Construction - Switzerland

Owner's liability for ground conditions and duty of care towards contractor

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Introduction

The scope of liability between owner and contractor with regard to subsoil conditions and other issues that affect the location where works are performed is often a source of dispute. Most contracts (eg, International Federation of Consulting Engineers (FIDIC) contracts) contain particular language on this issue, delineating the respective risks of the parties.(1)

Swiss construction law provides fall-back solutions if the parties have not included in the contract appropriate language that governs this issue exhaustively. Article 369 of the Swiss Code of Obligations provides that the owner's rights in case of defective work are forfeited if the owner is at fault for such defects. Such 'fault' may be found in, among other things, deficient subsoil conditions.(2) The same risk allocation is provided in Article 376(3), setting forth that a contractor keeps its right for remuneration for work already performed if the work has been destroyed due to a defective construction site, provided that the contractor notified the owner about such risk in due time. In addition, the general rule of good faith is construed as obliging each party to a contract to prevent harm to the other by informing the other about possible risks in performing the contract.

In an interesting decision dated December 7 2010(3) the Supreme Court applied this duty of care in a case where a contractor's equipment was damaged by obstacles on the ground. The contract in question was not a construction contract in the usual sense, as it concerned the custom harvesting of a cornfield. However, the contract was characterised as a construction contract by the Supreme Court. Therefore, the court's findings may be applied to construction contracts in general.

Facts

The owner hired the contractor to harvest a cornfield. The owner had bought the harvest from a farmer who owned the cornfield. During harvesting, a piece of metal (a 17-centimetre rusty adjustable wrench) lying on the ground got caught in the harvest unit of the corn harvesting machine, causing significant damage to the machine. Repairing costs amounted to nearly Sfr80,000, for which the contractor sued the owner. The claim included interest at the legal default interest rate of 5% (interest on the date that the damage occurred).

The courts of first and second instance rejected the claim. The contractor appealed to the Supreme Court.

Decision

The Supreme Court first confirmed the lower courts' characterisation of the contract for custom harvesting as a contract for works within the meaning of Article 363 of the Swiss Code of Obligations. It was undisputed that the damage had occurred because of the metal piece (ie, the rusty wrench lying on the cornfield).

The contractor argued that the owner had an implied, accessory, contractual duty to protect it from any damage or harm. Further, according to the contractor, the owner had a duty to inform it of any obstacles (stones or metal pieces lying on the ground) that he knew or could have known (in application of due diligence) might have posed a risk for the contractor's corn harvesting machine. In the contractor's view, the owner violated his

contractual duty of care, since he did not inspect the cornfield before handing it over to the contractor. In contrast, the owner relied on the farmer's statement that there were no obstacles on the cornfield (even though he knew that metal pieces had been found on the cornfield in the past). The contractor argued that in view of the possibility of obstacles on the cornfield for the corn harvesting machine, and in view of the risk to animals arising out of the harvesting machine, the owner should (and could) have reasonably been expected to inspect the cornfield to verify the absence of any such obstacles/risk. Such an inspection would have taken between one and two hours to complete. By relying on false information provided by the farmer, the owner violated his duty of care.

The Supreme Court confirmed that besides undertakings expressly specified in a contract or expressly provided for by Swiss law for the legal relationship under consideration (eg, contract for works), the general principle of good faith set forth in Article 2 of the Civil Code imposes an implied accessory (contractual) duty to safeguard the other party's legitimate interests and goods. As a consequence, the owner had to protect the contractor from any harm to its person or goods/tools when executing the contractual work. Where the contractor undertakes work in an owner's sphere of influence/risk (ie, under his control/instructions, on his grounds or by using his materials/tools), the contractor may expect the same duty of care as an employer has towards its employees (Article 328 of the Swiss Code of Obligations). Applying this rule to the case at hand, the Supreme Court ruled that the owner was obliged to inform the contractor about major obstacles such as boundary stones, piles, culverts or lifting holes, but not to inspect the cornfield for small metal pieces. Such an inspection of a cornfield where corn plants were 'man-high' would have been unreasonable. The sole fact that significant damage occurred was, as such, insufficient to establish a breach of the owner's duty of care.

The court further specified that the owner's duty to inform the contractor about obstacles related only to obstacles of which the owner knew or could have reasonably known. In the case at hand, the Supreme Court confirmed the lower courts' view that even if the rusty wrench had been lying on the surface of the soil at the time of sowing, it would not, due to its small size and colour, have been distinguishable from the soil. Therefore, it would not have been detected in the application of due diligence.

Given that the rusty wrench was reasonably not detectable, the owner did not violate his duty of care by relying on the farmer's statement that the field was free of obstacles and informing the contractor accordingly. In consideration of these circumstances, the court rejected the contractor's claim.

Comment

This Supreme Court decision is of practical importance because it draws not only on the statutory provisions governing contracts for works specifically, but also on Article 2 of the Civil Code (rule of good faith), which is part of public policy and should be mandatorily respected by courts and arbitral tribunals. Parties to a works contract should know that under Article 2, they may have additional (contractual) duties beyond the language of the contract.

Swiss statutory law governing contracts for works imposes only one explicit obligation on the owner: the duty to remunerate the contractor for the works. Of course, parties regularly stipulate additional duties in the contract.

Besides any such specific contractual undertakings, the general rule of good faith as set forth in Article 2 is a further source of (accessory) contractual duties - in particular, a mutual duty of care. Parties to a contract for works are, as a rule, obliged to prevent harm to each other. Consequently, they are to inform each other about possible risks in performance of the contract. This duty is increased when one party enters the other's sphere of influence/risk (eg, by using its material, working on its premises, being bound by particular instructions). In such case an employer's duty of care towards its employees (Article 328 of the Swiss Code of Obligations) applies by analogy. The specific scope of such duty of care depends, of course, on the particular circumstances and the content of the contract at hand.

Finally, in cases where the contractor knows or should have known about defective ground conditions (eg, due to its particular expertise or the like), it cannot rely on Article 2. It is obliged to inform the owner about such facts. First, the general duty to protect the other party from any harm resulting from Article 2 applies to the contractor as well. Second, Article 365(3) of the Swiss Code of Obligations expressly requires the contractor to inform the owner immediately when, in the course of its work, it notes defects in the construction site or any other circumstance which might compromise the correct or timely performance of the work. Failure to comply with such duty may entail the contractor's liability for any adverse consequences.

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Endnotes

(1) The provisions in the FIDIC Silver Book are sometimes criticised as being one-sided, favouring the owner. These provisions are often subject to negotiation.

(2) Peter Gauch, *Der Werkvertrag*, 4th edition, 1996, N 1979 with further reference to case law.

(3) Case 4A_494/2010.