Kellerhals Carrard

In a nutshell

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# Additional compensation of the contractor or planner in the event of construction disruption, despite flat-rate price or cost ceiling?

**In the scope of a construction project, contractors or planners are regularly confronted with the problem that factors unforeseeable at the time of conclusion of the contract can have an influence on the agreed construction process. The term construction disruption describes the extension (and, if necessary, complication) of the work beyond the planned and agreed total construction time.**

If the client fails to cooperate, the question arises for the contractor or planner in this connection as to whether and how it can assert the additional expenditure incurred by the longer duration of the construction site vis-à-vis the client. Typical examples of acts of cooperation of the client include scheduled deliveries, completion of preparatory work, issuing of instructions, coordination of the ancillary contractors or the (timely) provision of the building site. Typical additional expenses on the part of the contractor or planner, on the other hand, are additional costs due to longer provision of machinery and labour, additional costs for construction management, financing costs (due to later final payment) and additional expenses due to postponement of work in a period of unfavourable weather.

The concept of construction disruption and its consequences can be found neither in the law nor in SIA standard 118. Even in courtroom practice, the problem of construction disruption leads rather a shadowy existence. In decision 4A_507/2015 of 19 February 2016, the Federal Supreme Court had the opportunity to comment on any claim for additional compensation of the contractor due to construction disruption. The matter involved a contract for the construction of apartment buildings. After the client had instructed the contractor to postpone the construction of two apartment buildings, the client allowed an ancillary contractor to deposit landfill on the building sites in question. Because of this, it was no longer possible for the contractor to continue its construction activity on the two building sites. After completing the project, the contractor asserted a construction disruption for which the client was responsible and demanded additional compensation for the additional costs incurred. The lower court (the Commercial Court of Zurich) confirmed the claim of the contractor and held that the client had a fundamental duty of compensation as the client was in default of acceptance. The Federal Supreme Court confirmed the decision of the lower court and stated that the breach of obligations to cooperate by the client could lead to a duty of compensation. Although the dogmatic justification and the precise conditions of a claim for additional compensation are not finally clarified by the two aforementioned decisions, the Federal Supreme Court seems to tend to affirm a claim for additional compensation in the case of construction disruptions attributable to the client, even if the parties have entered into a flat-rate agreement or have agreed on a cost ceiling. Of great importance, therefore, is the question of whether and to what extent the parties can contractually exclude a potential claim for additional compensation of the contractor for construction disruptions caused by the client. In particular, the terms and conditions of customers with market power, such as pension funds or large general contractors, may often contain such exclusion clauses in their subcontracts.

The Commercial Court of Zurich and the Federal Supreme Court did not comment on the question of the extent to which a claim for additional compensation due to construction disruption could be contractually excluded. It is conceivable that courts will consider such exclusion clauses as excessive and therefore void under Art. 27 (2) Civil Code in certain constellations. Due to the lack of pertinent Federal Supreme Court case law, it is difficult to predict whether such an exclusion clause can be assumed to be void. The criterion of predictability could be relevant. If the contractor already knows at the time the contract is concluded which types of construction disruptions are to be expected, as well as their duration and extent, such an exclusion clause can be assumed to be valid. However, if such exclusion clauses are absolute, if the contractor cannot anticipate expected construction disruptions and if the exclusion particularly applies if the construction disruption is the responsibility of the client, it cannot be ruled out that courts may take into consideration the nullity of such an exclusion clause under Art. 27 (2) Civil Code in the event of a dispute. A corresponding risk (nullity of an exclusion clause due to excessiveness) can be avoided by contractual provisions that adequately allocate the risk of a construction disruption to the client on the one hand and the contractor on the other hand.

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