THE PROFESSIONAL NEGLIGENCE LAW REVIEW

Second Edition

Editor
Nicholas Bird

THE LAWREVIEWS

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PREFACE

This second edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in 15 jurisdictions. I am delighted that we have enlarged the number of jurisdictions covered adding substantial chapters dealing with Russia, Norway, Switzerland and Austria. *The Professional Negligence Law 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. It is published at a time when we continue to face an unusual level of political and economic turbulence and liability and regulatory risks for professional firms are increasingly global concerns.

In my own jurisdiction we highlight the ongoing work that professional firms face implementing the European General Data Protection Regulation. Its extraterritorial reach means that most international firms across the world will have to have policies in relation to it. We are now in our second year and seeing enforcement action. The first of these in the UK was by the ICO against a firm based outside the EU in Canada. Large fines have been levied by other European authorities against significant commercial entities. We also highlight a substantial change in the way that disclosure is dealt with in our business and property courts. Practitioners here have been grappling with that since 1 January 2019.

You will see similarly significant developments in all of the other jurisdictions. This second edition is the product of the skill and knowledge of leading practitioners in those 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 of 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 especially like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparation the chapter on England and Wales, and to Bryony Howe in particular. Finally, the team at Law Business Research has managed this production of this second edition with passion and great care. I am very grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
London
June 2019

Chapter 14

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, the rights and duties of the contractual parties of a service agreement are mainly governed by the legal provisions of agency law. To the extent that the law does not provide for specific duties in relation to specific services, the 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, the law provides a number of basic provisions, which are mandatory. 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 Weber, Article 394, No. 21; Basel commentary on the CO from 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. With the exception of the reference to the duty of care of the employee in employment law,[6] the duty of care is, however, 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]

In 1989, the Federal Supreme Court again confirmed that 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, respectively 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 not a required element of contractual liability, and, if the three other elements can be affirmed, culpability is assumed. The agent can, however, avoid liability by exculpating himself or herself if he or she proves 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 enforcement.[11] Therefore, the debtor can avoid liability by asserting the exception or prescription. If the debtor raises this exception, the court is required to determine whether the legal requirements are fulfilled and, if so, dismiss the claim. In the event that the debtor

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* (Second Edition. Zurich/Basel/Geneva 2012), 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.

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 by 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] The general rule for claims in tort is that they become time-barred one year after the damage and the identity of the person causing the damage become 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 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 commencement of formal conciliatory proceedings, an action in court or arbitration proceedings also prevent the forfeiture of a claim.

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 (SCL).

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 Swiss francs.[17]

Certain cantons, such as Zurich, which are of particular importance for the Swiss economy, have specialist commercial courts. These commercial courts deal with commercial

12 Article 142 CO.
13 Article 127 CO.
14 Article 128 CO.
15 Article 137 Paragraph 1 CO.
16 Article 122 Paragraph 2 of the Swiss Constitution and Article 3 CPC.
17 Article 243 et seq. CPC.

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 professionals from the insurance industry.

The district courts are the courts of first instance for all disputes except for those that are brought before the commercial courts. Prior to filing the claim with the district 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 futile exercise 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 Swiss 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 which 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 Swiss francs.[18]

iv Remedies and loss

As mentioned above, the statutory basis for most claims resulting from professional negligence is agency law. 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 (Article 107 et seq. CO). In general, both the agent and the principal by law have the right to at any time terminate the agency relationship. 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 element of trust has – for whatever reason – ceased to exist.[19]

The right of termination does not apply if, due to 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 due to the negligence of the agent, the agent may also be liable for damage caused due to the termination of the legal relationship as such.[20]

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 return everything he or she has received from

18 Article 74 Paragraph 1 SCL.

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

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

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.[21]

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 the agent properly performed his or her duties for the benefit of the principal. In the event that the work product is, due to the negligence of the agent, without any value to the principal, the agent forfeits the entire fee.[22]

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 of liabilities. Damage 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.[23] There are two manners in which the hypothetical value of the net assets can be determined. 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 in the event that 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).[24] This can pose difficulties in determining the hypothetical net asset value resulting from correct performance.[25] The second method can be applied if the professional service provider should, under normal circumstances, have known that it would 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.

Article 8 of the fundamental introductory provisions of the Swiss Civil Code provides that, in the absence of a statutory provision to the contrary, the party asserting a right has the onus of proving the factual basis of its claim. The claimant is also required to substantiate the factual basis of his or her claim and to submit evidence in support of his or her statements of facts.[26] The principal asserting claims for damages against the service provider is, therefore, required to substantiate and prove (1) the violation of duties, (2) the amount of damages and (3) the causal connection between the violation of duties and the damages incurred.[27] On the other hand, the agent can refute the claim by asserting and proving facts that create doubt in the judge's mind.[28]

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21 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.

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

23 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.

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

25 Fellmann, 2017, paragraph 1458 f.

26 Article 55 CC.

27 Swiss Federal Supreme Court decision 128 III 271 No. 2a/aa; Swiss Federal Supreme Court decision 115 Ib 175 No. 2b.

28 Landolt, Hardy: 'Facilitation of evidence and reversal of the burden of proof in medical malpractice proceedings', Fellmann, Walter/Weber, Stephan (ed.), *Liablity Litigation* 2011, Substantiation, Evidence,

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 in order 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 dutifully and carefully provide services to the principal.[29]

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 with which he or she has no or little 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 is no conflict of interests and that he or she can exercise the mandate independently. In a second phase, he or she is required to obtain the instructions needed to properly perform his or her duties. This is frequently a task that is 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 in order 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 properly perform the analysis. The lawyer is then required to properly report 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. It can, therefore, be said that a lawyer needs to comply with a high standard of care.[30]

Facilitation of Evidence, Trial against Several, Free Administration of Justice and Legal Protection Insurance, Contributions to the Conference of 24 May 2011 (Zurich/Basel/Geneva 2011), page 83.

29 Article 12 lit. (a) BGFA.

30 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..

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 most frequent cases in which lawyers are held liable in Switzerland are care cases. Missing a statutory or court-ordered deadline is considered a violation of the duty of care almost irrespective of the reason.[31] 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, while 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 the lawyer is 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, to a lesser extent, applies 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 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 due to the incorrect application of the law in contractual or corporate work is higher, as such mistakes are generally easier to prove.

Lawyers licensed to practise in Switzerland are required to maintain a professional liability insurance with a minimal coverage of 1 million Swiss francs.[32] In practice, large law firms have a 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. On the other hand, the relationship between medical practitioners, respectively hospitals, and their patients are governed by cantonal public law. Therefore, the basic principles applicable to agents also apply to medical practitioners in private practice. With respect to negligence and liability, the respective 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.

31 Swiss Federal Supreme Court decision 87 II 364.

32 Article 12 lit. f BGFA.

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 the same degree of care even when treating patients outside of their practice or hospital either as a favour or in the case of an emergency.[33] The required degree of care is determined based primarily on objective criteria. The standard of care is higher for specialists practicing 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 associate with this treatment or operation, the timely urgency and the available infrastructure are of the essence.[34] 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.[35]

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.[36] This consent can only be given based on a correct disclosure of the benefits, risks and possible alternative treatments.[37] The agent's duty to account for his or her activities[38] 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).[39]

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

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 (Federal Law on Banks and Savings Banks, Anti Money Laundering Law and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading to only name a few) also apply. 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

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

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

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

36 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.

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

38 Article 400 CO.

39 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.

Act) are expected to enter 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. 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 verifying signatures and the identity of the customer in the context of transfer and investment instructions.

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 is not only 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, which applies also in cases of *dolus eventualis*. A violation of Article 305 *ter* PC is possible in cases in which the financial service provider negligently failed to exercise due care in ascertaining the identity of the beneficial owner of the assets concerned. 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.[40] 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.

iv Computer and information technology professionals

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

v Real property surveyors

The same applies with respect to real property surveyors. A private association of 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.

40 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.

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 as 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, the distinction is, however, not relevant. They are equivalent. The SIA-Rules 102 and 103 of 2014 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.[41] An architect is further, in accordance with Article 2.1 and 3.4.1 of the SIA-Rules 102 2014 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.[42]

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

In general, architects and engineers voluntarily conclude a 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 396 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.[43]

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

The general liability of auditors is governed by Article 755 CO. The auditor is liable for all damage caused intentionally or negligently.[44] 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.

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

42 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 Weber, Article 398, No. 29.

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

44 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.

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 of 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.[45]

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 the 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

The most notable developments in 2018 have been the development of the legislation applicable to the provision of financial services (see Section II.iii). The law applicable to limitation and prescription has also been amended, and the new rules will enter into effect on 1 January 2020. These amendments will not, however, have a major impact on professional liability.

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.[46] Also, professionals in various industries have been organising themselves in professional associations and will continue to do so. These will on their part further develop professional standards, which will become the standard in the respective industry 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 following years.

45 Article 9 Paragraph 1 lit. c RAG.

46 Fellmann, 2016, page 96.

Appendix 1

ABOUT THE AUTHORS

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Philipp Känzig has more than 20 years of experience in litigation and arbitration. He heads the litigation/arbitration team at STAIGER Attorneys at Law Ltd and represents clients in commercial disputes before the courts and administrative authorities. 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 and recommended by *The Legal 500* for commercial litigation, insolvency and corporate recovery.

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