Gini/Durlemann: Federal Supreme Court ruling could facilitate recourses for transport insurers

(A slightly shorter version of this article was published here)

A potentially ground-breaking Federal Supreme Court ruling[1] suggests that the notorious Gini/Durlemann practice may soon be abolished. If so, it would finally facilitate recourses for transport insurers in Switzerland; however, it remains too early to be certain if and when this will happen..

Background

Switzerland is an exotic country when it comes to an insurer's recourse possibilities. Due to the ominous Gini/Durlemann practice applied by the Federal Supreme Court for more than 60 years, insurers may take recourse to the party that is liable under a contract only if the latter acted intentionally or with gross negligence. However, where a simple fault occurs (ie, a merely negligent breach of contract), the insurer is barred from recourse.

While the suggestion that recourse is prohibited in Switzerland is untrue, such a complicated recourse practice makes it unique.

The Origin of Gini/Durlemann

The name Gini/Durlemann dates back to the party names of a 1954 Federal Supreme Court ruling[2] in which an employee of a painting company set a house on fire during renovation works. The damage was paid for by the insurance of the house owner, who subsequently sought recourse against the painting company and the craftsman carrying out the work. The Federal Supreme Court rejected the recourse against the painting company on the following grounds:

Art. 72 of the Swiss Insurance Contract Act provides for a subrogation mechanism for non-life insurances: Claims of the aggrieved party against the party liable *in tort* are transferred to the insurer if and to the extent to which the insurer has paid compensation to the aggrieved party. However, this provision contrasts somewhat with the general rule of Art. 51 of the Swiss Code of Obligations (CO). This rule governs who ultimately has to bear a loss if several liable parties are liable for the same loss. In other words, Art. 51 CO describes the internal rules of recourse between different parties who are liable for the same damage. Art. 51 CO thereby establishes a cascade: First and foremost, the damage shall be borne by the party liable for tort due to fault of that party. Thereafter, any contractually liable party shall bear the damage. Finally, and therefore only in the last place, shall the damage be borne by a party who is liable under tort rules but without fault (strict liability).

At the time, the Federal Supreme Court was of the opinion that an insurance was also a kind of liability, since an insurance company was, just like a liable third party, under a duty to

[1] Decision of the Swiss Federal Supreme Court 4A.602/2017 of 7 Mai 2018.
[2] BGE 80 II 247.

compensate for a third-party damage. However, if insurance is considered as a form of liability, then the question arises as to what place and level this liability shall have within the cascade of art. 51 CO. At the time, the Federal Supreme Court ruled that an insurer is to be considered as a *contractually* liable party and therefore the insurer had to be placed on the same level as any other contractually liable party, e.g. a carrier in transport matters. However, the Federal Supreme Court considered this as not fully appropriate, since it is precisely the purpose of an insurance coverage to bear a loss and since the insurer collects premiums for this coverage. The court therefore came to a Solomonic decision: As a rule, an insurance company has no recourse against another contractually liable party; however, recourse should be permitted if the other contractually liable party has caused the damage by acting grossly negligent. Then, but only then, would it be appropriate to allow the insurer's recourse.

The Gini/Durlemann practice thus established has now lasted for 60 years.

The Importance of Gini/Durlemann in Transport Law

Today, transport insurers are involved in almost every transport damage case. If a transport insurer pays damages by compensating an insured party, it can take recourse against the carrier only if it can establish gross negligence on the part of the carrier. Since the threshold for this is rather high and numerous questions of evidence can arise, many insurers waive recourse in Switzerland from the outset.

The Development of Gini/Durlemann

The Gini/Durlemann practice has been heavily criticised by scholars for decades and, for obvious reasons, has found no favour in the insurance industry. Nevertheless, the Federal Supreme Court has stuck to it firmly.

In 2006 the Federal Supreme Court slightly restricted Gini/Durlemann for the first time (BGE 132 III 626). The court held that if an insurance contract is subject to foreign law and the transport contract is not subject to national law, but rather international treaties (eg, the Convention on the Contract for the International Carriage of Goods by Road), then Gini/Durlemann would not apply.

In a 2011 decision[3] the Federal Supreme Court recognised that Gini/Durlemann was being heavily criticised and intended to take this into account; however, it did not abolish the practice. At that time, a pending revision to the Insurance Contract Act would have put an end to the Gini/Durlemann practice, but the court held that it was unable to anticipate legislative revisions and decided against changing its practice. Unfortunately, the revision unexpectedly failed in Parliament and Gini/Durlemann thus remained in place.

Now, a new revision is imminent[4]. Like the first revision, it aims at abolishing the Gini/Durlemann practice.

The combination of persistent criticism from scholars and clear political intent to abolish this practice created the breeding ground for the Federal Supreme Court's recent ruling.

[3] BGE 137 III 352.

[4] Federal Council opinion of 28 June 2017 (BBl 2017 5089).

Abolishment of Gini/Durlemann Practice?

The Gini/Durlemann practice has not yet been abolished. In its current decision, the Federal Supreme Court allowed an insurer to take recourse against a party liable under a strict liability (ie, under tort rules but without fault). However, the court did not rule on whether this softening of the Gini/Durlemann practice also applies to parties liable under a contractual liability.

Article 72 of the Insurance Contract Act regulates only the insurer's recourse to non-contractual liability (ie, tort and strict liability). The recourse to contractually liable parties is not covered by Article 72, but is exclusively subject to Article 51 of the Code of Obligations.[5] Since the Federal Supreme Court's current decision dealt exclusively with Article 72 of the Insurance Contract Act, it cannot be easily applied to recourses on contractually liable parties. While some scholars have already proclaimed the end of the Gini/Durlemann practice, it remains too early to be certain whether and when this will happen.

However, one point is encouraging: in justifying its change in practice, the Federal Supreme Court explicitly and decisively relied on the political intent to abolish the Gini/Durlemann practice and referred to the planned new Article 95(c) of the Insurance Contract Act.

According to this new provision, insurers' recourse should be permitted against all liable parties (ie, explicitly against contractually liable parties as well).[6] Since it was the explicit idea of the Federal Supreme Court to be guided by this planned revision, it may rightly be assumed that the court would come to the same conclusion if a recourse against a contractually liable party must be decided on. However, such a decision has not yet been published; therefore, for the time being, it seems likely that Gini/Durlemann will be abolished completely, but this has not yet taken place.

Summary and Significance for Transport Insurers

1. The Federal Supreme Court has indicated in a non-transport law decision that it could completely abolish the so-called Gini/Durlemann practice in the near future. However, there is no certainty in this regard until a respective judgement will have been passed.

2. If the Gini/Durlemann practice were abolished, this would mean that transport insurers would no longer be limited in Switzerland when it comes to recourses against carriers or freight forwarders causing the damage.

3. Switzerland would thus finally adapt to international standards on this point.

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[5] BSK-Graber, 6 Ed, Basel 2015, N 28 on Article 51 of the Code of Obligations.
[6] Federal Council opinion of 28 June 2017 (BBl 2017 5132).