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Shipping & Transport - Switzerland

Recourse Action for Subrogated Underwriters

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[Facts](#)
[Decision](#)
[Comment](#)

A recent Supreme Court decision has opened up a number of possibilities for subrogated underwriters.

Facts

A seller in Switzerland sold several machines for the processing of oil seeds to a buyer in Iran. The seller organized the transport for the risk and account of the buyer. The machines were transported to Iran by road in three trucks. One of the trucks went off the road and overturned. As a result, some of the machines were damaged.

The contract of carriage was governed by Swiss law and the Convention on the Contract for the International Carriage of Goods by Road (CMR). The subrogated underwriter of the buyer filed a recourse action against the carrier in Switzerland. The commercial court awarded damages to the subrogated underwriter.

Decision

On appeal, the Supreme Court confirmed the decision of the commercial court.⁽¹⁾ The court held that a recourse action is governed by the law of the contract of carriage under Swiss law and admissible if the law governing the insurance contract also permits recourse actions.⁽²⁾ On appeal, the carrier argued that it could not be burdened with damages, as the recourse action of the subrogated underwriter was barred according to practice established by the *Gini/Durlemann* decision.⁽³⁾ This landmark ruling held that a subrogated underwriter is entitled to take recourse against the party in breach of contract only if it shows that that party acted in wilful misconduct or gross negligence. The court concluded that where a recourse action is based on a contract of carriage governed by the CMR, so too is the recourse action governed by the CMR. It held that there is no room to apply Swiss substantive law or the practice established in *Gini/Durlemann* in CMR cases. It therefore admitted the recourse claim and confirmed the commercial court's award of damages.

Comment

This decision is significant because it opens the door for subrogated underwriters to take recourse action in international transport relationships. The decision limits the longstanding practice established in *Gini/Durlemann* in cases where the transport is governed by CMR. In such cases, the subrogated underwriter may file a recourse action without needing to show that the carrier acted with wilful misconduct or gross negligence. It remains to be seen how far this door will open and how the jurisprudence will evolve in cases governed by other international transport conventions.

For further information on this topic please contact [Regula Hinderling](#) or [Stephan Cueni](#) at [Wenger Plattner](#) by telephone (+41 61 279 7000), fax (+41 61 279 7001) or email (regula.hinderling@wenger-plattner.ch or stephan.cueni@wenger-plattner.ch).

Endnotes

(1) See Supreme Court decision of June 20 2006, BGE 132 III 626. Before this decision, the state courts generally applied the *Gini/Durlemann* practice to CMR cases (eg, the St Gallen Commercial Court

decision of the commercial court of June 2 1999.

(2) See Sections 144(1) and (2) of the Federal Act on Private International Law.

(3) See Supreme Court decision of October 5 1954 in *La Neuchateloise v Gini and Durlemann*, BGE 80 II 247.

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