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CERHA HEMPEL

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GROUND-BREAKING RULES



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Ground-breaking rules – How to manage ground risk in construction projects –

What the earth hides is always a mystery, and so are the legal implications stemming from unknown conditions. While for treasure hunters and archaeologists the secrets of the soil can be exciting, for contractors they are more of a headache than a thrilling experience. A number of projects run into the ground due to the mismanagement of risks arising from unknown conditions beneath the surface.

This article will discuss the legal issues related to “ground risk”, primarily under Hungarian law, but also from an international perspective to help construction companies better understand and manage these complications.

1. What ground risks are and what legal issues it raises

- (1) Soil properties can have a major influence on construction projects. Its composition, hardness and particle size largely determine the time, methods and tools needed to excavate the foundation of a building or dig a tunnel. The problem is that these attributes are not always predictable. There are cases when even preliminary examinations, for example, pilot drilling, do not



provide sufficient information; whereas in other cases, the preparatory phase of the project does not allow for proper soil investigation. Finally, there are situations, and this is the most common case, where the soil conditions are simply radically different from what the parties had anticipated.

- (2) These unforeseen adverse circumstances usually lead to delay and cause extra costs, and the question arises as to which party has to bear the responsibility and the related costs. Answers vary depending on the contractual provisions, the risk and cost allocation mechanisms of the contract and the applicable legal provisions, and, last but not least, on how the given legal system considers enforceable risks and how it determines obligation and liability.

2. Different international approaches

- (3) What makes the comparative analysis of different international approaches particularly interesting is that the response of the major legal systems to this seemingly simple issue reflects the major divergences between the traditions and principles of these legal families.
- (4) In common law, a contract is similar to a guarantee, which in general means that if a party breaches its obligations, the other party is entitled to damages, regardless of whether the breaching party's non-performance was his fault or not. These legal systems emphasise the sanctity of the contract. Predictability that comes from enforcing contract in all circumstances ("*pacta sunt servanda*") is more valued than flexibility allowing for unforeseen or changing conditions. This rigid stance can, of course, lead to a significant upsetting of the contractual value balance. For example, when it becomes more costly for the obligor to complete the contract, and yet he cannot ask for a higher price. It follows from this view that unless the contract expressly provides otherwise, as a main rule, delay cannot be excused, nor can extra costs be claimed on the basis of unforeseeable ground/ soil properties. This is so even if the unpredictable ground / soil conditions make it impossible to carry out the works as planned ("*strict liability principle*"). An exception to this is, if the employer (principal) prepares and provides to the contractor a report on ground conditions on which the tender price has to be based. The High Court of Appeal stated in a case that if there is an implied term or warranty that the ground conditions accord with the hypothesis upon which the contractor was contracted, then the relevant risks must be borne by the employer.
- (5) Civil law systems, perceive the contract more as a promise. Consequently, the enforcement of contractual obligations is based on the moral imperative of fulfilling a promise rather than on the logic of enforcing a guarantee. Thus, a promise cannot be considered to have been breached if external



circumstances made it impossible to keep it, and for this reason the contractor cannot be made liable for the breach if the failure of performance was not his fault (“*default principle*”). In a nutshell, it can be said that the civil law concept of contract implies a presumption that the circumstances considered and foreseen when concluding the contract will not fundamentally change (“*clausula rebus sic stantibus*”). Based on this approach, these systems either allocate such unforeseen (ground) risks to the employer (e.g., German law and Italian law), or provide for the possibility, in exceptional cases, of restoring the contractual equilibrium by renegotiation (for example in France) or, even by judicial means (for example in Germany).

3. What Hungarian law says

- (6) Hungarian law is developed within the civil law tradition, and is closest to the German approach. In case of a fixed price contract, the contractor has to bear the risks and costs associated with his performance. In practice, he has to make sure that the technical content is feasible in the presumed circumstances and at the costs anticipated at the time of the conclusion of the contract. In exceptional cases, however, the contractor may be allowed to excuse its liability for breach (e.g., for the delay) and to recover unforeseen additional costs.
- (7) The contractor can be released from the liability for its breach, if able to prove that the damage occurred in consequence of *unforeseen* circumstances *beyond his control*, and there had been no reasonable cause to take action to *prevent or mitigate* the damage. Accordingly, in case of a delay due to unfavourable soil conditions, the burden of proof is on the contractor. In practice, this means that he has to pay contractual penalty (liquidated damages) for each day elapsed since the contractual deadline until the actual completion of the works, *except for those days* in respect of which he can be excused. The contractor also has to explain how the different causes for delay are related in time and whether they were crucial to the project or not. Furthermore, if the given obstacles were not crucial to the performance of the tasks, in other words, they could have been avoided or their effects could have been reduced (e.g., by reasonable work reorganisation or by involving further manpower and resources), they may be taken into account, but only to the extent such obstacles could not have been eliminated.
- (8) Additional costs may also be claimed in exceptional cases. Hungarian judicial practice considers ground risk as an unforeseen technical necessity, and deals with it as a risk-sharing issue. As explained above, as a main rule, the contractor has to bear all the cost concerning its performance even if he has not assessed them properly when determining the amount of the contractor’s fee.



However, courts set a reasonable limit to the risks and costs assumed by the contractor: the costs arising from unforeseeable obstacles affecting the whole project are usually not covered by (even the fixed) contractor's fee; reimbursement can be claimed for additional costs arising from obstacles that could not have been foreseen. All relevant factors must be considered carefully such as the circumstances of the case, the nature of the work, its scale and its cost.

- (9) On the basis of these principles, depending, of course, on the circumstances of the case and the provisions of the contract, contractors can often exempt their liability and / or claim reimbursement for their additional costs concerning obstacles caused by unforeseen adverse conditions beneath the ground. In one case, for example, the contractor successfully enforced additional costs, because the employer had provided him with incorrect geotechnical data, based on which the contractor had a legitimate expectation that he had to excavate 200m³ of soil. However, after the works had started it turned out that 3000 m³ had to be excavated due to the insufficient stability of the layers of the ground. In another case, the court ruled that the contractor could not have been reasonably expected to take into account the possibility that the ground might contain explosives. It is worth noting that this statement would not necessarily apply in general, for example to areas heavily bombed and devastated by war.

4. How ground risks can be managed effectively

- (10) First, it is essential to assess and document the soil conditions as accurately as possible. The geological data collected should be summarized in geotechnical baseline report on the basis of which the contractual provisions can be structured. Of course, it is not always possible to carry out thorough examinations before the contracting phase, but it should be ensured that the risks assumed by the contractor and the quality and quantity of the data provided by the employer are in balance. In order to avoid misunderstandings, it is also advisable to stipulate whether geotechnical data incorporated in the contract considered a "warranty" by the employer or only general information to be reviewed by the contractor. As mentioned above, in the case where the contractor has to price based on the information provided by the employer, it may imply a "warranty".
- (11) In addition to preparing a list of soil properties, it is also worth identifying and allocating the risks as well as determining the "known unknowns" (risk that you know exist, but can't quantify) and "unknown unknowns" (risks that you are neither aware of nor understand). In general, it makes economic



sense to allocate the risks to the party who can manage it best and at the lowest cost.

- (12) The above considerations should be taken into account when drafting the ground baseline conditions. These provisions should set out the legal consequence of differing site characteristics and unforeseen adverse physical conditions. Standard contracts can help in formulating these provisions, for example the “2019 Emerald Book”, a standard contract form developed by FIDIC (Federation of Consulting Engineers), in association with ITA (International Tunnelling and Underground Space Association).

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