

APPLYING THE 20.1 SUB-CLAUSE OF THE FIDIC CONDITIONS OF CONTRACT UNDER STANDARDS OF POLISH CIVIL LAW

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1. INTRODUCTION

No law in force in Poland (and Act of 7 July 1994 - construction law in particular), in any of its provisions, uses the term "FIDIC".¹ As FIDIC is a set of generally recognized international standards, which are English-language contract patterns (conditions) of contractual agreements for project or construction works, it is not present in Polish law. However, it has been successfully used in the Polish construction process for years, which arouses controversy.²³ The main problem in incorporating the FIDIC conditions of

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¹ Journal of Laws of 2016, item 290 as amended.

² FIDIC conditions of contract as the acronym of *Fédération Internationale Des Ingénieurs-Conseils* have been developed by the International Federation of Engineers-Consultants (with headquarters in Geneva). This international organisation was founded in 1913 in Switzerland and currently brings together 94 countries - the members of the organisation. Its purpose is to define and promote standards in technological industries, represent independent engineers-consultants in the international arena and raise their qualifications and support the exchange of knowledge and the activities of businesses providing services in the field of technology. Since 1991 a member and the only representative of FIDIC in Poland is the Association of Engineers, Consultants and Experts (SIDiR). The Federation has drafted multiple contractual conditions relating to the building and engineering works, design-build works, conditions of contract for EPC/ turnkey projects, conditions of contract for small construction projects, conditions of contract for subcontracting building and engineering works, engineering designs, conditions concerning tender procedures and contracting, conditions of contract for equipment, design and construction, performance of engineering works (Cf Bogdan Roguski, 'The scope of FIDIC condition of contracts' (2011), Lex/el.; *idem*, 'The role of FIDIC and the history of conditions of contract. Non-contractual FIDIC conditions of contract' (2011), Lex/el.

³ In Polish construction contracts the FIDIC conditions of contract started to be applied when, in our country, big foreign contracts for construction or assembly based on the FIDIC conditions of contract started to be carried out. Originally they were required and popularized in Poland, among other things, during implementation of IRDP projects (Integrated Regional development operational programme - the programme which develops the objectives of the National Programme for the Development that defines priorities, directions and the amount

contract to Polish agreements for project or construction works is the fact that they have not been created by the Polish construction practice, and what is even more important, they cannot be modified by it in any way. The source of their origin is the United Kingdom and the Anglo-Saxon legal system of *common law*, which functions there, is completely different from the continental one whose Polish law is a part. For that very reason, it is quite difficult for lawyers to incorporate the FIDIC conditions of contract into our civil law system; it is also difficult to interpret the FIDIC provisions due to the need to translate the standard English forms into the Polish language. Each translation is a kind of interpretation of the FIDIC concepts and being also aware of the tradition and the complexity of English legal terminology it is often difficult to give the context in which individual words are used in Polish construction law practice. Also, as is often emphasized by the practitioners of the construction process, the problem in the application of the FIDIC conditions in the Polish legal system (especially in the case of public procurement orders by public contracting authorities) is the fact that FIDIC is not a law. In any case, these patterns apply independently to both Polish and European law and they the need for their existence in legal transactions to be transported into other provisions binding parts of a contract⁴. Any law in force (national or international) which is a source of law does not oblige the entities participating in the implementation of the construction investment to use the FIDIC conditions of contract.⁵ So it is hard to determine their legal nature. It must be stated that these are the only contractual patterns that apply to the extent that they will be transferred to specific contracts for construction and assembly works and design, and as such they, in any case, cannot be in contradiction with the generally applicable provisions of the national law.⁶ FIDIC are just contractual proposals of a legal nature regulating the construction process in investment projects.⁷ The literature on the subject also

of resources dedicated to the implementation of regional policy of the State. These resources were operated with the participation of structural funds during the first period of Polish membership in the European Union). Promoting the FIDIC procedures in Poland also contributed to the decision of the European Commission from 1994 approving the Act No. 1628/94 concerning the implementation of the aid programme Phare (Poland and Hungary: Assistance for Restructuring their Economies). This Act served the support, in the first place, Poland and Hungary and later also other Central and Eastern European countries in their accession to the European Union structures. The use of the funds of the Phare programme depended, inter alia, on application of the FIDIC conditions of contract.

⁴ See Krzysztof Cichocki, 'FIDIC contract terms and regulations regarding public entities' (2012) 18 *Biuletyn Arbitrażowy* 28.

⁵ In general, the FIDIC conditions of contract are applied when the project is large; hence, the parties are reluctant to apply them, unless it is necessary due to the size of the investment project. See Wojciech Sadowski, 'Legal problems of the application of the FIDIC conditions of contract in Poland' (2009) 10 *Biuletyn Arbitrażowy*.

⁶ Janusz A Strzępka and Wojciech Wyrzykowski, 'Selected issues of the application of international standard FIDIC conditions of contract' part I (2013) 16 *Monitor Prawniczy*. The legal literature uses the term of the "merger clause" to describe a certain type of contractual provisions that are commonly used in the contractual practice; this comes down to indicating that the document that comprises such a clause represents "the entire agreement between the parties" which "supersedes and replaces other prior or contemporaneous understandings or agreements, written or oral." See Marlena Pecyna, *Merger clause as a reservation of the exclusivity of the document, contract integrity clause, rule of interpretation of the contract* (Wolters Kluwer Polska 2013) 25.

⁷ Małgorzata Bednarek, *Patterns of agreements in Polish law* (C.H. Beck 2005).

raises the issue that, when incorporated into Polish agreements, the provisions of the FIDIC conditions of contract become a part of a catalogue of the so-called “other new contractual phenomena”.⁸ From a practical point of view, in the case of the incorporation of them into a contract the parties must treat them as applicable and breach of the contract in any field will result in not only in liability specified in this contract but also may cause a breach of provisions of the national law.⁹ Modification of the FIDIC conditions of contract also gives rise to certain legal issues, especially when it is the State Treasury who is the Contracting Authority.¹⁰ A good example of the difficulties of the incorporation of the FIDIC conditions of contract as contractual patterns of Anglo-Saxon origin into the Polish legal system is discussed in this article FIDIC 20.1 Sub-Clause. It introduces an attestation that claims have been lodged, on which the contracting party’s right to damages is conditional and whose compliance with the Polish civil law remains questionable and its direct transferring to agreements for project or construction works may generate negative legal consequences.¹¹

2. FIDIC 20.1 SUB-CLAUSE AND THE STANDARDS OF THE POLISH CIVIL CODE

The transfer of the FIDIC conditions of contract, including the 20.1 Sub-Clause, to contracts is possible due to the principle of contractual freedom expressed in 353¹ Article of the Act of 23 April 1964 - the Civil Code.¹² The FIDIC conditions of contract are therefore used in Poland by way of incorporation into a specific agreement within the limits of freedom of contracts.¹³ In accordance, however, with the wording of mentioned article, the contracting parties may arrange the legal relationship at their sole discretion as long as its content does not oppose the nature of the relationship, the Act, and rules of social conduct. It requires that the transferred FIDIC conditions of contract remain consistent with the Act and so to widely

⁸ See Radosław Strugała, *Standard contractual clauses: adaptation, salvator, merger, interpretation and de forma pactum* (C.H. Beck 2013) 7.

⁹ See Janusz A Strzępka and Wojciech Wyrzykowski, ‘Selected issues of the application of international standard FIDIC conditions of contract’ part II (2013) 17 *Monitor Prawniczy*, see also Janusz A Strzępka, ‘Consequences of non-performance and improper performance of contractual obligations’ in Jerzy Rajski (ed), *The law of obligations - a detailed part. Private Law System. Volume 7* (C.H. Beck 2011) 527.

¹⁰ Łukasz Witecki and Agnieszka Chylińska and Anna Ochocka, ‘State entities as contracting entities in accordance with the FIDIC agreement. Deviations from standard FIDIC contracts in the practice of the Treasury of the Republic of Poland’ (2012) 18 *Biuletyn Arbitrażowy* 55.

¹¹ See Janusz A Strzępka and Wojciech Wyrzykowski, ‘FIDIC and the contract for construction works in the Civil Code - selected issues. General characteristics of the FIDIC conditions of contract’ in Joanna Kruczałak-Jankowska (ed), *The impact of Europeanisation of law on commercial law institutions* (LexisNexis 2013).

¹² *Journal of Laws* of 2017, item 459.

¹³ Janusz A Strzępka, ‘Contract for construction work’ in Stanisław Włodyka (ed), *Commercial contract law. Private Law System. Volume 5* (C.H. Beck 2013) 1191.

applicable law.¹⁴ Otherwise, as has been expressly indicated in the article 58 paragraph 1 of the Civil Code, a legal action contrary to the Act or intended to circumvent the law is not valid unless the competent provision provides another effect, and in particular one stating that invalid provisions of legal action are replaced by the relevant provisions of the Act.¹⁵ Pursuant to the 3 paragraph of the mentioned article - if the invalidity affects only a part of the legal action then such an action remains in force as to the rest unless the circumstances show that without the provisions affected by the nullity the action would not have been made. It seems that the case of fragmentary annulment will be present more often with the practice of application of FIDIC conditions of contract in the Polish legal system. Thus, in most cases the contract will not be declared invalid as the result of this will apply only to its individual provisions. In the remaining scope, the contract will still be the source of rights and obligations.¹⁶ And so the 20.1 FIDIC Sub-Clause¹⁷ stipulates that the contractor may not demand increased wages or time to execute the subject provision if he or she has not submitted such a claim within twenty-eight days from the occurrence of the circumstances entitling the raising of such a claim.¹⁸ What is more, in this case, the contracting entity shall be exempt from all liability for specific claims.¹⁹ 20.1 Sub-Clause conditions the possibility of additional claims assertion by the contractor from the period specified in it which is against to the article 119 of the Civil Code. In accordance with its content the limitation periods may not be shortened or extended by a legal action, and, if a special provision does not provide otherwise, the limitation period is ten years, and for the periodic benefits claims and claims related to running a business - three years (article 118 of the Code).²⁰ In addition, any Polish act does not introduce a specific limitation period which is in accordance with the FIDIC regulation. Under the current regulations, the provisions of the Polish law in force also do not provide for the contractual modification of limitation periods. However, under Article 89 of the Civil Code (in conjunction with Article 116), it is permissible to use contractual statutes of repose; the term is used both in respect to contractual provisions that modify the final dates envisaged in an act of law (for example, Article 598.2 and Article 568 of the Civil Code), as well as in respect to contractual provisions that introduce to the agreement a time limit for a certain right that has not been limited by an act of law (the so called contractual statutes of repose *sensu stricto*, or the “clean” statutes of repose),

¹⁴ For more information on the freedom of contracts principle under Polish civil law please see Piotr Machnikowski, *Freedom of contracts pursuant to art. 353¹* (C.H. Beck 2005); Roman Trzaskowski, *The boundaries of the freedom to shape the content and purpose of bond agreements* (Zakamycze 2005).

¹⁵ Piotr Machnikowski, ‘Freedom of contracts’ in Ewa Łętowska (ed), *Liability of obligations - general part. Private Law System. Volume 5* (C.H. Beck 2013) 462.

¹⁶ Maciej Gutowski, *Nullity of a legal action* (C.H. Beck 2013).

¹⁷ *Conditions of Contract FIDIC*, 20.1 contractor's claims Sub-Clause (Red Book 4th edition).

¹⁸ Piotr Bytnerowicz and Magda Kofluk, ‘The 28-day time limit for filing claims by the contractor reservation in the 20.1 FIDIC clause’ (2012) 1(8) e-Przegląd Arbitrażowy.

¹⁹ See Przemysła Drapała, ‘Patterns of a FIDIC contract and the provisions of the civil code’ (2014) 11 Państwo i Prawo 53.

²⁰ Piotr Ciepierski, ‘Delay, liquidated damages, withdrawal from a contract according to the FIDIC New Red Book and the provisions of the civil code - selected issues’ (2008) 8 Biuletyn Arbitrażowy.

such as the one in Clause 20.1.²¹ So one may wonder if the 20.1 FIDIC Sub-Clause does not introduce a new 28-day limitation period contrary to the applicable law contained in the Civil Code, and whether the passage of the agreement which directly incorporates terms of the 20.1 Sub-Clause should therefore not be regarded as unlawful and unable to produce legal effects. This interpretation should have to be inferred directly by reading and analyzing the standards of the code.

3. APPLICATION OF THE 20.1 SUB-CLAUSE AND NATIONAL CASE-LAW

There are, however, different opinions concerning the introduction to agreements of deadlines that have not been defined by the legislator – the legal qualification of contractual statutes of repose and different opinions regarding their admissibility under Polish law. On the one hand, there is the dominating view, especially in case law, whereby the admissibility of creating contractual statutes of repose is negated.²² During many years of existing practice of incorporating the 20.1 FIDIC Sub-Clause into Polish construction contracts, national courts have taken a somewhat different position on its compliance with the standards of Polish civil law. It is worth quoting here the judgment of the Regional Court in Warsaw of 11 July 2012 which states that "the 20.1 FIDIC clause section 2 should be understood as a total regulation introducing an agreed limitation period that causes termination of claim and also unconditional contractual exclusion of liability of the contracting entity covers also the limitation of liability for damage caused by wilful misconduct."²³ According to the Court, the two parts of the abovementioned regulation of the 20.1 FIDIC clause section 2 should be considered together; they do not constitute separate regulations but serve the same purpose: to preclude that the plaintiff upon the lapse of the period loses specified claim". Referring to the above indicated judgment it can be concluded that this clause prevents the contractor assertion of the claim from the contracting entity as a result of the contractor's failure to report the notification to the engineer within a 28-day period. However, the judgment of the Regional Court in Warsaw states next "Regardless of the above, in the opinion of the Court, under Polish law, none of this agreed construction considered also separately is not allowed, and as a consequence, such a contractual provision is not valid. There is also no basis for such an interpretation of the provisions of 20.1 FIDIC clause according to which that regulation would be a specific exemption from the debt because of the lack of declarations of intent of the parties required in article 508 of the Civil Code. This raises the question about the nature of the period in the FIDIC 20.1 clause, section 2. At the beginning,

²¹ Radosław Strugała, 'Contractual time limits - legal qualification and the admissibility of their use' (2016) 3 Przegląd Prawa Handlowego 46.

²² See, for example, the judgement of the Supreme Court dated 1 July 1958, 1 CR 683/57, OSPiKA 1960/7-8, item 187, or the view expressed by Jerzy Ignatowicz in Stefan Grzybowski (ed), *Civil law system, Volume 1: Civil law - general part* (Zakład Narodowy im. Ossolińskich - Wydaw. Polskiej Akademii Nauk 1985) 846.

²³ The judgment of the Regional Court in Warsaw of 11 July 2012, XXV (C) 647/11.

it should be noted that the conditions of contract of construction work subjected to the general FIDIC Conditions originate from the *common law* system, and the very FIDIC conditions have been created with a view to their »national« application regardless of the law applicable to the contract. For this reason, by subjecting the contract based on the FIDIC to the given legal system, and in particular to the law of a country belonging to the continental legal culture, it is unacceptable to automatically incorporate, without any reflection, individual FIDIC institutions without taking into account the norms of *ius cogens* of a national law. In considering the admissibility of the abovementioned contractual FIDIC regulation under Polish law the analysis of the nature of the claims, which in the case of admission to establish contractual time limits would be precluded, must be performed. On the basis of FIDIC application of the 20.1 FIDIC regulation would have to lead *prima facie* to the termination of any kind of claims arising from the construction contract or being in connection with it". Recognition of the 28-day period from the 20.1 Sub-Clause would therefore result in contractual modification of the time-bar, introducing in its place blatantly shorter time limits so the periods, causing far more far-reaching legal effects than the ones resulting in termination of limitation periods which would cause circumvention of the provision of article 119 of the code, and consequently, in accordance with article 58 paragraph 1 of the Civil Code recognition of the 20.1 Sub-Clause to be invalid. Such a passage of the contract based on the FIDIC contract patterns should, therefore, be considered as inconsistent with the law and such a clause shall not have legal effect in legal transactions.²⁴ The above judgment undoubtedly opens the way to assert payment to contractors, whose claims have been rejected by the engineer pursuant to the described clause; however, on the other hand, it puts the important question regarding the legitimacy of its application in other construction contracts.²⁵ It is also worth noting that a similar interpretation of the courts can be found in earlier judgments. For example, the judgment of the Regional Court in Warsaw of 13 July 2011, or the judgment of the Regional Court in Warsaw of 11 June 2012.²⁶²⁷ In each of them, the Court underlined that such an agreed limitation period cannot be considered to be valid and in accordance with the generally applicable law. The attempt to impose on the contractor limited to 28 days period for submission of notice of the claim which would entail greater sanction than allowed by the Civil Code in the form of loss of entitlement to an extension of contract time to complete works to pay the additional cost -is ineffective *ex lege*. Similarly, it is not possible to raise the plea of the time-bar by the contracting entity in order to avoid the effects of the claim. In the same way provisions of the 20.1 Sub-Clause should be understood as an attempt to implement the agreed limitation period causing termination of the claim and also the unconditional exclusion of liability of the contracting entity, covering also the limitation of liability for damage caused by wilful misconduct. This regulation may be also judged as a contractual waiver of claim to increase the

²⁴ See Maciej Gutowski, *Nullity of a legal action* (C.H. Beck 2006).

²⁵ See Adam Olszewski, 'Contract procedures of settlement of disputes in construction works contract based on FIDIC contractual patterns to all legal intent and purposes of Polish law' (2010) 2 *Radca Prawny*.

²⁶ XXV C 701/10.

²⁷ XXV C 567/11.

agreed remuneration (similarly the time to fulfil obligation) or as a reservation of the period for its application (the so-called contractual time or complaint limits²⁸) which is also contrary to Polish law.²⁹ However, it is worth noting a view, which is presented in the literature on the subject, that Article 119 of the Code only points to the inadmissibility of influencing the limitation period for claims which the legislator did not subject to the statute of limitation. Contractual statutes of repose, however, (and undoubtedly those are the terms in the said Clause 20.1 of FIDIC), define the moment when a claim fully expires, rather than the moment in which the claim becomes time-barred. Upon the expiry of the contractual statute of repose, the eligible party definitely loses the claim – the expiry of the contractual statute of repose does not lead to a situation which is typical for the expiry of the limitation period when the eligible party still has the right to the claim, which is, however, deprived of the suability attribute; as a consequence, one certainly cannot claim that the contractual statutes of repose are in conflict with the act of law, including Article 119 of the Civil Code.³⁰ In conclusion, attention should be paid to the issue of the recognition of the judgment of the Regional Court that for contracts for construction works the provisions of articles 117-120 shall apply. They have, in fact, *ius cogens* nature, so they are mandatory - hence their precedence over the ineffectuality provisions of the construction contract based on the FIDIC conditions of contract found in the 20.1 Sub-Clause referring to 28-day time limit of submission of notice of the claim, on pain of loss of privilege to extend the time for completion and receiving payment of an additional cost. The significant conclusion results from the above considerations - the FIDIC conditions of contract, due to their not precisely specified legal nature, take effect only to the extent that does not conflict with national standards. It may therefore be assumed that the FIDIC contractual clauses whose provisions cannot be reconciled with the standards of the Polish law will not be applied to it and this is in accordance with the assumption of only supporting nature of the FIDIC conditions of contract for concluding contracts for project and construction works.

4. CONCLUSION

²⁸ Agnieszka Lizer-Klatka, 'Effectiveness of the contractual periods of claims assertion in general FIDIC conditions to all legal intents and purposes' (2012) 1(8) e-Przegląd Arbitrażowy 24 et seq.

²⁹ It is worth to add to these considerations that the issue of application of the 20.1 clause can also be assessed within the much broader area. The content of the clause, as well as other related clauses indeed raises some doubts as to the being in accordance with article 632 of the civil code which introduces the principle of the immutability of the flat-rate remuneration in Polish law.

³⁰ Strugała (n 21) 48.

So the FIDIC conditions of contract are particular contractual patterns originating from the *common law* system and which seem to apply in Poland despite the fact that they cannot be treated as a law, and certainly not as a domestic source of law; but only to the extent that is not in conflict with generally applicable national standards. It can be said that the FIDIC conditions of contract are extralegal standards functioning in the legal order without the mediation of reference standard. They are peculiar standards-patterns with prenormative nature and which, although are indirectly valid, do not exist in the Polish legal order through legal norms. The proof that the FIDIC conditions of contract are classical extralegal standards can, for example, be irrelevant to Polish accession to the European Union in the context of heightened Polish judicial activity in matters of application of FIDIC in construction contracts. These contractual patterns still formally remain outside the Polish normative legal order; however, they influence the shape of contractual terms which are valid under it. The fact that in Poland the FIDIC conditions of contract are not generally applicable standards has far-reaching consequences in possibilities of being subjected to any modifications depending upon the will of the parties or other legal standards in force. An example of this is the discussed here the 20.1 FIDIC Sub-Clause and in practice, it can cause a distortion of their original shape and undermines the sense of their application. As there are no domestic standard forms, we are in favour of more frequent use, in the Polish practice, of the FIDIC conditions of contract, their propagation and adjustment to the existing constructions and solutions under Polish law while maintaining well-balanced duties and risks of parties to the contracts, and also bearing in mind that the FIDIC conditions of contract were created as contractual terms and conditions, whereunder both parties to the contract have harmonised and guaranteed rights and duties.

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