THE PROFESSIONAL NEGLIGENCE LAW REVIEW

Fifth Edition

Editor
Nicholas Bird

THE LAWREVIEWS

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Editor
Nicholas Bird

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PREFACE

This fifth edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in most of the key jurisdictions. The *Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders who are concerned with the liability and regulatory issues of professionals across the globe. The variation in law and practice across the different jurisdictions is very noticeable and underlines the usefulness of a guide such as this.

This edition is the product of the skill and knowledge of leading practitioners in these key jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all those who have contributed to this edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found in Appendix 1. I would particularly like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and especially to Bryony Howe, who has assisted in its production with great knowledge and skill. Finally, the team at Law Business Research has managed the production of this fifth edition with passion and great care. I am grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
London
June 2022

Chapter 9

SWITZERLAND

Philipp Känzig and Jonas Stüssi[1]

I INTRODUCTION

i Legal framework

Swiss law distinguishes between contractual and extra-contractual liability. The statutory provisions are mainly to be found in the Swiss Civil Code (CC) and the Swiss Code of Obligations (CO).

It is possible for damage to be caused cumulatively by a violation of contractual duties and through extra-contractual negligence. However, indemnification for the same damage can be obtained only once. The claim is exhausted once it has been satisfied, irrespective of the legal basis.[2]

The focus of the present analysis is on professional negligence and the resulting liability. Therefore, it deals mainly with contractual liability. The legal basis for contractual liability is Article 97 CO. Legal literature and case law supplement the main contractual duties by adding several ancillary duties. These ancillary duties mainly focus on diligence, care and reporting requirements. A violation of any of these duties can result in contractual liability.

In Switzerland, a service provider is primarily considered to be an agent of the service provider's client. To the extent that the law does not provide for specific duties in relation to specific services, the general duties of care and diligence are therefore governed by agency law.

In performing its duties, the agent is required to act in the interest of the principal in achieving the desired results.[3]

Despite the general principal of freedom of contract, agency law contains a number of mandatory provisions. Based on the jurisprudence of the Swiss Federal Supreme Court, the principle duties of care and loyalty[4] are mandatory and cannot be waived by contract.[5]

Article 398 Paragraph 2 CO provides that the agent owes the principal the loyal and careful performance of the mandate.

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1 Philipp Känzig and Jonas Stüssi are partners at Staiger Attorneys at Law Ltd.

2 Fellmann, Walter and Kottmann, Andrea: *Swiss Liability Law*, Volume I, General Section as well as liability for fault and personality infringements, ordinary causal liability of the CO, CC and Product Liability Act (Berne 2012), Paragraph 10.

3 Article 394 Paragraph 1 CO.

4 Article 398 CO.

5 Basel commentary on the CO from Oser/Weber, Article 394, No. 21; Basel commentary on the CO from Oser/Weber, Article 398, No. 34.

The duty of loyalty encompasses the safeguarding of the principal's interest and the performance of all acts necessary to achieve the purposes of the mandate. The agent is required to refrain from acts that could cause the principal damage. The duty of loyalty encompasses duties of care, reporting, discretion and confidentiality.

A violation of the duty of loyalty can also constitute a violation of provisions of penal law such as embezzlement under Article 138 of the Penal Code (PC) or criminal mismanagement under Article 158 PC. The duty of care is considered to further specify the duty of loyalty. However, with the exception of the reference to the duty of care of the employee in employment law,[6] the duty of care is not explicitly referred to in statutory law, and its scope has been defined by the jurisprudence of the Swiss Federal Supreme Court. The duty of care includes the purposeful and success-orientated performance of duties. The threshold of negligence is defined objectively by the average professional care exercised in the industry in question.[7] The level of care is also defined by the level of knowledge and skills of a specific agent that the principal knew or should have been aware of.[8]

According to the long-standing jurisprudence of the Swiss Federal Supreme Court, the agent cannot be held liable for a lack of success. Liability can only be incurred by a lack of care or disloyal conduct leading to damage. Objective criteria are applied. The level is higher for professional agents who are paid for their services. Standards and practices applicable to specific professions are also relevant.[9] Finally, the specific circumstances of the case in question must be taken into account.

Over time, the jurisprudence of the courts has defined rules of conduct that have become the benchmark for the level of care in certain professions.[10] In many areas, the duties of care have, therefore, become standardised.

A claim for negligence is in most cases asserted based on Article 97 Paragraph 1 CO in connection with Article 398 Paragraph 2 CO. Three fundamental elements are of relevance. The first element is a violation of contractual duties, specifically negligence in performing the duties. The second element is that damage has been suffered, and the third element is a natural and adequate causal connection between the violation of duties and the damage that occurred. Culpability is another required element of contractual liability, but, in contrast to the other elements, it is assumed if the other three elements can be affirmed. The agent can, however, avoid liability by exculpating himself or herself by proving that he or she has not acted negligently.

ii Limitation and prescription

Under Swiss law, limitation does not affect the existence of the claim but rather the legal possibility of asserting the claim.[11] Therefore, the debtor can avoid liability by asserting the exception or prescription. If the debtor raises this exception, the court is required to

6 Article 321(e) Paragraph 2 CO.

7 Basel commentary on the CO from Weber, Article 398, No. 24; Huguenin, Claire: *Swiss Code of Obligations* – General and Special Section (Third Edition. Zurich/Basel/Geneva 2019), Paragraph 3266.

8 Swiss Federal Supreme Court decision 127 III 357 No. 1c.

9 Swiss Federal Supreme Court decision 115 II 62, 64 f.; Fellmann: 'Walter, Objectification of due diligence in contract law', HAVE, 2016, page 95; Müller, Thomas: 'The liability of the lawyer – selected aspects', Anwaltspraxis, 2015, page 461.

10 Fellmann, 2016, page 98 f.

11 Huguenin, Paragraph 2220; Fellmann and Kottmann, Paragraph 3027.

determine whether the legal requirements are fulfilled and, if so, dismiss the claim on its merits. In the event that the debtor does not assert the exception, the court has no authority to itself determine whether the claim is time-barred or not.[12] Swiss law distinguishes between prescription and forfeiture. Whereas prescription only affects the enforceability of a claim, forfeiture results in the extinction of the claim. Therefore, the court is required to determine *ex officio* whether a claim has been forfeited by the lapse of time. Moreover, contrary to limitation, forfeiture cannot be stayed or interrupted.

Depending on the cause of action, Swiss law provides for various statutes of limitation. According to Article 127 CO, the general rule is that, in the absence of specific legal provision to the contrary, contractual claims become time-barred after 10 years.[13] Certain claims – for example, claims for legal fees and fees for medical treatment – become time-barred after five years.[14] One exception to these general principles is provided for in Article 128a CO, according to which contractual claims based on personal injury or death generally become time-barred after three years from the date on which the claimant became aware of the damages but, at the latest, 20 years after the violation of the contract. The general rule for claims in tort is that they become time-barred three years after the damage occurred and the identity of the person that caused the damage became known. This 'relative' statute of limitations is provided for in Article 60 Paragraph 1 CO. Irrespective of the relative statute of limitation, claims in tort become time-barred 10 years after the act that triggered liability. One exception to these general principles again applies to claims based on personal injury or death. Article 60 Paragraph 1*bis* provides that such claims in tort become time-barred three years after the claimant becomes aware of the identity of the tortfeasor but, at the latest, 20 years after the illegal act. Another exception is provided for in Article 60 Paragraph 2 CO, whereby a claim based on a criminal offence with a longer prescription period than the civil law statute of limitations becomes time-barred only after the prescription period for the prosecution of the criminal offence has lapsed.

The law provides for the possibility of interrupting the statute of limitations under specific circumstances. If the statute of limitation is interrupted, a new limitation period of the same length is triggered.[15] According to Article 135 CO, the statute of limitations is interrupted by: (1) the acknowledgement of the debt; (2) debt collection proceedings; (3) the initiation of formal conciliatory proceedings; (4) the filing of a claim in court or in arbitration proceedings; and (5) a declaration of insolvency. The parties can also agree to interrupt the statute of limitations when entering settlement proceedings. Moreover, a party can waive its right to invoke the statute of limitations. It can, however, only do so after the limitation period starts. According to the new Article 141 Paragraph 1*bis* CO, which entered into force on 1 January 2020, the waiver is required to be made in writing.

The commencement of formal conciliatory proceedings, an action in court or arbitration proceedings also prevent the forfeiture of a claim.

12 Article 142 CO.

13 Article 127 CO.

14 Article 128 No. 3 CO.

15 Article 137 Paragraph 1 CO.

iii Dispute fora and resolution

In Switzerland, civil procedure is governed by the Federal Civil Procedure Code (CPC) and, with respect to the procedure before the Swiss Federal Supreme Court, the Supreme Court Law.

Whereas civil procedure is governed by federal law, the organisation of the courts of first instance and the courts of appeal are governed by cantonal law.[16] The competence of the cantonal courts and the determination of the type of procedure is generally determined by the amount in dispute.

In the absence of statutory provisions to the contrary, the ordinary (general) procedure before the court of first instance applies if the amount in dispute exceeds 30,000 Swiss francs. A simplified procedure applies to claims of no more than 30,000 francs.[17]

Certain cantons, such as Zurich, which are of particular importance for the Swiss economy, have specialised commercial courts. These commercial courts deal with commercial litigation between corporate entities. Individuals acting as plaintiffs can chose between the commercial court and the district court if the respondent is a commercial entity. The commercial court acts as the sole cantonal instance in commercial disputes. The panel of judges includes professionals with experience in the commercial area the dispute focuses on. The panel of judges hearing an insurance-related dispute will, therefore, include industry experts who are frequently professionals from the insurance industry and act as part-time judges.

The district courts are the courts of first instance for all disputes except for those brought before the commercial courts. Prior to filing the claim with the district court (but not before the commercial court), the claimant is required to file a request for conciliation with the justice of the peace. The role of the justice of the peace is similar to the role of a mediator. Although minor disputes between private individuals can frequently be resolved in this manner, thereby avoiding an action in court, the conciliatory hearing is mostly a purely formal hoop to jump through in cases in which the parties have already retained counsel and an attempt to settle the case out of court has failed. According to Article 199 CCP, the parties can mutually agree to go directly to court if the amount in dispute exceeds 100,000 francs. The claimant can also unilaterally decide to directly file its claim in court if the respondent is domiciled abroad or if its domicile is not known.

The cantonal superior court is the court that hears appeals against the decisions of the district courts. The judgments of the cantonal superior courts are then subject to an appeal to the Swiss Federal Supreme Court if the amount in dispute exceeds 30,000 francs.[18]

iv Remedies and loss

Depending on the circumstances, the principal can assert claims for: (1) performance; (2) damages; (3) reporting; (4) disgorgement of profit; and (5) fee reduction.

If the agent is in default with the performance of his or her duties, the principal has the right to assert a claim cumulatively for performance and damages resulting from the delay.

The principal can also, in the event of a default, rescind the contract and claim damages.[19] In general, both the agent and the principal by law have the right by law to terminate at

16 Article 122 Paragraph 2 of the Swiss Constitution and Article 3 CPC.

17 Article 243 et seq. CPC.

18 Article 74 Paragraph 1 of the Supreme Court Law.

19 Article 107 et seq. CO.

any time the agency relationship.[20] According to legal literature and the jurisprudence of the Swiss Federal Supreme Court, an agency relationship is always based on mutual trust. Therefore, neither the agent nor the principal can be expected to continue to perform their duties if the trust between the parties has – for whatever reason – been lost.[21]

The right of termination by the agent does not apply if, because of the specific circumstances, termination would be untimely. An example would be a lawyer terminating the client relationship at a time at which the client can no longer properly instruct a replacement to meet a legal deadline. If the principal is, under such circumstances, forced to terminate the agency relationship because of the negligence of the agent, the agent may also be liable for damage caused because of the termination of the legal relationship as such.[22]

In addition to his or her claim for performance and damages, the principal can assert his or her right pursuant to Article 400 CO to require the agent to report to the principal. The principal can also demand that the agent disgorge everything he or she has received from the principal or from third parties in the context of the performance of his or her duties. The agent is required to surrender not only valuables but also documents and other data carriers.[23]

If the agent was negligent in performing his or her duties, the principal has the right to reduce the fees payable to the agent. The principal is, however, required to pay fees to the extent that the agent properly performed his or her duties for the benefit of the principal. In the event that the work product is, because of the negligence of the agent, without any value to the principal, the agent forfeits the entire fee.[24]

According to the jurisprudence of the Swiss Federal Supreme Court, damage is defined as an involuntary reduction of net assets. Damage can, therefore, be a reduction of assets as such or an increase in liabilities. Damages can also include a loss of profits. The Swiss Federal Supreme Court applies the general formula that damages can be calculated by comparing the current financial situation with the financial situation as it would have been without the breach of duties.[25] There are two methods for determining the hypothetical value of the net assets. The first method is to compare the current net asset value with the net asset value that would have resulted if the agent had properly performed his or her duties under the contract. The alternative is a comparison between the current net asset value and the hypothetical net asset value if the contract had not been concluded at all.

The general rule for determining damages in the case of agency agreements is the former method (comparison between current net asset value and net asset value in the case of proper performance).[26] This can pose difficulties in determining the hypothetical net asset value resulting from correct performance.[27] The second method can be applied if the professional service provider should, under normal circumstances, have known that it would

20 Article 404 Paragraph 1 CO.

21 Swiss Federal Supreme Court decision 115 II 464 No. 2a.

22 Swiss Federal Supreme Court decision 110 II 380 No. 3.

23 Article 400 CO; Swiss Federal Supreme Court decision 139 III 49 No. 4.1.2; Swiss Federal Supreme Court decision No. 122 IV 322 3c/aa.

24 Swiss Federal Supreme Court decision 124 III 423, Pra 88 (1999) No. 22.

25 Swiss Federal Supreme Court decision 104 II 198 No. a; Swiss Federal Supreme Court decision 127 II 403 No. 4a; Fellmann,Walter: Attorneys at Law (Second Edition, Berne 2017), Paragraph 1458.

26 Article 97 CO in connection with Article 398 Paragraph 2 CO.

27 Fellmann, 2017, Paragraph 1458 f.

not be possible to fulfil the contract correctly. If the service provider in this case did not make the principal aware of this when accepting the mandate, the principal has the right to be made whole again.

II SPECIFIC PROFESSIONS

i Lawyers

The basis of the relationship between a lawyer and his or her client is an agency agreement. The principal duty of the lawyer in accordance with Article 394 Paragraph 1 CO is to fulfil the duties provided for in his or her contract with the client. This must be understood in a very broad sense. In general, the client primarily requires advice to determine what legal options are available. Although this practice is slowly changing, Swiss lawyers do not as a rule define their task in a detailed engagement letter. In general, the mandate agreement simply identifies the counterparty and defines the task of the lawyer in very short terms (for example, 'claims in tort' or 'claims out of professional negligence').

Although the mandate agreement could in theory define the scope of the duty of care, this is rarely the case in practice. The duty of care is defined by what can reasonably be expected of a legal professional with average skills. The Federal Law on the Conduct within the Legal Profession (BGFA) simply states that the lawyer is required to provide services to the principal dutifully and carefully.[28]

However, in complex cases requiring specialist knowledge, the lawyer is required to inform the potential client and refuse to accept the mandate if he or she does not have this specialist knowledge. A general practitioner can, therefore, be held liable if he or she accepts a mandate that requires knowledge of an area of law of which he or she has little or no experience and this results in damage to the principal.

In addition to the general duty of care, the lawyer has several duties relating to different phases in the execution of his or her mandate. When accepting the mandate, the lawyer has to verify that there are no conflicts of interest and that he or she can exercise the mandate independently. In the second phase, he or she is required to obtain the instructions needed to perform his or her duties properly. This task is frequently underestimated. Clients have a different perception of what is relevant and the lawyer is required to pose questions and obtain the information that he or she requires to conduct a proper legal analysis. The third phase is the legal analysis itself, based on the instructions the lawyer has received from the client. The lawyer is required to know the law and have access to the legal literature and precedents that are necessary to perform the analysis properly. The lawyer is then required to report properly to the client and make the client aware of possible risks. In disputes, the lawyer is required to conduct the litigation in accordance with the applicable procedural rules, in particular to observe deadlines and to react in the appropriate manner to procedural steps undertaken by the counterparty. If, during the course of performing his or her duties, the lawyer comes to the conclusion that specialist knowledge is required, he or she must inform the client and engage a specialist – possibly as a subcontractor. Agency law is governed by the principle that the agent is required to perform personally the task agreed upon. Therefore lawyers and

28 Article 12 lit. (a) BGFA.

other agents as a rule specifically include a provision in their contracts that allow for the engagement of a subcontractor. A lawyer needs to comply with a high standard of care.[29] He is also responsible for the conduct of subcontractors he has engaged.

However, a lawyer does not undertake to be successful in achieving the results that the client desires. The client must accept the risk that the lawyer, despite exercising due care, will not be successful.

In practice, the negligence for which lawyers are most frequently held liable in Switzerland is a violation of the duty of care. Missing a statutory or court-ordered deadline is considered a violation of the duty of care almost irrespective of the reason.[30] The same applies with respect to claims becoming time-barred after the lawyer has accepted the mandate. Other procedural mistakes with irreversible consequences also give the lawyer little room to exculpate himself or herself. On the other hand, it is extremely difficult in Switzerland to successfully assert liability claims based on the – possibly wrong – assessment of the law in litigation. In most areas of civil law, including agency law, it is the judge who is required to correctly apply the law (*iura novit curia*). Therefore, although it can certainly be embarrassing for a lawyer to make fundamental mistakes in arguing substantive law, the judge is required to correct these mistakes. Litigation is not an exact science and lawyers are often forced to make tactical and strategical decisions as to how to present the case in court. Therefore, what has been said concerning the correct application of the law also applies, to a lesser extent, to the manner in which the facts are presented to the court. Liability can successfully be asserted in such cases, but it is certainly more difficult to do so than if the lawyer had committed a procedural error. The above applies to dispute resolution in court or before other authorities. The risk of becoming liable for malpractice because of the incorrect application of the law in contractual or corporate work is higher, as mistakes of this kind are generally easier to prove.

Lawyers licensed to practise in Switzerland are required to maintain professional liability insurance with minimum coverage of 1 million francs.[31] In practice, large law firms have substantially higher coverage. Professional liability insurance is governed by the Federal Law on the Insurance Contract. The client cannot assert a claim directly against the insurer but rather against the lawyer. There is, therefore, a risk that the client will not be covered for loss if the insurance company can successfully assert an exception to coverage, in particular the belated notification of the claim to the insurance company.

ii Medical practitioners

With respect to medical practitioners, it is important to distinguish between doctors in private practice (including doctors who work for private clinics) and medical practitioners who work for public institutions such as the cantonal or regional hospitals. The legal relationship between a private practitioner and the patient is qualified as an agency agreement in accordance with Article 394 et seq. CO, whereas the relationship between public medical practitioners (in hospitals in particular) and their patients are governed by cantonal public

29 Fellmann, 2017, Paragraph 1498 ff.; Müller, page 462 f.; Huguenin, Paragraph 3267; Schiller, Kaspar and Nater, Hans: 'The professional due diligence obligations of lawyers under Art. 12 lit. a BGFA do not go beyond the contractual obligations', SJZ, 2019, page 43; Schmid, Markus: 'The attorney's duties of care – a selection', HAVE, 2016, page 101.

30 Swiss Federal Supreme Court decision 87 II 364.

31 Article 12 lit. f BGFA.

law. Therefore, the basic principles applicable to agents also apply to medical practitioners in the private sector, whereas the applicable cantonal law on the liability of public institutions applies to public institutions and their employees.

Specific provisions concerning medical practitioners can be found in the Federal Law on Medical Practitioners (LMG). Moreover, professional regulations and guidelines, such as the Rules of the Swiss Association of Doctors, apply. These rules and regulations more closely define the rules of conduct set out in the LMG, and also set out ethical principles.

The primary duty according to Article 40 LMG is to exercise due care in the interests of the patient. In practice, the courts obtain expert opinions when dealing with a specific malpractice case. The Swiss Federal Supreme Court has held that doctors are required to exercise due care even when treating patients outside their practice or hospital either as a favour or in the case of an emergency.[32]

The required degree of care is determined based primarily on objective criteria. The standard of care is higher for specialists practising in their area of specialisation. The circumstances of the specific case play a role in correctly applying both the objective and the subjective criteria in question. In particular, the nature of the treatment or the operation, the risks generally associated with this treatment or operation, the timely urgency and the available infrastructure are of the essence.[33] Although a hospital or a doctor, therefore, in general incurs liability for any violation of care, the test applied in emergency situations or where a fully reliable diagnosis is not possible because of the nature of the disease or injury, is less strict.[34]

The duty to correctly and completely inform the patient of the risk of a treatment is of fundamental importance. According to the Swiss Federal Supreme Court, an operation qualifies as a bodily injury. With the exception of emergencies, the consent of the patient is therefore required.[35] This consent can only be given based on a correct disclosure of the benefits, risks and possible alternative treatments.[36] The agent's duty to account for his or her activities[37] is also of relevance.

If the patient is not given all necessary explanations before the treatment, the medical practitioner can become liable irrespective of whether he or she then exercised due care in treating the patient. In this case, the medical practitioner can only exculpate himself or herself if he or she can prove that the patient would have consented to the treatment even if he or she had been given all necessary explanations (hypothetical consent).[38]

As is the case for lawyers, doctors are also required to obtain insurance coverage for errors and omissions.

32 Swiss Federal Supreme Court decision 115 Ib 175 No. 2b; Landolt, Hardy and Herzog-Zwitter, Iris: 'Physicians' duty of care', HAVE, 2016, page 112.

33 Swiss Federal Supreme Court decision 133 III 121 No. 3.1; Huguenin, Paragraph 3268; Landolt and Herzog-Zwitter, page 112.

34 Swiss Federal Supreme Court decision 113 II 429 No. 3a; Landolt and Herzog-Zwitter, page 112.

35 Swiss Federal Supreme Court decision 124 IV 258 No. 2; Ott, Werner E: 'Medical and legal clarification of medical liability cases', HAVE, 2003, page 282.

36 Swiss Federal Supreme Court decision 113 Ib 420, No. 4; Ott, page 282.

37 Article 400 CO.

38 Swiss Federal Supreme Court decision 117 Ib 197 No. 5; Basel commentary on the CO from Weber, Article 398, No. 29; Huguenin, Paragraph 3270; Ott, page 282.

iii Banking and finance professionals

Financial services are again, in general, governed by agency law. However, the financial industry is highly regulated and a great number of laws also apply (the Federal Law on Banks and Savings Banks, the Anti-Money Laundering Law and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading to name only a few). Further legislation applicable to the provision of financial services adopted by Parliament in spring 2018 (namely the Swiss Financial Services Act and the Swiss Financial Institutions Act) entered into force as of 1 January 2020. Generally speaking, the rules governing the industry are being aligned to those in the European Union and constantly becoming stricter and more detailed.

For the time being, in providing investment advisory, securities trading and assets management services, the service provider is primarily required to observe the general duties of care and loyalty as provided for in agency law. The applicable benchmark is the degree of care that can objectively be expected of a conscientious and diligent agent, and it is high in the financial industry. To a certain degree, the knowledge of the client is also of relevance. Although this does not diminish the agent's duty of care, a client who is engaged in the financial industry himself or herself, or otherwise has experience with investments, will find it more difficult to hold an investment adviser or portfolio manager liable. Rules of conduct and the general practice when providing the financial services in question are also of relevance. A great degree of standardised duties of care have developed over time, starting with the Swiss Bankers Association Due Diligence Code of Conduct first implemented in 1977 and continuously revised until present. Further statutory and regulatory rules apply in particular to investment advice and portfolio management. The increased risks associated with cybercrime have also led to a very high standard for the duty of care – in particular in the context of e-banking.

The duty of a full and detailed risk disclosure and stringent rules concerning the identification of customers and beneficial owners play a significant role. The violation of these duties not only is associated with a liability for damages but can also have penal and administrative law consequences. A violation of the duty of due care can be qualified as criminal mismanagement according to Article 158 PC. Sanctions are also imposed for violations of the duties to ascertain the identity of the beneficial owner and the source of the funds. The Swiss Federal Supreme Court has held that the probability of causing damage and the grievousness of the lack of care are the two elements to be considered from the point of view of penal law.[39] The Swiss regulator can impose financial (disgorgement of ill-gotten gains) and other sanctions on financial service providers who have not exercised due care. In grievous cases, the regulator can revoke licences to provide financial services and ban individuals responsible for serious violations of supervisory law from acting in a senior function at a supervised institution for up to five years.

39 Swiss Federal Supreme Court decision 130 IV 58 No. 8.4; Roth, Monika: 'On the due diligence of financial service providers', HAVE, 2016, page 114.

iv Computer and information technology professionals

Other than in the legal, medical and financial sectors, no specific rules apply to services in the information technology sector. These professions are not regulated in Switzerland. The general rules applicable to agents set out in the introductory section therefore apply.

v Real property surveyors

A private association of Swiss real estate appraisers, SIV, exists, but this association does not publish rules that are binding for either its members or the profession in general. Again, the general considerations set out in the introductory section apply.

vi Construction professionals

Although not regulated by state authorities, the Swiss Association of Engineers and Architects (SIA) publishes very detailed rules, which can be considered the standard in the industry.

It is often difficult to determine whether the contract with architects and engineers is an agency agreement or a works contract. With respect to the level of loyalty and care, however, the distinction is not relevant. They are equivalent. The SIA Rules 102 and 103 of 2020 provide for a general duty of due care, which is then further specified in various respects. The engineer is, according to Article 1.2.1 of the SIA 102 and 103, required to apply the current art of construction as well as generally accepted current rules of building and construction.[40] An architect is further, in accordance with Article 2.1 and 3.4.1 of the SIA Rules 102 and Article 4.2 of the SIA Rules 103, required to give the customer proper advice. If he or she received instructions that are impractical or dangerous, he or she is required to warn the customer. If the customer is a professional and knowledgeable of the practices in the construction industry, the architect or engineer has a lesser responsibility in this respect. The Swiss Federal Supreme Court has held that an architect can also become liable for mistakes made in the calculation of costs.[41]

The liability of engineers and architects is governed by Article 97 Paragraph 1 CO combined with Article 398 Paragraph 2 CO (on agency), and Article 364/368 Paragraph 1 CO (on works contracts).

In general, architects and engineers voluntarily take out professional liability insurance. It is advisable to ascertain that such insurance exists when choosing a planner or an architect.

vii Accountants and auditors

Accountants are agents in accordance with Article 394 et seq. CO. In this respect, the general rules set out in the introductory section above apply. As in the area of construction, most accountants are members of a private association. However, the degree of private law regulation is not comparable with the construction industry. The Swiss Federal Supreme Court has held that accountants are liable for an exact and complete accounting.[42]

40 Hochstrasser, Michael and Denzler, Beat: 'The planner's duty of care', HAVE, 2016, page 116.

41 Swiss Federal Supreme Court decision 134 III 361 No. 6.2; Swiss Federal Supreme Court decision 4A_271/2013 from 26 September 2013 No. 2.1; Basel commentary on the CO from Oser/Weber, Article 398, No. 29.

42 Swiss Federal Supreme Court decision 4A_601/2012 from 14 October 2013 No. 3; Basel commentary on the CO from Oser/Weber, Article 398, No. 29.

Auditors are more strictly regulated by the Federal Law on the Admission and Supervision of Auditors. Special rules apply to the auditors of financial institutions. A special regulatory authority exists.

In addition to the general provisions of agency law, the liability of auditors is governed by Article 755 CO, a provision in the section of the CO dealing with corporate law. The auditor is liable for all damage caused intentionally or negligently.[43] An objective standard applies. The auditor is required to be capable of properly analysing financial statements with respect to their accuracy and adequacy. He or she is required to carefully prepare an accurate audit report. Special duties apply in particular to the auditors of financial institutions, which are required to inform the financial regulator (FINMA) of violations of regulatory and legal duties by the audited financial institutions.

The duty of the auditor to notify the judge in cases of insolvency is of particular importance in the context of liability. A failure to do so can result in the liability of the auditor for damages resulting from a further deterioration of the financial situation following the audit. In this respect, the auditor is also required to ensure that the audit report is prepared and submitted to the shareholders in a timely manner. According to Article 699 Paragraph 2 CO, the annual general assembly, which is required to approve the financial statements based on the audit report, must take place within six months of the end of the business year. If the board of the directors does not comply with its duty to convene the general assembly in a timely manner, the auditors are authorised and required to themselves convene the general assembly. The failure to do so can again lead to the liability of the auditors.

Professional liability insurance is the standard in the industry. Regulated auditors are legally required to be insured.[44]

viii Insurance professionals

Insurance companies are considered to be a part of the Swiss financial industry and are strongly regulated. The legal basis is the Federal Law on the Supervision of Insurance Companies and the regulator is FINMA. To a great extent, reference can be made to Section II.iii concerning financial service providers. The duty of care is high.

Professional liability insurance is mandatory.

III YEAR IN REVIEW

There have been no substantial legislative developments in the area of professional negligence in 2021. A very substantial claim in the context of the insolvency of a financial institution is currently being asserted by its clients as a derivative action against a major audit firm. This case is likely to go up to the Swiss Federal Supreme Court ultimately, and result in a published judgment that could serve as a precedent for future actions against auditors. At present, it is not yet possible to disclose further details.

43 Böckli, Peter: Swiss Stock Corporation Law with Merger Act, Stock Exchange Company Law, Group Law, Corporate Governance, Auditor's Law and the Audit of Financial Statements in new version – taking into account the ongoing revision of Stock Corporation and Accounting Law (Fourth edition, Zürich/Basel/Geneva 2009), page 2413.

44 Article 9 Paragraph 1 lit. c Federal Law on the Admission and Supervision of Auditors.

IV OUTLOOK AND FUTURE DEVELOPMENTS

The Swiss Federal Supreme Court has tended to impose higher standards of care and also to standardise the requirements for certain industries over the past years and is expected to continue to do so.[45] Also, professionals in various industries have increasingly been organising themselves in professional associations. These will further develop professional standards that can become the standard in their respective industries and, therefore, a benchmark that will be taken into account by the courts. In general, it is to be expected that the standard of care within the service industry will continue to become stricter over the coming years.

45 Fellmann, 2016, page 96.

Appendix 1

ABOUT THE AUTHORS

PHILIPP KÄNZIG

Staiger Attorneys at Law Ltd

Philipp Känzig has more than 30 years of experience in litigation and arbitration, and he heads the arbitration team at Staiger Attorneys at Law Ltd. A focus of his practice is the representation of financial institutions, in particular insurance companies in coverage disputes and banking institutions in disputes with customers. Aside from representing clients before the Swiss commercial courts, his practice includes acting as counsel and as arbitrator in ICC, Swiss Rules, VIAC, LCIA and ad hoc arbitration proceedings. Philipp Känzig is the author of numerous publications in the area of civil procedure and civil law. He is recommended by The Legal 500 for commercial litigation, insolvency and corporate recovery, and named a Global Leader by *Who's Who Legal: Professional Negligence 2021*.

JONAS STÜSSI

Staiger Attorneys at Law Ltd

Jonas Stüssi is the managing partner at Staiger Attorneys at Law Ltd and head of the firm's litigation practice. He specialises in domestic and cross-border dispute resolution. Jonas Stüssi has extensive experience in complex commercial disputes before both the state courts and international arbitration tribunals. He advises clients in a wide range of industries, such as insurance, banking, mechanical engineering and construction. Jonas Stüssi is the author of numerous publications in the area of civil procedure and civil law. He is recommended by The Legal 500 for commercial litigation, and named a Global Leader by *Who's Who Legal: Professional Negligence 2021*.

STAIGER ATTORNEYS AT LAW LTD

Talacker 41
8001 Zurich
Switzerland
Tel: +41 58 387 80 00
Fax: +41 58 387 80 99
philipp.kaenzig@staiger.law
jonas.stuessi@staiger.law
www.staiger.law

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