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COMMENTARY ON

Art. 97 CO

A commentary by Clarisse von Wunschheim / Cristina Wulschleger

Edited by Christoph Hurni / Mirjam Eggen

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Section Two: The Consequences of Non-Performance of Obligations

A. Failure to perform

I. Obligor's duty to compensate

1. In general

Art. 97

¹ An obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove that he was not at fault.

² The procedure for debt enforcement is governed by the provisions of the Federal Act of 11 April 1889 on Debt Collection and Bankruptcy and the Civil Procedure Code of 19 December 2008 (CPC).

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I. CONTEXT & PURPOSE

- 1 Art. 97 of the Code of Obligations ("CO") opens the Chapter on the Consequences of Non-Performance, which includes Art. 97 to Art. 109 CO. This Chapter starts with Art. 97 CO, which sets out the principle that a debtor has the duty to compensate for the damage caused by his failure to perform a specific obligation.
- 2 For a lay or foreign readership, the language of Art. 97 CO may be peculiar in various regards:
 1. It refers to "an obligation" in general terms, and not to a contractual obligation specifically. This is due to the fact that Swiss private law is based on a general theory of "law of obligations", in which contracts are only one of three sources from which obligations can arise (tort [Art. 41 fol. CO] and unjust enrichment [Art. 62 CO] being the two other sources).¹ Thus, even though a reader will not find the word "contract" mentioned therein, both Art. 97 CO and the following Art. 98-109 CO directly and specifically apply to any situation of breach of contract, unless (i) the Parties have provided for a different regime of liability for breach of contract (to the extent permissible by statutory law), and/or (ii) the Code of Obligations (or an applicable international convention such as the CISG) provides for different and overriding provisions when dealing with specific types of contracts (e.g. sales contract, rental contract, agency contract, etc.) (so-called principle of "*Lex specialis derogat lex generalis*").
 2. Art. 97 CO officially deals with "the consequences of a failure to perform" such obligation, but then seems to focus on only one of these potential consequences, i.e. the duty to repair any damage caused by the failure to perform. This does however not mean that the duty to compensate for a damage is the only remedy available in case of a failure to perform. In particular, the right of a creditor to request specific performance from a non-performing debtor is implicit in Art. 97 CO and widely recognized by Swiss case law.² Further rights are set out in the Articles following Art. 97 CO, such as the right to substitute performance by a third party (Art. 98 CO) or the right to terminate the contract (Art. 107 fol. CO).
 3. Art. 97 CO also does not specify what type of "non-performance" is meant. It is generally admitted that Art. 97 CO applies to all sorts of improper performance (so-called 'disturbed performance', *Leistungstörungen*), including late performance (so-called 'default', *Verzug / Demeure*, see Art. 102 fol. CO), incomplete performance, defective performance or any other type of actual breach or non-compliance with specific contractual obligations ("*positive Vertragsverletzung*").³
 4. A lay or foreign reader may further wonder why Art. 97(2) CO refers to the procedure for debt enforcement law in the midst of provisions on contract breach. The reason is that Swiss law provides for a very special mechanism of enforcement of monetary debts, which allows a creditor holding a specific title establishing a monetary claim to enforce such claim against the debtor directly through the debt enforcement procedure without having to resort necessarily to court litigation to claim damages pursuant to Art. 97 CO. Whether or not it will be necessary to first enforce the damage claim through court litigation will eventually depend on the type of title held by the creditor and on whether the debtor resists debt enforcement.⁴

1. BK-Emmenegger, Introd. Art. 97-109 CO N. 4; BK-Emmenegger, Art. 97 CO N. 9; Gauch/Schluép/Emmenegger, N. 2933.

2. BK-Emmenegger, Art. 97 CO N. 7; Schmid, p. 591; Huguenin, N. 808 f.; BGE 116 II 441 consid. 2a; BGer 4A_41/2016 dated 20.6.2016 consid. 3.4.

3. BK-Emmenegger, Art. 97 CO N. 14; BSK-Wiegand, Art. 97 CO N. 1; Huguenin, N. 846; Gauch/Schluép/Emmenegger, N. 2616; BGer 5A_69/2018 dated 21.9.2018 consid. 3.3; BGer 4A_306/2009 dated 8.2.2010 consid. 6.1.

4. BK-Emmenegger, Art. 97 CO N. 536, 538 f.; Gauch/Schluép/Emmenegger, N. 2504; BSK-Acocella, Art. 38 SchKG N. 1, 4 ff.; BGE 143 III 173 consid. 6.

- 3 What is further noteworthy is that Art. 97 fol. CO are, subject to very few exceptions dealt with below, not mandatory law. Parties may thus in principle deviate from the liability regime set out in these provisions.
- 4 In summary, Art. 97 fol. CO constitute the default provisions applicable in case of breach of contract where neither the contract itself, nor the Code of Obligations (or any applicable international Convention), provides for any other specific provision applicable to the contract at stake.
- 5 Art. 97 fol. CO do not directly apply to a breach of potential pre-contractual obligations, such as the duty to conduct negotiations in good faith. Pre-contractual liability, also known as "*culpa in contrahendo*" is – according to the currently predominant doctrine and case law - mainly subject to tort law, although certain provisions of the present Chapter may be applied by analogy.⁵ In contrast, Art. 97 fol. CO generally apply to breaches of post-contractual obligations, which arise out of the contract and exist beyond its termination.⁶

II. GENERAL CONTRACTUAL LIABILITY STANDARD

- 6 Under Swiss law, contractual liability, understood as the duty to compensate for a damage resulting from an improper contract performance, is subject to four basic requirements:
 1. A non-performance of a specific contractual obligation, i.e. a breach of contract;
 2. A damage;
 3. A causal nexus between the non-performance and the damage;
 4. A faulty behavior by the non-performing party.

A. A Non-Performance

- 7 As mentioned above, the concept of 'non-performance' of Art. 97 CO encompasses all kinds of non-compliance with contractual standards. In other words, any deviation from any contractual duty or, failing any specific contractual duty, from any statutory duty applicable to the contract at stake qualifies as "non-performance" in the meaning of Art. 97 CO.
- 8 Art. 97 CO also makes no distinction as concerns the type of duty which is breached. In particular, Art. 97 CO makes no difference between so-called 'main obligations' (*Hauptpflichten* | *obligations principales*), which are the characteristic obligations of a specific contract (e.g. delivery of an object versus payment of its price in a sales contract, or transfer of money versus interest payment in a loan contract), and 'ancillary obligations' (*Nebenpflichten* | *obligations secondaires*) which surround the main obligations, such as a duty of exclusivity, non-competition, confidentiality, etc. It also makes no distinction between duties which consist of an active behaviour (to do something) or those which consist in a passive behaviour (to tolerate or not do something).⁷
- 9 Art. 97 CO also does not distinguish between various degrees of breaches. Although it is common in practice for parties to attach different consequences to a breach depending on its severity, for exam-

5. BSK-Wiegand, Introd. Art. 97-109 CO N. 10 f.; BK-Emmenegger, Introd. Art. 97-109 CO N. 73 f., 85 ff.; BK-Emmenegger, Art. 97 CO N. 30 ff., 147 ff., Gauch/Schluep/Schmid, N. 963 ff.; BGer 4A_229/2014 dated 19.9.2014 consid. 4.1; BGE 120 II 331 consid. 5a.

6. BSK-Wiegand, Introd. Art. 97-109 CO N. 12; BK-Emmenegger, Introd. Art. 97-109 CO N. 78 ff.; Schwenzer/Fountoulakis, N. 73.11; Huguenin, N. 646; BGer 4A_398/2007 dated 23.4.2009 consid. 6.2; BGer 5A_947/2013 dated 2.4.2014 consid. 6.2.

7. BK-Emmenegger, Art. 97 CO N. 118 ff., 132 ff., 144 ff.; BSK-Wiegand, Art. 97 CO N. 32 ff.; Huguenin, N. 852 ff.; BGer 4A_306/2009 dated 8.2.2010 consid. 6.1; BGer 4A_494/2010 dated 7.12.2010 consid. 4.

ple in case of 'material breach', Art. 97 CO does not know any such distinction. All types of failure to perform are at the outset treated in the same manner.⁸ However, where a debtor is put on notice of his non-performance and refuses to remedy it within the contractual or statutory deadline (so-called 'default of the debtor', *Verzug / Demeure*), the creditor is given a broader array of choices of remedies, including a right to termination and/or additional damages (see Art. 102 fol.).

- 10 Further, at the stage of determining the existence of a non-performance, the actual causes of such non-performance are irrelevant. There are only two exceptions to this principle:⁹

1. Original & Total Impossibility: Where performance of an obligation was objectively and totally impossible from the very beginning, i.e. already at the time of conclusion of the contract, the obligation itself is invalid *ab initio* based on Art. 20 CO and no performance is due. Where performance becomes impossible only after the conclusion of the contract, Art. 20 CO does not apply. Instead, where the event causing the impossibility to perform occurs after the conclusion of the contract and is beyond the scope of influence of the debtor, Art. 119(1) CO provides that the concerned obligation extinguishes, meaning that the debtor is released from the obligation to perform and must return what he/she

has already received (Art. 119(2) CO). Thus, Art. 119 CO deals with what is commonly referred to as '*Force Majeure*', even though Art. 119 CO does not provide a specific definition thereof and instead focuses on the result: the objective impossibility to perform due to external factors. It should be noted that Art. 119 CO is not mandatory law, and the parties may thus deviate for this rule in their contract by allocating specific risks to a party irrespective of the latter's influence on the realisation of this risk (Art. 119(3) CO)). Please refer to the commentary on Art. 119 CO for more details on the mechanism of subsequence impossibility under Swiss law. Where neither Art. 20 CO nor Art. 119 CO apply, an impossibility to perform will be dealt with as a case of non-performance under Art. 97 CO.

2. Clausula Rebus Sic Stantibus: Where the original situation and balance of interests underlying the contract has changed in an unforeseen way and to such an extent that a performance of a certain obligation has become unbearable for the debtor and the insistence on such performance by the creditor would create an abusive imbalance between the two performances, a debtor may be excused from his/her duty to perform. The requirements of the *Clausula Rebus* are more stringent than the doctrine of hardship under English law and require the debtor to first request a re-negotiation of the contract and, in case the creditor refuses, to enforce a contract modification before the courts. The *Clausula Rebus* does not give the debtor a direct right to refuse performance.¹⁰

- 11 Thus, where parties to a contract want to create exceptions to the duty to perform certain obligations in case of *Force Majeure* events or hardship, they must provide for relevant provisions in their contract and pay particular attention to the definition of such concepts and their consequences.¹¹
- 12 In summary, all types of breaches of any type of contractual duty, whether arising out of the contract or of the law, qualify as "non-performance" under Art. 97 CO irrespective of the reason for such non-performance. Carve-outs to such a broad definition of non-performance are possible but must be

8. BSK-Wiegand, Introd. Art. 97-109 CO N. 7 f.; BK-Emmenegger, Art. 97 CO N. 118 f.; Gauch/Schlupe/Emmenegger, N. 2627 ff.; BGer 4A_610/2017 dated 29.5.2018 consid. 5.2.1.

9. BK-Emmenegger, Art. 97 CO N. 50 ff.; 111 ff.; Huguenin, N. 825, 827 ff.; BGE 129 III 209 consid. 2.2; BGE 127 III 300 consid. 5b.

10. BSK-Wiegand, Art. 18 CO N. 99 ff.; BK-Emmenegger, Art. 97 CO N. 116; Gauch/Schlupe/Schmid, N. 1300; Huguenin, N. 320 ff.; BGer 2C_825/2013 dated 24.3.2014 consid. 6.1; BGE 138 V 366 consid. 5.1.

11. BSK-Wiegand, Art. 18 CO N. 10 ff.; BK-Emmenegger, Introd. Art. 97-109 CO N. 21; BK-Emmenegger, Art. 97 CO N. 10; Huguenin, N. 321; BGE 135 III 1 consid. 2.5; BGE 100 II 345 consid. 2b.

provided for by the parties in their contract and are subject to certain statutory limitations (see below Art. 100 CO).

B. A Damage

- 13 The definition of damage under Swiss law is very broad and encompasses any involuntary decrease of one party's assets, which may take the form of an actual reduction in the net worth of its assets or an increase in liabilities. This decrease in assets or increase in liabilities is measured as the difference between the status of assets and liabilities which would have existed without the breach compared to their status with the breach (so-called 'difference theory'; *Differenztheorie*).¹²
- 14 Thus, although the definition of damage is rather broad, it focuses on damages of a financial nature. Other types of harm which do not transcribe into a clear monetary value, such as moral prejudice, reputational damage or a loss of opportunity, generally do not qualify as damages under Swiss law and may thus not be compensated.¹³

According to the general rule on the burden of proof (Art. 8 Civil Code and Art. 42 CO), it is up to the party alleging a damage to prove (i) the existence of such damage, as well as (ii) its scope (i.e. quantification).¹⁴

- 15 In this regard, Swiss law shows the following particular features:
1. As a general rule, under Swiss law all types of damages are compensable, as long as they fall under the above definition of damage. In particular, Swiss law does not limit the compensable character of a damage based on its categorization as direct or indirect, or as consequential damage. These types of damages also fall under the general definition of damage, and their compensable character will depend on whether they show an adequate causal nexus to the breach in order to be compensable (see below Section 2.3).¹⁵
 2. The actual damage constitutes the ceiling of potential compensation. In other words, the amount of compensation due may not exceed the actual value of the damage incurred.¹⁶ In particular, Swiss law does not recognize the concept of 'punitive damages' as known in certain common law jurisdictions. Swiss law nevertheless allows the parties to provide for contractual 'penalty clauses' (*Vertragsstrafe / Clause pénale*), which aim at increasing the pressure for a party to perform by providing for a lump sum penalty in case of breach, thereby releasing the creditor from the burden to prove any damage at all.¹⁷ These clauses must however be provided for in advance of any damage and may be reduced by the judge in certain circumstances, so that their nature and purpose are quite distinct from the common law concept of 'punitive damages' (see Art. 163 CO).¹⁸

12. BSK-Wiegand, Art. 97 CO N. 38, 54 f.; Huguenin, N. 867; Gauch/Schluep/Emmenegger, N. 2848; BGE 144 III 155 consid. 2.2; BGer 4A_506/2011 dated 24.11.2011 consid. 4.

13. BK-Emmenegger, Art. 97 CO N. 187 ff., 217, 236 ff.; Gauch/Schluep/Emmenegger, N. 2850 ff.; BGE 123 IV 145 consid. 4b/bb; BGE 127 III 403 consid. 4a.

14. BSK-Wiegand, Art. 97 CO N. 60; BK-Emmenegger, Art. 97 CO N. 527 f.; Huguenin, N. 1850; Gauch/Schluep/Emmenegger, N. 2653; BGE 144 III 155 consid. 2.3.

15. BK-Emmenegger, Art. 97 CO N. 255; BGE 142 III 433 consid. 4.5; BGE 138 III 276 consid. 4; Moss, Swiss Law vs English Law on Contract Interpretation: Is Swiss law better suited to the realities of international construction contracts? In: International Construction Law Review, Part 4 October 2015 [2015] ICLR 470 (available here: <https://pdf4pro.com/download/swiss-law-vs-english-law-on-contract-50811a.html>).

16. BK-Emmenegger, Art. 97 CO N. 284, 343 f.; Huguenin, N. 1852.

17. BK-Emmenegger, Art. 97 CO N. 240, 476 f., 529; Gauch/Schluep/Emmenegger, N. 3788 ff.; BGE 135 III 433 consid. 3.1; BGE 122 III 420 consid. 2a.

18. BK-Emmenegger, Art. 97 CO N. 476 f.; Gauch/Schluep/Emmenegger, N. 3793 f., 3824; BGE 143 III 1 consid. 4.1; BGE 133 III 201 consid. 5.2.

Art. 97 CO also does not prevent parties from contractually limiting the type of damages or from setting an amount of damages lower than or different from the actual damage incurred (so-called 'agreed sums' or 'liquidated damages'). However, this constitutes a limitation of the standard liability regime established by Art. 97 CO and is thus subject to the restrictions provided in Art. 100 CO, which will be dealt with below.

3. The fact that the definition of damage is broad does not mean that a party can ask for all sorts of damages at the same time. Under Art. 97 CO, a general distinction is drawn between the so-called 'positive damage' or 'performance interest' (*positives Vertragsinteresse, Erfüllungsinteresse | dommage positif*) and the 'negative damage' or 'reliance interest' (*negatives Vertragsinteresse, Nichterfüllungsinteresse | dommage négatif*).¹⁹

- The **performance interest** represents the full value of the contract being properly performed. Here, the compensation aims at putting the creditor in the situation he/she would have been, had the contract been fully and properly performed. The damage is thus the difference between the status of the creditor's assets and liability in the breach scenario compared to what such status would have been had the contract been properly performed. This includes most importantly lost profit (*lucrum cessans*), but it may also comprise any costs which the creditor incurs due to the improper performance (*damnum emergens*), such as additional storage costs for goods, inspection costs, repair costs, destruction costs, costs of a product recall, penalties or damages due by the creditor to its own clients in relation to late deliveries, etc.²⁰
- The **reliance interest** represents the actual costs and losses arising out of the improperly performed contract. Here, the compensation aims at putting the creditor in the situation he/she would have been, had the contract never been concluded. The damage is thus the difference between the status of the creditor under the breach scenario compared to its status prior to the conclusion of the contract.²¹

Under Swiss law, it is not possible to claim both the performance and the reliance interest; the creditor may only claim one of these two types of damages. As long as the contract remains in place, the creditor may only request the performance interest. Where the creditor decides to terminate the contract, he may then only claim the reliance interest (Art. 107-109 CO).²² Thus, it is crucial for a creditor to carefully evaluate the *pros* and *cons* of a claim for performance interest vs a claim for reliance interest before exercising the specific remedies available under Art. 107 fol. CO.

C. A Causal Nexus

- ¹⁶ Whereas certain legal systems require a damage to be "foreseeable", or differentiate between direct and indirect or consequential damages, Swiss law refers to the concept of "causal nexus" (*Kausalzusammenhang | lien de causalité*). For a damage to be subject to a duty to compensate, the breach and the damage claims must be in a 'cause and effect' relationship, which is assessed from two separate angles:

19. BK-Emmenegger, Art. 97 CO N. 286; Huguenin, N. 872 ff.; BGE 144 III 155 consid. 2.2.

20. BSK-Wiegand, Art. 97 CO N. 38a; BK-Emmenegger, Art. 97 CO N. 288 f.; Gauch/Schluep/Emmenegger, N. 2898; BGer 4A_651/2015 dated 19.4.2016 consid. 4.1.

21. BK-Emmenegger, Art. 97 CO N. 291 f.; Gauch/Schluep/Emmenegger, N. 2899; Schwenzer/Fountoulakis, N. 14.31; BGer 4A_251/2010 dated 12.8.2010 consid. 2; BGE 113 II 25 consid. 2.

22. BK-Emmenegger, Art. 97 CO N. 293 f.; Huguenin, N. 874.

1. There must be a **natural** causal nexus (*natürlicher Kausalzusammenhang* | *lien de causalité naturelle*): the concerned behavior, which constitutes the breach of contract, must be the *conditio sine qua non* of the damage. In other words, without the breach, no damage would have occurred.²³

Example: A pharmaceutical company used an incorrect ingredient while manufacturing a medicine. As a result, patients got sick and the seller had to recall the medicine as well as indemnify its distributors and the patients. Had the manufacturer used the right ingredient, the patient would not have become sick and no recall or indemnification would have been necessary.

2. This natural causal nexus must also be **adequate** (*adäquater Kausalzusammenhang* | *lien de causalité adéquate*): This means that in addition to being the natural cause of the damage, "*the breaching behaviour must have been, according to the ordinary course of things and the experience of life, capable of bringing about an effect of the kind that has occurred, so that the likelihood of occurrence of this result would appear to have been generally increased by the breaching behaviour*".²⁴ Although conceived differently, the test of adequate causality under Swiss law is – in practice – not so different from the test of 'foreseeability' applied under CISG or other laws.²⁵

Example: According to common knowledge and experience, it was to be expected that the use of the wrong ingredient in the medicine would cause patients to get sick, and thus require a product recall.

Where the breaching behaviour consists of an omission, the test of causality must be adapted. The relevant question is then whether, according to the ordinary course of things and the experience of life, the damaging result could have been avoided had the concerned party acted out the required behavior (so-called '**hypothetical** causal nexus').²⁶

D. A Fault

- 17 In order to trigger a liability for damages under Art. 97 CO, a breach of contract alone is not enough. The breach must be the result of a faulty behavior by the debtor. However, Art. 97 CO establishes a presumption of fault. In other words, the creditor must only prove that a breach has occurred. This breach is then presumed to be the result of a faulty behavior and it is up to the debtor to show that no fault was attributable to him/her when committing the breach (so-called 'proof of exculpation', *Exkulpationsbeweis* | *Preuve exculpatoire*).²⁷
- 18 This is a major difference compared to the standard of liability for international sales contracts under the CISG, where fault is not a requirement of liability for breach of contract.²⁸
- 19 The concept of fault is then further addressed by Art. 99 CO.

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23. Huguenin, N. 119 f.; Schwenger/Fountoulakis, N. 19.01; BK-Emmenegger, Art. 97 CO N. 348 f.; BGE 133 III 462 consid. 4.4.2; BGE 129 V 177 consid. 3.1.

24. BGE 129 V 177 consid. 3.2, BGE 125 V 456 consid. 5a; BGE 123 V 98 consid. 3d.

25. Huguenin, N. 2838.

26. Huguenin, N. 122; Gauch/Schlupe/Emmenegger, N. 2950; BK-Emmenegger, Art. 97 CO N. 412 ff.; BGE 124 III 155 consid. 3b.

27. BSK-Wiegand, Art. 97 CO N. 42 f., 61; Schwenger/Fountoulakis, N. 22.30; Huguenin, N. 893; Gauch/Schlupe/Emmenegger, N. 2980; BGE 124 III 155 consid. 3b.

28. ~~Commentary on the Swiss Code of Obligations, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 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