

Risk management in cultural heritage areas

International aspects, Hungarian experience

CERHA HEMPEL

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Chapter 1

What is Culture?

What is Culture?

Culture is the Broader Context within which People Can Come to a Shared Understanding

In all complex forms of human cooperation, a shared broader context is essential for participants to understand one another. Without this common framework, neither understanding nor agreement nor any form of collaboration is possible.

Hence, in order to collaborate, first the participants must establish a shared context through the „*fusion of their horizons*”

„ (...) the fusion of horizons that takes place in understanding is actually the achievement of language” (Hans-Georg Gadamer, Truth and Method, Continuum, London, 2004, p. 370.)

Misunderstanding

Misunderstanding often Stems from Lack of Common Language

Misunderstanding of *technical content* may lead to:

- Design Flaws
- Variations
- Warranty claims

Misunderstanding of *allocation of costs and responsibilities* may lead to:

- Liquidated Damages („LD”), or
- Extension of Time („EOT”)
- Extension of Costs („EOC”)

Chapter 2

Risks and Risk Management

Risks

Risks in construction law encompass a wide range of potential issues that can affect the successful completion, cost and quality of a construction project.

Risk management in construction involves identifying, assessing, and mitigating potential risks that could negatively impact a project's success, safety, or legal standing.

From a litigation perspective, it involves both preventing avoidable disputes and effectively preparing for those that are unavoidable.

Construction projects in cultural heritage areas are especially telling examples of risk management.

Special Risks in Cultural Heritage Areas

„The horizon of the present cannot be formed without the past. There is no more isolated horizon of the present in itself than there are historical horizons which have to be acquired” (Gadammer, p. 340.)

Construction projects in cultural heritage areas pose unique challenges, as participants must engage in a **dialogue** not only with current stakeholders, but also **with the past**. They cannot freely shape their immediate environment; instead, they must align their objectives within the **constraints established by historical and cultural conditions**.

Heritage conservation regulations complicate both the planning and the construction of buildings. Special care must be taken to ensure the **stability** of the foundation structures and the surrounding buildings. **Ground risk** and risks related to **archaeological finds** are especially crucial and require particular attention.

Potential Complications

- Conflicts between heritage regulations, designs and actual site conditions discovered during restoration works.
- Plans and designs cannot be implemented as the condition of the foundation structures and surrounding buildings is worse than expected.
- Unforeseen soil conditions hinder construction works.

Ultimately, all these risks lead to the same result: the project cannot be executed as originally planned.

Who should bear the resulting responsibility and costs in this case?

Chapter 3

International Examples of Allocation of Costs and Responsibilities

Allocation of Responsibility and Costs

General Rule and Exceptions

General rule: The contractor bears the responsibility and risk to ensure that the building can be constructed at the designated *site*, as per agreed *design*, and within the specified *time* and *budget* as stated in the contract. „Pacta sunt servanda”

In exceptional cases contractors can transfer these risks to the employer, provided they satisfy the strict criteria for the burden of proof.

	<i>Site</i>	<i>Design</i>	<i>Time</i>	<i>Budget</i>
Employer's claims	Additional work w/o extra fee	Warranty	LD	No extra fee
Contractor's claims	Hindrance	Design flaw	EOT	EOC

Different Legal Cultures, Different Solutions

Should the Contract be Viewed as a Guarantee or rather as a Promise?

The main rule is similar everywhere. However, the situations in which a contractor can be exempted or claim additional fees vary significantly in different legal cultures.

	UK	France	Germany	Hungary
Exemption from liability	No default rules	Exemption is possible (Force Majeure) CC Art. 1231-1 Exemption	Fault based liability BGB 276. §, 280. §	Exemption is possible (Quasi Force Majeure) Ptk. 6:142. §
Clausula rebus sic stantibus	No default rules	Imprévision CC Art. 1195.	Wegfall der Geschäftsgrundlage BGB 313. §	Modification by court Ptk. 6:192.
Release from performance	Frustration <i>Taylor v Caldwell (1863)</i>	Empêchement définitif CC Art. 1218.	Unmöglichkeit BGB. 275. §	Impossibility Ptk. 6:179. §
Ground risk	Liability of contractor <i>Obrascon v Gibraltar (2014)</i>	Vice du sol CC Art. 1792.	Baugrundrisiko Bundesgerichtshof IZR 60/14 of 28 January 2016	Additional work Ptk. 6:244. §

UK

France

Germany

Hungary

Obrascon v Gibraltar (2014)

- Obrascon's contract with the Government of Gibraltar to build a road and tunnel was terminated after contractor suspended works due to contaminated soil. The court held that the contamination was reasonably foreseeable, thus the suspension was unfounded and termination by the employer was lawful under the FIDIC clause 15.

Cour de cassation, civile, Chambre civile 3, 23 October 2013, 12-25.326

- The Court of Appeal held the contractor liable for a foreseeable landslide risk under Article 1792, classifying it as a ground defect. However, the Cour de Cassation overturned this ruling, stating that liability requires actual damage to the building.

BGH, Urteil vom 20.08.2009 - VII ZR 205/07

- A house built on former industrial land developed severe cracks due to inadequate foundations and unsuitable soil, entitling the plaintiff to damages under Section 635 of the German Civil Code (BGB). The court also ruled that the contractor's failure to conduct soil investigations in a high-risk area was a deliberate breach of technical standards under the VOB/B, thus confirming the contractor's liability.

BH1998. 124

- The court found that the contractor was not expected to anticipate the presence of explosives or ammunition in the ground. These conditions, discovered during site investigation, were deemed to be an extraordinary situation entitling the contractor to claim additional costs.

Batty v. Metropolitan Property Realisation (1978)

- The court held the contractor and developer liable for failing to investigate the neighbouring land. The court ruled that it is the duty of the contractor to examine the surrounding area for potential risks, such as landslips, which could affect the site.

Cour d'appel de Fort-de-France, 28 September 2012, 11/00519

- A landslide damaged a house in Martinique and the contractor was initially found liable under Article 1792 for a ground defect. However, on appeal, the court held that the scale of the landslide was unpredictable and irresistible, and therefore overturned the decision, dismissing the employer's claims.

BGH, Urteil vom 20.08.2009 - VII ZR 205/07

- The court ruled that contractors cannot claim additional costs simply because the soil conditions differ from those expected. However, if soil reports are included in the tender and incorporated into the contract, the conditions described therein may become a binding contractual obligation.

- In another case, the contractor successfully justified their claim for additional costs by arguing that the employer provided an incorrect geotechnical report. The report stated that 200 cubic meters of soil needed to be excavated for the construction of the swimming pool due to the inadequate strength of the soil layer. However, after the commencement of work, it was revealed that, for safety reasons, actually 3,000 cubic meters of soil needed to be excavated.

Allocation of Risks and Responsibilities in the FIDIC Contracts

		RED		YELLOW		SILVER	
TITLE	Cl. no.	EOT	Cost/ Profit	EOT	Cost/ Profit	EOT	Cost/ Profit
Right of access to the site	2.1	Y	C + P	Y	C+P	Y	C+P
Unforeseeable physical conditions	4.12	Y	C	Y	C	N	N
Archeological and geological findings	4.23	Y	C	Y	C	Y	C
Extension of time for completion	8.5	Y	N/A	Y	N/A	Y (exp)	N/A
Delays caused by Authorities	8.6	Y	N	Y	N	Y	N
Variation Procedure	13.3.	N	V.O.*	N	V.O.*	N	V.O.*
Adjustments or Changes in Laws	13.7.	N	C	N	C	N	C
Contractor's Entitlement to Suspend Work	16.1.	Y	C+P	Y	C+P	Y	C+P

* V.O. stands for 'Variation Order'. EOT, C and P are handled via the variation procedure.

Discharge and Force Majeure in the FIDIC Contracts

Force Majeure (Cl. 18.1-18.4.)

Exceptional Event is an event or circumstance which

- (i) is beyond a Party's **control**
- (ii) the Party could not reasonably have **provided against** before entering into the Contract
- (iii) having arisen such Party could not reasonably have **avoided or overcome** and
- (iv) is not substantially **attributable** to the other Party.

Exceptional event may be any of the following events or circumstances provided that the conditions above are satisfied (see a)-f)).

If the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of the Exceptional Event of which they gave a notice the Contractor shall be subjected to **EOT** and/or payment of **costs**.

Release from performance (Cl. 18.6.)

Any event arises outside of the control of the Parties which *a)* makes it **impossible or unlawful** for either Party or both Parties to fulfil their contractual obligations or

b) under the law governing the Contract, entitles the Parties to be released from further performance of the Contract and if the parties are unable to agree to an amendment which would permit continued performance of the Contract then after either Party gives a Notice to the other Party of such event: (i) the Parties shall be **discharged** from further performance and without prejudice to the rights of either Party in respect of any previous breach of the Contract; and (ii) the **amount payable** by the Employer to the Contractor shall be the same as would have been payable under optional termination and such amount shall be certified by the Engineer/Employer.

Overview of the Liability and Risk Allocation System in Hungarian Law

Main rule: all risks and liabilities rest with the contractor

Exceptions:

Release	Modification of contract and / or extra claims	Exempted from liability
Impossibility -> release (extremely rare)	Variation -> C + P	Force majeure -> No D / LD
Design flaw not remedied. Optional / mandatory termination.	Unforeseeable cost resulting from additional works. -> C	Omissions of employer hinder works of contractor. -> No D / LD -> C + P
-	Modification by judge (rare occurrence, contracts can be modified regarding the future)	-

Chapter 4

Hungarian Experience

Brief History of Buda Castle

- Construction began in the 13th century
- Castle was looted and set ablaze by Ottoman forces in 1526
- Between 1541-1686, it sustained heavy damage from various armies.
- It was severely battered during the Hungarian War of Independence (1848–1849).
- In World War II, bombing raids left both the castle and the surrounding district functionally destroyed.



Restoration works

- **Further archeological** excavations became necessary -> *Variation* -> *EOT, EOC*
- During the restoration survey works forgotten medieval ruins were **discovered**, thus plans had to be modified -> *Variation*
> *EOT, EOC*
- Contractors found **solid rocks** instead of the sandy soil specified in the offer. Experts believed this was unforeseeable.

> *No EOT, No EOC.*



Restoration of Siklós Castle



- During the restoration works it was revealed that the actual **size of the uncovered loggia** was only one-third of what the archeologists initially estimated
- Heritage Protection Office modified the restoration permit.
- *Variation*
- *EOC, EOT*
- *136 days / 183 days of delay was excused*
- *LD paid for 47 days of unexcused delay.*

Chapter 5

Lessons Learned

Lessons Learned

- Contractors face unique risks in cultural heritage areas due to unpredictable conditions.
- These risks may affect project timelines and cost estimates.
- Certain risks can be transferred to the employer.
- Transfer of risks requires thorough documentation, justifying the unforeseeability and unavoidability of these risks.
- Risk assessment can be significantly improved through modern technology, such as drone-based 3D scanning.



Bence Rajkai

Attorney-at-Law

T +36 4 457 8040

bence.rajkai@cerhahempel.hu

Admission

- Lawyer, Hungary (2021)

Services

- Litigation & Arbitration
- Construction
- Commercial law

Education

- Eötvös Loránd University, Budapest (Dr. iur. 2017)
- Yeditepe University, Istanbul, Turkey (Erasmus scholarship 2015)

Languages

- Hungarian
- English