CONTROVERSIES REGARDING THE ARBITRAL INSTITUTION DESIGNATED BY SUB-CLAUSE 20.6 OF FIDIC CONDITIONS OF CONTRACT TO ADMINISTER THE ARBITRAL CASES RESULTED FROM EXECUTION OF PUBLIC WORKS UNDER THE ROMANIAN LAW

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Abstract

From 2010 to 2017 the execution of public works in Romania took place by virtue of the General Conditions of Contract of FIDIC Yellow Book or Red Book approved by Government Decision no. 1405/2010. In 2011 the Romanian Ministry of Transportation and Infrastructure issued Order no. 146/2011 whereby it approved standard forms of Particular Conditions of Contract, Appendix to Tender and Contract Agreement for execution of such public works. In particular, the Appendix to Tender modified the provisions of Sub-Clause 20.6 regarding the arbitral institution empowered to administer the disputes resulted from public procurement contracts based on FIDIC Conditions of Contract. The mention included in the Appendix to Tender in this regard referred to "the Court of International Commercial Arbitration", apparently an incomplete reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania. Encouraged by a subjective interpretation of the contractual provisions, a significant number of contractors submitted their disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration. Recently, the Bucharest Court of Appeals decided that this approach was wrong, setting aside the final partial awards issued under the auspices of the ICC International Court of Arbitration. In an attempt to clarify which arbitral institution has jurisdiction to administer such arbitral cases, this paper analyzes the controversial contractual provisions, the soundness of the various interpretation and arguments brought by the involved parties under the rules of interpretation provided by the Romanian Law and internationally applicable custom in arbitration, and the recent jurisprudence of Romanian Courts related to this matter.

Keywords: *arbitration, jurisdiction, the Court of International Commercial Arbitration, FIDIC, public works, G.D. no. 1405/2010, Order no. 146/2011, Sub-Clause 20.6, Appendix to Tender*

1. Introduction

The Government Decision no. 1405/2010 regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds (**"G.D. no. 1405/2010"**) imposed to all the units subordinated or under the authority of the Ministry of Transportation and Infrastructure, including the National Company for Administration of Road Infrastructure in Romania, the obligation to apply the General Conditions of Contract of FIDIC Yellow Book or Red Book to the execution of public works. G.D. no. 1405/2010 entered into force on 20 January 2011.

Taking over the wording of the standard ICC arbitration clause, Sub-Clause 20.6 of both FIDIC Books approved by G.D. no. 1405/2010 reads [...]:

„Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

(b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules [...]."

On 1 March 2011, the Ministry of Transportation and Infrastructure issued Order no. 146/2011 regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation road infrastructure of national interest financed by public funds (**"Order no. 146/2011"**), whereby it approved standard forms of Particular Conditions of Contract, Appendix to Tender and Contract Agreement for execution of public works. Order no. 146/2011 entered into force on 17 March 2011.

Whilst Sub-Clause 20.6 of the particular conditions of contract remained unchanged, reiterating the wording provided for that sub-clause by the General Conditions of Contract of FIDIC Yellow and Red Books as approved by G.D. no. 1405/2010, the classic form of the Appendix to Tender provided by FIDIC was amended by Order no. 146/2011, being added supplementary information fields regarding the number of arbitrators (1), arbitration language (Romanian), seat of arbitration (Bucharest) and arbitral institution (the Court of International Commercial Arbitration, apparently an incomplete reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania).

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The modification of the arbitration clause comprised by General Conditions of Contract and Particular Conditions of Contract by the Appendix to Tender created a lot of confusion in the community of construction law practitioners with regard to the arbitral institution designated to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, and the rules which should be used for the appointment of arbitrators and settlement of such cases by an arbitral tribunal.

There were two (2) main approaches of this matter to date, both being based exclusively on arguments related to interpretation of contracts and priority of contractual documents. Whilst a part of the construction community interpreted the provisions of Sub-Clause 20.6 of G.D. no. 1405/2010 and Order no. 146/2011 in the sense that the ICC International Court of Arbitration would be the arbitral institution designated to administer arbitral cases resulted from execution of public works in Romania, the other part considered that that institution would be the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

In an attempt to clarify which arbitral institution has jurisdiction to administer such arbitral cases, this research focuses on the analysis of the legal framework in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government, which suggests that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is actually the arbitral institution contemplated by the aforementioned enactments, yet for different reasons than those expressed within the community of construction law practitioners and by the Courts to date.

2. Actual perspectives on interpretation of Sub-Clause 20.6 of G.D. no. 1405/2010 and Order no. 146/2011

2.1. Arguments in favor of the jurisdiction of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (The Theory of Hybrid Clause)

Under the Theory of Hybrid Clause[1] it was considered that the mention regarding the arbitral institution comprised into the Appendix to Tender denotes a clear intention to modify the said institution to administer the arbitral cases resulted from the contract.

In this respect it was argued that a corroborated reading of the provisions of Sub-Clause 20.6 included into the Appendix to Tender with the provisions of the same Sub-Clause of the General and Particular Conditions of Contract would take to the conclusion that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is the arbitral institution which should administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, by using the rules of another institution, *i.e.* the ICC International Court of Arbitration.

However, having in mind that at the beginning of 2012 the International Chamber of Commerce issued a new version of its Arbitration Rules, expressly providing, *inter alia*, that: *„The Court is the only body authorized to administer arbitrations under the Rules [...]"*[2], it was concluded that since the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania cannot use the ICC Rules anymore, it would become applicable its own rules.

2.2. Arguments in favor of the jurisdiction of the ICC International Court of Arbitration (The Theory of Semantics.)

On a different note, the supporters of the Theory of Semantics[3] considered that the mention regarding the arbitral institution included into the Appendix to Tender did not modified but completed the provisions of Sub-Clause 20.6 comprised into the General and Particular Conditions of Contract.

In this regard it was contended that, since there are a lot of Courts of International Commercial Arbitration worldwide, a reference to a *"Court of International Commercial Arbitration"* alone, such as the one comprised by the Appendix to Tender, would not provide sufficient information to accurately identify one arbitral institution or another, from Romania or from another country, so that the said reference cannot be construed in any case to be a reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

It was also argued that as long as the documents forming the Contract are to be taken as mutually explanatory of one another, and the Appendix to Tender did not modify the applicable Rules for appointment of arbitrators and for procedure to be followed during the arbitral case provided by Sub-Clause 20.6 of the General and Particular Conditions of Contract, the „real intention of the parties" resulting from interpretation of the contract provisions as a whole would have been to submit their disputes resulted from such contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 to the ICC International Court of Arbitration,

[1] The name of the theory was given by the author for an easier reference to the arguments grouped under this theory

[2] Art. 1 – *International Court of Arbitration*, para. 2) of the 2012 Rules of Arbitration of the International Chamber of Commerce (the provision was maintained in the latest version of the Rules of Arbitration of International Chamber of Commerce issued in 2017)

[3] The name of the theory was given by the author for an easier reference to the arguments grouped under this theory

i.e. „the only body authorized to administer arbitrations under the Rules [...].”[4]

Another argument brought in favor of the jurisdiction of the ICC International Court of Arbitration was that the contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 are at the end of the day FIDIC Conditions of Contract. Therefore, except the case when the Appendix to Tender would have actually modified the General and Particular Conditions of Contract, the international contractors - professional users of FIDIC Conditions of Contract – would have been entitled to believe that when they concluded such contracts of public works with the National Company for Administration of Road Infrastructure in Romania, the disputes resulted thereafter shall be referred to the ICC International Court of Arbitration, in accordance with the international custom and the applicable Rules of the ICC.

2.3. Actual jurisprudence of the arbitral tribunals regarding the jurisdiction

Based on the Theory of Semantics a significant number of contractors submitted their disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration. In the majority of cases the Arbitral Tribunals constituted under the Rules of the ICC International Court embraced the arguments brought under the Theory of Semantics and retained the arbitral cases for settlement.

For instance, in an Award on Jurisdiction issued in 2017 (unpublished), an Arbitral Tribunal concluded:

“The effective contextual and systematic interpretation of the Appendix, considering all other contractual documents and the hierarchy of documents agreed by the Parties, leads the Tribunal to find that the reference in the Appendix can be interpreted as being consistent with the arbitration agreement in the Contract of the Parties. Consequently, Sub-Clause 20.6 has not been amended by the Appendix and clearly refers disputes to be resolved under the auspices of the International Court of Arbitration of the International Chamber of Commerce.

Since the arbitration agreement refers disputes to the ICC for resolution and this Tribunal has been validly constitute under ICC Rules it does have jurisdiction to resolve this dispute [...].”

The same approach of retaining for settlement the arbitral cases related to contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 was adopted by the Arbitral Tribunals constituted under the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which, based on the arguments brought under the Theory of Hybrid Clause, decided that they have full jurisdiction to settle the arbitral cases received so far, by using its own Arbitration Rules.

In this regard, in an Arbitral Decision issued in 2018 (unpublished), an Arbitral Tribunal constituted under the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania concluded:

“Therefore, having in mind:

- the provisions of art. 6 (1) of the Rules of arbitral procedure of Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in force at the date of the request for arbitration referral (“Rules of arbitral procedure”), which provides that they are applicable whenever an arbitration is lodged to the Court, and
- the provisions of art. 6 (3) of the Rules of arbitral procedure, according to whom, in the situation in which the Parties opted for the application by the Court of the whole package of procedural norms of another court of arbitration, their applicability is possible only if the said norms do not explicitly forbid this, by reference to
- the provisions of art. 1 (2) of the Rules of arbitral procedure of the ICC International Court of Arbitration,
- the Arbitral Tribunal concludes that the parties’ will, by the last modification brought to the arbitral convention in Sub-Clause 20.6 of the Particular Conditions of Contract[5], was in the sense of application of the Rules of arbitral procedure in settlement of the disputes between them […].”

2.4. Recent jurisprudence of the Romanian Courts regarding the jurisdiction

The arbitral cases we hereby referred to are still ongoing, so that there are not too many final awards issued to date.

Yet, there are a limited number of arbitral cases in which the Arbitral Tribunals constituted under the Rules of Arbitration of the International Chamber of Commerce issued several final partial awards whereby the National Company for Administration of Road Infrastructure in Romania has been ordered to comply with the Dispute Adjudication Boards’ decisions.

In two (2) such cases[6] the National Company for Administration of Road Infrastructure in Romania requested to the Bucharest Court of Appeals to set aside the final partial awards:

In 2018 the Bucharest Court of Appeals decided in both cases to set aside the final partial awards, considering that the arbitral tribunals were not constituted in accordance with the arbitral agreement of the parties, and that the institution which has jurisdiction to settle the disputes resulted from

[4] Art. 1 – *International Court of Arbitration*, para. 2) of the 2012 Rules of Arbitration of the International Chamber of Commerce (the provision was maintained in the latest version of the Rules of Arbitration of International Chamber of Commerce issued in 2017)

[5] It is noteworthy that pursuant to Order no. 146/2011, the Appendix to Tender is part of the Particular Conditions of Contract

[6] In this respect please refer to Court case no. 3261/2/2017** - *National Company for Administration of Road Infrastructure in Romania v. Salini Impregilo S.p.A.* (regarding the final partial awards issued in the ICC case no. 21328/MHM/2015); and Court case no. 5771/2/2017* - *National Company for Administration of Road Infrastructure in Romania v. JV Teloxim Con SRL - SC Comsa SA - Aldesa Construcciones SA - SC Arcadis Eurometudes SA* (regarding the final partial awards issued in the ICC case no. 21466/MHM (c.21775/MHM)).

performance of the contracts concluded under G.D. no. 1405/2010 and Order no. 146/2011 is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

In deciding so the Bucharest Court of Appeals reasoned that[7]:

"The Court concludes that, by indication of an arbitral institution in the Appendix to Tender ("the Court of International Commercial Arbitration"), the parties understood to modify the arbitral institution chosen by the contract, having in mind the provisions of art. 1268 para. 3 of the Civil Code, pursuant to which "the clauses are interpreted in the sense in which they may produce effects, and not in that in which they would produce none" as well as the fact that the Appendix to tender prevails over the Particular Conditions of Contract.

This interpretation respects also article 978 of the Civil Code which provides that, when a clause has two meanings, it will be interpreted "in accordance with the meaning which may produce an effect, and not in accordance with the no-effect meaning." The defendant's interpretation with regard to the terms "the Court of International Commercial Arbitration" removes any effect of these terms, because it would simply confirm a reference to the ICC arbitration already existent in Sub-Clause 20.6 of the Particular Conditions of Contract.

The Court acknowledges that the name of the institution utilized in the Romanian version of the Appendix to Tender "the Court of International Commercial Arbitration" is almost identical with the official name of the arbitral forum attached to the Chamber of Commerce and Industry of Bucharest, Romania.

Moreover, having in mind that the contract language is Romanian, that the language applicable to the procedure is Romanian, that the substantive law is Romanian, and that the election of the city of Bucharest, Romania, as the seat of arbitration, the Court appreciates that election of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is understandable from the perspective of the relationship of the contract with Romania [...].

Therefore, the Court acknowledges that the arbitral institution indicated in the Appendix to Tender ***refers to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania from Bucharest,*** *and not to the International Chamber of Commerce - International Court of Arbitration (ICC), so that the arbitral tribunal was not constituted in accordance with the arbitral agreement of the parties, the reason provided by art. 608 para. 1, letter c) invoked by the plaintiff being grounded."*

Even though both aforementioned decisions of the Bucharest Court of Appeals were not final and they could have been appealed at the High Court of Cassation and Justice, only in Court case no. 3261/2/2017** the defendant decided to file such an appeal. This appeal is currently pending.

Confronted with the aforementioned jurisprudence of the Bucharest Court of Appeals, another contractor which submitted its disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration based on the same reasons of semantics and has its arbitral case pending, vested the Bucharest Tribunal with a request to issue an injunction *"to remove the hindrance occurred with regards to the permanent arbitral institution which must administer the arbitral case"* and to decide that the ICC International Court of Arbitration is the right arbitral institution to administer its case[8]. The Bucharest Tribunal admitted this request for injunction.

Under the Romanian Law it is highly debatable if the contractor could have used this procedural pathway to obtain a clarification from a lower court with regard to the arbitral institution to administer its arbitral case. Also highly debatable is whether a Court could have issued a decision on which arbitral institution would have jurisdiction to administer the arbitral case in lieu of the appointed Arbitral Tribunal and before the issuance of an award on jurisdiction by the Arbitral Tribunal.

However, the injunction issued by the Bucharest Tribunal has only an interim nature under the Romanian Law. This means that at the end of the arbitral case when an award will be finally issued under the auspices of the ICC International Court of Arbitration, the Bucharest Court of Appeals will still have the full power to set aside the arbitral award in accordance with its previous jurisprudence, irrespective of the injunction issued by the Bucharest Tribunal.

3. The jurisdiction of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania according to the Romanian Law

The analysis of the legal framework in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government suggests not only that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is actually the

[7] Decision no. 4119/2018 rendered by the Bucharest Court of Appeals in Court case no. 3261/2/2017** - *National Company for Administration of Road Infrastructure in Romania v. Salini Impregilo S.p.A.* (regarding the final partial awards issued in the ICC case no. 21328/MHM/2015)

[8] Please refer to Court case no. 14400/3/2018 – *JV Astaldi S.p.A. – Max Boegl România SRL v. NCAIR* (referring to the ICC case no. 22145/MHM)

arbitral institution contemplated by the aforementioned enactments, but also that what was considered for a long time being a controversed modification brought by Appendix to Tender to the arbitration clause provided by Sub-Clause 20.6 of the General and Particular Conditions of Contract, is in fact a solid solution, strongly sustained by legal arguments and consistent with the applicable provisions of Romanian Law and of the international conventions to which Romania is a signatory part, provisions which were in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government.

3.1. Sub-Clause 20.6 of FIDIC Conditions of Contract - a mandatory arbitration clause under the Romanian Law

The debate on which arbitral institution has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011 has gravitated so far around arguments related to interpretation of contracts and priority of contractual documents from the perspective of the will of the signatory parties exclusively. However, the matter was not analysed from the lawmaker's perspective to date.

It is noteworthy that whilst the FIDIC General Conditions of Contract applicable to the public works administered by the units subordinated or under the authority of the Ministry of Transportation and Infrastructure, including the National Company for Administration of Road Infrastructure in Romania were adopted by G.D. no. 1405/2010, the Particular Conditions of Contract, Appendix to Tender and Contractual Agreement applicable to the public works administered by the National Company for Administration of Road Infrastructure in Romania were adopted by Order no. 146/2011. Therefore, all the provisions of the FIDIC General and Particular Conditions of Contract, Appendix to Tender and Contractual Agreement, including the provisions of Sub-Clause 20.6 [*Arbitration*] are part of the Romanian legislation, being mandatory for the parties involved in the construction of infrastructure, the National Company for Administration of Road Infrastructure in Romania and the contractors alike, by the effect of the law.

Thus, with the occasion of initiation of a public tender, the National Company for Administration of Road Infrastructure in Romania has only the liberty to choose which FIDIC Conditions of Contract will be applicable: Red Book or Yellow Book, including in this regard into the tender documentation the relevant Conditions of Contract provided by G.D. no. 1405/2010 and Order no. 146/2011 for information of the participants.

The decision of the interested contractor to participate at a public tender organized by the National Company for Administration of Road Infrastructure in Romania implies the contractor's adherence to the tender documentation, including Sub-Clause 20.6 of the relevant Conditions of Contract provided by G.D. no. 1405/2010 and Order no. 146/2011, in a *"take it or leave it"* manner[9].

Therefore, when later on the winner of the public tender signs the Contractual Agreement, Appendix to Tender and Conditions of Contract, it only reinforces its commitment to comply with the relevant provisions of G.D. no. 1405/2010 and Order no. 146/2011.

In other words, the content of the FIDIC Conditions of Contract applicable to public works, in Romania, including the content of Sub-Clause 20.6 [*Arbitration*], is not the result of the parties negotiation materialized in a *"common intention/understanding of the parties"*, but the result of the lawmaker's will.

Under these circumstances, Sub-Clause 20.6 represents a mandatory arbitration clause imposed by the Romanian law, an arbitration organised under such auspices being a mandatory arbitration, and not a voluntary one, based on the parties' agreement.

In view of the aforementioned, in order to determine which arbitral institution has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011 it is therefore not important to establish what was the so-called *„common intention of the parties"* at the conclusion of the contract, but to understand what was the intention of the lawmaker when G.D. no. 1405/2010 and Order no. 146/2011 were issued.

3.2. Sub-Clause 20.6 of FIDIC Conditions of Contract imposes a certain institutional arbitration under the Romanian Law - the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

The intention of the lawmaker at the issuance of G.D. no. 1405/2010 and Order no. 146/2011 may be revealed by an analysis of the legal framework applicable to arbitration in force at that moment in Romania. It is noteworthy that when it issued the aforementioned enactments, the lawmaker had to comply entirely with the Romanian legislation applicable to arbitration at that moment.

In particular, the analysis of the following enactments are relevant for the scope of this research:

- The Code of Civil Procedure (1865);
- European Convention on International Commercial Arbitration (Geneva 1961)[10];
- Law no. 335/2007 *of the chambers of commerce*

[9] Pursuant to Law no. 98/2016 on public procurement and Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints, the participants to a public tender have the legal right to challenge the requirements of the tender documentation considered too restrictive or illegal. However, the legal means whereby a contractor would challenge the legal provisions of G.D. no. 1405/2010 and Order no. 146/2011 in a public tender procedure are not forming the scope of our research

[10] Ratified by Romania by the Decree no. 281 of 25.06.1963

in Romania;

- 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration[11].

The ad-hoc arbitration was regulated by the provisions of the Code of Civil Procedure (1865), Book IV, art. 340-371, which remained unchanged until 1993. It is noteworthy that between 1948 and 1990 the rules of ad-hoc arbitration were used exclusively in the state mandatory arbitration organized under Law no. 5/1954[12], the voluntary arbitration being practically inexistent in Romania in the period of the communist regime.

In this regard, by Decree no. 495/1953 it was founded the Commission of Arbitration attached to the Romanian Chamber of Commerce and Industry, having its headquarters in Bucharest. This Commission of Arbitration had jurisdiction *"to settle the disputes resulted between the Romanian organizations of international commerce and their foreign partners."*

Later on, the Decree-Law no. 139/1990 *regarding the chambers of commerce and industry in Romania* conferred to the chambers of commerce organized under the new legislation the jurisdiction to administer the ad-hoc arbitration initiated under the Code of Civil Procedure. Further to the issuance of Law no. 15/1990 *regarding the reorganisation of the state economic units into autonomous administration and commercial societies* which formally allowed to such entities to refer their disputes to arbitration, the provisions regarding ad-hoc arbitration comprised by the Code of Civil Procedure were modified, being included[13], *inter alia*, a new article - art. 341[1], providing that:

"The Parties may agree to have their arbitration organized by a permanent institution of arbitration or by a third party".

In 2007 it was issued a new law of the chambers of commerce in Romania - Law no. 335/2007, whereby, by art. 29 (1), it was clearly stated that:

"The Court of International Commercial Arbitration is a permanent institution of arbitration, without legal capacity and operates attached to the National Chamber[14]."

Moreover, art. 2 [*Organisation of the institutional arbitration*] of the 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration reinforced that:

"Organisation of the institutional arbitration is made by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, hereinafter referred to as the Court of Arbitration, based on the Rules of organisation and operation of the Court of Arbitration, the Rules of the College of the Court of Arbitration, provisions of the Code of Civil Procedure to the extent that the present rules of arbitration procedure, hereinafter referred to as rules, do not provide otherwise."

In view of the aforementioned, it results that the reference to *"the Court of International Commercial Arbitration"* included in the Appendix to Tender adopted by Order no. 146/2011 is a clear referral to the arbitral institution provided by art. 29 (1) of Law no. 335/2007 *of the chambers of commerce in Romania*, and by art. 2 of the 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration respectively, which is beyond any doubt the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

Therefore, contrary to the arguments brought under the Theory of Semantics, when issued Order no. 146/2011, the lawmaker identified in a correct and complete manner the arbitral institution to administer the disputes related to the public works administered by the National Company for Administration of Road Infrastructure in Romania, taking over the name of this arbitral institution exactly as it was provided by the relevant law in force - Law no. 335/2007.

3.3. The rules of arbitral institution v. the institution of the arbitral rules under the Romanian Law

Pursuant to Article 4 [*Organization of the Arbitration*] of the European Convention on International Commercial Arbitration (Geneva 1961), ratified by Romania by the Decree no. 281/1963:

„1. The parties to an arbitration agreement shall be free to submit their disputes:

(a) to a permanent arbitral institution; ***in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution****;*

(b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia

(i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;

(ii) to determine the place of arbitration; and

(iii) to lay down the procedure to be followed by the arbitrators."

Therefore, under the provisions of the Code of Civil Procedure (1865) and Decree no. 281/1963, whenever an arbitral clause such as Sub-Clause 20.6 of the Appendix to Tender, provides that the disputes shall be submitted to a permanent arbitral institution, the rules of the said institution will become automatically applicable.

Moreover, that also means that, under the Romanian law, whenever there is nominated in the arbitration clause a certain arbitral institution to administer the arbitral case, but by using the rules of

[11] Published in the Official Monitor no. 197 of 29.03.2010

[12] Law no. 5/1954 *regarding the organization and operation of the State Arbitration*

[13] Art. 341 was included into the Code of Civil Procedure by Law no. 59/1993 *for modification of the Code of Civil Procedure, Family Code, of the Law of Administrative Disputes no. 29/1990 and of Law no. 94/1992 regarding the organization and operation of the Court of Accounts*

[14] Pursuant to art. 1 para. (2) letter b) of Law no. 335/2007, the National Chamber is the Chamber of Commerce and Industry of Romania

another institution, the arbitral institution which will have jurisdiction to administer the case will be the one expressly nominated and not the one to which the rules referred to.

Consequently, not only that the reference to *"the Court of International Commercial Arbitration"* included in the Appendix to Tender adopted by Order no. 146/2011 denotes a clear intention of the lawmaker to refer the disputes resulted from the execution of public works administered by the National Company for Administration of Road Infrastructure in Romania to this arbitral institution, but also this reference implicitly excludes the application of the Rules of Arbitration of the International Chamber of Commerce stated by Sub-Clause 20.6 of the General and Particular Conditions of Contract.

Under these circumstances, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is the arbitral institution which has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, by using its own arbitration rules in force at the date when the arbitral case is initiated.

Last but not least, it is noteworthy that provisions of the new Code of Civil Procedure, entered into force on 15.02.2013 maintained the rule of prevalence of the arbitral institution nominated in the arbitral clause over the institution to which the rules mentioned in the same clause referred to. In this regard, art. 619 [*Arbitral rules*] para. 2 of the Code of Civil Procedure (2013) reads:

„By designation of a certain institutional arbitration as having jurisdiction in settlement of a certain dispute or type of disputes, the parties automatically opt for the application of its own rules of procedure. Any derrogation from this provision is null, unless, taking into consideration the circumstances of the case and content of the rules of procedure indicated by the parties as being applicable, the management of the institutional arbitration which has jurisdiction decides that it may be applied also the rules elected by the parties, establishing if the application of the latter is effective or by analogy."

However, in the legal doctrine[15] *it was emphasized that:*

"The rules of procedure elected by the parties may be applied only exceptionally, and under certain circumstances, further to the decision of the arbitration institution management, taking into consideration the circumstances of the case and content of the rules of procedure indicated by the parties."

4. Conclusions

Once adopted by G.D. no. 1405/2010 and Order no. 146/2011, the FIDIC Conditions of Contract became part of the Romanian Law. Thus, the contractual nature of their provisions was replaced by the mandatory nature of the law.

Under these circumstances the intention of the lawmaker when issued the aforementioned enactments prevail over any other argument based on interpretation of the will of contractual parties.

From the analysis of the legal framework in force at the moment of approval of G.D. no. 1405/2010 and Order no. 146/2011 it results a clear intention of the Romanian Government to submit the disputes resulted from the performance of public works to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which will settle such disputes pursuant to its own rules of arbitration.

These conclusions confirm the fairness of the Bucharest Court of Appeals decisions which decided in a couple of recent cases to set aside the final partial awards issued by the ICC Court of International Arbitration, considering that the institution which has jurisdiction to settle the disputes resulted from performance of the contracts concluded under G.D. no. 1405/2010 and Order no. 146/2011 is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania instead, yet for different reasons than those analysed within this paper.

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- G. Boroi and others, *"The Code of Civil Procedure commented"*, Hamangiu Publishing, 2016;
- The Code of Civil Procedure (1865);
- Law no. 5/1954 *regarding the organization and operation of the State Arbitration*;
- European Convention on International Commercial Arbitration (Geneva 1961) ratified by Decree no. 281 of 25.06.1963;
- Decree-Law no. 139/1990 *regarding the chambers of commerce and industry in Romania*;
- Law no. 335/2007 *of the chambers of commerce in Romania*;
- 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration, published in the Official Monitor no. 197 of 29.03.2010;
- The Government Decision no. 1405/2010 *regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds*;
- Order no. 146/2011 *regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of*

[15] G. Boroi and others, *"The Code of Civil Procedure commented"*, Hamangiu Publishing, 2016

Consulting Engineers (FIDIC) for the investment objectives from the field of transportation road infrastructure of national interest financed by public funds;

- Law no. 98/2016 *on public procurement*;
- Law no. 101/2016 *on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints*.