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CONSTRUCTION INSURANCE: SCOPE OF RESCUE COST COMPENSATION

In its decision on 7 Ob 195/22k, the Supreme Court recently commented comprehensively on the reimbursement of rescue costs pursuant to § 63 VersVG in the context of construction insurance.

OUTPUT SITUATION

The decision was based on a comprehensive construction, assembly and builder's liability insurance policy that the policyholder had taken out in the course of constructing a run-of-river power plant. During the construction work, a flood occurred which, on the one hand, destroyed part of the construction work already carried out and, on the other hand, necessitated a large number of measures to prevent further damage.

In this case, it was particularly questionable whether these expenses were to be attributed to the basic cover as rescue measures within the meaning of § 63 VersVG, or whether they were cost items that were specifically included in the supplementary cover (whereby a significantly lower sum insured was agreed here). As part of the additional cover, for example, clearing and demolition costs, movement and protection costs, damage search costs as well as costs for auxiliary structures and building ground/soil masses are insured as additional costs in the event of a claim.

REIMBURSEMENT OF RESCUE COSTS AS A CONSEQUENCE OF THE DUTY TO MITIGATE DAMAGES

Section 63 VersVG standardizes an - in principle, waivable - ancillary obligation of the insurer to reimburse the policyholder for expenses incurred in the interest of averting or at least mitigating damage to the insured property (or the insured interest).¹

This obligation has a close systematic connection ("[...] pursuant to § 62 [...]") with the policyholder's obligation to rescue pursuant to § 62 VersVG. Accordingly, the policyholder is obliged to take all possible measures to avert and minimize the damage upon occurrence of the insured event and to follow the instructions of the insurer in this respect. The obligation to minimize the loss begins with the event that is likely to result in the loss and applies for an unlimited period of time as long as the loss can be averted or minimized or the scope of compensation can be reduced.² The specific content and scope of the duty to mitigate loss is determined by how the policyholder would

¹ vgl. *Vonkilch in Fenyves/Perner/Riedler* (Hrsg.), *VersVG* (2021) zu § 63 VersVG Rz 1.

² RIS-Justiz RS0080622, RS0080451.

reasonably have behaved if he had not been insured. The rescue measures must therefore be possible and reasonable in the respective situation.³

If the policyholder breaches the duty to minimize losses, the insurer shall be released from the obligation to indemnify unless the breach is based neither on intent nor on gross negligence.

RESCUE COSTS AS SECONDARY DAMAGE

Although the claim for compensation for rescue costs pursuant to § 63 VersVG exists as a (statutory) ancillary obligation in addition to the claim for compensation for the main or primary damage, it is subject to the general provisions on the policyholder's claims against the insurer, in particular the insurance contract, with regard to various questions of detail. On the other hand, compensation for rescue costs is generally limited to the sum insured.⁴

For rescue costs to be eligible for compensation, they must have been objectively incurred to avert or minimize an insured loss.⁵ Rescue costs therefore only include costs that serve to avert the damage that the insurer would have to cover.⁶ Conversely, property maintenance or loss prevention costs that were not incurred in the course of loss prevention/mitigation do not count as rescue costs within the meaning of § 63 VersVG. Expenses that would have been incurred regardless of the rescue measure ("anyway costs") are also not eligible for compensation.⁷

RESULT

The Supreme Court has primarily based the qualification of the measures carried out after the occurrence of the insured event as a rescue measure within the scope of the basic cover or as an insured measure within the scope of the additional cover (e.g. movement and protection costs) on the objective suitability of the measure in question. If it is established that the measure objectively served the purpose of averting or mitigating the insured loss, it is eligible for compensation as a rescue expense in accordance with § 63 VersVG. As a consequence, the lower sum insured of the additional cover does not apply to such expenses, as the rescue costs were incurred in connection with the insured risk of the basic cover. In the case in question, the Supreme Court overturned the decision and referred the proceedings back to the court of first instance for further proceedings, as there were no findings regarding the objective suitability of the measures in question.

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³ RIS-Justiz RS0080439.

⁴ vgl *Vonkilch in Fenyves/Perner/Riedler* (Hrsg), VersVG (2021) zu § 63 VersVG Rz 2, 31.

⁵ vgl RIS-Justiz RS0080425.

⁶ vgl OGH 7 Ob 63/15p mwN.

⁷ vgl OGH 7 Ob 174/17i, 7 Ob 14/89.