

The SGHA and maintenance agreements in civil law courts

Risk Allocation in Contracts for the Supply of Services

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SYNOPSIS

- Enforceability of exclusions/limitations of liability
- Concept of consequential loss

THE ENFORCEABILITY OF EXCLUSIONS/LIMITATIONS OF LIABILITY IN CIVIL LAW

1. Exclusions/limitations of liability in civil law
2. The example of Swiss law
3. Are the exclusions/limitations of the SGHA enforceable?
4. Illustration – case

1. Exclusions/limitations of liability in civil law

- Contract law
 - Common law: ‘within the four corners’
 - Civil law: implied terms in Civil Code and other legislation
- In civil law (France, Germany, Italy and Switzerland), exclusion/limitation of liability is often not enforceable in case of
 - Gross negligence or intentional fault; and
 - Personal injury

2. The example of Swiss law



Art. 100

2. Exclusion of liability

¹ Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.

² At the discretion of the court, an advance exclusion of liability for minor negligence may be deemed void provided the party excluding liability was in the other party's service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official licence.

³ The specific provisions governing insurance policies are unaffected.

2. The example of Swiss law (cont'd)



3. Liability for associates

Art. 101

¹ A person who delegates the performance of an obligation or the exercise of a right arising from a contractual obligation to an associate, such as a member of his household or an employee is liable to the other party for any loss or damage the associate causes in carrying out such tasks, even if their delegation was entirely authorised.³⁸

² This liability may be limited or excluded by prior agreement.

³ If the obligee is in the obligor's service or if the liability arises in connection with commercial activities conducted under official licence, any exclusion of liability by agreement may apply at most to minor negligence.

2. The example of Swiss law (cont'd)



Definition of gross negligence ('faute grave') under Swiss law:

'Breach of a basic duty of care' -> *'how could he/she do that??'*

3. Are the exclusions/limitations of the SGHA enforceable?



‘[...] the Carrier **shall not make any claim** against the Handling Company **and shall indemnify** it (subject as hereinafter provided) against any legal liability for claims or suits [...] arising from an act or omission of the Handling Company in the performance of this Agreement **unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result.**’

4. Illustration – case

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4. Illustration – case (cont'd)



- Ms C booked a ticket ZRH-LHR from an airline and suffered injuries while she was using the mobile boarding stairs at ZRH. Due to a mistake by the operator, the steps of the staircase started folding unexpectedly. Ms C's right foot got crushed.
- Ms C sued the airline under the Montreal Convention and obtained compensation of her loss.
- The airline (its insurers) intended to seek contribution from the handling company that operated the mobile boarding stairs.

4. Illustration – case (cont'd)



- Under Swiss law, a contribution claim by a party liable in contract is only possible against a party liable in tort.
- To sue a company in negligence, the claimant shall demonstrate that the defendant's top management was at fault.
- Impossible in casu, hence the carrier sought contribution from the boarding stairs' operator (the handling company's employee; also insured under the handling company's policy).

4. Illustration – case (cont'd)

- Under Swiss law, the exclusion of liability set out under 8.3 SGHA only applies to the extent the defendant was simply negligent (Art 100 CO).
- In other words, the carrier had to demonstrate that the employee was grossly negligent (which is nevertheless a less strict test than wilful misconduct).

CONSEQUENTIAL LOSS

1. Common law perspective
2. Civil law perspective
3. Exclusion of consequential damages under civil law

1. Common law perspective

- ‘A loss arising from the results of damage rather than from the damage itself’ (Black’s Law Dictionary)
 - Typically lost profit
- Under common law, recoverable if it may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable consequence of the breach (Hadley v Baxendale)

2. Civil law perspective



- Under civil law (France, Germany, Italy and Switzerland), consequential loss is not a legal concept
- All losses are recoverable, provided the breach of contract is their proximate cause / they were foreseeable
- In spite of different perspectives, the outcome under civil and common law is not much different

3. Exclusion of consequential damages under civil law



- Instead of referring to the concepts of direct/consequential loss, the parties should rather specify which types of losses are recoverable and which are not
- A limitation of the compensation which would normally be available (eg by lost profit) is subject to the conditions usually applicable to the exclusion/limitation of liability (eg no gross negligence)

Thank you for your attention!

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