Kluwer Arbitration Blog

Romanian and Moldovan Perspectives on Construction Disputes during COVID-19

Ioana Knoll-Tudor (Jeantet) · Sunday, June 13th, 2021 · Jeantet

This post is a non-exhaustive summary of an online ICC YAF conference organised on 27 May 2021 primarily for the benefit of the Romanian and Moldovan practitioners, but with the participation of international practitioners having a general interest in construction arbitration in Eastern Europe. The conference comprised two panel discussions, each one debating one of the topics described below.

The Impact of COVID on Construction Arbitration Disputes in Romania and Moldova

In 2020, the Romanian construction sector registered the highest growth rate among the 27 EU countries, being one of the only three EU countries to have experienced a positive growth rate. Of course this does not hold true to the entire sector: both **Claudiu ?âmp?u** (Strabag), for Romania, and **Serghei Covali** (Covali Litigation & Arbitration), for Moldova, pointed out that while COVID impacted negatively civil engineering projects (like office buildings)), infrastructure projects, such as roads and highways actually benefitted from reduced traffic and easier-to-observe social distancing rules and progressed at a faster than usual rate (not yet reaching, however, such a speed as to have contractors benefit from bonuses for early completion!). Moreover, the construction sector in Moldova benefited from a "special treatment" from the authorities, for example, with foreign personnel of employers or contractors being allowed to cross the otherwise closed borders. Despite a rather positive picture of the sector, contractors did file preventively, notices to employers requesting extensions of time; if such requests will be accompanied by requests to additional costs is to be seen in the coming months.

Regulatory landscape

Crina Baltag (Stockholm University) introduced the recently passed Government Decision 298/2021 of 30 March 2021 which sets out the guiding principles of the forthcoming Land Planning, Urbanism and Construction Code ('Civil Construction Code'). This will be Romania's first Civil Construction Code and it is eagerly awaited by the industry as it aims at improving the coherence of the regulatory framework and reducing bureaucratic processes. Baltag then further explained that the Code aims at gathering all laws, regulations and rules which concern rural and

urban planning, required documentation, authorisation requirements, and disputes administration in one document. The forward-looking character of the Civil Construction Code is further reflected in the Decision's proposal to promote specialised judges who would decide upon disputes arising out of construction projects, in particular on matters concerning authorizations and permits by the relevant public authorities. An equivalent proposal would also benefit the Moldovan market which has a similarly dense legislative framework, but no project is in sight yet.

Elaborating on the Romanian legislative framework and the implementation of the FIDIC standard forms of contract in Romania, ?âmp?u indicated that while a few private contracts are regulated by FIDIC, the vast majority of public contracts concerning infrastructure are regulated by standardised general and special conditions adopted by Government Decision 1/2018. **Ioana Knoll-Tudor** (Jeantet), the moderator of the event, clarified that Government Decision 1/2018 (mandatorily applicable to public contracts whose value is of at least EUR 5 million) brought about 2 main changes in the Romanian construction disputes landscape: first, Dispute Adjudication Boards were removed; second, the Decision introduced a compulsory jurisdiction clause which provides for arbitration before the Court of Arbitration attached to the Romanian Chamber of Commerce (therefore excluding the former ICC jurisdiction or any other arbitral institutions).

The Moldovan landscape has its own particularities: FIDIC Contracts are rarely, if ever, used outside public projects where the employer is always the State Road Administration, and the contractors are almost invariably foreign companies. In such contractual relationships, the FIDIC Pink Book 2006 – an adaptation of the red FIDIC 1999 standard forms, is the norm, with the parties always opting for *ad hoc* UNCITRAL arbitration.

Practical challenges contractors are likely to face due to COVID and contractual solutions

First, the contractor is likely to face difficulties in mobilizing personnel, or in obtaining materials due to lengths in the supply chains. *Second*, delays may be incurred due to repeated health & safety inspections by governmental agencies; *third*, laws restricting construction activities and works on the site may be enacted by national authorities. In practice, both Covali and ??mp?u underlined that contractors in Romania & Republic of Moldova sent out notices to employers arguing force majeure and change in laws, but emphasized that for contracts signed after the start of the pandemic, the unpredictability character which is inherent in the definition of force majeure, fades and such arguments may be more difficult to sustain.

Baltag also noted, from an arbitrator's perspective, that there have not been yet many construction disputes directly caused by COVID, and emphasized the importance of the domestic law applicable to the contract in terms of the remedies available: contractors who may not claim force majeure can deploy other concepts, such as frustration, which however under English case-law requires certain conditions to materialise, for example the frustration needs to span for a certain duration before it comes into effect.

Arbitrating construction disputes: best practices and tips

The panel's concluding remarks focused on the actual resolution of disputes in the construction sector, underlining the fact since construction disputes are highly technical and require voluminous

documentation, the virtual-hearings are not an ideal platform for advocacy and that the industry awaits a return to in-person hearings. Among the best practices recommended, maintaining detailed and up to date documentation, employing project managers and a thorough understanding of the domestic applicable law ranked high in the speakers' views.

Expert Witnesses in International Arbitration

Construction disputes almost consistently raise technical engineering and programming issues, requiring detailed analysis of large volumes of data, for example progress reports, schedule programme updates and modelling, drawings etc. Consequently, expert witnesses – such as engineers, architects, surveyors, delay analysts, or accountants play a vital role in arbitration proceedings. Indeed, the Damages Awards in International Commercial Arbitration (2020) Study by PwC & Queen Mary University revealed that tribunals awarded on average 69% of the amount claimed where a claimant expert was engaged, but no respondent expert, whereas it awarded only 41% of the amount claimed when respondent defended the quantum claim by also engaging an expert. Therefore, understanding the regulatory framework and the practical considerations affecting the deployment of the experts is essential for counsel and arbitrators alike.

The use of expert witnesses in arbitration proceedings vs domestic courts

Drawing a comparison between the use of experts in arbitration versus domestic litigation, **Lumini?a Popa** (Suciu Popa, Member of the ICC Court) praised arbitration for its flexibility as compared to litigation. For instance, in Romanian courts (1) the court can only appoint an expert which is on a list held by the central bureau for judicial technical experts, and (2) the objectives and scope of the expert's report are determined by the court. By contrast, arbitration allows greater flexibility for the parties not only in choosing their experts but also in giving them their instructions. **Ana Sebov** (PwC România), also noted that unlike in the national court system where experts rarely have the opportunity to present their reports, arbitral hearings allow for the assessment of facts and assumptions which may not be evident from the reports themselves.

More generally, the panel mentioned two documents, in which both counsel and arbitrators may find guidance in this type of disputes: the ICC Commission Report on Construction Industry Arbitrations (2019), and the ICC Commission Report on Issues for Arbitrators to Consider Regarding Experts (2015).

Criteria for selecting an expert witness and guidelines

Alina Leoveanu (Mayer Brown) outlined the following non-exhaustive criteria when appointing an expert: (1) qualification and experience, (2) availability, (3) interpersonal skills, depending on his/her role and the need to participate in a joint expert meeting or to attend a hearing and, ideally, be familiar and comfortable with cross-examination, as well as (4) language requirements. Observing that arbitration rules contain few provisions regulating the conduct of expert witnesses and their testimonies, Leoveanu mentioned an array of guidelines on the use of expert evidence in international arbitration: the IBA Rules on the Taking of Evidence in International Arbitration

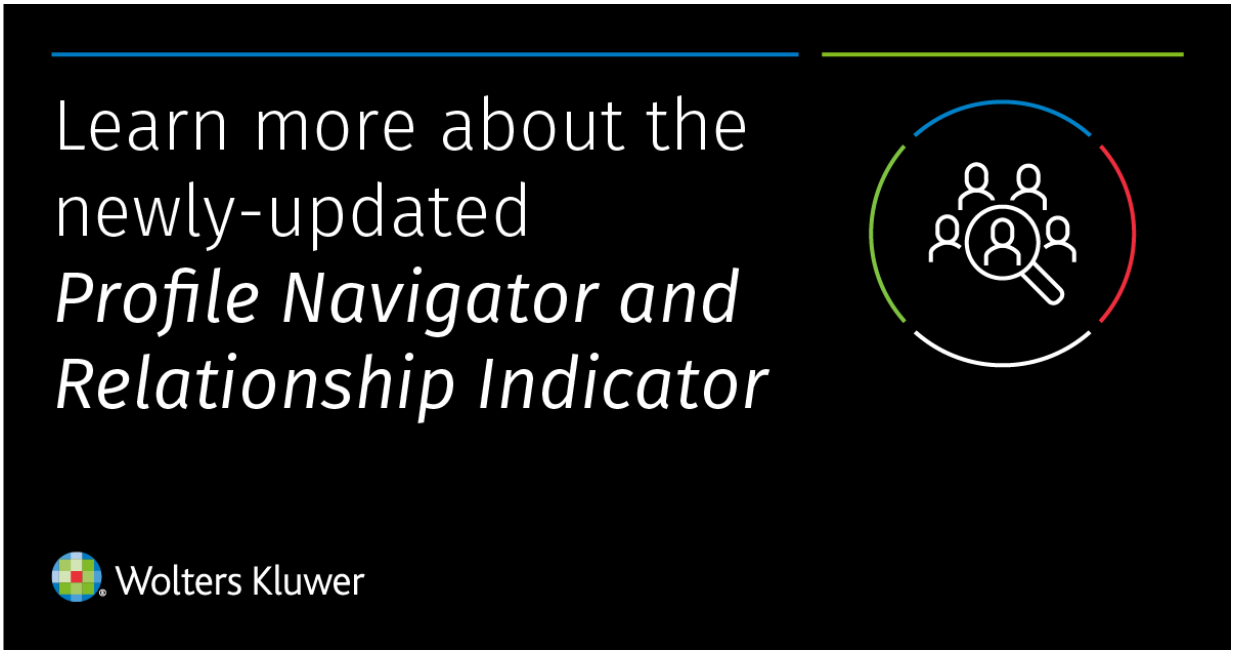
(2020), the IBA Guidelines on Party Representation in International Arbitration (2013), the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007), the ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration (2018).

Notably, all of these documents mention the duties of independence and impartiality which expert witnesses have to observe and some also include the requirement that the expert witness report contain a statement of the expert's independence from the parties, their legal advisers and the tribunal. In practice, however, it is one thing to include a statement of independence in a written report, and quite another to be perceived as such by the arbitral tribunal, especially since party appointed experts provide services for the client that retained them, being often referred to as "hired guns".

One practical way for counsel to change this perception of partisanship and enhance the credibility of their expert is to have the expert proposed by the ICC International Centre for ADR under the ICC Expert Rules. Sebov corroborated these comments, explaining that one of the first considerations taken into account by experts when nominated by parties is to conduct a conflict check and verify that they are independent in a broad sense, by looking at the tribunal, the lawyers of the other side, as well as the expert retained by the opposing counsel.

The role of the arbitral tribunal in managing the process of production of evidence through expert witnesses

Moving further, Popa emphasized that the earlier an arbitral tribunal becomes involved in the process, the more efficient and qualitative this process becomes, since it may use a variety of tools: asking the parties' experts to confer with each other and submit joint reports or identify the issues on which expert reports should focus. Such early involvement enhances the efficiency of the procedure as by the time of the oral hearings, the arbitral tribunal would have formed a clear view on the issues agreed-upon by the experts and examine only their most fundamental differences. Indeed, Sebov explained that while at first sight there may be little room for interpretation of certain binary and technical issues, in practice expert reports often advance diametrically opposed views. This can be explained by (1) the instructions received by counsel, (2) the valuation methodologies used (for quantum experts), and (3) other variables employed by the experts.



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