BALÁZS & KOVÁTSITS
LEGAL PARTNERSHIP

NEWSLETTER

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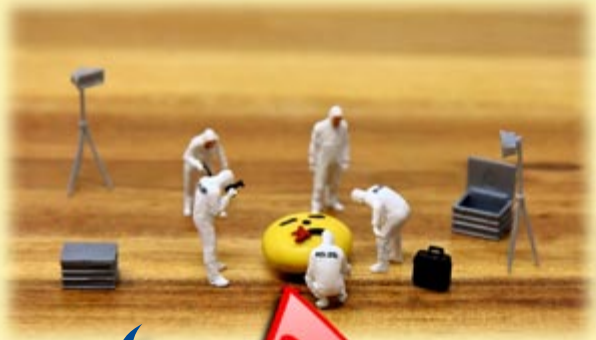
FOUNDING MEMBER OF EAST LEGAL TEAM EEIG – AN INTERNATIONAL ASSOCIATION OF EASTERN EUROPEAN LAW FIRMS



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DEAR READERS,

We are happy to inform you that our Legal Partnership has been given the opportunity to write the Hungarian chapter of the Book of European Construction Law by the European Society of Construction Law (ESCL). This book gives an extensive and comprehensive picture about the Construction Law of most of the European countries in a way that the authors of the different chapters answer the same editorial questions regarding their countries and introduce the regulations of their countries.

In our present newsletter you can also read an article about a field of Hungarian Construction Law, i.e. the new regulations of the new Civil Procedure Law regarding private experts. I would also like to call your kind attention on the General Data Protection Regulation entering into force on 25 May 2018, which has been looked forward in all of the member states of the European Union.

We look forward to your remarks and questions.

Best regards,

Dr. Tamás BALÁZS
Attorney at law
Managing Partner

THE CHALLENGES POSED BY THE IMPLEMENTATION OF THE NEW GENERAL DATA PROTECTION REGULATION OF THE EUROPEAN UNION AND HOW ENTERPRISES SHOULD MEET THEM

The European Parliament has ratified the General Data Protection Regulation, or GDPR more than two years ago, in 14th April 2016. Thus more than two years have been provided for adaptation, but there shall be no more adaptation period and the GDPR shall come into effect on 25th May, 2018 with direct effect, meaning that it shall be directly applicable in all member states of the European Union. As the GDPR shall introduce a new, unified and complex data protection regulation, it shall necessitate through preparation by corporation and lawyers in the EU, in order to avoid data protection fines.

BALÁZS & KOVÁTSITS Legal Partnership has many years of experience in the field of data protection law, and in our experience, a great many of Hungarian corporations fails to invest sufficient resources to comply with data protection regulations, despite the fact that Hungarian data protection regulations are amongst the sternest in Europe, and despite that the negative legal consequences are easily avoidable with proper legal groundwork. For such negligent enterprises, the substantial increase in the data protection fines under the GDRP may prove most motivational however. Under the current Hungarian data protection laws, the maximum data protection fine is 20 million HUF, whereas under the GDPR, even smaller violation of data protection regulations may result in a fine of up to 10 million Euros, or approx. 3 billion HUF. In more serious cases of data violation, the fine may even reach double of this amount and such fines may well make even large multinational corporations think for a minute. For small and medium enterprises, it may be a relief however that the maximum amount of the fine is interconnected with the (global) revenues of the corporation and is limited to 2% thereof; however, this may be increased twice the amount in case of a serious breach of data protection regulations.

Employers that are most affected by the regulations are advised to begin assessing their data wealth and to comply with GDPR rules such as the Right to Access, the Right to be Forgotten, the Right to Object or principles such Privacy by Design or Notification of a personal data breach to the supervisory authority and the more

widespread use of Data Protection Officers. Enterprises must lay solid legal grounds for processing and controlling the data and its legal structure and must specify and limit the data that is essential to be controlled or processed and is required for well-defined data controlling purposes, as well to limit the number of persons and regulate authorized access by them to the date.

It is important to stress that the new GDPR regulations shall not only apply to data controllers and processors within the EU (such as enterprises incorporated with a registered seat in the EU), but as per Article 3, the Regulation shall also apply to the processing of personal data of data subjects who are in the EU by a controller or processor not established in the Union, where the processing activities are related to the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or monitoring of their behaviour as far as their behaviour takes place within the EU.

At the same time, GDPR is likely to make things a bit easier in everyday use – consent for controlling of special data will be easier to obtain, and data controllers shall enjoy simplified ways of informing the affected parties. The compulsory – yet often ignored – notification of the local supervisory authorities (NAIH in Hungary) wherever data is being controlled or processed shall be also done away with; however, it will be still required to maintain an effective database on the data that is being controlled (for internal use only), and the right to protest against direct marketing method shall remain in place. Another important change is that the compulsory employment of Data Protection Officers shall see far wider use.

However, we are confident in that the enterprises shall successfully conquer these challenges with the employment of our professional experience in the field of Data Protection Law.

dr. Ádám MILLEI
Attorney at law

CONTRACTS WHICH BECAME IMPOSSIBLE IN CONSTRUCTION INDUSTRY

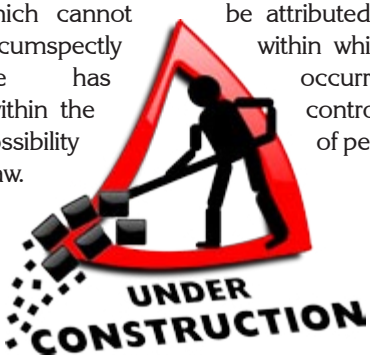
In construction industry contracts cannot be performed according to the intentions of the parties in each case. It means that the parties cannot fulfil their duties. In the practice of our Legal Partnership we usually meet cases in which the performance of the contracts became impossible or one of the parties referred to it. We can talk about impossibility of the performance if the reason of the impossibility has been originated after the conclusion of the contract. According to Hungarian law and Hungarian judicial practice, the impossibility of performance can be physical impossibility, legal impossibility or impossibility of the interests. The latter type of impossibility of performance is accepted only in very special cases by Hungarian courts.

If performance has become impossible for a reason attributable to one of the parties, the other party shall be relieved from the obligation of contractual performance and may demand damages for the loss caused by non-performance of an obligation. If performance has become impossible for a reason attributable to both parties, the contract shall be terminated and the parties may demand damages from each other in the proportion of their interaction. According to the general rule of the Hungarian Civil Code, if performance has become impossible for a reason that cannot be attributed to either of the parties, the monetary value of the services provided before the time when the contract was terminated shall be compensated. It is important to know that the last general rules cannot be applied in case of contracts for professional services.

In case of contracts for professional services special rules shall be applied and in this case also other circumstances shall be respected in connection with the application of the legal consequences of impossibility of contractual performance. According to these special rules, if performance has become impossible for a reason that cannot be attributed to either party

and the cause of impossibility has occurred within the control of the contractor, he shall not be entitled to demand remuneration. If the cause of impossibility has occurred within the control of customer, the contractor shall be entitled to remuneration, but the customer shall be entitled to deduct the amount that the contractor had saved or could, without great difficulty, have earned elsewhere in the time gained. If the cause of impossibility has occurred within or beyond the control of both parties, the contractor shall be entitled to a proportionate amount of the remuneration for the work done and for his expenses.

According to our experience, if we meet an impossibility of performance in a construction contract which cannot be attributed to either of the parties, we have to consider circumspectly within which party's control the impossibility of performance has occurred. Finally, I would like to remark that the category "within the control of the party" and legal consequences of the impossibility of performance were known and applied also by Roman law.



Dr. Tamás BALÁZS
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PRIVATE EXPERT OPINION NEW MODE OF EVIDENCE BY THE EXPERT IN THE CIVIL PROCEDURE

According to the new Act on Code of the Civil Procedure that entered into force on 01st January 2018, the judge takes into account the opinion of such an expert who is chosen and paid by the Party and answers the technical question put by the Party in his opinion.

• When can the private expert be appointed?

The judge is entitled to appoint a private expert if

1) answering technical question is necessary from point of view of determination of framework of the legal dispute or defining, judgement of the fact relevant in the civil procedure;
2) the proving Party requests it; and
3) in the subject of the technical question it is not any other opinion prepared by an expert appointed by the judge or in other procedure.

• How is the private expert chosen?

The proving Party chooses the private expert and he puts the technical question to the private expert and he is obliged to pay for the fees of the private expert as well.

• What does the private expert opinion include?

According to the new Act on Code of Civil Procedure, the private expert is obliged to answer the technical question of the proving Party and to contact the adverse Party in connection with the subject of the technical question and to respond to the statements and the remarks regarding the technical question of the adverse Party in his opinion.

• What probative value does the private expert opinion have?

If the private expert opinion clearly and consistently answers the technical question of the proving Party and reacts to the statement of the adverse Party, according to the new Act on the Code of Civil Procedure, the private expert opinion has the same probative value as the opinion of the expert appointed by the court during the civil procedure.

- What circumstances should be considered during the evidence by private expert opinion?

It is important that the proving Party chooses a suited private expert. In our opinion it is the best solution if the proving Party hires a forensic expert for preparation of the private expert opinion. It is crucial that the technical question is composed by exactly and impartially because in case of breach of these formal requirements the competent court can leave the private expert opinion out of account and the court is entitled to appoint another new private expert or forensic expert to prepare a new opinion in the subject of the technical question what can cause further expenses to the proving Party. Furthermore, in this case the proving Party is not entitled to enforce his claim for the fees of the private expert in the civil procedure and according to the new Act on the Code of Civil Procedure the proving party is obliged to bear the fees of the private expert independently of the result of the lawsuit.

Dr. Károly BAGÓCSI
lawyer

GUEST PAGE

THE UPDATES OF THE 1999 FIDIC FORMS OF CONTRACTS (RED-, YELLOW AND SILVER BOOKS) LAUNCHED IN LONDON, EARLY DECEMBER 2017

by *Zoltán Záhonyi* **Z & Partners** Consulting Engineers, **chair of the FIDIC Contracts Committee** [www.zandpartners.com]

FIDIC's 1999 forms of contracts are well known in the Hungarian construction market, as the majority of public projects involving EU co-finance were successfully implemented based on one of these FIDIC forms. After having FIDIC's well known 1999 Red, Yellow and Silver Book in circulation for about ten years, FIDIC

decided to launch a new task group to update these forms. The **core aims** for the update included:

- to keep existing features of the 1999 versions, which had been proven to be successful;
- changes to be made only where found necessary and resulting in improvement;
- update the documents by all features, that have been introduced since the launch of the 1999 forms (especially, the 2008 DBO form and the recent forms of the MDB Conditions of Contract for Construction); and
- the basic principle: *"Wording shall be same as 'Gold Book' where intended to be for the same purpose"*.

The **main sources** for the updates:

- the Terms of Reference provided by FIDIC's Contracts Committee;
- proposed update items by the FIDIC Contracts Committee's Special Advisors (the authors of the 1999 FIDIC Contracts);
- contract users' feedback gathered over the years of using the 1999 forms for thousands of construction projects worldwide.

The **underlying philosophies** for the update included:

- *"drafted by engineers for engineers"*, but as a legal document, with the support of experienced international construction lawyers;
- project management features and tools are to be enhanced for clarity and certainty;
- the role of the "Engineer" had to be reinforced;
- more equality (balanced risk allocation) between the parties,
- current international best practice had to be reflected;
- issues, comments raised by users / practitioners to be addressed and
- most recent developments with latest FIDIC forms adopted.

The updates became more prescriptive, hence longer, because the clearer and the more certain the wording of a contract, the higher the chance of no difficulties in understanding or interpretation and so the higher the chance of successful project.

These initial expectations regarding the updates resulted in no substantial changes to the basic principles and the risk sharing as they were introduced in 1999. The only apparent change is that the number of the main clauses was increased – only the claims are dealt with under Clause 20, meanwhile disputes in the new Clause 21.

In summary, the following main features and procedures became updated in the 2017 editions:

- The Definitions part lists the terms in alphabetical order. Also, there are a number of new defined terms – all this make the conditions easier to interpret.
- The project management procedures were significantly improved, by giving details of expected actions by the stakeholders, in a well identifiable sequential order of actions.
- The procedures in the Updates offer solution and definite consequences in many cases, where there was no explicit way forward under the 1999 forms.
- Management of time was a focus area of the update process. Some procedures received explicit time limits (but NOT time bars) – if these are not met (or exempted), then there is a specific outcome. The obligation to serve an "early warning" became more exposed.
- Clauses 17 to 19 were subject to complete revision regarding "Care of the Works and Indemnities", "Exceptional Events" (previously: "Force Majeure") and "Insurance".
- The 2008 FIDIC Gold Book included the dispute avoidance feature of the DAB in the General Conditions of Contract (previously referred to only in the General Conditions of Dispute Adjudication Rules in the Red Book). But at the same time, the Engineer now especially enjoys much greater freedom in dealing with agreements and/or determinations.

- As the DAB now got its new role (dispute avoidance), its name changed to "Dispute Avoidance/Adjudication Board" ["DAAB"]. Also, the new forms include an updated set of Dispute Avoidance/Adjudication Rules, together with a refreshed General Conditions of Dispute Avoidance/Adjudication Agreement as well as a new form for the tripartite DAAB Agreement.

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