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CONSIDERATIONS CONCERNING THE APPLYING OF FIDIC CONTRACTS IN ROMANIA

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Abstract. In the context of a continuously developing commercial activity, the standard forms of contracts have become a significantly important part of current transactions, with the purpose of making the activities more efficient and protecting the interests of the contracting parties. In the present, the most spread and used standard forms of contracts in the construction field are the ones drafted by FIDIC (Fédération Internationale des Ingénieurs Conseils).

The FIDIC norms had the purpose of driving the public acquisition contracts that encountered serious difficulties in the past few years. In order to constitute a coherent normative frame that would ensure the effective management of the contracts of works financed with public funds, the Ministry of Economy and Finances have initiated a project for PHARE technical assistance, with the purpose of transposing the General Conditions of FIDIC Contracts in the national legislation.

The FIDIC Books cover a large scope of situations, depending on the specificity of each project. To this end, FIDIC proposed a series of recommendations for their modification according to specific situations, as the unitary and unaltered application of the conditions from a practical point of view is not beneficial and sometimes it can be even impossible.

Key words: FIDIC norms; public acquisition; legislation; order; contracts of work.

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1. Introduction

FIDIC stands for the International Federation of Consultant Engineers (Fédération Internationale des Ingénieurs Conseils) which is an international professional organization seated in Geneva which reunites the national professional organizations of consultant-engineers. Founded in 1973 by Belgium, France and Switzerland, FIDIC comprises today over 70 member associations worldwide.

FIDIC is a private organization without normative competence in the meaning of the capacity to issue norms with mandatory force in a law system, either national or international. Following a vast international experience along time, this organization issued and perfected numerous forms of contracts adapted to major ongoing construction projects between private contractual partners as well as between public and private companies.

The first forms of contracts issued by FIDIC have closely followed the contractual conditions elaborated by the Institution of Civil Engineers in London, based on the Anglo-Saxon law. Thus, the FIDIC conditions have been drafted according to the common law. The fact that the FIDIC books were constituted by virtue of the principles the common law is based on, namely the judicial precedent, the principle of equity, legislation, international treaties and customary law, results in the first place from the terminology used, *i.e.* the list of definitions at the beginning of the Conditions establishing this specificity.

Secondly, the powerful mark of the Anglo-Saxon law in the contractual mechanisms stems from the English tradition, the most conclusive example being the institution of the Engineer as administrator of the contract. This issue has been mentioned in the new edition of the FIDIC Books without substantial modifications, except for the fact that the role of mediator was transferred to the Dispute Resolution Commission.

In the context of the construction industry development at international level, FIDIC has updated the framework agreements issued previously. The result of this measure was the issue, in 1999, of a new and different set of contractual conditions.

The initial contractual conditions, drafted before 1999, had been modified because of a series of considerations regarding the necessity to standardize the forms of FIDIC contracts and the necessity to simplify them, having in view the use of these framework contracts in numerous cases by people with a different language background. Another aspect that led to the decision to modify the initial Books has been determined by the necessity to adapt the forms of FIDIC contract so that it can be used both in the common law systems as well as in the civil law ones. Finally, the role of the Engineer was an aspect leading to the drafting of new FIDIC Books, especially the request that the Engineer would be hired and paid by the Enterpriser.

Thus, the new FIDIC system has a new set of norms that are currently being used and it comprises the following Books:

a) The *Red Book* is applied to projects designed by the Beneficiary, as it is a contract with final measurements, administrated by an Engineer.

b) The *Yellow Book* is a more complex variant of the Orange Book in 1995, applied to electrical and mechanical works, including their design by the Enterpriser and is recommended by FIDIC for engineering and building construction. This type also implies the presence of the Engineer.

c) The *Green Book* is used in works contracts of reduced value and complexity, being used especially for works that are contracted out. It is not managed by an Engineer, unlike the Red Book, and is a contract with final measurements, applicable to the works designed by the Beneficiary.

d) The *Silver Book* is applied to turnkey projects, including infrastructure ones, with a special approach regarding the distribution of contractual risks, leaving more risks in the task of the Enterpriser, unlike the other types of FIDIC contracts. The innovatory character of this Book corresponds with the requests expressed by certain Beneficiaries interested in warranting the agreed price and the stipulated terms. This form of contract does not include an Engineer.

In September 2008, FIDIC published the first edition of the Gold Book, directed towards the contracts for design, construction and operation (DBO Projects). This Book represents a development of the Yellow Book and is dedicated to the projects for which the beneficiary want the Enterpriser that designed and build a certain facility to continue to operate it and maintain it for a longer period of time (a certain number of years).

Synthetically, the basic features of the four FIDIC Books drafted in 1999 can be described as follows: the Red Book is applied to the works designed by the Beneficiary, as it is a contract with measurements at the end, managed by a single Engineer; the Yellow Book represents an evolved variant of the Orange Book in 1995, applied to electrical, mechanical works, including their design by the Enterpriser and is recommended by FIDIC for the works of engineering and construction of buildings. This type of contract implies also the presence of the Engineer.

With the same line of standardization it can be noticed that the actual FIDIC Books are similar to each other, given that their object does not impose a different drafting being structured in a similar manner. Each Book includes the General Conditions, a Guide for drafting the Special Conditions, guides for offer letters, for contractual agreements and an agreement for dispute solving.

The main differences between the actual Books and the previous ones are clearer: regrouping the contractual clauses, making it easier for the parties to draft a contract and follow all the conditions imposed, the distinct regulation of the Engineer's obligations and the detailed regulation of the mechanisms of the Dispute Resolution Commission.

At present now, the FIDIC Contractual Conditions have gained a wide applicability, becoming an international customary law in the construction field.

As the FIDIC framework contracts benefit by a worldwide reputation, being adapted to international projects, the Ministry of Economy and Finances, as beneficiary of the Phare Project 2004/016-772.05.02, has accomplished a transposition of the contractual clauses of FIDIC in the Romanian legislation.

The main objective of the Phare project was to accomplish the harmonization of the Romanian legislation, with respect to the contract's conditions for constructions according to the practice at the level of the European Union and the conditions established by the International Federation of Consultant Engineers.

The above-mentioned project has a series of objectives among which we mention the accomplishment of a high quality, official translation of the contractual conditions of FIDIC 1999 and the subsequent adoption of the devoted principles in the contractual conditions as legal norms applicable in Romania with the purpose of improving the national legislation so that the legislative frame would be able to ensure the closure of contracts using Structural and Cohesion Funds.

2. Material and Methods

2.1. The Romanian Legislation for Transposing the Conditions of FIDIC Contracts

In June 2008, following the above-mentioned Phare project, the Joint Order of the Ministers of Economy, Finances, Transportation and Development, Public Works and Housing no. 915/465/415/2008 on the approval of the contractual general and special conditions at the conclusion of contracts of works was adopted, with immediate applicability.

Before the issue of the Order, in June 2006 an agreement was signed between the Romanian Ministry of Economy and Finances and FIDIC, agreement that became effective when FIDIC representatives signed it on July 12th, 2006. Through this agreement FIDIC warranted non exclusive rights for the Ministry of Economy and Finances for the translation in Romanian of the following crucial documents:

- a) Conditions for Construction contracts, first edition 1999.
- b) Conditions for Contracts of Equipment and Construction, including Design, first edition 1999.
- c) The short form of the Contract, first edition 1999.
- d) Conditions for PAC/ Turnkey projects, first edition 1999.

According to the fourth clause of the Agreement, the copyright for the translation will belong to FIDIC, after the publication of the translated documents in the Romanian Official Journal.

The translation in Romanian language was drafted in August–December 2006 within Activity 1 of the Contract of Services mentioned above. The translation comprised the General Conditions for Contracts for the first three of the four documents mentioned in the previous section, namely the Red

Book, Yellow Book and Green Book. The translations were sent to the Ministry of Economy and Finances in order to be used in the projects deployed in Romania, after their publication in the Romanian Official Journal.

Before the adoption of the Order, the Romanian legislator adopted a series of other norms, laws and regulations. The legal framework regarding the works of construction was represented by Law 50/1990 on the authorization of civil construction, republished in the Official Journal no.933 on October 13th, 2004, with all the amendments and completions. This law establishes guidelines and rules regarding the authorization of construction, the object of the contracts the authorizations are released for, as well as the beneficiaries of these authorizations. The Law also establishes rules and regulations on how the authorizations and permits are issued and has an entire chapter dedicated to the concession of land for constructions. Chapter three in Law 50/1991 presents also the liability and sanctions related to executing construction works without receiving the authorizations of construction. Related to the above-mentioned law, the legislator issued the Norms of applying it, approved by Order 1430/2005 offering general guidelines related to the application of the conditions imposed by the Law.

The construction works are regulated by a series of norms regarding the reception of construction and installation works, rules approved by the Government Decision no. 273/1994, published in July 1994, amended by another Decision in 2004.

Public procurement went also through a slight reform determined mainly by the Government Emergency Ordinance 34/2006 that has been the most significant, complete and important set of guidelines for public acquisition, public works concession contracts and public service concession works published in May 2006. The Ordinance sets the rules for public works and the methods for acquisition and also for the entire process from the presentation of an offer until the contract is signed between the representative of the administration, central or local, and the private party participating at the conclusion of the contracts, going through the tender process and conditions of contracts, rules regarding the public acquisition after the conclusion of contracts and the administration of the contracts.

The Ordinance establishes strong and detailed rules also for the contracts of concession, both works as well as services and still represents the cornerstone of public acquisition. The norms for the application of this Ordinance are set and regulated as they have been established by the Government in its Decision no. 925 in 2006, with the amendments and completions. The assignment of contracts by virtue of the Ordinance 34/2006 was set up in a Guide of Public Acquisition approved by the Romanian National Authority of Monitoring Public Acquisition, which also issued a regulation for the control of assigning public acquisition contracts.

Besides the rules and regulations, the legislator issued with the purpose of supporting both the contractors, beneficiaries as well as defining the entire

processes beginning with the authorizations for construction and ending with the conclusion of contracts after the settlement of eventual disputes, the parties of the contracts have received also the legal framework regarding public finances, the most important being the Government Decision no. 264/2003 on establishing the actions, categories of expenses, criteria, procedures and limitations for payments coming from public funds, last amended in 2006. The control of the community funds, their recovery, the co-financing and the use of these funds in faulty manners, are regulated by Government Ordinance no. 79/2003, with its amendments and application norms. The Civil, Commercial and Fiscal Code also contained relevant specifications for contracts and their conditions of application.

This entire legislative framework prepared the grounds for the adoption of the Order in 2008, making the contactors and beneficiaries familiar with specific conditions for contracts and preparing the harmonization of the Romanian legislation with the FIDIC contracts. This harmonization was meant to be accomplished through the adoption of Order 915/2008 but this process was not a smooth one.

2.2. The FIDIC Criteria Transposed in Order no. 915/2008

The regulation process of the Romanian legislators has been difficult and unclear many times, as well as the defective translations which created major difficulties on several occasions for its application. In this context we can also include the Joint order of the Ministry of Economy and Finance, Ministry of Transportation and the Ministry of Development, Public Procurement and Housing no. 915/465/415/2008 (“Order”) approving the contract model that has to be used for the conclusion of contracts of works when entering in the scope of the Emergency Government Ordinance no. 34/2006 on the assignment of public acquisition contracts, public works concession contracts and service concessions. This initiative has been concretized through the promotion of the Joint Order concerning the approval of the contractual conditions generated especially by the conclusion of the works contracts, published in the Official Journal no. 424/ 050.06.2008.

The Order comprised in the annex: models of contract that the contracting authorities had the obligation to use when concluding public acquisition contracts, namely the ones having the object of executing construction works (site organization, preparation of the terrain, partial or complete construction, installation and isolation works, finishing works, renting of equipment or the execution of a construction, or both the execution as well as design of construction works.

Specifically, the Order had annexes regarding the Conditions for Contract of Construction for buildings and engineer works designed by the Beneficiary, in Annex 1.a.; Special Mandatory Conditions for Construction Contracts, in Annex 1.b.; Conditions for Contracts for electrical and

mechanical equipments and for buildings and engineer works designed by the Enterpriser, in Annex 2.a.; Special Mandatory conditions for the contracts mentioned, in Annex 2.a.; Short form of Contract, in Annex 3.a.; Special Mandatory Conditions for the Short form of contract, in Annex 3.b.; the provisions mentioned in Annex 3 were applied exclusively to the contracts of public acquisition with a value up to 5 million euros or the equivalent of this amount in national currency.

The Order applied therefore the dispositions of the Red Book, the Yellow Book and Green Book, without the Silver one. The Order implements unfortunately not in an ideal way the contractual conditions issued by the International Federation of Consultant Engineers in the four books.

The implementation implied firstly the translation of the FIDIC conditions with the role of general conditions, followed by the stage of drafting a series of mandatory special conditions with the purpose of harmonizing the general conditions with the Romanian specificity. The process was finalized through the issue of the Order on the approval of the general conditions, as translated and the approval of the special conditions.

Of course that this step is a positive one and is justified by the necessity of ensuring a unitary practice of the contracting authorities in their contractual relation with the enterprisers, the necessity of a better knowledge of the used contractual mechanisms by the contracting authorities as well as by the enterprisers and of course the Romanian alignment to the contractual instruments used at international level. From this point of view, the FIDIC conditions represent an instrument which the foreign investors know and accept in the process of deploying enterpriser actions. But if the purpose of implementing the FIDIC conditions is a justifiable one, the way in which it has been put into practice and the result of this implementation are seriously contested.

Therefore, according to the Order, at the conclusion of a contract of works, the contracting authorities have the obligation to use both the general conditions as well as the special mandatory conditions. The Order states at the same time that the application of the general conditions can be made only through the corroboration of these conditions with the provisions of the special mandatory conditions comprising special clauses derogatory from the general contractual conditions.

The formulation of the Order generates two issues, which we consider righteous: the practicability of the contracting authorities obligation to use these contractual conditions on one side, and on the other side to what extent the contracting authorities can bring modifications to the general conditions, besides those special mandatory.

Therefore, as the Order is formulated, we conclude that the contracting authorities have the obligation to use the general conditions as they are modified through the special conditions, according to the principle that the special derogates from the general. A first aspect deserves to be mentioned: the reason

for which it was necessary for a general set of conditions to be approved, that the contracting authority has to corroborate with the special ones in order to obtain finally a model of mandatory contract, when a model of consolidated contract could have been proposed from the beginning by the initiators of the project.

Once debated the issue of the mandatory character of the FIDIC obligations, another aspect needs to be mentioned, namely the possibility of the contracting authorities to bring other modifications to the general contractual conditions besides the special mandatory conditions. If the solution is a positive one, then it means that the Order does not draw any type of limitation in this context, which would practically lead to the elimination of the mandatory feature of the conditions and the elimination of the unifying effect for the practice of the contacting authorities, wanted after the issue of the Order.

The phrasing of the Order mentioned above suggests that the contracting authorities cannot bring any modifications to the contractual conditions. But besides of the above-mentioned, regarding the obligation to apply the conditions as they were approved by the Order, because of the specific character of each project belonging to the contracting authority the unitary and unaltered application of the conditions is difficult and it can determine serious practical problems of correlation and interpretation.

The FIDIC Books cover a large area of situations, depending on the specificity of each project. To this end, FIDIC proposed a series of recommendations for their modification according to specific situations, as the unitary and unaltered application of the conditions from a practical point of view is not beneficial and at times it can be even impossible. Besides from that, there is official information published on the website of the Ministry of Public Finances containing special conditions recommended to the FIDIC Yellow and Red Books, adding new conditions or amending the provisions of the existing conditions. In the same context, the Beneficiary's Guide for the use of the Special Conditions for Contract comprises a series of recommendations regarding some clauses in the general conditions, besides the special ones approved by the Order.

As a proposal for the modification of the legislation, the obligation to use the conditions at the conclusion of the works contracts has to be cleared by a new regulation provisioning in express terms the possibility to modify the conditions according to the specificity of each contract.

Maintaining the same doubtful tone regarding the use and the success of the Order in implementing the conditions of the FIDIC contracts, we have to mention an aspect related to the significant obstacles the contracting authorities have faced in their attempt to use of the contractual provisions adopted by the Order at the conclusion of the public acquisition contracts, because of the incompatibility, sometimes a major one, between some essential provisions of the Order with the norms in the legislation on public acquisition.

Related to the above-mentioned, in contrast with the legislation of public procurement is the possibility to modify the works representing the object of the contract, including the execution of works additional to the initial ones that were contracted. The Order provisioned this possibility in situations both in the case of the Beneficiary as well as the Enterpriser. As an example, we mention the provisions of Clause 13 – Amendments and Updates, according to which the amendments can be initiated by the Engineer before the issue of the Reception Protocol at the end of the works through an instruction or a solicitation addressed to the Enterpriser. A modification can include changes in the quantities for a works item in the contract; modifications in the quality and characteristics of certain articles, modifications in quotes, positions and/ or dimensions of parts of the works; the omission of works, with the exception of the ones performed by other executants or any other modification related to supplementary works, equipment, materials or services necessary for the permanent works, together with the tests at the end of the latter and other activities of testing and investigation.

The modifications of the works that represent the object of the contract as well as the performance of other works, additional to the ones already established, usually bring modifications in the specification conditions, technical offer and price of the contract. This aspect can lead to the breach of the principle of equal treatment of the economic operators participating in the tender for public procurement as well as the breach of the principle of effectiveness in using the public funds, principles that represent the basis of public procurement contracts assignment.

The new regulation, coming into force after the adoption of the Joint Order of the Ministers of Economy, Finances, Transportation and Development, Public Works and Housing no. 915/465/415/2008 on the approval of the contractual general and special conditions at the conclusion of contracts of works stayed in force less than one year. Even at the beginning of its publishing, the Order created some problems whose causes, or at least some of them, were presented above. The issues related to the extremely difficult translation and interpretation, determined mostly by the defective normative practice, the use of terminologies that are not adequate for the Romanian legal system as the insufficient correlation, sometimes pushed to flagrant contradiction, of its provisions with the imperative judicial norms in key fields for the conclusion and execution of contracts, such as public acquisition and public finances have created conditions that made impossible the use of FIDIC contracts as models, in the manner they were transposed by the Order.

Because of these issues, the Joint Order of the Ministers of Economy, Finances, Transportation and Development, Public Works and Housing no. 915/465/415/2008 concerning the approval of the contractual general and

special conditions at the conclusion of works contracts was abrogated by the Joint Order of the Minister of Public Finances, Minister of Transportation and Infrastructure and the Minister of Regional Development and Housing no. 1059/2009.

3. Conclusions

It is true that at international level it is considered that the FIDIC rules balance the risks between the Beneficiary and Enterpriser and this is the reason why they are used for any contracts of execution and works, from the ones with reduced value to the big and significant ones. Still it can be stated that these rules are, to a great extent, suitable for the contacts between private parties.

The public acquisition contracts are governed by special rules, because of the prevalence of the principle of priority of the public interest in relation to the principle of contractual liberty. In this context, in the public acquisition contracts the interest of the contracting authorities should be prevailing, and not that of the private contractors, as resulting from the provisions of the Order.

Because of their disadvantageous position, the public authorities had to intensely negotiate in order to reestablish the balance of forces in the context in which, for the beginning of the negotiations they needed a framework contract favourable for the public sector.

Interesting to analyse would be the way in which the operation of not transposing the Conditions for Contract approved by the Order and Silver Book was consolidated, allowing turnkey projects to be implemented and offering a more favourable position to the beneficiary in comparison to the other FIDIC Books, especially in risk management.

The FIDIC Conditions of Contract are today recognized as a suitable contractual package for an international construction contract, providing a valuable neutral substitute to the national standard forms of contract and to the jurisdiction of national courts, when using arbitration.

The FIDIC contracts will therefore enable the parties to carry out international and national engineering and construction projects on the basis of clear contractual provisions and therefore with an increased probability of success

The practical experiences show that the challenge for Employers and Contractors in managing contracts is to avoid the loss of time and money which result from disputes arising in their performance. Such situations endanger their interests and often lead to a loss of reputation and to severe financial consequences for their business activities. In this respect, it must be underlined that most probably a well structured preparation and management of the

contractual package is a first but important attempt in the way of the prevention of disputes.

We assert that the transposition of FIDIC principles and rules is a beneficial measure from many points of view for both the parties that have to conclude complex acquisition contracts for works and positively execute those contracts.

The main advantage consists in the alignment to a solid practice system at international level, based on an assembly of rules tested through interpretation and application in many circumstances, leading to the crystallization of a rich experience fund, of exceptionally use for the parties of a contract with a high risk level and complexity.

The transposition of these rules has to be made through the solid and careful harmonization with the provisions of the normative frameworks in force in Romania, especially in public acquisition and public finances as to eliminate the contradictions between the contractual conditions and imperative dispositions of Romanian law.

The transposition of these FIDIC contractual conditions will be beneficial for the efficient management of public resources in what concerns the drafting and negotiation of contracts and the administration of these contracts. By standardizing the general conditions of the contracts they become non negotiable rules mandatory for both parties and the efforts of the partners will be focused efficiently on analysing and solving the situations with specific character intervening in the creation and execution of contractual relations.

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CONSIDERAȚII ASUPRA APLICĂRII CONTRACTELOR DE TIP FIDIC ÎN ROMÂNIA

(Rezumat)

În contextul unei activități comerciale aflată într-o continuă dezvoltare, formatul standard al contractelor a devenit un aspect foarte important în ceea ce privește relațiile de afaceri în domeniul construcțiilor, având drept scop o mai bună eficiență a activităților, dar și protejarea intereselor părților contractante. Astfel, cele mai cunoscute și folosite formate standard de contracte în domeniul construcțiilor sunt cele tip FIDIC (Fédération Internationale des Ingénieurs Conseils).

Normele impuse de contractele tip FIDIC au drept scop arbitrarea desfășurării achizițiilor publice, activități care au întâmpinat dificultăți pe parcursul anilor. În vederea creării unui cadru normativ care să asigure eficiența managementului contractelor de achiziții publice, Ministerul Economiei și Finanțelor a pus bazele unui proiect de asistență tehnică din fonduri PHARE care are drept scop introducerea condițiilor generale impuse de contractele tip FIDIC în legislația națională.

Cărțile FIDIC acoperă o gamă largă de situații, în funcție de particularitățile fiecărui proiect. Până în acest moment, FIDIC a propus o serie de recomandări pentru modificarea acestora, în conformitate cu situații specifice, deoarece aplicarea unitară și nealterată a condițiilor dintr-un punct de vedere practic nu este benefică și, uneori, poate fi chiar imposibilă.