

Construction - Switzerland

Additional works performed with owner's knowledge but without formal approval

Contributed by **LALIVE**

April 14 2014

Introduction

Facts

Decision

Comment

Introduction

Controversies between owners and contractors regarding remuneration for additional works are among the most frequent types of dispute in the construction industry. Typically, they raise questions such as:

- whether the works qualify as additional works under the contract;
- whether the works were properly ordered by the owner or its representative;
- whether the contractor complied with any applicable notice requirements; and
- what rates apply for additional works.

A 2013 Swiss Federal Supreme Court decision⁽¹⁾ addresses many of these issues under Swiss law.

Facts

In this case, the contractor asserted claims for additional payments for two types of additional work it had performed. It first argued that the owner's representative had submitted a new design and had asked for work to be performed which was outside the contractual scope. At the representative's request, the contractor had submitted a quote for the work on the basis of measured quantities. The contractor eventually performed the works on the basis of the owner's implicit approval of the quote; however, the owner had not formally approved it. The contractor also alleged that when performing the additional work, it had been requested to perform further work to comply with the owner's additional wishes. It invoiced this further work at cost, as foreseen in Article 374 of the Code of Obligations.⁽²⁾

The owner refused to pay for any of the alleged additional work, claiming that it was not aware of any design changes, changes of scope or special wishes. The owner also pointed out that the engineer – its representative – had no authority to enter into contracts or to change the scope of an existing contract. The contractor sued the owner, claiming the amount that it quoted for the new scope of work, as well as the actual costs of the minor further works it had performed.

Decision

The first instance court upheld the contractor's claims, both for the work performed as a result of the original change in scope and for the further work arising from the owner's additional wishes. By comparing the original scope of work and the work that had actually been performed, as evidenced by the signed progress reports,⁽³⁾ the court found that the initial scope of the contract had indeed been changed. However, the court noted that, according to the contract, any variation or change required a written amendment signed by the owner. The contractor had repeatedly asked whether the owner accepted its quote for the work but had not received explicit approval from the owner. Ultimately, no written amendment was concluded. Therefore, the court rejected the contractual claim for the additional work. However, it granted an extra-contractual claim based on Article 672 of the Civil Code. According to this provision, even in the absence of a contract a property owner is obliged to pay equitable remuneration to a party that builds on the property in good faith if the works cannot be removed. If the contractor acted in bad faith, remuneration is still payable but can be as low as the minimum value of the construction for the owner.

Authors

Matthias Scherer



Samuel Moss



The first instance court did grant the contractor's claim for remuneration (on a cost-plus basis) under the contract for the smaller works arising from the owner's alleged additional wishes. The court found that under the general conditions of contract, these works were not subject to a written amendment signed by the owner. The decision does not elaborate on the nature of these additional works, but presumably they were within the contractual scope or too small to amount to a variation or change which would have required a signed amendment to the contract.

The owner appealed the decision of the first instance court to the Supreme Court. However, the Supreme Court upheld the decision.

In its appeal, the owner challenged the lower court's finding that the contractor had acted in good faith. Good faith is a prerequisite for full compensation for works under Article 672 of the Civil Code. In the owner's view, the contractor had been perfectly aware that the owner had not approved its quote for the new scope, and that changes were subject to a written amendment of the contract, which was never concluded. The lower court found that the absence of a written amendment was fatal to a contract claim, but that the contractor could nevertheless have believed in good faith that the owner had approved the new scope of work to the extent that the owner had been aware that the works were being performed and had not objected to them. The Supreme Court dismissed the owner's argument on the grounds that the contractor's good faith reliance on the owner's implied approval was a finding of fact by the lower court, which the Supreme Court has only very limited powers to review.

The owner further complained that the progress reports, on which the lower court had relied to reach its finding that additional works had indeed been performed by the contractor, were inaccurate and were neither conclusive evidence of the performance of the works nor a sound basis for the calculation of their value. However, the Supreme Court rejected this argument on the basis that it was submitted too late and was unsubstantiated.

Finally, the Supreme Court analysed the calculation of the compensation which the lower court had granted to the contractor under Article 672 of the Civil Code. The lower court had relied on the contractor's invoices and progress reports as evidence for the value of the works. The owner argued that these documents were insufficiently detailed and should not have been accepted as evidence for that purpose. The Supreme Court dismissed the argument as ill-founded since it failed to address the lower court's main finding that these documents mentioned individual work items and their pricing. The Supreme Court also accepted that under Article 672 an owner could be ordered to pay a contractor not only for the value of the material used, but also for the value of the work as a whole, and that this value was equivalent to what the contractor could have earned on another project.

Comment

The case highlights the clash between contractual requirements of form and good-faith reliance on the other party's conduct, even though it may be ambiguous. It is arguable that a contractor which has performed work outside the contractual scope with the owner's knowledge should be remunerated, even if a contractual written form requirement for amendments was not complied with. However, good faith is not always a cure for failures to comply with such requirements. In this case, the court applied the contract strictly. The contractor's contractual claims were denied since the new scope of work had not been confirmed in a written amendment to the contract. However, the court was manifestly unsatisfied with that outcome and granted extra-contractual compensation for the added value which the owner of the property derived from the additional works.

Other courts or tribunals might, in similar circumstances, have nevertheless granted a contractual claim, given that the owner's conduct could be argued to be tantamount to a waiver of the contractual form requirement, which would have made it unnecessary to resort to an extra-contractual basis to grant compensation.

The lesson for owners is that they might not be able to hide behind requirements of form in order to avoid paying for works which they knew were being performed by a contractor and were outside the contractual scope. In addition, owners should avoid signing off on progress reports and other records of the work performed if they consider that any part of the work to which the records relate was outside the contractual scope.

However, the Supreme Court's decision should not be construed as a licence for contractors to press on with works outside the contractual scope without first obtaining the owner's approval in writing if required by the contract. Courts and arbitrators applying Swiss law will adopt a case-by-case approach in assessing whether the contractor was entitled to assume that the owner had accepted the additional works and that it would have to pay for them.

The decision raised no issues relating to contractual notice requirements, which in construction contracts often require the contractor to give notice within a (usually short) time period if it considers that instructed work is outside its scope of works. However,

the existence of a notice provision in addition to a form requirement may make it more difficult for the contractor, if it failed to comply with the notice provision, to argue that it believed in good faith that the owner had waived the form requirement. The good faith of the contractor will notably have an impact on the amount of remuneration to which it would be entitled under Article 672 of the Civil Code for works that cannot be removed.

For further information on this topic please contact [Matthias Scherer](mailto:mscherer@lalive.ch) or [Samuel Moss](mailto:smoss@lalive.ch) at Lalive by telephone (+41 22 319 87 00), fax (+41 22 319 87 60) or email (mscherer@lalive.ch or smoss@lalive.ch). The Lalive website can be accessed at www.lalive.ch.

Endnotes

(1) 4A_178/2013, July 31 2013.

(2) Unofficial translation of Article 374 of the Code of Obligations: "if the price has not been determined in advance it shall be established in light of the value of the works and the contractor's costs".

(3) It is not specified in the Supreme Court's decision, which summarises the lower court proceedings, whether the progress reports were signed by only the contractor or also by the owner and/or its representative.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2014 Globe Business Publishing Ltd