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COMMENTARY ON

Art. 99 CO

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II. Scope of liability and compensation

1. In general

Art. 99

¹ The obligor is generally liable for any fault attributable to him.

² The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

³ In other respects, the provisions governing liability in tort apply *mutatis mutandis* to a breach of contract.

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I. CONTEXT & PURPOSE

- 1 Whereas Art. 97 CO established the standard of liability itself, Art. 99-101 CO concerns the scope of liability and of compensation for damages.
- 2 Art. 99 CO deals with the basic concept of fault, and how it impacts the scope of liability. As concerns other aspects, such as the determination of damage or the reduction of its compensation, Art. 99(3) CO contains a general reference to Art. 42-54 CO which apply in case of tort liability. In other words, the principles applicable to the determination of the damage and of the scope of compensation in tort liability (Art. 42-54 CO) apply by analogy to damage claims for breach of contract.
- 3 Art. 100 CO then deals with contractual limitation of liability and damages, and Art. 101 CO deals with liability for auxiliaries/delegates.

II. LIABILITY FOR FAULT (ART. 99(1) CO)

- 4 Art. 99(1) CO states that "**any** fault" is sufficient to trigger liability for breach of contract,¹ without however defining the concept of fault. In fact, there is no definition of 'fault' in the Code of Obligations, but it has been defined by case law as follows: The deviation from average human behaviour ("objective side") by a person capable of judgement and responsibility ("subjective side")². The concept of fault includes both willful conduct and negligence (whether light or gross).
- 5 Thus, Art. 99(1) CO establishes the principle that a debtor committing a breach of contract will be held liable irrespective of the degree of his/her fault, whether severe or light. Although the degree of fault is thus irrelevant when establishing liability as such, it will nevertheless play a role when determining the scope of compensation. Further, the Code of Obligations provides certain exceptions to the general liability for fault, where the degree of fault is also relevant (see e.g. Art. 248, 420(2), 454 CO). Therefore, it is still useful to distinguish between the three typical types of faults known under Swiss contract and tort law:³
 1. **Willful conduct** (*Vorsatz* | *Intention*): Willful conduct is given where a party intentionally commits the breach, or where it consciously accepts the possibility of such breach happening and does not care (*dolus eventualis*).
 2. **Gross negligence** (*grobe Fahrlässigkeit* | *négligence grave*): Gross negligence is given where the breaching party, without wanting the breach or accepting its likelihood, disregarded the most elementary standard of diligence.
 3. **Light negligence** (*leichte Fahrlässigkeit* | *négligence légère*): In doctrine and case law, light negligence is usually described as a minor deviation from the standard of care that may be expected by an average person in a comparable situation.
- 6 When determining the existence of a fault, courts will apply an objective assessment and rely on how an average third person would generally have behaved in similar circumstances. Thus, at that stage, individual characteristics, background or skills of the specific debtor are irrelevant, although civil capacity is a prerequisite. However, when determining the relevant standard of care applicable, the specific skills and standards of trades and professions of the debtor at stake must be considered.⁴

1. BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 4; BK-Emmenegger, Art. 99 CO N. 122; Schwenzer/Fountoulakis, N. 22.23; BGer 9C_109/2016 dated 29.6.2016 consid. 2.3.
 2. Camald/Schubert/Löwy/Högenmühl, 2963; BK-Emmenegger, Art. 99 CO N. 46 ff.; BGE 116 Ia 162 consid. 2c; BGE 115 II 62
 3. Koller, N. 48.48 f., 48.52 f.; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 5 f.; BGE 132 III 523 consid. 4.6; BGE 117 II 563 consid. 3.

- 7 Example: An ENT doctor operated on a patient. This operation resulted in a lesion of the facial nerve and the opening of the lateral semicircular canal, which led to permanent hearing loss and dizziness even after revision surgery. In this case, the Federal Supreme Court had to examine whether the doctor could be considered as having exercised the necessary care in relation to his skills as an ENT doctor compared to what a third party doctor possessing similar specialised knowledge and skills would have done.⁵

III. THE SCOPE OF LIABILITY (ART. 99(2) AND (3) CO)

- 8 The purpose of Art. 99(2) CO is not very clear when reading its wording. It refers to the 'nature of the specific transaction' and to the extent the debtor was 'to gain' from such transaction. It is generally admitted that this provision aims at introducing a ground to reduce the scope of liability where the debtor did not really benefit from the transaction. The lower the gain for the debtor, the more lenient the judge may be in determining the scope of liability. Example: Where a donor offering a good for free fails to properly package such good, which then breaks during transport to the beneficiary.
- 9 Otherwise, Art. 99(3) CO simply refers to the provisions applicable in case of tort liability without however directly specifying these provisions. They are Art. 42-54 CO except for Art. 52 CO,⁶ some of which are however more relevant than others in the context of contractual liability.
- 10 We will give a brief overview of the purpose and scope of these provisions and otherwise refer to the commentary of such provisions themselves:

1. **Art. 42 CO** deals with the burden of proof with regard to the damage.⁷ Art. 42(1) CO states that it is the burden of the damaged party to prove its damage. This is a mere application of the general principle of burden of proof set out in Art. 8 CC. The proof of the damage refers to both its existence and its scope (quantification). Art. 42(2) CO then introduces an exception as concerns the scope of the damage, providing that "*where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage*". In other words, Art. 42(2) CO seems to state that where a damage cannot be quantified by the debtor him/herself, the court may assess and determine such damage directly. Unfortunately, this provision is very seldom applied in practice, the main reason being that the standard for establishing the unquantifiable nature of the damage is very high.⁸

2. **Art. 43 CO** sets out the general principle that the scope of compensation to be awarded should be assessed based on the specific circumstance and the degree of culpability, i.e. of fault.⁹ This, however, does not mean that a damage caused by light negligence will automatically lead to a reduction of the scope of compensation (see however Art. 44(2) CO). Instead, the underlying rationale of this provision is that the judge may reduce compensation where the damage is disproportionate to the degree of fault involved.¹⁰ Equally, the judge may not increase the compensation beyond the amount of actual damage, even in case of very severe wilful behaviour (see above Art. 97 CO). By law the maximum

4. Gauch/Schluep/Emmenegger, N. 2984 ff.; BK-Emmenegger, Art. 99 CO N. 72 ff.; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 8 f.; BGE 139 III 24 consid. 3.2; BGE 137 III 539 consid. 5.2.

5. BGer 4A_499/2011 dated 20.3.2012.

6. Brunner, Die Anwendung deliktsrechtlicher Regeln auf die Vertragshaftung, N. 116; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 15 ff.; BK-Emmenegger, Art. 99 CO N. 187 ff.

7. Huguenin, N. 1850; BK-Emmenegger, Art. 99 CO N. 208; BGer 4A_399/2012 dated 3.12.2012 consid. 2.1.3.

8. BGE 134 III 306 consid. 4.3 f.; BGer 4A_154/2009 dated 8.9.2009 consid. 6; BGer 4C.55/2006 dated 12.5.2006 consid. 6; BSK-Kessler, Art. 42 CO N. 10b.

9. Huguenin, N. 1886 f.; BSK-Kessler, Art. 43 CO N. 1; BGE 127 III 453 consid. 8c.

10. Huguenin, N. 1888 ff.; BK-Emmenegger, Art. 99 CO N. 217 ff., BGE 127 III 446 consid. 4b; BGE 104 II 184 consid. 3a.

compensation is always the actual damage, except where the parties have contractually provided for a penalty clause (see Art. 163 CO) or fixed liquidated damages (see below Art. 100 CO).

3. **Art. 44 CO** then provides for two specific grounds for reduction of compensation: (i) in case of contributory fault or consent, i.e. where the harmed party has either by fault or by consent contributed to causing the damage, and (ii) in case of light negligence, provided a full compensation would put the debtor in a situation of financial hardship.¹¹

4. **Art. 45 to Art. 49 CO** then deal with damages for homicide, personal injury and infringement of personality rights. These provisions have limited practical relevance in the context of contractual liability¹² and we therefore refer to the commentary on Art. 45-49 CO for further details.

5. **Art. 50 and Art. 51 CO** deal with the situation where several debtors have jointly caused the damage, either by tort and/or by contract breach. The principle is that these debtors are jointly and severally liable towards the creditor (see Art. 143(2) CO), and that – among themselves – the debtor liable by tort or by willful breach of law has to provide compensation first, followed by the debtors having contributed to the damage through a breach of contract or by an unfaulty breach of the law. There are some limited exceptions to this principle handled very cautiously by the Federal Supreme Court.¹³

6. **Art. 53 and Art. 54 CO** deal with the issue of lacking capacity to judge (*Urteilsfähigkeit* | *imputabilité*). First, Art. 53 CO establishes that the concept of capacity to judge in civil law is independent from the same concept in criminal law. Then Art. 54 CO establishes an exception to the principle of liability for fault. As mentioned above, liability requires fault and fault presupposes civil capacity. Capacity to judge is one aspect of civil capacity. Thus, someone lacking the capacity to judge is in principle not subject to civil liability. Art. 54 CO establishes an exception to such principle by allowing the judge to order partial or total compensation where equity so commands. These provisions have very little practical relevance in the context of contractual liability, and we therefore refer to the commentary of these provisions for further details.

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11. Huguenin, N. 1889 f., 1895 f.; Schwenger/Fountoulakis, N. 16.14, 16.25; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 19; BGE 112 II 347 consid. 3b; BGE 4C.103/2005 dated 1.6.2005 consid. 6.

12. BGE 137 III 303 consid. 2.2.2; BGE 116 II 519 consid. 2c.

13. Huguenin, N. 2014 ff.; BSK-Graber, Art. 51 CO N. 11 ff.; BGE 115 II 42 consid. 1; BGE 144 III 319 consid. 5.2 f.

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