

The Duty to Co-operate in Construction Contracts – an International Review

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Abstract:

Contractually non-described issues are inevitable when implementing relational contracts. Mutual understanding and co-operation are vital for solving such issues. Disputes regarding construction contracts are usually caused by a lack of co-operation between the parties involved – often because they do not understand or underestimate the obligation to co-operate. The purpose of this paper is to emphasize the importance of the duty of co-operation when implementing the rights and obligations in construction contracts. The paper elucidates the substance of the duty to co-operate in construction contracts and analyses the importance of notices, meetings, assistance, and good management on site. The market situation created by the worldwide credit crunch makes scrutiny of such issues all the more important.

The analysis is based on the following widely accepted international documents: UNIDROIT Principles of International Commercial Contracts (2004); The Principles of European Contract Law (2003), prepared by The Commission of European Contract law; the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987); with references also to the FIDIC Red Book of 1999, several jurisdictions of Common law and Continental law systems. Analysis of the above-mentioned sources leads to the following inferences. The duty to co-operate is related to the principles of good faith and fair dealing, which permeate the law of contract. In order to achieve the optimal result for the parties involved, a reasonable level of co-operation must be maintained; the parties should be well aware of certain measures to be taken during the construction process. Close attention to proper implementation of the duty to co-operate leads to better mutual understanding between parties and may prevent tension, conflicts and disputes from arising while implementing the construction contract.

Keywords:

Duty to co-operate, construction contracts.

1 Introduction

A contract is not merely a meeting point for conflicting interests but must also, to a certain extent, be viewed as a common project in which each party must co-operate. Duty to co-operate is established in such instruments of the unification of private law (which shall be examined) as the UNIDROIT Principles of International Commercial Contracts (2004) (hereinafter – the UNIDROIT Principles), The Principles of European Contract Law (2003) (hereinafter – the PECL), the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987), and the Draft Common Frame of Reference (hereinafter – the DCFR), prepared by the Study Group on a European Civil Code and Research Group on EC Private Law (*Acquis Group*). The duty to co-operate may be also found in FIDIC model documents, civil codes in Continental law system countries and case law in Common law system countries. Therefore, duty to co-operate may be considered as a general principle of law.

This paper analyses the above-mentioned documents drafted by international organisations/research teams. As these documents are drafted on the basis of international comparative analysis, the paper does not analyse legislation of particular jurisdictions, with the exception of several cases. The Author uses means of analysis and comparative methods in this paper. The paper's primary purpose is to elucidate the substance of the duty to co-operate, which is a substantive principle, and also to answer the question: what is the impact of proper implementation of the duty to co-operate in preventing conflicts and disputes, and making the construction process more fluent and coordinated? This is a very pertinent topic in long-term construction contracts, where proper implementation of the contract depends heavily on a wide range of participants: architects, engineers, and technical supervisors etc.

2 The principle of duty to co-operate

In many Civil law systems, it is considered that the duty to co-operate derives from the principle of good faith. The duty to co-operate is also recognised as a general principle of *lex mercatoria* (Vogenauer and Kleinheisterkamp 2009, p. 543). The duty to co-operate is implied in the key instruments of the unification of private law. These instruments are analyzed below in attempt to elucidate the substance of the analysed principle.

2.1 The principle of duty to co-operate in the UNIDROIT Principles 2004

The UNIDROIT Principles clarify that when concluding a contract, contracting parties receive not only rights but also obligations towards each other. In certain cases, one contracting party should perform or refrain from certain actions in order to allow the other party to implement its duties – i.e. the parties are under a duty to co-operate.

The duty to co-operate is stated in the fifth chapter (Content and third-party rights), regulating the basic implied terms of contract law. Under Article No. 5.1.3 (Co-operation between the parties) of UNIDROIT Principles (2004 edition, p. 102), each party must co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations. Thus, the obligation to co-operate is settled next to the very basic implied principles: good faith and fair dealing,

reasonableness etc. (article No. 5.1.2.). The placing of the duty to co-operate in the fifth chapter, and the fact that it is distinguished as a separate principle, show the great importance attached to the duty and implies that it is considered a general principle of contract law.

The cited provision clearly states that the duty to co-operate is not an ordinary obligation of one party to another party. The duty to co-operate cannot be considered as one party's absolute right to demand from another party the performance of certain actions. The provision draws a line between the right to demand co-operation and the obligation to co-operate. As the duty to co-operate is not an ordinary obligation, but a principle, the line is flexible and can be best expressed by one word – reasonable.

UNIDROIT Principles commentary (1994 edition, p. 103) states that “the duty of co-operation must of course be confined within certain limits [the provision refers to reasonable expectations], so as not to upset the allocation of duties in the performance of the contract.” Although the principal concern of the provision is the duty not to hinder the other party's performance, there may also be circumstances which call for more active co-operation. Thus, the obligation of one party to co-operate with the other is defined with the abstract aspect of reasonable expectations, which depend on the factual circumstances. It is very difficult to determine the substance of the duty to co-operate, as necessarily the duty significantly depends on the factual situation. Indeed, the circumstances of the contract implementation may require the parties to be either passive or to be active in the performance of their contractual obligations.

The latest commentary on the UNIDROIT Principles (Vogenauer and Kleinheisterkamp 2009, p. 543, 544) distinguishes two dimensions of the duty to co-operate: (i) each party is under a duty to remain passive if a particular action might hinder the performance of the other party. Parties must refrain from obstructing the other party's efforts to perform; (ii) each party is under a duty to engage in actions if such actions are required to enable or facilitate the other party's performance. In the first case, if for example the owner should provide the site and if the contractor so requires, the owner should refrain from performing any activity on the site if such activity could obstruct the proper implementation of the contractor obligations. In the second case, for example, the contractor may request the owner to provide the contractor with necessary solutions or responses to the contractor's questions or help obtain instructions from an architect.

The UNIDROIT Principles do not define the scope of the duty to co-operate in detail. They merely provide abstract criteria of “reasonable expectations”, which help to identify the level of necessity to co-operate and actions which should be performed. The Principles specify, however, that the duty to co-operate may be performed in both active or in passive ways, depending on the facts in a particular case. Such abstract determination of the duty to co-operate is thought-provoking and requires the parties to act on their best endeavour, while seeking proper implementation of the co-operation.

2.2 The principle of duty to co-operate in the PECL

The duty to co-operate is also found in the PECL article No. 1:202 (Duty to Co-operate; PECL 2003). The provision states that each party owes to the other a duty to co-operate in order to give full effect to the contract. Apparently, the PECL wording differs from

that of the UNIDROIT Principles. The PECL, as well as the UNIDROIT Principles, require the parties to co-operate as “reasonably expected.” However, the PECL stipulates additional criteria, which help to define whether the party duly implements the obligation to co-operate – i.e. the requirement to act in order “to give full effect to the contract.” On first sight, it might be thought that one party may request unreasonably much from its counterparty. However, each party has its own obligations under the contract. Moreover, the party may not be deemed in breach of the duty to co-operate, if such party does not perform what it was not obliged to perform (Lando and Beale 1995, p. 60). Therefore, even though parties are under a duty to co-operate, a reasonable balance between the parties must be maintained, while paying attention to their obligations.

While the wording of the duty to co-operate differs in the UNIDROIT Principles and PECL, the nature of this principle is the same. Both parties should act in their best ability while implementing the contract. In order to assess whether the duty to co-operate was properly implemented, it is necessary to analyse the balance of the party obligations, the factual situation and the final result – i.e. whether it was or was not achieved due to the lack of co-operation of one of the parties.

Under the PECL, non-co-operation of one party is considered as non-performance (with all the consequences thereof). Paragraph 4 of Article 1:301 (Meaning of Terms) provides that ‘non-performance’ denotes any failure to perform an obligation under the contract, whether or not justified. The “failure to perform” includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract. Moreover, under the UNIDROIT Principles, non-co-operation is considered as non-performance as well (Vogenauer and Kleinheisterkamp 2009, p. 547). This implies that proper implementation of the duty to co-operate should be treated not only as a theoretical principle, but also as an obligation. This obligation is especially important in contracts obliging parties to work together; for example, construction contracts where a contractor may implement the idea of the owner (or his architect) only if worksheets are clear.

2.3 The principle of duty to co-operate in UNCITRAL Legal Guide

The UNCITRAL Legal Guide (1987, p. 48) suggests that successful implementation of a contract depends on co-operation between the parties. The Guide clarifies that, while it may be impossible to list all instances when parties should co-operate in the contract, it is desirable that the contract generally obliges each party to both co-operate with another party to the extent necessary for the performance of the other party’s obligations, and also avoid conduct interfering with that performance (UNCITRAL Legal Guide 1987, p. 48). In practice, it is impossible to foresee all the conditions in one single long-term construction contract. Questions during the construction process are inevitable. However, such questions can be addressed by mutual consultations – i.e. proper co-operation. Early solving of questions can prevent disputes.

2.4 The principle of duty to co-operate in the DCFR

While there is no doubt that all parties should co-operate while implementing construction contracts, the scope of the principle is not clear-cut. The DCFR, issued in 2009, attempts to clarify the scope of the duty co-operate. The document was prepared

by the legal academics Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) and reflects a compromise between different legal systems, as it was based on legal regulation and best practice of different EU member states. The provisions of the DCFR go a little further regarding the duty to co-operate than the UNCITRAL Principles and the PECL. As the DCFR is reminiscent of a classical code, the duty to co-operate is determined in several chapters.

In the DCFR, the duty to co-operate is set as a general principle of the law of obligations. DCFR III. – 1:104 (Co-operation) states the general principle of co-operation. It provides that the debtor and the creditor are obliged to co-operate with each other when and to the extent that can reasonably be expected for the performance of the debtor (Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) 2009, p. 230). The wording is closer to the wording of the UNIDROIT Principles than of the PECL. The duty to co-operate is determined by the criteria of reasonable expectations.

The DCFR classifies construction contracts as services contracts. The specific obligations stemming from the duty to co-operate in the construction process are found in the following provisions: (i) Article No. IV. C. – 2:103 (Obligation to co-operate, stated in Chapter 1 (General provisions) of Part C – (Services); and (ii) Article No. IV. C. – 3:102 (Client's obligation to co-operate), stated in Chapter 3 (Construction) of Part C – (Services). The provisions lay down each party's obligations for proper implementation of the duty to co-operate. Article No. IV. C. – 2:103 states that (1) the obligation of co-operation requires in particular:

- (a) the client to answer reasonable requests by the service provider for information insofar as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;
- (b) the client to give directions regarding the performance of the service insofar as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;
- (c) the client, insofar as the client is to obtain permits or licences, to obtain these at such time as may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;
- (d) the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract; and
- (e) the parties to co-ordinate their respective efforts insofar as this may reasonably be considered necessary to perform their respective obligations under the contract (Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) 2009, p. 304, 305).

In addition, obligations specific to the construction industry are laid down in Article No. IV. C. – 3:102, which provides that the duty to co-operate requires the client to:

(a) provide access to the site where the construction has to take place insofar as this may reasonably be considered necessary to enable the constructor to perform the obligations under the contract; and

(b) provide the components, materials and tools, insofar as they must be provided by the client, at such time as may reasonably be considered necessary to enable the constructor to perform the obligations under the contract (Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) 2009, p. 311).

On first sight it appears as if the DCFR refers only to active actions of the parties for the proper implementation of the duty to co-operate: i.e. give answers, provide directions, obtain permits, coordinate, provide access, and provide goods. It is not an exhaustive list of obligations comprising the duty to co-operate. In practice, where specific obligations are not defined, the general principle of duty to co-operate applies.

Nevertheless, in the opinion of the author of this paper, under the DCFR the duty to co-operate may require a party to stay passive in certain cases. For example, the contractor may have to provide necessary information to the client and to refrain from interfering, to allow the client to make independent observations, and notify anticipated non-conformity or directions to the contractor thereafter. All these obligations reflect common construction practice and are (or may) be respectively acknowledged in Civil law system countries or in Common law systems. However, exact obligations may vary and should be reviewed accurately.

If a construction contract does not specify the actions essential for implementing the duty to co-operate, the necessity to perform certain actions can be determined according to the reasonableness test. This test has already been analysed and is embedded not only in the DCFR but also in the UNCITRAL Principles. Finally, it should be noted that the above listed obligations are only part of all the obligations constituting the duty to co-operate. In other cases, where the exact duty is not defined, the main principle of duty to co-operate applies with proper implementation of the reasonableness test.

2.5 The principle of duty to co-operate in construction contract forms

2.5.1 The principle of duty to co-operate in the FIDIC

Some of the best-known construction contract forms are the FIDIC construction contracts. These contracts are widely used because of the implemented balance between the parties. Of course, some authors may disagree with this statement, but this is a question of separate discussion. One of the basic FIDIC contract forms is the Construction Work Contract Form of the first edition 1999 – the so-called Red Book 1999, where parties' rights and obligations are defined in twenty chapters.

The Red Book 1999 provides for the duty to co-operate both implicitly and explicitly: for example, an employer's obligation to give the contractor right of access to, and possession of, all parts of the site (clause 2.1); or a contractor's obligation to give notice to the engineer as soon as practicable if the contractor encounters adverse physical conditions, which he consider to have been unforeseeable (clause 4.12).

The duty to co-operate is also explicitly established as a separate contractors' obligation in the FIDIC Red Book 1999. Sub-clause No. 4.6 (Co-operation) states that the contractor shall, as specified in the contract or as instructed by the engineer, allow appropriate opportunities for carrying out work to: (a) the employer's personnel, (b) any other contractors employed by the employer, and (c) the personnel of any legally constituted public authorities, who may be employed in the execution on or near the site of any work not included in the contract (FIDIC 1999). The same sub-clause clarifies that any such instructions shall constitute a variation of and to the extent that it causes the contractor to incur unforeseeable cost. Services for the personnel and other contractors may include the use of contractor's equipment, temporary works or access arrangements which are the responsibility of the contractor (FIDIC 1999). As we can see, the clause of co-operation is not analogous to the above analysed clauses of the duty to co-operate in UNIDROIT Principles or PECL. The FIDIC Red Book 1999 does not provide for the duty to co-operate as a general obligation of both parties. As Glover states, despite being headed "co-operation", this sub-clause does not seem to refer to co-operation in the partnering sense of the word, or arguably in any real sense at all (2006, p. 92).

The above cited FIDIC Red Book 1999 sub-clause of co-operation indicates several issues which can be considered as substantive elements of the duty to co-operate. Of course, this does not mean that the parties do not have the duty to co-operate while implementing the contract. The duty to co-operate is a general principle of contract law, which is widely acknowledged in international practice and is a codified norm in national laws or an implied legal concept arising from the case law. Therefore, the parties have a duty to co-operate even under the FIDIC Red Book 1999 though it simply lists a limited number of obligations, which are a part of the general principle – duty to co-operate.

2.5.2 The principle of duty to co-operate in other standard construction contract forms

The duty to co-operate is also an important principle while implementing obligations under other well-known standard contract forms, such as the JCT and the NEC. The duty to co-operate is not directly expressed in the JCT standard terms, but this does not mean that the duty to co-operate can be ignored. It is an implied term under English law that the employer will do all that is reasonably necessary on his part to bring about completion of the contract (Furmston 2006, p. 164). Implementation of a building contract embodying the JCT general conditions does require close co-operation between the contractor and the architect (Furmston 2006, p. 171). The importance of the duty to co-operate is also emphasised in the Early Contractor Involvement (ECI). Mcinnis (2003, p. 289) states that co-operation is key in both relational contracting and under the NEC (New Engineering Contract).

The importance of the duty to co-operate is acknowledged in the NEC as well as in long-term contracts. This was influenced by relational contract theory, the basics of which were elaborated by MacNeil¹. Mcinnis (2003, p. 130) presents a short distillation of MacNeil's work: the success of the contractual relationship depends less upon what

¹ For more see MacNeil, I. R. (1980), *The New Social Contract*, Yale University Press, New Haven.

has been agreed than upon how the parties will agree to handle events in the future. Relational contract theory is only one of many modern contract law theories trying to overcome shortcomings of traditional contract law. Under classical contract law, there ought to be no room for an additional unexpressed obligation to co-operate (Quick 2007, p. 7). However, common law courts have insinuated the obligation into contracts by a variety of devices including the general rules of interpretation and implication of terms (Quick 2007, p. 7), and more will be discussed in the next section of this paper.

Clause 10.1 of the NEC3 states that an employer, contractor, project manager and supervisor must act as stated in the contract and “in a spirit of mutual trust and co-operation.” The clause provides for two obligations: i) to act as stated in the contract; and ii) to act in a spirit of mutual trust and co-operation (Egglston 2006, p. 85). In other words, the duty to co-operate goes beyond the provisions of the contract and obliges the parties to act on the basis of mutual trust and co-operation. According to some commentators, contractors, rather than employers, are likely to be the main beneficiaries of any uncertainty, as they have more opportunities to capitalise on uncertainty as to whether individual provisions are to be applied in a spirit of mutual trust and co-operation and they are better placed to prove damages in any claim based on failure to do so (Egglston 2006, p. 85). However, the author of this paper considers that such concern is unsubstantiated. Uncertainties in relational contracts may be addressed and issues arising from such uncertainties may be solved or avoided all together if both parties co-operate, i.e. act fairly and put their best efforts to implement the contract.

Moreover, clause 16 of NEC3 sets out early warning procedures. The clause obliges the contractor to warn the project manager on certain matters. Both the contractor and project manager are then required to attend an early warning meeting. The main purpose of such a meeting is to discuss possible problem solutions. The clause provides for a partnering based approach – to resolve an issue before it causes a dispute. In that respect, co-operation between the parties generally and early warning meetings in particular allow the parties to discuss and resolve the matter in the most efficient manner.

Consequently, the parties have a duty to co-operate, regardless of which above mentioned contract form was chosen for the project implementation, but national law is not less important as chosen contract form.

2.6 The principle of duty to co-operate and national law

Different jurisdictions follow different approaches regarding good faith and the duty to co-operate (these differences are especially apparent when comparing continental and common law jurisdictions), but the comparison of these approaches requires separate research.) *Travaux preparatoire* of the UNCITRAL Principles, the PECL and the DCFR contain a rather comprehensive analysis and comparison of different legal systems. For the purposes of this paper, the author focuses his analysis on international documents as they reflect the common view of different legal systems on the principle of duty to co-operate. However, for the sake of completeness, the author nevertheless refers to several examples of national legislation on the duty to co-operate.

2.6.1 *Duty to co-operate under German law*

In German civil law, duty to co-operate is derived from the principle of good faith. Under article No. 242 (Performance in good faith) of German Civil Code (the BGB)² an obligor has a duty to perform certain actions as required by the principle of good faith. The concept of good faith is one of the core legal principles in German civil law (while common law jurisdictions follow the opposite approach)³. Moreover (as co-operation duty is essential in the contracts to produce work), article No. 642 (Collaboration by the customer) of the BGB provides that if a customer must perform certain actions in order to achieve the result envisaged in the contract, the contractor may demand reasonable compensation if the customer, by failing to perform the act, is in default of acceptance. As we see, the general principle that the customer of the contractor has a duty to co-operate is firmly established in one of major jurisdictions in Europe – German civil law.

2.6.2 *Duty to co-operate under Lithuanian law*

Co-operation duty is determined in the codes of small continental law jurisdictions, especially where new codes were enacted recently; for example, article No. 6.691 (Co-operation of parties to a contract of construction independent work) of the Civil Code of the Republic of Lithuania⁴ provides that in implementing a construction contract, parties to the contract are obliged to co-operate. In the event of obstacles hindering implementation of the contract, each of the parties is obliged to take all available reasonable measures to eliminate such obstacles. Accordingly, the party that fails to perform this duty is deprived of the right to claim damages caused due to the relevant obstacles. Both parties of the construction contract have a general duty to co-operate that is understood as the duty to remain passive and the duty to engage in actions. Notably, such wording of the provision gives national courts ultimate freedom of interpretation as to which party will be considered responsible for failure to co-operate on a case-by-case basis. Therefore, not only the rules of the codes but also judicial practice should be considered when identifying the concept of duty to co-operate under exact jurisdiction.

2.6.3 *Duty to co-operate under common law*

Common law jurisdictions have already firmly established duty to co-operate in long-term contracts. For example, under English law, in leading case *London Borough of Merton LBC v Stanley Hugh Leach Ltd*⁵ two general employers' obligations were established:

- (a) The employer will not hinder or prevent the contractor from carrying out all its obligations in accordance with the terms of the contract, and from executing the works in a general and orderly manner;

² German Civil Code (BGB), http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G1, viewed 03/06/2010.

³ For more see: WHITTAKER, S. and ZIMMERMANN, R., 2000. Good faith in European contract law: surveying the legal landscape. In: ZIMMERMANN, R. and WHITTAKER, S., ed. *Good faith in European contract law*. Cambridge: Cambridge University Press, 7- 62.

⁴ The Civil Code of the Republic of Lithuania (with amendments) (Valstybės žinios, 2000, No. 74), http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_1?p_id=370997, viewed 03/06/2010.

⁵ (1985) 32 BLR 51.

(b) The employer will take all steps reasonably necessary to enable the contractor to discharge all its obligations and to execute the works in a regular and orderly manner.

As Murdoch and Hughes (2008, p. 172) observe, these two general obligations are in reality “the positive and negative aspects of the same thing.” Together they make in the employer’s duty to co-operate with the contractor in all aspects of the construction work (Murdoch and Hughes 2008, p. 172). Duty to co-operate is usually referred to as employer’s obligation, because the contractor is usually the weaker party in construction contracts, and in most cases the co-operation of the employer is required for the proper implementation of the contract.

The author notes that the concept of duty to co-operate may vary from country to country, and attention should be paid to national legal regulations when determining the duty to co-operate.

3 Implementing the duty to co-operate in the construction process

Nowadays the construction process is increasingly complex as huge and expensive projects (e.g. road construction, bridges, airports, sports stadiums, music arenas etc.) are planned and implemented. Such projects involve many participants: architects, engineers, supervisors, consultants, contractors, subcontractors, etc. The implementation of such projects usually lasts a long time. During the implementation of long-term projects, unforeseen circumstances may often arise. This leads the parties to perceive long-term contracts as common projects. According to Campbell and Harris (1993, p. 167), efficient long-term contractual behaviour must be understood as consciously co-operative. Parties perceive long-term contracts as analogous to partnership.

If the construction process is indeed perceived as a common project, and the construction contract as analogous to partnership, the duty to co-operate is thus a pertinent element of that process. However, in practice, the importance of the principle of the duty to co-operate in contract law is underestimated. Mcinnis (2003, p. 293) analysed the duty to co-operate in depth; he concluded that the duty to co-operate is not an additional obligation under classical contract law. However, Mcinnis argues, the courts have imposed the duty to co-operate on the parties. In other words, the duty to co-operate was acknowledged to exist in itself.

3.1 Duty to co-operate prevents disputes

Usually conflicts arise because the parties misunderstand each other. Occasionally even minor contradictions may develop into a complicated dispute. Proper implementation of the duty to co-operate may at the very least prevent many initial contradictions.

First, it is very important that each party is able to express its needs and expectations. As Jansen (1998, p. 147) observes, the employer is under an obligation to inform the contractor about his ideas, needs and expectations in order to facilitate the contractor’s performance of his obligations under the contract. In a traditional construction process, the communication of expectations is a condition *sine qua non* to the contractor’s ability to commence performance of his obligations under the contract (Jansen 1998, p. 148). Such communication of expectations can be reflected in various ways, e.g. as Jansen

(1998, p. 154) suggests, the description of the work to be carried out by submitting bills of quantities is a characteristic feature of the general conditions of building contracts used in English legal culture. Other countries also have similar measures under which the expectations can be reflected clearly.

Second, disclosure of information and providing timely directions is equally important. Even if the needs and expectations of the parties are expressed, withholding of some information may lead to significant damage. As Jansen (1998, p. 170) states, the employer is under an obligation to disclose information by means of directions; and this general obligation derives from the general obligation to provide the contractor with necessary information under various legal systems such as France, Germany, and England. Moreover, proper implementation of this obligation may reinforce the bonds between the parties. Usually, the engineer's and surveyor's roles are of high importance while implementing the obligation to give instructions in reasonable time.

Third, exchange of information between the parties should be ensured. The best way to do so may be by holding meetings. Meetings as a dispute prevention tool was identified in the UNCITRAL Legal Guide (1987, p. 111), which suggests that a contract may provide that representatives of the parties are to meet periodically at specified intervals on the site to promote co-operation between them and to resolve outstanding issues concerning the construction on site. Such meetings may help to resolve routine problems or misunderstandings, and thus dispel the need to invoke contract provisions on dispute settlement.

Finally, good conflict management may prevent parties from disputes. Disagreements that arise in meetings can be solved only if the parties possess conflict management skills. In practice, usually professional engineers and surveyors are called upon to settle disagreements between the parties. Wilmot-Smith (2006, p. 54) observed, "contractors had professionals on their staff that were often as good as or better than the professional engineers and surveyors who were employed by the firm of architects or engineers which was engaged by the employer". It should be noticed that sometimes personnel of the contractor are held to be better at contract conflict management than many professionals, but engineers as mediators or adjudicators are usually called upon only when serious questions arise and where the management of the conflict is complicated. This shows that contractor staff can't handle all situations and professional dispute settlers should be involved in the process.

In conclusion, the emergence of conflicts may be prevented by proper implementation of the following elements of the duty to co-operate: (i) clear statement of parties' needs and expectations, (ii) disclosure of information and provision of timely directions, (iii) exchange of information (especially during meetings) and (iv) good conflict management.

3.2 Duty to co-operate conditioned by outside factors

Even if parties do their best, it is very difficult to predict future difficulties, which are beyond the control of the parties. Proper implementation of the duty to co-operate may help to solve the problems during the implementation of the contract.

One such example can be exempting impediments. If one party invokes an exempting impediment, it should give written notice of the impediment to the other party without undue delay. This notification could facilitate the taking of measures by the other party to mitigate the loss caused or which is likely to be caused by failure of performance (UNCITRAL Legal Guide 1987, p. 239). Upon receipt of notice on impediment, as the duty to co-operate requires, the parties should meet and consider the measures to be taken in order to prevent or limit the effects of the impediment. The parties certainly also have further duties, such as the duty to prevent and mitigate any loss which may be caused by the impediment.

Such events as breakdowns of economic systems or other upheavals or exceptional circumstances can also considerably influence the conditions under which the parties had assessed their risks and estimated costs before concluding the contract. Such unforeseen circumstances can distort the balance of performance of parties' contractual obligations. The question then arises of which party should bear the risk of such unforeseen changes and to what extent. It is generally acknowledged that the question is to be addressed by applying two fundamental principles – the sanctity of contract (*pacta sunt servanda*) and the equal fundamental principle of good faith (Brunner 2009, p. 391). Without going deeply into the civil law system doctrine of *clausula rebus sic stantibus*, it should be emphasised that hardship cases are solved similarly in different countries. In order to prevent a dispute, parties should co-operate and solve problems, and evaluate which of them should bear the risks. In other words, again, the parties should co-operate – give notices, communicate and negotiate in attempt to sustain their contractual relationship. The UNIDROIT Principles and the PECL establish that in the case of hardship, the disadvantaged party is entitled to request restarting negotiations⁶.

Variation is one more issue which is worth mentioning. As Pfeiffer (2007, p. 166) states, if the subject of contract is complicated then the contract needs to be sufficiently flexible to accommodate later change, and in the construction industry this has always been the situation. Of course, there should not be too many variations, because this can complicate the execution of the contract. Even in the case of variations, if the parties wish to implement the contract, they should co-operate: exchange information, communicate their expectations.

4 Conclusions

The above analysis yields the following main conclusions:

1. The duty to co-operate is a general principal of contract law, which is closely connected with the principle of good faith and fair dealing and plays a major role while implementing construction contracts, and permeates the law of contract;
2. It is very difficult to determine the substance of the duty to co-operate, as the necessity to apply the duty significantly depends on the factual situation and national legal regulations. Nevertheless, two dimensions can be easily distinguished: (i) duty to remain passive and (ii) duty to engage in actions;

⁶ For more see: Brunner 2009, p. 393 - 399.

3. The framework of the duty to co-operate is determined by the criteria of reasonable expectations. Proper implementation of the duty to co-operate can be estimated by analysing the balance of the obligations of the parties, factual situation and final result, whether it was reached or was not reached because of the lack of co-operation of one of the parties;

4. The substance of the duty to co-operate while implementing the construction contract comes from common construction practice. The duty to co-operate comprises such obligations as: (i) to give answers; (ii) to provide directions; (iii) to obtain permits; (iv) to coordinate; (v) to provide access; (vi) to provide goods as agreed; (vii) to provide opportunity for determination (viii) clearly state needs and expectations; (ix) to disclose information and provide timely directions; (x) to provide exchange of information during the meetings; (xi) to take care of good management.

5. The parties should co-operate even if one party invokes an exempting impediment, unforeseen circumstances occur or one party requests variations. Proper implementation of the duty to co-operate may determine the smooth implementation of the construction process, prevent the onset of conflicts or help to solve disputes in their initial stages.

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