

PROBLEMS OF PROPERTY RIGHTS IN THE IMPLEMENTATION OF STANDARD FORMS FIDIC CONTRACTS IN THE ROAD SECTOR IN UKRAINE

Kharchenko A., Candidate of Technical Science, National Transport University, Kyiv, Ukraine

ПРОБЛЕМИ МАЙНОВИХ ПРАВ ПРИ РЕАЛІЗАЦІЇ ТИПОВИХ ФОРМ КОНТРАКТІВ FIDIC В ДОРОЖНЬОМУ ГОСПОДАРСТВІ УКРАЇНИ

Харченко А.М., кандидат технічних наук, Національний транспортний університет, Київ, Україна

ПРОБЛЕМЫ ИМУЩЕСТВЕННЫХ ПРАВ ПРИ РЕАЛИЗАЦИИ ТИПОВЫХ ФОРМ КОНТРАКТОВ FIDIC В ДОРОЖНОМ ХОЗЯЙСТВЕ УКРАИНЫ

Харченко А.Н., кандидат технических наук, Национальный транспортный университет, Киев, Украина

Formulation of the problem.

Typical forms of contracts for the construction of international engineering organizations (in particular, the contracts of the International Federation of Consulting Engineers FIDIC) for quite a long time successfully used in many countries of the world. The spread of their application can be seen on the official websites of international organizations and associations (in particular, sites of FIDIC, the World Bank, the International Monetary Fund, and others) [1]. The implementation of FIDIC formalities in Ukraine will reduce the level of corruption by simplifying cash flow management procedures, to improve understanding between the parties to construction projects through effective allocation of responsibilities and risks of the parties to create a secure environment in order to attract financial investment from international investors and increase the investment attractiveness of the state. But, unfortunately, there are a number of problems that arise in the way of adoption and adaptation of FIDIC formalities for the road sector in Ukraine. A significant problem is the disparity between the legal structure of Ukraine, which leads to the problems of the economic rights in the performance of contracts.

Analysis of recent research and publications.

The analysis of the scientific research problems showed lack of attention of scientists and practitioners to the problems of the economic rights of using FIDIC contracts in the road sector in Ukraine. However, it should be noted the increased interest in FIDIC contracts adaptation problems in Ukraine in the work of Enrico Vinca (Executive Director of the International Federation of Consulting Engineers FIDIC), S. Teush, V.Grabchak, N. Berezovsky, S. Andreev, A. Lilov and others.

The aim of the article is to analyze the theoretical aspects of the economic rights in the implementation of standard forms of FIDIC contracts in the road sector in Ukraine.

Presenting main material.

Many countries which are only in the way of the introduction of FIDIC as well as Ukraine, faced with the fact that the majority of local experts believe FIDIC «enslaving agreement». However, in reality, in the proforma (forms of the contract which were designed by FIDIC or also they called as «books») incorporated a number of different mechanisms (for example, the regulation of the price of the contract, deadlines, etc.). FIDIC proforma is a balanced agreement, which is valid under the terms of «fair terms» (fair conditions), which are equally protected and the interests of the customer and the contractor.

According to the methodology of FIDIC each proforma contains two main parts. They are «General Terms and Conditions» and «Special Conditions». «General Terms and Conditions» are typical of the contract and can be applied anywhere in the world. Terms, conditions and features of the country's legislation, which are under construction, are recorded in the «Special Conditions» [1] (Figure 1).

European Bank's for Reconstruction and Development (EBRD) position on FIDIC contract determines they as well-balanced, they can be easily adapted to the conditions of a specific country and are

used for a wide range of projects. However, they need to localization, as some conditions are contrary to national law, local contractors are not always familiar with FIDIC, sometimes in the projects used the incorrect form of such contracts in the future may lead to the issue of property rights to the construction.

It is important to clearly define the "Special conditions" for the implementation of FIDIC contracts in the road sector in Ukraine, as in attracting foreign engineering consultant for the implementation of FIDIC contracts in Ukraine, he must be familiar with the specific features of the national legal framework, as the legal construction of Europe and Ukraine sometimes differ radically.

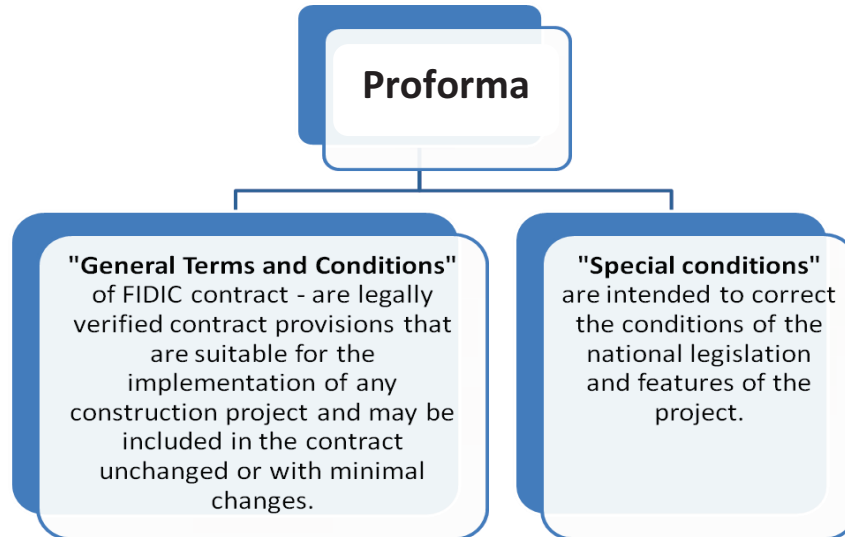


Figure 1 – The typical structure of FIDIC proforma

As is known, the property rights to the construction objects in the implementation of the contract occur at the time of approval of the project for the construction and stored before delivery to the customer object, then the object of the property rights transferred to the balance as an asset. The complexity of the implementation of this approach by using FIDIC proforma is in the imperfection of the bureaucratic procedures for land allocation under construction in Ukraine. Accordingly, the customer cannot provide timely access to the construction object for contractor and consulting engineer.

In present time the main problems in the allocation of land, the coordination of project documentation, registration of land and rights to them in the building are follows:

1. Inability to automatic transfer of the right to use the land (rent) for the transfer of ownership of real property. The new owner of the property is to actually go through the whole procedure of land allocation in use and the lease contract that the optimistic scenario can last about six months. With this new property owner cannot make effective use of their property (for example, to carry out reconstruction) [2].

2. Investors are not able to check in to publicly available sources, land plots of state and municipal property free from development if they, or could they be used for construction projects [2].

3. The property in Ukraine is divided into private, public and municipal. But public and municipal sometimes exist inseparably (for example, state-owned land in urban area, land with cultural and historical value, etc.). The same plot may be under state protection and be on the balance of the city. At this moment, the legislative process is the distribution between public and municipal land is not yet complete. Therefore, in general, it is difficult to identify the owner of the land, resulting in significant delays in the design documentation for the land.

4. Also the question of land alienation should be settled, which are privately owned. The grounds and procedure for compulsory acquisition of land for reasons of social necessity determined by law. In some respects it is similar with compulsory purchase of land for public purposes subject to full reimbursement of its cost. It is well known that the property - the basis of the market economy. That is why the Ukrainian Constitution establishes the guarantee of this right. Thus, Art. 41 of the Basic Law specifies that no one may be unlawfully deprived of property rights [3]. So, there is a contradiction in the law of Ukraine regarding the private ownership of land.

In addition to these problems directly related to property rights in the implementation of FIDIC contracts, it should be noted a number of indirect but the important (Figure 2):

1. The problem of the definition of a FIDIC contract as a form of the relationship between customer and performer. The solution to this problem would put a design point in the majority of legal collisions on the application of FIDIC contract in Ukraine. It should be clearly defined in law the rights, powers, duties and responsibilities of the customer and performer, because their functions in the traditional scheme of works are differ from FIDIC, it is evidenced by the analysis of the Civil Code [4].

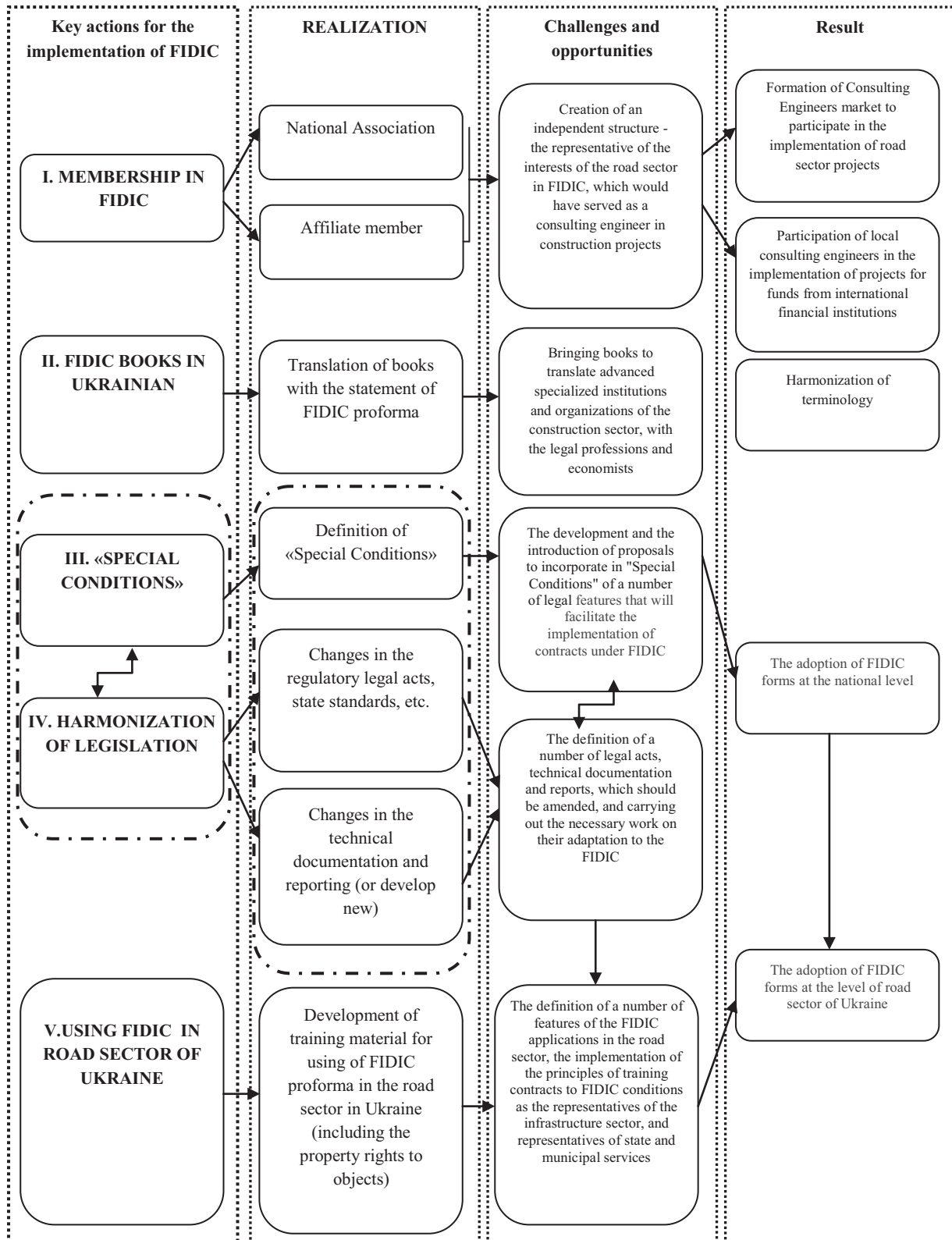


Figure 2 - Scheme of the implementation of FIDIC contracts in the road sector in Ukraine

The directly relationship between customer and performer on FIDIC is not allowed. There is also the problem of long-term contractual relationships, which can be solved by making changes to the Budget Code.

2. The problem of the definition of "consulting engineer" in the current legislation (as a third party of the contract), his powers, qualifications, responsibilities, etc.

FIDIC defines the "engineer" as an independent company, impartial, highly qualified and experienced professionals for the design of the construction and management, including the selection of a designer; organizing and conducting tenders; construction management; technical and field supervision; acting as an independent arbiter in disputes between the parties.

3. Revision of approaches to determining the value of work and their reflection in the financial statements. For example, in Ukraine necessarily attached transcript by component costs at each stage of the calculations, whereas in FIDIC contracts may be sufficient to indicate the costs once a part of the offer [5].

4. Definition of quality controls, technical supervision of the rules, and receive funding works.

5. The absence of official translation proforma into the Ukrainian language creates the problem of inadequate understanding of the terminology, principles and mechanisms of FIDIC action [5].

Conclusion

There are many legal obstacles for the use of FIDIC contracts in Ukraine, some of which can be eliminated by using the mechanism of change of the current legislation and normative-legal base, the other part can be taken into account in the part of the "Special Conditions". It is also necessary to take measures to amend the legislation on property rights and land. It should be possible to renew the lease of land to the new owners of real estate on a simplified and transparent scheme and make an inventory of public and uniform registers (inventories) and to provide a direct exchange of information between them within the framework of automated systems (State Land Cadastre, State Register of Property Rights To Immovable Property And Their Burdens, The State Register of Civil Status of Citizens, Tax Payers Registers, etc.).

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ABSTRACT

Kharchenko A. Problems of property rights in the implementation of standard forms FIDIC contracts in the road sector in Ukraine. Visnyk National Transport University. Series «Economic sciences». Scientific and Technical Collection. – Kyiv: National Transport University, 2017. – Issue 2 (38).

The article reveals the problem of the property rights in the implementation of standard forms of FIDIC contracts in the road sector in Ukraine.

The object of the study - property rights in the implementation of standard forms FIDIC contracts in the road sector in Ukraine.

Purpose of the study - to analyze the theoretical aspects of the property rights in the implementation of standard forms of FIDIC contracts in the road sector in Ukraine.

Methods - analysis and theoretical generalization of the legislation on property rights and land.

In the article are listed as main problems, which directly affect the property rights in the implementation of FIDIC contracts and adaptation problems of FIDIC forms in general. Also, was offered the scheme of implementation of FIDIC contracts in the road sector in Ukraine.

The results of the article can be used as a theoretical basis for the implementation of standard forms FIDIC contracts in the road sector in Ukraine.

KEY WORDS: CONTRACT, FIDIC, PROPERTY RIGHTS, ROAD SECTOR, STANDARD FORM

РЕФЕРАТ

Харченко А. Проблеми майнових прав при реалізації типових форм контрактів FIDIC в дорожньому господарстві України / А.Харченко // Вісник Національного транспортного університету. Серія «Економічні науки». Науково-технічний збірник. – К. : НТУ, 2017. – Вип. 2 (38).

У статті розкривається проблема забезпечення майнових прав при реалізації типових форм контрактів FIDIC в дорожньому господарстві України.

Об'єкт дослідження – майнові права при реалізації стандартних форм контрактів FIDIC в дорожньому господарстві України.

Мета статті - проаналізувати теоретичні аспекти майнових прав при реалізації типових форм контрактів FIDIC в дорожньому господарстві України.

Методи - аналіз і теоретичне узагальнення законодавства про право власності та земельні ресурси.

У статті перераховані основні проблеми, які безпосередньо впливають на права власності при реалізації FIDIC контрактів, і проблеми адаптації форм FIDIC в цілому. Крім того, була запропонована схема реалізації FIDIC контрактів в дорожньому секторі в Україні.

Результати статті можуть бути використані в якості теоретичної основи для реалізації типових форм контрактів FIDIC в дорожньому господарстві України.

КЛЮЧОВІ СЛОВА: КОНТРАКТ, FIDIC, МАЙНОВІ ПРАВА, ДОРОЖНЄ ГОСПОДАРСТВО, СТАНДАРТНА ФОРМА

РЕФЕРАТ

Харченко А. Проблемы имущественных прав при реализации типовых форм контрактов FIDIC в дорожном хозяйстве Украины / А.Харченко // Вестник Национального транспортного университета. Серия «Экономические науки». Научно-технический сборник. – К. : НТУ, 2017. – Вып. 2 (38).

В статье раскрывается проблема обеспечения имущественных прав при реализации типовых форм контрактов FIDIC в дорожном хозяйстве Украины.

Объект исследования – имущественные права при реализации стандартных форм контрактов FIDIC в дорожном хозяйстве Украины.

Цель статьи - проанализировать теоретические аспекты имущественных прав при реализации типовых форм контрактов FIDIC в дорожном хозяйстве Украины.

Методы - анализ и теоретическое обобщение законодательства о праве собственности и земельных ресурсах.

В статье перечислены основные проблемы, которые непосредственно влияют на права собственности при реализации FIDIC контрактов, и проблемы адаптации форм FIDIC в целом. Кроме того, была предложена схема реализации FIDIC контрактов в дорожном секторе в Украине.

Результаты статьи могут быть использованы в качестве теоретической основы для реализации типовых форм контрактов FIDIC в дорожном хозяйстве Украины.

КЛЮЧЕВЫЕ СЛОВА: КОНТРАКТ, FIDIC, ИМУЩЕСТВЕННЫЕ ПРАВА, ДОРОЖНИЙ СЕКТОР, СТАНДАРТНЫЕ ФОРМЫ

АВТОРИ:

Харченко Анна Миколаївна, кандидат технічних наук, Національний транспортний університет, доцент кафедри управління виробництвом і майном, e-mail: anna-x3@ukr.net, тел. +380442807909, Україна, 01010, м.Київ, вул.Суворова, 1, к.206.

AUTHOR:

Kharchenko Anna N., Candidate of technical science, National Transport University, associate professor of Department of Production and Property Management, e-mail: anna-x3@ukr.net, tel. +380442807909, Ukraine, 01010, Kyiv, Suvorova 1, k.206.

АВТОРЫ:

Харченко Анна Николаевна, кандидат технических наук, Национальный транспортный университет, доцент кафедры управления производством и имуществом, e - mail: anna-x3@ukr.net, тел. +380442807909, Украина, 01010, г.Киев, ул.Суворова, 1, к.206

РЕЦЕНЗЕНТИ:

Лантух-Лященко А.І., доктор технічних наук, професор, Національний транспортний університет, професор кафедри мостів і тунелів, Київ, Україна.

Казачков І.В., доктор технічних наук, професор, Ніжинський державний університет ім. М. Гоголя, завідуючий кафедрою ПМІОВ, Ніжин, Україна.

REVIEWER:

Lantuh-Liashchenko A.I, Dr. of Tech. Sci., professor, National Transport University, professor of department of bridges and tunnels, Kyiv, Ukraine.

Kazachkov I.V., Dr. of Tech. Sci., professor, Nijinsky State University of Nikolai Gogol, head of the department PMIOV, Neghin, Ukraine.