

## **SHORT OVERVIEW ON THE ROMANIAN CONSTRUCTION LEGAL FRAMEWORK**

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### **ABSTRACT**

The Romanian construction legal environment is a very dynamic one which in this decades witnessed great changes, either in relation to the legislation specific to obtaining of the construction planning or works permit, the new rules in public procurement, after the implementation of the European directives in the field, or the forms of contracts, either imposed by the state for public works or brought in the private life by new normative acts as the updated Civil Code.

The paper intends to be an overview on the Romanian construction legal framework, presenting mainly the amendments of the normative acts which influenced a lot the industry.

**Keywords:** Construction Law, Construction Contract , Works, Public Procurement.

### **1. Legal framework**

The Romanian system of law is guided by a series of general and fundamental principles of law. The general principles of civil law are guiding ideas for the whole civil legislation, as such targeting all the civil law institutions, even though they might not show their presence with the same intensity. Among these general principles of law, we also include the principle of the freedom of contracts.

According to Article 1169 from the Civil Code, the parties are free to conclude any type of contracts and to determine their content, in the limits imposed by law, by public order and good morals. This means that the parties are free to choose whether they want to conclude or not legal acts, they can freely choose their contractual partner, can determine through mutual consent the object, the clauses and the effects of their convention, can change or eliminate them and may adopt or reject, in all or only partly, the patterns provided by law for different types of legal acts, where permitted. (Pop.&others, 2012)

In the last two decades especially, the Romanian society has encountered a series of changes on the economic and financial level which led to the occurrence of a multitude of new special laws, but also to significant changes to the already existing ones. Therefore, this legislative reform has implied a long-term process, which, in the year 2011, has culminated with the change of the Civil Code and also to the adoption of a monist/unitary system of private law, as inspired from the Italian legal system. In the systems of law that provide the unity of private law, there is no distinction between the civil legal relations and the commercial legal relations. As such, both the commercial and the civil relations are regulated by civil laws. Unlike these systems of law, the ones that provide a duality of private law regulate in a distinct manner the civil legal relations and the commercial legal relations, the civil relations being regulated by civil laws and the commercial relations being regulated by special commercial laws.

Previously, in Romania, the two main branches of private law were civil law (having as the main applicable law the old Civil Code from 1864) and the commercial law (having as the main applicable law the Commercial Code), also completed with other series of special laws.

The Romanian legal system, since the entering into force of the new Civil Code in 2011, does not recognize anymore concepts such as “merchants” or “commercial”. Now the Civil Code provides specific rules for professionals.

According to Article 3 paragraph 2 from the Civil Code, the professionals are those who exploit an enterprise. Also, paragraph 3 from the same article explains that exploiting an enterprise means to perform in a regular manner an organized activity which consists of production, administration or alienation of goods or provision of services, regardless of its goal – to obtain or not economic benefits. (Angheni, 2013)

Therefore, nowadays, all the legal rules of civil law and also those regulating the activity of professionals are provided by the Civil Code from 2011 and other special laws.

### **1.1. Public Policy**

Public policy is one of the most popular grounds used by parties and courts of law in arbitration to resist enforcement of awards. However, in Romania it can still be considered a controversial concept since national courts have different approaches towards the concept of public policy.

Even if regarding construction contracts we often refer to international arbitration we cannot deny the essential role of the national courts. Once the arbitral award is granted national courts may refuse to enforce it due to a breach of public policy.

In the Romanian legislation there is no definition of public policy. The International Law Association (ILA) tried to formulate a general definition for public policy but reaching a consensus at an international level proved to be impossible. Trying to define this concept in a general manner they gave public policy the following definition: *“the body of principles and rules recognized by a State, which by their nature may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration”*. (Jemielniak& Miklaszewicz, 2010)

The international public policy of any state (also applicable for Romania) includes: fundamental principles, rules designed to serve the essential political, social or economic interests of the state and, also, the duty of the State to respect its obligations towards other states or international organizations. Since there is no generally valid definition of public policy, the matter was left to the national courts to decide. (ILA, 2003)

Romanian legislation leads a pro-enforcement policy towards arbitral awards, taking into consideration the provisions of the Romanian Civil Procedure Code. It was considered that not any breach of a mandatory rule should not be a reason for refusing recognition or enforcement of an arbitral award, but only in those cases when it would manifestly disrupt the essential political, social and economic interests protected by national legislation. For example, in a case before the Bucharest Tribunal, one party argued that the decision issued by a foreign tribunal was contrary to public policy due to the fact that he was obliged to hire an attorney, which is contrary to the right of free representation under Romanian law (mandatory rule). The court held that there was no reason to annul the decision on this ground and rejected the claim.

From observing Romanian case law regarding construction contracts and public policy, we can draw two conclusions. Firstly, national courts have a generally pro recognition and enforcement of arbitral awards and secondly, that not every breach of an imperative rule is a matter of public policy and a ground for the annulment of an arbitral award.

## **1.2. Statute Law**

The Romanian state is organized based on the principle of separation and balance of the legislative, executive and judicial powers. In Romania, the observance of the provisions of the Constitution and of the laws is compulsory.

All Romanian citizens are equal in front of laws and can file an action in court for the defence of their rights, freedoms and legitimate interests.

The sources of law are: the Constitution, the laws adopted by the Parliament, the decrees of the President of Romania, normative acts of the government, normative acts issued by the central

public administration and by the local public administration bodies, European Union legislation and international treaties to which it is a party.

The Constitution is the supreme law in Romania, regulating the structure of the country as a national and indivisible state, the legal relations between the legislative, executive and judicial powers and the relations between the bodies of the state, the citizens and the legal persons.

The laws adopted by the Parliament are constitutional laws, organic laws and ordinary laws. The constitutional laws are the ones that allow the revision of the Constitution, being drawn up by the constituent assembly elected and convened for this purpose. The Constitution and the constitutional laws occupy the first place on the scale of the legal rules, all the other normative acts having to be in accordance with their provisions.

### **1.3. Implied contract terms**

As a rule, the contracts are concluded through the consent of the parties, if the law does not require a certain form for its valid conclusion. A written form is, though, advisable, for evidence in case of future potential litigations.

The main conditions that must be respected and fulfilled for the validity of a contract are: the capacity to conclude a contract, the consent of the parties, a determined and lawful object and a moral and lawful cause. (Dumitru, O.I, 2020) In case the law requests a certain form of a contract, it has to be respected, under the sanction provided by the applicable legal rules.

Any person can conclude a contract unless they are declared incapable by law or forbidden from concluding certain types of contracts.

### **1.4. Formation of contract terms.**

The contract is concluded by negotiation between the parties or by unconditional acceptance of an offer to contract. According to Article 1182 from the Civil Code, it is enough for the parties to agree on the main elements of the contract, even though certain other elements are going to be discussed later. The consent of the parties needs to be genuine and they should act with good-faith. (Vasilescu, 2012)

The contract that was validly concluded has the same power as a law between the contracting parties. The contract can be changed or terminated only through the parties' agreement or in the situations provided by law.

The Romanian legislation regulates, in Article 1271 from the Civil Code, the situation of the possibility given to the parties to either adapt the contract or terminate it, if during the execution of the contract, fulfilling its obligations has become overly onerous for one of the parties due to an exceptional change of the circumstances and forcing the debtor to continue executing his obligations would be clearly unfair. As such, when the hardship event occurs, the parties must renegotiate the contract in order to maintain a balance between the promises. If they fail to do so, it may lead to the termination of the contract.(Dumitru, O.I, 2020)

### **1.5. Private and Public procurement**

Public procurement is regulated in Romania through Law no. 98/2016 on public procurement. The law regulates the procedures for the public procurement and the organization of competitions for solutions, the specific tools and techniques that may be used for the award of public procurement contracts, as well as certain specific aspects relating to the execution of the public procurement contracts. The legislation in the matter creates the legal framework necessary to achieve the purchase of goods, services and works in conditions of economic and social efficiency.

Procurement or public procurement means the purchase of works, products or services by means of a public procurement contract by one or more contracting authorities from the economic operators designated by them, whether the works, products or services are intended to be carried out of public interest.

According to the law, the contracting authority can be:

Central and local public authorities and institutions, as well as those structures which have been delegated the status of authorizing officers and which have established competences in the field of public procurement;

Bodies governed by public law;Associations formed by one or more of the contracting authorities foreseen at letter a) or b).

The contracting authority is not entitled to use methods of calculating the estimated value of the acquisition in order to avoid applying the award procedures provided by law. Moreover, the contracting authority is not entitled to divide the public procurement contract into several distinct lower value contracts nor to use calculation methods leading to a sub-valuation of the estimated value of the public procurement contract in order to avoid application of the award procedures.

The estimated acquisition value is determined prior to the start of the award procedure and is valid at the time of initiation of the award procedure. The award procedure is initiated in one of the following ways:

- The submission of the ad for publication;
- In the case of the acquisition of social services or other specific services, provided in Annex no. 2 from Law no. 98/2016 on public procurement, the submission for publication of the contract notice or the notice of intent which is valid continuously;

The submission of the invitation to participate in the negotiated procedure without prior publication of a contract notice.

Any economic operator shall have the right to participate in the award procedure as a tenderer or candidate either individually or jointly with other economic operators, including by temporary associating themselves with others for the purpose of participating in the award procedure.

The contracting authority is not entitled to impose on the economic operators who jointly participate in the award procedure to adopt or form a certain legal form for the submission of an offer or a request to participate. Yet, the contracting authority has the right to request jointly participants in the award procedure whose offer has been awarded the winning bid to adopt or form a certain legal form, provided that this has been stipulated in the contract notice and the offer documentation and to the extent that such modification is necessary for the proper execution of the public procurement contract.

The main award procedures governed by law, applicable for the award of public procurement, framework agreements or the organization of solutions contests are the following: open auction; restricted auction; competitive negotiation; competitive dialogue; partnership for innovation; negotiation without prior publication; solution contest; the award procedure applicable to social services and other specific services; simplified procedure.

The technical features are set out in the awarding documentation and define the required features for the work, service or products that are the subject of the acquisition. According to Article 155 paragraph 2 from Law no 98/2016 on public procurement, these features may also address the process or specific method of execution of the works, the manufacture of the products or the provision of the services requested or a specific process for another stage of their life cycle, even if they are not part of the material content of the products, works or services to be procured, but provided that these characteristics are related to the subject-matter of the public procurement or the framework agreement and are proportionate by reference to its value and objectives.

The technical specifications also determine whether the transfer of intellectual property rights is required. The technical specifications must enable all economic operators to have equal access to the award procedure and must not have the effect of introducing unjustified obstacles to ensuring effective competition between economic operators.

The contracting authority shall establish the winning bid on the basis of the award criterion and the valuation factors specified in the invitation to offer or the contract notice and in the procurement documents.

In Romania, we also apply Law no. 99/2016 on sectoral procurement and Law no. 100/2016 on the concessions of works and service concessions. Law no. 99/2016 regulates the way in which contracting entities achieve sectoral procurement, the procedures for the award of sectoral contracts and the organization of solutions contests, the specific instruments and techniques that may be used for the award of sectoral contracts, as well as certain specific aspects relating to the execution of sectoral contracts. Law no. 100/2016 regulates the procedure for the award of works concession contracts and service concession contracts, the legal regime applicable to such contracts and specific aspects of their execution. Its goal consists in:

- Promoting competition between economic operators;
- The use of resources in terms of efficiency and economy;
- Ensuring the integrity of the procedure for the award of works concession and service concession contracts;

Ensuring the legal framework for the award of works concession and service concession contracts.

For solving the disputes arising in the application of the public procurement procedure, it is applicable Law no. 101/2016 on remedies and appeals in respect of the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints. Its provisions are also applicable for claims seeking compensation for damages caused in the course of the award procedure, as well as to the enforcement, cancellation or termination of contracts.

## **2. Public Construction Legislation**

## **2.1. Legislation and Regulation**

In Romania, construction contracts are regulated by special legislation, in addition to the general rules contained in the Romanian Civil Code. One of the most important laws governing construction contracts is Law no. 50/1991. According to art. 1, the execution of works shall be made only with after obtaining an Permit for Construction or Demolition Works, issued within the conditions of Law 50/1991 at the request of the Beneficiary.

## **2.2. Codes of Practice**

Along with the request for the issuance of the Permit for construction works (described in point 1.4.3), the Solicitant shall also present a documentation which comprises: the Urbanism Certificate, the proof of ownership, technical documentation, energy audit report, copy of tax payment document.

The Urban Planning Certificate, has an informative character and does not alone provide the legal right to execute the works. Both a legal entity or a private individual may file for an Urban Planning Certificate. There are several types of urban planning documentation in Romania: The General Urban Plan and the Related Local Norms of Urbanism ("PUG"), The Zonal Urban Plan ("PUZ") and the Detailed Urban Plan ("PUD").

All administrative units in Romania must have their own General Urban Plan duly approved, as the "PUG" represents the legal ground for any development plan. One of the most important aspects regulated under this document concerns the identification of the area.

The "PUZ" is characterized by a more specific/detailed urban planning development within the provisions of the "PUG" and provides for the technical details regarding the location of the works, in respective of their nature and/or beneficiary.

The "PUD" is an urban planning documentation with even a more in-depth character than the "PUZ", prepared for the detailed regulations of the provisions prescribed in the "PUG"/"PUZ" or for the purpose of determining the construction conditions. The "PUD" ensures the conditions for the site and supplies (for example water and electricity supply).

The validity of the urban planning documentation is analyzed by the local public authorities situated in the jurisdiction of the site.

Another requested document is the proof of ownership of the land and/or buildings, or the up to date land register. The land register is a standardized form which comprises information regarding the identifying and the description of the building and/or land, data about the owner of the land and/or building.



Furthermore, the project for the Permit of works execution is requested. This project is extracted from the technical project and it is drafted according to the provisions of Law no. 50/1991. The Constructor has the legal obligation to conduct the construction works based on the technical project.

The last document that is needed in order to obtain the Permit for construction of works is the proof of payment of the legal taxes, proving that the solicitant has fulfilled all of his obligations.

### **2.3. Licensing of professionals and contractors**

The Permit for Construction Works is an administrative unilateral act which gives its Holder the right to build and it is regulated by Law no. 50/1991. The competent authority for issuing the Permit is the City Hall situated in the jurisdiction of the site.

The solicitant shall gather the Technical Documentation to obtain the Permit for Construction Works (D.T.A.C.). The D.T.A.C. comprises three essential parts: the design plan drafted by a licensed architect, the resistance plan drafted by an engineer specialized in structural resistance and the equipment plan drafted by the equipment-engineer specialized in electric installations, indoor sanitary and thermic equipment.

If, in time, the theme of the construction undergoes significant modifications, the solicitant must apply for a new Authorization for Construction works, but without having to adjust the Urban Planning Certificate.

Also, if the initial Authorization for Construction works expires, the solicitant must apply for an extension.

### **3. Construction Contracts**

The modern trend regarding construction contracts encourages, from a legal point of view the use of standard contracts provided by various professional organizations involved in constructions. These contracts are usually grouped under families or contract suites. National and international projects would rather use the standard contract unless the parties choose to use their own form of contracts. There are several advantages brought by the use of standard form of contracts (for instance, they are amended to incorporate Romanian Law requirements on engineering, design and build) and they are largely supported by professional and scientific communities. Needless to say, that these advantages are also endorsed by international financial institutions and development banks.

### **3.1. Most used forms of contracts**

The Contract for Construction of Works is defined by article 1874 of the Romanian Civil Code. According to article 1851 the entrepreneur is binded, on his own risk, to implement a certain kind of construction work for the beneficiary, in the exchange of a price.

The Construction Contract is consensually, one being able to conclude it verbally, only if the Romanian legislation does not provide something else regarding the domain of the activity. However, it is recommended that this contract is concluded in writing so as to be proved in court, when necessary.

This type of contract is also known as being commutative and onerous. The parties know their obligations and the extent of them, precisely from the completion of the contract and from this, both parties follow a patrimonial purpose. Moreover, the contract is bilateral and this gives the parties the possibility to invoke in court the termination of the contract and the exception of non-performance.

The Contract for Construction Services represents a particular case of the contract of works regulated by art. 1851-1873 of the Romanian Civil code. In addition, it has other special regulations which can be found in the following articles from the Civil Code: 1874-1880 (general provisions and is completed by special legislation such as Law no. 50/1991 and Law no. 10/1995).

#### **Rights and duties of the parties**

The Romanian Civil Code comprises the standard rights and obligations derived from this type of contract. Furthermore, both of the parties can expand those by simply stipulating additional terms and conditions.

Regarding the obligation of procurement and utilization of the necessary materials, article 1857 of the Civil Code stipulates two hypotheses. In the first case, the contractor provides the materials which remain in his property until the moment of entrusting the beneficiary with the construction (Reception of works). In the second case, the employer provides the materials, which remain in his property and entrusts the contractor with them in order to use them with the obligation of reporting to the beneficiary and the obligation of returning them back if they are not used for the completion of works.

Moreover, it is also stipulated the obligation of the contractor to inform the employer, immediately, when the normal execution of the construction is endangered due to the procured materials/ the other means that were provided by the beneficiary or the incongruous instructions

given by the beneficiary (art. 1858 Civil Code). The immediate article presents the right of the contractor to annul the contract if the employer does not take any action concerning the information brought to his knowledge also, in the same situation, the contractor can continue the project but on the risk of the beneficiary, notifying him regarding this aspect.

In the case that, before the reception, the completed work went under serious damages or simply degraded without the involvement of the beneficiary, the contractor who procured the materials is due to rebuild the construction, on his monetary account, and within the parameters of the initial terms and conditions of the contract. If the materials were procured by the employer and the finished work is in the situation mentioned before, the party in question must provide again the necessary materials. These regulations are not available if the reception of works was previously completed (art.1860 Civil Code).

The employer has the right to inspect the works and its progress on his own expense, but without the unjustified disturbance of the contractor. The Employer is obliged to immediately communicate any observation regarding the matter (art. 1861 Civil Code).

According to article 1862 of the Civil Code, as soon as the beneficiary has been announced that the work is completed, the employer has the obligation, in a reasonable amount of time, to verify it. The employer that signed the minutes of the Reception of works without any mentions, loses the right to further report any non-conformities that existed and were known at the moment of the reception.

### **Variation of works and price revision**

The beneficiary is obliged to remunerate the contractor at the date and place of reception of works, if the contract does not specify otherwise. According to art. 1864 of the Civil Code, the case of deterioration of works, without the beneficiary being at fault, the contractor does not have the right to remuneration.

If the price of the works has been previously established or estimated and at the time of the termination of the contract, the price was modified, the contractor has the obligation to justify any adjustment. According to article 1865 of the Civil Code, the beneficiary is not bound by the increased price, unless it is justified by services that the contractor could not have predicted at the time of concluding the contract.

In the case that the price of the project is established based on the value of the works, the contractor is obliged to inform the beneficiary of the stage of the work, about the services already provided, and about the expenses already encountered (art. 1866 Civil Code).

When the price of the project has been established globally (lump sum, such in the case of Yellow FIDIC for example), the beneficiary must pay the established price and does not have the right to ask for a discount based on the fact that the project needed less input, or it costed less than initially expected. On the same note, the contractor does not have the right to ask for an increase in price, based on the opposite of the reasons mentioned above. The price remains unchanged, even though there has been changes regarding the conditions of execution initially forecasted, if the parties have not concluded otherwise.

### **Subcontractors**

Mainly, the contractor has to execute the works with his own equipment and personnel. However, with the written assent of the beneficiary, he can assign part of the works to subcontractors. The part assigned to subcontractors cannot exceed 75% of the contract's value (including the rental of required machinery or the acquisition of the materials from third-parties instead of original producers). In the case that, at the completion of works, the contractor did not respect the above-mentioned provisions, the employer is entitled to apply a penalty of 2% of the contract value and to exclude the contractor from future auctions.

The assent for subcontractors must be obtained at the time of closing of the contract or two weeks before the employment of the subcontractor, at the latest.

### **Guarantees and defects**

In accordance with article 1863 of the Civil Code, the contractor is obliged to provide the beneficiary a guarantee for compliance of works in the form of a letter of warranty issued by a bank or by an insurance company. The reception of works is equivalent with the liberation of the contractor who is no longer obliged to extend the letter warranty.

Nevertheless, the contractor is responsible, in all cases, for the concealed defects of the works even after the receptions of works (the period of the after the reception of works should be covered by a different letter of warranty). In accordance with article 5 from Decree no. 167/1958, the right of legal action regarding the concealed defects of works is affected by a six months' time bar, but only in the case that the defects were not concealed with archness.

The six-month period for notification of defects is computed from the date of their discovery, however, no longer than a year from the reception of works. These time bars can be modified by the parties.

### **Termination of the contract**

The beneficiary has the right to unilaterally terminate the contract, with immediate effects, and without any delays or judiciary or extra judiciary formalities, through a written notice to the contractor, in the case that a severe non-conformity of the contract is observed (art 1872 Civil Code). The non-conformities can be: the contractor is extremely late with the delivery of the project, the project presents major defects, the contractor hired subcontractors not accepted by the beneficiary, the contractor goes bankrupt, the contractor or the legal representatives of the contractor offers directly or indirectly to a person of interest any kind of bribe. For the cases mentioned above, it is presumed that the beneficiary has previously notified the contractor and offered him a 14 days remediation period. After the 14 days period and after issuing the written notice of the termination of the contract, the beneficiary has the right to evacuate the contractor off the premises.

In the case of the termination of the contract by contractor's fault, the beneficiary has to reimburse all the work the contractor has already provided, deducting the sum of penalties, the remediation of defects and all the other costs involving the termination of the contract.

The beneficiary has the right to terminate the contract, due to causes independent of the contractor. This is accomplished through a written notice to the contractor informing him of the termination of the contract, with a seven days term. During this time, the contractor has the obligation to terminate any contract with the subcontractors and does not have the right to initiate any other actions, except for the urgent matters.

If the contractor cannot start or continue the execution of the project based on the beneficiary not fulfilling, without any justification, his own obligations, the contractor does have the right to terminate the contract, and he is entitled to damages, if there is the case, according to art. 1873 Civil Code.

The termination will be carried out through a written notice, informing the beneficiary of the termination of the contract, if previously the contractor has notified the beneficiary, regarding the intention of terminating the contract and has given him a reasonable amount of time. The contractor will have the right to be remunerated for all the work he has provided to that moment and to some rightful damages.

### **Force Majeure**

Force Majeure, according to article 1351 of the Civil Code, is an extern occurrence, with exceptional character, utterly unpredictable and inevitable, unexpected and independent of the

parties' will, which prevented one of the parties to accomplish their contractual obligations, even though all the possible measures were taken.

When a case of force majeure is invoked, the party in question must immediately inform in writing the other party, specifying the cause that compels the disruption of the activity, the foreseen consequences and the measures that are to be taken for the negative impact to be diminished. Furthermore, it is also the party's right to extend the contract term but only with the equivalent of the period of the disruption caused by the force majeure event.

If the works are executed partially or is completed by the contractor, but it is deteriorated before reception, due to a situation of force majeure, for instance natural events, civil war, rebellion, acts of terrorism, assault or other cases, then, the contractor has the right to financial remuneration. For any other damages, none of the parties can ask for compensation from the other one.

### **The hardship clause**

The parties are still bound to execute their contractual obligations even though it has become more onerous, due to increase in costs of execution or because of the diminishing of the contractual obligations of the other party. However, if the execution of the works has become more onerous due to an exceptional change of context, which will make the obligation of the debtor unjust, the court can grant the adaptation of the contract, which can establish that the burden of the change will be carried equally by both parties or can establish the termination of the contract. This disposition is only applicable if the changes in context intervened after the contract was concluded, if the change or the termination of the contract could not have been forecasted at the time of concluding the contract, if the debtor has not accepted the risk of a change in context and the debtor has tried, in good faith, in a reasonable time to renegotiate the contract.

### **Limitation of liability**

Article 1556 of the Civil Code stipulates that when the obligations established by a synallagmatic contract are overdue, the interested party can refuse to execute its own obligations, except the case when the law or the contract specifies that the party invoking the exception of non-performance should execute their obligation first. The synallagmatic contracts are characterized by the fact that both parties have to execute their obligations simultaneously.

By "Limitation of Liability" we refer to the contractual remedy, according to which the interested party can invoke, in the case of a synallagmatic contract, his right to refuse the execution of his own obligations until the other party does not execute their own.

The admissibility conditions of the “Exception of non-performance” are: the obligations of the both parties arise from the same synallagmatic contract, both obligations must be overdue, both obligations must be executed simultaneously, the non-performance of the obligations of the other party must be significant and should not be a consequence of the exception of non-performance invoked by the other party.

FIDIC (Fédération Internationale des Ingénieurs-Conseils) stands for the International Federation of Consultant Engineers. This private organization, based in Geneva, reunites all the national professional structures of consultant-engineers. It was founded in 1973 by Belgium, France and Switzerland, but to this day, FIDIC comprises over 70-member associations worldwide.

The FIDIC system has a new set of norms that are currently being used and it comprises the following Books: (Uff, 2013)

The Red Book: in regulation with the usual arrangements, the entrepreneur carries out the work in conformity with a project provided by the beneficiary or the engineer;

The Yellow Book: the terms of this contract are destined for regulating the supply of electrical and mechanical equipment;

The Green Book: this is the short form of the contract and it is used in the case of a lower complexity and value projects due to the simplicity and flexibility of it.

In June 2008, 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 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 nonexclusive rights for the Ministry of Economy and Finances for the translation in Romanian of the crucial documents. The translation in Romanian language was drafted in August-December 2006 and comprised the General Conditions for Contracts for the first three documents mentioned in the previous section, the Red Book, the Yellow Book and the Green Book.

The entire legislative framework prepared the grounds for the adoption of the Order in 2008, making the contractors and the beneficiaries familiar with specific conditions for contracts and preparing the harmonization of the Romanian legislation with the FIDIC contracts. The harmonization was meant to be accomplished through the adoption of Order 915/2008.

The Joint Order of the Ministers of Economy, Finances, Transportation and Development, Public Works and Housing no. 915/465/415/2008 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.

National Construction Contract. On the 11th of January 2018, the Government Decision no. 1/2018, approving the general and the specific decisions for certain categories of public procurement contracts related to the investment objectives which are financed from public funds, was published in the Official Monitor of Romania.

The legislative act contains two annexes: the first one comprises the general and the specific conditions, moreover a model of a contractual agreement for implement of work contracts and the second one comprises not only the same set of conditions but also a model of a contractual agreement for design and implement of work contracts.

These models of general conditions will be used mandatorily for works contracts which are financed from public funds, non-refundable and/or refundable, whose estimated total value is at least equal to the disclosure threshold of a notice from the Official Journal of the European Union.

On the recommendation of the European Commission, given the existing models found previously in the legislation, especially the ones approved by Order no. 600/2017, the new models of contracts approved by Government Decision no. 1/2018 were developed by several experts from the European Investment Bank. Several experts from Romanian Association of Consulting Engineers participated actively, in autumn 2017, to the public consultation. From their point of view, the resulted contractual terms are more balanced and efficient than the previous types of contracts used by the Romanian authorities, which were based on FIDIC Conditions of Contract, but more distorted.

However, mixed feedback was received from the Contractors and it is yet to be determined the mid and long-term consequences of the National contract's implementation.

Under the rule of these new conditions of contract, the beneficiaries are entitled to elaborate Special Conditions only in the view of sub clauses and only regarding to the topics that are listed in the table provided at the end of the General Conditions. Any other special condition is considered to be void. With this aspect considered, the possibility of any beneficiary to bring their own changes to the contract is removed.



## **NEC Contracts**

NEC is a family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships. It is suitable for procuring a diverse range of works, services and supply, spanning major framework projects through to minor works and purchasing of supplies and goods. The implementation of NEC contracts has resulted in major benefits for projects both nationally and internationally in terms of time, cost savings and improved quality. The choice of this form depends on the projects' complexity and level of risk. Each contract is supported by associated guidance notes and flow-charts, detailing exactly what procedures should be followed by whom and when. (Patterson, 2009)

## **4. Dispute Resolution**

### **4.1. Mediation**

According to the Romanian legislation, there are several ways of solving a conflict between the contractual parties.

As such, they can choose between mediation, solving the dispute in front of the competent courts of law or arbitration.

The mediation is an alternative way of solving the disputes between two or more parties who want to reach a certain mutual understanding with the help of a third party specialized as a mediator.

The applicable law in the matter is Law no. 192/2006 on mediation and organising the profession of mediator.

According to Article 1 from Law no. 192/2006, the mediation is an alternative way of solving the disputes in a peaceful way, with the help of a third party, specialized as a mediator, respecting the conditions of neutrality, impartiality, confidentiality and by having a valid consent from the parties. The mediation is based on the trust that the parties have in the mediator, as a person being able to facilitate the negotiations between them and to support them in solving the conflict by reaching a mutually convenient, efficient and sustainable solution.

The parties in conflict can present themselves in front of the mediator in order to solve their dispute. In case only one of them comes to the mediator, the mediator will send the other party a written invitation for the information over the mediation and ask for its acceptance.

For the mediation to take place, the parties need to conclude a mediation contract with the mediator. According to Article 44 paragraph 1 from Law no. 192/2006, the mediation meetings are forbidden until the mediation contract is concluded.

The mediation is based on the cooperation of the parties and the use, by the mediator, of specific methods and techniques, based on communication and negotiation. The methods and techniques used by the mediator need to focus exclusively on the interest and goals of the parties in conflict. The mediator cannot impose on the parties a certain solution regarding the dispute.

During the mediation procedure, the parties can be assisted or represented by a lawyer, under the conditions agreed through mutual consent. Also, they can choose to be represented by other persons who, under the conditions imposed by law, can conclude acts of disposition.

All the statements made during the mediation by the parties, their representatives or the mediator are confidential and cannot be used as evidence during a judicial or arbitral procedure, with the exception when the parties agree otherwise or the law provides the contrary.

The mediation procedure ends:

- Through the reach of an understanding between the parties, that can be in written form and signed by the participants;
- Through the ascertainment of the mediator of the failure of the mediation;

Through the submission of the mediation contract by one of the parties.

If the parties have only reached a partial understanding, any one of them can decide to solve the rest of the conflict in front of the competent courts of law or through arbitration.

#### **4.2. Courts**

The principles, the structure and the organisation of the judicial system in Romania are governed by the Constitution and Law no. 304/2004 on the judicial organization. Justice is being done in the name of law and is achieved through the following courts of law: The High Court of Cassation and Justice, courts of appeal, tribunals, specialized tribunals, military courts and judicatures.

The High Court of Cassation and Justice is the only supreme court in Romania, having its headquarter in Bucharest. The courts of appeal are courts in whose area more tribunals and specialised tribunals function. Currently there are 15 courts of appeal in Romania, established in Annex 1 to Law no. 304/2004. The tribunals are organized at the level of every county and the

capital Bucharest. The judicatures are present in the main cities of Romania and the 6 districts of Bucharest.

Each court of law is divided into departments, each department being formed by judges specialized in certain branches of law according to the litigations they have to solve.

Anyone who has a claim can bring an action in front of the competent court of law. The court, according to the object of the trial, the quality of the parties, their domicile/headquarters or the value of the claim needs to be competent generally, materially and territorially.

The rules applicable for the trials are governed by the provisions of the Civil Procedural Code, the Criminal Procedural Code and other provisions regulated in special laws.

Normally, according to the object of the file, the decisions of the first courts can be challenged by the unsuccessful party and have it judged by a higher court, before getting a final and irrevocable decision.

In front of the courts of law, the parties can represent themselves in the trial or seek the help of a lawyer.

### **4.3. Arbitration**

In accordance with sub-clause no. 20.6 FIDIC, after undergoing the preliminary Dispute Adjudication Board (DAB) stage, once the dispute arisen from a construction contract is deferred to arbitration, the arbitral tribunal has the jurisdiction to access, review and revise any certificate, determination, instruction, opinion or evaluation of the engineer, and any DAB decision. None of the parties will be limited in their actions in the proceedings before the arbitrator to the evidence or arguments invoked in front of the DAB. However, any DAB decision will be admissible as evidence in the arbitral process.

Arbitration can be commenced prior to or after completion of the works. Nevertheless, in the first instance, the obligations of the parties, engineer or DAB shall not be altered by reason of any arbitration being conducted during the process of works.

According to article 70 (Dispute and Arbitration), the disputes regarding the National Contract for Execution of Works published by Government Ordinance no. 1/2018 are to be settled under the rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

According to article 606 of the Civil Procedure Code, arbitral awards are final and binding and can only be contested by an action for annulment, for specific grounds, regulated by article 609 of the Civil Procedure Code.

The Court of Appeal from where the arbitration took place has jurisdiction to decide upon the action for annulment of the arbitral award. The parties can file an application within 1 month from the date when the arbitral award was communicated. If the parties applied for the correction, clarification or completion of the award, the time limit will run from the date of the communication of the award or, if it is the case, from the date by which their application was resolved. In the case in which the ground for annulment is a decision of the Constitutional Court, according to art. 608 (1)(i) of the Civil Procedure Code, the time limit will be of 3 months from the publication of the decision in the Romanian Official Gazette.

Regarding construction contracts, especially in public procurement, it is important to bear in mind that the award can be set aside through an action for annulment due to the fact that the dispute was not capable of resolution by arbitration (for matters such as reception of works). Not every dispute is "*arbitrable*". This international understanding of arbitrability under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is that each contracting state shall recognize an arbitration agreement "concerning a subject matter capable of settlement by arbitration," and in Article V(2)(a) provides that an arbitral award may be refused recognition and enforcement if the "*subject matter of the difference is not capable of settlement by arbitration under the law of that country.*" (Adriaanse, 2010)

In case of admission of the action for annulment, the Court of Appeal shall annul the arbitral award and render one of the following solutions:

Firstly, in the cases in which, according to article 608 of the Romanian Civil Procedure Code, the dispute was not capable of resolution by arbitration, the arbitral tribunal resolves the dispute in the absence of an arbitration agreement or based on an agreement that was null or inoperative, the award is rendered after the expiry of the time limit for arbitration. The Court of Appeal shall send the dispute to the competent court of law, in accordance with the provisions of the law regarding the competence.

Secondly, in all the situations provided as grounds for the action for annulment, the Court of Appeal shall remand the dispute to the arbitral tribunal if at least one of the parties requests so.

The decisions of the Court of Appeal is subject to a final appeal, in the High Court of Justice. This appeal can only be filed for a specific number of reasons, as stated by art. 488 of the Civil Procedure Code.

There are several situations in which the parties did not conclude a compromissory clause or in which the compromissory clauses are pathological and therefore, considered void. In these cases, the national courts have jurisdiction in deciding upon the matters arising from a construction contract According with art. 94 (1) of the Romanian Civil Procedure Code, if the value of the object is valued up to 200.000 RON the dispute will be settled by the Court of first instance. If the object is valued at more than 200.000 RON, the dispute will be settled by the Tribunal.

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