



ONLINE COMMENTARY
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LEGAL COMMENTARY

COMMENTARY ON

Art. 100 CO

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Status of processing: 08.04.2025

PDF generated on: 06.10.2026

DOI: 10.17176/20250408-194428-0

SUGGESTED CITATION

Clarisse von Wunschheim/Cristina Wulschleger, Commentary of art. 100 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-von Wunschheim/Wulschleger, art. 100 CO N. XXX.

2. Exclusion of liability

Art. 100

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.

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I. CONTEXT & SCOPE

- 1 As mentioned above, whereas Art. 97 CO establishes the general standard of liability itself, Art. 99-101 CO deal with the scope of the liability and of compensation for damages. In this context, Art. 100 CO deals with the parties' right to deviate from the general liability standard set out in Art. 97 and 99 CO by limiting their contractual liability.
- 2 The right to tailor one's contractual liability derives from the general principle of freedom of contract. However, this right is not unlimited and may be restrained by law (see. Art. 19 and 20 CO). Art. 100 CO constitutes such statutory limitation and refrains the parties' freedom to contractually limit their liability, where the damage was caused by willful intent or gross negligence.
- 3 In other words, Art. 100 CO does not distinguish between various types of liability limitations, and instead relies exclusively on the degree of fault. Thus, pursuant to Art. 100 CO, a limitation of liability (of whatever type) is only possible as long as the damage was caused by light negligence only (see OK-von Wunschheim/Wulschleger, art. 99 CO). Where a damage is caused by gross negligence or willful conduct, liability may not be limited (in any way).
- 4 It should, however, be noted that Art. 100 CO applies only to contractual limitations agreed upon by the parties prior to the occurrence of the damage. Once a damage has occurred, the restrictions of Art. 100 CO do not apply and the parties are free to agree on the compensation of such damage, which then qualifies as debt waiver in the meaning of Art. 115 CO.¹
- 5 It is further noteworthy that, according to the principle of the freedom of contract, which includes the freedom of form, contractual liability limitations are – by law – not subject to any specific form requirement.

II. TYPES OF LIABILITY LIMITATIONS IN PRACTICE

- 6 In practice, there are many ways to limit contractual liability. The most common types are the following:
 - (1) Limitations on the scope of liability itself or its full exclusion (so-called "liability limitations" or "exemption clauses"; *Haftungsbegrenzung* | *limitation de responsabilité*); or
 - (2) Limitations on the scope of damage compensation (so-called "limitations on damages"; *Begrenzung der Schadenersatzpflicht* | *limitation du dommage reparable*); or
 - (3) Limitations by way of changing the statutory modalities of a liability claim, for example by a shortening of the statutory limitation periods or a shifting of the burden of proof.

A. Liability Limitations *stricto sensu*

- 7 Based on the principle of freedom of contract, it is possible for the parties to exempt certain behaviours or events from any liability. In such cases, even though a damage may occur, liability is excluded from the outset.

1. Gauch/Schluep/Emmenegger, N. 3083; BSK-Widmer Lüchinger/Wiegand, Art. 100 CO N. 2; BK-Weber Art. 100 CO N. 6; BGer 4A_25/2014 dated 7.4.2014 consid. 7.1; BGer 4C.411/1999 dated 4.2.2000 consid. 2b.

- 8 Here one has to distinguish between a contractual risk allocation, which transfers a risk to a certain party and is not subject to the limitations of Art. 100 CO, and a limitation of liability on a risk belonging to a specific party, which is subject to Art. 100 CO.

For example:

- Parties to an international sale of goods contract (not subject to CISG) agree that the seller shall incur no liability in case the local authorities refuse to grant an export license. In this case, the risk of not obtaining the necessary export license is specifically allocated to the buyer. The parties are free to do so under the principle of freedom of contract and such a risk allocation is not considered a limitation of liability.
 - Parties to a sale of a car agree that the car is sold "as is", i.e. that the seller is not liable for any default or problem the car may have. Here the risk of providing a functional car remains on the seller, but his liability in case the risk materializes is limited.
 - Parties to a sales or service contract may provide that a party shall only be liable in case of "material breach" and then define in the contract what constitutes such material breach (considering that Swiss law does not distinguish between immaterial and material breaches (see OK-von Wunschheim/Wullschleger, art. 97 CO)). There is no re-allocation of contract risks. The risk of a breach remains with the breaching party, but the scope of its liability is limited to material breaches.
 - Parties to an M&A transaction agree that a warranty shall only be triggered where the damage incurred exceeds a certain threshold (so-called "de minimis" clauses). Again, the risk of a warranty breach remains with the party breaching the warranty, but the liability is only triggered by breaches having a minimum impact.
- 9 To the extent the last three examples above limit a party's general liability on a risk which is allocated to them, such limitative clauses are subject to the limits set forth by Art. 100(1) CO (see below).

B. Limitations on Damages

- 10 In practice, parties often limit the scope of their liability either by excluding certain types of damages or by determining a certain amount of compensable damage.

1. Exclusion of certain categories of damages

- 11 As mentioned above, Swiss law does not limit the compensable character of a damage based on its categorization. Instead, the relevant question is whether such damage shows an adequate causal nexus to the breach.
- 12 Parties may however contractually exclude certain categories of damages from their scope of liability, such as indirect damages, consequential damages or more specifically lost profits, or legal fees, etc. Such exclusions are however subject to the limits set forth by Art. 100(1) CO (see below). Further, it is generally admitted that parties may not exclude damage arising out of personal injury even in cases of light negligence.²
- 13 In contrast, it is often neglected in practice that, based on the principle of freedom of contract, the parties are free to extend the statutory definition of damage to include categories of damages which are not recognized under Swiss law. Art. 100(1) CO does not limit the parties' freedom to extend liability. It only limits the parties' freedom to restrict it.³ Thus, for example, although Swiss law does not recognize the loss of opportunity or reputational damage as a compensable damage (see above Art. 97

2. See a specific case of application of this principle in Art. 16 of the Swiss Law on Package Travel.

CO), the parties may very well provide in their contract for a compensation of reputational damage or loss of opportunity. When doing so, it will be very important to carefully define such damage and subject it to a liquidated damage clause in order to avoid practical issues when attempting to prove and quantify a damage, which is usually not recognized under Swiss statutory law.

2. Liquidated Damages, Agreed Sums, Lump-sum Indemnities and the like

- 14 Although the Code of Obligations does not expressly deal with the concept of "liquidated damages", it is common in practice for parties to fix in advance a specific amount of damages to be paid in case of contract breach and the Federal Tribunal has recognized the admissibility of such practice (subject to the limits of Art. 100(1) CO).⁴ This sort of arrangements referred to as 'lump-sum indemnities' or 'agreed sums payable' (*pauschalierter Schadenersatz* | *indemnité forfaitaire*) are, however, somewhat different from the "liquidated damages" known in common law jurisdiction.
- 15 Under Swiss law, there are different ways to design clauses on 'agreed sums payable' depending on whether the lump-sum at stake is a fixed amount, a maximum amount, or a minimum amount, and on how such arrangement impacts the burden of proof:⁵

1. Fixed agreed sum / lump-sum: Parties may determine, in advance, a fixed amount considered to be representative of the damage caused by the concerned breach. They can do this by excluding the parties' possibility to increase or reduce this amount. In other words, whatever the effective damage, the amount of compensation due will be the fixed lump-sum amount (so-called 'absolute fixed lump-sum'). Alternatively, the parties may provide that the agreed amount may be increased or reduced depending on specific circumstances, such as the scope of effective damage or other mitigating factors, whereby the existence of such circumstances and their impact on the agreed sum must be proven by the party requesting an increase or reduction (so-called 'relative fixed lump-sum') (see Art. 42 fol. CO). Thus, whereas the fixed lump-sum puts a limit to the amount claimable, the relative fixed lump-sum is a mere arrangement regarding the allocation of the the burden of proof of the damage, and not a real limitation of the actual amount of damages claimable.

2. Maximum agreed sum / lump-sum: The parties may further agree on a maximum amount of compensation, which can only be reduced where the party claiming reduction proves that the actual damage was actually smaller than the agreed sum.

The difference between such maximum lump-sum and a relative fixed lump-sum is that it only allows for a reduction of the lump-sum, and not for an increase. Thus, even though the actual damage may be higher than the lump-sum, the creditor does not have the possibility to claim an increase.

3. Minimum agreed sum / lump-sum: The parties may also agree on a minimum amount of compensation, which can only be increased where the party claiming compensation proves that the actual damage was superior to the agreed sum.

The difference between such minimum lump-sum and a relative fixed lump-sum is that it only allows for an increase of the lump-sum, and not for a reduction. Thus, even though the actual damage may be smaller than the lump-sum, the debtor does not have the possibility to claim a reduction.

3. Gauch/Schluép/Emmenegger, N. 3078; BSK-Widmer Lüchinger/Wiegand, Art. 100 CO N. 1; BK-Weber Art. 100 CO N. 12; Tolou, para. 95.

4. Huguenin, N. 1256; BK-Weber Art. 100 CO N. 68; BGE 29 II 273 consid.6, BGE 83 III 525 consid. 3; Couchepin, SJ 2009, p. 1, 3; Tolou, para. 70.

5. Tercier/Pichonnaz, N. 1343 f.; Gauch/Schluép/Emmenegger, N. 3079; Emmenegger/Jegher/Graf, FS Koller, p. 180 f.; Tolou, paras 15-105; Couchepin, SJ 2009, p. 1, 11-14.

3. Difference with Penalty Clause

- 16 Under Swiss law, one must distinguish between 'agreed sums payable' and 'penalty clauses' (Art. 160-163 CO), as they have different purposes and work differently in practice:⁶

1. Different Purpose: The purpose of 'agreed sums payable' arrangements is to facilitate the claim for compensation of damage by exempting the creditor from its general duty to prove the actual existence and scope of its damage. Indeed, proving the scope of a damage is often a major hurdle in practice. Thus, 'agreed sums payable' are not primarily meant to punish a breach, although it is evident that the existence of an 'agreed sums' clause will have a positive impact on the debtor's incentive not to breach the contract. Instead, 'agreed sums' clauses serve both the interest of the creditor, whose burden of proving its damage is alleviated, and the interest of the debtor, who is able to quantify in advance its potential damage liability.

In contrast, the penalty clause has a primary repressive function and thus primarily serve the interest of the creditor.

2. Modalities: Under an 'agreed sums' clause, the party claiming the agreed lump-sum is exempted from proving the scope of the effective damage (as long as it does not claim a reduction or increase of the lump-sum), and thus only needs to prove a faulty breach by the debtor and a causal nexus between the breach and the damage. In contrast, the contractual penalty is triggered by the mere breach of contract, irrespective of the existence of a fault, an actual damage or a causal nexus.⁷

3. Reduction by the Judge: In case of a contractual penalty, the creditor keeps the right to claim more than the mere penalty if he/her can prove that his/her actual damage exceeds the penalty (Art. 161(2) CO). In contrast, in case of 'agreed sums clause' there is in principle no room for a judge to intervene by reducing or modifying the parties' agreement, except in very limited circumstances such as a case of *Clausula Rebus Sic Stantibus*.⁸ In practice, however, where the agreed sum is far superior to the effective damage, to such extent that it deploys a punitive effect, an agreed sum clause may be deemed to be, in essence, a penalty clause and thus be subjected to the reduction possibility of Art. 161(2) CO. This will however depend on the interpretation of the agreed sum clause pursuant to the general principles of contract interpretation (Art. 18 CO).

C. Other Limitations

- 17 Limitations on liability itself and damages are not the only ways to limit the scope of a party's liability.

- 18 For example:⁹

- Parties may agree to shorten statutory notice periods or time limitation periods.
- Parties may provide for additional or stricter requirements to trigger liability, such as requesting that certain notices be done in a certain form, not required by law.

6. Koller, N. 82.10 f.; Gauch/Schluep/Emmenegger, N. 3851; BK-Emmenegger, Art. 97 CO N. 476 f.; BGE 140 III 200 consid. 5.3; BGE 109 II 462 consid. 4a. Couchepin, La Clause pénale, N. 1206 ff.; Tolou, la forfaitisation du dommage, para. 18.87 f.; Couchepin, SJ 2009, p. 1,5-25.

7. Koller, N. 81.08, 82.10; Gauch/Schluep/Emmenegger, N. 3782; Huguenin, N. 1259 ff.; BSK-Widmer Widmer/Costantini/Ehrat, Art. 160 CO N. 1, 12, 14 f.; BGE 144 III 327 consid. 5.2.1; BGE 135 III 433 consid. 3.1; BGer 4C.241/2005 dated 25.10.2005 consid. 3.2; Couchepin, SJ 2009 II, p. 1, 24.

8. Schwenzer/Fountoulakis, N. 73.17; Gauch/Schluep/Emmenegger, N. 3816 ff., 3851; Huguenin, N. 1267; BK-Emmenegger, Art. 97 CO N. 476 f.; BGer 4A_601/2015 dated 19.4.2016 consid. 2.3.3; BGE 83 II 525 consid. 3; Couchepin, SJ 2009 II, p. 1, 24.

9. BK-Weber Art. 100 CO N. 70; see also BGE 115 II 474 consid. 2d.

- Parties may diverge from the presumption of fault established under Art. 97(1) CO and require that the party claiming the breach also bears the burden of proving the existence of a fault by the debtor.

19 All these limitations are subject to Art. 100(1) CO and thus only valid where the damage was not caused by gross negligence or willful conduct.

III. EXTENDED APPLICATION TO TORT LAW

20 Although partially controversial, it is widely admitted that contractual liability limitations do not only apply to damages arising out of contract breaches, but also extend to damages caused by tort as long as the tortuous behavior occurred in connexion with the contract performance.¹⁰

IV. CONSEQUENCES OF EXCESSIVE LIABILITY LIMITATIONS

- 21 In principle, any limitation exceeding this limit set out in Art. 100 CO is null and void.¹¹ The question is then whether the nullity applies only to the excessive part of the limitation ('partial invalidity'), or whether it has the effect of invalidating the limitation as a whole ('total invalidity').
- 22 Generally speaking, in commercial transactions, the courts in Switzerland follow the first approach, i.e. partial invalidity, and will simply reduce the scope of an excessive limitation to what is admissible. As concerns consumer transactions, the situation is less clear and some courts have opted for a total invalidation.¹²

V. EXCEPTIONS / SPECIAL CASES

A. Special Cases (Art. 100(2) and 100(3) CO)

- 23 Art. 100(2) CO brings an exception to the principle of Art. 100(1) CO and provides that a limitation of liability may be invalidated also in case of light negligence. This exception applies to specific relationships, where one party is at the service of the other, or in case of activities which are subject to regulatory authorizations.
- 24 The most common examples of such relationships are employment relationships, banking relationships, transport companies such as railways or aerial cableways, water, electricity or nuclear power plants, trade in salt or alcohol, insurance agencies, lottery and gambling businesses.¹³
- 25 As concerns insurance contracts, Art. 100(3) CO provides that provisions governing insurance policies are unaffected. This is an implicit reference to Art. 14 and 98 of the Swiss Law on Insurance Contracts ("LIC"). These provisions establish that, although an insurance may reduce the scope of coverage of an insured damage where such damage was partly caused by wilful intent or gross negligence of the insured person, the insurance may not exclude or reduce the insurance payment in case of light negligence of the insured person.

10. BK-Weber Art. 100 CO N. 49.

11. BK-Weber Art. 100 CO N. 61, 135 ff.; Gauch/Schluep/Emmenegger, N. 3802 ff.; BGE 115 II 474 consid. 2d; BGE 102 II 256 consid. 4.

12. Schwenzer/Fountoulakis, N. 46.03 ff., 71.16; BK-Weber Art. 100 CO N. 153b.

13. BK-Weber Art. 100 CO N. 113 f.

- 26 Technically speaking Art. 14 LIC does not constitute a limitation of liability. Instead, it defines the scope of a contractual obligation, i.e. the scope of insurance coverage. Yet, the same principles as set out in Art. 100(2) apply.

B. Limitations of Liability in General Terms & Conditions

- 27 It is very common in practice to include limitation of liability clauses in General Terms & Conditions ("GT&C").
- 28 Compared to EU law, Swiss law adopts a rather liberal stance towards GT&C and the inclusion therein of limitation of liability clauses is subject only to the following limitations:¹⁴

1. Art. 100 CO;

2. The doctrine of "unusual clauses" (*Ungewöhnlichkeitsregel* | *clauses insolites*). According to well-established case law of the Swiss Federal Tribunal, the general acceptance of GT&C does not cover so-called "unusual clauses", which are atypical in the concerned industry and/or to usual business practices and which the contract partner could therefore not reasonably expect to be included in GT&C. Such clauses must be specifically drawn to the attention of the contractual partner, otherwise they are not enforceable. While limitation of liability clauses are nowadays common practice and would therefore, in principle, rarely qualify as "unusual" in the context of common business transactions between parties of equal standing, the question must be assessed on a case by case basis. A clause that is customary in a particular sector of the economy may be unusual for someone who does not operate in that sector. Further, the degree in which the clause affects the legal position of one party, compared to the other is also relevant. The more a clause affects the legal position of the contractual partner, the more likely it is to be considered unusual.¹⁵

3. Art. 8 of the Swiss Law on Unfair Competition ("SLUC") as concerns consumer contracts. Art. 8 SLUC prohibits unfair business practices which create a considerable and unjustified imbalance between contractual rights and contractual obligations to the prejudice of consumers. Thus, depending on the scope of limitation of liability, the nature of the transaction and the balance of rights and obligations between the consumer and the business, certain limitations of liability may be deemed to be "unfair" in the meaning of Art. 8 of the SLUC and thus be subject to invalidation.¹⁶

C. Limitations of Liability in Sales Contract (Art. 199 CO)

- 29 Art. 199 CO, applicable to contracts for sale of goods, provides that "*any agreement to exclude or limit the warranty obligation is void if the seller has fraudulently concealed the failure to comply with warranty from the buyer*". This provision concerns the situation where a seller, who is aware of certain defects affecting the good to be sold wilfully conceals such defects to the buyer, so as to lead the latter to conclude the sale. In such case, any exclusion or limitation of warranty obligations by the seller will be null and void.¹⁷
- 30 The question of the relationship between Art. 199 CO and Art. 100 CO is controversial. Some authors consider Art. 199 CO to be a *lex specialis* to Art. 100 CO and thus to prevail over it. Others consider that the two provisions complement each other, whereby Art. 199 CO merely aims at regulating the effects of a dissimulation of defects by the seller on the warranty regime, and Art. 100 CO prevents the

14. Gauch/Schluemp/Schmid, N. 1118 ff.; Tolou, para. 82.

15. BGer 4A_372/2022 dated 11.07.2023, consid. 3.3 and 3.6.

16. Probst, Art. 8 N. 477, 492; BK/UWG-Thouvenin, Art. 8 N. 36.

17. Tercier/Bieri/Carron, N. 826.

seller more broadly from limiting his/her liability. The Swiss Federal Tribunal has not yet ruled over this controversy.¹⁸

D. Other Statutory Exceptions

- 31 There exist further mandatory provisions excluding a liquidated damage clause in specific contracts (e.g. Art. 267(2) and 299(4) in case of rental contract, Art. 842(2) CO in case of exit of a partner from a cooperative company, art. 404 CO in case of untimely termination of the mandate). We refer, for further details, to the commentary on these provisions.

BIBLIOGRAPHY

Couchepin Gaspard, *La Forfaitisation du Dommage*, SJ 2009 II, p. 1 (cit. "SJ 2009").

Couchepin Gaspard, *La clause pénale : étude générale de l'institution et de quelques applications pratiques en droit de la construction*, Diss. Université de Fribourg 2007.

Emmenegger Susan, *Kommentierung zu Art. 97 OR* in: Weber Rolf/Emmenegger Susan (eds.), *Berner Kommentar, Obligationenrecht Allgemeine Bestimmungen, Die Folgen der Nichterfüllung, Art. 97-109 OR*, 2nd Ed., Bern 2020.

Emmenegger Susan/Jegher Nicola/Graf Seraina, *Für Hilfspersonen wird nicht gehaftet – oder doch?*, Art. 101 Abs. 2 OR im Lichte der Ungewöhnlichkeitsregel, in: Emmenegger Susan/Hrubesch-Millauer Stéphanie/Krauskopf Frédéric/Wolf Stephan (eds.), *Brücken bauen, Festschrift für Thomas Koller*, Bern 2018, pp. 177-194.

Emmenegger Susan, *Kommentierung zu Art. 100 OR* in: Weber Rolf/Emmenegger Susan (eds.), *Berner Kommentar, Obligationenrecht Allgemeine Bestimmungen, Die Folgen der Nichterfüllung, Art. 97-109 OR*, 2nd Ed., Bern 2020.

Gauch Peter/Schlupe Walter/Emmenegger Susan, *OR AT, Schweizerisches Obligationenrecht Allgemeiner Teil*, Band II, 11th Ed., Zurich et al. 2020.

Huguenin Claire, *Obligationenrecht, Allgemeiner und Besonderer Teil*, 3rd Ed., Zurich et al. 2019.

Koller Alfred, *Schweizerisches Obligationenrecht Allgemeiner Teil*, Band I, 5th Ed., Bern 2023.

Probst Thoman *Kommentierung zu Art. 8 UWG*, in: Jung Peter, *Bundes-gesetz gegen den unlauteren Wettbewerb (UWG)*, 3rd Ed. Bern 2023.

Schwenzer Ingeborg/Fountoulakis Christiana, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 8th Ed., Bern 2020.

Tercier Pierre/Pichonnaz Pascal, *Le Droit des Obligations*, 7th Ed., Geneva/Zurich 2024.

Tercier Pierre/Bieri Laurent/Carron Blaise, *Les contrats spéciaux*, 5th Ed., Zurich/Geneva/Basel 2016.

Thouvenin Florent, *Kommentierung zu Art. 8 UWG*, in: Hilty Reto M./Arpagaus Reto, *Basler Kommentar, Bundesgesetz gegen den unlauteren Wettbewerb (UWG)*, Basel 2013 (cit. BK/UWG-author).

Tolou Alborz, *La forfaitisation du dommage*, Diss. Université de Fribourg, 2017 = AISUF 372.

Widmer Lüchinger Corinne/Wiegand Wolfgang, *Kommentierung zu Art. 100 OR*, in: Widmer Lüchinger Corinne/Oser David (eds.), *Basler Kommentar, Obligationenrecht I*, 7th Ed., Basel 2020.

18. BK-Weber Art. 100 CO N. 38 f.; Tercier/Bieri/Carron, N. 826.

Widmer Markus/Costantini Renato/Ehrat Felix R., Kommentierung zu Art. 160 OR, in: Widmer Lüchinger Corinne/Oser David (eds.), Basler Kommentar, Obligationenrecht I, 7th Ed., Basel 2020.