Correspondent's Report
Switzerland

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I. INTRODUCTION

When you look only at its statutory base, Swiss private construction law has not seen many changes since the Swiss Code of Obligations[1] came into force on January 1, 1912. This view, however, does not hold true when you consider the many developments that have occurred elsewhere. For instance, the Swiss Society of Engineers and Architects (SIA)[2] has continually published standard forms of contract that apply to a wide range of construction related services. Its standardised building contract (SIA-118, 1977/91) has seen unsurpassed success and is applied to a vast number of construction related contracts by both private and government entities.

Major changes have also come about since 1996 with the enactment of extensive public procurement legislation. The new regulations have profoundly affected the way Swiss government bodies at all levels (federal, cantonal, and municipal) tender their contracts for works, services, and supplies. These changes were instigated by the WTO's Government Procurement Agreement (GPA), which Switzerland ratified on December 19, 1995. Although the GPA is only applicable above established thresholds, its implementation has triggered a complete overhaul of Swiss public procurement law. Occasionally, the new legislation has come under heavy fire. There is, however, no doubt that this fairly new body of

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1 Swiss statutes are easily accessible through the federal government's website (www.admin.ch/ch/d/sr). The entire body of statutory law can be read in either German, French, and Italian. As to the Swiss Code of Obligations ("CO"), which governs contracts for works (Arts 363 – 379 CO), English translations have been published by the Swiss-American Chamber of Commerce, most recently in 2002.

2 For details visit the association's website (www.sia.ch).

law is here to stay, which even its most ardent opponents will acknowledge.

In order to assess the impact, to some degree, the Swiss federal administration has recently started to compile data about procurement practice. The administration's intention is to establish the groundwork for major adjustments. Even though intermediate findings are publicly available, it is too soon to make a prediction about the outcome of the undertaking at this time. Still, considering the unfortunate maze of pertinent rules and **[132]** regulations[3], there is no doubt that some drastic measures will have to be taken to streamline this body of law.

In addition to these developments, there are the decisions rendered by the Swiss Federal Court in Lausanne, the highest court in the country. This report will present some of the Court's decisions pertaining to contract law and to public procurement law. The common starting point for these decisions is the Swiss Code of Obligations as well as other written statutes that may be applicable. However, the case law generated by the Swiss Federal Court constitutes a source of law in its own right that equals and sometimes even supersedes in practical significance its own statutory base. Hence, even though there is no room for the stare decisis rule in the Swiss legal system, careful analysis of the Federal Court's judgments is of paramount importance for both legal practice and doctrine.

In the year 2000, the Swiss Federal Court began (like many lower courts) to post a large number of its decisions on the internet (www.bger.ch).[4] Up to then, relatively few selected decisions were published in the Court's official bulletins.[5] Practitioners and academic lawyers alike have started to ask themselves whether, under the applicable standard of professional care, they are required to be familiar with all of the cases that are now accessible through the Court's website. In the view of many, this burden would be overwhelming. Whether courts will share this sentiment and exercise restraint when judging professional negligence cases remains to be seen.

II. CONTRACT LAW

1. A leaking roof

Contracts for building and other works are subject to Arts 363 et seq. of the Swiss

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3 For an overview, see STOECKLI (Ed.), *Das Vergaberecht der Schweiz* (6th ed., Zurich 2004).

4 Approximately 2,500 of the Federal Court's decisions are published on the internet annually (TSCHUEMPERLIN, SJZ 99/2003, p. 270).

5 For complete coverage of all officially reported decisions of the Swiss Federal Court relating to the Swiss Code of Obligations since 1874, see GAUCH/AEPLI/STOECKLI, *Präjudizienbuch zum OR* (5th ed., Zurich 2002).

Code of Obligations. In practice, however, works contracts are often subjected to SIA-118, 1977/91, a standard form of contract, which contains numerous modifications of and amendments to the statutory base.[6] In BGE[7] 128 III 402 (4C.258/2001), the Federal Court addressed various topics pertaining to the law of works contracts. Any report on recent Swiss case **[133]** law[8] should not omit this landmark case.[9] Of the significant issues examined by the Federal Court, I would like to elaborate on three of them. They all revolve around the contractor's obligation to remedy defects in the building works that he executed. The defects in this case consisted of leaks detected in a roof of an industrial facility.

According to the Federal Court's reasoning and in line with Art 368(2) of the Swiss Code of Obligations, the employer can insist that any defects identified in the building work be remedied by the contractor. At his discretion, the contractor may completely re-execute the works unless this is adverse to the employer's interests (BGE 4C.80/2000).[10] For his part, the employer is entitled to re-execution only if the defects cannot be remedied in any other manner. One of the points that make this case note-worthy, is that the Court compelled the contractor to use a sealing material different from what had been specified in the contract. Apparently, there was no other way to get the job done. The specified material ("Vatec Pur") was no longer available on the market, and only by using a substitute ("Sarnafil") could the leaks be properly sealed. From a legal perspective, this raises a question whether the contractor was not in fact put to perform something that had no basis in the contract. The Court held that this was included in the contractor's duty to re-execute the works.

The contractor's obligation to remedy defects at his own risk and cost has its limits. If the contractor's costs seem disproportionate when compared with the employer's interest, the contractor may refuse to perform any additional work (Art 368(2) of the Code of Obligations). This reduces the employer's choice to either terminate the contract provided that the defects are sufficiently significant

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6 The most comprehensive of the treatise on the law of works contracts is GAUCH, *Der Werkvertrag* (4th ed., Zurich 1996); see also BUEHLER, *Zuercher Kommentar* (1998) on Arts 363 – 379 CO; KOLLER, *Berner Kommentar* (1998) on Arts 363 – 366 CO; ZINDEL/PULVER, Basler Kommentar (2003) on Arts 363 – 379 CO; CHAIX, Commentaire romand (2003) on Arts 363 – 377 CO. On the SIA standard form of contract for building works see GAUCH (ed.), *Kommentar zur SIA-Norm 118, Arts 38 - 156* (Zurich 1992), and GAUCH, *Kommentar zur SIA-Norm 118, Arts 157-190* (Zurich 1991).

7 BGE is the abbreviation of *Bundesgerichtsentscheid*, which translates into Decisions of the Federal Court.

8 For an extensive collection of recent Federal Court decisions as regards to works contracts see HUERLIMANN/SIEGENTHALER, *Jusletter*, 2 February, 2004.

9 For further reading on this case see TERCIER/STOECKLI, *Baurecht/Droit de la construction*, 2003, pp. 10 *et seq*. and 53 *et seq*.); HUERLIMANN/SIEGENTHALER, *Jusletter*, 17 March, 2003.

10 This appears to correspond with German law, see 635(1) of the revised German Civil Code.

(Wandelung), or else to reduce the payment proportionally to the inferior value of the work (Minderung). In addition, he may claim damages if the contractor bears responsibility for the defects. In assessing whether the burden on the contractor is out of proportion, the initial contract price does not play any role whatsoever (BGE 111 II 173). This seems perfectly logical when one considers that the employer remains generally bound to fulfill his part of the contract.[11] Rather, the sole controlling factor is the extent of the employer's interest in having the defects remedied. This interest has to be weighed against the costs of improving the building work. There is hardly any room to consider the financial burden placed on the contractor if core functions of the building are adversely affected by the defects.

If the contractor fails to remedy any defects within a reasonable time, the **[134]** employer may at his discretion carry out the works himself or have them executed by others. The contractor has to cover the reasonable cost incurred by the employer and also bear the risk that goes with third-party performance. The contractor will not escape liability if he could have executed the improvement more cheaply. In fact, the contractor has to cover not only the expenditures, but also a reasonable fee which the employer owes to the third party. There is one more point of practical importance. The employer is entitled to an advance payment by the contractor. The amount due by the contractor has to be estimated based on the likely costs. The contractor may claim a deduction if he succeeds in convincing the Court that the work about to be performed will not merely remedy the defects, but produce additional advantages for the employer. For example, the enhanced longevity of a newly sealed roof might have to be taken into account here.

There are some additional important caveats that safeguard the contractor's interests, as reaffirmed by the Federal Court in its recent decision BGE 130 III 302 (5C.152/2003). First, the employer has to utilise the advance exclusively for the improvement of the building work, if he decides to use it at all. Secondly, the employer has to give a full account of his expenditures upon completion and refund the contractor any surplus. He may, on the other hand, claim additional payments if the advance was not adequate. Thirdly, the employer has to refund the advance payment in full if the work is not executed within a reasonable time.[12] These rules make it quite clear that advance payments are not designed to be used as a surrogate for damages. However, the employer may resort to setting off the

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11 It is possible, however, that the employer is entitled to set off his own obligation against his claim of damages.

12 It should also be noted that the employer owes interest to the contractor on the unused advance.

contractor's claim against his claim for damages (Art 120 of the Swiss Code of Obligations), and as a result refuse to refund the payments received. The Federal Court did not have to address what is to happen if the contractor is in default with the advance. In my view, if, as a result of the defects, there is imminent danger of extended damage, the employer will have to undertake all effective counter-measures that may be reasonably expected from him. Apart from that, the employer is entitled to damages which he suffered as a consequence of the contractor's delay if there was negligence involved.

2. Misplaced reliance

BGE 130 III 345 (4C.230/2003) is the latest in a string of cases[13] that have significantly expanded the so-called Vertrauenshaftung, which may be fittingly characterized as reliance-based liability. This relatively new type of liability requires neither a contractual relationship nor a tortious act, but, rather fills [135] gaps that are left open by both the law of contract and the law of torts. Its effect is one of expanding professional responsibility, welcomed by some, staunchly rejected by others.

The latest Federal Court decision in support of this new doctrine resulted from a suit by a purchaser of real estate (the plaintiff) who was claiming damages from an architect (the defendant). The architect had been engaged by the previous owner of the property to appraise it for mortgage purposes. Two years later, this owner included the architect's original report in his sales documentation that he sent to the plaintiff without the architect's knowledge. The plaintiff claimed that the report failed to disclose some structural defects of the property, which reduced its value by some 63,000 Swiss francs. He argued that he had relied on the defendant's faulty valuation when he made up his mind to purchase the property.

Based on this factual background, the Federal Court held that the purchaser's reliance was misplaced and thus rejected his claim. The decisive factor appears to have been that the architect had produced the valuation specifically for mortgage purposes and that he could not reasonably foresee that the report would also be utilised to inform potential buyers on the value of the property. The Court reasoned that under these circumstances, there was insufficient ground to assume a special relationship (rechtliche Sonderverbindung) between the purchaser and the architect. As a consequence, the Federal Court decided not to impose responsibility on the architect, which he himself had not assumed voluntarily.

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13 Earlier cases include *BGE 124 III 297, 121 III 350*, and *120 II 331*. The latter decision (the groundbreaking *Swissair* case) was the first one to address this new type of liability. On BGE *130 III 345*, see also HUERLIMANN/SIEGENTHALER, *Baurecht/Droit de la construction*, 3/2004 (forthcoming), and *Jusletter*, 14 June, 2004.

I certainly believe that one should not argue with the Court about the outcome of this case. For future reference, however, one should bear in mind the Court's broad statement that a professional may be held liable by parties whose sole relation to her is that they relied detrimentally on her expert opinion. The Court did not state how this rule applies to professionals who do not act on their own account but are employed by a firm. It seems probable that the rule would apply to them as well, as a contractual relationship is not a prerequisite for this type of liability. In order to fend off reliance-based liability, one should consider a standard procedure of amending opinions with an express statement about the purpose and limitations thereof. This disclaimer should be as detailed as possible because a broadly worded standard clause might not be sufficient to defuse justified reliance. One could well fear that in the future such disclaimers might take up more space than the actual opinion. This just might be the price of broadened liability.

3. A stolen suitcase

In BGE 130 III 182 (4C.233/2003), the Federal Court dealt with a case which has on the face of it nothing to do with construction. The dispute before the Court was one between an organiser of package tours and one of its tourist customers. It arose because the customer’s suitcase had been stolen while it was being transferred from the tour bus onto a cruise ship. The customer **[136]** asserted that the organizer had not observed the proper standard of care when transferring her luggage. There would have been little room for dispute and I would not have chosen to include this case, had it not been for the exceptional value of the suitcase's contents, which the customer alleged to be well over 100,000 Swiss francs in jewels and clothes. The lower court ascertained that the customer had not advised the tour organiser specifically of this particular fact and, as a result, rejected her claim for damages. The customer appealed to the Federal Court, which upheld the lower court's decision.

What takes this case beyond its particular factual context, is the reasoning of the Court. The federal judges found that a creditor generally has an obligation to notify the debtor if the object entrusted by him to the debtor has an exceptionally high value. The idea, obviously, is that proper notification enables the debtor to take appropriate steps to avoid the occurrence of an unusually significant loss. Only then does it appear fair to shift the risk of loss from the creditor to the debtor.

There is no reason to think that the Federal Court would not apply this rule to

other cases as well, including construction cases.[14] In fact, the Court has alluded to it in earlier decisions. As early as 1907, it found that the debtor could not be held liable if the creditor failed to notify him properly (BGE 33 II 426). And in BGE 109 II 238, it affirmed that the rule would apply if the creditor was the only one in a position to identify the risk of an unusually high loss.

This seems to be an application of the general principles of fair risk allocation. Under these principles, the party better suited to identify a potential risk assumes the responsibility for taking the steps necessary to fend off that risk. Failure to do so is generally to this party's detriment. This idea is the foundation of other rules as well. An example is the duty of notification under Art 365(3) of the Swiss Code of Obligations, which reads as follows:

"If, during the carrying out of the work, defects become evident in material supplied by the employer or with the designated construction site, or other conditions develop which endanger a due and timely carrying out of the work, the contractor shall without delay notify the employer thereof, otherwise he bears the adverse consequences himself."[15]

With regard to works contracts, namely employers are thus well advised to disclose fully any unusual risks to the contractor. For example, where an employer is likely to suffer heavy financial losses if the works are delayed, he should carefully consider relaying this information to his contractor. If the employer decides not to notify the contractor, he may not be able to claim damages due to the lack of notification.

There is, however, at least one innate limitation to this sweeping rule, as affirmed by the Federal Court. Under the Court's reasoning, notification is [137] not required if the risk is objectively discernible. In this case, the debtor will be liable for damages if he does not live up to the standard of care.

In the future, the Court might and should limit the scope of its rule in two other instances. The first is when the debtor is in fact conscious of the risk even though it is not objectively manifest. Here it does not seem fair to let the employer bear the adverse consequences of the contractor's failure to take appropriate measures to protect the employer's interests. The second instance, is when the contractor is not in fact aware of the risk but has to bear responsibility due to the level of care to which he agreed to contractually. The assumption of the risk then forms part of the contract, which explains why the debtor will be held liable for any damages,

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14 BECKER, *Berner Kommentar* (1941), Art 99 CO, para. 46; BRUNNER, *Die Anwendung deliktsrechtlicher Regeln auf die Vertragshaftung* (doctoral thesis Freiburg 1991), p. 104; GAUCH, *Der Werkvertrag* (4th ed., Zurich 1996), para. 1900; VON TUHR/PETER, *Allgemeiner Teil des Schweizerischen Obligationenrechts* (3rd ed., Zurich 1979), p. 112.

15 See also GAUCH, *Der Werkvertrag*, (4th ed., Zurich 1996), para. 829 *et seq.*

however high, if all other requirements are met.

III. PUBLIC PROCUREMENT LAW

To buy or not to buy ... a snowcat

In BGE 129 I 410 (2P.155/2003), the Federal Court settled a hotly debated issue that is right on the crossroads of public procurement law and private contract law. The Court had to determine whether, under public procurement law, the tendering entity assumes an obligation to conclude a contract when and if it initiates award procedures or awards a contract. Although this case addressed a supply contract, its legal reasoning also applies to construction works contracts.

The case was tried a total of three times by the lower court before it was submitted on appeal to the federal judiciary. It all started on 11 February, 2002, when the municipality of Tujetsch in the Swiss canton of Grisons advertised a contract for the purchase of a snowcat to maintain its slopes for cross country skiing. Subsequently, it obtained two bids from companies X and Y, respectively. Based on the evaluation of the two responsive offers, the municipality adjudget that the contract should go to Y for the amount of 156,000 Swiss francs, thus rejecting X's offer, even though the latter's price was considerably lower (132,000 Swiss francs). X appealed to the Grisons administrative court, asking for this award to be set aside. This court found in X's favor and ordered the municipality to re-evaluate the two offers. The municipality, however, saw no reason to change its mind and re-awarded the contract to Y. This triggered yet another appeal by X. On 17 January, 2003, the administrative court set aside the municipality's second decision and, without any further proceedings, awarded the contract to X. Roughly one month later, the municipality **[138]** of Tujetsch informed both bidders that it was no longer in a position to conclude a contract with either one of them. This decision was due to financial constraints that had occurred since the advertisement of the contract. X was not in any mood to accept this latest development and asked the administrative court to enforce its judgment. The court then ordered the council members representing the municipality of Tujetsch to conclude a contract with X, threatening them with criminal prosecution if they did not comply with the court's order. Considering this bleak outcome, it was hardly surprising that the council members decided to try their luck with the Federal Court.

The Swiss Federal Court found that the lower court's third decision would not stand. Unlike the administrative court, it held that, from a public procurement perspective, the award of a contract does not create any obligation to subsequently

conclude a contract. The award merely vests the public entity with the authority to enter into a contract with the successful bidder if it decides to conclude a contract at all. There are no further legal effects beyond this one. In particular, the award does not create any entitlement to the successful bidder to force the public entity to enter into a contract with him.

I should point out that under Swiss law the award of the contract and its conclusion have to be distinguished. This distinction was made in order to provide effective legal remedies in the public procurement arena. While a bidder may seek legal redress against an award decision, he cannot under normal circumstances bring an action to void the contract once it is concluded. This distinction concurs with a recent decision of the European Court of Justice, according to which

"complete legal protection … requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract."[16]

The Tujetsch case draws heavily on this legal distinction between awarding the contract on the one hand and concluding it on the other. The significance of the case, however, lies elsewhere. When the Federal Court states that a public entity cannot be ordered to conclude a contract, it implies that the entity remains free to terminate an award procedure at will. But what, then, is the implication of article XIII of WTO's Government Procurement Agreement? This article could be interpreted to mean that termination of an award procedure is only acceptable if it is "in the public interest". It seems to me, however, that the Tujetsch case suggests something else. Under this interpretation, a public entity may discontinue an award procedure without having to justify its decision. There may be, however, grounds for requesting damages if termination suggests a violation of the general duty to act in good faith and/or the award procedure was initiated under false pretences on the part of the tendering entity.

16 Case C-212/02, *Commission v Austria*