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Liability standards in Romania. FIDIC vs. National Construction Contract





The new National Construction Contract in Romanian Law

The **formal reasoning** for the adoption of Decision no. 1/2018 is found in the Descriptive File which indicates that the initiative was the result, *on the one hand*, of the **actions** agreed by the Government in the Chapter 4 of the **National Strategy** in the field of public procurement approved by Government Decision no. 901/2015 and

On *the other hand*, in Law no. 80/2017, it is established, at point 2, the amending of Law no. 98/2016 on public procurement in the sense that it will be provided by government decision "**general and specific contractual conditions for certain categories of public procurement contracts related to investment objectives financed from public funds.**"

The **real reasoning** behind the issuing of the Government Decision no. 1/2018 is related to: the **complex and numerous problems** the national authorities had **in the application** of the Order no. 600 of the Ministry of Transportation of May 30, 2017 amending the annex no. 1 to the Order of the Ministry of Transportation and Infrastructure no. 146/201136 regarding the approval of special contractual conditions of contracts for equipment and construction, including design, and **of contracts for construction of buildings and engineering works designed by the beneficiary in the form of the strand contracts offered by the International Federation of Consulting Engineers in the Field of Construction (FIDIC)**, for investment objectives in the field road transport infrastructure of national interest, financed from public funds.



Thus, following the **numerous debates between** of the representatives of the contractors, of the financial institutions, of the European Commission, of the European Investment Bank (as financier of the projects) and, the consultations with other stakeholders, the Romanian Government decided to issue a Decisions (GD 1/2018) which comprises in **two annexes providing general and special conditions for construction and design&build publicly funded projects**

Basically, the two annexes are delivering, in a very different form, models of contracts corresponding to the famous FIDIC **Red** and **Yellow** Contract Conditions



- *According to some of the initiators, the national contract, although it started from FIDIC standards, was intended not to be FIDIC, having similar structure and presentation but fundamentally being different in providing the parties's balance or performance*
- *As an example of change of view due to some practical issues, we need to indicate that the arbitration carried out is by the International Court of Arbitration at the Romanian Chamber of Commerce and Industry, a compromise between the Romanian administrative court and international arbitration (ICC Arbitration Court) the initiators indicating that the decisions of administrative courts are not adapted to the complexity of public investment contracts and the arbitration at international level is highly expensive and time consuming taking into consideration the types of conflicts.*

- *It should be mentioned that the Romanian legislator, more precisely the consultants working on the proposal, had as **sources** of inspiration the VOB (Vergabe - und Vertragsordnung für Bauleistungen), the **German standard construction contract**, the **contracts used by the European Commission** for the projects directly financed or even **standard forms from UK** like the respectively New Engineering Contract (NEC)/New Engineering and Construction Contract.*
- *At the same time, these two contract models proposed in GD1/2018 represent a form of **administrative contract** and the beneficiary, respectively the administrative authorities have the right to supervise and control as well as the right to unilaterally modify the contract in exceptional situations (with the granting of adequate and effective compensation) and the right to sanction.*
- *This new provisions are abrogating the Government Decision no. 1405/2010 on the approval of the use of contractual conditions of the International Federation of Consulting Engineers in the Field of Construction (FIDIC) for investment objectives in the field of transport infrastructure of national interest, financed from public funds*

Some features and the main actors

General conditions

Special conditions

The actors:

Employer - Beneficiary

Engineer - Supervisor

Contractor

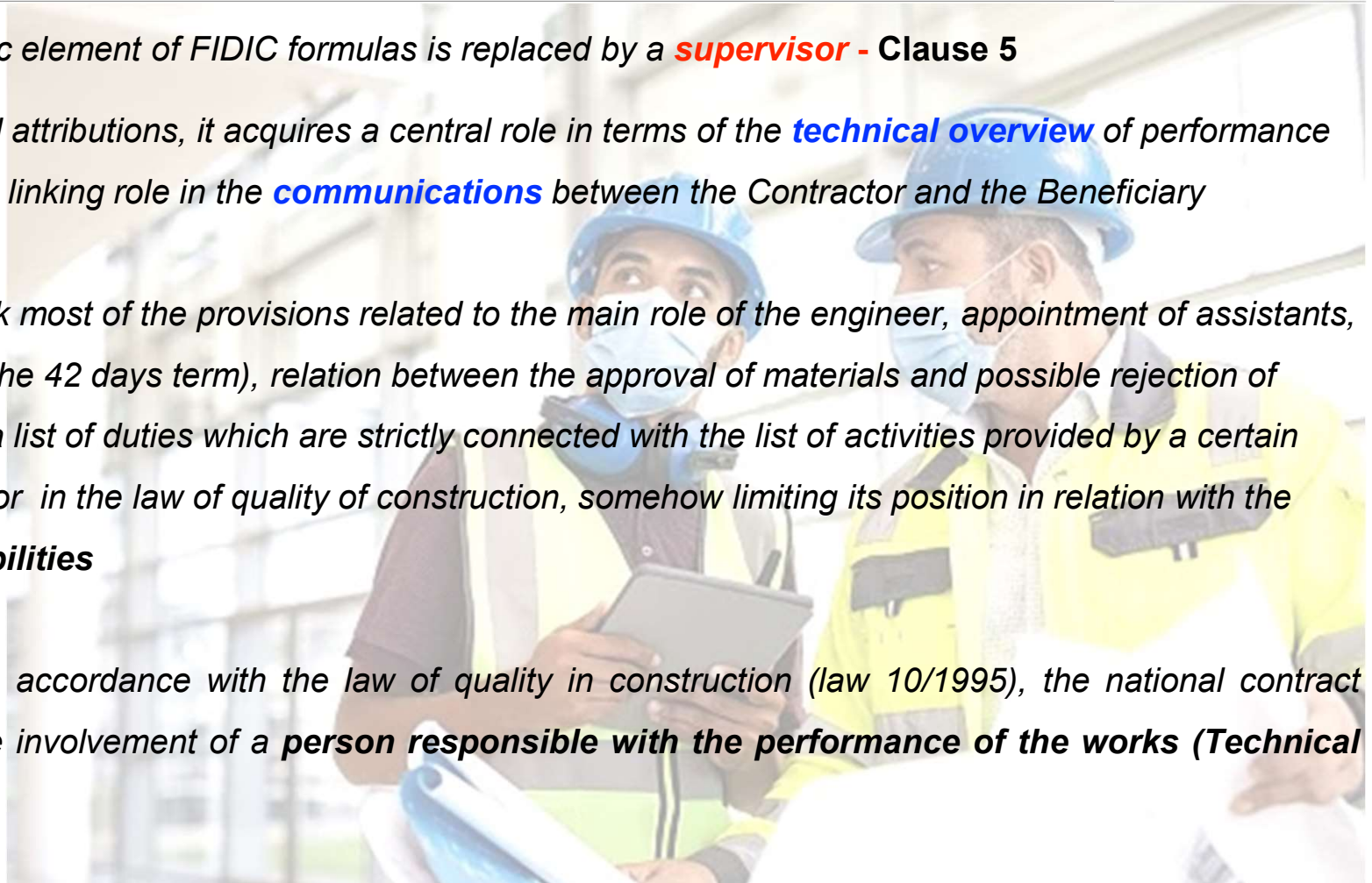
Subcontractor

- *The **language** of the Contract and of all communications between the Contractor, the Beneficiary and the Supervisor or their representatives shall be **Romanian**, unless otherwise provided in the Contractual Agreement - similar to FIDIC*
- *The contract will be governed by **Romanian law***
- *Beneficiaries may draw up **Special Conditions only in respect of the subjects listed in the table at the end of the model contract. Any other Special Condition is void. As a result, the beneficiary can no longer make his own changes to the contracts. At the same time, contractors will be obliged to accept it in the form proposed by the beneficiary, without being able to propose amendments, as in the case of FIDIC type contracts.***



The engineer/supervisor

- The **engineer** as a specific element of FIDIC formulas is replaced by a **supervisor - Clause 5**
- According to the entrusted attributions, it acquires a central role in terms of the **technical overview** of performance of the project, as well as a linking role in the **communications** between the Contractor and the Beneficiary
- The National Contract took most of the provisions related to the main role of the engineer, appointment of assistants, replacement (but without the 42 days term), relation between the approval of materials and possible rejection of works, but it enumerates a list of duties which are strictly connected with the list of activities provided by a certain position of Quality Surveyor in the law of quality of construction, somehow limiting its position in relation with the contractor to the **legal liabilities**
- Distinct from Fidic, but in accordance with the law of quality in construction (law 10/1995), the national contract provides at **clause 13** the involvement of a **person responsible with the performance of the works (Technical Supervisor)**



Assignment

- *As the projects financing activities have been affected, the Romanian legislator decided to provide some extra provisions in the national contract either to ease the cash-flow or to save the project from the hands of the contractor in difficulty.*
- **Clause 6** of the National Construction Contract provides possibilities of **assignment** only with the beneficiary's approval, but it indicates also some possible situations when:
 1. *Any party is allowed to assign the debt right from the contract to a financial institution*
 2. *The beneficiary is paying the works directly to subcontractor*
- **The contractor failing to respect the provisions and deciding to assign the works or rights without the beneficiary's approval risks the termination of the contract and payment of damages**

Subcontracting



- *Compared to other forms of administrative construction contracts, the national construction contract borrows from the “Nominated subcontractors” useful provisions, but most of them have adjusted texts.*
- *The main distinction we may notice is that the process of replacing an existing subcontractor or hiring a new one is very complex and highly connected to the initial conditions of the tender, the payment towards the subcontractors is reported to the beneficiary, but a direct payment to the subcontractor is seen as an exception (compared with clause 5.4 from Fidic)*
- *From the liability point of view, we can notice that the national contract is very strict with the contractor, the latter being liable for any of the subcontractors actions and, in case, it replaces without approval, **the beneficiary can decide to terminate the contract.***

Employer's general duties

- *The **clauses 8 - 12** from the national construction contract provides, very similar to Fidic, just the order being different, because it starts with clause 8 - transfer of design (in case of the construction contract, in design and build contracts being the duty of the contractor to deliver), with clause 9 - access to site, clause 10 - permits and assistance and finally its personnel.*
- *In a different view and a conservative one, the **Supervisor (Engineer) and the assistant are considered to be Employer's personnel**, which affects the role, positing and, as effect, duties of the Supervisor who may become very subjective.*
- *As regarding the **Employer's Financial Arrangements**, in the pure spirit of the Romanian authorities overprotective character, the national contract **does not provide**, as Fidic does, a “**reasonable evidence that financial arrangements have been made**”, the only solution applicable being the legal liability of the public authorities in establishing their budget, provided by law of public finance.*

Contractor's general duties

- *After reading the first 3 articles from clause 12 (12.1 - 12.3). Contractor's General Obligations you realise that there is a copy of Fidic's clause 4.1, but the rest of the articles, even containing provisions leading to similar effects, they have a different structure and specific terms.*
- *For instance clause 12.4 is very focused on the way the terms of receiving, contesting and performing the **Administrative Order coming from the Supervisor** are followed by the contractor. It is provided clearly that the contractor has to comply with any administrative orders issued by the supervisor and not contesting in 10 days.*
- ***Clause 12.6** refers to the Contractor's duty to ensure following the legal provisions in the field, but more important ensuring what its personnel and agents are doing, **being liable for any damage** produced in acting outside the limits of the law*
- ***Clause 12.7** tries to highlight the importance of **non-disclosure** (clearly a legal duty in the national law) by indicating that this **obligation is valid for 10 years after the final payment.***

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- *As Romania is still developing in the field and many small and medium companies need either to create joint-ventures with other similar ones or ask bigger companies for help and who become **”supporting entities”**, there were many cases when the leader or associates have failed to deliver a termination of the works, so the the others who came as support, should have replaced the other partner’s.*
 - *This made the Romanian legislator to introduce, in the new national construction contract, clear conditions for the ones who assume to become supportive entities, the articles referring to **joint liability of the associates and the supporting entities - 12.8 - 129***
 - *Other provisions of the national contract introduced as reaction to the factual events, were the ones referring to **ethics code and conflicts of interest**, the contractor having **administrative, civil and even criminal liability***

Risk and liability

- *The contractor has full **responsibility for the care of the Works** from the moment of Commencement Date until de Take-over Certificate is issued*
- *The Contractor shall obtain (at his cost) a **Performance Security** for proper performance in the amount established by the Special Conditions (usually 10% of contract value) and in the forms provided by law (insurance, banks or retainers)*
- *In Romania, due to many insolvencies of the insurance companies which lead to high risk, to the impossibility to use letters coming from non-banking financial institutions as the law cahnged and they have to report assets equal to 20% of the issued letters and high costs of banking letters - retainers are the most used form for Performance Security*

Risk and liability

- *The contractor has, also, to remedy the defects or damage at his own risk and cost in the Defects Notification Period between the take over and final termination if the defects of the works and are not others guilt.*
- *In this scope, the Contractor has to present a **guarantee security** (usually 3% of the contract value)*
- *Period of guarantee:*
 - *5 years - for A & B category constructions*
 - *3 years - for C category constructions*
 - *1 year - for D category constructions*

- **Clause 16. Liabilities and insurance**

A. Responsibility for damaging the works. *The Contractor has*

1. *To insure a **good quality of the design**,*
2. *to maintain the **integrity of the works** and*
3. *To **protect the works** till the hand-over against lost or any injury.*

B. The liability towards the beneficiary - *the contractor is liable for any injuries caused to the beneficiary, except the ones affecting the works*

C. The liability towards third parties - *the contractor will protect the beneficiary and his personnel against any actions/injuries, loses, direct or indirect ones, of any nature, generated by an action or inaction of the contractor and has to respond to all complains coming from third parties*

- **Insurance - Clause 16** - just *like the Fidic* forms stipulates, the national contract also provides for the contractor concluding insurance contract needed to cover:
 - Injury to persons and damage to property, similar to 18.3 Fidic
 - Works and equipment (including the issues of design) divided by National Contract in works insurance and auto insurance
 - Labor accidents
 - Quality of works, even after the final hand-over



- **Other liabilities**

1. *The contractor, during works, will follow all the legal rules regarding **health and safety** of labor ... and carries **all responsibility** for any labor accidents, dangerous events or incidents and professional illness of employees - **clause 22***
2. *On his own liability and cost, the Contractor has to **protect the neighbouring sites**...and will repay the Beneficiary for any financial consequences coming from the owners or residents in the area - **clause 23***
3. *The Contractor is liable for any **destruction of access ways** - **clause 24***
4. *The contractor is liable for keeping, protecting, moving or replacement of any **cables, pipes or other utilities** provided by the permits coming from the suppliers - **clause 25***
5. *The contractor is liable for **placement and all measurements** needed for that - **clause 26***

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- The Contractor is **liable for the quality of materials** brought and used and he has to present them for supervisor's approval.
 - **Testing . Chapter 5** - The Contractor will keep on site a record (called site recording book) of all weather conditions, labor working hours, number of workers and positions, materials used, tools, and equipments used, tests, difficulties on site, accidents, incidents or administrative orders, all these will be presented to Contractor's representative and Supervisor, the latter having to check and sign for approval and in case of disapproval, the Contractor has to respond in 10 days

Romanian Civil Code

Art. 1851 - Though the construction contract, the contractor assumes a work, on his own risk, for a beneficiary in exchange of a price

Art. 1860 - If prior to hand-over, the work deteriorates, for causes not related to the beneficiary, the contractor has to repair on his own cost and to respect the initial conditions and terms.

Art. 1879 - The Architect and the Engineer are not liable for defects only if they prove that those are not the result of the design supplied by them or there is not a failure in their supervision of the works.

The Contractor is not liable for defects if he proves they resulted from the design presented by Architect or Engineer selected by the beneficiary

The Architect, Engineer or Contractor are not liable for defects if any of them proves that they are the effect of the beneficiary's decision in choosing the land, materials, subcontractors, experts or construction methods, but exoneration does not apply if those defects were foreseeable during works and were not notified to the beneficiary.

Statute of limitation

Art. 1880 Romanian Civil Code - The term of statute of limitation for foreseeable defects starts after the Termination or after the term offered by the Contractor

Law 10/1995 regarding Quality in Construction

The Designer, the Authorised Design Supervisor, the producers of materials, the Contractor, the Authorised Works Supervisor, The Supervisor (Engineer) and The Authorized Design Expert are liable for not following the design and construction rules, in accordance with their duties, for the unforeseeable defects of the construction which may appear in a 10 years period from the moment of termination of works and after that in the entire life of the construction for defects of the structural elements.