

A Legal Approach to the Fédération Internationale des Ingénieurs Conseils (FIDIC) – The Yellow Book Case

Antonios Maniatis, Technological Educational Institute of Ionian Islands, Greece,

maniatis@dikaio.gr

Vasiliki Tsouvala, Civil Engineer, University of Patras, Greece,

vtsouvala@yahoo.gr

Evi Batra, Electrical Engineer, PhD at Occupational Safety and Health, Greece,

evibatra@otenet.gr

Abstract

The purpose of this research paper consists in the presentation of the Transnational Organization FIDIC, headquartered in Geneva, and of the standard contracts that it has established for potential use in the technical works market on international scale. Within the construction industry, standard contract terms are used, being types of contracts that are not shaped by the parties through negotiations. They have been prepared by agencies or contractors represented by associations, for instance engineers associations. As a result, negotiations between the contracting parties are limited to only specific terms of each contract. The understanding and good knowledge of the structure and terms of the construction contract are no longer necessary for all engineers involved in the construction industry. The current paper presents, as a specific case study, the contract model of FIDIC Yellow Book, analyzing the basic concepts of the contract. It puts the stress on the crucial question whether the above-mentioned model is ruled by the contract-law fundamental principle of ‘‘bona fide’’.

Keywords

Bona fide, Construction Contract, Construction Law, FIDIC, Technical Works, Yellow Book.

1. Introduction to Construction Contracts

The international construction activity is a cross-border transaction with particular characteristics. Because of the nature of the activity, there is an undeniable close interrelation with the territory of the project installation country, resulting in an intense character of the investment.

As the contractor has to face increased risks in the construction place, the construction contract seems to be an investment activity instead of a mere commercial transaction.

A convention for the manufacture of the technical work constitutes an agreement between the Employer and the Contractor. According to this convention, the rights and the obligations of the two parts are or they should be regulated as well as their risks allocation. In the simplest form, the international construction convention is a convention of work between a contractor and an employer, within the contractor undertakes to carry out construction work on the property of the owner.

Nowadays, projects like buildings, civil engineering etc., become complicated and result in a difficulty to interpret the terms ruling a contract as well as in a high risk of misunderstandings. All the above-mentioned data lead to a delay in executing the project and to a disagreement. That is why, it is necessary to standardize these contract terms for the benefit of all factors involved, such as financial carriers, the Employer, the Engineer and the Contractor.

An important methodological issue that arises for any international construction contract consists in the legal order of reference, within which legal issues arising from such activity can be tested *in vitro*. Construction contracts are ruled by the Law and Practice and also interpreted on the basis of the ‘‘bona fide’’ principle. Is that valid also for the FIDIC standard contracts?

2. FIDIC

The International Federation of Consulting Engineers (in French ‘‘Fédération Internationale Des Ingénieurs-Conseils’’) known with the acronym ‘‘FIDIC’’, is an institution that represents the international community of engineers-counsellors. It was founded in July 1913 in Belgium and is located in the World Trade Center in Geneva, in Switzerland. It includes organizations coming from 97 countries.

An agreement on wide cooperation on issues of concern for consulting engineers worldwide was signed in 2010, between EFCA (European Federation of Engineering Consultancy Associations) and FIDIC. This pact put an end to the problems existing since over 10 years between the two organizations and created new prospects in the representation of counsellors and researchers in all the European and international meetings, as well in the common promotion of important questions of the branch.

FIDIC has as a main objective to represent the entire consulting industry of engineers for the promotion of the business interests of the firms supplying intellectual services for the built and natural environment. It is known in the engineering field for setting the project contract terms all over the world.

To achieve the main goals of promotion for the benefit of advisory services on technical works, FIDIC supports the enterprising ethics, ensures the viability and develops methods that facilitate the business dexterity and the implementation of projects.

The FIDIC terms are enough complicated but they have an important advantage that the evaluation of risks and responsibilities, as well as the distribution of duties and powers between the parties, in general, become acceptable. It is notable that the terms do not constitute obligatory rules and that nothing prevents the contracting parts from correcting the rules and adopting other ones.

FIDIC is recognized as a trustworthy advisor towards decision-makers involved in the planning and manufacture of a viable infrastructure for future generations (Axel-Volkmar, 2009).

3. Conditions of Contract for Plant and Design-Build (First Edition 1999) Yellow Book

At this point, we will try to take an approach to the construction contract, consecrated in the FIDIC Yellow Book.

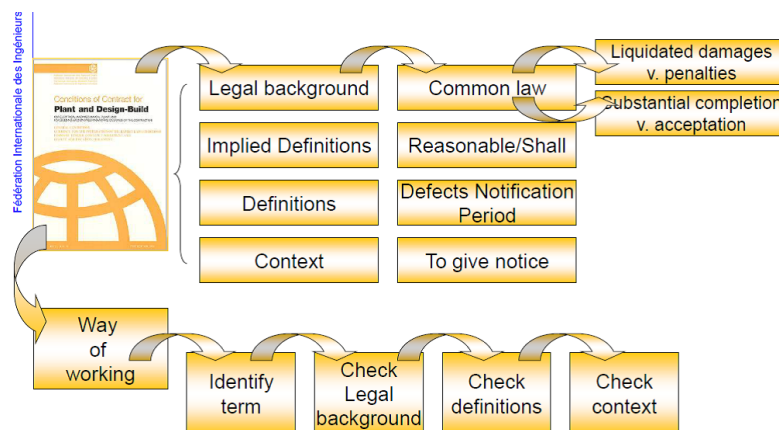
This type of contract focuses on projects, for which the Contractor does the greater part of the construction design (meaning that he does the design of the project in detail, to meet the specifications and requirements of the Employer).

Basic execution participants of a construction project are the following factors: the Employer, the Engineer and the Contractor.

The Employer may be either a natural person or a legal person, either private law or of or public one. The Engineer has no power to modify the project or to relieve the operator from any liability and responsibility. He has not the right to order additional work or to agree for any modifications without the permission of the developer, especially if it has to do for an increase of prices or delay as for the time required for the completion of the project, unless he has been given by the developer general or specific authorization. The Engineer is appointed by the Employer, unless there is a different term in the contract, and works for the Employer.

The Contractor has to follow the contract, based on the instructions and decisions of the Engineer. Under the terms of the contract, the contractor may undertake the obligation of preliminary studies or verification (Nardin, 2008).

The Yellow Book provides guidance on specific circumstances of the time that is necessary to amend the General Conditions. It previews a well-balanced standard contract, which provides a fair balance between the interests of the Contractor and the Employer's ones. The contract includes a package price, with payments to be made upon the Engineer's certification of the works already executed.



The contract is ruled by the law of the country presented in the Appendix of the competition Tender. If there are versions of any part of the contract written in more than one languages, the prevailed version is the first that is mentioned in the Appendix of the competition. The communication language should be the language shown in the Appendix to Tender, and in case that there is no reference, the chosen communication language is the language in which it is written the entire contract (or its most extended material) (Totterdill, 2006).

4. ‘Bona fide’

‘Bona fide’ constitutes a juridical principle of universal content, capable of crossing the entire law, as well as an interpretative approach. Therefore, any behavior and action carried out by the State or by any citizen, to any natural or legal person, should be conducted in such a way that error situations, fraud and threat are avoided. A key component of this principle is the respect for the limits of freedom and the rights of each person, values which are specifically protected by the Constitution (Manitakis, 2004).

This principle, although its non-observance often results in penalties, is a "method" that binds and obliges the State to design policies and act on their basis. Consequently, as for each provision on a right or an obligation, the State should include a social value deserving protection. The usefulness of the principle of bona fide emerges in cases that there are no specific explicit provisions of the law, so it is possible to make use only of the available general clauses.

‘Bona fide’ constitutes a "general principle of law", which means that it is used in the sense of a principle of general application, throughout the length and breadth of the legal system, regardless of the form in which it appears, namely of its explicit or implicit consecration. It is not referred as a category of general principles of the public law or the private law, but of the entire one. It is a rule of *ius cogens* (so contracting parties cannot decide to reject it, in their contract) and so may be considered as a first kind of restriction on the principle of contracting freedom. In overall, each agreement, being a source of rights and obligations, must be interpreted in the light of this fundamental principle. Furthermore, it is notable that ‘bona fide’ can affect much more intensely private will, leading the court to amend the content of the contract.

In national legal orders different from the UK, being based on common law, many responsibilities of the Parties result from Civil Code. It is recognized the autonomy of the contracts whilst contracting parties are allowed to determine the terms and provisions of their contract, provided that these conditions violate no statutory laws and public policies. According to various Civil Codes, a contract must be performed in conformity to its terms and in a manner consistent to the principle of bona fide.

In national legal orders, such the French one and the Greek one, a ban on abuse of rights has been consecrated. So, a legitimate right cannot be exercised as long as bona fide or similar principles are transgressed. This provision becomes of paramount importance for the limitation of the oppressive exercise of the rights of the economically powerful factors. The principle of autonomy of the private will requires people’s equality, to negotiate on equal terms. However, individuals who are legally equal are not always financially equivalent. Under the Civil Code of Egypt, for example, the exercise of a right proves to be illegal in the following cases:

- If the only purpose is to hurt another person,
- If the profit of one person causes damage to the other one (Glover, 2008).

The contract interpretation should be done according to ‘bona fide’, even if this principle is consecrated implicitly. The contract terms are submitted to the criteria used by an average,

honest member of the society. To ensure the protection of operators, whose interests are at risk, this person should be a member of the trading society (Katsantonis, 1998).

The concept of ‘‘bona fide’’ has a moral content, in the sense of good behavior required to trade. Although the concept itself is stable and unchanging, it is flexible and adjusted to the specific economic and social circumstances of each particular case.

‘‘Bona fide’’	Article of Yellow Book		Subject
	Article 4.10	Page 23	Information to the Contractor by the Employer on the morphology of ground, hydrological and environmental conditions.
	Article 15.5	Page 80	Employer's right to terminate the contract any time.
	Article 20.1	Page 97	Notify the Contractor of a claim within 28 days.
	Article 20.2	Page 99	Dispute resolution through amicable settlement or DAB

It is likely that the aforementioned concept of ban on use of rights could help to the treatment of the hard consequences arising from the requirements of the Contractor, within the model contract consecrated in the Yellow Book.

5. Conclusion on FIDIC model contracts: ‘‘Scripta manent...’’

To sum up, as for the convention model of the FIDIC Yellow Book, we realized there is no general clause, explicitly consecrating the principle of ‘‘bona fide’’ as long as contract interpretation is operated. However, it is to pay special attention to the fact that this fundamental principle on international scale, is not thoroughly absent. Just the opposite, it is consecrated in specific clauses, that is to say in provisions on special topics, which establish the obligation of fair behavior. FIDIC is ruled by this spirit as for its model conventions, to ensure their normal execution in practice. According to the current paper, it is recommendable to formulate this concept in an explicit way, in the form of a clear general clause of each model contract. This potential development would be based on the legislative practices of countries like Greece, which is traditionally endowed with a rule of this content, in article 200 of Civil Code. A technique like highlights this crucial concept and promotes it in ideological terms, to prevent potential disputes.

Of course, it is to underline the fact that bona fide is an intrinsically vague concept, unavailable for monolithic approaches. Each construction project is unique by nature, particularly in case of complicated buildings or other scopes, and each construction mainstreaming contract is accompanied by various other ones. Construction contract should be treated as a data set which, while it has many different individual elements within it, such

as lines, numbers, different heights and sizes, it leads to only one outcome: the authentic, unique fingerprint. All seem similar but nothing is identical to anything else. However, this variety makes things exciting and interesting... (Tsouvala, 2014)

6.References

- Axel-Volkmar J., *FIDIC-A Guide for Practitioner*, Springer Editions, 2009.
- FIDIC, *Conditions of Contract for Plant And Design-Build Contract*, First Edition, 1999
- FIDIC, <http://fidic.org>
- Glover J., *FIDIC an overview: the latest developments, comparisons, claims and a look into the future*, 2008.
- Katsantonis V. / Georgiadis S. / Tieder Jr J.B., *An Overview of Construction Contracting Under Greek Law*, I.C.L.Rev. 1998.
- Manitakis A., *Rule of law and judicial review of the constitutionality I*, 2004.
- Nardin M., *A practical approach to the FIDIC principles*, 2008.
- Totterdill Br., *FIDIC users' guide A practical guide to the 1999 Red and Yellow Books*, Thomas Telford, 2006
- Tsouvala V., *A legal approach to the Fédération Internationale des Ingénieurs Conseils (FIDIC) – The Yellow Book case*, master degree thesis, Hellenic Open University, 2014 (in Greek).