GAR KNOW HOW CONSTRUCTION ARBITRATION

Romania

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

A traditionally civil law jurisdiction, Romania's laws have been influenced over the years (starting with the 1864 Civil Code) by other civil law jurisdictions, such as France, Italy, Switzerland or Belgium and, recently, by the Civil Code from Quebec province in Canada (a primary resource for Romania's 2011 Civil Code). The laws are the main legal instrument, but there is significant regulation through emergency or simple government ordinances and through government decisions; also, in particular fields, regulation is made through the normative deeds issued by the various ministries or other central public authorities. The lawmaking bodies are the Parliament and the government for primary legislation and the ministries and other central public authorities for secondary legislation. The laws and other similar instruments are published through the Official Gazette. With few exceptions (for example, the more favourable criminal law), laws may not be passed and/or enacted with retroactive effect.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

Generally, a construction contract is formed in accordance with the general rules of contract law; there is no special formal condition to be fulfilled, an exchange of an offer and the corresponding acceptance of both contract parties suffice. The contract does, however, need to contain a description of the works or services to be performed and the corresponding price or payment mechanism. In certain cases, such as construction contracts concluded following a public procurement procedure, other conditions may apply. A letter of intent from an employer will be given contractual effect when accepted by the contractor, provided that it contains sufficient information as to lead to contract formation (ie, scope of work and payment).

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Parties are free to choose all of (a) to (f). For a brief period of time (2012–2014) the main arbitral institution – the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania – had changed its rules by excluding the parties' possibility and right to nominate the arbitrators. Also, in public contracts concluded following a public procurement procedure there may be predetermined options from points (a) to (f) – for example, in some cases the ICC Court in Paris is pre-selected. The limit to the parties' choice is given by public order and imperative legal provisions that, if infringed, may lead to the nullity of any deed that is the result of such infringement.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

Generally, the parties to a contract are bound not only by what is expressly stipulated therein, but also by what is implied by common practice between such parties, usage, statute or equity, as per article 1272 of the Civil Code, which also stipulates that usual clauses in a contract are understood. In construction contracts terms may be implied either following the conduct of the parties or the interpretation of the contract (as per articles 1266–1269 of the Civil Code), also having in mind the general

framework for works contracts and, more specifically, for construction contracts within the Civil Code (articles 1851–1873, respectively articles 1874–1880). However, in practice construction contracts usually expressly address all relevant issues to avoid any ambiguity, given the complexity of construction projects.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

A certifier under a construction contract should always act impartially, fairly and honestly, even when acting under the control of the employer (such as the case with the engineer in all FIDIC-based contracts concluded with public authorities in Romania). The parties are bound by certificates to the extent agreed upon within the contract, since there are no legal provisions regulating such certificates. As generally there is no contractual relationship between the contractor and the certifier, any legal proceedings against the latter will have to be filed under tort liability, based on the duties and obligations that were assigned to the certifier and general conduct rules in mandate contracts.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Romanian law does not have an established set of rules on concurrent delay and its effect on the contractor's entitlement to an extension of time, it is only the contract that may regulate this. However, general rules on contract liability will be applied as to establish the extent of each party's fault in causing the delay and thus apportion the delay in view of only allowing the resulting extension of time (if any). If the contractor's culpable delay would have led to a (at least) two-week delay, then it will not be entitled to any extension.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

Since Romanian law does not have an established set of rules addressing disruption claims general contract rules will have to be applied. The contractor would thus be entitled to any damages caused by such disruption and to the corresponding extension of time with associated costs provided it could prove the necessary conditions for contract liability – the breach of the relevant contractual provision, the damage and the causality link (the fault is presumed). The burden of proof lies with the claimant party, the court or arbitral tribunal can only quantify the loss based on the evidence submitted by the claimant and, when there is no sufficient direct evidence, may rule upon indirect evidence provided that the damage is proved to be certain.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

Romanian law does not have an established set of rules for the notion of "(constructive) acceleration". Starting from the general law principles and provisions, the contractor would have to prove (i) that the contractual conditions for an extension of time were met, (ii) that the contractor requested such an extension but (iii) the employer did not allow it (and eventually warned the contractor that any delays would trigger the contractor's liability for delay penalties) and, consequently, (iv) that the contractor effectively accelerated the works in order to avoid the consequences of delay – which would mean proving that supplementary resources were used and thus costs were incurred with the acceleration.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

According to article 1351 of the Civil Code, the legal force majeure is any external event, unforeseeable, absolutely invincible and unavoidable (for any of the parties). The legal effect of a force majeure event is that the parties' liability following the breach of the obligations affected by such event is removed. However, the parties may contractually agree not to give such effect to force majeure. The contractual allocation of risk may affect the incidence of a force majeure event, since the law allows the parties to limit the effects of force majeure with respect to the parties' liability. The law does not provide any other conditions, which are left to the parties to decide upon. The liability exclusion following a force majeure event does not apply automatically; the interested party must request a force majeure certificate from the local Chamber of Commerce and Industry, which has to be transmitted to the other party. In the case of dispute the courts will ascertain the incidence of the force majeure and its effects as to the affected contractual obligations.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

The hardship clause is regulated under article 1271 of the Civil Code, which provides the obligation for the parties to continue execute their contractual obligations, even if the execution has become burdensome owing to the increase in the costs or to the decrease in value of the counter performance. However, the same provision allows the following remedies to be requested before the courts of law, if the hardship has appeared following an exceptional change of circumstances that could not be envisaged by the debtor at the moment the contract was signed and would make the execution of the obligation manifestly unjust. The courts may adapt the contract, in view of evenly distributing between the parties the losses and benefices resulting from the changes in the circumstances or terminate the contract, at the moment and in the conditions to be set by the court. The rules may be excluded by agreement since the law allows the debtor to undertake the risk of the change in circumstances.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

According to article 1557 of the Civil Code, the contract is terminated ipso iure and without any prior notification when the impossibly to execute (for reasons other than a fault of the contractor) is total and definitive and it regards an essential contractual obligation, from the very moment of occurrence of the fortuitous event. If the impossibility to execute is only temporary then the available remedies are the suspension of execution of the contractor's obligations or to seek termination of the contract before the courts. If the impossibility only relates to a particular aspect that is not essential for the execution of the contract than the risk would follow the general contract rules.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Romanian law prohibits the exclusion or limitation of liability for material damages by conventional means in cases of intention or grave fault (article 1355 of the Civil Code). Other than for the above, no liability clauses are prohibited if agreed by the parties.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

The law provides the obligation for the contractor to inform the employer (and the designer if the case) as soon as it is aware of any errors in design, together with any remedial proposals (if this falls within the contractor's professional background) and a request to take any necessary measures (article 1877 of the Civil Code).

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Good faith in performance of contractual obligations (and generally in exercising one's rights, be it substantial or procedural) is one of the basic civil law principles recognised by Romanian law. This being said, the duty of good faith therefore affects the execution of all rights under a contract. The courts of law will analyse each of the situations at (a)–(c) above having in mind this general duty of good faith and may thus decide that an employer's intervention in the works was abusive, that the party exercised in bad faith its right to suspend or terminate the contract or that the pre-agreed amount of the liquidated damages are excessive and unreasonably high and thus need to be reduced to a more realistic level (the latter possibility being expressly recognised under article 1541 of the Civil Code).

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Romanian courts usually admit time bar objections for claims that have not been notified within the prescribed term, be it contractual or legal. Generally, failure to notify a claim within the contractual or legal time bar term will preclude the claim from being pursued, unless the other party does not invoke any time bar objection (since under the new 2011 Civil Code the statute of limitations is no longer a public order institution). There is no difference in the legal treatment depending of the type of matters that give rise to claims.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

According to another basic civil law principles, exceptio non adimpleti contractus is recognised under Romanian law (within article 1556 of the Civil Code) as a remedy that allows a party to withhold its own performance, accompanied by a right to ward off a claim for such performance until the other party has duly performed his or her obligations under the contract. Such refusal to perform one own obligations under the contract is not allowed if, based on the circumstances and considering the low importance of the non-performed obligation of the other party, it could be considered contrary to good faith.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

Unless otherwise contractually agreed, the employer does not have a legal right to omit work or terminate for convenience. If it chooses to do so it is liable for the damages caused following such conduct.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

A construction contract may be generally terminated due to any of the party's fault or due to the contractor's manifest incapacity to execute the works (for other reasons than the contractor's fault). The parties are free to agree upon any other causes of termination. Termination in part is possible. The difficulties, both practical and financial, may appear more frequently in lump sum contracts where there is no bill of quantities to allow a simple quantification of the executed part of the contract.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Yes, the right to terminate as per the general legal provisions applicable – see answer 18. There are no differences in terms of practical and financial consequences between the explicitly provided contractual termination cases and the other situations in which termination may occur.

20 What limits apply to exercising termination rights?

Termination rights are to be exercised within the contractual terms (if any, if not within the general time bar) and with good faith. Generally, if a cause for termination appears but the party who could have invoked it to terminate the contract ignores it and continues execution of the contract it may be interpreted that such party accepted the other's party fault and forfeited the right to terminate. Such interpretation is actually an application of the good faith principle.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

No, taking beneficial possession of the works does not account to completion of the works. The law does provide for the situation in which the employer requests partial taking over a part of the works prior to the taking over of the entire works, case in which taking over minutes are to be concluded which are to include the state of the respective part of the works, the necessary conservation measures and measures for reciprocal protection for the unfolding of the activities of the two parties. In such situation all the risks associated with the part of the works that were taken over temporarily pass to the employer, except for hidden defects and the consequences deriving from the improper execution of the works.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Yes. Signing of the taking-over certificate (with or without objections) constitutes acceptance; also, if, following notification from the contractor that the works are finalised, the employer does not appear to verify the works or does not communicate the result of such verifications within a reasonable period of time, then the works are deemed to be accepted without any reservations. The law provides that after acceptance of the taking over by the employer, with or without any objections, the employer cannot raise any other remedial works requests, claims for penalties, decreases in value, etc, other than those expressly mentioned in the taking over certificate, except for the contractor's liability for hidden defects.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

The liquidated damages are a contractual tool legally recognised aimed at quantifying ab initio the damages caused for the delay in completion of the works, so that the creditor does not have to prove the value of the damages suffered following such delay, but only the delay itself. As a consequence, in general the liquidated damages are viewed as an exhaustive remedy. However, in case the critical delay is caused by contractor's fraud, wilful misconduct, recklessness or gross negligence, the law recognises the possibility to recover any other losses caused by such conduct, but within the limits of what is the direct and

necessary consequence of the non-fulfillment of the contractual obligation. As explained in answer 12, Romanian law prohibits the exclusion or limitation of liability for material damages by conventional means in cases of intention or grave fault (article 1355 of the Civil Code).

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

No, according to Romanian law, if following its own culpable action or omission the creditor (in our case the employer) contributed to the causing of the damage, the damages owed by the debtor (in our case the contractor) will diminish correspondingly (article 1534 of the Civil Code).

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

According to Romanian law, the court or arbitral tribunal may reduce the amount of the contractual liquidated damages when the main obligation was partially executed and such execution was beneficial to the creditor or when such penalty is manifestly excessive in comparison with the damage that could have been foreseen by the parties at the moment of conclusion of the contract (article 1541 of the Civil Code).

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

The Romanian law does not allow the court or arbitral tribunal to award more than the contractual liquidated damages.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

Monetary compensation for breach of contract is assessed on the basis that there must be full compensation (both damnum emergens and lucrum cessans). Damages will be awarded for losses that are certain and a direct and immediate result of the breach, if they were a foreseeable consequence of the breach when the contract was concluded (except for the case of intentional breach or grave fault, in respect to which the law recognises the possibility to recover any other losses caused by such conduct, but within the limits of what is the direct and necessary consequence of the non-fulfillment of the contractual obligation – see question 23). Damages may include loss of profit, even if they are exceptionally high, provided that such damages are proven – the law stipulates that the damage caused by the loss of a chance to obtain a certain advantage can be repaired proportionally to the probability of obtaining said advantage, taking account of the circumstances and of the concrete situation of the creditor.

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

Yes. The contractor has the obligation to execute its obligations as agreed within the contract and can be forced to execute such obligations accordingly, including to remedy any defects of the works irrespective of the cost of such remedy, as long as the rectification is not impossible. The parties can agree on a regime that is stricter for the contractor provided that such regime does not come in conflict with matters of public policy.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

Yes, the contractor will not be able to claim for any defects, apart from those defects with respect to which the law sets special time bar terms, on which the contract is otherwise silent, such as the claim for hidden defects.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

Such exclusion of liability is possible according to Romanian law and as a consequence the breaching party will have no liability for indirect losses.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

The limitations and exclusions of contractual liability are generally effective. In case of tort liability the law prohibits the limitation or exclusion of liability for any injuries and bodily harm caused to third parties. Also, as explained in answers 12 and 23, Romanian law prohibits the exclusion or limitation of liability for material damages by conventional means in cases of intention or grave fault and, in case of fraud, wilful misconduct, recklessness or gross negligence, the law recognises the possibility to recover any other losses caused by such conduct, but within the limits of what is the direct and necessary consequence of the non-fulfillment of the contractual obligation.

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

According to Romanian law (article 2386 of the Civil Code) the contractor benefits from a legal mortgage over the amounts due under the contract, within the limit of the added value of the contractor's works. The legal mortgage can be made public by its registration in the land book and can be enforced against the mortgaged asset following the recognition of the owed amounts in court.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Pay-when-paid clauses are generally customary in the subcontractors' contracts and have to be interpreted in good faith so as to avoid any abuse. The contract setting such payment mechanism should be doubled with a mechanism allowing the subcontractor to be immediately informed when payment is received from the employer, otherwise such clauses may be applied in bad faith and may lead to a significant delay in the due payment. In any way, in order to avoid any abuse, the law recognises the subcontractors' right to seek direct payment from the employer in court if the main contractor has not paid them (article 1856 of the Civil Code).

It should be noted that in recent case law, the courts upheld that only subcontractors who are natural persons (not also legal) are entitled to direct payment.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

Yes, see answer 33 – the law recognises the subcontractors' right to seek direct payment from the employer in court if the main contractor has not paid them (article 1856 of the Civil Code). The subcontractor will have to prove the amounts owed by the contractor and the existence of a construction contract between the contractor and the employer; the employer may rely on the defences that it could have invoked against the main contractor (ie, defective works, etc). The contractor can file a joinder claim so as to raise any defences that it may consider necessary for justifying the withhold of payment. The employer's liability in the subcontractor's direct action is only applicable when the Romanian law is the law governing the dispute and not also when both the main contract and the subcontract have chosen a foreign law as the governing law.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Yes, it may, since the dispute is based on the construction contract even if it concerns the subcontractor. There will have to be two different sets of disputes – on the one hand the arbitration between the employer and the contractor based on the arbitration clause and on the other hand the litigation between the subcontractor and the employer, in which the contractor can file a joinder claim so as to raise any defences that it may consider necessary. As explained in question 34, employer's liability is only possible in case Romanian law is the substantial governing law.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Construction contracts, such as any other contracts, only produce effects between the parties, which means that third parties can only bring claims in tort against the contractor (in which case the exclusions and limitations of liability under the construction contract are not applicable). Nevertheless, for the situation where a transfer of property has operated, the ultimate owner (which is a successor of the employer) may be able to bring claims in contract against the contractor, provided that the contractual deadlines and time bar terms for claims for delays and defects have not lapsed.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Considering the fact that the contractual liability belongs to the contractor as a company, which is a separate legal entity, it is not possible to extend claims in respect of delays, defects or payment against a company's affiliate, director or employee. The only possibility would be to file a claim in tort, provided that one can prove the existence of tort. Any limitation of liability in the construction contract is not carried over to tort claims that are separate from the main construction contract.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The limitation period for claims for money and hidden defects is three years. For claims for money the time bar starts to run from the moment the amounts were due as per the contractual provisions. For hidden defects, the time bar starts to run as a rule, in three years from the taking over (the three-year period being a warranty period) or from the moment the defect was actually discovered, if it was discovered prior to the taking over. The special law on construction's quality provides that the designer, the specialist checking the design, the producers and suppliers of materials, the constructor, the person responsible with the execution, the technical expert are liable for their corresponding obligations in relation to hidden defects of the construction appeared in 10 years from the taking over, as well as afterwards, during the entire existence of the construction for the defects of the structural frame of the construction resulted from the failure to observe the design and execution norms in force when the construction was built. Parties to a contract may agree to extend or shorten the limitation period, albeit to no less than one year or beyond 10 years, except for the limitation periods of 10 years or more, which can be extended up to 20 years. The lapse of the time bar term can be suspended or interrupted as per the applicable legal provisions (articles 2532 et seq. and 2537 et seq. of the Civil Code). The rules on the statute of limitation are substantive law rules. Nonetheless, the issue of statute of limitation is only considered by the court or arbitral tribunal upon a corresponding objection or plea of a party.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

For example, Government Decision No. 273 of 14 June 1994 regarding the approval of the Regulation of the taking over of the construction works and corresponding equipment, the aforecited provisions of the Civil Code excluding the limitation of liability in certain cases, the conditions for reparation of damages, etc. As regards the FIDIC Silver Book 1999, an example of the key aspects that would not operate is termination by the employer for the bankruptcy, insolvency or liquidation of the contractor under clause 15.2, which is inoperative as such termination would violate compulsory provisions on insolvency proceedings.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

If a construction project is located in Romania, then, for example, Government Decision No. 273 of 14 June 1994 regarding the approval of the Regulation of the taking over of the construction works and corresponding equipment will apply irrespective of the foreign law governing the contract. See also question 34.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

Experience shows that contractors have managed to obtain both partial and interim awards requiring payment of the sum awarded by the DAB pending a final award, which were considered to be enforceable in Romania, but the case law is not uniform are there are serious legal arguments against such manner of enforcing a contested DAB decision. Theoretically, a court may accept jurisdiction in connection with a party's application for interim relief requiring payment of the sum awarded by the DAB, but we are not aware of any case law in this respect.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

There are no specialised courts dedicated to construction and arbitration matters.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

In case of commercial disputes, the levels of court for construction matters depend on the value in dispute – anything above lei 200,000 goes to the tribunal as first level (otherwise at district courts), then to the court of appeal (or tribunal in case the value was under lei 200,000) and a second appeal is opened before the High Court of Cassation and Justice (or court of appeal for the lower values). In case of administrative construction disputes the first level is before the tribunal and the second level before the court of appeal; in case of disputes involving central public authorities the first level belongs to the court of appeal and the second to the High Court of Cassation and Justice. The set-aside claims against the arbitral awards are settled by the court of appeal in the county where the seat of arbitration was. Redacted decisions may be published in various publications and online portals. A doctrine of binding precedent does not exist, but some courts tend to follow the precedents of the highest courts.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

The judge or arbitrator cannot raise any issues that were not raised by the parties, but may require the parties to plead additional information and explanations if certain facts have not been sufficiently substantiated so as to allow the court to have a complete view on the dispute. Romanian courts and arbitrators are not allowed to give preliminary indications as to how it views the merits of the dispute, since such conduct would be considered a prejudgment of the case. In international arbitration in Romania the tribunal may give preliminary indications on the merits of the case, subject to due process.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

The existence of the arbitration clause excludes any other proceedings regarding the merits of the dispute. However, the Romanian courts recognise the parties' (generally the contractor's) rights to pursue an order-for-payment procedure which is a simplified and accelerated procedure for collecting claims liable to remain uncontested by the defendant – such as, for example,

the unpaid IPCs. Where the parties agreed compulsory preconditions to arbitration, they are contractually required to comply with them. The undergoing of such preliminary dispute resolution mechanism is construed by the courts as a question of admissibility, which may lead to the rejection of the arbitration claim as being premature or to the suspension of the arbitration procedure in view of undergoing the preliminary contractual procedure.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

No.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

Both tribunal- and party-appointed experts are commonly used in litigation and arbitration and generally the views of the tribunal appointed expert are embraced by the courts and tribunals. Party-appointed experts owe duties to the tribunal in the sense that their role is to help the tribunal get clarifications about the dispute.

Given that for the arbitration disputes initiated after 1 January 2018 under the purview of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (the largest arbitration institution in Romania), the new rules of arbitration allow the parties to replace expert reports realised by tribunal-appointed experts with experts reports issued by party-appointed experts, experts who will further be cross-examined before the tribunal, it is foreseeable that the use of party-appointed experts instead of tribunal-appointed experts will increase.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

Usually state entities and public authorities are restrained by the public procurement rules and other regulations regarding the spending of the public funds from allowing any modifications of the contract, including but not limited to payment, without the conclusion of an additional act (provided that this not would lead to a significant modification of the initial contract, which may require retendering). Experience has shown that budgetary constraints have also even impeded them from observing their contractual obligations in terms of payment. The law generally regulates the form and conditions of any construction contracts concluded by a public authority that actually turns them into adhesion contracts – for example, in land transportation infrastructure investments of national interest financed from public funds an order of the relevant Ministry was enacted that established that an amended version of the FIDIC Red Book would have to be used. With respect to enforcing an award against such an employer, the law does provide for a six-month grace period in favour of the public authority, which would allow it to budget the necessary amounts for performing the due payment, but in practice enforcement was possible irrespective of such legal term.

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

The parties are free to negotiate and settle the dispute and the corresponding costs at any time before or during an arbitration and they can also decide not to inform the arbitral tribunal of such settlement until the moment they consider it appropriate to submit their settlement.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

The law recognises the confidentiality of client-lawyer communications, but there is no "without prejudice" privilege for settlement offers that would apply to any party in the possession of such an offer. Parties may agree on a sum payable in the event that the party discloses parts of the "without prejudice" communications and such agreement would be enforceable against the defaulting party.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

No, unless the in-house counsel is a lawyer and would thus benefit from the confidentiality privilege. The relevant law covering the confidentiality privilege of the client–lawyer communication falls under substantive law.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

As per Romanian law, any guarantee must be in writing to produce effects. Guarantees can be in the form of personal guarantees (such as a guarantor/fidejusor) or autonomous guarantees (such as a letter of bank guarantee). Most guarantees provided under a construction contract are contractually agreed in the form of performance guarantees (generally in the form of a bank guarantee) and retention money (in the form of a percentage of each instalment payment made to the contractor in order to cover any reservations made upon acceptance of the works).

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

The guarantor's liability cannot extend beyond the obligations of the party to the underlying contract unless otherwise explicitly provided. The guarantee will generally also cover all accessories to the principal obligation.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

The guarantor will be released from liability if the guarantee has expired, if the underlying obligation has been fulfilled or in case of other situations that lead to the extinguishment of the guaranteed obligation (set-off, etc).

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

The call may be challenged before the Romanian courts of law (in the absence of an arbitration clause within the on-demand bond) if it was manifestly abusive, in the absence of any default from the principal debtor since, even for the case when the underlying contract is silent on when calls may be made, the bond is a guarantee instrument that, by definition, is aimed to guarantee performance of contractual obligations and any abuse in this regard should be sanctioned.

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The specificity of the on-demand bond is that it creates a payment mechanism that compels the bank to pay at the simple demand of the employer, based on its declaration that the contractor has failed to perform the construction contract and without any obligation to prove a breach of the underlying construction contract. Consequently, there are significant difficulties in obtaining a restrain of the call without also settling the merits of the underlying dispute. This is why injunction relief is almost always practically impossible to obtain; however, what can be obtained within the same litigation or arbitration covering the underlying dispute are damages for the fraudulent call of the bond, generally in the form of legal interest.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No, any specificities usually derive from the contractual provisions and not from the legal provisions.

Cosmin Vasile

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Dr Cosmin Vasile is managing partner of Zamfirescu Racoţi Vasile & Partners and head of the firm's arbitration practice group. He has gained extensive experience during more than 15 years of handling cross-border disputes and already boasts an outstanding track record of around 100 international arbitration proceedings as counsel and arbitrator conducted under various laws and sets of arbitration rules.

Cosmin has successfully coordinated an impressive number of significant and mission critical disputes for his clients, often in the glare of media attention. As one of the leading experts in construction, capital markets, privatisation and energy arbitrations in Romania, Cosmin is called upon to provide legal counsel to both government institutions and private companies. In court, Cosmin has an equally impressive record, being popular among major domestic and international corporations for advice in high-profile commercial, administrative-contentious and public procurement disputes.

He holds a doctorate degree from the University of Bucharest and defended his doctoral thesis on the topic 'The Applicable Law in the Ad Hoc Commercial Arbitration' (2011). Cosmin is a Fellow of the Chartered Institute of Arbitrators in London since 2012, and holds a diploma in international arbitration from this institute. He has been awarded the Certificate of the ICC Advanced Arbitration Academy for Central and Eastern Europe and the Certificate of the International Academy for Arbitration Law (Paris).

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Alina Tugearu, partner at Zamfirescu Racoţi Vasile & Partners, specialises in civil and commercial litigation and focuses her practice on international arbitration, administrative/contentious disputes and intellectual property disputes.

She presently represents corporate clients in various national disputes and has solid experience in trying arbitration cases before national and international arbitral panels in arbitration proceedings held under the auspices of the International Chamber of Commerce, the London Court of International Arbitration, the Vienna International Arbitration Center, the Court of International Commercial Arbitration (Bucharest) and under the UNCITRAL arbitration rules in ad hoc arbitration, in complex projects involving construction disputes, including matters regarding FIDIC contracts, post-privatisation related disputes arisen following the exercise of a put and call options and energy-related disputes.

Alina has been a member of the Bucharest Bar since 2005 and holds a law master's (LLM) degree from Sorbonne University.

Zamfirescu Racoti Vasile & Partners (ZRVP) is a leading law firm in Romania, assuring both business and dispute resolution support and representation. ZRVP manages the biggest national and international arbitration portfolio in Romania, handling arbitrations conducted under the auspices of numerous arbitral bodies or rules including the ICC International Court of Arbitration Paris (ICC), the London Court of International Arbitration (LCIA), the Camera Arbitrale Nazionale et Internazionale di Milano (CAM), United Nations Commission on International Trade Law (UNCITRAL), and the International Centre for Settlement of Investment Disputes (ICSID). ZRVP also offers legal assistance and representation services in multimillion-value disputes held under the auspices of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania. The practice includes a wide array of disputes in the following areas: construction and infrastructure projects energy engineering insolvency maritime law media banking and finance distribution and transport production real estate and others.

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