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Considerations on the Approach of the Contractual Agreement for Construction Works

Mircea Liviu Negrut*[a], Caius Luminosu[b], Ana-Andreea Mihartescu[c]

[a,b,c] *"Politehnica" University of Timisoara, Faculty of Management in Production and Transportation,Remus 14, Timisoara 300006, Romania.*

Abstract

The aim of this paper is to present a general outline of the Construction Works Contract Agreement under Romanian law and to provide some recommendations for its improvement, based mainly on German construction law. The authors noticed the existence of differences in this area between the EU Member States. Eastern countries that joined the EU after 2004 have less detailed regulations and technical standards for the construction works than Germany which has the most advanced system of regulations and standards in the EU in this area. The emphasis will be on the importance of the inclusion of the standardized specific terms and conditions into the Construction Works Contract Agreement, especially for public works.

Keywords: construction works contract; regulation; standard; contractual clauses.

* Corresponding author. Tel.: 0040256-404047;
E-mail address: mircea.negrut@mpt.upt.ro

1. Introduction

In the EU economy but also at national level the construction industry is an industry that uses significant human and material resources, as well as large financial resources in projects which quite often are very complex and have long service execution.

At present, the European construction industry is characterized by increasing internationalization and a reduction of entrance barriers to local markets. Therefore, there is a strongly growing demand from individuals, companies and organizations active in the construction sector for information on foreign national construction markets and

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information necessary for international operation. There is a particularly strong need for information on the instruments (such as specification systems) used by other national construction industries (Negrut, 2010).

These differences and particularities of national legislation, regulations and standards have several disadvantages for EU intra-community market and we will analyze them in this paper.

The first part of the paper presents the principles of contract law and the construction works contracting under the Romanian law.

In the second part of the paper we present the usual practice in Romania and describe the problems that may arise due to the use contracts that have insufficient or inappropriate and inadequate clauses specifically for the construction industry.

At the end of the paper are presented the advantages of the German system for contracting of construction works and are drawn conclusions about the advantages of using a set of minimum clause to be standardized across a country, or why not of the EU.

2. The Construction contract under Romanian law

2.1. Principles of contract law and legal statutes

Romanian contract law is in principle a private law branch which means in practice that the contractual provisions are binding law for the contracting parties. This main principle of private law agreements is complemented by other principles that help it being effective.

The parties are in general free to enter contractual agreements and also free to include into their agreements any stipulations they might find necessary. The only exception to this freedom is that it must not be contrary to public order, i.e. to the laws which ensure the effectiveness of the public order.

The freedom of contracts does also apply to the form of the agreement, to which the parties must be consent to. As a rule, a contract produces effects only between its parties. Romanian law allows only one exception, namely a contract that brings no obligations for a third, non-contracting party.

Because a contract expresses the will and intent to enter a binding agreement, exiting such an agreement or modifying it must reflect the same intention of all the parties involved. No party can unilaterally modify such an agreement unless statutory law provides for such a possibility. This principle, along with the one upholding the binding force of the contract between its parties, ensures the effectiveness and legal certainty of private law agreements. Without such certainty these agreements would not be feasible in practice.

The main statutory law in Romanian private law is the Civil Code (hereafter CC, MO nr. 505/2011). It was recently revised and brought up to date, after the previous version was in effect for more than a century. The recent amendments are intended to provide legal clarity and to close some of the gaps identified by years of legal practice.

The legal provisions pertaining to contract law are to be found in the 5th Book of the CC, entitled “Obligations”. The CC approaches all contracts in the same manner and provides in the first two titles of the 5th Book the general principles and provisions regarding contracts in general. After these universally applicable regulations, the specificities of all the main types of contracts are elaborated in separate titles of the same Book.

2.2. The construction works contracting agreement

Regarding the construction contract in particular, the CC does include a “Construction Works Contracting Agreement” in articles 1874-1880. As a classification, the CC regards the Construction Works Contract Agreement (hereafter CWCA) as a special form of the general contractor agreement. The general contractor agreement is regulated in art. 1851-1873 and provides in the systematic of the CC the framework for the special case of the CWCA.

Being a special type of contract, there are a few motives that justify a particular regulation by legal statute.

As a definition the CWCA is the contract by which the contractor promises to fulfil on his own risk, for the beneficiary, certain works that by law require the issue of a construction authorization. As the CC does not define what those “certain works” exactly are, its regulations must be interpreted in conjunction administrative law regulations, in particular with Law nr. 50/1991 regarding the execution of construction works (MO nr. 933/2004),