Construction - Switzerland

New Case Law on the Taking Over of a Turnkey Plant

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Swiss law is frequently chosen to govern construction contracts, often in combination with arbitration in Switzerland. A partial award rendered by an arbitral tribunal sitting in Geneva on September 1 2005 is a good illustration of the typical issues that arise in this field.(1)

A European party had agreed with a North African party to deliver a turnkey brewery. As is usual in this kind of contract, the parties stipulated detailed mechanisms for taking over the plant. Taking over was the triggering event for the supplier's guarantee for defects. The parties' dispute concerned alleged defects. The supplier was of the view that the owner had taken over the plant and that the claim for defects was time barred. The owner asserted that it had not yet taken over the plant and that the defect liability period had not yet started. The arbitral tribunal found that under Swiss construction law, delivery and taking over are one and the same event, seen from the perspective of the supplier and the owner respectively. The works need not be without defect in order to be delivered; it suffices that they are complete. Likewise, that the owner takes over the plant does not necessarily mean that it has accepted the works.

The tribunal found that the brewery was producing beer in industrial quantities. It concluded that even if the parties were in dispute about alleged defects, the plant had clearly been delivered in the sense of Article 371 of the Swiss Code of Obligations. However, the arbitral tribunal accepted that the parties are free to contract out of Article 371 by agreeing on specific delivery mechanisms. The parties had done this by providing that taking over would occur only after a series of tests had been performed successfully and a taking over protocol had been signed by the owner. Unfortunately, the parties could not agree on whether the tests were successful and which party was responsible for the lack of conclusive results and the remaining defects. The key ruling of the arbitral tribunal was that, given that it was using the plant for industrial production, the owner could not postpone the taking over indefinitely in good faith, even though certain contractual prerequisites had not been met. The supplier's defect liability period was thus deemed to run from the date on which the owner could no longer in good faith refuse to sign the taking over protocol. On the other hand, the arbitral tribunal rejected the supplier's argument that taking over had taken place either tacitly or through the joint signature of numerous delivery documents and handover certificates. The arbitrators ruled that Swiss law does recognize the possibility of a tacit takeover, but only if the contract does not contain specific provisions regarding takeover. With regards to the signing of handover certificates, the tribunal held that the parties were free under Swiss law to agree on partial

deliveries, but had not done so. Therefore, these documents were no substitute to the final taking over certificate explicitly required under the contract.

The tribunal held that under Swiss law it was entitled to fill contractual gaps. The hypothesis that it would no long be possible to proceed to a joint handover as foreseen under the contract had not been contemplated. Consequently, the arbitral tribunal ruled that taking over had taken place in good faith on day X and that the one-year defect liability period had not yet expired.

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Endnotes

(1) To be published in *ASA Bulletin* 4/2006, p 729.