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THE DESIGN CONTRACT AS A CONTRACTUAL SUBTYPE

WRITTEN BY JUDIT BARTA

The new Civil Code of Hungary entering into force on the 15th of March, 2014 substantially changed the rules on design contracts as a contractual subtype. Some legal institutions have utterly disappeared (such as updated revision), some have changed (the responsibility of designers) while others have dissolved in the sea of the general rules of the contracts (limitations of liability). The legal rules of design contracts incorporated in the new Civil Code are complemented by a series of private legal rules embedded in public ones.

In addition, design contracts, depending on their indirect subject, can be regarded as contracts aimed at using products of intellectual property, as such the application of the provisions of the Act on Intellectual Property Rights are also possible.

Design contracts may be under the provisions of three separate legal sources: the Civil Code, the Act on Intellectual Property Rights and public law, making them similar to a 'three-in-one instant coffee' and the most peculiar contracts of the Civil Code at the same time.

This study aims at presenting the intricate rules of design contracts in a systematic way, with an emphasized attention to the provisions of the new Civil Code.

1. Design contract

1.1. Definition

Within the framework of the design contract, a contractor has two major obligations: performing design work by which the design documentation is completed, and handing the resulting design documentation over to the customer. The customer's main obligation is to accept delivery and pay the contracted fees. (Section 6:251 of the Civil Code) Within the scope of this subtype, the Civil Code seeks to regulate only those design contracts that are taken as a result of design documentation in connection to construction as another subtype. Design activities that are not followed by construction such as clothing, jewelry, home accessories, set design or the design of means of transport and cars etc, and as such are not related to the built environment, are not included in this subtype. Contracts of such designs should be subject to the general provisions of contracting agreements.

The design work associated with the Built Environment essentially includes the two major areas of *urban planning* and *architectural and engineering design*. A separate government decree determines what areas of expertise have to be distinguished within

the two major areas. The area of architectural and engineering design can be further divided into *architectural design* (for instance interior design, design of garden structures), *garden architecture* and *landscape design*, the technical design of specific buildings (including, for instance transport structures, communication structures, water management structures, mining, construction, gas, oil and industrial construction, power engineering constructions), and *industry-specific engineering design* (including, for instance structural design, construction engineering, design and construction of electrical engineering, geotechnical engineering).

The design activities in the areas listed above are not only under the provisions of the Civil Code, the regulations included in Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (ETV.), Government Decree No 191/2009 (IX. 15) (Épkiv.) on the building construction activities, and Government Decree No 266/2013 (VII. 11) on the professional activities related to building and construction matters must be applied as well.

Subsection (1) of Section 32 in Act LXXVIII of 1997 on the Formation and Protection of the Built Environment determines the content of design or planning activities related to construction, according to which a preparation of an architectural and engineering plan is necessary for remodeling, expansion, renovation, rehabilitation, improvement, demolition, relocation of a structure, a section of a structure or group of buildings and for changing the function of such that involves construction.

1.2. Persons authorized for architectural and engineering planning

As a general rule, in Hungary any natural person may carry out engineering activities who is recorded in the register of names maintained by professional chambers. The requirement for being recorded in the register of names is a relevant university or college-level degree, having professional practice and a membership of a professional chamber. In Hungary, there are two major professional chambers comprising the architectural and technical engineers, the Hungarian Chamber of Engineers and the Hungarian Chamber of Architects.

Enterprises and other economic organizations may engage in engineering or design activities if one of their senior officers, members or employees have acquired permission for planning. [Government Decree No 266/2013 (VII. 11), Section 6, subsections (4)–(7)]

A person authorized for carrying out planning activities in any member state of the European Union has the freedom to provide planning services without settling in Hungary. As a prerequisite to the commencement of planning activities a professional chamber designated by law has to be notified. In the case of architectural planning activity on the Budapest Chamber of Architects, in the case of engineering, the Chamber of Engineers of Budapest and Pest County has to be notified. If the duration of planning activities is for more than a year, the application must be repeated annually.

1.3. Formalities and required content

Based on the Civil Code, the design contract is not required to be laid in a written format and its content standards are not mandatory, however, the government decrees mentioned above do require the design contract to be written and it has to contain certain compulsory elements.

The design contract aimed at preparing the design documentation has to be accompanied by a mandatory appendix, the so-called design program. The exact planning task is determined by the customer in the design program, together with the expectations regarding its quantity, quality and aesthetics. All important facts *have to be fixed* that must be considered during the design process, for instance, the customer might want to use renewable energy sources or want to determine certain property safety requirements etc.

The design program protects the customer because the designer is accountable for the stipulated requirements of the program but it also protects the designer, because if the customer comes up with further claims later, or modifies the original design program, or requires additional works with respect to the design program, the designer is entitled to demand a separate design fee if extra planning is necessary.

1.4. Expectations towards the design documentation

The expectations towards the design documentation are determined by the Civil Code, it shall include practical, economical and technically appropriate solutions and – even if it is not included in the design program – it has to pay attention to satisfying the recognizable needs of the customer originating from the purpose of use as well. (Section 6:251 of the Civil Code)

These criteria are determined by the regulation with regard to controversial cases occurred in practice. It happened that although the designer had planned a building suitable for construction (the plan was immaculate), the solutions used in the design program (eg.: planning a twice as much expensive, crack-free concrete structure in accordance with more stringent international standards than the national requirements, or planning large, expensive, thermal-insulated windows into a warehouse where natural lighting is not a preferred aspect etc.) were not either cost-effective or expedient.

Technical feasibility is also an important requirement. Naturally, this does not mean that the designer is responsible if the selected contractor lacking appropriate expertise or technology cannot implement the plan.

The requirement of the recognizable needs of the customer originating from the purpose of use is also essential. For example. planning high and narrow stairs and curbs for a physically disabled elderly couple, or planning a standard elevator into a nursing home which is not suitable for getting in with a wheelchair.

1.5. *The deadline for enforceable claims in case of any design defect*

The Hungarian jurisprudence and the legislature sees all potential customers as laymen, in other words, the customer cannot fully determine whether the provided digital or paper-based design documentation is in compliance with the requirements set forth in the contract or not. As the proof of the pudding is in the eating, the customer can really see whether the plan was good or not when they start to use the completed building. The defect of the plan mostly occurs as the defect in the building. It is justified by the fact that in Hungary claims can be enforced against the designer because of any design defect as long as claims originating from erroneous implementation can be enforced against the contractor. (Section 6:251 of the Civil Code) So it does not matter when the designer fulfilled the design contract, when the design documentation was handed over, when the construction began and how many years it took to finish, since handing in claims against the designer is still possible as long as it is allowed to enforce a claim against the contractor. The starting date of enforcing a claim against the contractor is the date of the acceptance of the building and claims can be enforced because of any defects in the works for at least five years after delivery.

1.6. *The design documentation and its use*

According to Act LXXVI of 1999 on Copyright, architectural and industrial design, and designs of engineering structures are qualified as copyright creations in case they have individual and original character. The copyright protection does not only apply to the plan or design but it is also valid to the building itself.

In the case of a design, copyright protection therefore depends on whether it possesses individual and original character and whether it reaches the level of independent creation.

According to the Hungarian judicial practice, apart from the individual and original characteristics of the creation, there are no other conditions for copyright protection. The protection does not depend on the quantity, quality, aesthetic characteristics or any value judgment on the quality of the work.

If the designer produces designs that reach the level of creative works, their terms of use have to be included in the design contract as well.

The design qualifying as copyright creation produced and delivered as a result of the construction contract cannot be used by the customer as freely as other works delivered under the construction contract in general. In this case, „freedom to use” copyright works are limited by the prescriptions of the law protecting copyright.

As a rule, the copyright works under the Act on Copyright have to be used on the basis of a special permission of use received from the author or designer, specifying the cases, manner and extent of use. In the case of architectural and engineering designs,

the use in the procedure of obtaining building permits and on-site construction also qualify as a use of copyright.

1.7. *Warranty of title*

The designer has to guarantee to customers that no third person has any right that can prevent or restrict the use of the design. (Section 6:251 of the Civil Code) This third person can be the original designer who originally made the plans, which are now to be used by another designer, because for example, the building needs to be redesigned or the other designer wants to use the original plans for making other plans, or intends to copy them for applying them in another location. A third person may be someone who is not the original author but obtained a legal and exclusive permission of use from the designer of the original plans.

If the other or later designer does not have a permission of use either from the original designer (author) or a third person holding an exclusive permission of use, the right-holders can impede or restrict use under the copyright law.

Through the legal institution of warranty of title, the designer thus guarantees that the design delivered to the customer is legal, it is his or her genuine plan, and if another designer's plans were used in the design process, it was done with prior permission.

Designers using others' plans without authorization or permission violate copyright law, hence, they are also in violation of the construction contract.

2. The construction contract

2.1. *Regulations*

In addition to the provisions of the Civil Code, the regulations on the construction contracts are included in Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (ETV.), Government Decree No 191/2009 (IX. 15) (Épkiv.) on the building construction activities must be applied as well.

2.2. *Name and definition*

Based on the construction contract, the contractor construction and installation work to perform, transmit the work produced as a result of the customer to receive and pay for additional charges. (Section 6:252. § of the Civil Code)

The construction contract follows the design contract, which is the primary reason that most Hungarian construction or installation work construction permit possession can be carried out, which gives permission to the authorities on the basis of pre-prepared project documentation. The contractor, are not only freely defined

by the customer's building, but the implementation structure designed specifically agrees feature is the schedule of implementation.

The building authority is entitled to check the legality of any construction activity.

2.3. *The actors of implementation*

The construction contract players are divided into two interest circle of interest of the customer and the contractor's sphere of interest, as follows:

Customer interest falls within the scope of the technical supervisor, foreman and designer, contractor and subcontractor interest to belong to the technical manager.

The building inspector is a technical expert who represents the customer the construction site, he checks the customer to the implementation of the law, the contract for the construction permit and the plans done properly. Customer will decide whether to make use of this, but order the cases determined by government decree.

The engineer simultaneously serve two interest during construction, on the one hand help through professional knowledge to the design of the customer interest of the right quality, contract properly done, on the other hand serves the public interest because it contributes to the country in the built environment of good quality and should be standard.

The designer's leading institutions traditions date back longer than the technical inspection. Implementation of quality and design committed to customers, in its own best interest, money sacrificed so that the designer built his house on the basis of his plans, there should be a design major mozzanatainál, and verify that the contractor of the plan complied with, do it properly work. In a number of situations that the plan itself does not contain any implementation details that need to be resolved such as bridges, structures encounters stairs meeting pavement, etc. In these cases, the designer maker plans can provide direct assistance to the contractor, as the exit for the construction, the contractor shall maintain relations. Designer's lack of leadership, there is no relationship between the designer and the contractor, the contractor will solve the problem in their own way, the best way for the simpler and cheaper.

The law also recognizes the importance of the designer's leadership, raised it to the rank legal. Currently, the ETV. Section 32/A (4) regulates, according to which, the designer – if you have received this order from head to build – managed to carry out design work. In this context, in order to assist in the proper architectural and engineering plans full implementation, as well as help in the design expertise to solve problems in connection with the plans.

The executor can be anyone, and individual enterprise, but the activity itself only continue, who (National Chamber of Commerce and Industry) members have the professional chamber. The condition of a registration to the contractor the necessary expertise, tools and have a professional portfolio.

The leader is responsible for the technical specialist, the contractor who is required to travel on, the ETV. and Épkiv. pursuant to the provisions of this specialist manages the construction and assembly work.

From participating in the design concepts employed by the government also makes a difference Based on who you are bound by the construction contract, and ordered the construction work is carried out only themselves, or make use of an intermediary.

General Contractor contractor who connects directly with the customer is involved in the construction contract and contractor. Subcontractor to whom the work to another contractor, general contractor or the order. The customer contract of the contractor general contractor, the contractor general contractor construction contract of the contractor. The main contractor, subcontractor may conclude else works contract, then he will be a customer entrepreneur, who is also bound by a subcontractor. Thus, the chain looks like this: the customer – the main contractor (contractor customer) – subcontractor (custom-employed) – subcontractors and so on.

2.4. *Formalities and required content*

According to the government regulation requiring the construction contract, the content specified in the regulation, must be in writing.

2.5. *Customer obligations*

Of the Civil Code according to customer's main obligation of work performed by the contractor, receipt and payment of the fee-employed work created.

Other key customer obligations, plan documentation and obtaining the construction permit is required to carry them.

Design documentation for the construction is based not only includes plans (architectural, mechanical, structural, garden design, etc), but other documents (technical specifications, opinions, etc) is all that is necessary for the implementation of the construction activities.

The ETV. and Épkiv. also imposes additional obligations to customers, which include the following:

- a) The building construction start-up mode, the customer is required for the construction of a suitable work area specified in the contract for work on time and condition specified in the contract or contractor to deliver the main contractor. The contractors for the work contractor customer gives his place of work.
- b) Our obligation is to ensure that the necessary building proper and safe use of ancillary buildings, landscaping, tree planting, landscaping works completed at the buildingsbut together.

- c) The obligation of the customer called. Exhibition of proofs, which recognizes that contractor to fulfill the contract, or any part thereof, and a contractor will be entitled to possession of the entrepreneurial award. The customer determines the delivery certificate – if for some reason there is a difference in the execution of the original agreement – the amount billed by the contractor.

2.6. Main contractor obligations

Of the Civil Code according to the contractor for the construction work performance and the resulting artificial transfer too, is bound to be examined before the conclusion of the contract, design documentation provided by the customer, and if you find that the design documentation provided incorrect or incomplete, the customer is required to be cautioned. If a fault or shortcoming in the design process of the project will be identified, without delay, the contractor is required to inform the customer informed.

The judicial practice design documentation provided by the client manages the customer's instructions as to the failure of the contractor is obliged manual to warn of the normal customer. The consequences of failing to alert the obligation that the resulting damage incurred shall be borne by the contractor.

Developer asks about all the design documentation prior to the conclusion of the contract and will study it in detail, because this can only be based on a quote, or to assess what amount, variety and quality of construction work to be done.

The contractor obligations beyond the Civil Code on the ETV. and Épkiv. details.

Contractor is responsible for the construction work area supplied by the customer balconies, occlusion, placement of warning signs, guarding. Also the organization, coordination, ensuring job security, keeping control of occupational safety and health standards of the contractor's obligation to its contributors activities.

The contractor is required to control the customer or technical inspectors to enable the necessary data or information given. In the case of the working portion which are to be covered under the law, at least three working days prior to notify customer to be able to exercise the right to control.

2.7. Construction journal

According to the decree requiring all construction permit subject to the order of the so-called building construction activity, a construction journal shall be kept.

The concept of building log in ETV. determines the start of the construction of log construction activity has led to the completion of construction, administrative and judicial proceedings as evidence of design essentials – image detail and content specified in the Épkiv. – containing document.

The client, contractor and outside of them were empowered by the law; technical

supervisor, foreman designers, technical manager responsible for building control authority, etc. provide all relevant information, in fact, work-related instruction to communicate with each other for the construction of the log.

The construction journal should be opened for the construction work zone transfer simultaneously recorded at the time of the construction work area and the indication of the transfer.

October 01, 2013 in Hungary came to pass led to the construction of a paper-based to electronic diary construction logbook, which functions as established by the state as part of a public electronic information network. The building authority and the building supervisor shall be exercised through this system and its leadership, can directly monitor it on a daily basis. First, the general construction of buildings had to be applied in the case began after the date of October 1, 2013 implementations. Then gradually being introduced in the specific types of buildings, structures such as transport, communication structures etc.

2.8. Completion of construction activity

The construction activity at the end of the Civil Code general provisions of, the handover procedure is set up with a duration of 30 days. From undue deviation to the detriment of the contractor, the law classifies as unfair. The main reason is that the exaggerated term handover process pushes the obligation to pay a fee to the customer's business, because it will only be paid if this procedure is completed.

Particular, the present invention it rules governing professional handover procedure Épkiv. details.

The decree calling technical handover procedure of the transfer process. The starting date for the technical delivery process is determined by the contractor, which gives customer in the construction of log entries. The participants were required (technical inspector, building authority, building inspection authorities, administrations, etc) notify and invite the customer.

The technical handover procedure is to verify that specified in the construction activity (construction and assembly) on the basis of the construction contract and regulations prescribed, the design specifications to be fully implemented and whether the performance meets the technical and contractual requirements set.

The technical handover procedure for electronic record shall be made of errors discovered during the process, gaps and validated customer warranty rights in this regard should be specified therein.

The minutes record the customer's decision on whether to accept the structure. During these decisions should be subject to the Civil Code general specifications, can not refuse to accept it, because a smaller gaps, errors that do not impede the right of use is intended or their replacements, repairing – not even together – to prevent use.

The pick of the time in terms of performance is important. Completion of the due date, or within the time limit in case of acceptance, the contractor completed in time so late penalty can not be used against him. However, the takeover does not pay the fee to issue the certificate of completion is essential, the contractor will be issued if the detected and corrected, to make up for mistakes, shortcomings directed. Instead, the customer may request a corresponding reduction in the corporate prizes.

If the customer errors, defects rectification replacement requests must contain these electronic Protocol deadline and the name of who is liable.

The customer is issued a certificate of completion after completion of the construction control. According to the certificate of completion, recognized that the extent can the contractor on account of charges issued corporate customer, who shall pay the contractor the contractor within 30 days of the date of receipt of the invoice value of the consideration.

Once the invoice value of receipt of the contractor contractor shall provide the customer the construction work area in the „doing” together, as well as the documents that are required to use the finished building, as to the actual realization of the building design documentation, operation and maintenance manuals, warranty documents, etc.

2.9. *Covering the costs and fees, expiration*

Hungary is one of the construction industry, where the so-called. can turn into a chain of debts. The reason is that in the case of complex designs, corporate chains formed by the main contractor, subcontractor contract with other contractors and more.

It is sufficient for the payment of a subcontractor *lányszemnél* jams, no longer reflect the additional subcontractors employed *díjukhoz*. In extreme cases, the customer is the one who does not pay the main contractor (general contractors), and then all the participants in design contractor and subcontractor remains unpaid. This investment standstill, leading to serious damage to businesses. The legislature therefore sought to remedy this problem as a legal means.

The ETV. included to prevent and protect the contractors and the development of debt chains, the general contractor, the contractor building the customer will only be able to assume the construction activities, if sufficient funds to cover the incumbent agency fees has to fulfill. This also ensures that the customer asks for an appropriate advance.

The law also requires that the payment deadline to be met to sub-contractors employed fee will be longer than the period for payment specified construction contract entered into with the customer. Statutory requirement is that the customer contracting with the main contractor remuneration for the work you are entitled to fully offset only if certified by the payment of subcontractors.

The provision for excluding the possibility of „position” the possibility of differences in the contract, it may be against the subcontractor in the abuse of position.

The *Épkiv.* requires that the customer shall immediately notify the general contractor for the construction of over logs, if not yet started construction phase collateral against the value specified in the construction contract, but declined to such an extent that it is not sufficient to charge more for the rest of the enterprise to meet.

To prevent the formation of circular debts were included in *Épkiv.*-in to the main contractor for the construction work area with buildings but only if the customer is obliged to pass, when he was paid. The legislature has rightly held that the construction work area by limiting admission encourage the customer to pay the contractor. To this end, the fact that under another government decree specific requirements, from April 2013, the use of the finished building the building authority can only be approve it if the customer proves that the main contractor for the construction work area handed. This means that as long as the general contractor can be shown to not enter the work area until the customer can not make a request for authorization to use.

The customer and the customer is the entrepreneur often with delayed payment of the fee to the contractor *megkifogásolják* contractual performance of reason. The legislature therefore to enforce legal means to accelerate in 2013, set up an expert body, which is suitable for business award of the contract.

Act XXXIV of 2013 on certain disputes relating to the design and execution of works sort of organization involved. Act created the certificate of technical bodies, which examines the request of the contractor concerned exclusively linked to the performance of the design, construction jobs professional issues within the statutory time limit specified. The expert opinion on the one hand can contribute to the customer without pay court or agreement of the parties, on the other hand, if legal action is initiated, is already recognized by a legal opinion, which can accelerate the process.