

# Legal Compass

## Insurance Law

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Facilitated right of recourse: The requirement of fault in the recourse of the insurers against loss or damage of property and personal risk falls away

**The Federal Supreme Court has changed a long-standing practice and thereby reorganised Switzerland's recourse landscape. The so-called Gini/Durlemann practice, which was established with the ruling BGE 80 II 247 in 1954, precluded the insurer against loss or damage of property (Sachversicherer) from taking recourse against persons who are liable under a strict liability, which means based on law and without fault, or who are contractually liable without the presence of gross negligence. Recourse was therefore restricted to persons held responsible through fault-based liability. This practice eventually applied to every insurer against loss or damage of property and insurance against personal risks (Personenversicherer), provided their policy is subject to the Federal Insurance Contract Act ("ICA").**

### Authors



**Peter Haas**  
Attorney-at-law, Partner



**Barbara Klett**  
Attorney-at-law, Partner

### 1. Revised jurisprudence

After the Federal Supreme Court had confirmed the Gini/Durlemann practice in BGE 137 III 352 (4A\_576/2010 from 7 June 2011) despite ever-increasing criticism from the doctrine, it has now carried out a change of direction and changed its own 64-year-old practice in its decision 4A\_602/2017 from 7 May 2018. As a result, there is no longer any limitation on recourse for an insurer against loss or damage (Schadenversicherer) in Switzerland in the event of claims against persons liable for damages under a strict liability (Kausalhaftung). This is because the newly interpreted article 72 ICA no longer constitutes an obstacle and because article 50 para. 2 of the Swiss Code of Obligations ("CO") does not apply. With immediate effect, an insurer can subrogate into the insured's claims against any person who is liable for damage arising from strict liability, irrespective of whether or not there was any fault. With this, the Federal Supreme Court has anticipated the solution proposed in the dispatch regarding the partial revision of the ICA from 28 June 2017.

### 2. Approach to a comprehensive turnaround ?

In Switzerland, liability of multiple parties and the right of recourse is regulated in the CO. Where two or more persons have together caused damage, they are jointly and severally liable to the injured party. In the case of joint liability based on different legal grounds, the so-called cascade order according to article 51 para 2 CO regulates who has to settle the compensation awarded to the injured party. The provision defines that first of all compensation is paid by those who are liable through fault-based liability and secondly by anyone liable under contract. Only if the aforementioned cannot provide the compensation, a person liable under a strict liability, without any fault, needs to provide the compensation.

In its most recent ruling, the Federal Supreme Court has not expressly opened the recourse of the insurer against loss and damage towards a third party liable under contract. It states, however, that the integral subrogation of the insurer and thus the planned end of Gini/Durleman is undisputed both in the doctrine and in the context of the planned revision of the ICA. Should the Federal Supreme Court go one step further and repeal the much criticised subsumption of the insurer against loss or damage under the cascade order of article 51 para 2 CO this would be the end of the Gini/Durlemann ruling. Such insurers could then take recourse against all persons liable from an event, whether from unlawful acts, or from strict liability or contractual liability.

### 3. Consequences

The consequences of the recent changes in practice are not insignificant and depending on whether an insurer takes recourse or rejects recourse claims based on this new practice, they will welcome the new legal situation. Health and accident supplementary insurances, provided the policy is subject to ICA, can now take unlimited recourse against persons liable under a strict liability. This also applies to insurers against loss or damage of property.

This change in practice will also have a major influence on damages in the transport sector. In particular, transport companies and their insurers will now be able to take recourse more easily to those liable under strict liability. In this context, it should be noted that the Federal Supreme Court had already lifted the limitation of recourse in respect to CMR freight contracts in BGE 132 III 626 (judgment 4C.330/2005 from 20 June 2006).

With this decision, Switzerland has moved closer to European law. For liable persons, the recourse also carried out by foreign insurers will now certainly be noticeable.

## Your contacts for insurance law



**Peter Haas**  
*Partner*

T: +41 31 328 75 75  
[peter.haas@eversheds-sutherland.ch](mailto:peter.haas@eversheds-sutherland.ch)



**Barbara Klett**  
*Partner*

T: +41 44 204 90 90  
[barbara.klett@eversheds-sutherland.ch](mailto:barbara.klett@eversheds-sutherland.ch)

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