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# Can the covid-19 pandemic cause a rise in construction costs?

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### Introduction

The Supreme Court recently handed down a leading decision on the distribution of risk and the proof of additional costs in construction projects during the pandemic.

The case concerned increased construction costs due to the covid-19 pandemic. The contractor claimed not only that it had had to purchase masks and disinfectants, but that the wearing of masks had also caused a drop in performance that had to be compensated for. This had resulted in additional costs totalling approximately €30,000, which the defending building owner had to compensate.

The plaintiff sought to prove this claim with a very detailed expert opinion, which calculated percentage surcharges for various services on the basis of recognised principles. But the plaintiff failed to provide concrete costs and evidence.

There was not enough evidence for the Supreme Court, as had also been ruled by the trial court. Therefore, the Court reversed the decision of the appellate court and ruled that these additional costs were not due owing to the lack of sufficient evidence.

### Facts

The plaintiff, a construction company, was contracted to build a bridge. The start of construction coincided with the beginning of the covid-19 pandemic. From mid-March 2020, various protective measures had to be complied with due to statutory provisions (eg, protective masks and social distancing). Compliance with these measures allegedly resulted in additional costs.

Therefore, the plaintiff demanded percentage surcharges on the wage costs and also calculated costs for disinfectants and protective masks, for which it invoiced the defendant building owner approximately €30,000. The latter refused to pay, pointing out that the plaintiff had failed to provide any concrete proof of the additional costs incurred.

### First-instance court

The first-instance court made short work of the case. It adopted the defendant's legal opinion and ordered the plaintiff to specifically assert and prove the additional costs claimed. The reference to mathematically correct percentages based on the expert opinion of a building surveyor was not sufficient. The plaintiff did not comply with this court order, and the court of first instance therefore dismissed the claim for inconclusiveness without making findings or even conducting an evidentiary hearing.

### Court of Appeal

The Court of Appeal found this result too harsh, as an actual additional expense could be derived from the expert opinion in a sufficiently concrete manner. Thus the Court ordered the trial court to continue the proceedings.

### Supreme Court

The defendant appealed to the Supreme Court. The Supreme Court allowed the appeal because the Court of Appeal had deviated from the case law of the Supreme Court and restored the judgement of the first-instance court on the merits.

After a very detailed discussion of various legal doctrines, the court opined the following.

The parties to the case had agreed on the application of a widespread model construction contract. This allocates the risk in cases of force majeure (eg, the covid-19 pandemic) to the building owner. As a general rule, a plaintiff building contractor can, in this case, demand additional costs from the defendant building owner.

However, the relevant regulations do not release the plaintiff from first asserting and then also proving specific cost increases. The plaintiff must show cause and effect of a performance defect (ie, in this case, loss of time due to a decline in performance, which, in turn, was prompted by mandatory mask-wearing requirements).

The Supreme Court had already pointed out the necessity of this proof of causality in another recent decision. Among other things, the Court of Appeal had not sufficiently dealt with this decision.

Therefore, for a successful claim for additional costs, the assertion and the proof of specifically incurred additional costs are required.

An abstract calculation in an expert opinion, which obviously does not refer to the specific circumstances of the construction site, cannot provide this specific evidence and is also unable to replace the necessary assertions of fact. Otherwise, contractors could save themselves the trouble of even asserting the additional costs actually incurred.

This was also essential in the present case because the defendant builder had been able to observe, during his visits to the construction site, that no masks had been worn and no minimum distances had been observed. There had also been no observable disinfectants on the construction site. The entire construction process did not seem to differ from that before the pandemic. Concrete additional costs for separate accommodation had also not been certified, and the number of masks actually purchased had not been asserted.

Therefore, the defendant claimed that it was doubtful whether the plaintiff had incurred any additional costs at all. Thus, according to the Supreme Court, it was all the more important to adhere to the principle that allegedly incurred cost increases must be specifically asserted and proven. Otherwise, the plaintiff construction company could profit from disregarding pandemic measures on the basis of abstract calculations rendered by a court-appointed expert.

#### **Comment**

This line of jurisprudence of the Supreme Court is not entirely new, but the Court had not clearly stated that the basis for a successful assertion of additional costs cannot merely be premised on an abstract expert opinion.

The decision changes the course of typical construction litigation. Until now, an expert was appointed by the court for the calculation of additional cost claims. The expert checked the calculations in the plaintiff's expert report on which the plaintiffs typically rested their claims. Based on the court-appointed expert's report, the court then awarded the amount of additional costs.

Now, the first-instance courts have to dig through the evidence themselves – starting with determining whether the plaintiff has made all relevant assertions of fact. This means additional work for the courts as well as for the construction companies. They now have to specifically document every additional expense that occurs and show that it was caused by an action not under their control. Court-appointed experts, however, now stand to receive less business. Until now, they had dominated this type of litigation, due to their expertise in the calculation of and reasoning for construction cost increases.

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