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Romanian Transactional Work Trends and Tips for 2023

Recent years have largely confirmed the market expectations for the transactional legal work to get lighter, faster and of course better in order to keep up with the economic structural transformations.
In terms of legal counsel work, the "lighter-faster-better" paradigm brought in massive changes in relation to the transactional due diligence scope and standard of review, project structuring, transaction documenting, and it has hallowed the legal risk hedging. I discuss below these trends and share certain tips.

Due Diligence Scope and Standard of Review

The usual suspects around critical impact clearances have traditionally been assessing and handling the relation with the relevant regulators or control authorities, or more recently and acutely the Sanctions impact. Beyond them, checking the mechanism for analysing and authorising foreign investments from outside of the EU space has become of ever-increasing importance. Together therewith, and of course related thereto, the assessment of conducting business bans and restrictions, as for example limitations of rights to partner or bid, limitations of capital expenditures or investment, including profit repatriations, are getting a central role in the diligence review. The same is applicable in case of the risk of state intervention by means of regulation or administrative actions, or by indirect competition more generally.
Careful review of change of control provisions of all nature, scale and effect, and at all levels, remains a key concern, including with respect to the risk to trigger a hostile action or a take-over or a mandatory procedure of any kind as a result of the prospected transaction. Nonetheless, at the same time the compliance package – "The ABC Review" – and the reputational assessment, including issues in the public-private relation, got equally important. Same goes with what I refer to as "The Triple K Analysis" or the KYP – KYS – KYC Assessment [know your partner, your supplier and your customer]. All these require an even more pervasive investigation when it comes to publicly funded contracts, joint venture

agreements and consortia or contractor or sub-contractor agreements in relation to public to private contracts, which will add a layer of complexity where there is 'PEP involvement'. Scrutiny of contractual arrangements where politically exposed persons are involved has always been a hot point in the DD, but the standard of review got elevated notably. As it is the case with the assessment of conflicts of interest.

I would add here three other major trends. One refers to rating the stability of the target core business from a legal standpoint, which entails the legal review of matters relevant for the target's supply chain security, but also for key customer retention or the labour and expert capital stability. With it, the retention rate and review of relations in view of contracting or restating contracts with senior management is also a must.

A second one purports to a shift of focus in the analysis of project target indebtedness regime, a re-prioritizing of the assessment over the quality of the financing, the risk of cross default and the solidity of senior collateral securities regime. Open-ended arrangements with contingent liabilities, including partnerships, undertakings of loss compensation or gapping a guaranteed income, as well as previous mergers and acquisitions tail obligations, also represent a feature of the core business legal stability rating.

Thirdly, litigation due diligence turned more into assessing the dispute resolution conduct, resources and scoring of the target, based not only on the general dispute standing and representation, but also on the general performance of undertakings.

Project Structuring

In transaction structuring, jurisdiction of the target company and of the purchaser were always the first to consider. We see now such considerations being formulated more frequently not only upon the acquisition, but in terms of return of investment. However, projects structuring got closer to the target jurisdiction and the core places of the business, and less to the corporate or management legal quarters.

More often, transactions are structured as asset deals, or asset-based deals, with various and more complex caveats indeed, or as transfer of business (as a going concern). The number of transactions structured as neat share deals is significantly decreasing.

Contract culture seems to have finally absorbed the predicament that the best protection one can get in a deal does not come from the contract language, but from transaction structuring and, notably, from the project processes, carefully designed to govern the investment relationships from the initial ice-breaker talks to the most remote post-acquisition covenant.

Transaction Documenting

We are facing a new very complex evolution in the transaction legal documenting work, in itself a consequence of the shift in the due diligence scope and standard of review and originating in the structural transformations taking place in the economic sector. The 'lighter-faster-better' paradigm seems to generate in the transaction documenting domain some five major trends.

First, there is an advent of "umbrella agreements", definitely more often used nowadays than previously. Secondly, transaction mechanics see a certain preference for one-step completion structures, as opposed to two-step structures where signing and closing used to be detached. Thirdly, the architecture of conditions precedent is changing dramatically, as only fully objective, material CPs get their way through now, and mainly those related to regulators, clearances or certifications. Fourthly, a 'demise of the MAC clause' is taking place, with material adverse change and material adverse effect provisions being resisted more and more successfully on the sale or commitment side. Fifth, gun-jumping and conduct covenants contract menus are also notably reduced.

Legal Risk Hedging

But, to end with, the most spectacular change of recent years which seems able to yield permanent effects consists in what I tag as the legal risk hedging. Against a background where the specific performance of the undertakings is favoured towards collection of liquidated damages, new tools for managing transaction failure or loss risks have been developed. The most popular so far include Transaction Risk Insurance, Representations, Warranties and Indemnity Insurance, but also various ADR Mechanisms, such as Expert Board Determinations, as well as third party driven work-out or compensation methods.

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Public Procurement in 2022

Thoughts on an early retrospective

In a nutshell, in the public procurement sector, 2022 has been the year with the highest number of amendments brought on to the legislative framework since the adoption, in 2016, of the package transposing the new 2014 EU Public Procurement Directives. It is also a record compared to the former legislative background, applicable between 2006 - 2016. We have witnessed no less than 6 major amendments to the primary legislation on public procurement - rolling out since March 2022 to October 2022, almost once per month, and two major amendments to the remedies legislation, therein not including additional secondary legislation and special rules adopted in respect to certain types of contracts (for example on price adjustment). All in all, 2022 may have been the most active legislative year in the public procurement sector since such a sector has been regulated in Romania under EU law. And it is not yet over.
The main reason stated for such amendments: the need to create a more flexible and efficient legal background to ensure the award and implementation of projects under the National Resilience and Recovery Plan.
Whether such an intense legislative activity in this sector is beneficial to the sector or not is still to be determined based on the centralised data for the year 2022 and the next years to come. Nevertheless, the immediate effect on the sector is already visible: both private sector and public sector and, moreover, courts of law signal contradictions within the legal texts, divergent practice and the need for further clarification.
Will such a stress on the system achieve the envisaged goal? Does it really address the problems within the system and ensure a smoother implementation of investments projects? Let's have a look on the main stages of the public procurement process and trends that are forming within.

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Project/Award Documentation Preparation

Especially in what concerns big infrastructure projects, past years have shown us that this stage of the public procurement process has been superficially dealt with by contracting authorities, leading to unclear or incomplete specs and, further on, to problems during the implementation of the contract.
This is a systemic problem in the public procurement sector and has unfortunately not been practically addressed so far and neither within the 2022 legislative interventions, nor the adjacent administrative measures undertaken, though consistently acknowledged in official statements and strategies. On the contrary, the new amendments envisaged the raise of thresholds for open, transparent procedures and regulation of more exemptions from the publication of an award notice – namely measures that obscure even more this systemic problem.
On the private sector side, however, a more subtle trend of the latest years has been picking up speed this year: a shift in the private sector's attitude is noticeable, as contractors have more consistently appealed the quality of the award documentations on big infrastructure projects, pointing out to the errors and omissions therein. Moreover, at least in some cases, the contracting authorities have started to actually analyse the content of the appeal and take remedy measures.
This still cautious but rising trend shows that a dialogue is possible and that public – private partnership is the key to successful implementation of big infrastructure projects.

Remedy System

The remedy system has been consistently pointed out as the "main culprit" for delaying implementation of infrastructure projects. The legislative framework got consistently more and more tight for contractors, in favour of contracting authorities, by means of very tight deadlines and significantly more restrictive procedural rules (bordering infringement of access to justice), high bails and restricted means of actions.
However, the data published by the National Council on Solving Complains on 2021 shows that the number of appeals has not only significantly increased but also that the number of admitted appeals is constantly higher every year. Thus, while during 2008-2019, the percentage of admitted appeals has been constantly around 34%, since 2019, this percentage has constantly increased from 38% to over 43% in 2021. The data on 2022 is not yet available, but we may at least assume that the number of appeals is similar to the one reported in 2021.
Moreover, the National Council on Solving Complains warned, in their 2021 report, on this increase in admittance of appeals stating that this evolution "shows, on the one hand, that economic operators -plaintiffs have proven, over time, a better understanding of public procurement legislation, while, on the other hand, the public procurement personnel

within contracting authorities show, more and more, lack of transparency, efficiency, efficacity, but most of all a lack of professional training of the public procurement clerk".
But let's analyse how could the remedy system block the implementation of big infrastructure projects. An appeal may be entered only within ten days from the acknowledgement of an act issued by a contracting authority and has to be (and in the majority of cases is) settled by the National Council on Solving Complains within 25 days from receipt of the appeal. After the Council has passed a decision, if such decision is favourable to the contracting authority, the contract must be signed, notwithstanding any further complaint. Thus, a complaint, if indeed not grounded, may delay the conclusion of a public procurement contract for maximum 35 days. Such a delay cannot be reasonably cause for the significant delays in big infrastructure projects.
Therefore, the new amendments on the remedy system, excluding the purely corrective ones, do not address the systemic issue at hand: namely that the remedy system may be cause for certain delays only in those circumstances wherein breach of legality has been found (admitted appeals). Obviously, such potential delays are necessary – in the end, for the successful implementation of the project and protection of the public funds.

Contract Implementation

One of the main amendments impacting especially infrastructure public procurement contract implementation brought on in 2022 consisted in new rules on the adjustment of the public procurement contract. Nevertheless, it must me mentioned that the principles and legal texts allowing for an adjustment of the public procurement contract price to the current context of price increases were already present within the primary and secondary legislation and could have been applied on a case by case basis.
The new legal amendments have, however, a short to medium term beneficial effect in that they allow for a faster and smoother price adjustment procedure, eliminating many potential disputes between contracting authorities and economic operators. As most of the public investment contracts are delayed by a combination of avoidance of decision on the part of the contracting authority and burden of proof on price adjustments on the contractor' side, the new amendments might be beneficial, within the current situation, on a short to medium term, for certain contracts, mainly related to public investment.
On the medium and long term, however, this type of "patch" regulation may undermine a reform that has been long on the national public procurement strategy list: the professionalization of the public procurement human resources and the increase of institutional capacity to apply public procurement legislation and principles. Also, from a contractor's perspective, an universal formula such as the one now regulated, might not allow for all costs to be covered – thus, the new amendments may now be seen as a compromise for covering costs, but on the long run it is to be determined whether such a compromise was beneficial.
All in all, looking back on 2022, we note an increase in the private sector involvement and responsibility towards big infrastructure projects, however replied to by measures to restrict the private sector access to remedies and transparent procedures. Still waiting on the data to assess the effect of the new amendments, we hope for a more stable, more predictable 2023, wherein the dialogue between the public and private sector becomes more qualitative and efficient.