



COVID-19 (coronavirus): delay and disruption in the construction industry

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Key Take-aways

- 1.** The measures taken by the Swiss as well as foreign authorities to fight the coronavirus pandemic (COVID-19) directly and severely impact the construction industry, delaying and disrupting construction projects.
- 2.** Under Swiss law, the contractor has a duty to immediately inform the employer of any events causing delay and disruption to the works, whether or not the delay/disruption is attributable to the contractor.
- 3.** If the contractor breaches its duty to inform, it could be deprived of its right to an extension of time and/or additional remuneration.

1 Introduction

To prevent the spread of the coronavirus (COVID-19) outbreak, as of 13th March 2020, the Swiss Federal Council and the Cantons took various measures which have already had a direct and severe impact on the construction industry and will probably continue to have an impact, irrespective of the gradual easement in and outside of Switzerland, such as disruptions in supply chains, suspensions of production and manufacturing, quarantine measures, travel and import restrictions, temporary closure of construction sites, or compliance requirements with the recommendations issued by the Federal Office of Public Health (FOPH) relating to hygiene and social distancing.

The contractor is responsible for the delay if it breaches its duty to inform.

Ultimately, these consequences and implications will have to be borne by one of the contracting parties. It is therefore critical that the party which could be held liable for delays and disruption and the associated damages take the necessary precautions to protect its interests.

This Construction Insight briefly summarizes the key elements of the contractor's duty to inform and its right to an extension of time and an increase of the agreed remuneration due to delay and disruption under the Swiss Code of Obligations („CO“) as well as Norm SIA 118 (General Terms and Conditions for Construction Works issued by the Swiss Society of Engineers and Architects), in general and in particular in view of the COVID-19 outbreak.

2 Contractor's duty to inform

2.1 Swiss Code of Obligations

The contractor must carry out and deliver the promised work within the contractual time limits. If the contractor is late in the execution of the works, it is in default (Articles 102 ff CO). One of the consequences of the contractor's default is that it has to indemnify the employer for damages (including loss of profit) for late performance pursuant to Article 103 CO. Additionally, the parties may also have agreed on contractual penalties for late delivery.

However, the contractor is only be liable for damages if it is responsible for the default (Article 103(2) CO). The contractor is also responsible (in whole or in part) for the delay if it breaches its duty to inform. The contractor has a duty to inform the employer immediately of any circumstances that could compromise the timely execution of the works (Article 365(3) CO). This duty includes informing the employer of the cause

of the delay and applies irrespective of whether or not the contractor is responsible for the delay.

The statutory duty to inform does not include facts the employer is already aware of or ought to have been aware of. The employer cannot claim damages or liquidated damages for a breach of the contractor's duty to inform if it knew, or ought to have known, the pertinent facts. In order to avoid the contractor's liability, the employer must know the reasons for the delay as well as its expected duration and implications for the specific construction project. This is usually the case where the employer is directly responsible for the delay. The recent measures taken by the Federal Council and cantonal governments, especially the closure of construction sites in some cantons, will have automatically caused delays and disruption of the works. However, even if these measures were and are still broadly reported in the public domain, the contractor nevertheless has to inform the employer of delays of the specific construction site because of the Covid-19 measures in order to comply with its duty to regularly inform the employer of any delay in order to avoid a potential liability. It is unlikely that based on public information, the employer can determine whether or not those measures will delay the construction project to what extent.

If the progress of the works is hindered by circumstances beyond the contractor's control, the contractor is in principle entitled to an extension of time for completion of the works if it duly informs the employer of the reasons of the delay. In this case, the employer is not entitled to delay penalties and/or damages until the end of this extension period. Hence, if the contractor duly informs the employer of the delays resulting from the COVID-19 outbreak and consequent administrative measures, the contractor can probably avoid liability for delays and might be granted an extension of time.

The duty to inform does not include facts the employer is already aware of.

Hence, contractors should strictly follow contractual notice requirements in order to preserve their rights to an extension of time for completion and avoid potential claims from the employer for late performance.

2.2 Norm SIA 118

Norm SIA 118 contains a similar mechanism with regard to the contractor's duty to inform. Article 25(1) Norm SIA 118 provides that the contractor has a duty to advise and warn the employer without delay of any circumstances that could affect the proper or timely execution of the project, subject to the provision that the employer is not aware of those circumstances, explicitly referring to Article 365(3) CO. Article 25(1) Norm SIA 118 thus corresponds to Article 365(3) CO with respect to the scope of the duty to inform.

Governmental measures might entitle the contractor to an additional remuneration.

In addition, Article 96(1) Norm SIA 118 provides that, where the execution of the project is delayed with no fault on the part of the contractor, the contractual performance period shall be extended for a reasonable period of time. However, the right to an extension of time under this provision requires that the contractor promptly notified the employer in accordance with Article 25 Norm SIA 118, indicating the cause of the delay, unless the contractor can demonstrate that the employer was aware of the delay and its cause even in the absence of such notification.

Article 98(2) Norm SIA 118 clarifies that contractual penalties shall not be owed where the contractor is entitled to an extension of the performance period under Article 96(1) Norm SIA 118.

3 Contractor's right to an increase of the remuneration

3.1 Swiss Code of Obligations

Assuming compliance with the obligation to notify, article 373(2) CO provides for an adjustment of the agreed price (reimbursement of additional costs) for the works, if unforeseeable circumstances, or circumstances which the parties excluded from their forecasts on the basis of a (false) common representation, arise. The correction set in this provision is available to the contractor, provided that the extraordinary circumstances – arising after the conclusion of the contract – aggravate its burden of performance of the contract to an excessive degree, causing excessive additional costs. Such „extraordinary“ circumstances may take various forms. They may prevent the performance of the works as such, but they may also result in additional labor, tools or equipment costs. Current border restrictions adopted not only by Switzerland but also by many other countries, could also

lead to a shortage of supplies and cause the contractor to purchase materials from different suppliers, possibly at higher costs.

Article 373(2) CO does not entitle the contractor to an additional profit and does not guarantee that the execution of the work despite the exceptional circumstances will not cause any loss to the contractor. However, the contractor may claim the restoration of a tolerable exchange relationship where extraordinary circumstances have led to a gross imbalance between his performance and the agreed remuneration.

The COVID-19 outbreak and the measures taken by the Federal Council as of 13th March 2020 (*Ordinance 2 on measures aimed to fight the coronavirus (COVID-19)*) had a huge impact on the performance by the contractors of their duties, particularly on construction sites, and could be considered as unforeseeable circumstances.

In Switzerland, employers in the construction, civil engineering and secondary work sectors and industries are obliged to comply with the FOPH's recommendations on hygiene and social distancing. In particular, the number of people working on construction sites or in companies must be limited, the organization on construction sites and the operation of companies must be adapted, and the use of break rooms and canteens must be adequately restricted. Furthermore, the competent cantonal authorities can decide to temporarily close a company or construction site if the aforementioned obligations are not complied with. This situation may impact the schedule of the works and cause additional costs for the contractor.

The contractor needs to submit proof of the additional costs incurred to the employer.

Hence, the measures taken by the Federal Council mentioned above, and the ones respectively taken by the cantonal governments, such as Geneva State Council, might entitle the contractor to claim additional remuneration.

3.2 Norm SIA 118

The Norm SIA 118 provides a similar method to adjust the price agreed between the parties.

According to Article 59(1) Norm SIA 118, the contractor is entitled to additional remuneration where extraordinary circumstances – that could not have been foreseen, or the possibility of which was excluded under the assumptions shared by both parties – impede or render the performance of the works excessively difficult. Such circumstances may include, for example: water ingress, earthquakes, storms, gas leaks, excessive underground temperatures, radioactivity, drastic official measures, and disruption of labor relations. In order

to be entitled to additional remuneration, the contractor has to demonstrate the occurrence of extraordinary circumstances unless these are notorious. The contractor also needs to submit proof of the additional costs incurred to the employer.

Article 59(2) Norm SIA 118 further provides that the amount of the additional remuneration shall be determined by the parties' mutual agreement on a case-by-case basis. However, the remuneration shall not exceed the additional costs actually incurred. Where no agreement can be reached, the court shall determine, upon application by the contractor, the amount of the additional remuneration or shall terminate the contract.

Article 59(3) Norm SIA 118 provides that the contractor's right to an increase of the remuneration is subject to compliance with its duty to advise and warn under art. 25 Norm SIA 118 as described above.

The provisions set in the Norm SIA 118 appear more restrictive than those of the CO regarding the proof of the additional costs incurred. However, their application leads to the same result: they provide the contractor with the right to claim the reimbursement of the additional costs incurred by the measures taken by the Swiss federal and cantonal authorities in response to the COVID-19 outbreak.

4 Conclusion

The COVID-19 outbreak and the decisions taken by the Federal Council and some cantonal governments affecting construction sites could be deemed as extraordinary circumstances which may possibly provide the contractor with the right to an extension of time for the performance and completion of the works as well as a possible additional remuneration.

However, in order to preserve these rights, and protect itself against a claim for damages and/or contractual penalties for late delivery of the works, contractors are well-advised to comply with their duty to advise and inform the employer, in a timely and regular manner.



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