CONSTRUCTION AND EXECUTION OF WORKS CONTRACT. CONTRACTUAL BALANCE IN THE APPLICATION OF CONTRACTUAL REMEDIES STAGE

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Abstract

Through this study, we analyze how the regulations in the field of general theory of obligations have influenced the field of administrative contracts. By the way of issuing the model of purchase agreement for design and execution of work, adopted by the Decision no. 1/2018, the field of administrative contracts took over the mechanisms of balancing the contract laid down by legislation by adopting the Civil Code from 2011. Through the method of research on document analysis, we show that, including in the field of administrative contracts, an efficient contractual relationship is dependent on the existence of principles that allow the contract to be concluded, by providing concrete mechanisms for responding to unpredictable situations. In the present article we will analyze how the administrative contract model applies the rule "favor contractus", the practical impact of our effort is to guide the actors involved in the development of such contracts, so controversial in the Romanian space, by showing the concrete ways of applying the contractual remedies in balance with the gravity of the violated obligation or the impediment involved in the fate of the contract.

Keywords*: administrative contract for design and execution of works; balance of contractual remedies; favor contractus; harmonizing the administrative contract with the principles of private law.*

JEL Classification: K12, K23

1. Non – performance remedies of the contract

The contractual balance is defined in the doctrine as a way of reflecting a concept corresponding to equivalence, which applies not only to the administrative contract, but also to other matters of private and administrative law. Also, it corresponds to a principle, without being expressly provided for by legislation, which favors the stability of the contract[2]. Thus, firstly, in the contract economy, the contractual balance has an important role for achieving the interest of each party, which has the purpose of preventing, correcting and even sanctioning excesses. This does not mean that the obligations of the parties to a synallagmatic contract must necessarily be economically and mathematically equivalent, but just have to be no obvious imbalance between them, and the imbalance that has occurred after the conclusion of the contract must be remedied[3].

The creditor has the fundamental right to require the debtor to voluntarily execute the obligation stipulated in the contract or provided by law[4], having the right to resort to the remedies for non-execution provided by the Civil Code.

The contractual imbalance resulting from the failure of one of the parties to fulfill its obligation translates into the absence of the cause of the other party's obligation due to the interdependence between it and the unfulfilled mutual obligation. In such a case, the creditor of the unexecuted obligation, which has fulfilled or is ready to fulfill his own obligation, is in a situation in which he loses the motivation to carry out his contractual obligation. The creditor is found in the hypothesis of being under the authority of "*pacta sunt servanda*" principle, which means that it is required to execute his own freely assumed obligations, but faced with a lack of motivation by the fact that the mutual and interdependent obligation of the debtor has not been fulfilled. This situation fades his initial determination (to execute in good faith and properly all the obligations he has assumed

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[2] I. Turcu, *Tratat teoretic și practic de drept comercial*, vol. III, Ed. C.H. Beck, Bucharest, 2009, p.136, *apud* A. Almășan, *Drept civil. Dinamica Obligațiilor*, Ed. Hamangiu, Bucharest, 2018, p. 172.

[3] L. Pop, *Solidarismul contractual şi obligaţiile părţilor în cursul executării contractelor*, „Revista Română de Drept Privat" no. 1/ 2017, p. 258.

[4] Also see: J.L. Baudouin, Y. Renaud, *Code civil du Québec annoté,* 14th ed., remarks by the Minister of Justice on Art. 1590 of the Québec Civil Code, Ed. Wilson & Lafleur Ltée, Montréal, 2011, p. 1760 ; apud I. Ninu, *Rezoluțiunea și rezilierea, excepția de neexecutare, riscul contractului. Practică judiciară și reglementarea din noul Cod civil,* Ed. Hamangiu, Bucharest, 2014, p.2.

under contract), making him think of an alternative solution, to prevent or limit possible injury and/ or to obtain, as far as possible, the execution of the other party. In other words, he will seek to save what he can save from the contract, and if this is not possible, he will seek to prevent or to reduce the deterioration of the state of his own patrimony as reported at the time when the contract was concluded.[5]

A principle underlying the contractual balance, as it is set up by the Romanian legislation, which applies in the field of contractual remedies is the "*favor contractus*" principle, thus, although there are several European conceptions regarding the hierarchy of remedies, the Romanian legislator chose to hierarchize the remedies for non-performance of the contract based on the "*pacta sunt servanda*" principle.[6]

"The premise of using any of these remedies is the principle of the right to a proper performance of the contract (conforming performance), enshrined in para. (1) of art. 1516 C.C., so that the fundamental condition of invoking the remedies is the existence of a contractual non-performance and regardless of its significance for the creditor. However, the gravity of non-performance is of overwhelming importance in relation to the type of remedy that can be invoked and will be considered for its determination."[7]

In the doctrine[8], in order to preserve the contractual balance, it has been established that these remedies are applied gradually, from the most gentle sanction to the harshest, as follows: the application of an additional time of execution, enforcement procedure, he can invoke the non-performance exception/ contractual liability, and as a last resort remedy it is provided the sanction of the termination, preceded by the notification.

The hierarchy is not done directly, but the Civil Code suggests it. This results from several laws.

We can identify regarding this: the possibility of requesting/waiting for the voluntary execution as it was established, granting to the debtor an additional time for execution [art. 1522 par. (3) C.C., the faculty to invoke the exception of non-performance of the contract (Article 1556 C.C.)]; the prerogative to suspend the performance of its own obligations [art. 1557 par. (2)]; the right to obtain the termination of the contract [art. 1557 par. (2) C.C.].[9]

The cumulative conditions for invoking any remedy listed in art. 1516 par. (2) are stipulated *expressis verbis* in its very content, which must be corroborated with art. 1517 C.C., where the conditions are: the debtor has not fulfilled his obligation; non-performance of the obligation has no justification; the non-performance of the obligation was not caused by the creditor's own action or omission; the debtor performance is delayed (he has been given an additional time to fulfill his obligation – by operation of law or by the creditor).[10]

Art. 1521 and seq. Civil Code shows the priority of the execution of the debtor's obligation, giving him another chance by regulating the technique of the additional time, which is made up of the demand for a delay. Therefore, prior to the imposition of another sanction, the debtor must be given an additional time to fulfill his obligations by means of a notification.[11]

By making a hierarchy, the first intended remedy, with priority being given, is to grant an additional time to perform. It is important to note that if the debtor performs late but complies with the obligations, the creditor must accept the performance within the additional time, but has the right to claim moratory damages intended to cover the damage caused by the late execution of the debtor, thus applying two remedies cumulatively.

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[5] I.F. Mangu, *Rezoluțiunea, rezilierea și reducerea prestațiilor - (I) Reglementarea legală, fundamentul, domeniul de aplicare, poziția în ierarhia "remediilor" contractuale, dreptul de opțiune al creditorului, felurile*, „Pandectele Romane" no. 1/2014, p. 112.
[6] L. Pop, *Curs de drept civil. Obligațiile*, Universul Juridic, Bucharest, 2015, p.185.
[7] I. F. Mangu, *loc. cit.*
[8] B. Oglindă, *Principle of progressive (gradual) use of contractual remedies*, „Juridical Tribune – Tribuna Juridica" Volume 4, Issue 2, December 2014, p. 226-239.
[9] I.F. Mangu, *loc. cit.*
[10] *Idem*.
[11] I. Ninu, *op. cit.*, p. 5.

In doctrine[12], this additional given time mechanism is considered both as a chance for the debtor to fulfill his obligation and as a condition for invoking the other measures, with only one exception: giving the time is not necessary if it is in default by operation of law.

Also, in a doctrinal opinion, it is considered "that the additional time is an essential element for establishing the debtor's culpability in relation to the non-performance of the contractual obligations"[13], which supports the idea that this remedy is at the basis of all the others, an idea supported by jurisprudence[14] too ("and if the parties clearly expressed the resolution by operation of law, it will operate only when the debtor has be given an additional time.").

The second remedy is exception for non-performance (*exceptio non adimpleti contractus*), which is regulated in the section dedicated to "the justified causes of non-performance of contractual obligations", as well as in art. 1555 C.C. which stipulate the performance order of services in a contract, art. 1522 par. (4) C.C. which stipulate the main effects of the additional time for performance. This is not explicitly defined, but art. 1556 par. (1) C.C stipulates that when the obligations of a synallagmatic contract are due and one of them fails to fulfill its assumed obligation, another is entitled, to an appropriate extent, to refuse to perform its own obligation, unless otherwise provided by law, customs, or will of the parties.[15]

In the doctrine, the exception to non-performance is defined as "a mean of defense, the direct consequence of the reciprocal obligations principle of parties in synallagmatic contracts, by virtue of which any party to such a contract may refuse to performe its own assumed obligation, while the other party does not perform the correlated obligation."[16] The same idea is also found in the jurisprudence[17], so the exception of non-performance is not considered to be a procedural exception or an exception on the merits, but only a means of defense, a specific effect of synallagmatic contracts.[18]

Faced with the non-performance of the contract by its debtor, depending on the causes, the gravity of non-performance, the temporal extent of it, and last but not least, depending on his interest in performing the debtor's obligation, the creditor may terminate the contract or to demand a proportional reduction of his own obligations, with the purpose of restoring the balance of the contract (in the case of a reduction) or a waiver of the contract (if it chooses to invoke the termination).

By using the „*per a contrario"* interpretation of art. 1551, par. (1) C.C. "the resolution of the contract may be invoked only if the non-performance is significant or, in the event of termination, it may even be minor, but repetitive; and the debtor has be given an additional time by the creditor or in default by operation of law, and if the non-performance was justified. These conditions, expressly provided by the legislator, underline the notion that resolution/termination is a sanction that can not be enforced at any time, but through the transition of the first stage – additional time- and only when non-performance is important and can attract such a sanction.

We consider that the additional time has a particular importance, so if it is not applied the sanction will be the impossibility of the creditor to demand the resolution/termination of the contract.[19]

By applying the principle of safeguarding the contract - art. 1549, par. (2) C.C. stipulates the prevalence of the partial resolution in the plurilateral agreement, if it is possible, and if the non-performance of the obligation should not be considered as "essential" one.

Also, for the application of the unilateral resolution, art. 1552 par. (1) C.civ. stipulates that it is necessary to involve the mechanism of giving an additional time, supporting the idea of the

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[12] L. Pop, *op. cit*., p. 190.

[13] D. Chirică, *Imposibilitatea executării antecontractului de vânzare-cumpărare într-o situație specială*, S.C.J. no. 3/1987, p. 146 et seq., *apud* I. Adam, *Drept civil. Teoria generală a obligațiilor*, 2nd ed., Ed. C.H. Beck, Bucharest, 2014, p. 156.

[14] Decision no. 1114/2003 from 21-Feb-2003, ICCJ, Commercial Section.

[15] L. Pop, *op. cit*., 2015, p. 202.

[16] M. Costin, C. Costin, *Dicționar de drep civil de la A la Z*, 2nd ed., Ed. Hamangiu, Bucharest, 2007, p. 436, *apud* I. Ninu, *op. cit*., p. 8.

[17] Decision no. 3786 of 16 December 2008, ICCJ, Commercial Section, *apud* I. Ninu, *op. cit.*, p. 9.

[18] Decision no. 2413/2014 from June 25, 2014, ICCJ.

[19] I. Adam, *op. cit.*, p.157.

priority of specific performance.[20]

It is also possible to choose between the resolution/termination and forced performance of the contract[21], but also the option to reduce personal obligations in the case of partial performance. This does not contradict the existence of a hierarchy because there are stipulated the above-mentioned conditions and the aim pursued by the injured party is also envisaged, the legislator offering the possibility of terminating the contract as the ultimate solution, but also taking into account the principle of the parties' availability, offering the opportunity to choose a milder sanction in relation to each situation.

In the doctrine, it is appreciated that: "The basis of both remedies (resolution/terminating and reducing the personal obligation) is undoubtedly the idea of a bivalent cause, which characterizes the synallagmatic contracts, objected to the reciprocity and interdependence of the obligations from these contracts, coupled with the principle of the binding effect of the contract and, implicitly, with one of its most important principles applied in the subsidiary, the principle of the right to a proper performance of the contract."[22]

All these rules shows the order in which these measures must be applied, even if the legislator did not expressly mention them. Thus, in the way in which the texts of the Civil Code, but also the doctrine and jurisprudence, make it clear that specific performance by applying either an additional time to execute or the exception of non-performance are first resort solutions, while the resolution is a last resort, by applying the principle of contractual balance.

It was found that in the hierarchy of remedies, the resolution/termination is placed on the last position in the top of the preferences of the Romanian legislator, seeking by any means to save the contract and that both parties achieve what they wanted in the first place.[23]

2. Remedies of non-performance in the contract for design and execution of works

This order of remedies application established by doctrine and jurisprudence is also found in the Contract for the design and execution of works (hereinafter referred to as the *Contract*).

2.1. The additional time for performance

This remedy consists in the creditor's obligation, in the event that the obligation is due to mature without being executed, to provide the debtor with an additional period within which to perform its obligation. It is not a prescribed remedy in the enumeration contained in art. 1516 C.C., but is foreseen as a prerequisite for the other remedies provided in Section 2, dedicated to the placement to default.

2.1.1. Cases when the additional time for performance operates

Including in the way of this type of administrative contract regulates this remedy, the additional time for performance is the remedy that is applied with priority, as well as the precondition for the implementation of the other remedies.[24]

Clause 8.5 of the *Contract* provides that the Contractor shall be entitled to extend the performance time if he records delays and/or produces additional costs as a result of an error recording in the Beneficiary's Requirements, provided that a diligent contractor would not have discovered the error when studying requirements. Also, under Clause 26.2, the same remedy applies if there is an error in technial specifications of the Project, data that a diligent contractor could not identify so as to avoid delays or additional costs.

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[20] I.F. Mangu, *Rezoluţiunea, rezilierea şi reducerea prestaţiilor (IV). Modul de operare*, „Pandectele Romane" no. 4/2014.
[21] I. Adam, *op. cit.*, p. 158.
[22] I.F. Mangu, *loc. cit.*
[23] *Idem*.
[24] Liviu Pop, *op. cit.*, 2015, p. 190.

Clause 9.5 lays down that the Contractor shall be entitled to extend the additional time for performance if he causes delays and/or causes additional costs as a result of the Beneficiary's failure to grant access to the Site or make available the acces to the Site within the time limit specified in Sub-clause 9.1 (30 days from the start date), or at the latest at a time to give the Contractor the opportunity to act in accordance with the program submitted.

It is important to mention that the term "Site" is limited to "the places where the Permanent Works will be executed and where the Equipment and Materials will be delivered, and any other places specified in the Contract as part of the Site".[25]

Another moment when is granted the additional time of performance to the Contractor is when the term of 60 days is overcome from the date of Supervisor approval of the needed documents, term which is granted to optain the building licence [stipulated in clause 19.3, let. b)]. Also, with regard to the bulding licence, an additional period will also be granted when the authority issuing the building permit express remarks or additional requests which are not caused by a deficiency in the Contractor's Documents.

Regarding this type of contract, a circumstance which is often able to activate the need for application the additional time and which has generated controversy in practice is the occurrence of conditions or obstacles mentioned in sub-clause 21.1. Sub-clause 21.1 states that these may be: natural or artificial physical conditions, including unexploded ammunition or underground utilities, as well as other physical or polluting factors that could not reasonably have been foreseen by a diligent contractor at the time submission of the Offering.

According to the FIDIC Guideline[26], physical conditions means "natural and artificial physical conditions, as well as other physical and pollutant factors that the Contractor encounters on the site of work, including groundwater and hydrological conditions, except climatic conditions". Also, the following remarks are made about physical conditions: *"groundwater conditions are conditions below ground level, including those below the surface of the water and those related to the riverbed and the seabed; hydrological conditions means river courses, including those formed due to weather conditions outside the Site, and physical conditions exclude the weather conditions of the Site and, as such, exclude the hydrological consequences of weather conditions in the Site."*[27]

Another example of granting the additional time, which was the most common litigation case in practice for public works contracts, is found in sub-clause 31.1 which states that the Contractor will be entitled to extend the execution time for delay if record delays and/or cause additional costs due to execution of a Supervisor's instructions and to the extent that the contract did not provide an obligation for the Contractor to ensure the proper conditions for the provision of services or the execution of work.

There are two conditions established which need to be met with priority to be given an additional time to perform. If these conditions are not met, there is no right to receive an additional time.[28]

The first condition is a matter of substance and implies the occurrence of an event stipulated in the Contract, which results in a need for performance to be delayed. It is not enough for the Contractor to state that there is a delay or disruption in the execution program, but the need must be justified in the light of the concrete evidence of the factual situation and the contractual rules governing it.[29]

The second condition is a formal one and involves sending a notification to the Supervisor.[30]

As regards the extent of the time allowed, it must be reasonable and will be determinated

[25] International Federation of Consulting Engineers, *Ghid de Utilizare a Contractelor FIDIC,* Aric 2014, p. 61.
[26] *Idem*, p. 131.
[27] *Idem*, p. 133;
[28] J. Glover, S. Hughes, C. Thomas Qc, *Understanding the new fidic red book, A clause-by-clause commentary,* Thomson Sweet & Maxwell, London, 2006, p. 196.
[29] *Idem*, p.196.
[30] *Ibidem*.

according to the particularities of each case.[31]

In conclusion, the additional time for performance is applicable in the case of minor infringements that do not fundamentally affect the Contract and are not by the fault of the Contractor, so that its compliance can be carried out within this additional period, and there is no need for a more drastic sanction for these inconveniences. This approach is an application of contractual balance principle, giving the parties yet another chance to fulfill their obligations, but also the balance of contractual remedies principle, because it respects the gradual application of sanctions based on the gravity of the non-performance. By its nature, this remedy is the most gentle and thus occupies the first position in the hierarchy of remedies stipulated in the contract model analyzed, being a "first resort remedy".[32]

2.2. Non-performance exception

Clause 63.2 enshrines the non-performance exception in the Contract. When a breach of contract occurs, the injured party is entitled to a contract suspension.

Such an infringement is described in sub-clause 17.7, which indicates that the Contractor unduly delays making payments to Subcontractors. This Subclaim entitles the Beneficiary to suspend payments to the Contractor until the situation is remedied.

The provisions of this clause are extremely important as the Beneficiary's ability to force the Contractor to execute his contractual obligations towards his Subcontractors is emphasized, not only for the proper execution of the contract between the Beneficiary and the Contractor, but for the good conduct of the whole project and the compliance of all obligations in connection with it.

It is also enshrined in sub-clause 41.3 too, the Supervisor's ability to suspend the works on the basis of the findings recorded in the report of a work reaching the decisive stage requiring the contractor to be summoned to check the works and to authorize the execution to be continued.

Under Sub-Clause 44.5, the Beneficiary may suspend payments as a precautionary measure without prior notice if the conditions for the termination of the Contract are fulfilled by the Beneficiary, before or in lieu of termination.

The literal interpretation of the above stipulation could lead to the idea of a Beneficiary's discretionary right to choose between invoking the exception of non-execution and termination, but this right is censured precisely by the principle stated in this study - the balance of contractual remedies – because the choice will have to be filtered by the Beneficiary considering the condition of the essential non-performance and the declaration of termination for violation of a non-essential obligation will entail the contractual liability of the Beneficiary who will be liable for damages caused by the inappropriate and ungrounded termination of the contract.

2.2.1. Suspension by administrative mandate of the supervisor

Under Clause 38.1, one way to suspend the Contract is by the order of the Supervisor given by an administrativ mandate. In this case, the Contractor shall, upon receipt the Administrative Suspension Mandate, suspend the execution of the Work or a part of it for the period or periods and manner specified in the notice.

According to art. 1, pt. 34. ff), the Administrative Mandate is a document issued by the Supervisor in accordance with Clause 5 (the Supervisor and the Supervisor's representative), and Sub-Clause 5.4 provides that instructions and/or orders issued by the Supervisor or by its representative shall be considered an Administrative Mandate.

[31] E. Baker, B. Mellor, S. Chalmers, A. Lavers, *FIDIC Contracts: Law and Practice*, Informa Law from Routledge, 1st ed., 2009, p. 427.

[32] L. Pop, *op. cit.*, p. 186.

2.2.2. Suspension by contractor's notice

Another way, provided in sub-clause 38.2, is the suspension by Contractor's notice. In this case, the Contractor will notify the Beneficiary and will be entitled, after a period of 30 days from the date of the notification, to suspend the execution of the Works or to reduce the execution rate in accordance with the notice. Suspension will take place until the date when the Contractor receives the Payment Certificate or payment as specified in the notice, or if the Supervisor does not fulfill the obligations under the Sub-Clause relating to the Payment Certificate or if a payment due to the Beneficiary in accordance with the provisions of the Contract is delayed at least 45 days before the deadline according to the provisions of the sub-clause on payment.

2.2.3. The exclusive fault of the contractor or the common fault in suspending the works

It is also stipulated that the fault is the exclusive responsibility of the Contractor (subclause 38.4). Thus, if the cause of the suspension is due to the Contractor failing to fulfill any of his obligations under the Contract[33], the Contractor will not be entitled to extend the Execution Time or to pay additional costs as a result of the suspension, of the protective measures or the restarting the execution of the works

The contract does not foresee all the causes that could lead to suspension from the exclusive fault of the Contractor, but only exemplifies possible situations. In the doctrine, these situations are considered to refer to work in dangerous conditions, violations of local standards or breach the insurance obligations.[34]

If the need to suspend the execution of works by the Beneficiary is due to any contractor's failure or circumstances for which he is responsible under the contract, the Beneficiary is entitled to the compensation provided for the Contractor in the remaining cases.[35]

2.2.4. The consequences of suspension

Subclause 38.5 highlights the consequences of suspension. If the cause of the suspension is related to the failure of the Beneficiary to fulfill any of its obligations under the Contract or generally to any risk under the Beneficiary's responsibility, the Contractor will be entitled to extend the performance time and/or to pay the additional costs.

If the suspension period of work exceeds 180 days and the cause of the suspension is not the fault of to the Contractor, he may, by notice to the Supervisor, request the resumption of the Works within 30 days of the notification.

The Supervisor, after consultating with the Beneficiary, will inform the Contractor as soon as possible but no later than 10 days after receipt of the notice about the date of resumption to the Works execution.

It should be noted that the Contractor is entitled to terminate the Contract in the event of a negative response or in the absence of a response within the deadline, providing multiple possibilities for solving the problems, but their application being gradually established: (i) it will be given an additional time or he will suspend the work for more serious situations; (ii) even if the 180-day suspension period is exceeded, it is stipulated that it is necessary to notify the Contractor beforehand, which will require the resumption of the work, in the attempt to save the contract, and only in the end, (iii) in the event of an negative response or in the absence of it he can terminate the Contract.

By analyzing this clause it can be observed how the balance of the contract principle operates, beacuse the three remedie are presented in the order of their application, but also can be seen two

[33] including but not limited to errors in the Contractor's project, inappropriate work, material or workmanship, failure to comply with the safety and security rules of work, or failure of the Contractor to protect, store or secure the security or, generally, any risk under the Contractor's responsibility under the Contract.
[34] E. Baker, B. Mellor, S. Chalmers, A. Lavers, *op. cit.*, p. 266.
[35] *Idem*, p. 446.

possibilities: restoring contractual balance (in the case of resuming works) or terminating the contract (in case of termination).

2.3. Termination

The analyzed Contract resembles FIDIC contracts on the terms of termination clauses[36]. Termination causes are divided into two categories: Termination by the Contractor and Termination by the Beneficiary, but there are also special clauses stating the termination of the contract in default by operation of law.

Under Sub-Clause 63.2, when a breach of contract occurs, the injured party is also entitled to terminate the Contract.

Sub-Clause 63.2 establishes the general application of termination, and by the phrase "to the extent and under the conditions set forth in the Contract" it points out that the termination will follow the hierarchy of remedies regulated by the entire contractual ensemble and not any non-performance will lead to the operation of this last resort remedy.

2.3.1. Termination by the beneficiary

The Beneficiary is entitled to terminate the Contract when the situations referred to in Subclause 64.1 occurs. The mechanism for applying the remedy of termination implies the formality of issuing a prior notice, 15 days after which it will be terminated. It is not explicitly provided, but the remedy for non-performance during the 15 days leaves the notice of termination without object, which means that the sanction of termination will no longer operate. Therefore, the notification may encourage the other party to fulfill its contractual obligations[37] and thus to respect the contractual balance, and there will be not necessary to apply a remedy.

It is also considered to be a common feature of good faith that any termination due to failure to comply with contractual provisions should be based on a notification.[38]

Prior notification also applies if some defects or damage occur. The Contractor is required to remedy any defect or damage, so it will be given an additional time to fix them after receiving a notice, and if he does not remedy the defects or damages, the Beneficiary will have the right to terminate the Contract.

In another hypothesis, the Beneficiary may terminate the contract when the Contractor is in the situation where the Execution Program is rejected 3 times. Under Sub-Clause 17.6, the first two rejections are sanctioned withholding from payments, and only the third rejection, which demonstrates a serious lack of professionalism and diligence, will attract the most serious sanction-termination.

Following the same pattern, sub-clause 36.5 states that the Beneficiary will be entitled to terminate the Contract if the Beneficiary becomes entitled to charge the maximum amount of payment penalties as set out in sub-clause 36.4.

In the event of late payment penalties are due at the level of the maximum amount covered by the Contract, it is obvious that the Contractor has consistently manifested a fault or negligence that could seriously affect the nature of the Contract, which, firstly, justifies the sanction of termination, and secondly, the termination is the consequence of the effects of contractual balance, since by reaching the maximum penalty for the future negligence or fault of the Contractor, the Beneficiary has no longer any means of pressure to lead to the conforming performance. It also follows from this provision that termination is a last resort remedy, used when the injured party has left no other means of remediation or constraint available.

The Beneficiary is entitled to terminate the Contract unilaterally by notice of termination addressed to the Contractor, but the termination must not be made in order for the Beneficiary to take

[36] Axel-Volkmar Jaeger, Gotz-Sebastian Hok, *FIDIC-A Guide for Practitioners,* Springer, Berlin, 2010, p. 318.
[37] *Idem,* p. 320.
[38] *Idem,* p. 320-321.

over the execution of the work or to hire another Contractor to execute them, this is the unlawful purpose of changing the person of the Contractor.[39]

Another case of unilateral termination is stipulated in Subclause 15.7, applied in the event that the Contractor fails to submit a new Performance Warranty within 30 days from the date of the notification, if the Waranty is no longer valid due to the impossibility of the issuing society to meet its commitments.

Among the termination situations by the Beneficiary are also those provided in Sub-Clause 64.1, where the Contractor fails to comply with the deadline and the measures indicated in a notice of a placement in default in accordance with 63.2 (a). Including this stipulation highlights the need for prior notice, which was issued in accordance with the provisions of art. 63.2 (a), setting a reasonable remedial period.

The FIDIC Guideline provides that termination also occurs in cases where the Contractor refuses to execute the works, execution is delayed, abandoned, or fails to execute with the intended materials and under the prescribed conditions.[40] Thus, it is highlighted the idea of the fault of one party or the need for a delay. The FIDIC Guideline provides that the Beneficiary may terminate the Contractor if: *"The Contractor is unable to provide an Warranty of Performance, if he abandons the Works or demonstrates the intention to no longer carry out the undertaken obligations, subcontracts without requiring the Beneficiary's consent, becomes insolvent, etc."*[41]

The remedies provided to the Beneficiary in FIDIC models far outweigh the remedies available to the Contractor. This apparent disparity does not indicate an imbalance in the treatment of the parties, but can be explained mainly as due to the fact that the works are in the process of execution, and in the end the Beneficiary will acquire the work but also that the Contractor has significantly more obligations than the Beneficiary. [42]

2.3.1.1. Termination by operating the law for entering a third party in the contract/ change of the association without consent

A cause of termination by operating the law is provided in sub-clause 6.4 for breach of the Contract if the Contractor has waived or partially assigned without complying with Clause 6 of the Contract - if the assignment is not preceded by a written agreement of the other Party (except cases expressly provided by the law).

This kind of termination also applies if the Contractor subcontracts without the consent of the Beneficiary, according to sub-clause 7.7.

As set out in Sub-Clause 12.8, termination shall also apply by operating the law if the association, consortium or any other group of two or more persons constituted by the Contractor changes its status or composition without the prior consent of the Beneficiary.

2.3.2. Termination by the contractor

The Contractor may terminate the Contract if: he does not receive the amount due under a paid interim certificate, the Beneficiary fails to fulfill its obligations if there is a prolonged suspension affecting the works, if the Beneficiary is bankrupt, insolvent or in a similar situation.[43]

The Contractor is entitled to terminate the Contract, if he complies with the other relevant provisions of the Contractual Terms (if he give a motivated termination notice and this is received by the Beneficiary 15 days before the termination date), in any of the situations referred to in subclause 65.1: if he does not receive a payment due within 120 days of the expiration of the due date; if the Beneficiary and / or its Personnel fail to meet their contractual obligations after repeated

[39] FIDIC, *Ghid de utilizare a contractelor FIDIC*, *op. cit.*, p. 300.
[40] A.V. Jaeger, Gotz-Sebastian Hok, *op. cit.*, p. 317.
[41] *Idem*, p. 320.
[42] E. Baker, B. Mellor, S. Chalmers, A. Lavers, *op. cit.*, p. 425.
[43] A.V. Jaeger, Gotz-Sebastian Hok, *op. cit.*, p. 320.

notifications; if the execution of all Works is suspended for more than 210 days and the cause of the suspension is not related to the Contractor's failure to fulfill any of his obligations under the Contract; and if the Beneficiary becomes bankrupt, entered into bankruptcy proceedings, or if any other event that (in accordance with the law) has a similar effect to that of any such situation or event.

Under Subclause 69c, termination occurs also as a result of the repeated refusal of the Supervisor to certify a payment.

All of these sub-clauses have an important role to play in the interest of each party, with a role in the finality, prevention, correction and even sanctioning the excesses, by application of the contractual balance principle. Therefore, if the Contractor considers that the failure of the Beneficiary to fulfill its obligations is sufficiently serious to terminate the contract, the Contractor must submit a notice, otherwise it will be a breach of the contractual provisions through using his right in an abusive way.[44]

Clause 69c, however, creates a contractual imbalance because a similarly situation is regulated in a different way, in the sense that when the Contractor fails to comply with a single remedy notice issued by the Supervisor or the Beneficiary, the Contract shall be terminated by default, on the other side, when the Beneficiary fails to meet its principal obligation (Payment), the Contractor shall issue three such notices of delay, subclause 38.2 requiring a 30-day time limit for such notifications, so we will reach 90 days following the breach of the essential payment obligation, and then the notification of termination that will take effect after 15 days will be sent. Therefore, the Contractor is required to remain a party in the Contract and to execute the obligations for at least another 105 days from the moment when the payments have ceased.

3. Conclusions

The principle of contractual balance has spread in last years in all areas of contract law, being inherent in an economy market guided by the goal of a contract - its successful performance.

Including in administrative contracts field, it must take precedence over the pursuit of public investment, which can not be achieved without finalising the contract. However, this successful conclusion of the contract is not a matter of fate, but can only be achieved if there is increased attention to concluding, maintaining and remedying the contract in accordance with the principle of contractual balance, keeping alive the motivation of both parties to submit efforts to overcome the difficulties encountered in running a public contract.

We have noticed in the present study how the drafters of the administrative contract model have integrated the principle of contractual remedies balance into all contractual clauses.

The essential conclusion drawn from the above analysis is that it will be not the choice of the parties what contractual remedy to apply but they will have to choose for that remedy that corresponds to the severity of the contractual non-performance, the contract offering gradual first-remedies (additional time for performance), harsher remedies (exception of non-performance) and the last resort remedy (termination).

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[44] FIDIC, *Ghid de utilizare a contractelor FIDIC*, op. cit., p. 305.

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