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THE RIGHT OF RECURSE OF AN EMPLOYER AGAINST A SUBCONTRACTOR

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I INTRODUCTION

Under the provisions of Swiss law governing contract for work and materials, there is no contractual relationship between the employer and the subcontractor. Both are considered as mere strangers, although the employer fully relies on the subcontractor’s professional skills, and despite the fact that the subcontractor is actually often appointed by the employer himself.

Mere strangers? It is the purpose of the present contribution to propose an alternative solution, fully consistent with the general principles of Swiss law, in an attempt to reconcile practitioners and academics.

II CONTRACTUAL CLAIMS BETWEEN THE EMPLOYER AND THE CONTRACTOR

1. Concerning the delivery of an “aliud”

(a) Rules governing non-performance of contractual obligations

If the completed work does not correspond to that which was agreed, the contract is not considered as having been badly performed but rather not performed at all. In such a situation, the rules governing liability for defective work do not apply and the employer must resort to the general rules applicable to the non-performance of contractual obligations (articles 97 as Swiss Code of Obligations, hereafter CO). As long as the contractor has not delivered the agreed work, he finds

1 The present contribution is the English version of an article originally published in Revue de droit de la construction, No 3/97, pp. 71-83, Fribourg, Switzerland. The Editors of The International Construction Law Review are most grateful to the Editors of Revue de droit de la construction for their consent to the republication of this article and to the authors for their agreement and for their assistance in providing the translation.

2 About this distinction: see Revue de droit de la construction (DC) 1987 p. 66 n° 73.

3 ENGEL, Contract, p. 786; GAUCHI, Working, p. 1444; HONIELL, p. 236. Note: see the Bibliography which appears at the end of this article for references to works whose authors are in capital letters and for other citations.
himself in the situation of a debtor in default, which confers upon the principal the right to sue the contractor for specific performance (art. 102 ss CO). If specific performance of the contract becomes impossible, it must be determined whether or not the impossibility derives from a fault (art. 97 CO) or not (art. 119 CO).4

(b) Necessary conditions

Article 97, paragraph 1, CO requires four conditions to be satisfied: the non-execution of a contractual obligation, damage, a direct causal link between the non-execution and the damage and the fault of the party who was obliged to perform the work.5 In the present case, the first three conditions do not raise any problem: the non-performance of the contractual obligation consists in having performed the work with material other than which was agreed; the damage consists of the decreased value of the final works as delivered; since no extraneous element has broken the causal link, the only remaining discussion concerns the contractor's fault, which is presumed according to article 97, paragraph 1, CO. When it comes to subcontracting, the contractor can be held liable for his own fault (art. 97, para. 1 CO) as well as that of the subcontractor, who is considered to be his agent (art. 101, para. 1 CO).6 If the conditions stated by these two articles are met, there is concurrent application of articles 97, paras. 1 and 101, para. 1 CO.7 According to the latter disposition, which is considered by some legal scholars to impose an objective "causal" liability, the contractor can be held liable even in the absence of a personal fault. However, it still might be argued that the debtor could only be held liable if, by acting on his own behalf in the agent's place, he would himself have committed a fault: this is a case of the debtor's hypothetical fault.8 That question leads to the analysis of the correlative question of the burden of proof imposed upon the allegedly non-performing party.

(c) The burden of proof required

Article 101 CO, was conceived at a time when the agent was less specialised than the principal; originally it covered situations such as secretary and lawyer, dental assistant and dentist, apprentice and craftsman.9 Now, in subcontracting matters, the situation is the opposite: the subcontractor is usually more technically qualified in the specific field than the contractor. Therefore, reference to the hypothetical fault of the allegedly non-performing party is meaningless; moreover this would encourage general contractors to accept complex tasks exceeding their own skills and have them done by specialised subcontractors, and then escape all liability for lack of the necessary technical knowledge that would be essential if they were hypothetically placed in the shoes of the subcontractor. Accordingly to determine the level of diligence required on the part of the party who has agreed to deliver the works to the principal, reference must be made to the content of the "promised" work and not to the "actual" technical knowledge of the contractor.10 Under these circumstances, it appears that if the contractor unconditionally undertakes to perform the work (and has it done by one or more subcontractors), he cannot be exonerated from liability by claiming that he would not have been guilty of insufficient diligence had he done the work himself. This is the solution under the 1980 Vienna Convention for International Sale of Goods which is applicable to many such contract.11 This Convention stipulates that the contractor can only be relieved from liability if the subcontractor would himself be exonerated (art. 79, para. 2 CV).12 Consequently, according to articles 97, para. 1 and 101, para. 1 CO, the employer can recover from the contractor for the damage incurred—which corresponds to the decreased value of the works. The contractor cannot obtain exoneration as his liability is treated as if it were causal.

2 In the case of delay

(a) Principle

The default of the non-performing party consists of the lack of timely execution of the contract. In such a case, the principal cannot resort to the rules governing contracts for work and materials but only to the general rules of the Code of Obligations.13

(b) Damages

In the event of delayed completion attributable to the subcontractor, the principal will want to keep the works as finished, albeit late (but without defects) but will want to obtain payment for the damage incurred. According to article 103, para. 1 CO, as long as the contractor is in default, the employer is entitled to financial compensation for the delay. This comprises all

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1 GAUCH/SCHLUEP, n° 5776.
2 ENGEL, Obligations, p. 796; GAUCH/SCHLUEP, n° 2597 ss.
3 That the subcontractor is regarded as an agent is unanimously recognised: ATJ 116 II 505, 508; GAUCH, Werksbrief, n° 177; TERCHE, n° 5773.
4 We must reject one opinion which maintains that only Art. 97 CO applies, because it would lead to a situation where the contractor could escape liability according to Art. 107, para. 1 CO, but where he would be liable according to Art. 101, CO. For this view see CERUTTI, n° 488 ss; KOLLER, n° 259; GAUCH/SCHLUEP, n° 2962.
5 CERUTTI, n° 472; GAUCH/SCHLUEP, n° 2695.
6 CERUTTI, n° 472; GAUCH/SCHLUEP, n° 2865; KOLLER, n° 505; OTT, in RSG 74 (1978) 288.
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8 So SPIRO, p. 247: "(...) the party liable promises a performance, not his performance". "The demands to be made as to competence and knowledge of the craftsman depend rather on what performance has been promised" (p. 248).
9 Article 3 CV.
10 NEUMAYER/MING, commentaire, n° 8 of art. 79 CV.
11 GAUCH, Werksbrief, n° 609. We should explain that Art. 356, para. 1 CO only refers to the situation prior to the agreed for completion, which is not the case here (idem 668).
himself in the situation of a debtor in default, which confers upon the principal the right to sue the contractor for specific performance (art. 102 ss CO). If specific performance of the contract becomes impossible, it must be determined whether or not the imposibility derives from a fault (art. 97 CO) or not (art. 119 CO).1

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5 Cerutti, n° 472; Gauw/Schluemp, n° 3799.
6 Cerutti, n° 472; Gauw/Schluemp, n° 2860; Koller, n° 503; Ott, in Rö 74 (1978) 288.
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subcontracting matters, the situation is the opposite: the subcontractor is usually more technically qualified in the specific field than the contractor. Therefore, reference to the hypothetical fault of the allegedly non-performing party is meaningless; moreover this would encourage general contractors to accept complex tasks exceeding their own skills and have them done by specialised subcontractors, and then escape all liability for lack of the necessary technical knowledge that would be essential if they were hypothetically placed in the shoes of the subcontractor. Accordingly to determine the level of diligence required on the part of the party who has agreed to deliver the works to the principal, reference must be made to the content of the "promised" work and not to the "actual" technical knowledge of the contractor. Under these circumstances, it appears that if the contractor unconditionally undertakes to perform the work (and has it done by one or more subcontractors), he cannot be exonerated from liability by claiming that he would not have been guilty of insufficient diligence had he done the work himself. This is the solution under the 1980 Vienna Convention for International Sale of Goods which is applicable to many such contract. This Convention stipulates that the contractor can only be relieved from liability if the subcontractor would himself be exonerated (art. 79, para. 2 CV). Consequently, according to articles 97, para. 1 and 101, para. 1 CO, the employer can recover from the contractor for the damage incurred—which corresponds to the decreased value of the works. The contractor cannot obtain exoneration as his liability is treated as if it were causal.

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involuntary diminution of his patrimony, i.e., his overall assets resulting from the late delivery even if this is fortuitous. The contractor is, however, only responsible for the damage if the delay is due to his fault, which, as in all cases of contractual liability, is presumed (article 97, para. 1 CO). Article 101, para. 1 CO applies to the subcontractor. Therefore, the employer can obtain compensation for damages, whether these represent actual loss of assets or simply that their value has not been enhanced. Under this head as well, the contractor cannot take advantage of an exonerating proof.

3. In the case of liability for defects

(a) Rights which derive from such liability

When the contractor delivers the works contracted for on time but they are defective, the employer has three routes available each of which may be taken in the alternative to any other:
- to rescind the contract (art. 368, para. 1 in initio CO);
- to claim for reduction in price (art. 368, para. 2, 1st hypothesis CO);
- to demand repairs to the work without cost to him (art. 368, para. 2, 2nd hypothesis CO).

This last right does not assume any fault on the part of the contractor and can be exercised by a simple and irrevocable demand. Therefore it does not have to be submitted to a court of law or require the agreement of a third party.

(b) Compensation (damages)

In addition to the rights mentioned above, the employer is entitled to claim monetary compensation (art. 368, para. 1 and 2 in fine CO). The damage recoverable under these provisions must be directly caused by the defect itself, but developed outside. If the defect has decreased the value of the works, the principal is entitled to obtain a reduction in the price (art. 368, para 2, 1st hypothesis CO) irrespective of any fault on the part of the contractor or subcontractor. However, if the employer suffered additional costs or was prevented from entering into another business transaction as a result of the defect, he is entitled to compensation for this as well. In other words, the principal is entitled to compensation for all physical or economic damage.

The contractor's liability for defective works is governed by the general provisions of contractual liability. Since fault is presumed, the burden of proving otherwise lies on the contractor. In matters involving a subcontractor, the contractor will be held liable for the subcontractor's default (art. 101, para. 1 CO).

III CIVIL LIABILITY CLAIMS OF THE EMPLOYER AGAINST THE SUBCONTRACTOR

In any of the situations which we have examined so far, the employer may prefer to go directly against the subcontractor. Most often, this will arise in the event of the contractor's bankruptcy or insolvency after completion of the works. For convenience, the employer may also prefer to sue the subcontractor instead of the contractor: for instance, in contemplation of a future business venture with the contractor that might be jeopardised by a legal claim against him. If the damage is unarguably the result of the subcontractor's obvious fault, a direct legal proceeding may be much less awkward than several indirect claims which could then be delayed by numerous appeals.

1 Civil liability in matters involving contracts for work and materials

(a) Acts harmful to absolute subjective rights

Liability based on article 41, para. 1 CO, requires that the author has committed an illicit act. According to case law, an illicit act comprises any harmful action that violates, directly or indirectly, any order to act or to abstain from acting aimed at protecting a specific right, it being understood that the rules of conduct in question must derive from Swiss law, written as well as non-written, administrative, public or private (civil, criminal . . .), Federal or Cantonal. These direct violations consist of acts harmful to the victim's absolute subjective rights. Under Swiss law these are the right to life, the right of personal integrity, the right to own property and the right of personality. On the other hand, case law, in its actual state, does not consider the violation of the general principle of good faith as an illicit act.

(c) Acts harmful to patrimonial rights

Whereas article 41 CO protects the right of ownership, it does not protect against acts merely harmful to the victim's property or those which inflict pure
involuntary diminution of his patrimony, i.e., his overall assets resulting from the late delivery even if this is fortuitous. The contractor is, however, only responsible for the damage if the delay is due to his fault, which, as in all cases of contractual liability, is presumed (article 97, para. 1 CO). Article 101, para. 1 CO applies to the subcontractor. Therefore, the employer can obtain compensation for damages, whether these represent actual loss of assets or simply that their value has not been enhanced. Under this head as well, the contractor cannot take advantage of an exonerating proof.

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economic losses. Such damages are only taken into account if the alleged wrongdoer, while causing the damage, has broken a normative rule which indirectly serves to protect the victim's interests. These are therefore the indirect injuries mentioned above. In order to comply with the objective theory governing illicit acts, one must determine whether there are any normative rules which aim to protect the private interests of the parties involved in a subcontractual operation.

The only ones which can be taken into account are articles 227 and 229 of the Swiss Penal Code, which deal with the flooding or caving-in of construction as well as with the general technical norms of construction. According to their text, those two legal dispositions were enacted to protect life, to protect against bodily injury or property damage, in other words, absolute subjective rights which are already protected as such. Therefore, one must come to the conclusion that these rules are not intended to protect exclusively patrimonial interests. This is, moreover, the conclusion reached by case law.

(c) Opposing views held by legal scholars

Aware of the absurdity which could arise in civil liability cases from the radical difference in treatment between damage to personal or subjective rights and damage to patrimonial rights, some legal scholars have vigorously opposed the objective theory of illicit acts developed in the jurisprudence. Gabriel has endorsed the subjective theory of illicitity inherited from French law: the only limit to compensation for a damage would come from a justifying fact, such as the victim's consent. More recently, Werro, contending that any reduction of delictual liability is not acceptable, has argued that the simple breach of contract must be deemed as an illicit act: therefore, more damages stemming from the defect itself but also the decreased value of the works must be considered illicit when resulting from a lack of diligence on the part of the general contractor.

Neither of these solutions can be adopted. First there would be the risk of an explosion of civil liability cases which would not be desirable and in any event is not justified by case law. It is not possible to start from the principle that all damage must be made good by means of actions for civil liability. In effect, it appears that our legal order, even though not authorising, at least tolerates some harm to the property of individuals which can occur in

business life. Secondly, the objective theory of illicitity would require the elaboration of a complex system of justifying facts which would only result in shifting the problem. Finally, the extension of civil liability would not respond to the interests of the injured party when it came to the presumption of fault, the intervention of agents and the effect of a statute of limitation.

(d) Exclusion of civil liability

Accordingly, in matters involving work contracts there are no legal norms which would allow indirectly the exclusively patrimonial interests of the principal to be protected. Therefore, he cannot sue the subcontractor on the basis of a civil liability claim in a matter involving compensation for damage incurred in the midst of a business transaction relating to real property. Let us now examine the extent of civil liability in the examples under discussion.

2 In matters concerning the delivery of an "aliud"

The delivery of works other than those agreed does not cause any harm to the principal's right to own, enjoy or dispose of his property, which is the only absolute subjective right that could be taken into account. Indeed the employer is not entitled to any property right related to the works before their delivery (art. 714, para. 1 Swiss Civil Code, herein after CC). The decreased value of the work therefore constitutes typically only a case of harm to the patrimonial rights of the employer which is not covered, even indirectly, by a protective legal norm.

Consequently, in such a situation, civil liability does not assist the employer who wants to bring a claim directly against the subcontractor for payment of the difference between the price of the agreed works and those which were delivered. Moreover, civil liability does not allow him to sue for specific performance, unlike the rules governing non-performance of contractual obligations.

3 In matters involving delay

Iardy delivery of the works can lead to unfortunate economic consequences for the employer: he will incur further costs and lose future gains. These losses do not, however, undermine the employer's property rights. Moreover, no legal disposition aiming to protect the private interests of the employer would allow the commission of an illicit act.

Consequently, the employer cannot file a civil liability claim against the subcontractor to obtain compensation for loss incurred because of late delivery. None of the elements pointed out in this example can be covered by article 41, para. 1 CO.

30 Guhl/Meier/Koller, p. 174; Keller/Gabli, p. 36. 31 Guhl/Sweet, p. 138. 32 See infra 4(b).
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39 MARKEINS, in MLQR 1987, p. 594; GAUCH, n° 171; "etn Verwigschaden".
40 BRUEMM, n° 30 ad Art. 41 OR, DESCHENEAUX/TERCIER, p. 71; GABRIEL, n° 249 and 263; GAUCH/SWEET, p. 139; GUHL/MECK/KOLLER, p. 175, 176.
41 ATF 111 II 177; ATF 117 II 259.
42 For an example, see KRÄMER, in JDS 2 (1984) 192.
43 GABRIEL, n° 90 and 903. According to this author, this system would avoid the tortuous reasoning required by the rigidity of the absolute theory.
44 WERRO, in DC 1996, p. 68.
45 About the new developments concerning the so called liability based on fact ("responsabilité fondée sur la faute"), CHOPUS, in SJ 119 (1997) 165.

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40 GAUCH/SWEET, p. 138.
41 See infra 4(3).
4 In matters involving liability for defects

(a) Rights deriving from such liability

The delivery of defective work as such does not undermine the absolute subjective rights of the employer. The delivery of works of lesser value than those undertaken (art. 368, para. 2, 1st hypothesis CO) does not particularly affect the employer's rights to own property. In the absence of protective provisions in this context, the employer cannot obtain compensation for pure economic losses on the basis of civil liability. Likewise, he cannot require the defective works to be put right on the basis of article 41, para. 1 CO.

(b) Claim for compensation

Losses arising from defective work that affect other goods owned by the employer constitute an interference with his property right which is a protected subjective right under article 41, para. 1 CO. An illicit act having been committed, the employer must still prove that a causal link exists between that illicit act and the damage, as well as a fault on the part of the subcontractor. Contrary to contractual liability, civil liability does not presume the existence of a fault on the part of the alleged wrongdoer. The burden of proof concerning this matter therefore rests on the shoulders of the victim (article 8 CC).

Moreover, liability based on article 41, para. 1 CO appears to be less favourable to the victim than that based on article 97, para. 1 CO for other reasons as well. On the one hand, the employer's action can fail if the subcontractor can demonstrate that his agents were carefully chosen, supervised and given proper instructions (art. 55, para. 1 CO). On the other hand, a claim based on civil liability has to be instituted within one year from the time that the existence of the damage and the identity of the author are discovered (article 60 CO), unlike contractual liability which is subject to a prescription period of five years in construction matters (art. 371, para. 2 CO; art. 189 SEA Rule 118). If all these conditions are met, the employer can recover compensation for the damage caused to his property from the subcontractor.

5 Inadequacy of civil liability in matters involving works contracts

Civil liability, which offers the employer the possibility of taking direct legal action against the subcontractor, does not provide compensation for the typical losses that can result from a subcontracting operation, and submits a claim for compensation for other damages to stricter conditions than would contractual liability. The inadequacy of civil liability is not surprising when

one considers that it would attempt to apply extra-contractual rules to cases which arise from a double contractual relationship. Consequently, one must stay in the realm of contractual rules and examine carefully which obstacles genuinely restrict the contractual rights of the employer towards the subcontractor(s). This discussion leads necessarily to the application of the principles of privacy of contract.

IV PRIVITY OF CONTRACT AND EXCEPTIONS THERETO

1 The legal basis

Contrary to French law, but inspired by German and English law, Swiss law does not contain any specific legal basis which could correspond to the principle of contractual privacy. This absence in Swiss law does not however imply its non-existence. Indeed, case law reminds us occasionally, that "in application of the principle of contractual privacy, a contract is only binding upon the contracting parties". Legal scholars consider this to be so obvious that it rarely leads to any discussions. While not codified, it is nevertheless recognised that the principle of contractual privacy derives from legal dogma. Consequently it is for legal scholars to define the significance of the notion.

For present purposes this calls for an analysis of how the legislator has set up the relationships among the parties in subcontracting matters.

2 Subcontracts in Swiss law

Strongly inspired in this instance by French law, the Swiss Code of Obligations recognises important exceptions to the principle of privacy of contract in matters involving subletting and submandating.

(a) The rental contract

In rental contracts, article 262, para. 3 CO allows the landlord, who fears that the rental locale might not be used as provided in the main contract, to take legal action directly against the subtenant to force him to abide by the main rental agreement. Even though the text of this disposition limits the direct

...
4 In matters involving liability for defects
(a) Rights deriving from such liability

The delivery of defective work as such does not undermine the absolute subjective rights of the employer. The delivery of works of lesser value than those undertaken (art. 368, para. 2, 1st hypothesis CO) does not particularly affect the employer's rights to own property. In the absence of protective provisions in this context, the employer cannot obtain compensation for pure economic losses on the basis of civil liability. Likewise, he cannot require the defective works to be put right on the basis of article 41, para. 1 CO.

(b) Claim for compensation

Losses arising from defective work that affect other goods owned by the employer constitute an interference with his property right which is a protected subjective right under article 41, para. 1 CO. An illicit act having been committed, the employer must still prove that a causal link exists between that illicit act and the damage, as well as a fault on the part of the subcontractor. Contrary to contractual liability, civil liability does not presume the existence of a fault on the part of the alleged wrongdoer. The burden of proof concerning this matter therefore rests on the shoulders of the victim (article 8 CC).

Moreover, liability based on article 41, para. 1 CO appears to be less favourable to the victim than that based on article 97, para. 1 CO for other reasons as well. On the one hand, the employer's action can fail if the subcontractor can demonstrate that his agents were carefully chosen, supervised and given proper instructions (art. 55, para. 1 CO). On the other hand, a claim based on civil liability has to be instituted within one year from the time that the existence of the damage and the identity of the author are discovered (article 60 CO), unlike contractual liability which is subject to a prescription period of five years in construction matters (art. 371, para. 2 CO; art. 189 SEA Rule 118). If all these conditions are met, the employer can recover compensation for the damage caused to his property from the subcontractor.

5 Inadequacy of civil liability in matters involving works contracts

Civil liability, which offers the employer the possibility of taking direct legal action against the subcontractor, does not provide compensation for the typical losses that can result from a subcontracting operation, and submits a claim for compensation for other damages to stricter conditions than would contractual liability. The inadequacy of civil liability is not surprising when

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5. According to Article 1105 of the Swiss Civil Code, "agreements only take effect between contracting parties: they do not injure a third party, nor do they benefit him except where provided by Art. 1102 inter alia (regarding antibodies)."

6. KRAMER, Miinchner Kommentar, no 14 ad Einleitung zum Schuldrecht (Allgemeiner Teil).

7. PFEIFFER / NOTZT, p. 156, English law emphasizes the intimacy of the relationship of agreements by referring to "privity of contract".


9. RUCKER, Allgemeiner Teil, p. 107; ORRUCHER, no 38 ad Verfassungswesen en Art., 1—40.

10. GROBEN, p. 113; ENGEL, Obligationen, p. 21.

11. Editorial note in order not to destroy the nuances of the concept of "mandant/mandataire" which are not always reflected by the use of terms such as "agency/agent," "authorized attorney" etc., "mandate/submandate" is used in this translation.
Recourse of an Employer against a Subcontractor

Article 10.2 of the Hamburg Convention, article II of the Guadalajara Convention, articles 90.2 et 50.3 of the Warsaw Convention, and article 4 (1) of the Athens Convention provide for direct liability of the subcontractor towards the consignor, cargo owner or passenger. This is also the position under the Hague-Visby rules and part of the case law relating to the CMR (transportation of goods by road) favours this solution.

3 Swiss law sensitivity to subcontracts

This brief overview on contracts regulated by law or by conventions leads to the following observation: Swiss law takes into account the specific nature of certain subcontractual operations to define certain limits to the strict application of the principle of privity of contract. This is done by setting up a particular system that entitles the employer to a direct action against the subcontractor in long-term contracts, and especially in service contracts. Acknowledging the existence of a direct contractual right between employer and subcontractor stems from this.

Moreover, it appears to be in harmony with recent developments by the Swiss Federal Supreme Court concerning liability based on trust, which tends to create a new basis for liability in matters involving a special relationship of confidence such as that in a group of related contracts.

V CONTRACTUAL CLAIMS BY EMPLOYER AGAINST SUBCONTRACTOR

1 Direct claim pursuant to agreement

Depending on the contractual arrangement adopted by the parties, the employer’s direct claim against the subcontractor may result from the contract between the employer and the contractor, the contract between the contractor and the subcontractor, or, exceptionally, from a new contract between the employer and the subcontractor.

1 According to TANDOGAN, p. 5, the landlord is entitled to sue the tenant for compensation. According to TERCER, (2nd edition of 1995), the landlord would be able to rescind the subcontract.

2 ATF 120 II 112, 115.

3 SK-FELDMANN, p. 347 ad Art. 398; HÖNL, p. 274; TERCER, n° 4601.

4 BE-AUGUST, n° 5 ad Art. 399 OR; GÜHL-ŠERZ/DREYER, p. 498; SK-FELDMANN, n° 404 ad Art. 399 OR; HÖNL, p. 274; TERCER, n° 4609.

5 SK-FELDMANN, n° 682 ad Art. 398 OR; SK-AUGUST, n° 602 ad Art. 398 OR.

6 This condition is only necessary in matters of authorized substitution according to article 399 para. 2 CO. ATF 118 II 112, 114, 112 II 547, 283.

right of the landlord towards the subtenant to this unique case, some authors have tried to extend its effects. Moreover, in a recent decision, the Swiss Federal Supreme Court has found that a special legal link exists between the landlord and the subtenant.

(b) The ordinary mandate
In the field of ordinary mandate, article 399, para. 3 CO endows the employer with a direct legal claim against the submandantary. The concept of substitution mentioned in article 398, para. 3 CO, implies that the substitute agent acts legally, technically and economically in an independent manner. In practice, this concept covers cases involving submandantaries, but excludes those involving agents who are deprived of personal initiative and who find themselves in a relationship as a subordinate such as between a worker and his employer. Finally, substitution does not require that the activity be conducted in the sole or preponderant interest of the principal. Thus, it appears that the notion of substitution of mandates is close to the one of subcontracting, in which we are interested.

(c) Other long-term contracts
Contracts akin to ordinary mandate will also confer the direct right mentioned above. Among the other long-term contracts foreseen in the Code of Obligations, the employment contract is not considered as a subcontract because of the personal nature of the performance of the employee.

(d) Contract of carriage
The right to bring a direct claim is also provided by the international conventions relating to international transport. Under the maritime and air law conventions, the "contracting carrier" (which entered into the contract with the consignor/cargo owner) remains responsible for the entire carriage, while the subcarrier ("actual carrier") is liable towards the consignor/cargo owner/passenger for the part of the carriage that he has actually performed.

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Moreover, it appears to be in harmony with recent developments by the Swiss Federal Supreme Court concerning liability based on trust, which tends to create a new basis for liability in matters involving a special relationship of confidence such as that in a group of related contracts.

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20 Convention de Guadalajara du 18 septembre 1961 pour l’unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel, RO 1964, p. 156.
21 Convention pour l’unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel, RO 1964, p. 156.
22 Convention de Guadalajara du 29 octobre 1965 pour l’unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel, RO 1966, p. 114.
Recourse of an Employer against a Subcontractor

the Swiss courts will as a general rule hold the parties to these standard terms as trade usage. Thus, by way of example, the fact that the subcontractor has actually been directly selected by the employer will not be considered a sufficient demonstration of an agreement to enter into a third-party-beneficiary contract. 107

(a2) Consequences of a contract for the benefit of a third party. A third-party-beneficiary contract does not alter the original contractual relationship between the contractor and the subcontractor, nor does it modify the contractor’s rights against the subcontractor, which arise out of the subcontract. In addition, the employer is entitled, jointly with the contractor, to bring claims against the subcontractor.

The employer is thus directly entitled:
— to sue the subcontractor for specific performance; 108
— to place the subcontractor in default, within the meaning of article 102 CO, in case of delay in performance; 109
— to give formal waiver of the claim for specific performance in case of default; 109 subject to the terms of article 107 CO;
— to sue the subcontractor for damages resulting from delay in performance or defective performance; 109
to demand repairs to the works without cost. 109

However, the employer enjoys no direct exercise of rights affecting the terms and conditions of the subcontract between the contractor and the subcontractor, since the employer is not a party to the subcontract. In particular, the employer is not entitled:
— to rescind the contract, in the event the subcontractor is in default, or to withdraw from the contract at any time within the meaning of art. 377 CO;
— to claim a reduction in price.

These particular remedies are not available to the employer. To allow them would be to vary the terms of the subcontract, to which the employer is not a party.

(a4) Subcontractor’s defences to the employer’s claim. The subcontractor’s position is not weakened by the third-party-beneficiary structure. The subcontractor can raise against the employer the following defences: 109

107 CHAX, art. p. 211.
108 GAUCH, Werkvertrag, n° 366; ATP 120 II 116.
109 CHAX, p. 220.
110 OR-GONZENBACH, n° 35 ad Art. 119 OR.
111 Ibid.
112 GAUCH, Werkvertrag, n° 1497.
113 Ibid.
114 In general, see ATP 114 II 258; BECKER, n° 26 ad Art. 112; GAUCH, Werkvertrag, n° 1497; OR-GONZENBACH, n° 15 ad Art. 112; ENGEL, Obligations, p. 426.
115 BUCHER, p. 483; OR-GONZENBACH, n° 17 ad Art. 112 OR; GAUCH/SCHLUEP, n° 4010; ENGEL, Obligations, p. 427.

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(a1) Parties to the third-party-beneficiary contract. Under Swiss law, a party acting in his own name can promise to the other contracting party performance to and in favour of a third person. The third person or his successor in title is entitled in his own right to require performance in his favour, provided however that it was the intention of the two contracting parties (art. 112(3) CO). 108

The employer’s right to bring a claim directly against the subcontractor must be stipulated in the contract between the contractor and the subcontractor. This stipulation is not subject to the employer’s consent. 108

The employer will however be notified that he is the beneficiary of a third-party-beneficiary contract within the meaning of art. 112 CO, entered into by the contractor and the subcontractor.

Once the employer gives notice to the subcontractor that he intends to exercise his rights as the third party beneficiary, the contractor and subcontractor may no longer vary their contract in this regard. 109

From a practical point of view, the employer and the contractor may agree that the contractor will enter into a contract with the subcontractor for the benefit of the employer as a third party. In such case, conclusion of this third-party-beneficiary contract will become a contractual obligation owed by the contractor to the employer.

(a2) Formation of the third-party beneficiary contract. The contract for the benefit of a third party will be deemed to exist where the contractor and the subcontractor have agreed inter se that the works will be carried out in favour of the employer and that the employer will be personally entitled to claim performance.

Such an agreement, although it can in theory be implied by the parties’ conduct, ought in practice to be very clearly set out in the text of the contract between the contractor and the subcontractor, because stipulation by the contractor and subcontractor of a contractual right to be exercised by the employer derogates from art. 39(2) of SFA Rule 118 which reads as follows:

"Dans l'exécution de ses travaux, le sous-traitant n'a de rapport contractuel qu'avec l'entrepreneur." 109

"As for the carrying out of the work the only contractual relationship is that between the subcontractor and the contractor." 109

The SEA Rules are standard contractual terms which can be departed from by the parties. However, in the absence of a clear agreement to the contrary, 108

See GAUCH, Werkvertrag, n° 254.
109 OR-GONZENBACH, n° 5 ad Art. 112 OR.
110 Art. 112 al. 9 CO. This declaration is not subject to formal requirements: OR-GONZENBACH, n° 18 ad Art. 111 OR.
111 Generally speaking, there is no usage providing for a third-party-beneficiary contract in the case of subcontractors: GAUCH, Werkvertrag, n° 110.
the Swiss courts will as a general rule hold the parties to these standard terms as trade usage. Thus, by way of example, the fact that the subcontractor has actually been directly selected by the employer will not be considered a sufficient demonstration of an agreement to enter into a third-party-beneficiary contract.62

(a3) Consequences of a contract for the benefit of a third party. A third-party-beneficiary contract does not alter the original contractual relationship between the contractor and the subcontractor, nor does it modify the contractor's rights against the subcontractor, which arise out of the subcontract. In addition, the employer is entitled, jointly with the contractor, to bring claims against the subcontractor.

The employer is thus directly entitled:
— to sue the subcontractor for specific performance65;
— to place the subcontractor in default, within the meaning of article 102 CO, in case of delay in performance64;
— to give formal waiver of the claim for specific performance in case of default68 subject to the terms of article 107 CO;
— to sue the subcontractor for damages resulting from delay in performance68 or defective performance62;
— to demand repairs to the works without cost.68

However, the employer enjoys no direct exercise of rights affecting the terms and conditions of the subcontract between the contractor and the subcontractor, since the employer is not a party to the subcontract. In particular, the employer is not entitled67:
— to rescind the contract, in the event the subcontractor is in default, or to withdraw from the contract at any time within the meaning of art. 377 CO;
— to claim a reduction in price.

These particular remedies are not available to the employer. To allow them would be to vary the terms of the subcontract, to which the employer is not a party.

(a4) Subcontractor's defences to the employer's claim. The subcontractor's position is not weakened by the third-party-beneficiary structure. The subcontractor can raise against the employer the following defences67:

62 Chaux, p. 221.
63 GAUCH, Werktang., n° 136, ART 120 II 116.
64 Chaux, p. 220.
65 OR-GONZENBACH, n° 51 ad Art. 112 OR.
66 Ibid.
67 Ibid.
68 Ibid.
69 See GAUCH, Werktang, n° 394.
70 OR-GONZENBACH, n° 5 ad Art. 112 OR.
71 Art. 112 al. 3 CO. This declaration is not subject to formal requirements: OR-GONZENBACH, n° 18 ad Art. 111 OR.
72 Generally speaking, there is no usage providing for a third-party-beneficiary contract in the case of subcontract. GAUCH, Werktang, n° 116.
73 Generally speaking, there is no usage providing for a third-party-beneficiary contract in the case of subcontract. GAUCH, Werktang, n° 116.
Defences arising out of the contract between the contractor and the subcontractor.

All provisions of the subcontract can be pleaded against the employer. For instance, the subcontractor can still claim any exemption from or limitation of liability provided in the subcontract.

In the event that the subcontract is void for whatever reason, or subject to condition precedent or condition subsequent, or subject to rescission due to material error, willful deception or duress, or in the event that the subcontractor is entitled to withdraw from the contract in case of insolvency of the contractor (art. 83(2) CO), or in case of impossibility of performance imputed to the contractor, then the subcontractor is entitled to raise against the employer all defences based on these grounds in the same manner as would be possible against the contractor.

Likewise, the subcontractor is entitled to plead against the employer that the claim is time-barred. In such case, the _dies a quo_ is determined on the basis of the subcontract. Consequently, the one or five year period of limitation provided by art. 371 CO runs from the time of delivery of the work by the subcontractor to the contractor and not from the time of delivery of the final work by the contractor to the employer.

In the event that the contractor fails to give notice of defects in conformity with article 367 CO, the subcontractor is then entitled to claim that the contractor has impliedly accepted the work, thereby discharging the subcontractor from liability. The employer will in such case have to lodge the claim against the contractor.

Finally, on the basis of art. 82 CO⁵⁸ (according to which a party who wishes to demand performance of a bilateral contract by the other party must either have already himself performed or tendered his performance), the subcontractor is entitled to refuse the performance demanded by the employer should the contractor not have made payment to the subcontractor in compliance with the terms of the subcontract.

Defences based on the personal relationship between employer and subcontractor.

The subcontractor is entitled to set off against the employer’s claim any claim that he may have against the contractor.⁵⁹

An obvious example of this is the subcontractor’s claim against the contractor for payment. In the event that the employer sues the subcontractor for damages to compensate for defective work, the subcontractor cannot plead that he has not been paid by the contractor (whereas this would be a valid defence to a suit by the contractor against the subcontractor).

Although this result may appear surprising, it should not be overlooked that under Swiss statute the subcontractor holds a mechanic’s lien on the works as security for payment of the subcontract price.

Contract between the employer and the contractor: assignment of a claim

Parties to the assignment. In the main contract between the employer and the contractor, the parties can agree to an assignment to the employer of the contractor’s claims against the subcontractor. This assignment of claim may be either general or it may be limited to a claim for compensation in case of defective work. An assignment of future claims is permitted by Swiss case law.⁶⁰

Such an assignment of a claim does not require the subcontractor’s acceptance in order to be valid.

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⁵⁸ BUCHE, p. 485; ATF 92 II 10.
⁵⁹ BUCHE, p. 485, note 68, with a nuance to this solution.
⁶⁰ ORGONENBACH, n° 17 ad Art. 312 OR.
(1) Defences arising out of the contract between the contractor and the subcontractor. All provisions of the subcontract can be pleaded against the employer. For instance, the subcontractor can still claim any exemption from or limitation of liability provided in the subcontract.

In the event that the subcontract is void for whatever reason, or subject to condition precedent or condition subsequent, or subject to rescission due to material error, wilful deception or duress, or in the event that the subcontractor is entitled to withdraw from the contract in case of insolvency of the contractor (art. 83(2) CO), or in case of impossibility of performance imputed to the contractor, then the subcontractor is entitled to raise against the employer any defences based on these grounds in the same manner as would be possible against the contractor.

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Finally, on the basis of art. 82 CO (according to which a party who wishes to demand performance of a bilateral contract by the other party must either have already himself performed or tendered his performance), the subcontractor is entitled to refuse the performance demanded by the employer should the contractor not have made payment to the subcontractor in compliance with the terms of the subcontract.

(2) Defences based on the personal relationship between employer and subcontractor.

The subcontractor is entitled to set off against employer’s claim any claim that the subcontractor may have against the employer.47 On the other hand, the subcontractor is not entitled to raise the following defences:

(1) Defences based on the main contract between the employer and the contractor.

In the event that the main contract contains an exclusion or limitation of liability clause in favour of the contractor but the subcontractor does not, the employer is entitled to bring a claim for compensation against the subcontractor, despite the fact that the employer would have been unable to sue the contractor.

Likewise, should the employer fail to give timely notice of defects to the contractor, in conformity with art. 367 CO, but the contractor did give due notice of them to the subcontractor, it cannot be claimed by the subcontractor that the work has been accepted. In other words, the employer would be prevented from suing the contractor but not from suing the subcontractor.

Avoidance of the main contract does not affect the employer’s rights based on the third-party-beneficiary provision contained in the subcontract. Yet the fact that these two contracts are, in theory, independent of each other can lead to unfair results. For instance, in a case where the main contract had been avoided by the contractor owing to the employer’s insolvency (art. 85 CO), it would be unacceptable to allow the employer to demand performance from the subcontractor. The principles of Swiss law calling for good faith in contractual dealings will prevent the employer from suing the subcontractor in such a situation.

(b) Contract between the employer and the contractor; assignment of a claim

(b) Parties to the assignment. In the main contract between the employer and the contractor, the parties agree to an assignment to the employer of the contractor’s claims against the subcontractor. This assignment of claim may be either general or it may be limited to a claim for compensation in case of defective work. An assignment of future claims is permitted by Swiss case law.48 Such an assignment of a claim does not require the subcontractor’s acceptance in order to be valid.

47 BUCHER, p. 485; ATF 92 II 10.
48 BUCHER, p. 485, note 68, with a stance to this solution.
49 ORCZENZENBACH, n 77 ad Art. 112 OR.
(b2) Formation of the assignment of a claim. An assignment of a claim must be in writing (art. 165(1) CO). It may take the form of a provision in the main contract, which means that it concerns future claims (such as a potential claim for damages to compensate defective work). For the assignment of a future claim to be valid under Swiss law, the ground on which the claim would be founded, the content of the claim, and the party against whom the claim would be made, must be sufficiently capable of determination.\(^{76}\)

An assignment of a claim may also be agreed by the parties at a later stage, when the event which gives rise to the claim (such as the delivery of defective work) has already taken place.

(b3) Consequences of the assignment of claim. Where the assignment of claim is agreed between the employer and the contractor, the employer is substituted for the contractor as a creditor. The assignment of claim will be valid as against the subcontractor only if he has been given notice of it (art. 167 CO).

The claim to be assigned may be:
- a claim for specific performance;
- a future claim for compensation in case of defective product, delay, or non-performance;
- a claim for repairs to the work without cost.\(^{77}\)

On the other hand, an assignment of the right to avoid the subcontract in case of defective work or of the right to claim a reduction in price\(^{78}\) would be subject to the subcontractor’s consent,\(^{79}\) as the exercise of such rights would vary the content of the subcontract. Moreover, the assignment of such rights to a third party would be looked upon by Swiss law as an assignment of the subcontract itself rather than as an assignment of a mere claim thereunder. An assignment of a contract is subject to acceptance by all parties to the original contract.\(^{80}\) If the subcontractor consents to the assignment, the contractor disappears from the contractual relationship.

(b4) Defences by the subcontractor. The assignment of claim does not affect the subcontractor’s rights, since the subcontractor’s defences to the claim of the contractor-assignor may also be used against the employer-assignee, provided they already existed at the time the subcontractor was advised of the assignment (art. 189(1) CO).\(^{81}\) The subcontractor is entitled to raise defences based on the subcontract, but not defences based on the main contract between the contractor and the employer.

76 ATJ 57 I 530, 64 II 396.
77 See ATJ 114 II 299, 247; GAUCHI/SCHLUPE, n° 5556.
78 See however the contradictory opinion referred to in GAUCHI/SCHLUPE, p° 5556. In our opinion, it is not appropriate that the principal be entitled to claim for price reduction, when the contractor is the debtor of the payment.
79 OR-CHIBBERGER, n° 33 ad Art. 164 OR; GAUCHI/SCHLUPE, n° 5556.
80 On the assignment of a contract, see CHAIX, p° 57 ss.
81 See however OR-CHIBBERGER, n° 6 ad Art. 169 OR; BUCHER, p° 568.

(c) Contract between the subcontractor and the employer

Theoretically, the subcontractor and the employer are not bound to one another by a direct contractual relationship. However, such relationship may result from a direct warranty which the subcontractor may have given to the employer concerning the subcontractor’s work.

For instance, the subcontractor may give to the employer a promise that the work will not be defective, or, more generally, that the subcontractor’s performance will be completely satisfactory ("exécution sans défaut", or "travail irréprochable"\(^{82}\)).

It is the subcontractor, of course, who must give the promise. The guarantee cannot arise out of the main contract between the contractor and the employer, even if that contract gives the employer an undertaking that the subcontractor’s performance will be perfectly satisfactory.\(^{83}\)

Where the subcontractor does give such a promise or guarantee to the employer, an independent contractual relationship is created between these two parties. The terms of the promise or guarantee will determine the extent, terms and conditions of the employer’s claim against the subcontractor. The subcontractor’s defences will likewise depend on the relevant terms of the undertaking, and not on those of the main contract or the subcontract.

(d) Multilateral contract

In concluding this brief description of contractual arrangements entitling the employer to a direct claim against the subcontractor, the possibility of adhesion by the employer to the contract between the contractor and subcontractor ought to be mentioned. In such case, however, it would cease to be correct to speak of two separate contracts, the main contract and the subcontract. A single contract, multilateral in form, would exist, entered into by three parties on an equal footing: the employer and two other contractors,
(b2) Formation of the assignment of a claim. An assignment of a claim must be in writing (art. 165(1) CO).

It may take the form of a provision in the main contract, which means that it concerns future claims (such as a potential claim for damages to compensate defective work). For the assignment of a future claim to be valid under Swiss law, the ground on which the claim would be founded, the content of the claim, and the party against whom the claim would be made, must be sufficiently capable of determination.76

An assignment of a claim may also be agreed by the parties at a later stage, when the event which gives rise to the claim (such as the delivery of defective work) has already taken place.

(b3) Consequences of the assignment of claim. Where the assignment of claim is agreed between the employer and the contractor, the employer is substituted for the contractor as a creditor. The assignment of claim will be valid as against the subcontractor only if he has been given notice of it (art. 167 CO).

The claim to be assigned may be:

- a claim for specific performance;
- a claim for compensation in case of defective product, delay, or non-performance;
- a claim for repairs to the work without cost.77

On the other hand, an assignment of the right to avoid the subcontract in case of defective work or of the right to claim a reduction in price would be subject to the subcontractor’s consent,78 as the exercise of such rights would vary the content of the subcontract. Moreover, the assignment of such rights to a third party would be looked upon by Swiss law as an assignment of the subcontract itself rather than as an assignment of a mere claim thereunder.

An assignment of a contract is subject to acceptance by all parties to the original contract.79 If the subcontractor consents to the assignment, the contractor disappears from the contractual relationship.

(b4) Defences by the subcontractor. The assignment of claim does not affect the subcontractor’s rights, since the subcontractor’s defences to the claim of the contractor-assignor may also be used against the employer-assignee, provided they already existed at the time the subcontractor was advised of the assignment (art. 169(1) CO). The subcontractor is entitled to raise defences based on the subcontract, but not defences based on the main contract between the contractor and the employer.

76 ART 57 I 590; 84 II 366.
77 See ART 114 II 239, 247; GAUCHE/SCHLUEP, n° 3556.
78 See however the contradictory opinion referred to in GAUCHE/SCHLUEP, n° 3556. In our opinion, it is not appropriate that the principal be entitled to claim for price reduction, when the contractor is the debtor of the payment.
79 OR-GISBERGER, n° 23 ad ART 164 OR; GAUCHE/SCHLUEP, n° 3556.
80 On the assignment of a contract, see CHAIX, p. 57 et sq. 81 See however OR-GISBERGER, n° 6 ad ART 169 OR; BUCHER, p. 568.

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The subcontractor is entitled to set off against the employer-assignee’s claim a personal claim he may have against the employer-assignee.

Moreover, subject to art. 169(2) CO, the subcontractor is also entitled to set off against the employer-assignee’s claim whatever claims he may have had against the contractor-assignor, in particular the claim for payment of the price for the work. Art. 169(2) CO reads as follows:

“If a counterclaim of the debtor was not yet due at this time, he may set off the counterclaim if it does not become due later than the assigned claim.”

According to this provision, a claim for payment which has not accrued at the time the subcontractor obtains knowledge of the assignment may nonetheless be set off if it accrues prior to maturity of the assigned claim.

(c) Contract between the subcontractor and the employer

Theoretically, the subcontractor and the employer are not bound to one another by a direct contractual relationship. However, such relationship may result from a direct warranty which the subcontractor may have given to the employer concerning the subcontractor’s work.

For instance, the subcontractor may give to the employer a promise that the work will not be defective, or, more generally, that the subcontractor’s performance will be completely satisfactory (“exécution sans défaut”, or “travail irréprochable”82).

It is the subcontractor, of course, who must give the promise. The guarantee cannot arise out of the main contract between the contractor and the employer, even if that contract gives the employer an undertaking that the subcontractor’s performance will be perfectly satisfactory.83

Where the subcontractor does give such a promise or guarantee to the employer, an independent contractual relationship is created between these two parties. The terms of the promise or guarantee will determine the extent, terms and conditions of the employer’s claim against the subcontractor. The subcontractor’s defences will likewise depend on the relevant terms of the undertaking, and not on those of the main contract or the subcontract.

(d) Multilateral contract

In concluding this brief description of contractual arrangements entitling the employer to a direct claim against the subcontractor, the possibility of adhesion by the employer to the contract between the contractor and subcontractor ought to be mentioned. In such case, however, it would cease to be correct to speak of two separate contracts, the main contract and the subcontract. A single contract, multilateral in form, would exist, entered into by three parties on an equal footing: the employer and two other contractors,
of whom the second one would no longer be properly designated as a subcontractor. The rights and obligations of these three parties inter se would of course be determined by the terms and conditions of the multilateral contract.64

2 Direct claim pursuant to statute

(a) Relative silence of Swiss law

The contracting parties can expressly rule out the employer's direct claim against the subcontractor. This will be the case where the SEA Rules apply, in particular, art. 29(3) SEA Rule 118.65 The parties can also agree on such a direct claim, pursuant to the contractual arrangement, terms and conditions described above. What usually happens, however, is that the parties do not deal with this particular issue, i.e. they neither rule out nor provide for such a direct claim.

The provisions of Swiss law governing contracts for work and materials implicitly refer to subcontracting (art. 364(2) CO), but they do not deal with the particular issue of the employer's rights against the subcontractor. In other words, the possibility of a direct claim is neither expressly ruled out, nor expressly provided for by Swiss statute.

On the other hand, as mentioned above, the provisions of Swiss law governing ordinary mandates do permit such a direct claim. Article 399(3) CO reads as follows:

"If the agent has assigned the obligation to a third person (…) the principal may bring any claims which he has against his agent directly against the third person."

Bearing in mind that the provisions of Swiss law governing contracts for work and materials are silent on this particular issue, art. 399(3) CO, if applied by analogy, may offer a satisfactory solution.

(b) Application of Art. 399(3) CO to subcontracts for work and materials

Article 399(3) CO should be applied by analogy to contracts for work and materials for the following reasons:

— Unlike contracts that call for immediate performance, contracts for work and materials as well as ordinary mandates are contracts that are performed over a certain period of time.66 For this type of contract, Swiss law generally favours a direct claim, except in the case of contracts of work and materials.

— It is often the case that a contract for work and materials will closely resemble an ordinary mandate. The distinction, not easy to make, is an issue frequently discussed in case law and legal literature. For instance,

64 On this situation, see GAUCH, Wiesbregt, n° 1494.
65 See above, VI.1.a.2.
66 See however GAUCH, Wiesbregt, n° 9.

the question of how to characterise an architect's contract has been the subject of much debate.67

Legal scholars consider that art. 399(3) CO applies where the main contract is an ordinary mandate and the subcontract is for work and materials.68 From the point of view of the subcontractor, the precise nature of the main contract is irrelevant. It would not be appropriate to make the rules applicable to the subcontract depend on the characterisation given to the main contract.

An ordinary mandate is to be distinguished from a contract for work and materials owing to the fact that in the case of an ordinary mandate compensation is due only if agreed upon or customary, whereas compensation is an essential element of a contract for work and materials. However, from a practical point of view, this particular difference plays no role.69

According to art. 399(1) CO (if applied by analogy), the contractor will be held fully liable to the employer for the subcontractor's work if the latter has been appointed without the employer's authorisation, but this liability will be limited in the event that such authorisation has been given (art. 399(2) CO). However, art. 399(3) will apply irrespective of the scope of liability of the contractor towards the employer.

In legal literature, it is frequently stressed that, from a practical point of view, application of art. 399(3) CO spares the parties to a mandate from having to engage uselessly in the redundant procedure of an action by the principal against the submandant followed by an action by the latter against the submandant founded on the same merits. To impose on the mandatory this burden of a second action by way of recourse is obviously absurd: "It is obvious that such a roundabout procedure would not be practical and would possibly compel the principal to wage war on two fronts."70 This remark is equally valid in respect of contracts for work and materials.

According to art. 399(3) CO, the principal can bring a claim directly against the submandant, whereas the submandant is not entitled to bring a claim directly against the principal.71 It will here be recalled that, in a contract for work and materials, Swiss statute gives to a subcontractor a mechanics lien on the works as security for payment of the subcontract price. This burden renders the employer a guarantor of this payment. Application of art. 399(3) CO by analogy to contracts for work and materials would succeed in placing the parties on a fair footing in this connection, as a grant to the employer of a direct claim.

67 GAUCH, Wiesbregt, n° 47-64.
68 BK-FELLMANN, n° 392 ad Art. 398 OR.
69 BRAVERER, n° 16 ad Art. 394.
70 BK-FELLMANN, n° 92 ad Art. 399 OR.
71 BK-FELLMANN, n° 168 ad Art. 399 OR.
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87 GAUCH, Wiesnerg, n° 47-64.
88 HK-FELLMANN, n° 552 ad Art. 398 OR.
89 GB & WIESNER, n° 16 ad Art. 398.
90 HK-FELLMANN, n° 92 ad Art. 399 OR.
91 HK-FELLMANN, n° 108 ad Art. 399 OR.
against the subcontractor based on art. 399(3) CO would be an appropriate offset for the burden of the lien.

(c) Consequences of the application of art. 399(3) to contracts for work and materials

The application of art. 399(3) CO to their contract gives to the employer and the contractor a joint and several right to claim against the subcontractor. While retaining all his rights against the subcontractor, the contractor becomes a joint creditor together with the employer. The employer is entitled to bring the following claims:
- a claim for specific performance by the subcontractor as well as the right to place the subcontractor in default within the meaning of art. 107 CO,
- a claim for compensation in case of non-performance, late performance or defective work. It has been argued that art. 399(3) CO does not cover claims for compensation. This position, which if adopted would severely restrict the scope of application of art. 399(3) CO should be rejected. Given that the employer is entitled to claim for specific performance, it would be absurd to prohibit him from claiming compensation in case of a persistent refusal to carry out the work. A right to compensation in case of non-performance is indeed a logical corollary to a right to sue for specific performance. The sheriff does not deputise a cowboy and then stop him using his gun;
- a claim for repairs to the work without cost. This claim being a derivative of the right to claim performance, it would not be proper to sever them, as they both aim at the same result.

Article 399(3) CO does not make the employer a party to the subcontract. As a consequence, the employer is not entitled to exercise rights which substantially vary the subcontract, such as:
- the right to reduction of the price for the work;
- the right to avoid the contract in case of defective work;
- the right to avoid the contract in case of default for late performance;
- the right to withdraw from the contract. 

VI CONCLUSION

Swiss law gives to a third party beneficiary a direct claim against a person in the position of a subcontractor in a number of different types of contract. Yet no express provision to this end is to be found in Swiss law where the contract is for work and materials. Express provision for or exclusion of a direct claim can be made by the contract, be this the subcontract (which will contain a stipulation for the benefit of a third party) or the main contract (which will include among its terms an assignment of claim) or a contract between the employer and the subcontractor (in which the subcontractor will give directly to the employer a guarantee of satisfactory performance). In the absence of express contractual provision, it is incumbent on the
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92 BK-FELLMANN, n° 97 ad Art. 399 OR, whereby the solution of a legal assignment is ruled out.
93 TERCER, n° 4011; CHAIX, p. 241.
94 TERCER, n° 4011.
95 BK-FELLMANN, n° 102 ad Art. 399 OR. Similar solutions under German law; see CHAIX, p. 244 ss.
96 CHAIX, p. 240. The situation is to be the same as in case of third party beneficiary contract (see GAUCHARD, n° 1697).
97 BK-FELLMANN, n° 108 ad Art. 399 OR.
98 On the two last cases, see BK-FELLMANN, n° 109 ad Art. 399 OR. Cozma TERCER, n° 4011; BK-GAUTTSCHE, n° 109 ad Art. 399, ATF 110 II 186, relating to a withdrawal from the contract within the meaning of art. 404 CO. In our opinion (see also FELLMANN), art. 390 CO corresponds with similar situations of a third beneficiary contract or an assignment of debt.

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(d) Subcontractor’s defences under art. 399(3) CO

The defences available to the subcontractor if art. 399(3) is applied are the same as in the case of a contract for the benefit of a third party. The subcontractor is entitled to raise:

- defences arising out of the subcontract.95 This is expressly provided by art. 399(3) CO which provides that the employer can only bring an action against the subcontractor on claims that the contractor has against the subcontractor;
- personal defences against the employer, such as set-off of a personal claim against the employer.96

It is sometimes argued that, based on art. 399(2) CO, the subcontractor is entitled to raise against the employer’s claim the personal defences that the subcontractor has against the contractor and in particular to set off the latter claim against the employer’s claim. In our opinion, the conditions set out in art. 199(2) CO should apply here, this being the only provision of Swiss law pertaining to a similar situation.

Finally, the subcontractor is not entitled to raise defences arising out of the main contract between the employer and the contractor.97 This means that the employer profits from terms in the subcontract that are more favourable to him than those found in the main contract. For instance, in the case where the main contract provides for an exclusion of liability whilst the subcontract does not, the employer is entitled to sue the subcontractor for compensation despite the fact that he would not have been able to do so against the contractor.

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In the absence of express contractual provision, it is incumbent on the
court, empowered by art. 1, para. 2 of the Swiss Civil Code to supply the missing term. The court must take into consideration provisions of Swiss law that govern analogous situations. Resort to the principle of privity of contract will not suffice since this principle is subject to a number of exceptions in Swiss law.

The court should apply art. 399(8) CO. This would allow the employer to bring a direct claim against the subcontractor, a solution satisfactory from both a theoretical and practical point of view:

— From a theoretical point of view, the rights and obligations of the parties would not be drastically altered: the employer keeps his rights against the contractor, the contractor keeps his rights against the subcontractor, and the subcontractor’s position is not weakened.

— From a practical point of view, the employer is entitled to bring his claim directly against the subcontractor at fault, thus avoiding unnecessary proceedings against the contractor who has no personal responsibility followed by a second action by the contractor by way of recourse against the subcontractor. Moreover, since it is usual in practice that the employer relies as much on the subcontractor as he does on the contractor, such reliance is an interest worthy of protection.

All parties benefit from this solution. The employer is granted additional rights, the contractor does not have to face “a war on two fronts”, and the subcontractor keeps up a good commercial relationship with his client, the contractor, while enjoying the same defences as in the classic case where only the contractor can sue him directly. This satisfactory solution should not be sacrificed on the altar of privity of contract.

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**BUILDING CONTRACT TRIBUNAL**

**JUDGE F G DAVEY, QC**

A judge of the County Court of Victoria and Chairperson of the Domestic Building Tribunal

**INTRODUCTION**

The Domestic Building Tribunal of Victoria ("DBT") has been in existence since 1 April 1996. It has heard and determined or otherwise resolved over 1,000 domestic building disputes in that time. It presently has about 340 cases in its lists waiting to be heard or mediated. The vast majority of the cases now in the list will be resolved within four months. Sufficient water has now passed under the bridge to enable the performance of the DBT to be critically assessed.

I propose to attempt to assess the performance of the DBT against the stated purposes for its creation as set out by the Attorney General in the second reading speech to the House on the passage of the Domestic Building Contracts and Tribunal Act 1995 of Victoria ("the Act"). Victoria is one of three Australian states to have established specialist tribunals solely for the purpose of hearing domestic building disputes. The Queensland Building Tribunal was established by the Queensland Building Services Authority Act 1991 and that Tribunal has now been in existence for some five or six years. In New South Wales there is a domestic building tribunal with a jurisdictional limit of A$25,000 which is referred to as the Building Disputes Tribunal and the Commercial Tribunal hears domestic building disputes over that amount. At least in terms of its basic jurisdiction the DBT has much in common with the Queensland Building Tribunal. Indeed an examination of the Victorian Act reveals that parts of the Act relating to the DBT appear to have borrowed extensively from the Queensland Act. A close examination of the two pieces of legislation reveal material differences in the drafting although the overall schemes setting up the two tribunals are very similar.

The DBT has effective exclusive jurisdiction over all domestic building disputes in the State of Victoria. It also hears reviews of decisions made by insurers in respect of claims under insurance policies which domestic builders are required to take out under the Building Act of 1993 in relation to the carrying out of domestic building work. It is now only possible for a domestic building dispute to be heard in a court where no objection is taken by any party to the proceeding. If objection is made before any evidence is called then the judge must dismiss the proceeding and it can only be heard by

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*This is a revised version of a paper delivered in September 1997 to the Annual Conference of the Building Disputes Practitioners' Society. The Editors are grateful to Judge Davey, QC for his agreement to its publication.*