
# Uncertainty Concerning Liability for Gross Negligence in the Contracts of Carriage and its Insurance in Switzerland

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# Contents

# Contents

# 1 Introduction – the Swiss Code of Obligations (CO)

- The first Swiss Federal **Code of Obligations** was adopted in **1881.**
- The actual text of the CO, relating to contracts and tort, was adopted on March 30, **1911.** It is to a large extent based on its predecessor, the ancient CO 1881.
- Unlike many other countries, Switzerland does not have a separate Code of Commerce.
- During its existence for over a century, the CO has been amended several times, but **a vast majority** of its **provisions have remained unchanged.**
- The Code has a General Part and a Special Part that governs specific types of contract
- Like other Swiss acts and laws, the CO has an official German, French and Italian version, all of which are equally valid.

# 1 Introduction – the Swiss Code of Obligations (CO) (cont'd)

- The contract of carriage of goods is governed by **Title Sixteen** of the CO. It applies to national transport in general, irrespective of the mode in which the transport is carried out and irrespectively of the nationality of the carrier, i.e. also to cabotage.
- The provisions of this Title apply to contracts of carriage which are **not regulated by special enactments** (international conventions or special national laws), such as inland waterway transport on Swiss waters, transport by cablecars, funiculars, multimodal transport, towing, transport of household goods and courier services, carriage by unmanned road vehicles or by pipelines. In a great majority of cases, this Title applies to **inland transport of goods by road**.
- The application of special enactments, however, does not necessarily exclude the application of the Code of Obligations, or even Swiss Civil Code in total. Their provisions may apply to issues not governed by these enactments. If Swiss law is to be applied **subsidiarily**, these issues shall be governed by it.

# 1.1 Liability for Loss of and Damage to the Goods and the Delay in Delivery

- The carrier is liable if the goods entrusted to it are **lost or destroyed (total loss)**, as well as for any damage resulting from **delay in delivery**, **damage** in transit or **partial destruction** of the goods.
- This liability attaches only if the carrier has taken over the goods.
- For the carrier's liability to be in effect, besides **the lack of or inadequate performance** in the form of loss, partial or total destruction, damage in transit, or delay in delivery, a **causal link** between the lack of or inadequate performance and damage caused is required.

# 1.1 Liability for Loss of and Damage to the Goods and the Delay in Delivery (cont'd)

**Art. 447 Loss or Destruction of the Goods**

**1** If the goods are **lost or destroyed**, the carrier must compensate their **full value** unless it can prove that the loss or destruction resulted from the nature of the goods or through the fault of the consignor or the consignee or occurred as a result of instructions given by either or of circumstances which could not have been prevented even by the diligence of a prudent carrier.

**2** The consignor is deemed to be at fault if he fails to inform the carrier of any especially valuable freight goods.

**3 Agreements stipulating** an interest in excess of the full value of the goods or **an amount of compensation lower than their full value are reserved.**

**Art. 448 Delay, Damage, Partial Destruction**

**1** Subject to the same conditions and reservations as apply to the loss or destruction of goods, the carrier is liable for **any damage resulting from late delivery, damage in transit or the partial destruction** of the goods.

**2** Unless specifically agreed otherwise, the damages claimed may not exceed those for total loss.

# 1.1 Liability for Loss of and Damage to the Goods and the Delay in Delivery (cont'd)

- The **full value** is the market value of the goods at the place and at the contractual time of delivery. It is mostly evidenced by a commercial invoice.
- If a **total loss** occurred, only this **physical damage** will be remunerated because the value of the goods exhausts the amount of the limitation of liability. In case of **partial loss**, **consequential damages** may also be claimed.
- If damage **accumulates** apace with a delay, so that the resulting total amount of compensation is higher than the value of the goods transported, the carrier remains liable to the **full value only**.
- The provision on the amount of compensation is **dispositive**, so it may be amended by an agreement between the parties.

# Contents

# 2 Levels of Fault in Swiss Law

- The Swiss Code of Obligations makes distinction between
  - **slight negligence** as the lowest level of fault,
  - **gross negligence** and
  - **unlawful intent**.
- In case of damage, i.e. in case of the non-performance or defective performance of the duties, there is a general **presumption** of (the lowest level of) fault.
- The carrier may be relieved of liability if it proves that the damage was caused by **elements independent of its fault.**
- On the other hand, the shipper has the burden of proving the **higher degree** of the carrier's fault.
- The carrier, however, is obliged to clarify those relevant facts which occurred under its responsibility, as these are facts which may be completely beyond the control of the shipper.

# 2.1 Slight Negligence (culpa levis)

- A person acts negligently if he, or she, does not provide the care, to which he or she is obliged, under the circumstances → the culpable breach of a duty of care.
- Swiss law applies an **objective test** and compares the acts of the wrongdoing party with **the acts of a reasonable man**, or, in professional matters, a person with the skill of an average member of his profession. **Fault would be the failure of the wrongdoing party to do what a reasonable person would do in the same situation.**
- In case of **slight** negligence, a person thus may not have violated the most elementary precautionary rules, but nevertheless **ignored the degree of care** which, based on the common custom and practice, **could be expected** in equal circumstances.
- This behaviour may somehow still be reasonably understandable. One could say: "That can happen".
- It can be assumed that approx. 80% of claims are settled and paid on the basis of slight negligence, i.e. limited, especially when it comes to the frequency claims with rather low claim amounts.

# 2.1 Slight Negligence (culpa levis) (cont'd)

- In a decision of the Federal Supreme Court dating long ago, a freight forwarder gave its subcontractor an order to forward goods "in transit" to a warehouse. The subcontractor **omitted to include the transit clause** in the consignment note, resulting in goods being confiscated. The Court held that the omission of the transit clause was **a mistake, as may happen** in any business. However, due to the lack of any special circumstances, there can be **no question of gross fault** as regards the dolus.

- In several cases similar to each other, it was unclear where exactly in Morocco and how **stowaways got into a trailer** – during loading, during the journey, at a rest stop or only at customs clearance in Tangier. The fact that **the driver did not search the trailer for persons** himself, after the customs in Tangier opened and inspected the vehicle, **does not constitute a qualified fault.**

# 2.2 Gross Negligence (culpa lata)

- The definition of gross negligence has been given in a series of court decisions. Swiss courts affirm this form of misconduct only conservatively.
- A person is guilty of gross negligence if he or she **violates a basic duty of care**, which would be respected by **any reasonable person in the same situation**.
- In other words, gross negligence occurs when **the most elementary precautionary measures, which every reasonable person would follow in the same situation and circumstances, are disregarded** and the behaviour of the wrongdoer under the given circumstances appears **incomprehensible**.
- Gross negligence may apply in some circumstances, even if the behaviour in question is common. It does not require any element of conscious action.
- In the field of **the carriage of goods** there are only **a few Swiss court decisions** dealing with gross negligence.

# 2.2 Gross Negligence (culpa lata) (cont'd)

- In the most well-known case, the freight forwarder shipped a package of **gold watches** as **ordinary freight** and not as a shipment of valuables. The consignor provided the information on the value of the goods but did not expressly indicate that the watches were valuable cargo. The watches were stolen. The court held that the freight forwarder should have taken **reasonable security measures** for the duration of the transport, regardless of whether it charged an additional fee, or not. By omitting to do so, the freight forwarder **acted with gross negligence**.

- As the **thefts of trucks** are still relatively frequent, judgements in this area are useful and groundbreaking: In assessing whether the driver's conduct was grossly negligent, the court considered that the driver chose **a car park** in which to sleep at night, that was **freely accessible** to anyone and that had **no security measures** against theft. The truck alarm system did not work, the driver was even not familiar with the operation of the alarm system, the truck was in no way secured against theft and, in addition, had easily surmountable tarpaulins. At least in its entirety, these misconducts would suffice to **justify gross negligence**.

# 2.3 Wilful Misconduct

- The term wilful misconduct is not known, although Swiss courts have sometimes had to decide on this level of fault.
- Wilful misconduct is a **higher degree** of negligence than gross negligence.
- Damage is caused by wilful misconduct when it was done **recklessly and with the knowledge that damage would probably result.**
- Thus, the requisites are, on the one hand, **reckless conduct** and, on the other hand, **awareness** of the damaging outcome. "Reckless" is defined as behaviour which is "bold, daring or foolhardy". As regards **the awareness of the probability of the occurrence of damage, it is necessary that this awareness subjectively existed**; the mere recognition according to objective standards is not sufficient.

# 2.4 Unlawful Intent (dolus)

- Under Swiss law, intent can be understood to mean two things:
- In the case of **direct intent,** the act of the damaging party is aimed at causing damage to a third party.
- In the case of **conditional or contingent intent** the damaging party pursues a different purpose, but in doing so consciously accepts a possible damage to a third party (dolus eventualis).
- In contrast to both, the negligent, even the grossly negligent, damaging party may act recklessly, but not with forethought. According to its elements, **contingent intent is equal to wilful misconduct**.
- It happens only exceptionally that a damage in transit is caused intentionally.
- Swiss courts are rather reluctant to confirm damage caused by unlawful intent.

# 2.5 Determining the Level of Fault

- All the circumstances must be examined on **a case-by-case basis**.
- The lack of care must be measured objectively. This requires an appraisal of concrete behaviour according to universal standards and makes **subjective excusability** of a harmful act (for example due to tiredness, lack of knowledge, etc.) **irrelevant**.
- Consequently, there is no rule according to which a certain type of damage, e.g. damage and contamination of cargo by stowaways or illegal immigrants, theft of loaded vehicles, armed robbery and the like, would always fall into one and the same group (exemption from liability, limited liability, unlimited liability).
- However, the **financial practicability** of any suggested precaution should also be borne in mind.

# Contents

# 3 The Question of Limitation of Liability for Gross Negligence

- Sometimes, damages, especially consequential losses and damages as a result of delay in delivery, such as business interruption and similar, are significantly **higher** than the value of the goods.
- In such cases it is very important to establish whether the carrier's liability may be limited if it acted with gross negligence.
- Since the law contains no explicit provision in this regard, there are **two diametrically opposed opinions** in Switzerland.

# 3.1 Arguments in Favour of an Unlimited Liability for Gross Negligence

- This opinion is mostly based on the provision (CO, General Part, Art. 100, para 1) according to which **“Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.”**
- In other words, the liability for unlawful intent or gross negligence **may not be contractually excluded.**
- Although **this provision does not expressly state whether such liability may be limited**, some judges and authors clearly understand it as an exemption clause that applies to both exclusion and limitation of liability.

# 3.1 Arguments in Favour of an Unlimited Liability for Gross Negligence (cont'd)

- In the only and often quoted decision on this issue (the freight forwarder shipped a package of gold watches as ordinary freight and not as a shipment of valuables), the Federal Supreme Court took the following view:
- "The Commercial Court considers a **limitation** of the amount of liability in the present case to be **inadmissible because it contradicts the purpose of Art. 100 CO**. ... According to Art. 100 para 1 CO, any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void. If, as here, such negligence occurs, **a contractual limitation of the compensation is also void**.

# 3.1 Arguments in Favour of an Unlimited Liability for Gross Negligence (cont'd)

- This does not contradict Article 447 para 3 CO [Agreements stipulating an interest in excess of the full value of the goods or an amount of compensation lower than their full value are reserved.]. On the contrary, a contradiction would arise if one wanted to assume that this provision excluded the general rule of Article 100 CO on contractual liability, since in that case the liability of the carrier would **at the same time be made more stringent and easier**. This cannot be the meaning of Article 447 para 3. The law cannot lay down a stronger strict liability for the contract of carriage in lieu of the usual liability for fault, but at the same time allow the exclusion of liability to be more widely recognized than in Art. 100 CO.
- As **the limitation of liability for gross negligence** on the part of the freight forwarder **was ruled out** in the present case, the Commercial Court rightly obliged the defendant to **fully compensate** for the damage incurred by the plaintiff."

# 3.1 Arguments in Favour of an Unlimited Liability for Gross Negligence (cont'd)

- Another argument for unlimited liability in cases of gross negligence is Art. 41, para 1 CO: **"Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation."**
- This provision denies both contractual and non-contractual exclusion of liability (liability for tort) and it is therefore **asserted that it also denies the statutory limitation of liability** of the carrier.

# 3.2 Arguments in Favour of a Limited Liability for Gross Negligence

- The intention of the legislator was unmistakable when, **in the revision of the old Code of Obligations (1911)**, a provision allowing claim for further damages, when gross negligence was proven, **was deleted without replacement;**
- Provisions concerning the liability of the carrier (Title Sixteen CO) for the goods entrusted to it must in any case be regarded as ***lex specialis***. Whenever the legislator wanted to allow unlimited liability for gross negligence, he **explicitly inserted** a corresponding provision in the law (like e.g. in Art. 454 on the prescription of actions for damages). However, when it comes to the liability of the carrier for damage to the goods in transit, or from delay in delivery, **no such provision exists**. In other words, the liability of the carrier remains in such cases limited even if the damage was caused by gross negligence.

# 3.2 Arguments in Favour of a Limited Liability for Gross Negligence (cont'd)

- Further, it is highly questionable whether the provision, according to which a prior agreement that **liability** for unlawful intent or **gross negligence is excluded is null and void (Art. 100 para 1, in the General Part of the CO)**, is suitable as a basis for the unlimited carrier liability for damage caused by gross negligence. This provision **regulates the contractual and not the statutory liability**. But, even if the statutory liability were limited, this limitation would **not apply to the carrier's liability**, since the provisions that govern this liability (Art. 447 CO) take precedence as *lex specialis*.
- This provision **does not expressly state whether the liability** for unlawful intent or gross negligence **may be limited**. Therefore, the question remains whether such an agreement is **also null and void analogously** to the abovementioned provision, or whether on the other hand **a failure to state it clearly permits a limitation of liability**.
- Although this is demonstrably **not a *lacuna***, the fact that this provision does not mention the limitation of liability is wrongfully treated as a lacuna that has to be filled ***per analogiam***.

# 3.2 Arguments in Favour of a Limited Liability for Gross Negligence (cont'd)

- In addition, the interpretation that the carrier's liability for gross negligence is unlimited based on the **obligation of compensation of damages** (Art. 41, para 1 CO), caused both on a contractual and non-contractual basis, is successfully countered by the fact that the claimant cannot evade the limited liability of the carrier for the loss of and the damage to the goods, that always is **a property infringement**, by receiving unlimited compensation based on this provision. In this way, the liability would be unlimited in case of the loss of or the damage to the goods but would still be **limited for damages arising out of delay in delivery**, which is unacceptable in terms of carrier liability.
- Finally, it is noted that the above-mentioned obligation to pay compensation **applies also to slight negligence**, so that its consequent application would lead to unlimited liability in cases of slight negligence as well. It is therefore rightly concluded that the limited carrier's liability for gross negligence cannot be bypassed in this way.

# 3.3 Actual Situation in Practice

- In Switzerland, the **traditional opinion** is that the carrier's liability for gross negligence **cannot be limited**.
- This tends to correspond to the "feeling" that it is justifiable for the compensation for a damage caused gross negligently to remain unlimited. If the carrier's or forwarder's actions are considered **grossly negligent, they are held liable for the entire loss**.
- Insurers cover this liability according to the terms and conditions.
- However, as showed above, although widely accepted, where Swiss law is concerned, legal arguments presented in favour of this interpretation are easily countered. It seems that they were sought out and deliberately extensively interpreted until a desired proof seemed to have been achieved. **Arguments in favour of a limited liability in such cases are more consistent, whether we like the result or not.**

# 3.3 Actual Situation in Practice (cont'd)

- **The Federal Supreme Court** only dealt with this question once, in the year 1976 (the case with the gold watches).
- The legal relationship between the parties to the proceedings was **a contract of freight forwarding.**
- Thus, this judgment was about a **contractual limitation of liability** and not a statutory one of Art. 447 et seq. CO.
- The Federal Supreme Court **has not yet decided** on the question of the limitation of the carrier's statutory liability in cases of gross negligence.

# 3.3 Actual Situation in Practice (cont'd)

- The standpoint that the liability in case of gross negligence remains **limited** was confirmed in a judgment of **a first instance court** concerning cross-border transportation by road:
  - According to Swiss laws, **gross negligence is not considered as equivalent to wilful misconduct.**
  - The carrier may have acted recklessly, but **not with forethought** as it could not be assumed that it consciously accepted that the plaintiff would suffer a damage.

# 3.3 Actual Situation in Practice (cont'd)

- In another case, the opinion of **the first instance** that the conduct of the sub-carrier was **grossly negligent**, but that it could not be charged of any contingent intent, which means that its conduct **cannot be equated with wilful misconduct**, what would harmonise the international law, **was repealed.** The second instance held that, in Swiss law, gross negligence is equated with intent both with regard to the limitations of liability and the statute of limitations.
- This opinion was confirmed in another CMR case where the court decided that the carrier's **liability for gross negligence was unlimited**.
- Unfortunately, none of these lawsuits was brought to the Federal Supreme Court.

# Contents

# 4 The Question of Equating Gross Negligence with Wilful Misconduct

- According to the Art. 29 of the CMR Convention, the carrier shall **not be entitled to exclude or limit its liability** or to shift the burden of proof, **if damage was caused by its wilful misconduct or by such default on its part as, in accordance with the law of the court or tribunal charged with the case, is considered as being equivalent to wilful misconduct.**
- The acts equated with wilful misconduct must contain **the elements of intent.**
- If a carrier acts with gross negligence, it may act recklessly, but not with forethought, since it cannot be assumed that it consciously accepts to cause the damage. **Gross negligence thus does not contain the element of contingent intent which would equate it to wilful misconduct.**

# 4.1 A Look at Other Countries

- In some European countries, two trends can be seen.
- In general, courts may be seen as setting **increasingly strict standards** for the conduct of the carrier and the driver, including, for example, in situations where violence is used against drivers. Previously, the robbery of a truck was often classified as an unavoidable event and the carrier was released from liability. In recent years, however, the courts have even applied Art. 29 of the CMR, leading to unlimited liability, in similar situations.
- There is a trend **against the general equalisation** of gross negligence with unlawful intent. **Minor, grossly negligent conduct** should be excluded from the degree of fault outlined in Art. 29 of the CMR, since it **cannot be equated to wilful misconduct** or to a degree of fault corresponding to it.
- In **Germany**, in contrast to previous law, in which gross negligence was literally equated with intent, the legislature adopted the principle of **deliberate recklessness**, like in some international transport conventions. The new law provides that in cases occurring after July 1, 1998, the exemptions from, and limitations of, liability will cease to apply if the damage results from an act or omission committed **intentionally or recklessly** by the carrier, or one of his servants or agents, **with knowledge that damage would probably result**. German legislation, that is often looked at by the Swiss judges, has thus adopted the principle of **deliberate recklessness** for the dismission of the limitation of liability, departing in this way of the gross negligence.

# 4.1 A Look at Other Countries (cont'd)

- **Belgium** also requires that the carrier acts "recklessly and with knowledge" that "damage is likely to occur", which roughly corresponds to the "wilful misconduct" required under **English** law.
- According to **French** law, contingent intent is not considered intent in the strict sense but is only equated with the latter. The drafting of Art. 29 CMR was intended to ensure that the limitations of liability of the CMR do not apply in the case of **contingent intent**, whereas **gross negligence is not sufficient** for the exclusion of limitation.
- The **Dutch** Supreme Court has recognised that under Dutch law **not all gross negligence** is equivalent to intent, but **only deliberate recklessness**.
- In **Italy** and **Spain** an exceptionally **severe degree of gross negligence** is required. In these countries, there are therefore gradations in the area of gross negligence.
- According to the Areopagus (the highest **Greek** civil court), only **actual intent** is able to break through the liability limits of the CMR at all.
- **Austrian** courts, **on the other hand**, consider this tendency to allow only "deliberate negligence" to suffice as not applicable to Austria. They continue to regard **gross negligence as equivalent to intent.** Gross negligence requires an unusual, conspicuous neglect in the face of reasonably foreseeable damage.

# Contents

# 5 Insurance of Carrier's Liability

- The non-binding **General Conditions for the Insurance of Transport Liability – Carrier Liability (GCIL Carrier 2008),** worked out by the Swiss Insurance Association (SIA), are used as model conditions.
- The insurance applies to carriers who carry goods **by road or in combined transport (road / rail / ferry)** according to the provisions on the contract of carriage of the Swiss Code of Obligations, foreign law on the contract of carriage or the CMR Convention. To other carriers, for example by rail, air or sea, these General Conditions do not apply.
- The insurance covers **the legal liability of the policyholder as carrier for loss or damage of the goods as well as for exceeding the delivery time.**
- Road carriers may limit their liability using **other general terms and conditions.** As a rule, they apply the limits provided for by the CMR Convention, i.e. 8,33 SDR per kilogram for loss or damage and the amount of freight for damages caused by delay. Foreign laws may have other limits of liability.

# 5.1 Intent and Gross Negligence as Exclusions

- The Conditions GCIL Carrier 2008 regulate precisely the insurer's obligation to indemnify if damage has been caused with a higher degree of liability, i.e. **intentionally or by gross negligence**.
- **The General Conditions assume that the carrier's liability for gross negligence is unlimited.**
- If **the policyholder or the persons treated equally to him** – the assured and all persons entrusted with the management or supervision of the policyholder's or the assured's business – caused the damage **deliberately**, the consequences of this damage are **not insured.**
- If these persons caused the damage **by gross negligence**, the insurer is entitled to **reduce its performance in proportion to the degree of the fault.**

# Contents

# 6 Uncertain Prospect for the Future

- The Federal Supreme Court only once, in the year 1976, dealt with the question of the limitation of liability in cases of gross negligence. It confirmed the unlimited liability of a freight forwarder arising of a **breach of contract**.
- When the statutory carrier's liability was concerned, some Swiss courts of lower instances acknowledged the arguments in favour of the limited liability for gross negligence, some others did not.
- The Federal Supreme Court has not yet decided on the question of the limitation of the carrier's **statutory liability** in cases of gross negligence. If this Court once approves the well-founded arguments for limited liability, this will fundamentally change the questions of the carrier's liability and its insurance in this area.
- Future court cases are inevitable. It cannot be excluded that the Federal Supreme Court will accept the arguments and decide that the limitation of the carrier's liability applies also in cases when it acted with gross negligence.

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