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LIMITATIONS AND CONSTRAINTS IMPOSED BY ROMANIAN LAW ON FIDIC CONDITIONS OF CONTRACT – A CONTRACTOR’S DILEMMA WHILE PERFORMING PUBLIC WORKS IN ROMANIA

Key aspects that Contractors, while performing Public works in Romania under the FIDIC Red and Yellow Books, should be aware in respect of the operation and application of Romanian law, which imposes certain limitations and constraints relevant to:

- ❖ Variations under Clause 13 (Red and Yellow Books);
- ❖ Design liability (Yellow Book);
- ❖ Certification under Clause 14 (Yellow Book);
- ❖ Statute of Limitations (Red and Yellow Books);
- ❖ The appointment of the DAB (Red and Yellow Books);
- ❖ International Arbitration or Romanian Courts as final method of dispute resolution.



FIDIC BOOKS ADOPTED IN ROMANIA

- ❖ Government Decision No. 1405/2010 regarding the approval of FIDIC conditions of contract for investments financed from public funds in relation to infrastructure projects of national interest.
- ❖ Order No. 146/2011 for the approval of particular conditions for FIDIC plant and design-build contracts and contracts for building and engineering works designed by the employer, for investments financed from public funds in relation to road infrastructure projects of national interest (hereinafter referred to as “RB roads” and “YB roads”).
- ❖ Order No. 1317/2014 for the approval of the particular conditions for FIDIC plant and design-build contracts and contracts for building and engineering works designed by the employer, for investments financed from public funds in relation to railway infrastructure projects of national interest (hereinafter referred to as “RB railways” and “YB railways”).



VARIATIONS UNDER CLAUSE 13 (RED AND YELLOW BOOKS)

- Government Emergency Ordinance no. 34 of 19 April 2006 regarding the award of public procurement contracts, public works concession contracts and service concession contracts (“**GEO 34**”) comprising mandatory rules in respect of public acquisitions, whereby limitations were imposed in respect of additional work.
- Sub-Clause 13.2 Particular Conditions of Contract (“**PCC**”) of all contracts provides that:

“The Contractor shall be fully responsible for any proposal according to this Sub-Clause, as well as for the periods necessary for analysis and approval of such proposal. The Contractor is not entitled to any Extension of the Time for Completion, Cost and associated profit for this type of revision and approval periods.”



VARIATIONS UNDER CLAUSE 13 (RED AND YELLOW BOOKS) cont.

- Section 6 of GEO 34 - Negotiation without previous publication of a participation announcement - ART. 122 provides the specific cases when the contracting authority shall apply this procedure.
- Letter i) therein, regulates cases when the acquisition of additional works or services - which had not been included in the initial contract - becomes necessary due to unforeseeable events and only when all of the following requirements have been met:
 - the assignment shall be offered to the initial contractor;
 - the additional works or services cannot be technically and economically separated from the initial contract without causing major drawbacks for the contracting authority or, although separable from the initial contract, they are necessary for the fulfillment of the contract;
 - the cumulative value of contracts assigned for additional works or services **shall not exceed 20%** of the value of the initial contract.



VARIATIONS UNDER CLAUSE 13 (RED AND YELLOW BOOKS) cont.

- Sub-Clause 13.3 from the PCC of YB roads stipulates that “*Any Variation involving an increase or decrease of the Accepted Contract Amount, in order to produce effects shall be materialized in an addendum to the Contract which shall be signed by the Contractor and Employer.*”
- Sub-Clause 14.1 from the PCC of YB roads states that: “*In any case, the Contract Price **shall not exceed the Accepted Contract Amount by more than 10%**, except the provisions of Sub-Clauses 13.7 and 13.8 of the Contract. [Emphasis added]*”



DESIGN LIABILITY (YELLOW BOOK)

- The FIDIC Yellow Book is characterized by the “*single point of responsibility*”, whereby the Contractor assumes responsibility for the design and the construction, in accordance with the Employer’s Requirements. Consequently, the Contractor assumes the legal responsibility to provide the Employer with all of the services necessary to both design and construct whole, or a specified portion, of a project.
- ❖ In Romania, the contracting authorities have for a while opted to use the Yellow Book form of contract for the construction of national roads and motorways.
- ❖ Contractor’s liability in respect of design and design life terms are usually encompassed within Sub-Clause 5.2 of the Contract and the Employer’s Requirements.



DESIGN LIABILITY (YELLOW BOOK) cont.

- ❖ Nevertheless, provisions of the contract require corroboration with (Romanian) applicable law relevant to design liability, as follows:
 - Law 10/1995 regarding quality in construction (“**Law 10**”),
 - the Romanian Civil Code (**RCC**) that entered into force on 1 October 2011 together with Law no. 71/2011 for the application of Law no. 287/2009 regarding Civil Code, as further amended (“**Law 71**”),
 - Law no. 50/1991 regarding the authorisation of construction works (“**Law 50**”);
 - Methodological Norms for the application of Law 50/1991 approved by Order no. 839/2009 (the “**Norms**”),



DESIGN LIABILITY (YELLOW BOOK) cont.

- Government Decision no. 28/2008 for the approval of the technical and economic content framework related to public investments and on the structure and methodology of the general estimate for investment objectives and intervention works (“**GD 28**”),
- Order no. 863/2008 for the approval of “Guidelines for the implementation of certain provisions of the Government Decision no. 28/2008” (“the **Instructions**”),
- Regulation for Technical quality verification and assessment of designs, execution of works and constructions, approved by Government Decision no 925/1995 (“**GD 925**”).



DESIGN LIABILITY (YELLOW BOOK) cont.

- ❖ Article 29 from Law 10/1995 differentiates liability into two main categories:
 - for hidden defects – defects in construction that may arise within 10 years from the Taking Over of the Works;
 - for defects regarding the resistance of structures, resulting from non-observance of design and performance regulations in force at the date of its completion – during the whole existence of the construction.
- ❖ Designer's liability concerning quality in construction is regulated by article 22 of Law 10 that provides the following obligations:
 - to establish, within the Technical Design, the importance category of the construction;



DESIGN LIABILITY (YELLOW BOOK) cont.

- to ensure, through Technical Design and Working Drawings, a quality level in compliance with the requirements, with observance of the technical specifications and contractual clauses;
- to submit the prepared designs to specialized and certified design checkers appointed by the investor, as well as to resolve identified non-conformities and discrepancies;
- to issue specifications, technical instructions regarding the performance of works, operation, maintenance and repairs, and as the case may be, design for the supervision of constructions over time.



DESIGN LIABILITY (YELLOW BOOK) cont.

- to establish, within the Technical Design, the performance stages established for the works in compliance with the requirements and the appropriate quality inspections on Site during construction;
- to establish the method of dealing with defects during construction, which are attributable to the designer, to ensure that constructions meet the quality level in accordance with the relevant requirements, and also to monitor the implementation of appropriate remedies thereof on the Site, after prior endorsement by specialized and certified design checkers, upon investor's request;
- to participate in the preparation of the technical book of construction and to the taking over of the executed works.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK)

- ❖ The certification and payment conditions has been significantly amended within the PCC of the YB roads. The PCC of the YB railways invoke similar changes, yet they are not so severely amended as the former.
- ❖ Sub-Clause 14 from PCC of YB roads at letter c) and d) introduces a deviation from the GCC of the Yellow Book, and stipulate that:

*“c) The Contractor, within 14 days from the approval of the technical design (prepared according to the Employer Requirements) in the Technical and Economic Committee by the Employer, shall submit to the Engineer the Bill of Quantities for each item of Works, which shall contain the unit price for each mentioned item. The total value of the Bill of Quantities items (quantity*unit price) for each item of Works should be at most equal to the value established within the Schedule of Payments for such item of Works.*”



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

d) The Contractor shall also submit a detailed breakdown of each unit price from the Bill of Quantities for the Works. The breakdown shall contain the price for manual labour, materials, equipment, transport, as well as the percentages for indirect costs, profit. The Engineer shall be allowed to use this breakdown when assessing any revision of unit prices or any other new unit price, according to the provisions of Sub-Clause 13.3 [Variation Procedure], but shall not be limited by it.”

- ❖ Sub-Clause 14.3 provides the following;
 - The Statement submitted by the Contractor shall be accompanied by a document issued by each Sub-Contractor in order to certify that he has received all the amounts he is entitled to according to the executed works and previously certified.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

- The Statement submitted by the Contractor shall be based on the measurements of the real works' quantities executed in order to prove the execution of the activities from the Schedule of Payments.
- The Engineer shall not certify any payment without prior verification of the quantities executed by the Contractor.
- The Contractor shall not apply for, and the Engineer shall not certify for payment, within the Statement, amounts for which the Contractor has not integrally supplied and in the final form the necessary supporting documents, established by the Employer.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

❖ Sub-Clause 14.6

- The Works shall be measured by the Engineer, in order to be paid.
- If the Contractor does not succeed to participate to the meeting for the measurements or to send a representative, the measurements made by the Engineer (or in his name) shall be accepted as correct.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

- Except otherwise stipulated in the Contract, any time that Permanent Works have to be measured based on the documents records, such documents shall be prepared by the Engineer. The Contractor shall participate together with the Engineer at the examination and approval of the documents and shall sign them after their common acceptance. If the Contractor shall not participate, the documents shall be considered accepted as correct.
- The Engineer cannot certify for payment any amount for which the Contractor has not supplied integrally and in the final form the necessary supporting documents.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

- The Payments Certificates shall compulsory contain the Engineer's measurements and also the documents containing the qualitative reception for the certified Works.
- Likewise, the Payment Certificates shall mandatory be accompanied by a statement drawn up by the Engineer identifying the Sub-Contractors which executed the works mentioned in the payment certificate. This statement shall have annexed, if necessary, the document requested according to the provisions of paragraph 3 of the Sub-Clause 14.3.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

- Without prejudice of any other right of the Contractor which flows from the Contract or otherwise, the Engineer cannot issue an IPC if the cumulated value approved for payment would exceed the Accepted Contract Amount or any other contract value agreed subsequently by the Employer and Contractor within the Contract Addenda validly concluded.
- The Employer is entitled to correct the arithmetical errors from any PC or to return any PC for which the Contractor has not provided integrally and in the final form the necessary supporting documents. Consequently, the Employer shall notify the Contractor, with copy to the Engineer, its total acceptance, partial acceptance or the return of every PC.



CERTIFICATION UNDER CLAUSE 14 (YELLOW BOOK) cont.

❖ 14.7. Payments

- The Employer **shall notify the Contractor the acceptance of the Payment Certificate**, within 28 days from the receipt of such Payment Certificate from the Engineer.
- Within 7 days from date of the Employer's notification of the acceptance of Payment Certificate, the Contractor must issue to the Employer an invoice in the value specified in the corresponding Payment Certificate. The invoice provided by the Contractor shall be issued and filled in according to the Romanian Law in force.



STATUTE OF LIMITATIONS (RED AND YELLOW BOOKS)

- ❖ Limitation is the period of time within which a Party would be required to bring its claims to court or arbitration, failing which, claims would be considered time-barred at law.
- ❖ Limitation starts to run when the right to bring action to court or to file for arbitration is born.
- ❖ Applicable legislation:
 - GEO 34/2006, as amended by GEO 77/2012;
 - Romanian Civil Code (RCC), which entered into force on 1 October 2011;
 - Law 554/2004 regarding administrative legal procedures;



STATUTE OF LIMITATIONS (RED AND YELLOW BOOKS) cont.

- ❖ Article 3 f) of GEO 34/2006 in its latest version, as amended by GEO 77/2012, stipulates that public procurement contracts are deemed to be administrative deeds.
- ❖ Thus all disputes arising out of or in connection with contracts concluded after 1 January 2013, shall be subject to the special procedures stipulated by Law 554/2004.
- ❖ In accordance with Article 7 paragraph (6) of Law 554/2004, the Contractor shall submit a so-called “**Preliminary Complaint**” to the Employer **within 6 months** from specific dates ascertained on the basis of the particularities of each case.



STATUTE OF LIMITATIONS (RED AND YELLOW BOOKS) cont.

- ❖ Two particularly relevant situations are presented below, specifically:
 - the date of an amendment to the Contract or the date of refusal to amend the Contract – in cases of disputes related to amendments to the Contract;
 - the date of breach of contractual obligations – in cases of disputes related to the performance of the Contract.

- ❖ Failure to submit a Preliminary Complaint within the 6 months' term would result in the Contractor's loss of entitlement to have its claim[s] heard at law.



THE APPOINTMENT OF THE DAB (RED AND YELLOW BOOKS)

- ❖ The Contract provides the timeframe within which to appoint a DAB – either standing or ad-hoc, depending on the type of Contract;
- ❖ A referral submitted to the DAB would suspend the limitation period during the entire duration of the DAB proceedings, including the period for the issue of a notice of dissatisfaction, and the mandatory period provided for the Parties to amicably settle the dispute pursuant to Sub-Clause 20.5 (see timeline below).
- ❖ The Contractor shall be obliged to refer a dispute to the DAB before the expiry of the limitation period, which is 6 months from the Employer's reply to the Preliminary Complaint or the expiry of the 30 days' term for such a reply (*i.e.* in accordance with Article 11 of Law 554/2004).



THE APPOINTMENT OF THE DAB (RED AND YELLOW BOOKS) ctd...

- ❖ According to Article 2.534(2) of the RCC, limitation will expire 1 month after the contractual dispute resolution mechanism (*i.e.* DAB proceedings, notice of dissatisfaction and mandatory period for amicable settlement) in accordance with Sub-Clauses 20.4 and 20.5 having been fulfilled (see timeline below).
- ❖ It is evident that several DAB referrals would likely be required in order to process complex EOT claims (and the like) to cover the entire period of the Time for Completion and extensions thereto.



INTERNATIONAL ARBITRATION OR ROMANIAN COURTS AS FINAL METHOD OF DISPUTE RESOLUTION

- ❖ All FIDIC forms of Construction contracts adopted in Romania provide the mechanism for the settlement of disputes that may have arisen between the parties, *i.e.* international arbitration or Romanian Courts.

- ❖ In accordance with Article 11 of Law 554/2004, court action / request for arbitration shall be filed within 6 months from:
 - the date of receipt of the Employer's reply to the Preliminary Complaint;
 - the date of receipt of unjustified refusal to resolve the Preliminary Complaint;
 - the expiry of the 30 days' term for the reply to the Preliminary Complaint.



INTERNATIONAL ARBITRATION OR ROMANIAN COURTS AS FINAL METHOD OF DISPUTE RESOLUTION

- ❖ The arbitration clause shall indicate the place of arbitration, the language of arbitration and the number of arbitrators;
- ❖ The new Rules of Arbitration of the International Chamber of Commerce entered into force on 1 January 2012;
- ❖ They provide the framework to be followed by the Parties and the arbitrators during the arbitration proceedings;
- ❖ ICC Court of Arbitration had also issued the Rules for Alternative Dispute Resolution (ADR) and the Rules for Expertise.



INTERNATIONAL ARBITRATION OR ROMANIAN COURTS AS FINAL METHOD OF DISPUTE RESOLUTION

- ❖ Actions filed with the Romanian Courts are regulated by the Romanian Civil Procedural Code that entered into force on 15 February 2013.
- ❖ Relevant jurisprudence concerning construction disputes within the realm of public procurement contracts in the matter of construction works is limited, whilst the very few civil decisions rendered in this specific domain have often been erroneous due to the unfamiliarity of the judges with construction works principles and related disputes, and the Courts being ill prepared to deal with such cases.
- ❖ Thus, due to the obligations under administrative contracts being always construed in favour of protecting public interest, the settlement of construction disputes by Romanian Courts may prove to be detrimental to Contractors.

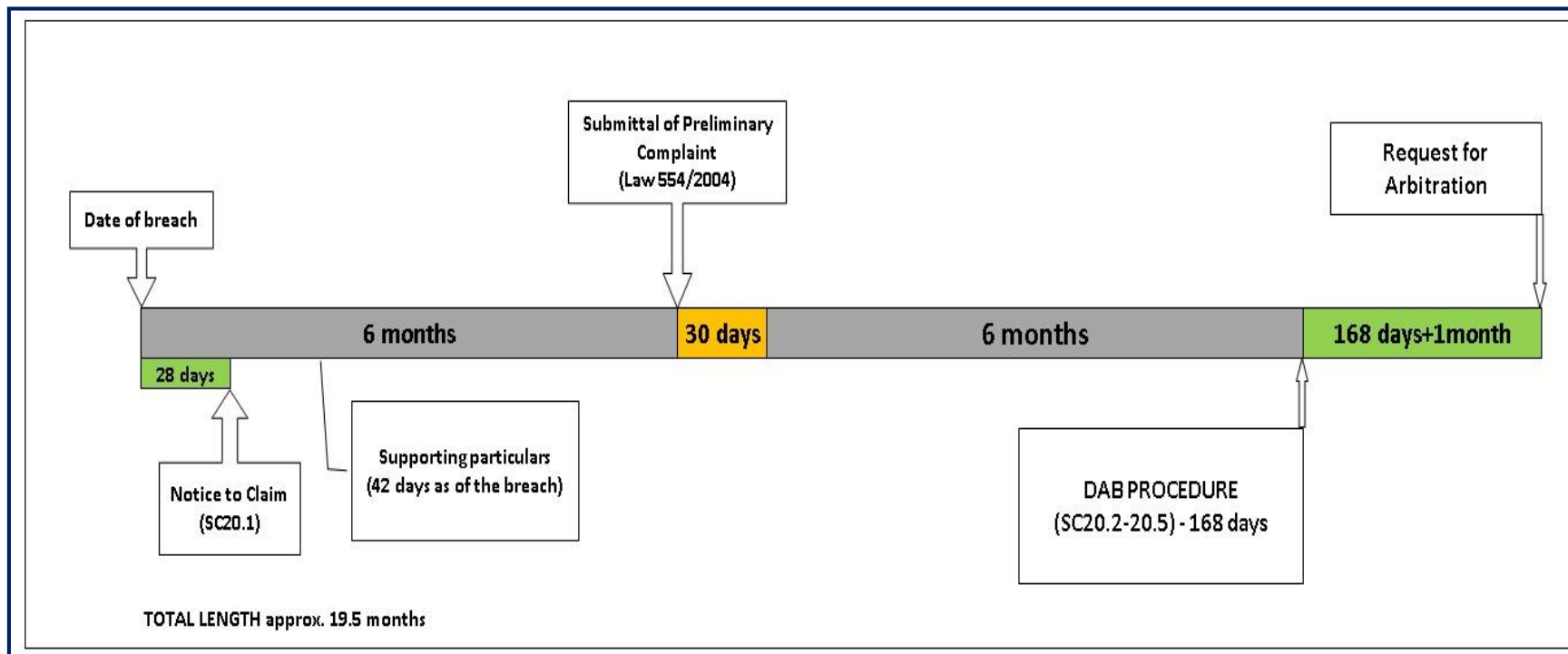


INTERNATIONAL ARBITRATION OR ROMANIAN COURTS AS FINAL METHOD OF DISPUTE RESOLUTION

- ❖ Such an interpretation *modus operandi* will certainly lead to contradictory decisions in respect of commercial contracts vs. administrative contracts. For this reason, until a reasonable body of expertise in this field will be available to the judges and a more coherent litigation practice will be established, Contractors should avoid concluding contracts which provide Romanian Courts for the resolution of disputes.
- ❖ However, at present it is only within the RB and YB railways that the DAB and International Arbitration has been removed and both replaced with the use of Romanian Courts. This should not stop Contractors during negotiations to stand firm on using the DAB and International Arbitration in lieu of local courts.



INTERNATIONAL ARBITRATION OR ROMANIAN COURTS AS FINAL METHOD OF DISPUTE RESOLUTION



Contractual multi-tiered dispute resolution mechanism in light of the Administrative Procedure and suspension of the Limitation Period



Your attention has been much appreciated



Thank you!

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