.g., changes the job title or assigns additional tasks to the employee), the redeployment can be made only with the employee's consent.

2.16.5. Sanctions

Employers are entitled to apply sanctions to any employee for a breach of their employment duties. Termination of the individual employment agreement for disciplinary reasons is the most severe sanction that can be applied by the employer.

Disciplinary sanctions should be proportionate to the infringement perpetrated by the employee, taking into consideration the circumstances, the guilt of the employee, consequences of the infringement, general behaviour of the employee and other prior disciplinary sanctions.

The Romanian law does not define 'severe infringements' that may lead to the termination of the individual employment agreement. Such infringements may be established by the applicable collective bargaining agreements or the employer's internal regulations. Therefore, employers can remove dishonest or bad workers only in accordance with the law and any applicable collective bargaining agreements or internal regulations.

Also, the employer may impose internal rules regarding the disciplinary procedure (e.g., written notes from the superior of the employee subject to the disciplinary procedure) with the observance of the procedure provided by the law (i.e., a prior disciplinary research, discussions with the employee subject to the disciplinary sanction and issuance of a well-grounded disciplinary decision).

2.16.6. Redundancy

Redundancy may be individual or collective, depending on the number of the employees made redundant. Prior to any collective redundancy a special procedure should be considered (i.e., consultation with the trade union and employees' representatives and notifications issued for the Labour Territorial Inspectorate and the Territorial Employment Agency).

In case of individual or collective redundancies, the law provides the employees' right to compensation, without establishing the amount of such compensation. Usually, such compensation is set out under the applicable collective bargaining agreements.

When redundant employees become unemployed, they are insured for a certain period of time by the state social insurance system and they benefit from social indemnities (i.e., unemployment indemnity, indemnity for illness, etc.). Also, such period of unemployment is considered contributory period for purposes of the public pension system.

2.16.7. Trade Unions

The Romanian laws (i.e., Labour Code, Law No. 54/2003 on Trade Unions[24]) give employees the right to join trade unions in order to protect and promote their professional, economic and social interests.

[24] Published in Official Gazette No. 73 of 5 Feb. 2003.

One of the trade unions' rights is to declare a strike. The strike is a collective and voluntary work cessation within a company, and can be declared during conflicts of interests. Strikes may be declared only to protect the professional, economic and social interests of employees, and they may not target political goals (i.e., goals that are not related with the work conditions or the employees' rights but aim to change a political/administrative structure).

The decision to declare a strike is made by the trade union representative within the company, and the decision has to be approved by, at least, half of the trade union members. The strike may be declared only if all other possibilities to solve the conflict of interests have been previously exhausted and the strike has been brought to the attention of the company's management forty-eight hours before. A solidarity strike may be declared by employees from other units in order to sustain the claims of other employees.

The Romanian law requires the employer to consult trade unions/employees' representatives in connection with all its decisions which may significantly affect the employees' rights and interests (e.g., collective dismissals, establishing the work norms, holidays, transfer of undertaking, elaborating the health and safety measures, professional training, etc.). The employer and the trade unions shall inform each other about all the decisions regarding the main problems in the work-relations field.

2.16.8. Requirements

To work in Romania, individuals who are not citizens of states from European Economic Area must have a long-stay visa, and, in certain cases, a work permit. Annex 1 of Regulation (EC) No. 539/2001 lists the countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.

Long-stay visas for employment purposes are granted to foreigners by the diplomatic missions or by the consulate offices of Romania abroad. They are typically granted at the employee's request submitted within thirty days of the issuance of the work permit. The long-stay visa for employment purposes has to be approved by the Romanian Visas National Centre.

2.17. CHOICE OF LAW

In general, parties may mutually choose the law governing their contractual relationship, provided a 'foreign' law element (in Romanian '*element de extraneitate*') can be identified as a feature of such relationship. Although the legal term 'foreign law element' is not clearly defined under current legislation, practice has outlined its applicability to include cases where: (i) one or both parties have a connection with a foreign country (e.g., a party is a foreign legal entity or its seat or business assets are located in a foreign country, etc.); (ii) the movable or immovable assets related to the agreement of the parties are located in a foreign country or, though they are on Romanian territory, they are

subject to foreign law; (iii) the contract was executed or is to be performed in a foreign country; (iv) under Romanian law, the lawsuit pertaining to an agreement is to be settled under the jurisdiction of a foreign law.

However, the governing law chosen by the parties will not be applicable if such law: (i) provides regulations contrary to Romanian mandatory laws on international private law; or (ii) was chosen or became applicable by fraud.

As a general rule, the parties to a PPP or a project finance transaction are free to elect the law governing their contractual relationship, even if one of the parties is a government entity. However, certain limits on the choice of law are applicable under the Romanian law. For example, under the current legislation, the property interest in assets and the dismemberment rights deriving from the assets (e.g., easements, usufruct), as well as the securities charging the assets (e.g., mortgages, pledges), and the mandatory publicity formalities (e.g., regarding the land register) in relation thereto, are governed by the law of the country where such assets are located.

Accordingly, the establishment, assignment or modification of interests in immovable property located in Romania will always be subject to Romanian law. Lease agreements and other similar contracts whereby the project company gains a right to use immovable property may be governed by a foreign law, provided such usage right cannot be qualified as a dismemberment right. The concession agreement for Romanian public property is governed only by Romanian law. Financing facilities could be subject to a foreign law chosen by the parties, although the accompanying securities in immovable property or dismemberments will be governed in accordance with Romanian law.

Regulation (EC) No. 593/2008 (the law applicable to contractual obligations) provides a unitary approach throughout the Member States to the problem of identifying the law applicable to obligations of a contractual nature. Pursuant to Romania joining the European Union, Regulation No. 593/2008 became directly applicable in Romania. Consequently, Romanian private international law regulations will apply only to the situations that are not subject to the European Regulation.