A series on extra and additional work / 2

– differences between the Civil Code and the Construction Decree as it was in effect until 1 January 2020 –

The distinction between extra work and additional work is a complex issue that creates a lot of problems and remains a constant source of legal disputes. In the first article of our series, we pointed out a few criteria that businesses can use to answer at least some of the multitude of diverse questions they regularly encounter in connection with construction contracts. This article addresses the legal uncertainty that existed until 1 January 2020 as a result of the conflicting provisions of the Civil Code and the Construction Decree and made life harder for everyone who was involved in construction projects. However, this remains a pressing issue because construction contracts that were concluded before 1 January 2020 are still subject to the conflicting regulations.

This analysis is part of a series of three articles that examine certain issues associated with the legal interpretation of extra and additional work. The first article described how extra and additional work can be distinguished. The second discusses the differences between the Hungarian Civil Code and Government Decree No. 191/2009 on Construction Activities as it was in effect until 1 January 2020. Finally, the third article will address the issue of how the related risks can be managed. This series is based on a more detailed article that was published in issue No. 2019/9-10 of Polgári Jog ("Civil Law"), a journal by Wolters Kluwer. We recommend that article for readers who want to take a deeper dive into this matter.

1. Problems with the Construction Decree as it was in effect until 1 January 2020

[1] Most of the uncertainties surrounding the issue of extra and additional work stem from the fact that the Civil Code and the Construction Decree used different definitions for these terms. In practice, it was not clear whether the Construction Decree could override the Civil Code and whether parties were allowed to deviate from the definitions used in the Construction Decree. Additionally, it was a questionable but widely held view among experts of the field that fees and costs could only be charged on the basis of work that qualified as additional or extra work under the Construction Decree.

[2] As discussed in the first article of our series, the Civil Code uses a dichotomy of terms: there is work that qualifies as extra work and extra fee is payable for it because it was not part of the original specifications and was ordered after the contract had been concluded; and there is additional work, where no fee or cost reimbursement is payable even if the contractor did not include it in its bill of quantities, because it was a part of the technical specifications regardless. On the other hand, contractors are entitled even in flat-rate arrangements to the reimbursement of costs that were unforeseeable on the contract date (while the old Civil Code was in effect, such work was known as "work required due to technical necessity" in judicial practice).

[3] On the other hand, Section 2f) of the Construction Decree defined extra work as follows: "work that is not included in the documentation underlying the contract and that is ordered on the basis of an unforeseeable technical necessity." So the Construction Decree tagged another element on to the Civil Code's definition of extra work: technical necessity that could not be foreseen on the contract date.

[4] Additionally, Section 3(9) of the Construction Decree stated that "the contractor shall, in accordance with a relevant separate agreement, carry out any extra work that is required due to a technical necessity or in order to make the facility safe and fit for the purpose intended." All this means that works qualifying as extra work under the Civil Code only qualified as such under the Construction Decree if they were required due to a technical necessity.

[5] Section 2e) of the Construction Decree gave a narrower definition than the Civil Code for additional work as well: "additional work: any item of work that is clearly identifiable in the (tender or execution) documentation that serves as the basis of the construction contract but not included in the contractor's apprised bill of quantities and the quantity of which increases due to a unforeseeable technical necessity."

[6] Section 3(8) of the Construction Decree stated that "a contractor can only charge fees for additional work if the relevant item of work was included in the contractor's apprised bill of quantities but the quantity changed."

[7] **The definition of extra and additional work, and other related provisions in the Construction Decree created uncertainties in the application of the regulations, which can be summarised as follows:**

- **In contrast with the Civil Code, the Construction Decree did not make a distinction between flat-rate and itemised arrangements**, which could mislead developers and contractors as to whether fees could be charged for additional work.

- **The Civil Code states that any work that is ordered after the conclusion of the contract is extra work, whereas the Construction Decree stated that only work that was required due to a technical necessity could qualify as extra work.** Therefore, the Construction Decree essentially eliminated the most frequent reason for extra work (within the meaning of the Civil Code). The overwhelming majority of extra work is ordered on the basis of post-contracting requirements rather than due to a technical necessity. This can raise the risk that a contractor could only charge fees for extra work that was required due to a technical necessity.

- **The Construction Decree limited the meaning of additional work, and contractors' ability to charge for them, to increases in the quantities stated in the bill of quantities.** The risk in that is contactors could only charge for quantity increases, and not new items of work, under the category of additional work.

- **In essence, the Construction Decree created a mash-up extra work, additional work and work required due to technical necessities, which are clearly distinguished in the Civil Code.** Among the many problems that this created was that contractors, despite the Civil Code's rules, could not seek the reimbursement of costs that were incurred in connection with additional work and could not be anticipated when the contract was concluded.

2. Possible solutions to the problems with the Construction Decree as it was in effect until 1 January 2020

[8] No clear and unequivocal case law or uniform opinion in the legal literature has crystallised as to how the contradiction between the Civil Code and the pre-2020 Construction Decree could be resolved and which of the provisions should prevail. Nevertheless, we will now attempt to present the criteria and modes of interpretation that appear to be on the most solid legal ground and are therefore more likely to carry the day in court.

[9] Up to 1 January 2020, the definition of extra work in the Construction Decree was included among the interpretive provisions, which describe the relevant definitions as being applicable "for the purposes of this decree". Therefore, these definitions were not intended to have a general legal meaning and were limited to the interpretation of the meaning and application of this specific piece of legislation. Consequently, our position is that the definition of extra work in the Construction

Decree, just as the rest of definitions in its interpretive provision, does not in itself impose any obligation on, or grant any right to, the parties to a contract; rather, it merely describes the situations where the provisions in the Decree that deal with extra work should be applied. In our interpretation, this means that Construction Decree's extra work rules are applicable if there is an item of work that meets the definition; however, these provisions may not result in a situation where work that qualifies as extra work under the Civil Code is not chargeable as extra work in cases that are covered by the Construction Decree. In short, anything that is chargeable as extra work under the Civil Code must also be chargeable under the pre-2020 version of the Construction Decree.

[10] In our view, the contradictions that existed between the Civil Code and the Construction Decree before 1 January 2020 can be managed with the right set of contract terms. Even if the definition in the Construction Decree had a wider application (which we very much doubt for the reasons described above), it would still have to be treated as a permissive rule and the parties could deviate from it in their construction contract. Therefore, if the parties created their own definition of extra work, they could avoid the related legal uncertainties, and in fact they can still do so if they introduce such definition in a modification of their contract.

[11] Finally, we would like to note that in our interpretation, the Construction Decree's pre-2020 definition of extra work cannot in any way affect a contractor's claim for fees regarding work that was not included in the contracted technical specifications. The contractor will be entitled to a fee in return for work that is outside the technical specifications not (only) on the basis of the definition of extra work but (also) on the basis of its own nature. The fact that the fee is modified along with the contracted technical specifications is a typical feature of contract modifications generally, and not only of contract modifications that are based on requirements for extra work. If both parties agree to modify a contract, the fee will be modified automatically, even in the absence of an express agreement. The concept of extra work serves the purpose of allowing developers to unilaterally modify construction contracts when commissioning work that was not originally specified. Consequently, if a contractual or statutory provision modifies, or excludes the application of, the Civil Code's definition of extra work, such modification or exclusion will apply to the developer's right to unilaterally modify technical specifications rather than to the contractor's entitlement to fees for the performance of work that go beyond the original technical specifications. If, in accordance with the developer's intent (whether implied or otherwise), a contractor performs work that is not stated in the contract, it will be entitled to extra pay even if the parties has excluded the possibility extra work or agreed to regulate it differently than the Civil Code.

3. The Construction Decree after 1 January 2020

[12] The current version of the Construction Decree, which took effect on 1 January 2020, defines extra work and additional work by reference to the Civil Code, and therefore those who concluded their construction contracts after that date do not have to contend with the legal uncertainties associated with the earlier version.

***

Authors: András Fenyőházi and Bence Rajkai

.

CERHA HEMPEL
CONSTRUCTION PAPERS

If you are interested in more articles on construction law, please visit our website: **Construction Papers**

Our mailing address:
CERHA HEMPEL Dezső & Partners
Budapest 1011
Fő utca 14-18.
Hungary

E-mail:
andras.fenyohazi@cerhahempel.hu
bence.rajkai@cerhahempel.hu