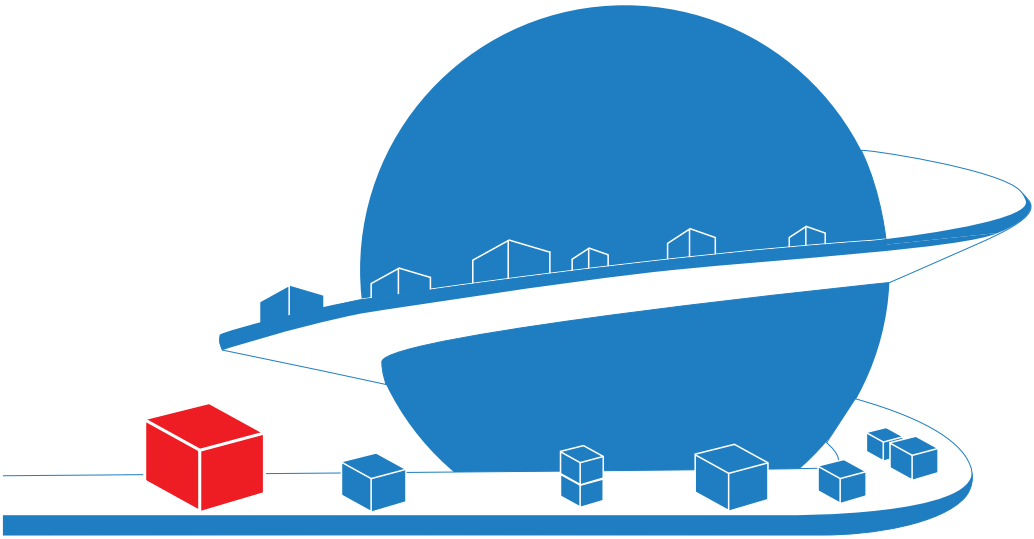
Schriftenreihe zum Logistik- und Transportrecht 11
Herausgegeben von Andreas Furrer und Juana Vasella

Andreas Furrer
(Editor)

Transportation Law on the Move

Challenges in the Modern Logistics World



KOLT KOMPETENZSTELLE FÜR LOGISTIK- UND TRANSPORTRECHT

Stämpfli Verlag

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Bibliographic information published by the German National Library
The German National Library lists this publication in the German National Bibliography; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de.

Print ISBN 978-3-7272-1610-7

In our online bookshop www.staempflishop.com
the following edition is available:

E-Book ISBN 978-3-7272-1611-4

printed in
switzerland

Insights for Switzerland

Second View from a practical perspective

STEPHAN ERBE

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I. Introduction

Talking about an insight on practical aspects is on the one hand a rewarding task, since I do not have to go into dogmatic depths of a topic. On the other hand the task is painstaking since in practice every case is different and therefore also the issues that arise are widespread. 1

Since I cannot give you an overview over all problematic areas I have chosen some aspects which reappear with a certain stubbornness. All these areas are from the field of transport of goods and I will not cover the field of passenger transports. However, due to the nature of the topic, my choice of issues covered, is to a certain extent arbitrary. 2

II. Problematic Areas of Swiss Transport Law in Practice

Before I delve into some problematic areas, I would like to mention two points which I do *not* consider problematic: 3

If one looks for articles about the particularities of Swiss transport law, one of the first points mentioned is always that the contract of carriage in Swiss law is a subspecies of the mandate and not of the contract for work and labour. 4

This results from the systematic position of the rules on the contract of carriage in the Swiss Code of Obligations (SCO) and also directly from the wording of Art. 440 para. 2 SCO.

5 This classification of the freight contract as a subtype of the mandate does indeed have various legal consequences (e.g. right of termination at any time according to Art. 404 SCO or the special rules on accountability), but it seems to be more of a dogmatically interesting question. In practice, however, to the best of my knowledge, this classification has no major significance.[1] Due to the lack of practical relevance, I will therefore not further indulge in this aspect.

6 The second aspect which is often mentioned is the fragementation of the Swiss rules on transport law. Here it is my opinion that a lawyer must be capable of finding the right set of rules, even if the specific rules are widespread. I therefore do *not* consider this a noteworthy complication. Furthermore, it has to be said in this context that Switzerland applies, when it comes to international treaties, the monistic system. This means that international treaties, as far as they can be considered as self-executing, are directly applicable, i.e. withouth an introductory law transferring them to national law.[2] Hence, most international treaties are directly applicable and therefore they apply in their purest form.[3]

7 So enough said about the areas that I do *not* consider as relevant in practice and on which I will not elaborate.

8 I have though identified some areas which do pose issues in practice. Some are strictly of a transport law nature, while others are of a more procedural nature but regularly pose problems in transport law matters.

A. Multimodal Transports

9 Let me start with the issue of multimodal transports.

10 One question that remains unresolved under Swiss law is the classification of multimodal transports. It is highly important for a Swiss litigator who is involved in compensation proceedings in the wake of a transport damage to

1 A possible practical implication is mentioned by FURRER, TranspR, p. 258 and SUTTER, p. 325 et seq.

2 HANGARTNER, St. Gallen Commentary SC, Art. 5 n. 41; HÄFELIN/HALLER, p. 561.

3 This effect is even enhanced by the fact that the national regulations on railway and air transport simply refer to the respective international treaties or provide for a liability system very similar to the one known from the international treaties; cf. Art. 21 Güterbeförderungsgesetz and Art. 9 et seq. Lufttransportverordnung.

know whether his client must expect to assume liability in accordance with the relevant international treaties or whether a liability under the Swiss Code of Obligations (SCO) could apply. The following example shall illustrate this:

Shipper X mandates carrier F to transport a Ferarri GTO 250 from the Zürcher Oberland to England for a car show. The value of the 1.5 tonne vehicle amounts to CHF 25 million. Carrier F decides to have the Ferrari packed in a special container, which is collected by truck and transported to the Rhine port in Basel. There it is loaded onto a barge. From Rotterdam, the goods are then transported by ship to England, where they are again delivered by truck. When opening the container, the consignee discoveres that salt water has apparently got into the container. The vehicle, including the engine, is damaged by moisture, mold and corrosion. The loss in value amounts to approximately CHF 10 million. 11

If the liability were assessed according to the HVR (or more accurately, the Swiss Shipping Act) or the CMNI, the liability would be limited to 2 SDR per kg, so that the liability limit would be 3000 SDR, which is slightly more than CHF 4,000 (Art. 105 SSG; Art. 20 CMNI). If liability were to be based on the rules of the CMR, the standard liability would be slightly higher and the limit would be approximately CHF 17,000 (Art. 23 CMR). If, on the other hand, liability were assessed under Swiss transport law, liability would also be limited, but the limitation of liability of Art. 448 SCO in conjunction with Art. 447 SCO would apply. Those articles provide for a liability limitation at the full value of the transported goods, i.e. CHF 25 million. Under the rules of the SCO, the entire damage of CHF 10 million would thus be covered. 12

From a practical point of view it is rather crucial whether your client is facing a liability of CHF 17,000 or a liability of CHF 10 million. But this is not only crucial with regard to the claim itself. Especially under the unfortunately rather expensive Swiss judicial system, costs related to the proceedings also have to be taken into account. Please also let me illustrate this with an example: In the canton of Basel-Stadt, for example, the court fee for a sum in dispute of CHF 17,000 amounts to approximately CHF 1,300, while the court fees for a sum in dispute of CHF 10 million amount to 1% to 3% of the claim, i.e. to an amount between CHF 100,000 – CHF 300,000.[4] In addition, the compensation of the parties has to be considered. The respective basic fees (without any surcharges) are approximately CHF 2,000 for the lower amount, but would amount to CHF 100,000 – CHF 300,000 if an amount of CHF 10 million is claimed.[5] If you include surcharges, then the difference in 13

4 Verordnung über die Gerichtsgebühren, SG 154.800.

5 Honorarordnung für die Anwältinnen und Anwälte des Kantons Basel-Stadt, SG 291.400.

procedural costs is somewhere between 0.5 million and 1 million Swiss Francs. It therefore really is essential to know your liablity regime.

14 So what is the situation with multimodal transport under Swiss law?[6] The starting point is that multimodal transports are generally not covered by the relevant treaties.[7] If no international treaty is applicable, then necessarily a national law applies. That national law will be Swiss law, if the transport is purely national. If the transport has relevant international connecting factors, the Swiss judge will determine the applicable law on the basis of the Swiss Act on International Private Law[8] (PILA) and will thus apply Swiss law if the parties have made a corresponding choice of law or if the carrier has his place of business in Switzerland (Art. 117 PILA). If a judge comes to the conclusion that Swiss law is applicable, he will face the situation that Swiss law, unlike, for example, German law (cf. § 452 et seq. of the German Commercial Code), does not contain any special provision which would allow a judge to apply the international treaties to specific legs of a transport. As a consequence, the general Swiss law on contracts of carriage as provided for in the Swiss Code of Obligations would be applicable if Swiss law applies to multimodal transports.[9] Although this legal consequence seems to be dogmatically correct, it cannot be overlooked that it leads to the somewhat peculiar situation that Switzerland has concluded international treaties on land, sea, inland waterway, rail and air transport, but that these rules do not apply if, and merely because, two or more of these types of transport are combined. This awkward situation has probably contributed to the fact that scholars have been looking for ways to allow the application of the international conventions on multimodal transports.

15 For example, Art. 456 SCO has been invoked to achieve this goal (at least if it is known where the damage occurred).[10] This has, however, raised the concerns that Art. 456 SCO leaves to many questions unanswered. For instance, Art. 456 SCO does not provide a solution if the place of damage is not known. Furthermore, para. 3 of Art. 456 SCO makes an exception for road hauliers («Cammionneure») and the meaning of that exception remains rather unclear. Finally, and despite a Federal Supreme Court Decision[11] and a deci-

6 Cf. ERBE/SCHLIENGER, TranspR, p. 421 et seq.

7 Exceptions such as the piggyback transport regulated in Art. 2 CMR or the rules on mixed transport in Art. 38 MC confirm the rule.

8 SR 291.

9 HOCHSTRASSER, Beförderungsvertrag, p. 563 et seq.; ERBE/SCHLIENGER, TranspR, p 427; UHLMANN/HINDERLING, p. 94; FURRER, Logistikvertrag, p. 38 et seq.; FURRER/VASELLA, Transportkollisionsrecht, p. 122 et seq.

10 BENZ, KuKo SCO, Art. 456 n. 11; BENZ, TranspR, p. 138.

11 BGE 48 II 278.

sion by the Swiss Federal Administrative Court[12] on this topic, the meaning of the term «öffentliche Transportanstalt» (public transport institution) is still not utterly clear. It therefore has to be concluded, that uncertainties remain.[13] Another method would be to assume that mere ancillary deliveries and ancillyary pick-up services are consumed by the main leg. But again, this approach would neither eliminate the uncertainties, since it would then have to be determined under which condition a delivery or a pick-up service could be considered as ancillary and when it becomes an own, separate leg of the transport.[14]

16 As interesting as these various approaches may be, it cannot be overlooked that the Federal Supreme Court has so far made no effort to pick up this thread in its unfortunately very scarce decisions on transport law. On the contrary, in its judgment 4A.218/2008 of 19 February 2009, the Federal Supreme Court was struggling with the qualification of a contract on carriage and stated the following: «qualora si sia invece trattato di un «trasporto multimodale», la CMR non potrebbe essere applicate», which can be translated as follows: «if it were to be a ‹multimodal transport›, the CMR would not be applicable.» Even though the Federal Supreme Court did not make any statements on the scholarly theories of Art. 456 SCO or on the possibility of absorbing ancillary transports into the main leg, this still is a very clear statement that the application of the CMR is excluded for multimodal transports.

17 Thus, from the point of view of the practitioner, a considerable degree of uncertainty remains. For the time being, it has to be assumed that multimodal contracts are subject to the transport law of the Swiss Code of Obligations. However, it would be desirable for the Swiss Federal Supreme Court to clarify whether Art. 456 SCO would actually be a gateway for the introduction of a network principle and whether – and under what conditions – mere ancillary deliveries and pick-ups could be considered as being a part of the main leg.

B. Modern Technologies

18 I must admit that firstly, I am not an expert on Blockchain or Distributed-Ledger-Technologies in general and secondly, I have so far not been involved in any transport litigation in which Distributed-Ledger-Technologies were an issue.

19 However, it cannot be overseen that the logistics industry is highly susceptible to standardisation and therefore to involvement of automized processes.

12 Decision of the Swiss Federal Administrative Court A-2149/2015.

13 Hochstrasser, Beförderungsvertrag, Nr. 1488.

14 See e.g. the MAFI-Trailer discussion in Germany: RABE, TranspR, p. 349.

Various players in this field are working either on smart contract-projects or at least on platforms relying on standardisation and automatistion or have even already gone live with respective projects.[15] It is therefore only a matter of time, until these technologies and the questions arising from them will find their way into Swiss court rooms.

20 How is Swiss law ready for these challenges? Regarding the legal framework for electronic transport documents, it can firstly be stated that Switzerland has signed and ratified the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note of February 20, 2008.[16] However, the effect of that protocol is mitigated with only rather few of the member states of the CMR having actually ratified that Protocol. In international railway and air transports the use of electronic waybills is provided for and widely accepted, as is the case in international inland waterway transports.[17] Under Swiss national law, the consignment note as provided for in the Swiss Code of Obligations is not subject to specific formalities, so according to the generally applicable rules, an electronic consignement note should be possible. This even applies, if the transport document shall serve as a negotiable instrument, since Swiss law does not require negotiable instruments to be on paper or in a physically tangible form.[18] Finally, Switzerland has adopted a Federal Law on Electronic Signatures, which enables such electronic documents to be validly signed and therefore transmitted.[19] This leads me to the conclusion that in practice – generally speaking – electronic transport documents are manageable under Swiss law.[20] Obviously, the legal framework is only one side of the coin, while the technical framework is the other side. The future will show, whether or not and in which way the technical framework (accessibility, storage, transferability, possibility of reproduction and authentification) will develop, so that a widespread use of electronic transport documents will prevail in practice.

21 Another topic which will without any doubt lead to disputes in practice is the the topic of smart contracts. This publication is not the adequate place to

15 Cf. e.g. the Maersk/IBM TradeLens-system as an example of a smart contract platform (https://www.maersk.com/en/news/2018/06/29/maersk-and-ibm-introduce-tradelens-blockchain-shipping-solution (accessed 26 June 2019)) or <www.efreight.com> (accessed 26 June 2019) as an example of use of electronic transport documents.

16 SR 0.741.611.2.

17 § 6 CIM; Art. 4 MC; Art. 1 and 11 CMNI.

18 FURRER, Schweizerisches Fracht-, Speditions- und Lagerrecht, p. 65 et seq.; WEBER, Smart Contracts, p. 299.

19 Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate, SR 943.03.

20 For further details, see FURRER, elektronische Warenpapiere, p. 333 et seq.

comprehensively deal with the matter. However, our contract law is based on the assumption that only human actions and human manifestations of intentions can have legal consequences.[21] This basic assumption poses challenges when it comes to smart contracts and it is even said that we are facing an artificial dogmatic ban on modern technologies without recognisable benefits.[22] With smart contracts, software assesses whether certain conditions are met and whether certain actions shall be initiated based on that assessment. Decisions are taken and actions are initiated without a human decision or declaration being involved.[23] If, and to what extent, such automatically generated decisions and actions can be attributed to a physical person is a question, wich is not explicitly addressed by Swiss law. Until the legislator makes the necessary but fundamental changes to our legal system, courts will have to decide, how actions initiated by smart contracts as «will and knowledge generation machines»[24] can be attributed to human beings or legal entities, but taking into account the developments which are to be expected, it would be more than appropriate if these matters were dealt with by our legal system.

Until then, court law will lead the way, just as the Commercial Court of the Canton of Zurich has recently done: The court explicitly stated that declarations which are automatically generated by a computer are binding upon a party.[25] 22

C. Gini/Durlemann

Another problematic area for transport law practitioners in Switzerland is the infamous Gini/Durlemann-practice, although there is now reason to believe that this problem may soon be overcome. What is the issue? 23

Due to the ominous Gini/Durlemann practice applied by the Federal Supreme Court for more than 60 years[26], an insurer could only take recourse to the party liable under a contract if the latter acted intentionally or with gross negligence. However, in the case of simple fault, i.e. a merely negligent breach of contract, the insurer was barred from recourse. 24

The Federal Supreme Court based this decision on the following grounds: 25

21 FURRER, Smart Contracts, p. 103 et seq., 106.
22 FURRER, Smart Contracts, p. 103 et seq.
23 WEBER, Smart Contracts, p. 299.
24 FURRER, Smart Contracts, p. 103 et seq.
25 Decision of the Commercial Court of the Canton of Zurich of 16 December 2016, in: ZR 116/2017, p. 132.
26 BGE 80 II 247.

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 SCO. 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 SCO describes the internal rules of recourse between different parties who are liable for the same damage. Art. 51 SCO 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 subject to a strict liability.

26 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 pay compensation for a third-party damage. However, if an 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 SCO mentioned above. At that 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.

27 Today, in almost every transport damage case transport insurers are involved in one or the other way. From a practitioner's point of view this means unfortunately Gini/Durlemann may be an issue and that therefore gross negligence may have to be established. Since the threshold for this is rather high and since numerous questions of evidence can also arise, many insurers have waived recourse in Switzerland from the outset.

28 The Gini/Durlemann practice has been heavily criticized by the scholars for decades and in recent years there were first hints to be found in the Federal Supreme Court's jurisdiction that Gini/Durlemann may be reconsidered.[27] And indeed, in a very recent decision,[28] the Federal Supreme Court has al-

[27] BGE 132 III 626; BGE 137 III 352.

[28] Decision of the Swiss Federal Supreme Court 4A.602/2017 of 7 Mai 2018.

lowed an insurer to take recourse against a party liable under a strict liability. However, the Federal Supreme Court did not rule on whether this softening of the Gini/Durlemann practice also applies to parties liable under a contractual liability. Since the Federal Supreme Court reasoned with the planned new Art. 95c of the Swiss Insurance Act it may well be assumed that Gini/Durlemann would also be abolished if recourse is sought against a contractually liable party.

However, the current decision did not refer to recourses on contractually liable parties[29] and an uncertainty for any litigator therefore remains. Given the importance of settlements by insurance companies and therefore the need for a clear recourse regime, this uncertainty is actually unbearable. 29

D. Survey Reports

Every transport law practitioner knows that hardly any transport law litigation takes place without a prior Survey Report. Survey Reports are often even at the core of the claimant's (or depending on its content, the defendant's) position. Unfortunately, a recent CMR-decision by the Swiss Federal Supreme Court has seriously jeopardized the meaning of Survey Reports in Swiss court proceedings.[30] What was the issue? 30

The Swiss Code on Civil Procedure (CPC) provides for a numerus clausus of admissible means of evidence. Assertions of a party are not listed among those means of evidence. The Decision of the Swiss Federal Supreme Court insinuates that Survey Reports, at least if prepared by one party alone, could be considered as mere assertion of a party and thus rendering them useless in court. 31

The meaning of that judgment cannot be fully grasped yet, since it can be taken from the lower-court judgment that the defendant had argued that he had not been given the opportunity to inspect the goods and that he had never agreed to the surveyor's appraisal. The Survey Report was therefore not based on a contradictorial survey. Whether the court would have come to a different conclusion if it had been a contradictory survey must therefore remain open. Due to these circumstances, the question remains unanswered as to what legal and procedural effect a Survey Report would have if both parties would have been involved in one form or another in the preparation of the report. 32

29 HOCHSTRASSER/HEMPEL, p. 18 et seq.; CASANOVA, p. 331 et seq.

30 Decision of the Swiss Federal Supreme Court 4A_261/2017 of 30 October 2017.

33 I agree with the Federal Supreme Court, that a private expert opinion that was not commissioned by a court is not an expert opinion within the meaning of Art. 168 CPC. It is also undisputed that Art. 168 CPC does contain a numerus clausus of admissible means of evidence and party's assertions do not figure among this catalogue of admissible means of evidence. However, «documents» («Urkunden») are mentioned in the catalogue and it would therefore be thinkable to simply file such Survey Reports as «documents». This approach is highly controversial, and the Federal Supreme Court has so far rejected this by stating that private expert opinions cannot qualify as «documents»[31] within the meaning of the CPC. At least, the Federal Supreme Court has conceded that party's assertions supported by Survey Reports are generally regarded as particularly substantiated.

34 In my opinion, the classification of Survey Reports as a «mere party assertion» does not do justice to reality and the Federal Supreme Court would have enough possibilities to adequately consider Survey Reports. For a starter, private expert opinions remain subject to the principle of free assessment of evidence, which would give a court a certain possibility to consider private expert opinions in their decision-making. Furthermore the Federal Supreme Court has left a door open by not stating how it would consider contradictory surveys, i.e. if the parties carry out the survey jointly or if the other party is at least invited.

35 Furthermore, a court should take into due consideration when assessing the evidence, if one party refuses to cooperate without good reason in establishing the extent of damages occurred. If a party is invited to examine the damage but refuses to participate, this should be taken into account.

36 However, for the time being it has to be concluded that Swiss law does not deal with Survey Reports and therefore with an indispensable part of every transport litigation, leaving practitioners in an uncomfortable situation.

E. Place of Jurisdiction in CMR Cases

37 According to Art. 31 CMR, there is, inter alia, a place of jurisdiction in the state in which the goods are loaded. This provision only determines the international jurisdiction, but does not fix any local place of jurisdiction. The specific place of jurisdiction has to be determined by national law.

38 Unfortunately, the Swiss legislator seems to have overlooked the fact that a national legislation would have been necessary. Before 2011 the Swiss Act on International Private Law (PILA) did not provide for a corresponding place of

[31] BGE 141 III 433.

jurisdiction at the loading location. In a decision issued in 2011, the Commercial Court of the Canton of Aargau assumed that there was a gap in the law and assumed jurisdiction, thereby by filling that gap.[32] The court confirmed that a place of jurisdiction exists at the place were the goods are loaded, but added the unfortunate wording, «at least this applies, if the defendant does not have a domicile in Switzerland», without further elaborating the meaning of this sentence.

39 In practice, such uncertainties are highly undesirable, as disputes over preliminary issues such as jurisdiction can have a significant effect on the costs of legal proceedings.

40 In 2011, this gap was allegedly closed by a revision of Art. 113 PILA. The revised Art. 113 PILA provides for place of jurisdiction at the place of «performance of the contract». Unfortunately, it turned out to be wishful thinking that this revision fully remedies the problem, as a dispute has now arisen among scholars as to where the place of performance of an international contract of carriage lies. Part of the doctrine seems to be of the opinion that the term «place of performance» of the contract must be construed in accordance with Art. 74 SCO and that in a contract of carriage only the place of delivery, but not the place of loading, is a place of performance.[33] This would mean that in the case of international contracts of carriage there would still be no jurisdiction in Switzerland at the loading place in Switzerland if the place of delivery is abroad. It is obvious that this again creates tensions with Art. 31 CMR which provides for a jurisdiction in Switzerland in such a situation. In my opinion, therefore, the other doctrine is correct, which wants to construe Art. 113 PILA autonomously. Those scholars point out that Art. 113 PILA was revised together with Art. 5 Lugano Convention and that tose two rules must be construed in the same way.[34] Under Art. 5 Lugano Convention/Art. 5 Brussels I-Convention, the European Court of Justice has unambiguously made clear that any international contract of carriage has two places of performance, one at the place of loading and one at the place of delivery.[35] If the place of performance of the contract in Art. 113 PILA were to be understood in the same way as the place of performance of the contract in Art. 5 Lugano

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32 Decision of the Commercial Court of the Canton of Aargau HR.2010.47 of 7 June 2011.

33 AMSTUTZ/WANG/GOHARI, Basel Commentary PILA, Art. 113 n. 13; KREN KOSTKIEWICZ, PILA, Nr. 2098 et seq.

34 MÖCKLIN-DOSS/SCHNYDER, CHK-PILA, Art. 113 n. 10a; BOPP/GROLIMUND/BACHOFNER, p. 8.

35 ECJ Judgment of 9 July 2009, C-204/08, 2009 I-06073; ECJ Judgment of 11 July 2018, C-88/17; GEIMER/SCHÜTZE, Art. 5 n. 91; MANKOWSKI, TranspR 2008, p. 67 et seq.; MANKOWSKI, TranspR 2018, p. 221 et seq.

Convention, then there must be a place of jurisdiction at the loading place in Switzerland.[36]

41 This legal issue is currently pending in a case before the Supreme Court of the Canton of Solothurn and a decision is expected shortly. It is possible that this decision will bring a little more clarity, but unfortunately for the time being we have to take note that jurisdiction in CMR cases remains unclear.

III. Conclusions

42 Let me conclude this short overview over some practical issues in Swiss transport law by coming back to the topic of this panel: Does Switzerland need a new transport law?

43 The above examples have shown that although some questions are controversially discussed, they have little practical impact. This applies to the classification of the contract of carriage under the law on mandates and to the fragmentation of transport law regulations. No revision is needed to amend issues with little practical impact. Other issues do indeed pose challenges to practitioners in transport law disputes, but these challenges are not of a transport law nature, but rather of a general nature or are a matter of procedural law. This applies to the Gini/Durlemann issue or to the evidentiary problems regarding survey reports. For these topics, a revision of transport law (in the strict sense), would not solve the problems since the root of the problems do not lie in transport law.

44 Other issues, such as the abovementioned jurisdiction issue or the problem of multimodal transports, are indeed of a transport law nature, but I am of the opinion that these are rather individual, specific questions. The legislator could remedy this, but individual, specific issues can just as easily be resolved by judicial clarification. An intervention by the legislator can therefore at least not be seen as urgent. In my personal opinion it is even to be considered a strength of the Swiss legal system that legal acts are traditionnally short and to the point, leaving sufficient room for parties to model their legal relationships. Over-regulation could therefore even be considered as counterproductive.

45 The only area which is indeed of a more fundamental nature and raises systematic problems is the mentioned area of modern technologies in the logistic industry. The questions that arise reach so deep into the core of our legal system that legislative adjustments seem inevitable. However, practice will

[36] Hochstrasser, Beförderungsvertrag, Nr. 1564.

still have to show which amdendments are actually needed and would be of use to the transport industry.

I therefore come to the conclusion that – from the point of view of the practitioner – no fundamental revisions are necessary, under the condition that case law deals with the questions that arise. The exception to this conclusion is that legislative changes will be necessary in order to cope with the challenges that modern technologies present. 46