CORRESPONDENTS' REPORT

SWITZERLAND

RECENT DEVELOPMENTS IN SWISS CONSTRUCTION LAW

THOMAS SIEGENTHALER[1]

Dr iur, M Jur, member of the Swiss Bar

AND

HUBERT STÖCKLI[2]

Prof Dr iur, MCL
Professor of Civil Law at the University of Fribourg

For quite some time there have been few noteworthy developments to report on. It seemed almost as if construction law was immune to change. After decades of relative calm, however, everything now seems suddenly to have entered a state of commotion. Laws are being amended, a revision of the standard for construction and planning contracts issued by the Swiss Society of Engineers and Architects is underway, and a number of parliamentary initiatives have called into question the peculiarities of Swiss construction contract law. Among the new rules are also the far-reaching changes to the Federal Act on the Posting of Workers (SR 823.20), which will impose potentially very extensive liability on prime contractors. This will be the subject of a separate article in the next issue. We summarise here in the next three sections changes to the standard SIA-Norm 118, some legislative developments and some noteworthy decisions of the Swiss Federal Supreme Court.

I. REVISIONS OF INDUSTRY STANDARDS

1. SIA-Norm 118

At their meeting of 10 November 2012, the delegates of the Swiss Society of Engineers and Architects (SIA) approved publication of a revised version of

[1] Dr iur, M Jur, member of the Swiss Bar; accredited in Construction and Real Estate Law by the Swiss Bar Association; Lecturer in Construction Contract Law at the University of Fribourg, Switzerland.

[2] Prof Dr iur, MCL, Professor of Civil Law at the University of Fribourg, Switzerland, Director of the Institute for Swiss and International Construction Law. You can reach him at hubert.stoeckli@unifr.ch. The authors would like to thank Mr Hal Wyner for the English translation.

their standard, SIA-Norm 118, "General Terms and Conditions for Construction Agreements".[3] In addition to certain refinements in the terminology ("contracting parties" in lieu of "contractual partners", "defect notification period" in lieu of "guarantee period"), a number of substantive changes were also introduced.

- The most important substantive change concerns the procedure for calculating price adjustments due to modified cost factors: Articles 69–82 of the previous standard, which set forth the procedure based on documentation of quantities, have been repealed. That procedure is now defined in the new SIA-Norm 124 (2013), which, according to the terms set forth therein, will apply only where it is included "as an integral part of the contract at the time of the formation of the contract".
- Article 65 now establishes reference to the production cost index (PCI) as the default procedure for the construction industry proper and the use of a sliding scale formula as the default method in contracts with installation and interiors contractors and with suppliers.
- Where value added tax is not itemised in the price quoted by the contractor, it is presumed not to have been included (SIA-Norm 118, Article 38, paragraph 5, and Article 49, paragraph 4). Whether this rule could also be asserted against a construction client who is qualified as a "consumer" is, in view of the revised UCA Article 8, arguable.
- The new standard introduces the requirement that site-specific safety measures are to be itemised separately on the bill of quantities (SIA-Norm 118, Article 1, paragraph 9).
- A provision has also been introduced expressly prohibiting unauthorised use by the client of "submitted tenders including contractor variants" (SIA-Norm 118, Article 18, paragraph 3).
- Pursuant to SIA-Norm 118, Article 25, paragraph 3, the contractor has a duty to inspect existing structures only where the client is neither represented by a construction manager nor is himself knowledgeable in such matters.
- SIA-Norm 118, Article 86, paragraph 5, newly foresees that "the provisions of Articles 86–89" (relating to the consequences of change orders) are to be applied *mutatis mutandis* also with regard to so-called pure quantity changes (that is, quantity changes that occur not as a result of order modifications).
- Also new is the provision in SIA-Norm 118, Article 104, according to which the safety of the persons employed on the construction

[3] The new SIA-Norm 118 is currently available in German, French and Italian. It can be obtained directly from the SIA (www.sia.ch).

project is to be taken into account "in the drafting of the contract".

- Where a contractor is required to dispose of excavation and demolition material contaminated by waste or hazardous substances, SIA-Norm 118, Article 121, paragraph 2, foresees that he is to be entitled to additional compensation (unless otherwise agreed).
- In SIA-Norm 118, Article 139, paragraph 4, it is now stated explicitly that the conduct of on-site verification and stress tests do not constitute acceptance within the meaning of Articles 157–164. SIA-Norm 118, Article 158, paragraph 4, states that even statutorily prescribed tests do not constitute acceptance.
- Adjustments have been made (in SIA-Norm 118, Article 150, paragraph 1) to the threshold amounts for retention provisions: a retention of 10% is to be applied for amounts of up to CHF500,000 (previously CHF300,000).
- The threshold amounts for suretyships have also been adjusted upward (10% up to CHF300,000 in lieu of the previous CHF200,000). In addition, SIA-Norm 118, Article 181, paragraph 3, states explicitly that surety must be provided for the duration of the defect notification period (i.e., two years). In the event of the expiration of the notification period before all defects have been remedied, the term of the surety bond is to be extended until full remediation.

2. Service and fee schedules—SIA 102, 103, 105, and 108—and the service model SIA 112

In November 2012, the Central Regulation Committee of the SIA released for consultation their revised service and fee schedules (SIA 102, 103, 105 and 108) and a revised service model (SIA 112). Nothing has been finalized yet which is why we shall report on the changes in our next country report.

II. LEGISLATIVE DEVELOPMENTS

1. Revised Article 8 of the Swiss Unfair Competition Act (UCA)—also in construction?

The revision of Article 8 of the UCA entered into effect on 1 July 2012. The revised version reads as follows:

> **"Article 8 Use of unfair general terms and conditions**
> As unfair dealing shall be considered, in particular, the use of general terms and conditions that foresee, in a manner contrary to the principles of good faith and prejudicial to consumers, a substantial and unjustified disproportion between contractual rights and contractual duties."

There are still a large number of questions to be resolved concerning the practical implementation of this new provision. For the construction industry, the following issues are the most salient:

- Are private construction clients and the buyers of residential properties for their own use to be considered as "consumers" within the meaning of this provision? The answer depends on whether one construes the term "consumer" in the light of the EU Directive 93/13/EEC on Unfair Terms in Consumer Contracts, or whether one relies instead on Article 32, paragraph 2, of the Swiss Code of Civil Procedure (CPC), which speaks of goods and services "for ordinary consumption". The term consumer is defined in the EU Directive 93/13/EEC (Article 2) as follows:

  " 'Consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession."

  The background that led to the revision of Article 8 of the UCA suggests that it was intended to be construed in conformity with the Directive.[4] Moreover, it is not the term "consumers", as used in Article 8 of the UCA, for which Article 32, paragraph 2, of the CPC provides a definition, but the term "consumer contracts". Also, the limitation to "ordinary" consumption contained in Article 32, paragraph 2, of the CPC does not necessarily remove construction services *a priori* from the scope of application of CPC, Article 32—at the very least, smaller scale construction services performed by independent contractors (maintenance, built-in carpentry, etc.) would certainly fit within the definition provided in CPC, Article 32, paragraph 2. The wording of the newly amended Article 210, paragraph 4, of the Swiss Code of Obligations (CO)[5] also suggests that the legislative intent was not to limit the scope of consumer protection to goods that are actually "consumed", since it is formulated in terms that unquestionably include contracts for the purchase of residential property for the buyer's own use (" . . . for the personal use of the buyer or his family . . . "). Construing the term "consumers" in this broader sense is also entirely in keeping with the meaning attaching in common usage to the German words for "consumption" (*Konsum*) or "use" (*Verbrauch*). In Germany it is

[4] Hubert Stöckli, "Der neue Art 8 UWG—offene Inhaltskontrolle, aber nicht für alle", in BR/DC 2011 p. 186; *ibid.*, "UWG 8—neues Recht gegen unfaire Verträge", BRT 2013, p. 177; see also Pascal Pichonnaz, "Le nouvel art 8 LCD—Droit transitoire, portée et consequences", in BR/DC 2012, p. 141; Jörg Schmid, "Die Inhaltskontrolle Allgemeiner Geschäftsbedingungen: Überlegungen zum neuen Art 8 UWG", in ZBJV 148/2012, p. 9; *contra*, e.g., Andreas Furrer, "Eine AGB-Inhaltskontrolle in der Schweiz?", in HAVE 2011, p. 326; Markus Hess and Lea Ruckstuhl, "AGB-Kontrolle nach dem neuen Art 8 UWG—eine kritische Auslegeordnung", in AJP 2012, p. 1195.

[5] All federal Acts can be found on the internet at www.admin.ch. Selected Acts are available in English. However, since English is not an official language of the Swiss Confederation, these translations are provided for information purposes only and have no legal force.

considered self-evident that the terms for "consumer" (*Verbraucher*), "consumer contract" (*Verbrauchervertrag*) and "consumer protection" (*Verbraucherschutz*) may also be used in connection with contracts involving private construction contracts and buyers purchasing residential property for their own use. In our view, therefore, it may be presumed that private construction clients and the buyers of residential property to use themselves benefit, as "consumers", from the protection offered by the revised Article 8 of the UCA.

- Can notarised contracts also be considered as "general terms and conditions" within the meaning of the revised UCA, Article 8? Where contractual terms have been standardised for use in multiple contracts and are not subject to negotiation on an individual basis,[6] these amount, in our view, to "general terms and conditions"—regardless of the (authenticated) form in which the agreement is executed.[7] An example would be the set terms and conditions included in the sales contracts for each of the several condominium units in a new residential development. At the same time, those terms that the beneficiary thereof is seriously willing to negotiate would not count as "general terms and conditions".[8] This raises the more general question as to when a term may be considered to have been "negotiated" and thus removed from the scope of application of UCA, Article 8.[9] And even assuming that clarity is achieved as to what may be considered to have been "negotiated", there remains the question of whether a willingness to negotiate seriously individual terms of an agreement (e.g., the price of an individual condominium unit) is to be considered sufficient to remove all terms of the contract from the scope of application of UCA, Article 8, as having been "individually agreed".[10]

Treating private construction clients as "consumers", within the meaning of the revised UCA, Article 8, opens a whole new range of issues with regard to the unfairness test also for general terms and conditions in construction contracts. If it is to be assumed that notarised agreements can also be regarded as "general terms and conditions", the effects of this will be substantial, especially where the sale of land on which construction is

[6] See the characterisation of General Terms and Conditions by the Swiss Federal Supreme Court, in its decision 4P. 135/2002 of 28 November 2002, consid. 3.1.

[7] Hubert Stöckli, *op. cit.* n. 4, p. 180.

[8] Isabelle Wildhaber, "Inhaltskontrolle von Allgemeinen Geschäftsbedinungen im unternehmerischen Verkehr", in SJZ 107 (2011) No 23, p. 542.

[9] *Cf.* Erdem Büyüksagis, "La bonne foi dans l'article 8 LCD: un remède à l'impuissance des consommateurs face aux clauses générales, soi-disant 'négociées'?", in AJP 2012, p. 1393 *et seq.*

[10] See the arguments in favour in: Isabelle Wildhaber, *op. cit.* n. 8, p. 542. By contrast, pursuant to Art 3, para. 2, of the EU Directive, the fact that certain aspects of a term or one specific term have been individually negotiated does not preclude the application of Art 3 of the EU Directive to the remainder of the agreement, provided that an overall assessment results in the conclusion that it is essentially a preformulated standard contract (Markus Hess and Lea Ruckstuhl, *op. cit.* n. 4, p. 1193).

planned or has already begun is concerned—and this, particularly in view of the limitation of liability clauses that are so common in this domain.

2. Revised Article 371 of the Swiss Code of Obligations—new rules, new questions

The revision of Article 371 of the CO entered into effect on 1 July 2013.[11] The revised version reads as follows:

> **"e. Time limits**
>
> 1. The right of the customer to bring claims due to defects in the work is limited to two years from acceptance of the work. However, the period amounts to five years where defects in a movable object that has been incorporated in an immovable work in a manner consistent with its nature and purpose have caused the work to be defective.
>
> 2. The customer's claims in respect of defects in an immovable work against both the contractor and any architect or engineer who rendered services in connection with such work become time-barred five years after completion of the work.
>
> 3. Otherwise the rules governing time limits for the corresponding rights of a buyer apply *mutatis mutandis*."

The impetus for the revision of the statute of limitations on sales contracts and independent contractor contracts was provided by a parliamentary initiative submitted by National Councillor Leutenegger Oberholzer (on 20 December 2006) and by State Councillor Bürgi (on 20 December 2007). The changes made were as follows:

- For movable objects, the new statute of limitations is two years (formerly: one year). The cause of action accrues, as before, upon acceptance of project delivery.
- A new five-year time limit has been introduced for movables that, in keeping with specifications, have been made integral parts of an immovable work and have caused a defect to that immovable work.
- The five-year time limit pursuant to CO, Article 371, paragraph 2, no longer applies only to an immovable works, but now applies to all "immovable work" which obviously goes far beyond the realm of construction.

In connection with private construction contracts, the revision of CO, Article 210, is also of interest—in particular, the new paragraph 2:

[11] Detailed remarks on the new provision in Peter Gauch, "Die revidierten Art 210 und 371 OR", in recht 2012, p. 124 *et seq.*; and earlier *ibid.*, "Der Revisionsentwurf zur Verjährung der kauf- und werkvertraglichen Mängelrechte: Analyse und Kritik der E-Art. 210, 371 und 199 OR", in recht 2011, p. 145 *et seq.*; now also Frédéric Krauskopf, "Verjährung bei Kauf- und Werkverträgen—neue Regeln mit Mängeln", in BRT 2013, p. 85 *et seq.*; Pascal Pichonnaz, "Le temps qui passe en droit privé de la construction", in JDC 2013, p. 82 *et seq.*

"2. The period amounts to five years where defects in a movable object that has been incorporated in an immovable work in a manner consistent with its nature and purpose have caused the work to be defective."

This change in the rules governing sales contracts will make it easier for construction contractors (whose defect liability is subject to a five-year statute of limitations under CO, Article 371, paragraph 2) to assert their rights of contribution against suppliers. Under the old rules, contractors remained liable to their clients for defects to construction projects for a period of five years; however, due to the shortness of the former statute of limitations on sales contracts (one year), it was in many cases not possible for them to take recourse against sellers of defective construction material.

The new statutes of limitations raise a number of questions, including the following:

- What is an object (CO, Article 210, paragraph 2) that "has been incorporated in an immovable work in a manner consistent with its nature and purpose has caused the work to be defective"? Specifically: how is "incorporated" to be construed? For example: Has a bookcase been "incorporated in an immovable work" if it has been secured to the wall by the seller using a screw that was included for that specific purpose?
- What is the applicable limitation period for a movable object that "has been incorporated in an immovable work in a manner consistent with its nature and purpose has caused the work to be defective" only years after delivery?
- How is "immovable work" to be construed? For example: is the trimming of a tree by a gardener an "immovable work"? Is scrubbing the floor an "immovable work"?

Questions without end! It could be years, even decades before the case law has created firm precedents on all these issues—and that, assuming of course that the new rules are not soon changed again.

3. Revision of construction products legislation

On 21 September 2012 the Federal Council started a public consultation procedure on a complete revision of the federal legislation on construction products (Construction Products Act and Construction Products Ordinance). The aim is to achieve conformity with the new European Regulation on Construction Products (CPR) (Regulation No 305/2011 EU) and thus to preserve the benefits devolving from the existing Agreement between the European Community and the Swiss Confederation on Mutual Recognition in Relation to Conformity Assessment (MRA).

4. Revision projects

(a) Motion by Fässler: "Strengthening the Rights of Construction Clients"; Motion by Poggia: "Protecting Construction Clients Effectively"

The Motion (No 09.3392) entitled "Strengthening the Remediation Rights of Construction Clients in Case of Construction Defects", submitted by National Councillor Hildegard Fässler-Osterwalder in 2009, was adopted by the National Council on 2 March 2011 and by the Council of States on 20 September 2011. The Motion instructs the Federal Council to conduct a comprehensive study of the issues involved in providing stronger protection for construction clients where construction defects related to architectural and construction services are discovered and, based on that study, to submit a coherent proposal for dealing with the problems identified. As part of its study, the Federal Council will also examine the question of whether it would be reasonable to impose an obligation on all "companies active in the construction industry (structures and interiors) in Switzerland" to carry liability insurance, as demanded in a Motion (No 12.3089) submitted by National Councillor Mauro Poggia.

(b) Parliamentary Initiative by Hutter: repeal of the immediate notification requirement for concealed defects

On 14 December 2012, National Councillor Markus Hutter submitted an initiative, co-signed by 40 Federal Assembly members, and entitled "In Favour of Fair Notification Periods for Independent Contractor Contracts", which demands the repeal of the immediate notification requirement for concealed defects (No 12.502). It proposes that the word "immediately" in CO, Article 370, paragraph 3, be replaced by the phrase "within 60 days" (which would correspond to the defect notification period under Italian law (Italian Civil Code, Article 1667)).

III. SOME NOTEWORTHY DECISIONS BY THE SWISS FEDERAL SUPREME COURT[11a]

1. Defect warranty rights, defect notification, and defect limitation periods: Federal Supreme Court Decisions of 31 July 2012 (4A_53/2012 and 4A_55/2012)

Facts

For the construction of a new school building, the city of Winterthur engaged an architectural engineer whose duties also included, in addition

[11a] The following Decisions are available online using the search engine provided on www.bger.ch/index/jurisdiction.htm (in the German version of the Court's website, click on "Rechtsprechung (gratis)", then on "Weitere Urteile ab 2000" and enter the Decision's number, e.g., "4A_53/2012").

to the structural engineering for the building, the construction planning and supervision of the execution of the project. The contract was based on the SIA-Regulation 103 (2003). During the course of construction it was determined that the design was defective with regard to the structural analysis—at least in the opinion of the experts hired by the city. The contract with the architectural engineer was terminated immediately and damages were sought. The Commercial Court as the lower instance dismissed the action, ruling that the question of liability was subject to the statutory provisions governing independent contractor contracts and found, accordingly, that the city had failed to make immediate notification of the defect as required under these provisions.

Considerations

The qualification of the contract as an independent contractor contract was challenged. In this regard, the Federal Supreme Court (in BGr. 4A_53/2012, consid. 3.4) held as follows:

> "Architect-led design-build contracts are qualified by the Swiss Federal Supreme Court as mixed-type contracts, which makes it possible to find reasonable solutions, suited to the specific circumstances, pursuant either to the rules that govern professional services contracts or to those that apply to independent contractor contracts (BGE 134 III 361 consid. 5.1; 127 III 543 consid. 2a, p. 545; 114 II 53 consid. 2b, p. 56 with references). With that in mind, those services provided by architectural engineers that require them to produce a measurable result are to be considered as being subject to the provisions governing independent contractor contracts. In consequence, the Federal Supreme Court applies the rules on independent contractor contracts to such architectural engineering services as the preparation of preliminary reports, preliminary studies, feasibility analyses, execution plans, and tendering documents (BGE 119 II 40 consid. 2e, p. 46). The Federal Supreme Court has further held that it is possible to draw a distinction between the applicable legal effects, in the sense that liability for a planning fault can determined pursuant to the rules governing independent contractor contracts, while liability for a lack of care in construction management can be determined pursuant to the rules on professional services contracts (BGE 109 II 462 consid. 3d, p. 466; similarly, BGE 134 III 361 consid. 5.1: differing legal effects depending on the subject-matter of the dispute; further, Decision 4A_252/2010 of 25 November 2010 consid. 4.1)."

At the time when the contract was terminated, the architectural engineer had completed performance of that part of the contract that was to be considered subject to the rules on independent contractor contracts. Specifically, he had made delivery of the project (the plans), within the meaning of CO, Article 367, paragraph 1. However, even if performance of the services pertaining to the independent contractor portion of the contract had not been completed, the Federal Supreme Court held that the following would apply (4A_53/2012, consid. 4.3):

> "In the event of early termination of the contract, that part of the project that has been accepted has the same status as a completed project, with regard, specifically, to the client's defect warranty rights (BGE 116 II 450 consid. 2b/aa, p. 453; see also BGE 130 III 362 consid. 4.2, p. 366; Gauch, *Der Werkvertrag*, at 2434)."

In the case at hand, the Court proceeded on the basis that the city had been made aware of the planning defects, by virtue of expert reports, on 12 December 2006. The notification of the defects that was made in January 2007 was, therefore, no longer timely—the rule applicable to the notification period being, namely, the following (4A_53/2012, consid. 6):

> "As a matter of principle, the notification period should be kept short where the defect in question is of such nature as to give rise to a risk that further damage could be caused by waiting any longer (BGE 118 II 142 consid. 3b, p. 148, with references). Where, as here, this is not the case, the Federal Supreme Court holds that a defect notification period of seven days is reasonable (*cf.* Decisions 4A_82/2008 of 29 April 2009 consid. 7.1; 4C.82/2004 of 3 May 2004 consid. 2.3 with references, in: Pra 93/2004 No 146, p. 828; cf. also BGr 4D_4/2011 of 1 April 2011 consid. 4.1)."

In the Court's view, there was no reason to alter this stance in the case at hand, despite the fact that the agreement with the architectural engineer had included the following clause:

> "Rights of action based on defects to the immovable construction project shall be subject to a limitation period of five years. The period shall commence upon acceptance of the project or of the project element. The client shall be entitled to notify such defects at any time within the first two years following acceptance. After the expiration of that period, defect notification shall be made immediately upon discovery."

This clause was construed by the Federal Supreme Court (and prior thereto also by the Commercial Court) as meaning that only defects to the "immovable construction project" could be notified at any time within two years. With regard to planning defects, however, the clause was held not to apply.

Remarks

Critical comments on the Decision have been published previously by the present authors, to which the reader is referred for a more detailed discussion of the issues.[12] By holding that liability for planning faults is to be determined in keeping with the rules for independent contractor contracts, while liability for lack of care in construction management is determined in keeping with the rules for professional services contracts, the ruling by the Federal Supreme Court, draws a distinction between the legal effects attaching to the various elements of "architect-led design-build contracts" (and thus, *mutatis mutandis*, also of engineer-led design-build agreements). In doing so, the Court seeks to make it possible, in its own words, to find "reasonable solutions, suited to the concrete circumstances". The grounds on which it is to be considered "reasonable" for a duty of immediate notification of defects to apply in the concrete circumstances of the case here at issue are, however, not stated in the Decision. Moreover, in

[12] Thomas Siegenthaler, "Die 'Sennhof-Affäre'—Mängelrüge auch gegen Ingenieur", in: BR/DC 2012, p. 193 *et seq.*; Hubert Stöckli, "Mängelrüge bei Ingenieurleistungen—keine sachgerechte Lösung, in BR/DC 2012, p. 213 *et seq.*

construing the disputed clause in the contract, it seems more likely that the intent of the parties was to allow for notification also of planning defects at any time during the first two years: since architectural engineers do not themselves construct "construction projects" (but produce only the plans), there would otherwise not be much sense in including such a clause in an engineering agreement.

At the same time, however, it must be noted that the manner in which the clause is formulated also deserves criticism, since it is, at the very least, open to misunderstanding. The importance of this could well go beyond the case here under discussion, as the wording of the clause corresponds almost exactly to that found in Article 1.11.21 of SIA-Regulation 103 (2003).

The crux of the problem, however, ultimately lies neither with the jurisprudence of the Federal Supreme Court, nor with clumsily drafted contracts, but with the law itself: the reasons behind the duty to make immediate notification of defects in order to preserve one's warranty rights are historical; they resulted from the particular circumstances surrounding commercial sales in the mid-19th century. There are, however, no convincing grounds for arguing that a client who engages an independent contractor in the 21st century should forfeit all defect warranty rights for the simple reason that he did not make notification of the defect within seven days of its discovery. The law needs to be changed on this point, as the Federal Assembly has already recognised (see comments above on the Motion by Fässler and the Parliamentary Initiative by Hutter).

2. Reduction of fees: Federal Supreme Court Decision of 17 July 2012 (4A_89/2012)

Facts[13]

At issue were the fees charged by an attorney, whose client refused payment, arguing, among other things, that the former had poorly fulfilled his mandate as an attorney. Considerations 3.1 and 3.2 of the Decision rendered by the Federal Supreme Court are nevertheless of interest for all service providers in the construction industry who are hired under the terms of a professional services agreement ("Auftrag", CO, Article 394 paragraph 1).

Considerations

(a) "Where a mandate is not carried out with due care, this can lead to a reduction of the fees as contractually agreed [*sic!*] consideration within the meaning of CO, art.

[13] This portion of the text is based, in part, on the conference documentation for the Swiss Construction Law Conference 2013, p. 196.

395, para. 3. Where the result attained by an agent who has failed to exercise due care is entirely without use to the client, the latter does not owe to the former any fee whatsoever (BGE 124 III 423 consid. 4a, p. 427; 117 II 563 consid. 2a, p. 567; 108 II 197 consid. 2a; 87 II 290 consid. 4c, p. 293; Fellmann, *Berner Kommentar*, 1992, N. 501, 528ff., esp. 540 *ad* CO art. 394; Weber, in: *Basler Kommentar, Obligationenrecht*, 5th ed. 2011, N 43 *ad* CO art. 394)" (consid. 3.1).

(b) "Whosoever, without any reservation, in (purported) performance of a contract, makes greater performance than is owed under the terms of the contract may seek recovery of the difference on the basis of enrichment law (BGE 130 III 504 consid. 6.2; 127 III 421 consid. 3c/bb, p. 426; each with references). The situation is different where performance was made in the form of contractually agreed payments on account, but subject to a final settlement of accounts at a later date. In that case, the right of action for recovery of excess payments on account has its basis in a contractual obligation (BGE 130 III 504 consid. 6.4, p. 512; 126 III 119 consid. 3d). The reason given for this practice is that the terms both for the payments on account and for the final settlement were agreed upon in the contract. This allows the conclusion that the party found to have received payments in excess has a duty to refund those overpayments at the time of the final settlement (BGE 126 III 119 consid. 3d). By contrast, even where a final settlement was foreseen in the contract, once the final balance has been drawn up and approved by the parties, any amounts due as a result of the correction of a faulty entry in the accounts is to be compensated according to the rules of unjust enrichment (BGE 133 III 356 consid. 3.2.2). This ruling finds application, in particular, where there has been overpayment of utility and maintenance charges due under the terms of a lease (Decision 4C.24/2002 of 29 April 2002 consid. 3.3.2, in: mp 2002 p. 163ff, 168)" (E 3.2.3.)

(c) " . . . Arrangements concerning payments on account normally contain an express or implied understanding for the repayment of any excess amount paid on account. The fee advances received by the Appellant [here, the attorney] from the Respondent [the Client] under the terms of the professional services agreement between them were thus paid subject to a right to seek recovery of any amount by which the advances may have been in excess of the fees effectively owed. Where it is found—as in the present case—that a lack of due care in the execution of the mandate has brought about a result that is entirely without use to the client, and that, in consequence, no fees at all are owed, the entirety of the amounts paid on account constitutes an overpayment, the recovery of which can be sought on the basis of the contractual agreement . . . The Appellant's argument fails, however, also without regard to the issue of whether the duty to make final settlement with regard to payments made on account carries with it a right of recovery for a lack of due care in the execution of the mandate. The present situation is comparable with that which arises where, under the terms of a sales, rental, or independent contractor contract, a price reduction is accorded in order to restore the equilibrium of a contractual exchange. The rights of recovery that arise in those contexts have their basis in a contractual obligation (BGE 130 III 504 consid. 6.5, p. 513; Gauch, *Der Werkvertrag*, 5th ed., 2011, at 1273) and are thus subject to the corresponding statutes of limitation. This also applies with regard to the right to recover fees paid under the terms of a professional services agreement on grounds that use (full or partial) could not be made of the services, regardless of whether the client has made payments in advance (as here) or whether he has made payment of the fees in the amount agreed. In both cases, the right of recovery held by the client has its basis in a contractual obligation and not in an unjust enrichment, so that the limitation periods to which contractual obligations are subject apply, and this without regard to whether the parties had implicitly agreed that such a duty of repayment would exist" (consid. 3.2.2).

3. Deadlines—construction time promised by architect—delay damages: Federal Supreme Court Decision of 22 August 2011 (4A_203/2011)

Facts

An architect was commissioned with the renovation of a hotel. The work began in October 1994 and was completed in September 1995. In October 1996, the client sued for damages, asserting that there had been a delay in the completion of the work.

Considerations

In terms of construction contract law, consid. 3.3.1 of the Decision on the case is noteworthy: when a client sets a deadline for completion and that time limit is accepted by the other contracting party (here, by an architect), the resulting situation is similar to that in which the client sets a cost limit. The architect is liable for the losses that result from a delay for which he bears the blame. When an architect realises that the deadline he has accepted cannot be met, or where he has doubts in this regard, he has a duty to investigate, and to inform the client so that measures can be undertaken in order for the deadline to be met (with reference to Decision 4C.424/2004 of 15 March 2005, consid. 3.3).

Remarks

In this Decision, unlike in the Decision on cost limits to which it makes reference (4C.424/2004 of 15 March 2005), the Federal Supreme Court rightly notes that the instructions setting a time limit are binding on the architect only subject to his acceptance thereof. The issue involved is the terms for the modification of the contract with the architect (a point that was overlooked in the Decision 4C.424/2004 of 15 March 2005 concerning the cost limit).

Also worthy of special mention is the fact that between the time when the suit was filed with the first instance and the appellate Decision by the Federal Supreme Court, a period of nearly 15 years had lapsed. Litigation seems to have been delayed particularly before the court of first instance (North Mendrisio District Court in the Italian part of Switzerland), where the case was pending for some 12 years.

IV. NEW BOOKS ON CONSTRUCTION LAW

We restrict ourselves here to four works, for which we have a particular affinity, and willingly concede that the list is highly selective.

Peter Gauch, *Der Werkvertrag* (*The Contract for Work and Services*) (5th ed., Zurich 2011).

Peter Gauch, Viktor Aepli, Hubert Stöckli (Eds), *Präjudizienbuch OR* (*The Decisions by the Federal Supreme Court regarding the Swiss Code of Obligations from 1875 to 2012*) (8th ed., Zurich 2012).

Hubert Stöckli (Ed), *Schweizerische Baurechtstagung 2013* (*Contributions to the Swiss Construction Law Conference 2013*) (Freiburg 2013).

Hubert Stöckli, Thomas Siegenthaler (Eds), *Die Planerverträge* (*The Contracts of Architects and Engineers*) (Zurich 2013).