



Europeanization of Soviet legal culture in construction industry: a comparative study of Russia, Bulgaria and Romania

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Thesis submitted for assessment with a view to obtaining the degree of
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Introduction

The title of this thesis may sound provocative to many legal scholars who believe that Soviet law and thus Soviet legal culture are “dead and buried”. However the author of this thesis is of the opinion and agrees with those who still see the ashes of Soviet legal order glowing in the legal cultures of post-communist countries¹. The topic of this thesis is based on two complex concepts which are Europeanisation and legal culture. Both of them deserve a separate chapter if not a thesis to be considered properly. Therefore we will look at them in detail first to see how they are understood in the three countries mentioned in the title of the thesis and how they can be applied to the context of the Soviet dominance which although politically is a matter of history, continues to linger culturally in the minds of actors of construction market, at least, in certain post-communist countries.

In 2012 at a conference at one of the main Romanian universities, Philippe Beke, the then Ambassador of Belgium in the country, made the following comment regarding its accession to the EU:

We surely made a misjudgment on the administrative capacity of some new member states, especially Romania and Bulgaria. To make good use of European funds, in particular of structural and cohesion funds, it is indeed absolutely mandatory to boast of a well-functioning administration².

Can Bulgaria and Romania “boast of a well-functioning administration” now? Considering the latest “controversies” around the South Stream pipeline project in Bulgaria³ and the concerns expressed by the European Construction Industry Federation (FIEC) and the European International Contractors (EIC) in their joint letter to the Romanian Prime Minister and the Ministers for Transport and European Funds, regarding “the imbalanced contract conditions used for public procurement” which “are not in line with EU law”⁴, it is difficult to tell.

¹ Rafał Mańko, ‘Is the Socialist Legal Tradition “Dead and Buried?” The Continuity of the Certain Elements of Socialist Legal Culture in Polish Civil Procedure’ (Social Science Research Network 2006) SSRN Scholarly Paper ID 940947 <<http://papers.ssrn.com/abstract=940947>> accessed 26 January 2015; Rafał Mańko, ‘Survival of the Socialist Legal Tradition? A Polish Perspective’ (Social Science Research Network 2013) SSRN Scholarly Paper ID 2332219 <<http://papers.ssrn.com/abstract=2332219>> accessed 26 January 2015.

² Philippe Beke, ‘EU Enlargement, Past, Present and Future’ (2012) LVII Studia Universitatis Babes-Bolyai Studia Europaea 5.

³ ‘New Controversy Engulfs South Stream Pipeline Project in Bulgaria – Updated | The Sofia Globe’ <<http://sofiaglobe.com/2014/08/07/new-controversy-engulfs-south-stream-pipeline-project-in-bulgaria/>> accessed 10 August 2014.

⁴ “as expressed in recital 65 of the CEF-Regulation”, see: European Construction Industry Federation, ‘FIEC Annual Report 2014’ <<http://www.fiec.eu/en/cust/documentrequest.aspx?DocID=43554>> accessed 10 August 2014.

The answer to this question depends on what is understood under “a well-functioning administration” within the country as such and within the country as a Member State of the EU. The European Commission has associated a well-functioning administration with the rule of law saying that macroeconomic “policies should aim at efficient institutions by ensuring the rule of law in order to avoid unclear property rights, providing a well-functioning administration and integrating markets by reducing trade costs”⁵. It has also been emphasised that in terms of the EU Enlargement the rule of law and the public administration which “is transparent, effective, accountable and has the capacity to meet the needs of business”, together with the European standards being the norm, are among the key factors of the European business environment⁶.

In order to achieve its goals in building the European business environment which could be attractive not only to the European companies, but to foreign investors as well, the European Commission has used certain instruments during the Enlargement process which were meant to advance the European standards, including the rule of law, in the new Member States. The success of the application of those instruments can now be evaluated considering the time which has passed since their introduction.

During the past few years quite a few signs of the lack of such a success have already appeared. The European Commission has issued a communication on “A new EU Framework to strengthen the Rule of Law”⁷ and new public procurement directives were adopted by the Council⁸. In this research we will look in this context at the two SEE Member States which joined the EU in 2007, i.e. Bulgaria and Romania.

The whole history of the European Union enlargement has been a history of exchange of legal ideas and concepts, a history of connection and convergence of legal cultures and creation of a unified European legal culture for the EU⁹. With the accession of Romania and Bulgaria to the EU

⁵ European Commission and Directorate-General for Economic and Financial Affairs, *The EU Economy: 2004 Review* (Office for Official Publications of the European Communities] 2005). 130-131

⁶ Štefan Füle, ‘Press Release - Speech - Ready to Join? Perspectives on Further EU Enlargement and What It Means for Transatlantic Business’ <http://europa.eu/rapid/press-release_SPEECH-13-735_en.htm> accessed 12 January 2015.

⁷ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0158>

⁸ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG;

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG;

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG

⁹ See e.g. J.H.H. Weiler. Deciphering the Political and Legal DNA of European Integration. In: Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 138–158

there have been two main trends of transfer of legal rules from one legal community to another. The first one has been related to *acquis communautaire*. The second one has concerned the legal instruments that were supposed to facilitate the application of *acquis communautaire* in the new Member States.

The ISPA Manual, endorsed by the European Commission in 2002, advised the CEE candidate states to apply the “rules and regulations” developed by the International Federation of Consulting Engineers (FIDIC) while preparing conditions for public procurement contracts¹⁰. At that time the two most popular books of the FIDIC conditions of contract were the recently published new version of the Red Book (Conditions for Construction Contracts of 1999) and the Yellow Book (Conditions for Design and Build Contracts).

When Bulgaria and Romania joined the EU, they did not have – like most other CEE Member States – any standard contract conditions for construction contracts. Therefore, in order to facilitate the allocation of the EU funds, both Bulgaria and Romania chose to adopt the FIDIC conditions, whose use was also welcomed by the EBRD and the EIB, as local standard contract conditions for public procurement purposes.

However the construction industry specialists in both countries were not very optimistic about the adoption of the FIDIC conditions as state regulatory instruments since the conditions had been largely developed in a common law tradition and did not fit easily into the post-communist paradigm of the construction industry legislation and procedures¹¹. What was more, the FIDIC conditions would refer to certain philosophical categories, such as fairness, impartiality and reasonableness, which were unusual in the legal context of both Bulgaria and Romania, where the codified and non-codified laws were meant to give clear and precise directions without entering into the blurred areas of subjective categories.

Nevertheless the FIDIC conditions were officially translated in Bulgaria for public procurement purposes following the 2007 revision of the Bulgarian Territory Development Act, which is one of the key legal acts related to construction in the country. The FIDIC conditions have been regularly used for public procurement in Bulgaria before and after the issuance of their official translation in Bulgarian, although in 2011 the Bulgarian Ministry of Regional Development published a report

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199588770.001.0001/acprof-9780199588770>> accessed 4 April 2014.

¹⁰ http://ec.europa.eu/regional_policy/archive/funds/download/manu_en.pdf

¹¹ Dragoş Georgescu, ‘Considerations Concerning the Applying of FIDIC Contracts in Romania’ (2011) LVII (LXI) *Bul. Inst. Polit. Iaşi* 29, 37.

‘Специфичните Условия Към Общите Условия На ФИДИК Трябва Да Осигуряват Прилагане На Разпоредбите На ЗУТ При Въвеждане На Строежите’ [2010] Строителство Градът <<http://stroitelstvo.info/show.php?storyid=892314>> accessed 15 January 2015.

saying that in 2000-2006 the use of FIDIC conditions in Bulgaria in public procurement projects created more problems than provided easier solutions and facilitated the project implementation. In Romania the history of the state adoption of the FIDIC conditions for public procurement purposes has been more complicated. There have been two waves of introduction of the FIDIC conditions into the public procurement practice. The first attempt in 2008 was not a great success and the order which had initiated it was abrogated in less than a year after its appearance¹². The second wave was produced in 2010 by the by the Government Decision on the approval of the FIDIC general conditions of contract for investment purposes in the field of transport infrastructure of national interest, financed from public funds. Early the following year the general conditions were supplemented with particular conditions issued by the Romanian Ministry of Transport and Infrastructure. Very soon these particular conditions caused serious protests from the European construction community.

At the same time one may argue that the use of standard contract conditions for public procurement is only a segment in the area of construction contract law. However it is a very important segment in Bulgaria and Romania where construction industry is mainly driven by projects financed with the EU funds. So in the case of these two Member States the EU law related to construction should outweigh the national construction law, which does not seem to happen as the two key EU Directives directly linked to construction activities – the Service Directive and the old Directives on public procurement – have not been consistently followed by the state authorities although both of them have been transposed into the national legislation of both Bulgaria and Romania.

The Service Directive represents a particularly difficult piece of EU legislation in terms of its implementation in the post-communist Member States since it provides for a wide range of criteria which are meant to “preclude the competent authorities from exercising their power of assessment in an arbitrary manner”¹³, but those criteria being evaluative themselves undermine the whole idea of the restrictive norm based on the notion of “objective legality”¹⁴ so deeply rooted in the post-communist legal cultures. Now a similar principle will be introduced by the new EU Framework to strengthen the Rule of Law. However due to the difference in expression and understanding of those principles in English, Bulgarian and Romanian, continuous monitoring is

¹²The Joint Order of the Ministers of Economy, Finances, Transportation and Development, Public Works and Housing no.915/465/415/2008 on the approval of the general and special contract conditions for conclusion of works contracts was adopted in June 2008 and abrogated in May 2009.

¹³ Art. 10 of Directive 2006/123/EC of 12 December 2006 on services in the internal market.

¹⁴ Stanisław Frankowski and Paul B Stephan (eds), *Legal Reform in Post-Communist Europe: The View from within* (M Nijhoff 1995) 12.

required in public procurement construction contract law in Bulgaria and Romania in order to ensure successful implementation of the EU legal instruments.

Judging from the process of absorption of the EU funds, it can be said that both Bulgaria and Romania may boast a well-functioning administration, but not in the sense assumed by the western European political community. Bulgarian and Romanian administration are still well-functioning in terms of the Soviet political and legal culture. In this thesis I will use the latter to reveal the major drawbacks in the current status of the on-going Europeanisation process in the two relatively new Member States, while comparing the state of affairs in them with the former source of the Soviet legal culture, which is Russia.

That will be a useful comparison since in all three countries Europeanisation of construction contract law, especially at the public procurement level, has been associated with the use of the FIDIC standard contract conditions although FIDIC itself has the status of an international organisation. Despite the fact that the FIDIC membership has covered all parts of the world, in its core it is still a European project started by three European states (Belgium, France and Switzerland) and joined by Australia, Canada, South Africa, and the USA (whose history and culture cannot be thought of outside the European context) only in 1959. The documents developed by FIDIC have been mainly promoted by the European institutions (the EBRD, EIB, EC). So one can hardly speak of pure globalisation or internationalisation in this case.

In Russia and thus in the USSR and the Soviet bloc, the FIDIC conditions have been known of since 1973 at latest, when the United Nations Economic Commission for Europe produced the Guide on drawing up contracts for large industrial works¹⁵ (ECE/TRADE/117), but they were only used for “extramural” projects. In the new Russia the first big project where the FIDIC conditions were used took off in 2002 under the aegis of the EBRD, EIB, NIB. My brief report on that project has been published recently¹⁶. From the court cases related to that project it appears that the parties did not benefit significantly from the FIDIC contract conditions. The failures in the application of European contractual tools may be explained by the persistence of the old (Soviet) legal culture in Russia, Bulgaria and Romania. In construction industry this is especially true since industrial construction began its modern development in all these countries after the Second World War.

Research question and hypothesis

The main research question of my thesis will be:

¹⁵ <http://www.unece.org/fileadmin/DAM/leginstr/Annex.pdf>

¹⁶ Lukas Klee, *International Construction Contract Law* (Wiley-Blackwell 2015) 186–189.

How the remnants of the Soviet legal culture hinder the process of Europeanisation of construction industry sector in Russia, Bulgaria and Romania in terms of promoting the internal market for the EU in the latter two and wider opening of the Russian market for foreign construction service providers?

In order to answer the main question a number of subquestions will have to be answered first:

1. What is legal culture, in general, and Soviet legal culture, in particular?
2. What is Europeanisation, in general, and in construction industry, in particular?
3. What has been used as means of Europeanization in construction industry in Russia, Romania and Bulgaria?
4. Have these means of Europeanization succeeded?
5. What are the main reasons of their failure?

My primary hypothesis will be that remnants of the Soviet legal culture are still manifestly present in the legal culture of construction industry sector of certain post-communist countries (Russia, Bulgaria and Romania in our case) since industrial construction in these countries in its current form started developing after World War II when the Soviet Union took over political and economic control over those states.

It was suggested by Twigg-Flesner that within the EU Regulations are more suitable as a means of Europeanization than EU Directives¹⁷. My secondary hypotheses will be that the effectiveness of EU Regulations and Directives largely depend on the cultural (including the legal philosophy) and political environment of their application, and although “all Europeans share the Christian ethic, and have been influenced by Roman law and the great moralists”¹⁸, these ethic and influence differ substantially across Europe, especially in post-communist Member States.

Therefore even Regulations may not be more efficient than Directives if the cultural and philosophic background is not taken into account and the Regulations do not contain specific instructions that are easily interpreted in a given legal environment. I will endeavour to show that the effectiveness of the European legal instruments largely depend on the understanding of the principle of the rule of law in the post-communist Member States, and I will propose possible solutions to advance the compliance with the EU law and the rule of law in construction contract law in public procurement in the two SEE Member States.

¹⁷ Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2nd edition, Routledge 2013) 21.

¹⁸ Ole Lando, ‘Optional or Mandatory Europeanisation of Contract Law’ (2000) 8 *European Review of Private Law* 59.

Methodology

My methodology will have two main directions: theoretical and empirical. Theoretically, I will analyse the Soviet legal culture and its persistence in construction industry in the three national legal cultures from a historical point of view. I will consider the elements of the legal culture related to construction industry and public procurement law. My theoretical analysis will be based on the following theories: the theory of legal culture, the theory of Europeanization, the theory of the rule of law, the theory of compliance in EU law and the theory of construction contract law.

Empirically, I will show how the Soviet legal culture obstructs compliance with the EU Directives and Regulations in the two EU Member States and with the European principle of the rule of law in Russia using the cases from the national judicial systems and public authorities created for pre-judicial resolution of complaints related to public procurement.

Chapter 1. The Soviet legal culture in construction industry

The Soviet law and legal culture in general was more under scrutiny during the period of existence of the Soviet Union and for some time after its demise¹⁹. Now that the focus of attention has shifted onto the other Union, it may seem that the legacy of the USSR has lost its meaning and that the ideas and categories of the Soviet bloc are a matter of the past.

Yet the argument of this thesis stands on the grounds of the continuity of the Soviet legal culture, which, although crumbling away at the edges, just like an old concrete construction block, still remains solid enough at its core to influence the development of national legal cultures which were forced to accept it as a major part of their social structure.

This old concrete block is viewed in this thesis as a major obstacle on the way to Europeanisation. It seems that it is hardly possible to blow such a massive block up and completely remove it from the national legal cultures in one go. Moreover, considering that the Soviet legal culture was not absolutely alien to the legal cultures of the Continental Europe, or as Sharlet wrote about it:

“Soviet legal culture, as we generally know it today, is very much a product of Stalinism. Its main characteristics are stability, formality, and professionalism, characteristics of both legal belief and legal behavior familiar to any Continental lawyer as those of the Romanist legal culture of modern Europe. The legal culture of the Civil law systems of Western Europe was received in Russia both before and after the Bolsheviks came to power. As is always the case in the reception of ideas, this was a selective process, mixing the received legal culture with the indigenous legal culture”²⁰.

Probably, the way to deal with it is to leave it behind, as Vasari did while building his famous corridor around The Torre dei Mannelli. The Soviet legal culture, based on undemocratic principles, has no place in the future structure of a new common legal culture of the European Union or in the future legal culture of a bigger Europe of which Russia could become a part.

¹⁹ See e.g. Olimpiad Solomonovič Ioffe, *Soviet Law and Soviet Reality* (BRILL 1985); FJM Feldbrugge, Gerard Pieter van den Berg and William B Simons (eds), *Encyclopedia of Soviet Law* (M Nijhoff Publishers 1985); George Ginsburgs and others (eds), *Soviet Administrative Law: Theory and Policy* (M Nijhoff Publishers; Sold and distributed in the USA and Canada by Kluwer Academic Publishers 1989); Richard Wortman, *The Development of a Russian Legal Consciousness* (University of Chicago Press 2010) <<http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=389291>> accessed 19 January 2015. John B Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge University Press 2007). René David and Camille Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (Dalloz 1992).

²⁰ Robert Sharlet. Stalinism and Soviet Legal Culture. In: RRC Tucker (ed), *Stalinism: Essays in Historical Interpretation* (Transaction Publishers 1977) 158.

Although, in view of many scholars, it is too soon to speak of a common legal culture of the European Union or of Europe, there is a movement towards its creation²¹. The usual metaphor for this process is construction or building²². So the result of the process can also be seen as a building, a construction, or a structure. I believe that “building” is more becoming in this case since one can live in it, and I want to think of a culture as an environment to live in, using Lotman’s metaphor²³.

The perception of a European legal culture naturally depends on the point of view. For those looking from inside the EU there may be little integrity in the European legal culture, but for those looking from outside the EU the European legal culture is quite a “living thing”, born by the western capitalism and nurtured by its core adepts. This point of view does not depend on the geographical position of the speaker. It is rather produced by the reference grid taken as the basis of analysis.

Legal culture as a concept has accumulated so many definitions and explanations that it is possible to speak not only of one theory of legal culture, but of many. These multiple theories of legal culture differ in scope and contents, just as the initial definitions of legal culture as a concept do.

There have been numerous attempts to define legal culture as something else: legal consciousness, legal ideology, legal tradition, legal mentalité²⁴, etc. However from a comparatist point of view all these theories suffer from one common drawback which is their untranslatability into other languages and thus cultures. Legal culture as such does not translate well into French, for example, for *culture juridique* will not mean the same, and although legal ideology or legal tradition may sound similar in even Russian, Bulgarian, Romanian, and in English, their meaning will differ significantly due to the different legal histories.

In my opinion, all of those theories are useful for they help to understand legal culture in its entire complexity, and I see legal culture as a complex of legal philosophy, legal language, legal history, legal tradition, legal system, legal order, legal ideology, and legal mentality because all these components have a standing of their own and at the same time they influence the vague end result, which is legal culture, and which in its turn influence them back. Culture in general is very similar to education in Einstein’s sense, who is believed to say that “education is what remains

²¹ Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (CH Beck ; Hart ; Nomos 2014).

²² James Devenney and Mel Kenny, *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013) 135.

²³ Andreas Schönle (ed), *Lotman and Cultural Studies: Encounters and Extensions* (University of Wisconsin Press 2006).

²⁴ For a recent European overview of these theories one can see, e.g., Jennifer Hendry, ‘Unitas in Diversitate? On Legal Cultures and the Europeanisation of Law’ (Thesis, 2009) 43.

after one has forgotten what one has learned in school”²⁵. The same is true for legal culture. In a narrow practical sense, it is the residue of that enormous mass of information that is left in people’s (actors’) behaviour and interactions after they have forgotten what they learnt about law elsewhere. In a broader, theoretical, civilizational sense, culture in general engulfs human knowledge and thus understanding of the world, and, in particular, legal culture engulfs human knowledge and understanding of law and thus determines its use.

In the USSR and the countries it controlled legal culture had a meaning similar to that of legal consciousness, but being fundamentally politicised, it was based on the notion of vigilance or *soznatelnost* which presumed loyalty to the ideas of communism and the dogmas of Communist Party and good faith in a socialist sense. The complexity of the Russian term *soznatelnost* has been thoroughly analysed by Kharkhordin²⁶.

Another common meaning of legal culture in the Soviet discourse was the meaning of legal education or up-bringing. This meaning can still often be found in works on legal culture in the post-communist countries. However both these aspect of legal culture pertained to its theory mainly. What was more in practice could be described by two words: formalism and cynicism.

Here we need to bring up one global divide for legal culture as such, i.e. its division into internal and external legal culture, introduced by Friedman²⁷ and doubted by Cotterrell²⁸. Cynicism as one of the main ingredients of the Soviet legal culture²⁹ was more common in the external legal culture, than in the internal one. However Cotterrell seems to be right in suggesting that there no clear border between the two, even so these two sides of legal culture allow a better understanding of its bigger picture.

In an attempt to define legal culture Cotterrell suggested that it should be first disaggregated³⁰. His “first step towards *disaggregating culture*” was the “analytical separation of instrumental, traditional, affective, and belief-based social relations”³¹. We have already passed that step by choosing to analyse the legal culture in the context of construction industry. It will help us to concentrate on specific examples and see how a certain legal culture can manifest itself in one social sphere while being less obvious in others.

²⁵ Alison Kitson, Chris Husbands and Susan Steward, *Teaching and Learning History, 11-18: Understanding the Past* (McGraw-Hill Education (UK) 2011) 108.

²⁶ Oleg Kharkhordin, *The Collective and the Individual in Russia: A Study of Practices* (University of California Press 1999) 59–61.

²⁷ Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 223.

²⁸ Professor Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing, Ltd 2013) 85.

²⁹ Frankowski and Stephan (n 14) 476.

³⁰ Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (Dartmouth Pub Co ; Ashgate 2008) 297.

³¹ *Ibid*, 308

In disaggregating Soviet legal culture we should first look at the Soviet legal philosophy, ideology and mentality. Kelsen³² gave a thorough account of the Soviet philosophy and ideology, based on the ideas of Marx, Engels and Lenin, which later transformed under the pressure of Stalin's regime. There are also enough studies on Soviet mentality³³. What is prevalent in all of them is the role of the state in Soviet legal culture and in Soviet culture in general. The state takes a leading position in legal studies during Stalin's rule and continues to be in the front even now, not only in Russia, but also in Bulgaria and Romania, with one of the fundamental courses in law schools being the "Theory of State and Law" only recently changing to the "Theory of Law and State".

In this respect Glenn's picture of Soviet law is quite accurate:

If you are a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems in understanding it. Simply assume a hyper-inflated public law sector in the jurisdiction in which you presently function. Historical fields of private law such as contract, commercial law, civil responsibility or torts, property, bankruptcy or competition simply shrink away to relatively insignificant proportions, to be replaced by public law variants or replacements. State contracts (of innumerable agencies and units of production) largely displace private contracts; private commercial law and bankruptcy become essentially irrelevant; public compensation regimes replace, almost totally, court-ordered compensation...³⁴

Here a very important caveat about the meaning of state in the Soviet legal culture must be made. When we speak of the Soviet state in Russian, the word that is used to refer to 'state' comes from the old Slavonic root meaning 'lord'. Surprisingly this same root 'gospodar' is still used in Romanian to denote administration, directorate or management. So for the Soviet state its nature was directly derived from the old Russian czardom, and it should come as no surprise that the position of the state was so overwhelming.

Stalin used the political systems of the past to create his own absolutist state. The architectural style of Stalin's era drew a lot from the architecture of the reign of Louis XIV of France, and it was not mere coincidence³⁵. In Bulgarian the word used to denote the state is derived from the verb 'to hold', i.e. the state is something which is held, which also alludes to a "strong hand" of a

³² Hans Kelsen, *The Communist Theory of Law* (Scientia 1976).

³³ Isaiah Berlin, *The Soviet Mind: Russian Culture Under Communism* (Brookings Institution Press 2004).

³⁴ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press 2010) 348.

³⁵ See e.g. Evgeny Dobrenko and Eric Naiman, *The Landscape of Stalinism: The Art and Ideology of Soviet Space* (University of Washington Press 2003).

monarch. Such an understanding of the state could not fail to influence the understanding of the law within the state.

The lack of public/private divide in the legal sphere is a direct result of the omnipresence of the state as an autocratic machine. This omnipresence manifests itself, in particular, in the terminology used to describe the private law, which is not “private” in Bulgarian and Russian, but rather “particular”. These linguistic details bring us to another significant element of the Soviet legal culture which is Soviet legal language.

One might think that Soviet legal language is a fiction, especially in relation to languages other than Russian since there was no such ethnic entity as Soviet people in a sense of a nation which could create a national language, although the derogatory term *homo soveticus*, popularised by Zinoviev³⁶, has been used to describe Soviet man as a distinct social type³⁷. Nonetheless Soviet legal language still exists, and not only in the form of lexical remnants in national languages which keep using terms and structures that emerged in the Soviet period which was long enough for a linguistic expansion to take place and leave its seeds, but also in the form of a transnational metalanguage influencing the way of thinking of people in post-communist countries.

Soviet legal language is not a proper language, of course, it is rather a kind of a social jargon, similar to the modern Eurospeak³⁸ in Europe, and there is certain logic in the way it is classified by linguists in the post-communist area where it is considered as a “style” or even “sub-style”, or a register of the national language³⁹. Traditionally, in linguistics the term language is used to describe a fully-fledged apparatus consisting of grammar, vocabulary and rules to use the vocabulary to produce utterances or texts⁴⁰, while this cannot be said of the Soviet legal language. However in English-speaking linguistic discourse the approach to language as a term is more flexible. As Crystal points out, language nowadays tends to be defined on the basis of an identity⁴¹, which can be national first of all, but it can also be political.

Since the development of the Soviet Union itself spanned over an extended period of time, the development of its language had time to form its own history. Mattila, e.g., describes three basic

³⁶ Aleksandr Zinoviev, *Homo Sovieticus* (Atlantic Monthly Press 1985).

³⁷ See e.g. J Rozin, E Pavlovskaiā and Irina Zarinskaia, *Mental Stereotypes of ‘Homo Sovieticus’ as Reflected in Architectural and Industrial Design* (Woodrow Wilson Center, Kennan Institute for Advanced Russian Studies 1992).

³⁸ Vilemini Sosonis, Multilingualism in Europe: Blessing or curse? In Albert Branchadell and Lovell Margaret West (eds), *Less Translated Languages* (John Benjamins Publishing 2005) 45.

³⁹ J Wróblewski, Zenon Bankowski and N MacCormick, *The Judicial Application of Law* (Springer Netherlands 2013) 1234 <<https://books.google.it/books?id=yinh3BQAAQBAJ>>.

⁴⁰ Nigel Love, *The Foundations of Linguistic Theory: Selected Writings of Roy Harris* (Routledge 2014) 18.

⁴¹ David Crystal, *English as a Global Language* (Cambridge University Press 2012) 179.

stages in the formation of the Soviet legalese⁴². The first stage started after the revolution of 1917 and lasted until 1930s and was marked by abolishing the 'old' unnecessary terminology of the tsarist legal Russian and invention of new 'revolutionary' terminology for the Soviet law. In the 1930s it was understood that the Soviet law could not do without certain 'bourgeois' concepts and they were reintroduced into the legal language under the pretext of having a different meaning in the socialist legal order. In the 1980s a stage of stagnation began after it was decided that legislation is not a sphere for "linguistic experiments"⁴³. It is also possible to follow the logic of Berman⁴⁴ in describing the Soviet legal language and divide its formation into the stages of codification of the Soviet law.

In construction industry the key terms of Soviet legal language and thus the philosophy, ideology and mentality were the Gosplan (state plan⁴⁵), the technical and economic substantiation (a document similar to what is called "a feasibility study" in English, but mainly directed at justifying the needs for this particular development project), the technical assignment (a document similar to what is called the Terms of Reference in English, but including not only the technical details of the construction project, but also the formal details of the grounds for the project implementation, the Employer, the developer, etc.), construction norms and rules and the gospriemka (state acceptance procedure). These were the main points of the construction process.

The state acceptance procedure was the most difficult one. It required a creation of a commission including numerous representatives of the parties who were to sign numerous papers confirming the final acceptance of the works, and this practice is still alive not only in the public, but also in the private sector of construction industry in Russia, Bulgaria and Romania, due to the state regulation of the quality of construction works. We should not forget about the statutory authorities who control the safety of construction works and also take part in the acceptance procedures, which does not help to make them shorter. As Robinson writes about it:

In some countries (e.g. Romania, Bulgaria) there are statutory authorities who control the Taking Over process and the taking into use of the Works, all in accordance with the local law, thus circumventing the provisions of a FIDIC-based contract. Very often the bureaucratic nature of committees appointed by the authorities to oversee the Taking Over process in accordance with local law can be very tedious and time - consuming, leading to

⁴² Heikki ES Mattila, *Comparative Legal Linguistics* (Ashgate Publishing, Ltd 2006) 95.

⁴³ Ibid. 96.

⁴⁴ HJ Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* (Harvard University Press 1972) 114.

⁴⁵ Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge 2015) 93.

the Taking Over Certificate being issued later than might be the case under the Engineer-controlled Taking Over procedure inherent in a FIDIC-based contract. This situation could in theory leave the Contractor, possibly unfairly, exposed to the imposition of Delay Damages (Sub-Clause 8.7).⁴⁶

One last point that I would like to mention about the Soviet legal culture and Soviet legal language in construction is about the “court of arbitrazh” which sound similar to court of arbitration, but should not be called this way for the sake of avoiding misinterpretation. The nature of the Soviet *arbitrazh* is well described by Khvalei:

In the Soviet Union, disputes between companies fell under the jurisdiction of so-called "state arbitrazh" which in fact was a department in the government with a status similar to a ministry. To apply the term "arbitrazh," which traditionally applied only for arbitration, to a quasi-judicial system can hardly be considered a good idea. However it is unlikely that in Soviet times, given the undeveloped state of arbitration proceedings, that anyone would have paid serious attention to such a terminological error. State arbitrazh in the USSR was subordinated to the USSR Government. Alongside it, some state arbitrazh were subordinated to the governments of the Union republics, to the governments of municipalities, and so forth.⁴⁷

This character of “state arbitrazh” can still be seen in many courts of arbitrazh across the post-communist countries. We will look deeper into it in Chapter 4.

⁴⁶ Michael D Robinson, *A Contractor's Guide to the Fidic Conditions of Contract* (Wiley 2013) 52.

⁴⁷ Alexander J Bělohávek and Prof JuDr Naděžda Rozehnalova, *Czech and Central European Yearbook of Arbitration 2011: The Relationship between Constitutional Values, Human Rights and Arbitration* (Juris Publishing, Inc 2011) 124.

Chapter 2. Theory of Europeanization: building Vasari corridors

In 2007 Cini et al. wrote that there was “no one theory of Europeanization”⁴⁸. Seven years later there is still no one theory of Europeanization, which is quite explicable. It would be difficult to imagine that a single theory of Europeanization could be developed while the EU and Europe are in an ongoing transformation which apparently will not finish soon.

The term “to Europeanize” dates back to 1844 according to the Merriam-Webster Dictionary, and its meaning is quite straightforward in the English language: “to cause to acquire or conform to European characteristics”⁴⁹ or, according to the Oxford Dictionary, “to give (someone or something) a European character or scope”, a later development of the term also comprises “transfer to the control or responsibility of the European Union”⁵⁰. The presence of the term and its meanings in English can be explained by the detachment of the British Isles and the US from the European continent, which makes it useful in terms of an “outsider’s point of view”. The outsider’s point of view is not only the prerogative of the UK in Europe, which although being a Member State still keeps its detached position in many aspects of the EU polity⁵¹. Switzerland and Norway, e.g., have their own history and character of Europeanisation⁵².

With the development of the EU the term has become even handier, although many authors have been critical about the lack of clarity and too big a broadness of interpretation of the concept of Europeanization in social sciences. Some even doubted the usefulness of the concept as such since it did not have any definite scope⁵³. Nonetheless there have been enough proponents of the concept and even the theory of Europeanization. So far the concept of Europeanization has been described in so many ways that it would be difficult to mention them all here. In general terms I would discern two main types of Europeanisation running in two planes respectively: one in horizontal, the other in vertical.

In the horizontal plane Europeanisation is mainly driven by the centripetal force of integration or approximation with the EU. There are, of course, the undercurrents of regionalisation⁵⁴ and resistance to integration spurred by the fears of losing the status quo, but from a global point of

⁴⁸ Michelle Cini (ed), *European Union Politics* (2nd ed, Oxford University Press 2007).

⁴⁹ <http://www.merriam-webster.com/dictionary/europeanize>

⁵⁰ <http://www.oxforddictionaries.com/definition/english/Europeanize?q=europeanize>

⁵¹ Michael L Mannin, *British Government and Politics: Balancing Europeanization and Independence* (Rowman & Littlefield Publishers 2010).

⁵² JØ Sunde, *Rendezvous of European Legal Cultures* (Fagbokforlaget 2010)

⁵³ Kevin Featherstone, ‘Introduction: In the Name of “Europe”’ in Kevin Featherstone and Claudio M Radaelli (eds), *The Politics of Europeanization* (Oxford University Press 2003).

⁵⁴ James Hughes, *Europeanization and Regionalization in the EU’s Enlargement to Central and Eastern Europe: The Myth of Conditionality* (Palgrave Macmillan 2004).

view Europeanisation – in its political dimension, at least – is stronger and more obvious, especially if one looks at it from Russia.

In the vertical plane one can speak of a centrifuge movement of ideas coming from the EU to an abstract level related to the existence of the EU first of all. This phenomenon is called abstractisation in linguistics⁵⁵ and logic. Azuolai⁵⁶ writes about Europeanisation of legal concepts as emergence of legal concepts pertaining to the discourse related to the EU and similar to the idea of autonomous interpretation introduced by the ECJ⁵⁷. However we will not be looking at that dimension of Europeanisation in this thesis. Our interests will lie in the horizontal plane of Europeanisation. This horizontal plane can also be perceived in a thicker 3D way with the movement of ideas to and from the “imaginary centre”⁵⁸ of Brussels and at the same time with the movement of ideas in the peripheries.

In this respect one of the most comprehensive analysis of the theory of Europeanization can be found in works by Howell⁵⁹. I will only touch upon certain points. First of all, Europeanization is seen as normative downloading or top-down movement of norms and policies from the EU to the Member States. The transposition of the EU Directives can be taken as an example here. There is a trend to call this type of Europeanization “EUisation” although certain authors suggested that the latter term is inconvenient and is often replaced with the former⁶⁰. I would certainly distinguish between the two. In my understanding, EUisation is primarily derived from the EU while Europeanization can be seen as the European influence in a broader geo-political and cultural sense, e.g. there has been a long history of Europeanization of the Russian political, legal and artistic culture, especially, since the early 18th century, after Peter I had opened the “window to Europe”.

Secondly, Europeanization comprises the uploading process or bottom-up movement of legislative and political initiatives from the Member States to the EU. It is natural that the Member States do not passively accept the EU requirements to change their local legislation. As with any kind of

⁵⁵ Hartmut Schröder, *Subject-Oriented Texts: Languages for Special Purposes and Text Theory* (Walter de Gruyter 1991) 18; Henri Wald, *Introduction to Dialectical Logic* (John Benjamins Publishing 1975).

⁵⁶ Loic Azoulay, *The Europeanisation of Legal Concepts* in Ulla B Neergaard and Ruth Nielsen (eds), *European Legal Method: In a Multi-Level EU Legal Order* (Jurist- og Økonomforbundet Forlag 2012).

⁵⁷ Mrs M.K.H. Hoekstra (ne Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, ECJ Case 75/63 [1964] ECR 379

⁵⁸ Tatjana Jukić, ‘THE MAN WHO KNEW TOO MUCH Žižek and the Balkans’ (2013) 17 *European Journal of English Studies* 160.

⁵⁹ Kerry E Howell, *Europeanization, European Integration and Financial Services: Developing Theoretical Frameworks and Synthesising Methodological Approaches* (Palgrave Macmillan 2004).

⁶⁰ Alistair Cole, *Governing and Governance in France* (Cambridge University Press 2008) 87.

intervention certain reaction must follow. Thus the Member States also take part in the formation of the EU policies, institutions and processes which will afterwards become compulsory for them. Another aspect of Europeanization is the horizontal movement of ideas and political and legal instruments between the Member States as an intermediate stage before they are brought up to the level of the EU. This facet of Europeanization may not even go as far as the discussion of normative initiatives at the EU level. However the exchange of opinions and instruments between the Member States and other European countries will take place within the context of emergence of a European community. As an example the German VOB conditions for construction projects may be used in Poland and in the Czech Republic without being discussed as an option for EU standard contract conditions.

What has been missing so far in the theory of Europeanization is the indirect influence of the Member States on the politics of the EU through their non-compliance with the EU law which can be noticed by market operators or their professional associations as was the case with FIEC and EIC above and brought to the attention of the European Commission. This type of process can be described as a circular movement starting from the downloading phase, then causing movement in horizontal direction, and after that becoming vertical, first going up and then coming down on the Member State again.

This kind of movement should not be confused with the roundabout process initiated by the Member State and coming down back to it after consideration at the EU level as described by Waterhout⁶¹ for European spatial planning policies, for example. In case of indirect influence we are rather facing the reluctance and passiveness in adopting new legal behaviours. It is a facet of the "subject political culture" that Opatowska about in the context of overcoming nationalistic aspects in post-communist countries:

Why is it so difficult to develop enthusiasm for cross-border projects and the concept of a European identity among border region residents? The answer is not an easy one and includes many factors. First of all, both countries' post-socialist legacy should be mentioned. The centralist policy of the communist regimes led to the creation of a "subject political culture," which has been credited with the formation of a weak civil society and an absence of entrepreneurship. New civic patterns that can reverse these negative effects

⁶¹ B Waterhout, *The Institutionalisation of European Spatial Planning* (IOS Press 2008) 165.

cannot be quickly fostered by institutional framing. It is believed that 60 years must pass before a rooted civil society could function again in Central-East Europe.⁶²

One of the most widely quoted definition of Europeanisation was proposed by Radaelli “drawing upon Ladrech”⁶³. For Radaelli “the concept of Europeanization refers to:

Processes of (a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies”.

For us the word “construction” will play the key note in the theory of Europeanisation. I propose to see the process of Europeanisation as the process of building “Vasari corridors” in Europe as conduits for legal, political, social, and cultural exchange. The metaphors of construction can explain the lengthy period of Europeanisation as a process of exchange of existing values and creation of new shared ones and the metaphor of Vasari corridors explains the character of Europeanisation as a new route of communication which some may shun at first, but which will prove to be more convenient and comfortable with time.

Nowadays Europeanisation is concerned with two main ideas: compliance with the EU law and compliance with the principle of the rule of law. These two ideas are guiding both European integration within the EU and approximation of other countries towards the EU.

The theory of the rule of law lies in the foundation of Europeanization, since the European Community is “a Community based on the rule of law”⁶⁴. However, as fairly noted by Kochenov, “the European understanding of the Rule of Law is only at the stage of articulation. While a number of elements of it are quite clear, the general scope of the European Rule of Law is yet to be outlined”⁶⁵. Besides the “thin” (formal) and “thick” (substantive) understanding of the rule of law, one has to take into account the “semantic difficulty”, underlined by Weiler and related to the translation and interpretation of the rule of law in different languages, as noted by Weiler “the rule of law” may be translated in French – without being exhaustive – by the following terms: *prééminence du droit* (translation historically favored by the Council of Europe), *Etat de droit*

⁶² Elzbieta Opatowska. The Europeanization of the German-Polish Borderlands. In: Katarzyna Stokłosa and Gerhard Besier, *European Border Regions in Comparison: Overcoming Nationalistic Aspects or Re-Nationalization?: Overcoming Nationalistic Aspects or Re-Nationalization?* (Routledge 2014).

⁶³ Kevin Featherstone and Claudio M Radaelli, *The Politics of Europeanization* (Oxford University Press 2003) 30.

⁶⁴ *Partie Ecologiste ‘Les Verts’ v. Parliament*, ECJ Case 294/83 [1986]

⁶⁵ D Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 (1) *Erasmus Law Review* 5, 9.

(term today favored by legal scholars when referring to the rule of law as a constitutional principle governing the State), *primauté du droit*, *principe de légalité*⁶⁶.

The semantic difficulty of the rule of law in the EU is growing together with the EU. Speaking of the two neighbouring SEE Member States, sharing a common communist history, one cannot help wondering whether the linguistic difference of expression of the rule of law really reflects a difference in the understanding of the principle itself. The Romanian version of the rule of law is “*Statul de drept*” with an obvious allusion to the French “*Etat de droit*”, and in Bulgarian it is “Върховенство на закона” (which can be translated into French as “*prééminence de la loi*”, rather than “*prééminence du droit*”, since in Bulgarian there are two terms related to the two sides of law which are often not differentiated in English). The latter Bulgarian term has been used as interchangeable with the Bulgarian equivalent of the French “*Etat de droit*” (“Правова държава”) in the documents of the European Commission, including the “new EU Framework to strengthen the Rule of Law”⁶⁷.

At the same time the Croatian version of the Framework consistently referred to “*prééminence du droit*” (“*vladavine prava*”) although there is a similar linguistic pair of *droit/loi*. The other Slavonic versions used the “*Etat de droit*” phraseology, except the Polish text which was based on the term apparently similar to the English one as there is no such explicit differentiation in Polish between *droit* and *loi*, and the Polish concept of *prawo* can be compared with the English concept of *law*. Thus the theory of the rule of law boils down to the understanding of law in a given country. In this respect my research will contribute to the explanation of the specificity of the rule of law in Bulgaria and Romania which, in my opinion, share a common vision of this principle despite their linguistic dissimilarity.

Compliance can be perceived in different ways and at different levels⁶⁸. It may be defined as “the extent to which national actors conform to the EU requirements by incorporating and applying EU laws into national context”⁶⁹. In the context of the CEE enlargements of the EU it was often stated that compliance with the EU law in the new Member States was more formal than actual⁷⁰. Yet

⁶⁶ Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) 04/09 *Jean Monnet Working Paper*, New York 8.

⁶⁷ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0158>

⁶⁸ See e.g. Marise Cremona, *Compliance and the Enforcement of EU Law* (OUP Oxford 2012).

⁶⁹ Asya Zhelyazkova, ‘Complying with EU Directives’ Requirements: The Link between EU Decision-Making and the Correct Transposition of EU Provisions’ (2013) 20 *Journal of European Public Policy* 702.

⁷⁰ Florian Trauner, ‘Post-Accession Compliance with EU Law in Bulgaria and Romania: A Comparative Perspective’ [2009] *European Integration online Papers* 5 <<http://eiop.or.at/eiop/texte/2009-021a.htm>> accessed 16 June 2014.

positive trends in compliance with the EU law in Bulgaria and Romania have also been reported as compared to the situation in the older Member States⁷¹.

The main questions of the theory of compliance in EU law are why compliance is not achieved and what can be done to improve the situation. Various regulatory mechanisms have been proposed, based on rationalism, management, and constructivism⁷². However courts are still seen as typical “agents of compliance”⁷³, although in Romania, for example, more trust has been recently shown to the non-judicial authority in public procurement dispute resolution. At the same time compliance can be pursued by the industry-related associations, both international and national ones, such as FIEC and EIC at the European level and e.g. the Bulgarian construction chamber at the national level. In my research project I will look at compliance from the point of view of the national legal culture in construction contract law and the understanding of the principle of the rule of law in order to understand how the gaps of non-compliance can be covered and prevented in the future.

The theory of Europeanization is closely connected with the theory of legal transplants, especially after the two enlargements of the EU of 2004 and 2007. Since the term was coined in the 1970s by Watson⁷⁴, the theory of legal transplants has continued to develop without stop. And, although Teubner suggested that “legal irritants” would better explain the processes associated with “the transfer of legal rules from one country to another”⁷⁵, Teubner’s term has not become as popular as Watson’s.

The debate on legal transplants has been divided into “culturalists” and “transferists”, with the former claiming that law as a cultural phenomenon cannot be transplanted or transferred into a different cultural environment, the latter supporting the possibility of such a transfer⁷⁶. There has already been a proposal to contemplate on a Grand Transplant Theory, covering both approaches⁷⁷, and a protest that such a theory is simply impossible⁷⁸. In our case it would be interesting to consider the Soviet legal culture as a transplant which got so rooted in the legal

⁷¹ Dimiter Toshkov, ‘Compliance with EU Law in Central and Eastern Europe: The Disaster that Didn’t Happen (Yet)’ (2012) 364 *L’Europe en Formation* 91.

⁷² Esther Versluis, ‘Compliance Problems in the EU: What Potential Role for Agencies in Securing Compliance?’ (2005) 12.

⁷³ Cremona, o.c. 162

⁷⁴ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993) 107.

⁷⁵ Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’ (2003) 61 *The Modern Law Review* 11.

⁷⁶ Michele Graziadei, ‘Legal Transplants and the Frontiers of Legal Knowledge’ (2009) 10 *Theoretical Inquiries in Law*.

⁷⁷ N Foster, ‘Transmigration and Transferability of Commercial Law in a Globalised World.’ In: A Harding and E Örüçü, *Comparative Law in the 21st Century* (Kluwer Academic 2002) 55–73.

⁷⁸ Nursel Atar, ‘The Impossibility of a Grand Transplant Theory’ (2007) 4 *Ankara Law Review* 177.

cultures of the nation states that it is difficult to eradicate it even though economically it has proven to be stillborn.

As it was suggested by Foster⁷⁹, the complexity of legal transplants requires that they be carefully explored in terms of their effectiveness depending on their type and the environment in which they are inserted. This leads us to the theory of construction contract law which cannot boast having a solid structure since construction law is usually described in functional terms as a branch of law related to construction and thus encompassing various elements of other branches of law from land law and environment law to aviation law and commercial law. Besides, being heavily regulated by the state, construction law has always been one of the most public spheres of private law. Nonetheless there have been attempts in substantiating the theory of construction contract law.

In contract law the theory of Europeanization has been recently applied in order to understand and explore the future of the European contract law. Miller and Twigg-Flesner understand Europeanization in three main ways: the elaboration of contract law principles and norms at the European level, the change of the national contract laws under the influence of the EU law and the harmonisation of contract law with the EU⁸⁰. All those three ways fit quite well into the theory of Europeanization given by Howell and summarised above.

⁷⁹ Foster, o.c., p. 71-72

⁸⁰ Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011) 4–14. Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (Routledge 2013) 2–3.

Chapter 3. Theory of construction contract law

In this chapter I will give a brief overview of construction contract law in Russia, Bulgaria and Romania with its recent developments related to the accession of Bulgaria and Romania to the EU and approximation of the Russian legal system with that of the EU. This chapter will be divided into three sections respectively: the first section will be dedicated to Russia, the second one to Bulgaria, the third – to Romania.

Since this thesis is written in English, it makes sense to define the key terms of this chapter as they would be defined by an English speaker. John Uff, one of the most prominent English legal scholars in the sphere of construction law, has recently pointed out that “the term “construction” comprehends any form of building or assembling, but is usually confined to the creation of, or the carrying out of work to or in connection with, immovable property”. In his opinion, “construction embraces the carrying out of both building and engineering works”. Therefore, “the term “Construction Contract” includes both “Building Contract” and “Engineering Contract”, which will have particular characteristics depending upon the technical subject matter of the contract under consideration. Building usually indicates a structure intended for occupation whereas engineering will embrace any form of construction, which need not be static.”⁸¹

It would probably be easier to write about Russian, Bulgarian and Romanian law in French or in German – definitely easier in French for Romanian law for obvious reasons of genetic proximity of the two languages, and maybe still a bit easier in German for Russian law since the current Russian Civil Code was drafted under a significant influence of the German BGB. However it would not be as challenging as to write about the three legal cultures in English, which is not only the language of the common law, but also the language of a more distant legal system and culture which had far less influence on the legal cultures and systems of Russia, Bulgaria and Romania.

Writing in English about construction law and construction contract law in post-soviet countries is just as challenging as writing about their law in general. It may be assumed that the sphere of industry that is related to erection of buildings, construction of roads and transport facilities, etc., should be governed by some typical law and that this law should be more or less universal around the world since the core activities related to construction do not differ much, no matter whether they are performed in Europe, in Asia or in Australia. Nevertheless, although having certain similarities in its contents, the law governing those activities is perceived from the doctrinal point

⁸¹ John Uff, ‘Construction Contracts’, *Chitty on Contracts: 2 Volumes & Supplement.*, vol 2 (Sweet & Maxwell Ltd 2013).

of view rather differently in the UK, the US (if we take the two major English speaking communities) and the post-soviet countries.

This is important for the understanding of local practices and procedures, just as it is important to remember that although two different languages may have very similar words for a rather common notion (“mother” will be a good example), the connotations attached to those words will vary significantly (in Russian, e.g., the high rhetoric of the Motherland is directly linked to the “mother”, not to the “father” as in German Vaterland, and while there is in Russian a word derived from the “father” to denote a similar notion, it is more rarely used and a different set of allusions). The same can be observed in construction.

The “engineer” or the “architect” are two good examples, both play key roles in a construction project and both those words sound very similar to their English equivalents in Russian, Bulgarian, and Romanian. Nonetheless their powers, rights and obligations will differ depending on the country, the law and the type of project. Moreover, in Bulgaria⁸² and Romania⁸³ *Architect* and *Engineer* are professional titles with a status similar to that of *Dr*, while in Russia there are no such titles at all.

Another difficulty lies in the status of Construction law as a legal discipline in Russia, Bulgaria and Romania. Construction law and construction contract law in the English-speaking legal discourse represent two well-formed areas of law with its core cases and terms, with its own legal doctrine – in the US, for example⁸⁴, while in Russia, Bulgaria and Romania these two legal areas are diffused and dispersed, and need to be put together like a mosaic consisting of bits and pieces of various size and shape and colour. Unlike *Baurecht* in German-speaking legal circles or *Bouwrecht* in the Dutch legal discourse, in Russia and Bulgaria construction law is still considered to be out of the list of proper self-sufficient legal disciplines and in Romania construction law is only emerging as a legal discipline following the French example of being the twin brother of urban and regional planning.

⁸² Наредба за условията и реда за признаване на правоспособност в областта на устройственото планиране и инвестиционното проектиране на лица с професионална квалификация "архитект", съответно "инженер", придобита в държава-членка на Европейския Съюз, на Европейското икономическо пространство, в Швейцария и в трети държави. 25.10.2005 г. (Ordinance for the conditions for recognition of competence in spatial planning and investment design of persons with professional qualification "architect", respectively "engineer" in the Member-States of the European Union, the European Economic Area, in Switzerland and in third countries. 25.10.2005)

⁸³ Legea nr. 184/2001 privind organizarea și exercitarea profesiei de architect. (Law no. 184/2001 on the organization and exercise of the profession of architect)

⁸⁴ The Spearin doctrine, e.g., under which “A contractor cannot recover [...] if it knew, or through the exercise of reasonable care should have known, of the defective nature of the design before submitting its bid or proposal”, see: Thomas J Kelleher and G Scott Walters (eds), Smith, Currie & Hancock’s Common Sense Construction Law: A Practical Guide for the Construction Professional (4th ed, John Wiley & Sons 2009) 112.

The legal academic discourse in Russia, Bulgaria and Romania does not have a long-standing tradition of education or research in construction law. This area of law has been viewed as rather a mass of legislation related to construction than a proper subsystem of law with its own institutes and principles. Moreover, certain legal scholars in Russia still consider construction law to be an institute within the so-called “commercial”⁸⁵ or entrepreneur law⁸⁶.

Such an approach may result from the overall doctrine of civil law as virtually all encompassing area of law, except the spheres that are exclusively public and are directly controlled by the state, i.e. public law. With this approach construction contract is nothing but a type of “works contract” and does not deserve its own area of law. It also fits quite well into the old soviet picture of the areas of law where agrarian law was present, for example, as it regulated “agrarian relations”, but there was no place for construction law, because either it was thought that there were no specific construction relations (they were probably thought of as a type of contractual relations and contract law did exist after all) or it simply did not sound right.

Here we face another problem of our topic that may be lost in translation. For in the English-speaking legal academic discourse there are at least three visions of legal studies as an area of human intellectual activity: legal scholarship as a science⁸⁷, legal scholarship as not a science⁸⁸ and legal scholarship vs legal science (as study of legal texts vs proper theory of law⁸⁹). In Russia, Bulgaria and Romania legal studies are a science, called jurisprudence (or *юриспруденция* to be more exact, which sounds very similar to jurisprudence, but covers practical legal studies as well as the studies of the theory of law) or juridical science (in Romania’s case). This has a major impact on the legal culture and legal profession in those countries because the distantiated theoretical approach and the vision of law as more of a scientific exercise than of a practical tool results later in hasty court decisions lacking proper consideration of specific professional background such as that of construction industry.

In English when we speak of construction, we need to keep in mind that even in Euro-English it has acquired a legal definition. With the issue of the DCFR, “construction” became “services to construct a building or other immovable structure, or to materially alter an existing building or

⁸⁵ In Russia commercial law nowadays is perceived in Goode’s broader way, i.e. “branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade”, see, e.g., Eric Baskind, Greg Osborne and Lee Roach, *Commercial Law* (Oxford University Press 2013) 3.

⁸⁶ *Aktual’nye problemy nauki i praktiki kommerčeskogo prava* 6. 6. (Volters Kluver 2007) 3.

⁸⁷ Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press 2009) 515.

⁸⁸ David Herring, ‘Legal Scholarship, Humility, and the Scientific Method’ [2006] University of Pittsburgh School of Law Working Paper Series 40 885.

⁸⁹ Riccardo Guastini, *Juristenrecht: Inventing Rights, Obligations, and Powers*. In: `Jordi Ferrer Beltrán, José Juan Moreso and Diego M Papayannis (eds), *Neutrality and Theory of Law*, vol 106 (Springer Netherlands 2013) 149.

other immovable structure, following a design provided by the client” or by the constructor⁹⁰. The WTO Agreement on Government Procurement signed by the EU distinguishes between “construction services”, “architectural services; engineering services and integrated engineering services, urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services”, and “management consulting services and related services”⁹¹.

However in all three countries in question construction contracts are thought of as a special type of works contracts whose legal nature is different from services since works must have physical results. Such understanding of construction contracts in Russia, e.g., leads to the situation that even service contracts in construction are expected to have some kind of physical results – a report being one of the most welcomed options.

It should be noted that it is easier to compare the understanding of a construction contract in English with its understanding in Romanian as the latter is closely related with Latin and French and most legal terms in English are either derived from French or Latin borrowings. So the Romanian term for a construction contract “*Contract de antrepriza constructii*” will have at least two words sounding similarly to the English terms.

It will be more difficult to compare the English terms with the Bulgarian ones because there are mainly Slavonic roots in the terms used in this sphere in legal Bulgarian, apart from “Инженеринг” (Engineering) which was borrowed from English relatively recently. At the same time it should be borne in mind that both Romanian and Bulgarian legal systems share a common background of socialist planned economy in the sphere of construction industry and the ideas that lie behind the notions of construction contracts of various types still have the burden of a heavy state regulatory mechanism related to construction activities.

Besides when we use English to describe foreign legal systems and cultures, we should remember the important role of case law for the theory of law in English and when we speak of construction contracts, we cannot disregard the judicial definitions given to them, such as the one cited by John Uff: “ ... an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done”⁹². There are no officially fixed judicial definitions for construction contracts in Russia, Romania or Bulgaria, but there are a number of statute definitions in all three countries. I will start my overview of construction

⁹⁰ Christian von Bar and others (eds), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) (Outline ed, Sellier, European Law Publishers 2009) 310.

⁹¹ Agreement on Government Procurement between the WTO and the EU, Annexes 4 and 5, 6 April 2014

⁹² Uff, o.c. 711

contract law in those countries with the statute definitions of construction contracts in order to show how the legal institution of construction contract is understood there.

C.E.C. Jansen, one of the most prominent European legal scholars in construction contract law, proposed a theory of building contract law based on the phases of the contract implementation⁹³. The three main phases were derived from the three stages in the Maturin report: preparation, construction and use of completed works⁹⁴. The main phases were then subdivided into subphases and both levels were associated with legal principles significant for the main and sub-phases. Jansen gave a very broad picture of construction contract law, noting the different approaches to this area of law in Germany and France.

In Germany the distinction between the public and private construction law is much more emphasised⁹⁵ while in France this delineation is not so strong. This absence of rigidity can be seen even in the books of one author, e.g. M. Faure-Abbad states in one of her books that construction law is a branch of private law⁹⁶, and her other book that construction law draws essentially from private law, except for the cases where construction legal tools are public contracts⁹⁷. In this respect one has to bear in mind that in the French legal tradition there are two terms and spheres which can be related to construction law in English, i.e. *droit de la construction* and *droit de l'urbanisme*, the latter was referred to as "construction law: public law" in English by Jansen⁹⁸. A similar distinction was borrowed by the Romanian legal tradition which has been strongly influenced by the French law since the Civil Code of Napoleon. In Bulgaria and Russia, due to their legal terminology, construction law has encompassed all areas of construction whether private or public with a clear prevalence of public regulation for both sectors of construction industry.

In fact construction law represents such an enormous body of legal instruments that it is difficult to build a private law theory of construction law. At the same time, as was fairly noted by T. Stipanowich, "although the law relating to building design and construction cuts across the entire legal spectrum, construction law is first and foremost the law of contracts"⁹⁹. Stipanowich did not offer any theory of construction law as such, but his vision of construction law as a transactional system can be used for theory construction. In his rather extensive article Stipanowich, first of all,

⁹³ CEC Jansen, *Towards a European Building Contract Law: Defects Liability: A Comparative Legal Analysis of English, German, French, Dutch, and Belgian Law* (WEJ Tjeenk Willink 1998).

⁹⁴ Jansen, o.c., 13

⁹⁵ Jansen, o.c., 29

⁹⁶ Marianne Faure-Abbad, *L'essentiel du droit de la construction* (Gualino-Lextenso éd 2012) 15.

⁹⁷ Marianne Faure-Abbad, *Droit de la construction* (Gualino : Lextenso éditions 2013) 13.

⁹⁸ Jansen, o.c., 616

⁹⁹ Stipanowich, Thomas, 'Reconstructing Construction Law: Reality and Reform in a Transactional System' [1998] *Wisconsin Law Review* 463, 465.

drew up the line between the internal (written agreements, standard contracts) and the external (public laws) rules. Secondly, he distinguished between the primary (contractors, design professionals, and purchases/owners) and the secondary (lawyers, scholars, industry-related associations, and conflict resolution bodies) actors. Thirdly, Stipanowich separated residential construction from the rest of the construction industry, calling it the “other”¹⁰⁰ construction industry. This is true, especially considering the law and regulations used for residential buildings. Construction contract law is usually considered in functional terms as actualisations of various categories of private law in construction contracts (damages, liability, etc.). However these actualisations largely depend on the system of construction contract law in a given legal environment or country. It may make more sense to base the theory of construction law on its institutions, rather than phases in construction, and to analyse the institutions on which a construction contract is based, rather than its stages or phases, since such general phases as “preparation, construction and use of completed works” can be found in any type of works contract while such institutions as the building/construction permit, design (with its various scopes: preliminary, detailed/ working, etc.), Engineer/ Consultant, acceptance, taking over, etc. can only be found in a construction contract.

Europeanisation of construction contract law in Russia

In Russia construction law is a vast terrain where the Civil Code occupies only a small corner as compared to other legal acts. The Civil Code of the Russian Federation has been recently amended with the inclusion of the principle of good faith in its Art. 1 as one of the basic principles of the Russian civil law¹⁰¹. Now “the participants of legal relations” must act in good faith and no one has the right to benefit from their unlawful or male fide behaviour. This is not a complete novelty in the Russian Civil Code. Previously this principle was “hidden” in Art. 6 behind the situation where it was impossible to use legislation by analogy, then the rights and obligations of the parties were to be defined on the basis of “the general principles and sense of civil legislation (analogy of law) and the requirements of good faith, reasonableness, and justice”¹⁰². However courts of law used this principle quite well before this amendment¹⁰³. Apparently this amendment

¹⁰⁰ Stipanowich, o.c., 502

¹⁰¹ Federal Law of 30.12.2012 N 302-FZ

¹⁰² Peter B Maggs and AN Zhiltsov (eds), *The Civil Code of the Russian Federation: Parts 1 and 2* (ME Sharpe 1997) 4.

¹⁰³ See e.g. Resolution of the Supreme Commercial Court of Russia of 21.02.2012 N 12499/11

is another reminder to those who need explicit legislation to rule their behaviour just as it was in the Soviet Union.

The chapter of the Russian Civil Code covering the construction contract as such contains four other sections related to construction contract. They are general provisions on the works contract, provisions on the household works contract, provisions on design and survey contract, and provisions on works contract for state and municipal needs. This close relation is also reflected in the theory of law which does not classify design law in Russia into a separate branch and there is no fixed term to define this area of law as such. A similar approach can be found in both Bulgaria and Romania, and although theories of European design or architect law have emerged in Europe¹⁰⁴, design law has not yet established itself as a separate branch in the theory of law.

The chapter of the Civil Code related to construction contracts only provides a very basic framework for the regulation of contractual relations between the parties in a construction project. In total, construction contract law in Russia, just as in Bulgaria and Romania, can be seen as a building standing on three whales floating in the sea of technical standards and norms. The main central whale will not be the Civil Code, however, but the Urban Development Code which plays a much bigger role in large construction projects. It is in this code that all participants of a construction project are defined as well as their functions. What is even more important the term “construction” itself is defined here just as all other activities related to construction, such as “reconstruction” which in fact stands more for refurbishment, rather than demolition and re-creation of a building. It is useful to know exactly what is meant in Russian by all those terms which although may sound very similar to their English pseudo-equivalents like “reconstruction” above or territorial planning, e.g., will have their own legal contents.

The third whale holding the building of construction contract law in Russia is the public procurement law which has recently been revised in view of creating a Federal Contract System for public procurement purposes. It was suggested that a library of standard contract conditions be compiled for this system, including the FIDIC standard contract conditions for construction projects. However so far little has been done in this direction. The FIDIC contract conditions are mainly used in projects initiated by either foreign investors or the European banks. Nevertheless in terms of contract law Europeanisation, or approximation as its Russian variant¹⁰⁵, is more likely to

¹⁰⁴ Uma Suthersanen, *Design Law: European Union and United States of America* (Sweet & Maxwell 2010); Stephanie van Gulijk, *European Architect Law: Towards a New Design* (Maklu 2008).

¹⁰⁵ Only a few years ago there was a lot of discussion on the Europeanisation of Russian law, but last year the discourse has changed to approximation, see e.g. Roman Petrov and Peter Van Elsuwege, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory*

take place on the two sides of the island of construction contract law which are the civil code and the public procurement law not in the centre, where the urban development code lies, for the urban development legislation is core of the bureaucratic system in construction industry and it will not yield easily to foreign influences.

One inevitable direction of Europeanisation or approximation of the Russian law is represented by the technical standards and the legislation related to them. The Law on Technical Regulation of Russia provides for the use of Eurocodes in those areas which have not been covered by the relevant federal laws titled “Technical Regulations”, and the development of those federal laws has been notoriously slow so far.

Europeanisation of construction contract law in Bulgaria

Until recently the theory of construction contract law in Bulgaria did not receive much attention. In 2012 the first proper dissertation and monograph on this topic appeared since 1963¹⁰⁶. Soon after that two more monographs were published¹⁰⁷, but there have been no comparative studies in English so far. The risky character (aleatority) of construction contracts was seriously considered by Dimitrov in his dissertation and other writings¹⁰⁸. This makes one wonder whether such perception of construction contracts is a characteristic feature of Bulgaria as post-Ottoman country where the rule of law is perceived in a particular way¹⁰⁹.

The duality of law with its division into *ius* and *lex* or *право* and *закон* in Bulgarian and in Russian has resulted into the perception of law in its legislative form as something bendable, which has found its way in the proverbs comparing *lex* to a narrow gate in an open field in Bulgarian¹¹⁰ (only fools will use it) and to a horse cart in Russian (it will go the way one steers it). All these peculiarities are, of course, fruits of the experience of long periods of absolutism in the history of the two nations. Nowadays the situation is changing for the better in terms of respect of written

Space? (Routledge 2014). Roman Petrov and Paul Kalinichenko, ‘The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: The Cases of Russia and Ukraine’ (2011) 60 *International and Comparative Law Quarterly* 325; ‘Европеизация российского права’ (*Die Woche des russischen Rechts, Potsdam, 10.-15.05.2010 (mit der Moskauer Staatlichen Juristischen O. E. Kutafin Akademie)*). - S. 65 - 86) <<http://opus.kobv.de/ubp/volltexte/2012/5858/>> accessed 13 January 2015.

¹⁰⁶ ММ Димитров, *Договорът За Строителство* (Сиби 2012).

¹⁰⁷ СН Попова, *Договорните Правоотношения В Строителния Процес* (ЮЗУ ‘Неофит Рилски’ 2012). Пенчо Милков, *Договорната Система В Строителството* (ИК ‘Труд и право’ 2014).

¹⁰⁸ ММ Димитров, ‘Комутативен Или Алеаторен Е Договорът За Строителство?’ [2012] *Търговско право, София* 61. Димитров (n 106). Stojan Stavru, Deljan Nedev and Miroslav Dimitrov, *Aleatornostta na dogovorite v bălgarskoto graždansko pravo* (Feneja 2013) 253–268.

¹⁰⁹ See e.g. G D Postema, ‘Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law’ in Xiaobo Zhai and Michael Quinn (eds), *Bentham’s Theory of Law and Public Opinion* (Cambridge University Press 2014) 33.

¹¹⁰ Калоян Стайков, ‘Законът Е Тясна Врата В Широко Поле’ 641 *Преглед на стопанската политика* <<http://ime.bg/bg/articles/zakonyt-e-tyasna-vrata-v-shiroko-pole/>> accessed 2 February 2015.

law. However as we shall see further much needs to be done to achieve the level of such respect comparable to the Western European countries.

Just as in Russia, in Bulgaria there are three main legal acts related to construction contracts. They are the Obligations and Contracts Act (the usual abbreviation in Bulgarian can be transliterated as ZZD), the Spatial Planning Act (the usual abbreviation in Bulgarian can be transliterated as ZUT), and the Public Procurement Act (the usual abbreviation in Bulgarian can be transliterated as ZOP). And just as in Russia the ZZD provides a very basic framework for all works contracts. They are not even divided into the four types as in the Russian Civil Code. The ZUT also defines basic concepts of construction activities, and has been used by the Bulgarian construction industry representatives to object to the official introduction of the FIDIC conditions into the industry legislation by the public authorities.

In particular Leonidov¹¹¹ underlined that the FIDIC conditions do not include the presence of such parties as the “physical person exercising technical control on the "constructive" part”, the “technical manager” and “provider of machinery and technological equipment”. As in Russia and Romania, the FIDIC Engineer becomes a controversial figure when it comes to the national legislation. In general in Bulgaria the "Consultant" performs the functions of the Engineer, but it has a different name in the national legal system. However it is not such a big problem for public procurement projects and tenders are simply announced for the role of consultant (“Engineer” in the FIDIC conditions – is a usual caveat in the brackets). The real problem is caused by the turn-key FIDIC conditions which do not include either the Engineer or the consultant in its Bulgarian form.

Another issue which may prove to be a problem, as noted by Leonidov, is that the date of completion in FIDIC conditions is the date on which the Contractor hands over the completed works to the Contracting Authority. According to ZUT, this should be marked by signing of a document whose template is contained in Annex № 15 to Ordinance № 3 which is one of the key procedural legal acts related to handing-over of completed construction works.

In accordance with ZUT, after completion of construction works, the investor, the contractor, the designer, and the building surveyor should produce an act to certify that the construction is executed according to the approved investment projects, certified as-built documentation, requirements for works under ZUT and the conditions of the contract. This act should be accompanied by the protocols of successfully conducted tests of machinery and equipment. With

¹¹¹ Людмил Леонидов, ‘Различията Между ЗУТ, Който Е Закон И Договорните Условия На FIDIC, Който Не Са Такъв Нормативен Акт’ <<http://bacea-bg.org/files/Razliki.doc>>.

the issuance of this act the construction works are handed over from the contractor to the employer. This act is the basis for the final report which must be produced by the person exercising construction supervision, and it proves that the contractor has fulfilled its obligations under the construction contract.

The obligations of the contractor under the rules of FIDIC are not considered fulfilled until the Engineer issues a performance certificate, stating the date on which the contractor fulfilled his obligations under the contract. The performance certificate should be issued within 28 days after the latest of the deadlines for defects notifications or as soon as the contractor has submitted all documents and completed and tested the whole site and eliminated all defects.

However in Bulgaria, just as in Russia, the final stage of any large construction project will be linked with state commissioning, i.e. checks and acceptance of the completed construction works and issuance of a permit for their official use. In Bulgaria this permit is issued by the Directorate for National Construction Control, under the terms and conditions set out in Ordinance № 2 of 31.07.2003 on commissioning of buildings in the Republic of Bulgaria and the minimum warranty periods for finished construction works, facilities and construction sites. The head of the Directorate for National Construction Supervision (NCSD) or person authorized by him will issue a permit for use of the finished construction works based on the final report drawn up by the person exercising construction supervision and protocol following form #16 establishing the suitability of the construction works for use, issued by the State Acceptance Commission with an authorization for issuance of the use permit. This state commissioning procedure does not allow inserting the date of completion as the date of commissioning in the FIDIC contract conditions since ZUT does not regulate the time terms between the drafting and signing of the permit documents.

One other peculiarity of the Bulgarian construction practices is the role of the designer in relation to the Engineer in a FIDIC contract. According to ZUT and ordinance № 3 the designer (consultant) may send his decision to the Engineer, and the Engineer is obliged to execute it, which may contradict the terms of the contract signed under the FIDIC rules.

FIDIC rules do not define disputes. In most general terms, a dispute is failure to reach agreement. Disputes, according to FIDIC rules, may be settled through negotiations to reach an amicable settlement, by an independent expert, by DAB, or through court of arbitration. ZUT (Art. 45), however, requires that for all outstanding issues in connection with the conclusion, performance and termination of public procurement contracts the provisions of the Commercial Law and the Law on Obligations and Contracts be applied.

There are no standard contract conditions for construction contracts in Bulgaria, apart from the FIDIC¹¹² Conditions officially translated in Bulgaria for public procurement purposes following the 2007 revision of the Bulgarian Territory Development Act, which is one of the key legal acts related to construction in the country. The FIDIC conditions have been regularly used for public procurement in Bulgaria before and after the issuance of their official translation in Bulgarian, although in 2011 the Bulgarian Ministry of Regional Development published a report saying that in 2000-2006 the use of FIDIC conditions in Bulgaria in public procurement projects created more problems than provided easier solutions and facilitated the project implementation.

A recent comment from the Director of the Operational Programme on Transport, which is implemented in Bulgaria under the EU Regional Development and Cohesion Funds, in her interview to the official journal of the Bulgarian Construction Chamber ran along the line that the FIDIC conditions when adapted to the Bulgarian legislation show good results in project implementation, but may be too difficult to control sometimes, and since Bulgaria had become a Member State in 2007 it does not have to use “this standard” anymore¹¹³.

In fact the presence of this foreign element in Bulgarian construction contract law has not caused any significant turmoil amongst the industry operators. There were some opinions expressed about the incompatibility of the FIDIC conditions with the Bulgarian commissioning procedures and there were reports on problematic project implementation some years ago, but in general the situation with the use of FIDIC conditions in Bulgaria seems to have settled down nowadays, which cannot be said about Romania, and I will address this issue in the next section.

Europeanisation of construction contract law in Romania

Overall the current legal framework of Construction Contract Law in Romania resembles that of its post-communists neighbour, Bulgaria, with the exception that the Romanian construction contract legal terminology is based on the French and Latin roots. This exception – at the same time – may have certain impact on the perception of the roles in a construction contract by its parties. The

¹¹² FIDIC stands for Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers), founded in 1913 and since then promoting the use of standardized contract conditions in international construction projects with the aim to facilitate their implementation. There are now several sets of such standardized contract conditions differentiated by the type of works or services needed in a particular construction project. These sets are commonly known as books and each book has a cover of a certain color, so they are often referred to as the “rainbow of FIDIC”. Thus, for example, the most popular book is the “Red Book” which contains conditions for a construction contract based on the detailed design of the client.

¹¹³ Галина Василева: До края на годината ще имаме 100% договаряне по ОП „Транспорт“, Вестник Строител, 21.04.2013 http://vestnikstroitel.bg/news/57333_galina-vasileva-do-kraya-na-godinata-sche-imame-100-dogovaryane-po-op-transport/

Employer is called “beneficiar”, which alludes to the receiver of a good, and the Contractor is called “antreprenor” which reminds the party that it is a business entity first of all.

Besides the Romanian law can boast of its own Civil Code, largely based on the Napoleon Code, but significantly updated lately with the help of international experts, including those from Quebec. During the communist period the old Civil Code of 1864 was still widely used. However the Soviet paradigm of contractual behaviour is quite common nowadays, especially in construction and public procurement projects where the contracting authorities often tend to overuse their dominant status. This can be shown well by the history of adoption of the FIDIC conditions by the Romanian Ministries for public procurement projects.

In 2002 the European Commission in its ISPA¹¹⁴ Manual advised candidate states to award construction contracts in public procurement projects on the basis of the FIDIC books. By that time the FIDIC books had already been fairly well known in Romania. The climax of the process of the Europeanization of the construction contract law in Romania, in my opinion, happened in 2008 when a joint Order of the Ministry of Transport, Finance and Public Works introduced the mandatory use of three FIDIC books (Red, Yellow, and Green) for public procurement in construction¹¹⁵. All those numerous projects in construction that were implemented under the aegis of the EBRD between 1996 and 2008 were also tendered using the FIDIC conditions of contract following the procurement policy of the bank. However there had been no statutory requirement for such standardised tendering and contracting.

Although FIDIC was meant to be and now is a truly international organisation, with regards to the development of the books it was heavily influenced by the experience of the British engineers. In the international construction community it is a well known fact that the first editions of the FIDIC conditions of contract were slightly revised versions of the fourth edition of the ICE¹¹⁶ conditions of contract¹¹⁷.

There are certain advantages in such legacy. Despite the fact that the FIDIC books are real books (each about 100 pages long, which are only the general conditions for the contract; one will also have to take into account the hundreds of pages of particular conditions, including the technical

¹¹⁴ "Instrument for Structural Policies for Pre-accession" (ISPA) is the European Community's financial instrument set up in order to assist the ten Central and East European candidate countries prepare for accession in the fields of environment and transport

¹¹⁵ ORDIN nr.915/465/415 Din 2008 Al Ministrului Economiei Şi Finanţelor, Al Ministrului Transporturilor Şi Al Ministrului Dezvoltării, Lucrărilor Publice Şi Locuinţelor Pentru Aprobarea Condiţiilor Contractuale Generale Şi Speciale La Încheierea Contractelor de Lucrări' <http://www.cdep.ro/pls/legis/legis_pck.htm_act?ida=79864> accessed 20 February 2014.

¹¹⁶ The British Institution of Civil Engineers

¹¹⁷ Jeremy Glover and Simon Hughes, *Understanding the FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell 2011) xi.

specifications and bills of quantities and drawings) and would probably look frightening to many construction contractors coming from civil law jurisdictions, the books are based on the practical common law approach of describing all relevant details within the text of the contract agreement. At the same time FIDIC conditions of contract could still be criticised as foreign interventions since they are largely based on concepts and principles of common law and international business practice which are not yet deeply rooted in the Romanian legal system and culture. One of such concepts is the notion of reasonableness. Whilst in the common law and even some civil law jurisdictions this concept has become a popular legal criterion, in the Romanian law it is still more of an exotic bird.

Officially the problems were voiced by the European Construction Industry Federation (FIEC) and the European International Contractors (EIC) in their Joint Statement of FIEC and EIC on Sound management of EU Structural & Cohesion Funds and Public Procurement addressed to the European Commission in 2011¹¹⁸. The statement underlined that the legal principles, identified in the EU Financial Regulation EC No. 1605/2002, in particular those of “effectiveness, efficiency and economy of operations” and “adequate management of the risks relating to the legality and regularity of the underlying transactions”, and the provisions of Directive 2004/18 on public procurement, requiring sufficient accuracy of information, provided by the public contracting authorities at the tender stage, in order to allow the bidders to form a fair price for the contract, were “systematically not respected in Romania”.

During the following year FIEC and EIC continued to discuss this matter with the EC and issued their Joint Position Paper on the *Use of Fair Contract Conditions on Infrastructure Projects*, co-financed by the EU Structural Funds¹¹⁹. In this paper it was proposed that draft Regulations COM(2011)615 and COM(2011)665 should be amended with the following requirements:

“In order to ensure broad and fair competition for projects benefitting from CSF or CEF funds, the form of contract used must be appropriate to the project’s objectives and circumstances. Contract conditions should be drafted so as to fairly allocate the risks associated with the contract, with the primary aim of achieving the most economic price

¹¹⁸ European Construction Industry Federation and European International Contractors, ‘Joint Statement of FIEC and EIC on Sound Management of EU Structural & Cohesion Funds and Public Procurement’ <http://www.eic-federation.eu/media/uploads/attachment/fiec-eic-joint-statement-eu-structural-funds-without-attachment_1.pdf> accessed 14 April 2011.

¹¹⁹ FIEC and EIC, ‘Joint Position Paper of FIEC and EIC: Use of Fair Contract Conditions for Infrastructure Projects (incl. TEN)’ <<http://www.eic-federation.eu/media/uploads/attachment/fiec-eic-joint-pp-fair-conditions-final-version-with-annexes.pdf>> accessed 5 June 2014.

and efficient performance of the contract. This principle applies irrespectively of whether national or international standard forms of contract are used”.

Eventually these requirements were inserted (although in a slightly revised version) into the final text of the draft Regulation COM(2011)665 which entered into force on 1 January 2014 as Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility.

Nevertheless certain cases, related to public procurement procedures and heard by the Romanian National Council for Resolving Complaints (CNSC) early this year, indicate that these requirements seem to be unknown to the contracting authorities in Romania. The Council was given the status of a legal body with administrative and juridical functions on 1 January 2007, and so, in the opinion of the Council, “Romania complied with one more commitment assumed in the process of cohesion to the European structures”¹²⁰. The main competence of the Council is to resolve complaints filed against tender procedures in public procurement. However the results of the Council’s work tend to be more in favour of the public contracting authorities than in favour of the complaining bidders, which is confirmed by recent studies made by the Romanian legal scholars in this field¹²¹.

In general the problems related to the unorthodox use of the FIDIC conditions of contract by the state authorities in Romania indicate that in public procurement construction contract law the understanding of the principle of the rule of law is closer to simple legality and such facets of the rule of law as legal certainty, consistency and predictability are not yet fully presented in the sphere of public procurement. Moreover the principle of the prohibition of arbitrariness of the executive powers, underlined in the new EU Framework to strengthen the Rule of Law, has been challenged.

There were numerous discussions related to foreign concepts and ideas sprouting in the Romanian legal system in the autumn of 2011 when the new Romanian civil code was about to come in force. In particular, it was noted that the new code was “peppered” with the term “reasonable time” although it contained no clear definition for that¹²². However it was also fairly noted that the new civil code was a step forward towards the approximation of the Romanian legal culture with

¹²⁰<http://www.cnsc.ro/en/>

¹²¹ Dragos, D. C., Neamtu, B., Raluca, V., (2011) Remedies in Public Procurement in Romania. In: Treumer, S. & Lichère, F.(eds) Enforcement of the EU Public Procurement Rules, DJØF Publishing Copenhagen, p.186. Available at SSRN: <http://ssrn.com/abstract=2487994>

¹²² Iulian Anghel and Cristi Moga, ‘Ați Citit Cele 2.663 de Articole Ale Noului Cod Civil? Știați Că Dispar „comercianții” Și Apar În Locul Lor „profesioniștii”? Ce va Fi Cu Societățile Comerciale Din Legea 31? | Ziarul Financiar’ (29 September 2011) <<http://www.zf.ro/eveniment/ati-citit-cele-2-663-de-articole-ale-noului-cod-civil-stiati-ca-dispar-comerciantii-si-apar-in-locul-lor-profesionistii-ce-va-fi-cu-societatile-comerciale-din-legea-31-8813609>> accessed 20 February 2014.

the Anglo-Saxon one since the new civil code was strongly influenced by the civil code of Quebec¹²³.

In 2009 a Romanian legal firm, *Ratiu&Ratiu*, – under the aegis of the Ministry of Regional Development of Romania – prepared an extensive study of the FIDIC conditions as they were used at that time by the state authorities of Romania¹²⁴. It should be noted here that the joint Order of the Ministry of Transport, Finance and Public Works introduced the mandatory use of three FIDIC books (Red, Yellow, and Green) for public procurement in construction, mentioned above, was only in effect till May 2009.

The report issued by *Ratiu&Ratiu* referred to the inconsistency of the translated FIDIC books with the legal acts on public procurement. This kind of inconsistency was not caused by the lack of adequate equivalents in the Romanian legal language. Apparently it was a consequence of insufficient harmonisation of the new standard contract conditions with the legal acts on public procurement, in particular Governmental Orders No. 34/2006 and 925/2006¹²⁵.

Such inconsistency revealed a major drawback in the definition of one of the key elements of any construction contract which are the specifications, detailing the scope and particularities of the work to be done under the contract. The problem highlighted by *Ratiu&Ratiu* mainly related to the discrepancy in the definition of the specifications as such in the new FIDIC standard conditions and Governmental Order No.34/2006, where the term ‘specifications’ was explained in much more detail.

At the same time *Ratiu&Ratiu* did not mention that in the Romanian translation of the FIDIC books, endorsed by the ministries, the specifications “explained” or “described” (*explicitateaza*) the works, but did not *specify* them as suggested in the original. While the official translation of the FIDIC contract terms produced by FIDIC is in this respect much closer to the meaning of the English text, saying that the specifications “indicate the characteristics of the Works in a precise way” (*indică în mod precis caracteristicile Lucrărilor*).

In their conclusions and recommendations at the end of the report *Ratiu&Ratiu* gave a positive opinion on the introduction of the FIDIC standard contracts in the Romanian legislation as, in their view, it would “contribute to efficient management of public funds” and has an important role in

¹²³ Ibid. and see also Daniela Borcan and others, *Nouveau code civil roumain traduction commentée = Noul Cod civil* (Daloz : Juriscope 2013).

¹²⁴ *Ratiu&Ratiu*, ‘Studiu Privind Principiile de Elaborare a Lucrării În Cadrul Proiectului « Întocmirea Contractelor de Proiectare Şi de Execuţie Lucrări de Construcţii. Comentarii, Recomandări, Exemplificări »’ <http://mdrl.ro/_documente/construcii/reglementari_tehnice/studiu_impact_fidic.pdf> accessed 18 February 2014.

¹²⁵ *Ratiu&Ratiu*, op. cit., 26-34

terms of internationalisation of contractual relations in the context of the structure and dynamics of the global economy¹²⁶.

However, as the report of *Ratiu&Ratiu* was mainly concentrated on the differences between the FIDIC contract conditions and the Romanian legislation and not vice versa, it did not include comments on the effect of the revisions made to the FIDIC conditions following the Romanian legislation and affecting certain basic concepts of the former. Such as the replacement of the *'taking-over certificate'* with *'taking-over minutes upon completion of the works'*, which are "the minutes issued and signed in accordance with the Applicable Laws by a taking-over commission appointed by the Employer, at the Engineer's request, recommending or not the taking-over of the Works, Section or part (as the case may be) by the Employer under Clause 10."¹²⁷ This means that the role of the Engineer in the taking-over process is outweighed by the presence of the Employer and the commission appointed by the latter following a formal request from the former. The role of the Engineer is further diminished by an insertion into Sub-Clause 3.1 of both Red and Yellow Books, obliging the Engineer to obtain a specific approval of the Employer for issuance of all taking-over certificates, the performance certificate and instructions or approvals of all variations. Thus the role of the Engineer rolled back to the soviet style paradigm where he was a mere representative of the Employer on site.

As we can see the first round of adoption of the FIDIC conditions of contract was not a great success. The order which introduced their mandatory application for public procurement had been in force for less than a year. Its abrogation was not explained by the government. It may have been caused by the decline in the construction industry which went down by 17% as compared to 2008¹²⁸ and smaller hopes for foreign investment. Although some construction specialists suggested that the abrogation was a result of difficulties related to translation, interpretation and adoption of the FIDIC conditions as foreign rules and practices, combined with incompatibility of certain provisions of the FIDIC books with the Romanian legal system¹²⁹, I am more inclined to think of economic reasoning behind this change in public policy as the financial statistics on the

¹²⁶Ratiu&Ratiu, op. cit., 89

¹²⁷Quoted from the English translation of the Mandatory Particular Conditions for FIDIC Red Book, introduced by Annex 1 to ORDIN nr.915/465/415 Din 2008, see n.3 above, (Ministry of Finance, Romania, 'Mandatory Particular Conditions for FIDIC Red Book 1999' (13 April 2007) <http://discutii.mfinante.ro/static/10/Mfp/FIDIC/a1_fidic99_mandatory_pc_red_book.pdf> accessed 21 February 2014.)

¹²⁸Anca Parascan and Cristina Mihai, 'Construction and Projects 2010/11: Romania' [2010] *PLC Cross-border Construction and Projects Handbook* 115.

¹²⁹Dragoş Georgescu (n 11).

allocation of EU funds to Romania coincides with the introduction of the FIDIC conditions in the Romanian legislation¹³⁰.

In December 2010 the FIDIC books reappeared in the Romanian legislation¹³¹. Early the following year the FIDIC general conditions were supplemented with particular conditions issued by the Romanian Ministry of Transport and Infrastructure¹³². Very soon these particular conditions caused serious protests from the European construction community.

The European Construction Industry Federation (FIEC) and the European International Contractors (EIC) issued a Joint Statement to the European Commission on 4th May 2011¹³³. The statement underlined that the legal principles, identified in the EU Financial Regulation EC No. 1605/2002, in particular those of “effectiveness, efficiency and economy of operations” and “adequate management of the risks relating to the legality and regularity of the underlying transactions”, and the provisions of Directive 2004/18, requiring sufficient accuracy of information, provided by the public contracting authorities at the tender stage, in order to allow the bidders to form a fair price for the contract, were “systematically not respected in Romania”.

The statement pointed out the details introduced by the orders, mentioned above, into the FIDIC books as adopted in Romania, and briefly described them under the subtitle “Unfair and unbalanced contract conditions”. It highlighted the 10% cap on the increase of the contract price and the transfer of unquantifiable risks such as ground conditions, fossils, archaeological findings and permits to the Contractor. It also mentioned the deletion of the DAB clauses and the distortion of the role of the Engineer by imposing on him the duty of obtaining specific approvals from the Employer for the payments and certificates of the key milestones of the contract.

FEIC and EIC stressed that “such unfair conditions, only superficially based on the FIDIC forms” would create a situation where the Romanian construction market would lose its attractiveness for experienced European contractors and the quality of the works would suffer, which was not the aim of the EU, financing the Romanian road projects. In conclusion, FEIC and EIC expressed hope that the contracting authority and the Romanian consulting association would be able to

¹³⁰Record Absolut: România a încasat Într-O Singură Zi Peste 830 de Milioane de Euro Din Fonduri Structurale Și de Coeziune’ (*Ministerul Fondurilor Europene*) <<http://www.fonduri-ue.ro/comunicare/stiri/2378-record-absolut-romania-a-incasat-intr-o-singura-zi-pest-830-de-milioane-de-euro-din-fonduri-structurale-si-de-coeziune>> accessed 21 February 2014.

¹³¹Government Decision no. 1405/2010 on the approval of the FIDIC general conditions of contract for investment purposes in the field of transport infrastructure of national interest, financed from public funds

¹³²Order No. 146/2011

¹³³Joint Position Paper of FIEC and EIC: Use of Fair Contract Conditions for Infrastructure Projects (incl. TEN) Co-Financed by CSF and CEF Funds’ (17 September 2012) <<http://www.eic-federation.eu/media/uploads/attachment/fiec-eic-joint-pp-fair-conditions-final-version-with-annexes.pdf>> accessed 24 February 2014.

convince the Romanian state authorities to use the original FIDIC books, “unflawed by unfair and counterproductive particular conditions”. As a supplement to the statement EIC produced a comparative table quoting the controversial sub-clauses from the Romanian version of the FIDIC books along with their official English translation and the English original of the FIDIC conditions. In particular, EIC underlined that the status of the Engineer had been altered under the Romanian version of the FIDIC conditions and advised the Romanian Ministry that FIDIC had never intended to create “a self-certifying Employer”. EIC also indicated that the Romanian revisions to the Yellow Book were largely borrowed from the FIDIC Silver Book, which is not considered by FIDIC itself to be a balanced set of contract conditions in terms of risks of the parties since it was produced for projects with extensive underground works and the Employer has to bear the risks of the unforeseen ground conditions and risks related to what may be hidden in the ground. However under the Romanian version of the Yellow Book the Contractor appear to be obliged to foresee even the unforeseeable.

At the same time it is interesting to note that the concerns mentioned above were mainly expressed by foreign specialists caring for Europeanization or internationalization of the Romanian construction market. There have been no significant protests coming from the local Romanian construction contractors. Moreover, some Romanian scholars supported the policy of the country’s public authorities. In this respect two articles are noteworthy.

Georgescu in his article, which appeared in spring 2011, but was submitted for publishing earlier that year so it only referred to the first round of the FIDIC adventures, made a conclusion that the FIDIC rules were more suitable for private contracting, rather than public procurement projects. Georgescu underlined that public procurement is based on the “prevalence of the principle of priority of public interest” against the principle of the freedom of contract¹³⁴. Therefore the public authorities being in “disadvantageous position” need a contract better suited for the needs of the public sector.

It is difficult to understand why the skew in the balance of risks responds better to the public needs. Apparently it depends on what we understand under the public needs. If we consider that the public needs are solely represented by the net profit of the public authorities, then we will have to accept this argument. However prevention of arbitrariness of the public authorities – by means of introduction of fair conditions of contract, which was meant in the ISPA Manual by the European Commission – can also be an important constituent of the public needs since the profit of the contractor has an important influence on the salaries of its employees.

¹³⁴ Georgescu, D. op. cit., 38

Another article in support of the policy of the Romanian public authorities was published in 2013. Speaking of the complexity of construction contracts and projects the author refers to the lemon market of Akerloff, saying that in construction the potential risks for the client is higher¹³⁵. Following the line of this reasoning, the author strongly objected to the position of Gillion on the misuse of FIDIC conditions in Romania¹³⁶, and explained the policy of the Romanian public authorities through the need to avoid risks caused by their accountability to the EC for the funds spent under public procurement contracts.

¹³⁵ C Bănică, 'Standard Forms of Construction Contracts in Romania' (2013) 4 *Urbanism. Arhitectură. Construcții* 98.

¹³⁶ Frederic Gillion, 'Use and Misuse of FIDIC Forms of Contract in Central and Eastern Europe: The Worrying Trend of Silver Book Provisions in Public Works Contracts' <<http://fidic.org/sites/default/files/Frederickgil.pdf>> accessed 24 February 2014.

Chapter 4. Soviet approach to construction contract law in Russia, Bulgaria and Romania

Introduction

In this chapter I will give a review of recent cases related to large construction contracts in Russia, Bulgaria and Romania to show how Soviet legal culture is still present in construction industry in all three countries.

Soviet approach to construction contract law in Russia

In order for you to understand better the actions of the parties in the three cases that I will present below, I will need to make a small introduction into the history of the project in which all these three cases took place.

The idea of the ambitious project to build a flood protection barrier for St Petersburg the “Northern capital” of Russia dates back to the 19th century. However it only became possible to come closer to its physical realisation in the late 1960s and the governmental decree to start the construction works was signed in 1979. It is worth mentioning here that the construction started in the USSR since most of the people who dealt with its completion in 2003-2011 were either involved in the first phase of the barrier construction or grew up in communist system.

The works on the barrier were quite active until 1988 when the northern part of the barrier was practically completed and the southern part was just started. Unfortunately, the economic and political situation did not favour the project and the works were put to a halt in 1990. In 2000 Mr Putin became President of Russia and, coming from the Northern capital and knowing about the barrier project quite well, supported its completion as best he could.

Thus in December 2002 a loan agreement was signed with the EBRD and later with EIB and NIB (The Nordic Investment Bank) to finance the barrier completion project, and in 2004 construction works were resumed.

The project included 25km of earth embankment topped by a six-lane motorway, six sets of sluice gates, each with 10 or 12 radial gates – a total of 64 gates, 24m-wide, 110m-wide navigation opening with a 2,500-tonne steel vertical rising gate, 200m-wide navigation closed with two horizontal sector floating steel gates, each weighing 4,500 tonnes, 1.5km-long concrete viaduct with a steel lifting bridge with a span of 110m and a 1.2km-long reinforced concrete tunnel.

The original plan was to complete the barrier by 2008 (end of Mr Putin's second term as President), but as it often happens in construction – according to Cheops' law – the official completion of the barrier was only recorded in 2011.

The government of Russia represented initially by the State Committee for Construction (Gosstroy) and later by its successor, the Ministry of Regional Development, was the Employer of the project, and a local state enterprise, the Directorate for the Flood Protection Barrier, was acting as the Employer's representative on site, the so-called "employer-builder", which is normal for the Russian state procurement practice. Following the requirements of the EBRD, the construction contracts for the completion works were all based on the FIDIC conditions (mainly the Red book).

The three cases that will follow can be found on the web-site of the Supreme Commercial Court of Russia, so the information contained in them is not confidential. The first two cases resulted from disputes between the Employer and the Contractor for one of the key sites on the barrier.

The Contractor was a large construction company, Transstroy, working mainly in Russia. It should be noted that the company grew out of the Ministry of Transport Construction of the USSR.

The last case arose from a dispute between the Contractor mentioned above and one of its subcontractors on the same site. The subcontractor was a Russian-German joint venture, Autobahn, established in 1995 by Wirtgen GmbH and several Russian road building companies.

The design documents for the project completion were to a large extent produced in the 1990s by the Russian design institutes, especially for the site to which all three cases below are related. When the project was brought back to life in 2002, the lenders' requirements included involvement of an independent Designer Consultant whose task was to review and update the design following the European standards. The tender for this job was won by a consortium, made up of Halcrow Group Limited (UK), DHV (the Netherlands) and Norplan (Norway). Given the history of the project, it was quite natural that the consortium signed a subcontract with the design company, Lenhydroproject (design institute – in the older times), which led the development of the barrier design by at least a dozen other large specialised companies in the period before the project interruption. It made a lot of sense to use the experience of those who already knew the project from its very beginning.

The task of reviewing and updating the design was not an easy one as a lot of reinforced concrete structures and steelworks were preserved from the first stage of the project and demolishing or scrapping them would have only created additional costs. At the same time many as-built documents for the structures that awaited completion had been lost during the uneasy times of

political and economic reforms in the 1990s. The absence of proper as-built documents was one of the reasons of the unforeseeable ground conditions which resulted in Case 1.

Case 1¹³⁷: Unforeseeable ground conditions

In this case the Contractor had to go to court with a claim for an extension of time caused by several reasons. First of all, the Contractor faced the problem of the unforeseeable ground conditions mentioned above which had not been identified either in the tender documents or in the design documents provided by the Employer. The Contractor informed the Engineer accordingly, following Sub-Clauses 8.4 and 20.1 of the Red Book, and submitted the relevant claim for an extension of time, but the Engineer failed to make the necessary determination, thus breaching Sub-Clause 3.5, he only informed the Contractor of his intention to address the Employer regarding this issue. In order to resolve the problem of the unforeseen ground conditions, the Contractor had to purchase and import special equipment, which took 173 days, and as the works comprised extraction of large rocks from cofferdams located in the sea, the Contractor had to wait for the beginning of the navigation period in the Gulf of Finland and then spend 139 days more than what had originally been planned to complete the excavation works since it was more difficult to extract the rocks than to excavate regular ground. As a result the Contractor became entitled to an extension of the Time for Completion amounting to 312 days. Secondly, the Contractor was also entitled to an extension of time under Sub-Clause 8.4 (e) since the Employer delayed several payments, which allowed the Contractor to claim for another extension by 193 days.

From the materials of the case one can note that apparently the relations between the Employer and the Contractor were not idyllic as 10 days after the original completion date of the works under the contract the Employer gathered a meeting and ordered to suspend the works for the period of an “inventory check” of the works completed. The Contractor received corresponding instructions with a letter from the Engineer and suspended the works following Sub-Clauses 8.8 and 8.9. As a result the Contractor became entitled to another extension of the Time for Completion, amounting to 236 days. However these days were not included in the claim brought to the attention of the court.

Another evidence of complicated relations between the parties to the contract is that they failed to appoint the DAB under Chapter 20 of the Contract, and that is why the dispute ended up in

¹³⁷ Case file N A40-4363/09-104-30 in the library of Arbitrazh Decisions

court. The court of appeal ruled in favour of the Contractor and extended the Time for Completion by 505 days as the Contractor pleaded. It may be said that the Contractor had tried to mitigate the problem, judging from the chronicles of the first two cases. Having lost Case 1 in the court of first instance on 22.06.09, the Contractor only submitted his appeal on 12.08.09, received positive resolution on 08.09.09 and claimed additional payment on 08.10.09 with Case 2 submission below.

Case 2: Liquidated damages under Russian law

Case 2 is in fact Case 1 continued. The Employer refused to pay for the works done by the Contractor claiming that there were defects and the completion of the works had been delayed by the Contractor. The Employer also considered itself entitled to damages. However the court has decided in favour of the Contractor, taking into account the resolution on Case 1 and noting that under the Russian law damages must be proven with substantial evidence and the liquidated damages referred to by the Employer (or “pre-estimated damages” as they were put in the Russian translation of the FIDIC contract conditions used during the drafting of this particular contract) are not recognised as such under the Russian law, but are rather close to the concept of penalty in the Russian legal system.

Case 3: Delayed payment for completed works

Case 3 is especially interesting as here we find the Contractor mentioned above as the defendant. Case 3 arose from a dispute between the Contractor and its subcontractor. The subcontractor pleaded that he was entitled to the payment of works (about 650,000 USD) accepted by the Contractor under the forms KS-2 and KS-3 (these are in fact old soviet style accounting documents, dating back to 1972, but revised in 1999 and still used in construction in Russia, stating which works have been completed under the contract during a certain period and their costs. They can be used under a contract based on FIDIC conditions, but should not be confused with taking over certificates. In Russian their title is “Act of delivery and acceptance of works/services”, which usually means that by signing them the Employer accepts the quality and amount of works delivered and must therefore pay for the works in full as stated in the form. If the Employer has objections, he should refuse to sign the form and state in writing the reason of his refusal. The courts interpret the forms as evidence of the delivery of the works by the contractor and their

acceptance by the employer. Since the works mentioned above and other works had been accepted by the Contractor, the subcontractor also considered himself entitled to the retention money withheld (about 4.5 mln. USD) and to the use-of-money interest (about 0.5 mln. USD).

The Contractor contested those claims by a reduction of the subcontractor's remuneration for the additional works done by the subcontractor (about 2 mln. USD), claiming that the additional works had not been agreed with the Contractor, and by LDs of about 2 mln. USD due to delays in the completion of the works.

The court, as it often happens in Russia, started by considering the essential conditions of the contract and ruled that the contract had not been concluded since the time for completion was not stated properly in the contract (according to the Russian Civil Code, it must be expressed either with calendar dates or through an inevitable event). Therefore the Contractor was obliged to pay for the works delivered by the subcontractor as, "according to the Russian Civil Code, Art. 711, the only grounds for the payment of completed works is the delivery of their result to the employer", and to release the retention money in full. However, since the contract had not been concluded, the court found no grounds under the Russian law for the use-of-money interest calculated in foreign currency, besides the court decided that the interest as a penalty did not correspond to the consequences of the breach of contract and decreased it by half.

Case 4¹³⁸: Employer's refusal to pay for the works done by the Contractor

This is a more recent case involving the use of the FIDIC General Conditions. This case has been referred to in the process of the recent amendment of the Russian Civil Code as an example of possible use of the FIDIC standard contract conditions in the quality of 'business custom' in the Russian legal system.

It took the Contractor about two years to finally receive a positive decision on his case. In August 2011 the Contractor filed his lawsuit for the first time. The aim of the suit was to recover the money due for the works done from the Employer. Only in February 2012 the first decision on the case was made. The court rejected the claims of the Contractor as unfounded, but satisfied the counterclaims of the Employer who had filed a countersuit to terminate the contract and recover damages from the Contractor in an amount exceeding the initial Contractor's claim. The alleged damages were caused by the need to engage third parties to complete the works under the contract.

¹³⁸ Case file N A56-55092/2011 in the library of Arbitrazh Decisions

In its decision the court of first instance relied upon the documents presented by the parties to the contract. The Contractor's documents, confirming the works done, were not in full conformity with the requirements of the contract and the standard forms KS-2 and KS-3 used in accounting for acceptance of completed works. These documents were not signed by the Employer which in the eyes of the court made them invalid as proof of performance of the works.

The Employer's documents, on the contrary, were in full formal conformity with the requirements of the relevant legislation and thus were accepted by the court as proof of the Employer's damages as costs incurred to complete the works under the contract with the help of third parties. The court also took into account the evidence that the Employer had warned the Contractor several times before engaging third parties in the project, but the Contractor had not reacted.

The Contractor tried to cancel the decision of the court of first instance at the court of appeal, but did not succeed. It was not until next year that he succeeded with the cancellation at the cassation court. The cassation court, having considered the complaint of the Contractor, found out that in the course of performance of the contract the parties disagreed on the timing and quality of work, as well as on admission to the premises and the provision of technical documentation, in connection with which the parties actually stopped the execution of the contract. These circumstances led to the Contractor's sending the Employer KS-2 and KS-3 form acts (acceptance certificates) for works actually performed. The Employer refused to sign them and sent his objections to the Contractor. Agreeing with the observations of the Employer, the Contractor sent him revised KS-2 acts. As the Employer refused to sign the documents again and did not pay for the works done the Contractors filed a lawsuit to recover the money due from the Employer. The Employer, in turn, referring to a unilateral change in terms of the Contract by the Contractor, failure and poor performance of the work, which resulted in the need to involve a third party for the completion of the works, filed a counterclaim to terminate the contract and recover damages from the Contractor. Having checked the legality of the contested judicial acts, the court decided to cancel them and to send the case for a new consideration at the court of first instance on the following grounds.

According to Art. 2 of the Contract, its integral parts were as follows: the cost estimate, the offer of the contractor, the particular conditions of the contract, the work schedule, the working documentation (drawings, specifications) with a stamp for the performance of work, as well as Annex 3 - General Conditions of the International Federation of Engineers Consultants (FIDIC). In this case, the parties, including the text of the General Conditions into the Contract, agreed to their use. Therefore, the provisions of the model contract could be applied to the extent not

inconsistent with the norms of legislation of the Russian Federation, and taking into account the other conditions of the contract.

In accordance with Art. 7 of the Law of the Russian Federation of 07.07.1993 N 5338-1 "On International Commercial Arbitration" arbitration agreement is an agreement of the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of any particular legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement. Based on the requirements of the subject to the counterclaim, the Employer actually requested to apply the consequences of violation of the contract conditions by the contractor (Art. 11 of the General Conditions), and appealed to the Court of Arbitrazh.

However, the General Conditions contain a clause whereby disputes are considered in arbitration, formed in accordance with the Rules of Arbitration of the International Chamber of Commerce, but the question about the possibility of the dispute resolution outside the court of arbitrazh and its jurisdiction had not been considered by the courts in this case. As stated in the resolution of the Plenum of the Supreme Court and the Supreme Commercial Court of the Russian Federation of 01.07.1996 N 6/8 "On certain issues relating to the application of the first part of the Civil Code," disputes on the amendment or termination of the contract may only be considered by the court if the applicant provides evidence supporting that it has taken measures to resolve the dispute with the defendant (Sec. 2, Art. 452 of the Civil Code). The General Conditions in this respect provide for mediation, which is obligatory for the parties, as well as a period longer than 15 days under the Russian law for consideration and sending requests to terminate the contract.

The court of first instance accepted the plea to terminate the contract, but without the evidence of compliance with pre-trial dispute resolution procedure. The courts of both instances failed to consider the possibility of resolving the dispute through the pre-trial dispute resolution procedure in accordance with the General Conditions. Moreover, the court of appeal ignored the Contractor's argument of non-compliance by the Employer with the dispute resolution procedure, contained in the complaint.

The cassation court held that such procedural violations entail abrogation of judicial decisions and referral of the case back to the court of first instance. In reconsidering the case the court of first instance was also instructed to check the argument of the complainant about the absence of the necessary technical documentation for the production of works, but taking into account the nature of the works, and possibly business practices contained in the General Conditions. Besides the court of first instance was to compare the work done by the contractor, with the work

performed by the other contractors engaged by the Employer to complete the work under the Contract, and, accordingly, the validity of the inclusion of these costs by the Employer in its damages. Only at this stage it was advised to the court of first instance to evaluate the arguments of the Employer and the Contractor, to request the full text of the Contract with Annexes and check compliance with the Code of Arbitrazh Procedure.

However the new court of first instance rejected the initial suit and left the counterclaim without consideration. Disagreeing with the decision, the Contractor filed an appeal, and only at this stage the court of appeal finally considered all details of the case and ruled in favour of the Contractor. It turned out that there had been a conflict between the Employer and the Contractor and the Employer gave the Contractor instructions to free the site. The Employer also delayed the delivery of necessary technical documents with the stamp “ready for works”. The third parties engaged by the Employer did not work on the same site as the Contractor and were not used to rectify defects in the works completed by the Contractor, but performed different types and volumes of works. All these details could have been discovered by the courts of previous instances if they had required additional information and looked attentively into the documents presented by the parties before making decisions on the case. This case tells a lot about how formal the approach of the court can be in Russia nowadays, which is the legacy of the state controlled judiciary system of the Soviet period.

Soviet approach to construction contract law in Bulgaria

In Bulgaria, besides courts of law, compliance with the EU public procurement law in construction is monitored by the National Commission for Protection of Competition and by the Bulgarian Construction Chamber: the former deals with complaints as a pre-judicial body, but does not gather statistics relevant for construction only and does not evaluate the actions of the contracting authorities; the latter monitors the procurement tender process in construction industry and gathers statistics relevant for construction only, evaluating the actions of the contracting authorities.

It should be noted that according to the monthly reports of the Construction Chamber, starting from October 2012 till April 2014, the arbitrariness of the public contracting authorities in the public procurement tendering process was regularly decreasing, which may be due to the presence of such independent non-governmental monitoring body as the Construction Chamber and its activities. However there are still issues with the rule of law being violated by the state contracting authorities at the stage of contract implementation which have to be addressed.

Below I will give three examples of how rule of law may be challenged by the Bulgarian state contracting authorities.

Case 1¹³⁹: Municipal contracting authority refusing to compensate for Contractor's extra costs

Varbitsa municipality, being the contracting authority, refused to cover the Contractor's extra costs resulting from adverse weather, stating that the Public Procurement Act (ZOP) did not allow changes in the price of the contract and claiming delay damages instead, although the acceptance certificates for the works had been signed. The court took into account the materials of the technical expert analysis, confirming that the adverse weather conditions had actually taken place, the requirements of the technical regulations related to road construction works (although dated 1978, but still in force) and the provisions of ZOP allowing changes in the contract price in exceptional circumstances. The court rejected the contracting authority's claim for the delay damages and ruled that the contracting authority should pay for the extra costs of the Contractor.

Case 2¹⁴⁰: Municipal contracting authority refusing to pay for additional works

The essence of the case is similar to the previous one. The municipality of Yambol refused to pay for additional works and extra costs of the contractors relying on the ZOP provisions regarding the contract price. The Contractors claimed that they could not have foreseen the extra costs at the tender stage since the design documents had not been detailed enough and it had not been possible to visit the future site to properly evaluate the cost estimates. Besides it would be impossible to commission the completed works and obtain the operation permit (Act 19) without the execution of the additional works. The court took into account the deficiencies of the design documentation, the impossibility to fulfil the contract obligations without the execution of additional works and the results of the technical expert analysis confirming the necessity of the additional works, and ruled that the municipality should pay for the additional works done despite the absence of the formal agreement for such additional works.

Case 3: Municipal contracting authority refusing to pay for additional works

Another very similar case was decided by Pazardzhik District Court on 29.11.2013¹⁴¹. In that case Panagarushche municipality refused to pay for the additional works done although they were

¹³⁹ Shumen District Court Decision 104 of 09.07.2013

¹⁴⁰ Yambol District Court Decision of 18.11.2013

¹⁴¹ Pazardzhik District Court Decision 150 of 29.11.2013

necessary to commission the construction project facilities. The municipality claimed that there had been no written agreement for the additional works, which was a breach of the existing contract. The court took into account the necessity of the additional works, and ruled that the municipality should pay for the additional works done despite the absence of a written agreement for such additional works since otherwise non-payment for the works would mean unjust enrichment of the municipality.

Case 4¹⁴²: Lost in arbitration (agreement)

This case may seem to be a classical forum shopping case at first sight, but there is more to it than meets the eye. It also shows how long it can take to resolve a dispute through the system of courts of arbitrazh in Bulgaria, without necessarily having the resolution issued in your favour.

In 2009 the Ministry of Environment and Water of Bulgaria signed a contract with a consortium consisting of an Italian company and a Bulgarian one for the extension of a waste water treatment plant. The works were financed from the EU funds and the contract was thus based on the FIDIC conditions, but with amendments in Sub-Clause 20.6. The Contract said under Sub-Clause 20.6 par. 1 that in the event of a dispute between the Employer and a Bulgarian contractor, the dispute will be referred to a Bulgarian court of arbitrazh and under Sub-Clause 20.6 par. 2 that in the event of a dispute between the Employer and a contractor from a country other than the Republic of Bulgaria, the dispute will be referred to an international arbitration court.

In 2010 the applicant in this case being a Bulgarian company concentrated on the provision of the first paragraph and filed a lawsuit against the Employer at a Bulgarian court of arbitrazh. The Bulgarian court of arbitrazh having checked the provisions of the contract rejected the claims of the applicant on the grounds of wrong application of the arbitration clause with its final decision being given in January 2013. It turned out that the applicant had failed to consider the order of priority of the documents constituting the contract, which was as follows: 1) the memorandum of clarification of the contract; 2) the letter of tender and its Annex; 3) the particular conditions of the contract based on the FIDIC rules; 4) the FIDIC general conditions of the contract; 5) the requirements and technical specifications of the contracting authority; 6) completed schedules; 7) the offer of the contractor and 8) other documents accepted by the Parties. The applicant had not paid attention to the Annex of the letter of tender, which said that all disputes between the Employer and the consortium should be referred to an international arbitration court.

¹⁴² Decision of the Bulgarian Supreme Cassation Court No. 189 of 28.10.2013

Later in 2013 the applicant tried to protest against this decision saying that with such wording of the arbitration clause as quoted above under Sub-Clause 20.6 that the arbitration agreement was invalid for lack of subject-matter and lack of consent. Otherwise it would mean that the parties to the contract mutually created obstacles to dispute resolution through different institutions of arbitration and the arbitration clause did not establish a clear procedure for dispute resolution. However neither the court of first instance, nor the cassation court accepted the arguments of the applicant. It appears that the irreparable mistake had been made by the applicant at the first stage of his lawsuit.

The contracting authority seemed to have quickly understood the mistake of its opponent. For it tried to argue against the essence of the claims of the contractor at the court of first instance, but then, after the claims were rejected, it maintained the position of the court which ruled that since the contractor had referred to it in the first place, he had agreed to the jurisdiction of the Bulgarian court and there was no disagreement on the arbitration provisions of the contract.

The cassation court did not accept the arguments of the contractor regarding the violation of the principles of legal order (*Rechtsordnung*), provided for by Art. 2 and Art. 5 of the Civil Procedure Code of the Republic of Bulgaria, which guarantee the right of every person to judicial protection and assistance. The contractor pointed out that the arbitration provisions of the contract and the decision of the court of first instance made his judicial protection dependable on the will of another legal person and deprived him of the opportunity to freely exercise his subjective rights. The cassation court rejected this argument saying that the term "public order" comprises those mandatory legal norms that express basic ideas and values, respect for which is a guarantee for proper and free functioning of the *state*¹⁴³ and society.

Because of their importance, these principles are fixed with mandatory legal norms in the Constitution and the laws of Bulgaria and are associated with the requirements of legality, equality of civil entities, the right of defense and equality of the parties in the process, with the competition principle, the right to a fair process and the like. The court underlined that not all mandatory legal norms fall into this category, but only those who defend the rights and values common to all entities or rights and values of the individual subject, which are of such nature that the legislature has secured for them respect from everyone, which is in the interest of the whole society. When the arbitral award impairs such a fundamental principle, the decision is incompatible with public order and the arbitral award must be repealed, but to be inadmissible under the law or in such a way as to contradict the public policy the arbitral award need to be a

¹⁴³ Italics added by the author.

result of a criminal offense committed by an arbitrator – such as bribery, or of a false conclusion of an expert, which was not the case here.

So in October 2013 the cassation court closed the case and left the decision of the court of arbitrazh in force. Thus in this case the public order and the state “won” and the contractor was left with a decision of the court which was contradictory to common sense.

Soviet approach to construction contract law in Romania

“From its formation in 1919–20, Romania was administered in a very centralized manner”¹⁴⁴, and it is still so. The first two cases in Romania contain signals of breach of Art. 10 of the Service Directive and the principle of the rule of law in terms of arbitrariness of the actions of the state authorities. The third case contains a violation of the national law on combating late payments which transposes the respective EU Directive. The cases were heard by the Romanian National Council for Resolving Complaints (CNSC) which is now the first obligatory instance of addressing complaints related to public procurement in Romania before the matter can go to court. The Council was given the status of a legal body with administrative and juridical functions on 1 January 2007, and so Romania, in the opinion of the Council itself, “complied with one more commitment assumed in the process of cohesion to the European structures”¹⁴⁵. The main competence of the Council is to resolve the complaints filed against tender procedures in public procurement. However the results of the Council’s work tend to be more in favour of the public contracting authorities than in favour of the complaining bidders, which is confirmed by recent studies made by the Romanian legal scholars in this field¹⁴⁶.

*Case 1: Unreasonable payment time terms and vague contract conditions*¹⁴⁷

In this case the complaint was filed by a Romanian branch of an Austrian company as a bidder in an open tender, announced by the Romanian national railways company, as the contracting authority for a public procurement project on construction and installation works to rehabilitate some railway bridges. The bidder sought to suspend the contract award procedure in accordance

¹⁴⁴ Hughes (n 54) 57.

¹⁴⁵ <http://www.cnsr.ro/en/>

¹⁴⁶ Dacian C Dragos, Bogdana Neamtu and Veliscu Raluca, ‘Remedies in Public Procurement in Romania’, *Steen Treumer & François Lichère (eds) Enforcement of the EU Public Procurement Rules* (DJØF Publishing Copenhagen 2011) 186.

¹⁴⁷ CNSC decision No. 62/C5/43 of 10.01.2014

with Public Procurement Ordinance (GEO No. 34/2006), cancel certain unlawful provisions of the tender documentation and revise other unlawful requirements so that the tender documentation would be in accordance with the laws and legal acts applicable to public procurement in Romania. The bidder also required corresponding extension of the deadline for submission of the bids. The CNSC rejected the complaint as ungrounded.

If we give the case a closer look, the bidder, in particular, required that Sub-Clauses 4.1 (Contractor's General Obligations), 4.22 (Security of the Site), 8.7 (Delay Damages), 16.2 (Termination by Contractor) of the tender documentation were revised in accordance with common business practice. To the bidder the contract conditions in these Sub-Clauses appeared ambiguous and excessive. The bidder argued that the contracting authority "flagrantly violated the law on public procurement, the principle of transparency and efficiency of public funds" and was restricting competition by means of unfair contract conditions.

Under Sub-Clause 4.1 of the tender contract conditions which were very close to the Romanian version of the FIDIC Red Book, the Contractor was to design (to the extent specified in the contract), execute and complete the Works in accordance with the Contract and remedy any defects in the Works. The Contractor was to provide the Contractor's equipment and documents specified in the Contract, and all Contractor personnel, supplies, consumables and other products or services, temporary or permanent nature required for the design, execution, completion of work and remedying of defects. The bidder was concerned with the phrase "to the extent specified in the contract" since the specifications included in the tender package were not clear enough.

Regarding Sub-Clause 8.7, the bidder had pointed out that the tender documents simply quoted the FIDIC Red Book saying that the total amount payable by the contractor as delay damages was limited to a maximum stated in the offer. While the FIDIC contracts generally set a ceiling which ranges between 5% and 15% of the accepted contract price, the legal doctrine limits this amount so that bidders could evaluate their contractual liability to the Employer during the preparation of their bids and consider delay damages specified in the tender documentation. Therefore the bidder wanted that the contracting authority gave a clear and transparent range of delay damages, which is crucial for a decision to participate in a specific tender procedure.

Under Sub-Clause 4.22 the Employer in the event of the Contractor's failure to ensure the implementation and maintenance of the required traffic management plan was entitled to a compensation for the damages caused, as defined by the Engineer's instruction or determination.

The bidder required that the contracting authority provided transparent grounds for its right to the compensation and defined the minimum and maximum amount of the compensation.

The most interesting part of the complaint was related to Sub-Clause 16.2 which only entitled the Contractor to terminate the contract if the contracting authority had delayed the payment for the works done by more than 420 days. It was not a typing error as one might have thought since the figure 42 appears in a similar context in the FIDIC standard contract conditions where the Contractor is entitled to terminate after a payment has been delayed for more than 42 days¹⁴⁸.

In this context, the bidder considered that the introduction of such a condition, biased in favour of the contracting authority, was manifestly disproportionate as it was extremely burdensome for the Contractor. Behind this condition there was a risk for the Contractor who would have to finance the execution of works from its own resources for more than a year without the right to terminate the contract. Such a condition made the contract severely unbalanced, given that pursuant to Sub-Clause 15.2 of the Contract, the Employer had the right to terminate the contract after only 14 days' notice to the Contractor. Thus, in the eyes of the bidder, the contracting authority restricted access to the tendering procedure since the imposition of such contract clauses would deter construction companies from participation in the tender procedure.

The bidder argued that the contracting authority had not only deleted the maximum penalties usual for the FIDIC contracts from the tender documents, but also opted for ambiguous wording which referred to any other amounts owed to third parties according to the Engineer's determinations. The bidder believed that such wording would eliminate any kind of predictability in estimating the risks of the contract, making it virtually subordinated to the arbitrary determination of the Engineer in terms of the amount of penalties due.

The response of the contracting authority was formulated in the best traditions of Soviet legal formalism. The contracting authority replied by saying that the contract, which bidder claimed to be drawn up with serious violations of law, was in fact prepared in accordance with Annex 2 to the Order of the Ministry of Transport (OMT) No.774/2013 published in the Romanian Official Gazette No. 294 bis on 23.05.2013. Being a company controlled by the Ministry of Transport, the contracting authority's duty was to comply with the Order mentioned above and use the model contract conditions attached to it. Moreover, the contracting authority underlined that the Order was issued and published after being passed through the procedure of public consultation by

¹⁴⁸ In 2014 two more complaints containing the same issue were considered. Both of them were rejected as unfounded. See: CNSC official bulletin BO2014_2296, and BO2014_2323 available at http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_2323.pdf and http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_2323.pdf

means of open publication on the website of the Ministry of Transport with responses to the questions submitted by market operators and the opinion of the Social Dialogue Council¹⁴⁹ which was why the tender had been published in this form.

Regarding the particular comments of the bidder, the contracting authority considered that the request to revise the contract conditions was late. Regarding the bidder's allegations that by applying the sub-clauses that are part of the standard contract conditions published in OMT No. 774/2013 it restricted access to open tender procedure, the contracting authority stated that this was a misreading of the text which was exemplified by the bidder's interpretation of Sub-Clause 8.7 as lacking the ceiling for the maximum of damages.

Likewise the contracting authority stated that the bidder's opinion that the Contractor's entitlement to terminate the contract only after 420 days of non-payment would cause the work to be financed by the Contractor's own sources was erroneous interpretation, since payment delay damages were provided for in the contract and in the practice of civil courts, should the contracting authority face difficulties with payments and not delay them out of bad will.

In conclusion, the contracting authority argued that by applying the standard contract conditions, published with OMT No. 774/2013, it increased confidence that it would promote a competitive environment, avoid discrimination and lead to a more efficient use of public and the EU funds. Considering that the main issue was clarified, the contracting authority submitted that there were no grounds for the admission of the application for suspension of proceedings. Besides, given the status and scope of the complaint, it established that the request for the study of public procurement file could not bring the bidder any extra information necessary to support or constitute the right cause for postponement of the tender procedures.

CNSC decided in favour of the contracting authority saying that it had verified the tender documentation against OMT No. 774/2013 and found out that the contracting authority had "effectively enforced" the mandatory legal regulations so the bidder's request to amend the tender documents or cancel the procedure appeared unfounded. Therefore the contracting authority could continue with the contract award procedure.

As we can see in this case the bidder faced the wall of the public authorities' absolute conviction in the legitimacy of their position backed up by the formally accepted legal documents. There was no consideration of rationality or reasonableness of the tender requirements. The only analysis

¹⁴⁹ In 2011 the Romanian Government established the National Tripartite Council for Social Dialogue, composed of representatives of the Government, employers and trade unions confederations, whose main duties are providing the minimum guaranteed wage consultation and analysis of government projects

that was made was that of observance of the written legislation, which succeeded on bare formal grounds.

*Case 2: Misleading Employer's specifications*¹⁵⁰

In February 2014 the CNSC considered a complaint, submitted by a Romanian bidder against the County of Iasi, as the contracting authority, on a public procurement project comprising construction of two transfer stations and design and construction of one sorting station within the project of an integrated waste management system for the county. The whole project package included two contracts based on the FIDIC Red Book and on contract based on the FIDIC Yellow Book.

The applicant of the complaint stated that the tender documentation contained faulty formulation of the requirements, especially in the specifications, which resulted in the contracting authority's having to publish 73 clarifications (each containing 3-4 questions and as many answers) and the same number of errata notices. The applicant considered it evident that so many clarifications were due to a big number of errors in documentation. The analysis of the clarifications showed that they were contradictory to each other and often inconclusive, and their number caused doubts as to how competitive the whole tender procedure was. The applicant invoked Art. 33 para. (1) and Art. 78 para. (2) GEO 34/2006, pointing out that the purpose of organizing the award procedure was to promote competition between market operators and it could only be met if the bids were easily compared with the specifications, which was prevented by impressively large volume of clarifications.

The contracting authority considered the applicant's assertion on faulty formulation of requirements in the data sheet for the contract unfounded for the following reasons. The contracting authority had used standard tender documentation and requirements related to public procurement contracts for design and construction, approved by the Ministry of Environment and Forests and the National Authority for Regulating and Monitoring Public Procurement, and in accordance with Art. 176 of GEO 34/2006, it contained all information necessary for the bidders to prepare their proposals. The contracting authority claimed that it had complied with the provisions of Art. 78 GEO 34/2006, responding to requests for clarification as soon as possible, and its replies were clear, complete and unambiguous.

In determining the qualification criteria, the contracting authority considered them to be objective, non-discriminatory and proportionate to the complexity and scope of the contract and

¹⁵⁰ CNSC decision No. 523/C8/353 of 20.02.2014

able to reflect the real prospect of the market operators to fulfil the contract. Regarding the public procurement contracts to be awarded, the contracting authority stated that they were complex, taking into account the works to be carried. Given the above, the contracting authority argued that the specification consistently defined the requirements and the technical characteristics in accordance with the needs of the project.

In the opinion of the contracting authority, the large number of requests for clarification of operators did not speak of an insurmountable number of errors in the tender documentation, but rather was a natural result of the refining and clarification steps for submission of tenders in accordance with the requirements of the contracting authority. In addition the contracting authority emphasized that GEO 34/2006 was expressly aimed at the realisation of the rights of interested market operators to request clarifications and required that the contracting authority respond to such requests within the time limits set by the ordinance. Concerning the request of the applicant to correct the tender documentation for the purposes of republication to take into account the changes or additions resulting from the 73 clarifications, the contracting authority stated that it had no legal basis and was not required by any legal act on the matter. Thus the contracting authority opined that the council should dismiss the complaint as unfounded.

The Council agreed with the contracting authority by dismissing the complaint and allowing the contracting authority to continue the procurement procedure. Moreover in another case heard about a month later the Council pointed out that there were no statutory requirements for the contracting authority to justify their position before the bidders. The Council referred to Art. 78 para. (1) and (2) of GEO 34/2006, saying that any bidder has the right to seek "clarifications" and "The contracting authority has the obligation to respond clearly, completely and unambiguous, as soon as possible, to any requested clarification," but there was no right to ask for a justification or reason for the contracting authority's requirements.¹⁵¹

*Case 3: Violation of the requirements of EU Directive no. 7/2011/EU on combating late payment in commercial transactions by the contracting authority*¹⁵²

In December 2013 CNSC considered a complaint regarding the refusal of the contracting authority to revise a contractual clause which violated the Romanian Law no. 72/2013 on combating late

¹⁵¹ CNSC decision No. 942/ C2 /1103, 1136 of 02.04.2014 , available at: http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_0935.pdf

¹⁵² CNSC Annual Activity Report 2013, p. 20

payments under contracts between economic operators and between them and contracting authorities, which transposes Directive no. 7/2011/EU of 16 February 2013.

The Council noted that the position of the contracting authority could not be accepted since the contractual provision contravened the provisions of art. 6 and 12 of Law no. 72/2013 which provide that: "(1) Contracting authorities shall pay the amounts of money resulting from professional contracts no later than: a) 30 calendar days from the receipt of invoice or any other equivalent request for payment; b) 30 calendar days from the date of receipt of goods or services, if the date of invoice or any other equivalent request for payment is uncertain or previous to the receipt of goods or services; c) 30 calendar days from acceptance or verification, whether by law or by contract it is set a reception or verification procedure to certify conformity of goods or services and the contracting authority has received the invoice or the equivalent request for payment on the date of verification or prior to this date. (2) The procedure of acceptance or verification referred to in para. (1)c) may not exceed 30 calendar days from the receipt of goods or services. Exceptionally, in duly justified cases by the nature or characteristics of the contract, the acceptance or verification may take longer than 30 days, if expressly set out in the contract and procurement documentation reception both the date for the receipt and the objective reasons, provided that this clause shall not be unfair, in the sense of Art. 12 (3) The parties may not agree on the date of issuing/ receiving of the invoice. Any clause stipulating a deadline for issuing/receiving of the invoice is null and void. (...)" . Thus "the practice or the contractual clause which establishes manifestly unfair, against the creditor, the payment term, the interest rate for late payment or additional damages is considered abusive".

Therefore the Council concluded that the contracting authority's arguments could not be accepted it would be in total contradiction with the legal provisions quoted resulting from grammatical and teleological interpretation of the texts cited, including the fact that the contracting authority, by this clause and the disputed response, tried to circumvent the application of Law no. 72/2013.

For these reasons the Council allowed the complaint and ordered to cancel the contracting authority's clarification of the tender documents which violated the law and to issue a new clarification to comply with the provisions of Law no. 72/2013, after which it would be possible to continue the tender procedure.

Conclusion

In this thesis I have demonstrated how the Soviet legal culture still manifests itself in construction industry in Russia, Bulgaria, and Romania. I have shown how the FIDIC contract conditions – as means of Europeanisation – have been used during the past few years by the public authorities and private contractors in those countries in large construction projects. The FIDIC contract conditions were conceived and produced by the International Federation of Consulting Engineers as a private law regulatory instrument and, although the Federation has an international status, the standard contract conditions that it produces are based on the European business and legal practice. These conditions are meant to facilitate the interaction of the parties in large construction contracts by means of setting up an independent documentary system on the project and making everything possible to resolve the disputes arising during the project within the “walls” of the project and without unnecessary involvement of the state judiciary system. Thus their main purpose is to liberalise the system of construction project implementation and reflect the best business practice in the industry.

It should come as no surprise that the FIDIC conditions have been promoted by the European banks and the European Commission for implementation of construction contracts in post-communist countries, whose overwhelming bureaucracy is notorious for its omnipresence. The liberalisation of construction market was meant to be reinforced by the EU Directives in the new Member States, the Service Directive, in particular, but the free movement of services in construction is still impeded by the national legislation controlling the construction process and the procedures of putting completed facilities into operation which is the legacy of the Soviet administrative system.

Europeanisation of Soviet legal culture can be seen in two ways in the context of the EU. One way is to see it changing under the influence of the EU polity. The other way is to see it as a persistent pest on the body of the old European legal culture, or a kind of lichen on the beautiful tree of the new European legal culture. In order to avoid unpleasant connotations, I have proposed the metaphor of the Torre dei Mannelli in Florence around which the Vasari corridor is built. I suggest thinking of Europeanisation as of the process of construction of the Vasari corridors from one impressive building to another bypassing such obstacles as the Soviet legal culture and providing more convenient ways of communication.

In case of Russia Europeanisation has always had the form of tentative approximation in a manner of “one step forward, two steps back”. Even so Russia has always been more European, than Asian. The Russian monarchs and the communist rules of the USSR copied their political styles from the European kings and queens and the legal system of the Russian private law was mainly a product of the Western European civilisation. The main problem with adopting the European values in the legal system of Russia and the post-communist countries was caused by the dominance of the state in all aspects of the social life. This state-centred model has been a major obstacle in the democratisation of the society and the liberalisation of construction market.

The instruments aimed at the market liberalisation (such as the FIDIC contract conditions, or the EU Directives in case of Bulgaria and Romania) have been formally accepted, but their actual use have been limited in the name of the “public interests” and the state administration stability. There have been two periods of statutory adoption of the FIDIC books (Red and Yellow) in Romania with significant revisions to their original texts. These revisions did not simply adapt the FIDIC contract conditions, but they rather distorted and undermined some of the key concept and principles of the FIDIC conditions of contract.

In this thesis I have also presented my findings on the monitoring of compliance with the EU public procurement law and the rule of law in Bulgaria and Romania and based on those findings a conclusion can be made that the situation with such monitoring and the compliance itself is different in the two Member States although there is a general trend of challenging the rule of law by the public authorities in both those Member States.

In Romania there are still a large number of complaints from the bidders in the public procurement projects and the presence of a special body created to resolve those complaints does not help to reduce their number. In Bulgaria the activity of the Construction Chamber in monitoring the compliance with the EU Directives in public procurement related to construction seem to have contributed to the decrease of arbitrary decisions in public procurement tendering. However the arbitrariness of public contracting authorities at the implementation stage of construction project needs to be monitored further.

Judging from the results of the monitoring so far, two proposals can be made for the two Member States. In Romania it makes sense to establish an independent non-governmental monitoring of public procurement tenders similar to the one functioning in Bulgaria which would not only gather statistics but also evaluate the actions of the public authorities. In Bulgaria it would make sense to revise the Public Procurement Act towards more flexible provisions related to the contract price,

in particular. This might save the parties to public construction contracts the troubles of going to court.

Despite the fact that Russia, Bulgaria and Romania have different statuses in relation to the EU, they have very similar historical background and living legal cultures in the field of construction industry. The European principles that are promoted by either the EU, or the European institutions have to fight their way through the remnants of the Soviet legal culture which is still present in the field of construction industry, often supported by courts of law and administrative bodies controlling the industry. Although there are signs of change in the behaviour of the actors in the industry, it is too early to speak of a significant transformation. Apparently, a change of a generation is needed to overcome the legacy of the Soviet legal culture, together with a major overhaul of the administrative system and liberalisation of the documentation system in construction.

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