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1 INTRODUCTION

Corporations around the globe are beginning to look upon Romanian companies as extremely attractive targets for the implementation of their outsourcing projects. This involves a range of maintenance or support assistance services as well as the creation of products such as specialized software.

In the last few years, Romania has become a preferred destination for offshoring services, especially in the context of Romania joining the European Union (EU) on 1 January 2007. An increasing number of multinationals specialized in outsourcing have already set up service centres across the country, and there are also many local companies specialized in providing offshoring services (especially in information technology (IT)) to foreign companies.

Romania has become a destination of choice for companies looking for both a workforce with the appropriate combination of technical and language skills, and for a secure and cost-effective business environment.

The main reasons why investors choose Romania as an offshoring destination are the lower operational costs, particularly in relation to workforce costs, and the large, skilled workforce, especially in the IT field. Romania becoming a member of the EU has also been beneficial, especially for Western European investors, who have taken advantage of the various privileges deriving from the common market. In addition, Romania has an attractive fiscal regime, with taxes that are considerably lower in comparison to the rest of the European Union.

2 OPERATIONAL STRUCTURES: FORMS OF ROMANIAN COMPANIES

The most frequent forms of offshoring business processes in Romania are third-party supplier structures and captive structures.

The traditional structure for offshoring is considered to be the third-party supplier structure, especially in the small to medium scale offshoring of IT services. This is a services agreement between a foreign client and a Romanian supplier.

In the last decade, numerous multinational companies within the outsourcing industry have opened subsidiaries or branches in Romania, operating fully or partly under the control of the foreign parent company.

The most popular forms of company chosen by foreign investors are the limited liability company (in Romanian *societate cu răspundere limitată* or 'SRL') and the joint stock company (in Romanian *societate pe acțiuni* or 'SA'). These represent the highest percentage of the total number of companies currently operating in Romania, and this is due largely to the limitation of liability of the shareholders up to their contribution to the subscribed share capital in both forms.

Between the two forms of company, the SRL is preferred for the flexibility in its legal framework in regard to its organization and management. The law establishes a minimum set of rules which the shareholders may supplement, and from which in some cases they may derogate, in accordance with the specificities of the respective business. An SRL can have up to fifty shareholders and is usually managed by one or more directors.

An SA is more strictly regulated by law and is compulsory in the case of companies operating in certain sectors of activity (e.g. banking and insurance). It is the chosen form of organization for companies that require significant share capital contributions from a large number of shareholders, due on the one hand to the extensive and compulsory provisions stipulated by law regarding the management of the company, and on the other hand to the freedom of transacting with the shares. An SA must have a minimum of two shareholders (no maximum number is imposed) and can opt for a one-tier (Board of Directors) or two-tier (Board of Directors and Supervisory Council) management system.

Foreign companies also have the option to register a 'branch' of their company in Romania. A branch is not a separate legal entity; however, it has a separate patrimony and may perform commercial activities in Romania in accordance with the mandate granted by the parent company.

3 ISSUES TO CONSIDER WHEN OFFSHORING TO ROMANIA

In a detailed analysis of a number of key European locations, Bucharest in Romania has emerged as having the potential to be the next European

location for a business process outsourcing (BPO) delivery centre, with a special focus on French and other Latin languages skills. This is based upon the following:

- Workforce/Growth: Bucharest has a high number of university graduates (up to 10,000 people annually), and so there is access to a flexible and well-educated workforce.
- Scope: Bucharest is the only location that provides sufficient French, Italian, and Spanish language skills, with 20% of the city's population speaking French and 10% Italian/Spanish.
- Cost: BPO salaries are moderate in comparison to countries in Western Europe.
- Economic Risk: Romania has been a member of the EU since 2007.

The European culture, the geographic proximity (it takes at most a three-hour flight to reach anyplace in Europe), a time zone compatible with working schedules, especially for Western Europe, and furthermore the existence of (still) lower costs than in Hungary, the Czech Republic or Poland are some of the further competitive benefits Romania offers.

Deciding on which region and then in which country to offshore services is a complex task involving the meticulous and time-consuming analysis of various factors. While we cannot oversee all of the issues that a company may consider, our purpose is to briefly present in this chapter the main legal implications of offshoring services to Romania, especially if this involves setting up a new business entity. When using a third-party supplier, if the offshoring company does not have a direct presence in Romania – and thus does not employ Romanian personnel, nor is it subject to Romanian fiscal legislation – the main issues may be dealt with through the services contract. Issues which relate to protection of intellectual property (IP), flow of personal data and contract enforcement shall, however, be of interest to such investors as well.

3.1 Employment

3.1.1 Cost and Availability of the Workforce

One of the determining factors in choosing an offshoring location is the cost and availability of the workforce. Romania has a large pool of university graduates, especially in IT and other technical fields. Another very important reason for offshoring to Romania is the much diversified linguistic capabilities of the workforce, proficient in languages such as English, French, German, Spanish, and Italian.

Due to steady economic growth and an increasing number of offers of employment, salaries have increased in the last few years, particularly for

highly skilled employees. However, the cost of employment in Romania remains low compared to the United States or Western European countries. For example, the Romanian average monthly net salary for December 2008 was RON 1,489,[1] the equivalent of EUR 346, with a spread of EUR 184 in the clothing/textiles industry to EUR 997 in the financial services industry. While the minimum mandatory gross salary in 2008 was EUR 141 (the second lowest minimum salary in the EU according to Eurostat), salaries for highly skilled professionals and senior managers are similar to those seen in Western Europe.

While a large number of outsourcing or technology companies have opened service centres in Bucharest, there has recently been a rising interest in other locations throughout the country – especially the large university centres – due to the availability of many young graduates and the lower employment costs.

3.1.2 Legal Framework

Another important factor to consider is the legal framework of employment relationships in Romania.

Labour relationships in Romania are governed mainly by the Labour Code. Of equal importance are Collective Labour Agreements concluded at national level. These are a result of negotiations between various trade unions and employer organizations, and adherence to them is mandatory for all employers. Collective Labour Agreements contain supplementary rights for employees as compared to the Labour Code. Further specific issues, such as the health and safety of the workplace, labour disputes, and trade unions, are regulated by other pieces of legislation.

3.1.3 Employment Agreements

Employment agreements are based on a standard model, which has been adopted from a decision of the Ministry of Labour and Social Solidarity. This contains all the mandatory clauses of an employment agreement according to the law (e.g., workplace, position, salary, annual leave, notice periods, duration of work). Further clauses may be added to an employment agreement depending on the requirements and specific needs of the employer (e.g., non-compete and mobility clause). The Labour Code stipulates certain minimum rights of employees, which employees cannot waive and which cannot be limited by the agreement of the parties to the employment agreement.

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1. According to the official report of the National Institute for Statistics at <www.insse.ro/cms/files/statistici/comunicate/castiguri/a08/cs12e08.pdf>.

Employment agreements must be concluded in writing and must be in the Romanian language. The employer is also obliged to record it with the internal electronic registry as well as with the competent territorial labour authorities. Romanian law also gives effect to employment agreements concluded verbally, but the parties must prove any such verbal agreements through any available evidence.

It is also mandatory for employers to draft and adopt Internal Regulations, containing some mandatory stipulations which relate to the employees' conduct and also to the employers' obligations in respect of health and safety in the workplace. Internal policies by companies are common practice in Romania, especially in the case of multinational companies extending their business activities to Romania. Such internal company policies are generally attached to the Internal Regulations and as such are mandatory for the employer and employees, provided, of course, that they are compliant with Romanian law.

3.1.4 Termination of Employment

Employment agreements may be terminated in the following cases:

- as of right (e.g., nullity of the employment agreement or a criminal conviction of the employee);
- by the mutual consent of the parties;
- by the initiative of the employer for reasons pertaining to the employee (e.g., breach of discipline or professional incompetence) or for reasons not pertaining to the employee (e.g., reorganization of the employer's activity); or
- by the initiative of the employee.

During the trial period (up to thirty days for non-managerial positions and ninety days for managerial positions), employment agreements may be terminated by either party by sending a written notice prior to the end of the trial period.

The procedure for the dismissal of an employee for reasons of breach of discipline or professional incompetence is quite complex and time-consuming. Dismissal can only be decided after a preliminary investigation, comprising of the following steps: an internal decision to initiate the investigation based on feedback from the employee's direct supervisor; inviting the employee to a meeting where the employer must present to the employee the reasons why it initiated the investigation and where the employee must be given the chance to present a defence; drafting minutes of the investigation meeting, followed by a well-grounded decision of any measure taken by the employer (i.e., warning, temporary replacement or reduction of salary, or termination of employment). In a case of dismissal for professional incompetence, the employer must present evidence (e.g., practical or written tests) proving that

the employee has consistently failed to demonstrate that he/she has the required capabilities for performing the job.

A dismissal decision that is not preceded by this procedure or that otherwise infringes the legal provisions which relate to the dismissal of employees shall be null and void. There are a great deal of successful legal actions challenging dismissal decisions, due mainly to the following reasons:

- there is no stamp duty to be paid by the employee for challenging the employer's decision;
- if the decision is found to be null and void, the employee shall receive his salary rights from the moment of the dismissal decision up to the date of the court decision and, if requested by the employee, the court may also order that the employee be reinstated in the former work-place; and
- the courts generally tend to favour the employees as the weakest party in the employment relationship.

3.1.5 Foreigners' Access to Romanian Labour Market

Since Romania joined the EU, citizens of the European Union and of the European Economic Area (EEA) may reside and engage in employment relationships in Romania without having to obtain a residence or work permit. Such citizens require a registration certificate, although the procedure to obtain one is quite simple and short.

The procedure for the permanent employment of citizens of other states is more time-consuming and complex. For such foreign citizens, it is obligatory that they first obtain a work authorization, followed by a visa for work purposes and a residence permit for work purposes. Foreigners may obtain a work permit if the following conditions are cumulatively complied with:

(1) the vacancy cannot be filled by either a Romanian citizen, a citizen of the EU or of the EEA, or by a Romanian permanent resident;
(2) they meet the standards of professional expertise required by the employer;
(3) they are medically capable of performing the respective activity and they have not been convicted for criminal offences that would make them incompatible with the activity to be performed in Romania;
(4) they are within the annual contingent approved by the Government;
(5) the employer has no debts to the state; and
(6) the employer actually performs the activity for which the work authorization is being requested.

In order to demonstrate compliance with the condition under (1) above, the employer must submit to the competent authorities the following documents:

(a) a certificate issued by the territorial employment agency from the employer's headquarters regarding the available workforce for the vacancy communicated by the employer;
(b) proof of publication of the job announcement in a journal of wide circulation; and
(c) the minutes of the selection realized by the employer between the candidates for the respective vacancy.

That is, the employer must be able to prove that due to the specific capabilities and expertise of the position, the vacancy could only be filled by the foreigner.

However, the condition in point (1) above is not required if:

(a) the foreigner is first seconded by the foreign employer to a Romanian employer and, once the work permit for the secondment expires, the Romanian employer directly employs the foreigner; or
(b) the foreigner is the sole director of a Romanian company with foreign share capital participation.

3.1.6 EU Acquired Rights Directive

Romania has implemented the EU Acquired Rights Directive 2001/23/EC, and the Romanian Labour Code has been supplemented by Law No. 67/2006 regarding the protection of employees' rights in the case of transfer of a company. The law now stipulates that in the event of a transfer of a company, business unit, or part thereof to another owner, the employment contracts of employees of the transferred unit shall also be transferred to the new owner. That is, the transfer of a company, business unit, or part thereof may not constitute a reason to terminate the employment agreements by the assigner or assignee. The assigner and assignee have the obligation to inform and consult the union or the representatives of the employees before the transfer with regard to the legal, economic, and social implications of such transfer for the employees.

3.2 Fiscal Regime

One of the driving factors of the increase in investments in Romania over the last few years has been the adoption of a new tax regime, with lower income taxes than those applied in neighbouring countries.

3.2.1 Tax Regime

The Romanian tax regime is regarded as quite complex, due to the numerous and constant amendments of the tax legislation enacted in the last

few years which have given rise to multiple and varying interpretations of the law. The main legislative acts that govern fiscal relationships in Romania are the Fiscal Code and the Fiscal Procedure Code, together with the Methodological Norms for the application thereof and a large body of secondary legislation.

3.2.1.1 Corporate Income Tax

Companies operating in Romania, regardless of their business form, pay a 16% corporate income tax, applicable on the net profit.

3.2.1.2 Dividend Tax

The dividends obtained by a foreign legal person shareholder in a Romanian legal person are taxed as follows:

- 10% for shareholders residing in the EU or in the EEA;
- tax free for shareholders residing in the EU or in the EEA which held, in the two years prior to the payment of dividends, at least 10% of the shares of the Romanian legal person;
- 16% for shareholders residing in other countries.

3.2.1.3 Value Added Tax

The level of VAT in Romania is currently 19% of the value of the supplied services or goods.

3.2.1.4 Transfer Pricing

When setting up operations in Romania through a subsidiary or a branch, investors should be aware of the transfer pricing rules under the Romanian Fiscal Code. These state that transactions between affiliated persons must be performed at arm's length – that is, the commercial and financial conditions must not differ from those of transactions between independent persons. The fiscal authorities may adjust the amount of the income or expense of either of the affiliated parties participating in a transaction as necessary, in order to reflect the market price of the goods or services supplied through the transaction. In order to establish this market price, the fiscal authorities shall use the most appropriate of the following methods:

- a method of price comparison, according to which the market price is established on the basis of prices paid to other persons who sell comparable goods or services to independent persons;

- the 'cost plus' method, through which the market price is established on the basis of the costs of the goods or services, plus the corresponding profit margin;
- the resale method, through which the market price is established on the basis of the resale price of the goods or services to an independent person, reduced by the cost of the sale, other relevant costs, and the profit margin;
- any other method recognized by the Organization for Economic Cooperation and Development (OECD) guidelines on transfer pricing (such as the net margin or the sharing of profit method).

3.2.2 Tax Incentives

3.2.2.1 Research and Development Costs

The most recent fiscal incentives were granted in December 2008 through a modification to the Fiscal Code. The Fiscal Code stipulates that, for the purposes of computation of corporate income tax, the company may benefit from an extra deduction of 20% if costs for research and development have been incurred. Furthermore, the equipment used for research and development activities may be depreciated by using the accelerated depreciation method – that is, deduction in the first year of up to 50% from the asset value. The procedures for applying such incentives are yet to be enacted.

3.2.2.2 Dividends Reinvested in Order to Develop the Business

Another recent incentive relates to the tax exemption of reinvested dividends. Thus, starting with the fiscal year 2009, the following dividends will be exempt from the payment of tax:

(1) dividends reinvested for the purpose of maintaining existing jobs and creating new jobs and aimed at developing the business of that Romanian company; and
(2) dividends invested in the share capital of another Romanian company in order to create new jobs for developing the business of the latter.

As with the case of the fiscal incentives relating to research and development costs, the procedure for the tax exemption is expected to be adopted soon.

3.2.2.3 Software Development Income Tax Exemptions

The salary granted to employees who are developing software is tax exempted.[2] In order for such an exemption to be applicable, the following cumulative requirements have to be met:

(1) the individual must be employed under an individual labour agreement;
(2) the employee's position within the company must be one of the following: analyst, programmer, data processing system planner, engineer/data processing system programmer, database administrator, software engineer, data processing project manager;
(3) the position must be part of a specialized computer science department within the company;
(4) the individual must have a degree in Automatics, Computers, Computer Science, Mathematics, Cybernetics, Electronics; and
(5) the employer must have obtained in the preceding fiscal year and separately registered in its analytical balance sheets an annual income of at least the Romanian currency equivalent of USD 10,000 for each employee benefiting from the exemption of income tax, as a result of the activity of creating computer programs that are destined to be sold based on current contractual relations.

The employer bears the responsibility for determining whether a person may be included in the categories of activities or occupations for the purpose of benefiting from such exemption and for proving compliance with the above conditions.

3.2.3 State Aid Schemes

Companies may apply for different state aid schemes regulated in current legislation for setting up or developing their current activity.[3] State aid may be granted under any of the following forms:

- non-refundable financial support for the acquisition of tangible and intangible assets;
- financial contributions from the state budget for creating new workplaces; or
- reduced interest rate when contracting loans.

2. Article 55 para. 4 letter l of the Fiscal Code, as subsequently modified and supplemented and Order no. 250/2004 of the Ministry of Labour and Family.
3. Government Emergency Ordinance no. 85/2008 regarding the encouragement of investments.

The support measures may be provided to investments which are located in geographical areas with poor economic development or with higher unemployment rates than those registered at national level, which contribute to the development or modernization of infrastructure, or which contain research and development and innovation activities and use state-of-art technologies and so forth.

In order to benefit from the above-mentioned facilities, the investor must submit to the competent authority a request for the grant of the incentive, as well as the investment plan and the relevant documentation, according to the applicable state aid scheme. Numerous state aid schemes have been enacted and are currently offering incentives to investors in various fields of activity.

One example of a state aid scheme is the possibility of obtaining loans with a subsidized interest rate or with subsidized guarantees from the Romanian Export-Import Bank.[4] Such loans may be used for financing investment projects or for the current business activities of the company. The loans may be granted only in Romanian currency. The maximum amounts which may be borrowed range between EUR 35,000 and EUR 1,500,000 (depending on the type of loan) and may be granted for periods ranging between one and ten years. The interest rate is subsidized by five percentage points and the loan must be secured with collateral guarantees in a percentage ranging between 20% and 100%.

The Romanian Agency for Investment[5] is the designated authority in charge of the relations with investors and may offer guidance, upon request, with regard to the existing schemes and selection criteria.

3.3 Intellectual Property Laws

Romania has adhered to the most important international treaties in relation to IP and has a very strong set of normative acts which relate to the protection of copyrights, patents, and trademarks. The comprehensive legislative framework, together with the increased enforcement of the rules by the competent authorities and sanctions from the market or from professional associations for infringing business entities, ensure an adequate level of protection of IP in Romania.

4. Information on the types of loans that may be granted by the Romanian Export-Import Bank may be found on the institution's website, at <www.eximbank.ro>.
5. The website of the institution is <www.arisinvest.ro>.

3.3.1 Protection Afforded by IP Legislation

The moment from which the protection granted by IP legislation starts to be valid and enforceable differs for copyright, patents and trademarks. Thus:

(1) Under the Law on copyright and connected rights no. 8/1996, copyright is protected from the moment of the creation of the work; therefore, there is no obligation of prior official registration or public disclosure of the work in order for the copyright to be valid and enforceable against third parties.

(2) Under the Law on patents no. 64/1991, a patent is granted protection only after following an administrative procedure, aimed at verifying if the legal conditions in order to consider the work patentable are complied with. This procedure is finalized by the issuance of a specific protection title (*'brevetul de inventie'*). The applicant enjoys a temporary and exclusive right to exploit its invention starting from the moment of publication of the application for patent in the IP Official Bulletin.

(3) Under the Law on trademarks and geographical indicators no. 84/1998, trademarks are granted protection by the performance of a registration process, followed by the issuance of a registration certificate. The submission of the application for registering a trademark (*'depozitul national reglementar'*) with the State Office for Trademarks and Inventions gives the applicant a priority right – that is, the right to be recognized as the first and sole holder of a trademark. This right is of course subject to compliance with the other substantive and procedural conditions for the issuance of a trademark registration certificate. If a registration certificate is issued to the applicant, the protection of the copyright starts from the moment of submission of the application and lasts for a period of ten years thereafter, with the possibility to renew it for new periods of ten years.

While there is no generally accepted definition of 'know-how' or specific regulations which relate to its protection, it is generally considered, by the corroboration of specific normative acts, that 'know-how' is protected according to Romanian law. The protection of 'know-how' may be insured by the application of various legal rules and principles, such as criminal sanctions (interdiction to divulge work secrets), liability for torts (*'raspundere civila delictuala'*) and legal action for enrichment without just cause (*'imbogatire fara justa cauza'*).

3.3.2 Territorial Application of IP Laws

Copyright protection applies to works of authors who are Romanian citizens or citizens with their domicile or headquarters in Romania, regardless of

whether or not the work was disclosed to the public. Foreign legal or natural persons who are holders of copyright benefit from the protection of the international conventions to which Romania is a party. Alternatively, in the absence of such international conventions, they will benefit from equal treatment with Romanian citizens, provided that the latter also benefit from similar treatment in the respective countries.

Similarly, the protection of patent law and of trademark law is granted to Romanian citizens or citizens having their domicile and headquarters in Romania. Foreign legal and natural persons having their domicile or headquarters outside Romania shall benefit from the provisions of Romanian law under the conditions of the applicable international treaties and conventions to which Romania is a party.

3.3.3 Ownership of IP Rights in the Context of an Employment Relationship

Offshore agreements usually provide for the assignment of IP rights to the client (with or without a license back to the supplier) or the granting to the client of a license to use the IP developed by the supplier in the course of providing the services. However, in order to ensure the effectiveness of such provisions, the client must obtain guarantees that the supplier has the right to assign the IP rights or to grant a license for them. In other words, the IP rights must be properly vested in the supplier, as employer or principal of the author of the protected works, to the extent permissible by local law.

In relation to copyright, in the absence of contrary provisions, the principle is that the patrimonial rights for the works created in the performance of a job, as identified in the employment agreement, shall belong to the author – that is, the employee. Therefore, in order for the patrimonial rights to be vested in the employer, the employer must stipulate in the employment agreement that the patrimonial rights will be assigned to the employer. The employment agreement must also include details of the extent and the duration of such an assignment.

A different rule is applicable for the creation of software. In the absence of a contrary provision, the patrimonial rights over software developed by an employee in the performance of his or her job or at the instruction of the employer always belong to the employer.

In the case of work performed by a third-party contractor pursuant to an order of the client, the patrimonial rights belong, in the absence of a contrary clause, to the author – being the third-party contractor. Therefore, in this case also, the parties should include in their agreement clauses for the assignment of patrimonial rights to the client (e.g., specific rights assigned, the duration and extent of the assignment, and the remuneration of the author).

It should be noted that moral rights always belong to the author of the work and cannot be waived or assigned. According to the Romanian law on copyright, the author of a work has the following moral rights:

- the right to decide if, how, and when the work shall be disclosed to the public;
- the right to be acknowledged in his or her capacity as the author of the work;
- the right to decide under which name the work shall be disclosed to the public;
- the right to claim the observance of the integrity of its work and to oppose any modifications, as well as any interference with the work, if it damages the author's honour or reputation; and
- the right to retract the work, indemnifying, if the case may be, the holders of the usage rights which were damaged by the retraction.

In regard to patents in the context of an employment relationship, the patent law stipulates that in the absence of a more favourable clause to the employee, the right to the patent belongs to:

- the employer, for the inventions realized by the employee in the performance of his or her duties, if the employment agreement provides for a specific task of invention assigned explicitly to the employee and in which case the employee shall benefit from a supplementary remuneration established by contract. If the employer does not apply for the patent within sixty days from the moment when the employee informed the employer of the drafting of the invention's description, the employee shall have the right to apply for the patent; or
- the employee, for inventions realized in the performance of his or her duties, or in the field of activity of the employer, through the knowledge or use of the specific technologies and materials of the employer or the data of the employer, in the absence of a contrary provision. In order for the right to patent to belong to the employer in this case, the employer should include appropriate provisions in the employment agreement. However, even if no such clauses are included in the employment agreement, the employer has a preference right to the invention created by the employee, which must be exercised within three months from the employee's offer.

3.3.4 Enforcement of IP Rights

The holder of an IP right (whether resulting from copyright, patent, or trademark) has various options and rights granted by the law in order to protect its

IP rights from infringement by third parties and to be indemnified in case of such infringement, such as:

- the right to request in a court of law the cessation of the infringement and the obligation of the culpable party to perform everything necessary to restore the plaintiff's right;
- in the case of infringement of copyright, the handing over, in order to cover the suffered prejudice, of the income realized through the infringing act, or if the prejudice cannot be covered in this way, the handing over of the assets resulting from the infringing act, in view of capitalization of such assets, up to the full coverage of the suffered prejudice;
- legal actions based on tort liability (*'raspundere civila delictuala'*);
- legal action based on contractual liability, if applicable;
- legal action based on the principle of enrichment without just cause (*'imbogatire fara justa cauza'*); and
- criminal actions, in some particular cases.

3.4 Data Protection Rules

Romania has implemented the European Communities' legislation in the field of data protection. Thus, the Romanian legislative framework is comprised mainly of Law no. 677/2001 regarding the processing of personal data and the free movement thereof, which transposes in the internal legislation the provisions of Directive 95/46/EC, and secondary legislation issued by the Romanian protection authority.

The main issues that have to be taken into consideration by offshoring companies (whether by a third-party supplier or a captive structure) are the general conditions and principles for the processing of data and the conditions for transfer of such data to operators located outside of Romania.

3.4.1 Processing of Personal Data

Romanian legislation applies to any processing of data carried out in the scope of activities performed by data controllers in Romania. Personal data is defined as any information referring to an identified or identifiable natural person.

The Data Protection legislation establishes the main principles to be followed in the processing of personal data. Thus, personal data which is intended to be processed must be:

- processed fairly and in accordance with the existing legal provisions;
- collected for specific, explicit and legitimate purposes;

- adequate, pertinent, and non-excessive in relation to the purpose for which it is collected and further processed;
- accurate and, if necessary, updated; and
- stored in such a manner that allows the identification of the data subject only for the time limit required to fulfil the purposes for which it is collected and later processed.

The processing of personal data requires, in principle, the consent of the data subject. However, this consent is not required in situations such as when the processing:

- is required in order to carry out a contract or pre-contract to which the data subject is a party;
- is required in order to protect the data subject's life, physical integrity or health, or that of a threatened third party;
- is required in order to fulfil a legal obligation of the data controller;
- is required in order to accomplish some measures of public interest or is in regard to the exercise of public official authority prerogatives of the data controller or of the third party to which the data is disclosed;
- is necessary in order to accomplish a legitimate interest of the data controller or of the third party to which the data is disclosed, on the condition that this interest does not prejudice the interests or the fundamental rights and freedoms of the data subject;
- concerns data which is obtained from publicly accessible documents, according to the law; or
- is performed exclusively for statistical purposes, historical or scientific research and the data remains anonymous throughout the entire processing.

Romanian Data Protection legislation prohibits the processing of sensitive data, such as data concerning ethnic or racial origin, political, religious or philosophical opinions, or other similar information, trade-union membership, or personal data referring to the health or sexual life of individuals. The interdiction on the processing of such data is not applicable, *inter alia*, when:

- the data subject has given his explicit consent to the processing of such data;
- the processing is necessary in order to meet the obligations or specific rights of the data controller in the field of employment law, observing all the legal guarantees; that is, disclosure of the processed data to a third party can be performed only if the data controller is obliged by law to carry out such a disclosure, or if the data subject has expressly agreed to it;

- the processing is necessary to protect the data subject's life, physical integrity or health, or that of another person, and only when the data subject is physically or legally incapable of giving his consent;
- the processing refers to data which is manifestly made public by the data subject;
- the processing is necessary for the establishment, exercise, or defence of a legal claim; or
- the law explicitly lays down derogation for reasons of substantial public interest, and where all additional legal guarantees and rights of the data subject are observed.

According to Article 8(7) of Directive 95/46/EC, Romanian Law sets forth the rules for processing a second distinctive category of sensitive data, meaning identification data. This refers to the personal numerical code and to any other personal data with an identification character (such as series and number of identity card). Such data can be processed only if the subject has explicitly consented to this or if such processing is expressly allowed by a law provision.

In principle, all data processing activities must be notified in advance to the Romanian Data Protection Authority. The law sets out some exceptions to this rule, such that the notification is not mandatory in cases such as when:

- the processing is performed by human resources departments in order to comply with legal provisions and for the organization and performance of economic, financial, and administrative management; and
- the processing relates to personal data mentioned in the curriculum vitae forms of candidates for particular job positions and is performed by potential employers.

Data subjects have corresponding rights which relate to the processing of their data by the data controller or processors, such as: the right to access their personal data; the right to request appropriate rectification, erasure, or blocking of their personal data; the right to not be subject to automated individual decisions (automated decisions based on automated processing of data with the intention to evaluate certain personal aspects); and the right to refer to a competent court any breach of their rights which relates to the processing of their personal data.

3.4.2 Transfers of Personal Data Abroad

Transfers to another state of data that is subject to processing or destined to be processed after the transfer may take place only after preliminary notification to the Romanian Data Protection authority. Transfer of data within the EU can thus be performed after such notification to the Authority.

Transfers to countries which are not considered as being able to ensure an adequate level of protection are also subject to authorization by the Romanian Data Protection Authority. That is, a transfer can legally be performed only after obtaining such authorization from the authority. In such a case, the data exporter will submit to the authority, together with the notification form, a guarantee of protection of the personal data by the data importer, such as standard contractual clauses adopted by the decision of the European Commission.

Pursuant to the European Commission's decision in this regard, the Romanian Data Protection Authority also recognizes that certain countries outside the EU ensure an adequate level of protection and thus transfer of data to such countries may also be authorized.[6] In addition, transfer to United States companies that adhere to the Safe Harbour principles also may be authorized.

The Romanian Data Protection Authority has not yet implemented regulations which would authorize the transfer of data abroad based on Binding Corporate Rules,[7] as recommended by Article 29 Data Protection Working Party.[8]

3.5 Contract Enforcement

When deciding the governing law and jurisdiction for an offshore agreement, it is of utmost importance that the parties seek qualified legal advice from that jurisdiction. This is to ensure full enforcement of the contractual terms and conditions according to that particular law and to make sure that a judgment obtained in that respective jurisdiction will also be enforceable against the defaulting party.

Issues which relate to choice of law, choice of jurisdiction, and recognition and enforcement of foreign judgments are governed by provisions of the relevant EU Regulations or applicable conventions[9] and, if the conditions for applying EU rules are not complied with, by provisions of the Romanian conflict of law rules,[10] together with the international or bilateral treaties to which Romania is a party.

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6. Argentina, Canada, Switzerland, Guernsey, Isle of Man, Jersey.
7. Some national data protection authorities within the EU (such as the United Kingdom) have implemented rules which allow multinational corporate groups to transfer personal data from a data controller located in the EU to a data importer outside the EU, based on Binding Corporate Rules (an internal document adopted by the corporate group which contains adequate guarantees regarding the protection of data in the various countries where personal data is circulated).
8. Details regarding Art. 29 Data Protection Working Party recommendations which relate to Binding Corporate Rules can be found at <www.ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp74_en.pdf>.
9. Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; 1980 Rome Convention on the law applicable to contractual obligations.
10. Law no. 105/1992 regarding the regulation of international private law relationships.

3.5.1 Choice of Law: Specificities of Romanian Law on Limitation of Liability

Given that the different nationalities of the parties to an offshore agreement will be a defining factor of such an agreement and consequently that a foreign element will be involved, the parties may legally subject their agreement to foreign law. Of course, the choice of foreign law shall not prejudice the mandatory norms of the law that may be applicable to the agreement and which cannot be derogated from by the agreement of the parties. The choice of law shall not be upheld if it breaches the norms of public order of Romanian international private law.[11]

In the event the parties choose Romanian law to govern their contractual relationships, the parties should involve Romanian legal counsel in the drafting and negotiation of the terms and conditions, to ensure that the agreed upon terms and conditions are actually enforceable under such law. By way of example, Romanian rules regarding limitation of liability, an issue that is invariably included in any type of offshore agreement, should be carefully considered. Generally, the liability regime in common law countries is somewhat different from that which applies in civil law systems. Therefore, the clauses which relate to limitation of liability in contracts subject to Romanian law need to be drafted taking into consideration the specificities of Romanian law.

According to Romanian law, a party breaching its contractual obligations has to cover the effective loss (*damnum emergens*) suffered by the other party, and the lost profit or gain that could have been realized in the absence of the breach (*lucrum cessans*). Furthermore, only the damages which can be predicted at the time of concluding the agreement can be recovered, except in the event of fraudulent misrepresentation. Indirect damages are defined as those damages which do not occur as the direct effect of a specific breach, and, as an exception to the above rules, may not be recovered in court by a contractual party. This is because the principle is that only the direct damages (i.e., those which are a direct and necessary consequence of the breach) may be recovered. Consequently, in the absence of any express provisions regarding liability, the general rules mentioned above apply: the breaching party shall be liable for *damnum emergens* and *lucrum cessans*, but only insofar as they represent direct and predictable damages. It is therefore prudent to include limitation of liability clauses in commercial agreements, so that the parties can have a correct representation of the maximum liability that they might incur in case of breach of the agreement. A limitation of

11. The rules regarding the exclusive jurisdiction of Romanian courts are considered as norms of Romanian private international law order.

liability clause under Romanian law should take into consideration the above rules and clearly specify the type of liability that the parties accept. It should also be noted that Romanian law does not recognize limitation of liability for cases of gross negligence and wilful intent or if the breach results in personal injury or death.

3.5.2 Choice of Jurisdiction

The parties' choice to submit their dispute to the jurisdiction of an EU Member State shall be upheld in accordance with the provisions of Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation 44/2001'). The rules established by Regulation 44/2001 are also applicable if only one of the parties resides in an EU Member State.

According to Romanian conflict of law rules, if the parties agree to submit disputes to a certain jurisdiction, such jurisdiction shall be competent to hear the case, except for a case when the particular dispute is subject to the exclusive jurisdiction of a different court than that chosen by the parties. By way of example, parties may not choose a foreign court if the Romanian courts have exclusive jurisdiction to hear the case. This includes cases which relate to civil status documents concluded in Romania, which have reference to Romanian citizens, real estate located in Romania, or for the enforcement of a writ of execution on Romanian territory.

3.5.3 Recognition and Enforcement of Foreign Judgments

3.5.3.1 Recognition and Enforcement of Judgments Given in EU Member States

A judgment given in a Member State shall be recognized in Romania without any special procedure being required, in accordance with Regulation 44/2001. Such a judgment shall not be recognized in Romania:

- if such recognition is manifestly contrary to Romanian public policy;
- if it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- if it is irreconcilable with a judgment given in a dispute between the same parties in Romania; or

- if it is irreconcilable with an earlier judgment given in another Member State or in a third Member State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in that Member State.

A judgment given in another EU Member State and enforceable in that Member State shall be enforced in Romania if, on the application of any interested party, it has been declared to be enforceable in Romania. The procedure for making the application shall be governed by Romanian law. The judgment shall be declared enforceable immediately on submission to the Romanian court of proof of enforceability of the respective judgment in the other EU Member State. The declaration of enforceability by the Romanian court shall not be conditional on having first obtained recognition of the judgment.

3.5.3.2 Recognition and Enforcement of Judgments Given in Non-EU Member States

The procedure for recognition of judgments awarded in non-EU Member States is regulated by Romanian conflict of law rules. Thus, a foreign judgment shall be recognized if the following conditions are cumulatively complied with:

(1) the judgment is definitive, according to the law where it was given;
(2) the court that gave it was competent to hear the case; and
(3) there is reciprocity regarding the effects of foreign judgments between Romania and the state that gave the judgment.

The recognition of a foreign judgment can be refused in the following cases:

- the judgment is the result of a fraud committed in the procedure followed abroad;
- the judgment breaches the norms of public order of Romanian private international law; or
- the dispute was settled between the same parties by a judgment, even if not definitive, of the Romanian courts or was in the process of being judged by a Romanian court when the claim was lodged before the foreign court.

Enforcement of foreign judgments may only be performed after the judgment has been properly recognized in Romania according to the above procedure. Enforcement is subject to the judgment being enforceable in the country where it was given and provided that the right to request the enforcement is not affected by the statute of limitations according to Romanian law.

3.5.4 Recognition and Enforcement of Foreign Arbitration Tribunal Awards

Romania is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[12] Consequently, arbitral awards given in any other state that is a party to the convention and which concern commercial matters shall be recognized and enforced in Romania in accordance with the convention.

4 CONCLUSION

The above considerations may prove useful to investors considering offshoring some of their processes or activities to a foreign country, as a means to narrow down their search for acceptable locations. Romania, as a member of the EU, provides numerous guarantees for foreign investors looking to set up operations in Romania or to identify and contract with qualified and experienced local companies to outsource some of their operations. It is an economically and politically secure country, it has a legal system which is compliant with European rules and regulations, and probably most importantly, it has the necessary workforce, with the qualifications and expertise usually required in the outsourcing business, to allow for the implementation of successful offshoring transactions.

12. The text of the Convention and the states that have adhered to it may be found at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.