Construction - Switzerland

Failure to submit progress reports not fatal to compensation claim

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Introduction

Under Swiss law, the parties to a contract for works are at liberty to stipulate the contractor's fees. The remuneration is typically fixed in advance as either a specifiable or specific amount (ie, unit price or lump sum). In practice, however, agreements according to which certain parts of and/or variations or supplements to a work are to be remunerated on a time-and-material-spent basis are common. Where the remuneration is not fixed in advance or determined only as an approximate amount, it will be calculated based on the value of work performed and the contractor's actual expenses (Article 374 of the Code of Obligations). In this case, the question arises as to how the contractor may prove its claim for compensation. Progress reports submitted to the owner during the project are often used in such claims. Their evidentiary value and the effect of the contractor's failure to submit contractually agreed progress reports were examined in a recently published court of appeal decision.

Facts

In their contract for works, the parties adopted the set of rules provided by the Swiss Society of Engineers and Architects (SIA 118). These construction conditions are widely used in Swiss domestic contracts (similar to those of the International Federation of Consulting Engineers for international construction projects outside Switzerland). The parties agreed that part of the contractor's remuneration should be determined according to the actual work performed. For this purpose, and according to Article 47 of SIA 118, the contractor is obliged to submit regular progress reports to the owner, specifying:

- the work performed;
- the headcount of employees on site;
- the hours spent by employees on site; and
- the material used.

The owner or its representative must review and sign these progress reports and return them to the contractor within seven days. The owner must annotate the report by mentioning any differences or controversies. Such controversies must be settled within 30 days.

The contractor failed to submit the progress reports for signature by the owner. Subsequently, the contractor sued the owner seeking compensation for work performed, but not paid. The owner refused to pay compensation for those parts of the work that were subject to remuneration on a time-and-material-spent basis, arguing that the contractor was in breach of its contractual duty to submit progress reports. According to the owner, the contractor had forgone the right to compensation as a result of its failure to submit progress reports for review and signature.

The first instance court followed the owner's argument and dismissed the contractor's claim for compensation. The contractor appealed to the court of appeal, which annulled the first instance court's decision and confirmed the contractor's claim for compensation in principle. The quantum was left open and the case was remanded to the lower court.

Court of appeal decision

The controversial issue before the court of appeal was whether the contractor still had a claim for compensation, despite its failure to submit progress reports and have them signed by the owner. In the contractor's view, progress reports were only one available means of evidence in order to establish his claim, and the fact that there were no such signed progress reports did not invalidate his claim for compensation.

In its January 12 2010 judgment,(1) the court of appeal ruled that where the contract does not provide for a fixed price, the contractor bears the burden of proof regarding its compensation. It must establish what work it performed, its value and its actual costs. This rule is based on the fundamental principle of Swiss law as set forth in Article 8 of the Civil Code, according to which the burden of proof for the existence of an alleged fact lies with the party which derives rights from such a fact.

The court further pointed out that progress reports are means of evidence – no less, but no more. They do not constitute incontrovertible proof. Where the owner (and/or its representative) signed the progress reports without reservation, this would not constitute recognition of debt by the owner or reverse the burden of proof. It would merely create a presumption that the work specified in such reports had actually been performed. However, such presumption may still be rebutted by the owner with counter-evidence. In that event, the contractor must establish the alleged value of work and costs by other means. In any event, the burden of proof for the existence and amount of remuneration under the contract for works always lies with the contractor. Accordingly, signed progress reports are no prerequisite for the contractor's right to compensation, but rather a formality. The court ruled that in the absence of the contractually agreed progress reports, the contractor is still entitled to compensation but must establish (the amount of) its claim by other means of evidence.

The court's refusal to consider that failure to submit progress reports is fatal to a contractor's claim is grounded on the characterisation of the clause calling for regular reporting. In principle, such undertaking could have been construed as:

- an agreement to limit the means of evidence upon which the parties were to rely in case of a dispute; or
- an agreement whereby progress reports were found to be conclusive evidence.

The court ruled that such a limitation of evidence or prioritisation of certain means of evidence was inadmissible under Swiss procedural law. First and foremost, this would contravene the fundamental principle of Swiss procedural law according to which the court freely evaluates the evidence. Second, it would unfairly restrain the parties' procedural freedom.

In this case, if the contractor could only establish its claim for compensation using signed progress reports, this would be tantamount to such an illegal agreement limiting the means of evidence. In the court's view, however, the progress report provision had to be construed as an agreement whereby the parties agreed to secure evidence that might be useful for the resolution of future dispute. Such agreements are permissible.

The operative part of the judgment has not been published. Presumably, the court remanded the case to the first instance court, which had to decide it anew.

Comment

If a construction contract does not provide for lump-sum remuneration, the contractor's compensation is calculated based on the value of the works performed and the contractor's actual costs (Article 374 of the Code of Obligations).

The contractor bears the burden of proving both the value of work (including its actual costs) and that the works performed were in compliance with the contract.

Progress reports signed without reservation create a presumption in relation to both.

However, progress reports in this case were not the only means of evidence available, and the failure to submit them and have them signed by the owner did not preclude the contractor from bringing a successful claim for compensation. On the other hand, the owner was not prevented from adducing evidence to rebut a signed progress report.

The question which arises is by what (other) means of evidence a contractor may establish its claim. The Code of Civil Procedure sets out an exhaustive list in Article 168. In practice, expert opinions and site visits are frequently relied upon.

The decision does not address whether contractual undertakings that make progress reports a mandatory prerequisite (contrary to the provision in this case) must be entirely disregarded or construed as being non-mandatory.

The court did not address whether the prohibition to limit the means of evidence on which a party could rely in case of a dispute also applies to arbitration proceedings or only Swiss court proceedings. This is an interesting question, given that under many

international construction contracts, contractors are bound to submit progress reports. Similarly, certain contracts provide that an arbitral tribunal shall not rely on oral or expert evidence, unless it is supported by contemporaneous records. Beyond their validity, the interplay between such clauses and rules governing the arbitration proceedings – such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration, or procedural orders on evidence issued by the arbitral tribunal – may also be problematic.

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Endnotes

(1) Published in *Schweizerische Juristenzeitung*, 2012, page 97.