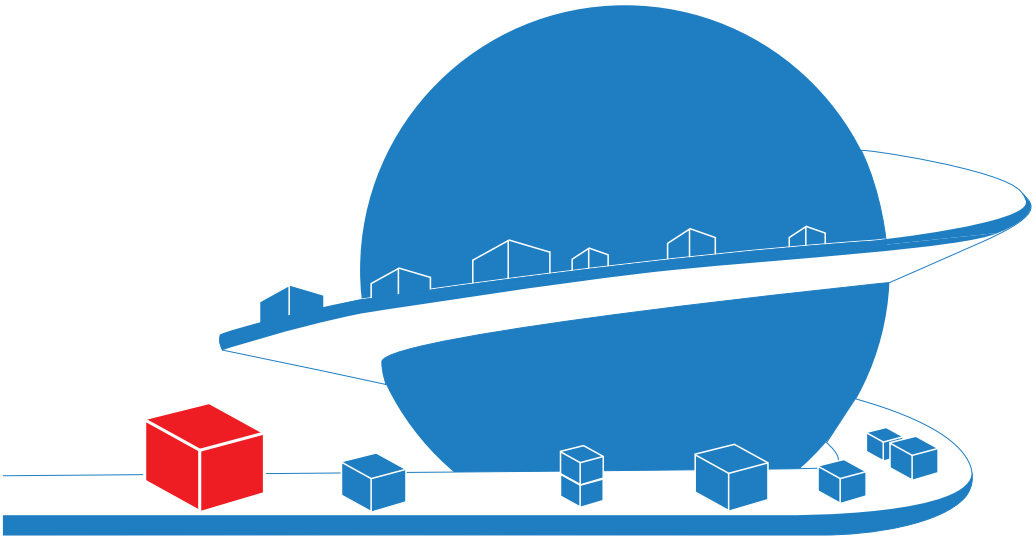
Schriftenreihe zum Logistik- und Transportrecht 11
Herausgegeben von Andreas Furrer und Juana Vasella

Andreas Furrer
(Editor)

Transportation Law on the Move

Challenges in the Modern Logistics World



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The inclusion of subcontractors in the national and international transport

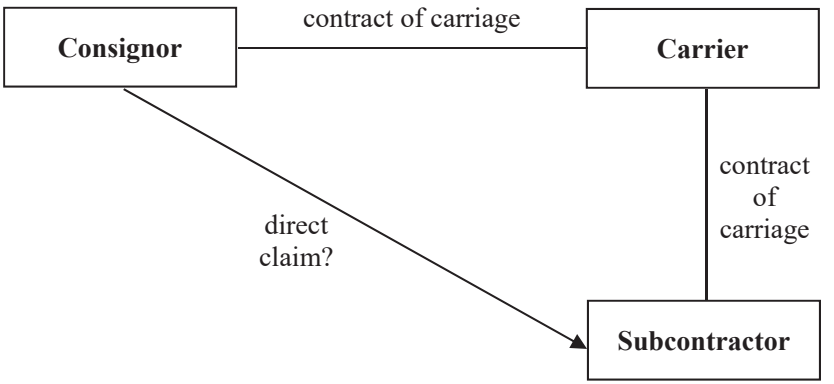
MICHAEL HOCHSTRASSER

Contents

I. Introduction

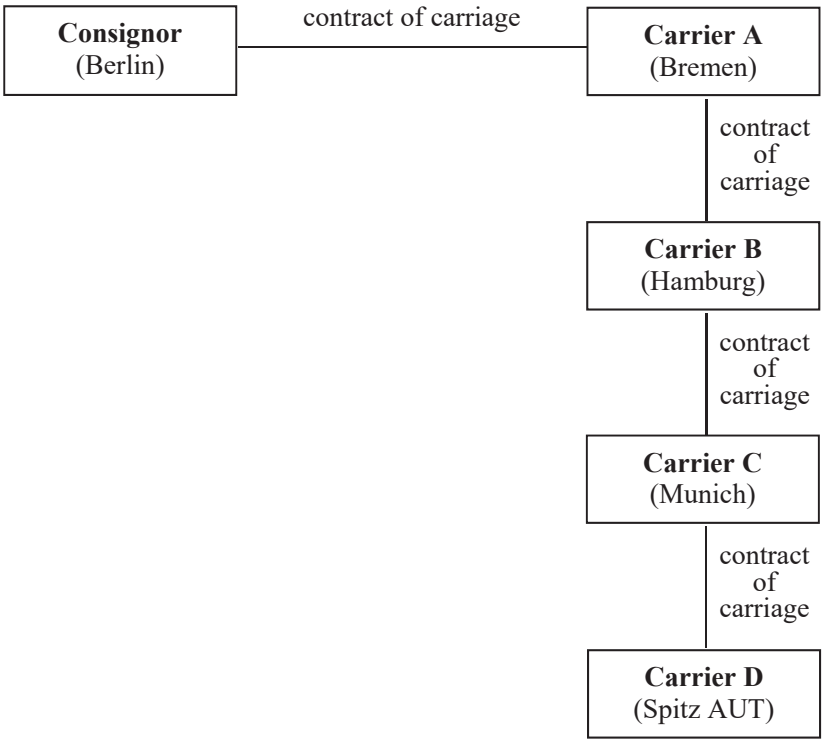
1 It is quite common in the transport industry that the carrier entrusts the performance of the carriage to a subcontractor (substitute carrier), be it in whole or in part.

2 The subcontractor performs the carriage by virtue of authority from the carrier. He thus fulfils a contractual obligation of the carrier. The carrier involves the subcontractor in his own name and for his own account. Carrier and subcontractor typically conclude a contract of carriage (subcontract). There is no contract, however, between subcontractor and consignor.



3 Sometimes, the subcontractor, for his part, delegates the performance of the carriage to a sub-subcontractor and so on, thus forming a chain of carriers. The facts that led to the decision of the Swiss Federal Supreme Court of 2 June 1981 (Bundesgericht; BGE 107 II 238) may illustrate this: The consignor sent steel components from Bremen to Riyadh (Saudi Arabia). Carrier A undertook to transport the goods by truck, transhipment not allowed, and to use the ferry from Volos (Greek) to Tartus (Syria). Carrier A subsequently entrusted the performance of the carriage to carrier B (subcontractor), carrier B to carrier C (sub-subcontractor) and carrier C to carrier D (sub-sub-subcontractor). Carrier D took over the goods in Bremen but redirected them to Ravenna (Italy) in order to ship the goods to Saudi Arabia by sea, thus increasing its profit margin. The goods did not arrive in Riyadh within the agreed time-limit. Now, just as the performance of the carriage had been passed on from carrier A to B to C to D, responsibility was given back from carrier D to C to B to A, who was liable towards the consignor. Finally, carrier B, presumably under pressure from carrier A, refused to pay half of the

freight charge to carrier C. Thereupon, carrier C filed a claim against Carrier B for outstanding payments and carrier B filed a counterclaim for damages.



There are various reasons for the carrier to include a subcontractor: the subcontractor may offer favourable conditions so that the carrier can increase its profit margin; the subcontractor may be able to execute a transport the carrier could not, e.g. a refrigerated transport; or the carriers may bundle the cargo so that one carrier provides carriage to destination A and another to B (see also para 33). There are even carriers that do not have the capability to carry goods themselves at all.[1] 4

[1] So-called paper carriers, also known as non-vessel operating common carriers (NVOCC), cf. HOEKS, Multimodal transport law, p. 5.

II. Other carriers and agents to be distinguished from the subcontractor

A. Successive carrier

5 In a successive carriage multiple consecutive carriers (successive carriers) carry the cargo for specific legs.[2] In a successive carriage there is a contract between the consignor and each successive carrier, be it that the consignor contracts individually with different carriers for carriage over each specific leg[3] or be it that the successive carrier becomes a party to the contract of carriage by reason of his acceptance of the goods and the consignment note[4]. In the case of a subcontract, in contrast, the consignor enters into a single contract of carriage with the carrier, and there is no contractual relationship between the consignor and the subcontractor.

B. Forwarding agent

6 A forwarding agent forwards goods for the consignor's account but in his own name. Unlike the carrier, the forwarding agent does not undertake to carry the goods himself, rather he organizes the transport. He acts as an intermediary, concluding contracts with carriers, warehousing companies and others. Pursuant to Article 439 SCO the forwarding agent is regarded as a commission agent (Articles 425 et seq. SCO) but in relation to the forwarding of the goods he is subject to the provisions governing contracts of carriage (Articles 440 et seq. SCO). The carrier mandated by the forwarding agent is not a subcontractor, his obligations arising from the contract of carriage are different from the obligations of the forwarding agent in the forwarding contract.

2 Cf. Art. 36 MC; Art. 34 CMR; Art. 26 CIM.
3 Cf. DETTLING-OTT, Frankfurt Commentary, Art. 39 n. 26.
4 Art. 34 CMR; Art. 26 CIM.

III. Liberty to include a subcontractor

A. Rule

The carrier is not obliged to perform the carriage in person.[5] Therefore, the carrier may delegate the performance of the carriage entrusted to him to a subcontractor without seeking the consent of the consignor. 7

This is in accordance with the general principle set forth in Article 68 SCO. True, in Swiss law both the agency contract (Article 394 et seq. SCO) and the contract for work and services (Article 363 et seq. SCO) oblige the contractor to carry out the work in person. There are several exceptions, however: the contractor may delegate the work to a third party if authorised by the customer, compelled by circumstance or where such delegation is deemed admissible by custom (Article 398 para. 2 SCO) or if the nature of the work is such that his personal involvement is not required, respectively (Article 364 para. 2 SCO). In the transport industry, the delegation of the transport to a subcontractor is deemed admissible by custom.[6] Furthermore, a personal involvement of the carrier is usually not required. In many cases, the carrier expressly reserves the right to include a subcontractor. 8

Pursuant to Article 4 para. 3 CMNI the carrier shall in all cases inform the consignor when he entrusts the performance of the carriage or part thereof to a subcontractor. Thereby, the consignor is given the opportunity to object to the delegation.[7] In Swiss law as well as in the international transportation law conventions there is no general duty to inform the consignor. However, the carrier may be obliged to inform the consignor as a consequence of his duty of loyalty. 9

Finally, the carrier may be under a contractual obligation towards the consignor to entrust the performance of the carriage, or part thereof, to a subcontractor. 10

B. Exceptions

In individual cases it may be different. The consignor may choose a specific carrier, be it for his reputation, his specialized skills or for another reason. 11

5 STAEHELIN, Basel Commentary SCO, Art. 449 n. 3; STETTLER, Nr. 197; GAUTSCHI, Bern Commentary, Vorb. n. 5c.; with regard to the CMR: the Obergerichtshof Vienna, decision of 26 November 1996, 4 Ob 2336/96z, in: TranspR 1997, p. 281 et seq., p. 283.

6 Cf. HUGUENIN, Nr. 3514.

7 Cf. VON WALDSTEIN/HOLLAND, Art. 4 CMNI n. 12.

Therefore, the consignor and the carrier may agree in the contract of carriage, or it may result from the circumstances, that the carrier has to perform the carriage by himself.

12 An unauthorised delegation becomes authorised, if the consignor approves the inclusion of a subcontractor subsequently.[8]

IV. Legal consequences

A. In General

13 The carrier involves the subcontractor in his own name and for his own account.[9] Usually, the carrier informs the subcontractor about the identity of the consignor; however, the carrier does not conclude the (sub-)contract of carriage in the consignor's name.[10] The subcontractor is an auxiliary person of the carrier.[11]

14 There is no contract between the consignor and the subcontractor. However, the Montreal Convention (MC) and the Budapest Convention (CMNI) refer to the subcontractor as «actual carrier» and treat him like a party to the contract of carriage in terms of liability, as does the CIM although not using the term actual carrier (see paras. 37 to42 et seq. hereinafter).

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8 Cf. GAUTSCHI, Bern Commentary SCO, Art. 449 n. 6a.

9 Instead, the carrier may be authorised to represent the consignor and to conclude a contract of carriage in the consignor's name and for the consignor's account (*direct representation*). In that case, the contract of carriage is concluded between the consignor and the second carrier. If, on the other hand, the carrier includes the second carrier in his own name but for the consignor's account, he acts as forwarding agent (Art. 439 SCO; *indirect representation*). The carrier is not allowed to do so, unless authorised by the consignor (AISSLINGER, p. 44 fn. 90 und p. 16 f.). Such second carriers are not subcontractors as they do not fulfil a contractual obligation of the carrier.

10 MONTANARO, p. 6; PERRINJAQUET, p. 36; BGH, judgement of 14 June 2007, I ZR 50/05, in: TranspR 2007, p. 425 et seq., cons. II.4.b.cc(1) (n. 30); see also GAUCH, n. 137. Also in the decision of the Swiss Federal Court of 2 June 1981, BGE 107 II 238, the sub-subcontractor was involved in the name of the subcontractor (E. 3). GAUTSCHI, Bern Commentary SCO, Art. 449 n. 5a, on the other hand opines that Art. 449 SCO is applicable only if the subcontractor acts in the name and for the account of the consignor; similar STAEHELIN, Basel Commentary SCO, Art. 449 n. 1 and 2.

11 JANKÖSTER, p. 61.

B. Carrier and subcontractor

Carrier and subcontractor conclude a contract of carriage (subcontract of carriage). Within the subcontract of carriage, the carrier acts as consignor and the subcontractor as carrier. 15

Alternatively, the carrier may conclude a charter agreement with the owner of a vessel. In that case, the owner of the vessel does not undertake to transport goods in return for payment; rather he assumes the rights and obligations stipulated in the charter agreement (i.e. hiring out the use of his vessel). His rights and obligations differ from the ones of the carrier. The owner of the vessel, therefore, is not a subcontractor. Nevertheless, CIM, Montreal Convention and Budapest Convention treat him as «actual carrier» (paras. 37 et seq. hereinafter).[12] In any event, the carrier remains responsible towards the consignor for the entire carriage. 16

The subcontract is independent of the main contract of carriage: independent in terms of conclusion and validity of the contract, applicable law and content.[13] 17

- If, for example, the carrier undertakes to transport goods from Rotterdam to Lucerne and entrusts the performance of the road leg from Basel to Lucerne to a subcontractor, then the main contract is subject to the CMR, whereas the subcontract is subject to the Swiss Code of Obligations.[14]

- An agreement between consignor and carrier extending the carrier's responsibility, as a rule, does not affect the subcontractor. Such agreement affects the subcontractor only if and to the extent he agrees to it.[15]

The carrier and the subcontractor are free to link the subcontract and the main contract, for example they may coordinate the responsibility.[16] 18

In a CMR transport the Swiss Federal Court considered that the contractual partner is determined by the consignment note.[17] This would lead to the con- 19

12 Art. 39 and 40 MC; cf. also Art. 27 § 2 CIM; Art. 4 para. 2 CMNI.

13 For the relationship of main contract and subcontract see CERUTTI, Nr. 258 et seq.

14 Depending on the applicable law (convention) the subcontractor may be treated as actual carrier and thus, nonetheless, may be subject to CIM, MC or CMNI; see paras. 37 et seq. hereinafter).

15 The international conventions require the subcontractor to agree expressly and in writing (Art. 27 § 3 CIM; Art. 4 para. 4 CMNI; similarly § 437 para. 1 of the German Commercial Code).

16 Cf. for the coordination of the main contract and the subcontract in general CERUTTI, Nr. 241 et seq., GAUCH, Nr. 146 et seq.

17 Decision of the Swiss Federal Court of 2 June 1981, BGE 107 II 238, E. 3.

sequence that, if no separate consignment note were issued in the subcontract, the consignor of the main contract rather than the carrier would be the contractual partner of the subcontractor (even if the carrier engaged the subcontractor in its own name and for its own account). The consideration of the Swiss Federal Court is not conclusive. In fact, the carrier is the contractual partner of the subcontractor. He is entitled to assert the claims provided to the consignor by the applicable law[18], thus invoking the damage he suffered himself as well as the damage of the consignor or the consignee.

C. Consignor and carrier

1. In General

20 The inclusion of a subcontractor, as a rule, does not affect the relationship between the consignor and the carrier.

21 The carrier remains responsible for the entire carriage, notwithstanding the fact that he entrusted the performance of the carriage or part thereof to a subcontractor.[19] This is the necessary corollary of recognising a liberty to the carrier to delegate the performance of the carriage to a subcontractor. The consignor must be able to enforce his claims against the person he chose as contractual partner. It would be unacceptable for the consignor if he had to take legal actions against a person that he does not know, that may be less reliable or less solvent or that may be domiciled in another country. This will be examined more closely hereinafter (paras. 24 et seq.).

22 In the event that the carrier acquires a claim against the subcontractor that extends further than his own responsibility to the consignor, the carrier has to inform the consignor. If the consignor so wishes, the carrier has to assign such claim (Article 400 para. 1 SCO).

23 The carrier remains entitled to the full payment (freight charge), including the leg he delegated to the subcontractor.[20]

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18 See also BGH, judgement of 14 June 2007, I ZR 50/05, in: TranspR 2007, p. 425 et seq., cons. II.4.b.cc(1) (n. 30).

19 Art. 27 § 1 CIM, Art. 40 MC, Art. 4 para. 2 CMNI; similarly Art. 449 SCO and Art. 3 CMR.

20 The freight charge the carrier promised to pay to the subcontractor is independent of the freight charge in the main contract. The freight charge in the subcontract may be higher or (more often) lower than the one in the main contract.

2. *International transport*

According to the CIM, the Montreal Convention and the Budapest Convention the carrier remains responsible for the entire carriage, including the leg entrusted to the subcontractor.[21] The acts and omissions of the subcontractor are deemed to be also those of the carrier.[22] In other words, the carrier is liable for all accidents and errors occurring during the leg delegated to the subcontractor, just as if he had performed the entire carriage himself. The same strict liability, the same exonerations from liability and the same limitations of liability apply. Naturally, the carrier is also liable for the acts and omissions of the subcontractor's servants and agents, including any sub-subcontractors and their servants and agents.[23] 24

The same solution, although formulated in a different way, can be found in the CMR. Pursuant to Article 3 CMR, the carrier is «responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage […], as if such acts or omissions were his own)». The term «any other person» refers, in particular, to subcontractors.[24] 25

3. *National transport*

According to the Swiss Code of Obligations, the carrier is liable for the entire carriage, regardless of whether he transports the goods to the final destination in person or subcontracts this obligation to another carrier (Article 449 SCO). This corresponds to the provisions in the international conventions.[25] Article 449 SCO supersedes the general provision of Article 399 paras. 1 and 2 SCO.[26] 26

Just as in the international conventions, the carrier that includes a subcontractor remains responsible for the entire carriage. The carrier's responsibility for 27

21 Art. 27 § 1 CIM; Art. 40 MC; Art. 4 para. 2 CMNI.

22 See Art. 41 MC.

23 Cf. Art. 41 MC; see also Art. 42 of the Swiss Passenger Transport Act (Personenbeförderungsgesetz).

24 Swiss Federal Court, BGE 132 III 626, E. 4.2; SUTTER, p. 326. See also Art. 103 para. 1 of the Swiss Maritime Navigation Act: persons of whose services the carrier makes use for the performance of the carriage («Personen, derer sich der Seefrachtführer bei der Durchführung der Beförderung bedient»); STETTLER, n. 380, on the other hand, wants to apply Art. 449 SCO on the sea transport.

25 According to the Swiss Federal Council Art. 4 CMNI is similar to Art. 449 SCO (Federal Council dispatch CMNI, BBl 2003 4005).

26 MARCHAND, Commentaire Romand SCO, Art. 449 n. 2 and 14.

the subcontractor corresponds to the responsibility for his auxiliary persons (Article 101 SCO).[27] As the Swiss Federal Court made clear, the carrier cannot get rid of his liability by assigning his rights vis-à-vis the subcontractor to the consignor.[28] However, his responsibility is subject to the right of recourse against the subcontractor (Article 449 SCO).

28 The Swiss Code of Obligation provides specific rules for the carrier that makes use of a state transport facility to perform carriage obligations he has assumed or if he assists in the carriage of goods by such a facility. In such case, the carrier is subject to the special provisions governing freight transport that apply to that facility (Article 456 para. 1 SCO). Therefore, the provisions applicable on the state transport facility – e.g. provisions on exoneration from liability, limitation of liability, duty of notification or forfeiture of liability claims – equally apply on the carrier.[29]

29 Article 456 para. 1 SCO ensures that the carrier is not liable to a greater or lesser extent towards the consignor than he can take recourse against the state transport facility (subcontractor).[30] This is in contrast, however, to the principle set forth in Article 449 SCO that the carrier remains liable for the carriage delegated to the subcontractor, just as if he had performed the carriage himself. From the consignor's point of view, Article 456 para. 1 SCO may lead to unjust consequences if he made arrangements (e.g. if he obtained insurance cover) based on the statutory basis he believed to apply according to his contract with the carrier – when in fact different liability provisions apply. At least, Article 456 para. 1 SCO applies only if the carrier was authorised to entrust the performance of the carriage to a subcontractor and only to the leg performed by the subcontractor.[31] The carrier is not authorised to make use of

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27 Cf. the decision of the Swiss Federal Court of 2 June 1981, BGE 107 II 238, E. 5.b; STETTLER, Nr. 219; CERUTTI, Nr. 437. See also Art. 42 of the Swiss Passenger Transport Act (Personenbeförderungsgesetz): the carrier is responsible for the servants and agents that carry out the transport, expressly including subcontractors and their servants and agents.

28 Decision of the Swiss Federal Court of 15 December 1921, in: ZR 21/1922, no. 58, p. 145 et seq., E. 2 (p. 148).

29 Cf. AISSLINGER, p. 47. According to the decision of the Swiss Federal Court of 12 July 1922, BGE 48 II 278, E. 1, also a waiver of liability of the state transport facility in the subcontract of carriage applies on the carrier (in the latter's relation with the consignor). This is doubtful as it could tempt the carrier to accept a far-reaching waiver of the state transport facility – in order to profit himself by means of Art. 456 para. 1 SCO of such waiver.

30 ZUELLIG, p. 56; AISSLINGER, p. 48; GAUTSCHI, Bern Commentary SCO, Art. 456 n. 1b; see also the decision of the Court of Appeal of Basel of 12 May 2000, BJM 2000, p. 311, E. 1.e.

31 GAUTSCHI, Bern Commentary SCO, Art. 456 n. 1d; STAEHELIN, Basel Commentary SCO, Art. 456 n. 6.

a state transport facility that is liable to a lesser extent than he would be if he knows that the consignor made arrangements based on the assumption that he provides carriage in person.

Swiss legal practice and doctrine interpret the term «state transport facility» broadly. It not only includes state-owned carriers and licensed carriers, but also non-licensed carriers that are accessible to everyone.[32] Article 456 SCO also applies on foreign state transport facilities.[33] 30

Article 456 para. 1 SCO is non-mandatory law (Article 456 para. 2 SCO). The parties are free to agree on another solution. Article 456 SCO does not apply to road hauliers (cammioneurs), that is to private carriers that bring the goods to the loading point of a state transport facility (Article 456 para. 3 SCO).[34] 31

4. Excursus: legal situation in absence of applicable transport provisions

In the rare case that neither one of the international conventions nor Article 449 SCO or any other transportation law provision applies,[35] the question arises as to whether the carrier is responsible for the acts and omissions of the subcontractor pursuant to Article 101 SCO (basically, liability for all acts and omissions of the auxiliary person) or pursuant to the Article 399 para. 2 SCO (liability only for failure to act with due diligence when selecting and instructing the subcontractor). 32

Usually, the delegation of the carriage to a subcontractor is in the interest of the carrier and not of the consignor.[36] By involving a subcontractor, the carrier may offer further services to its clients (e.g. transports for which he does not have suitable means of transport), he may be able to expand his business 33

32 BGE 48 II 278, E. 1; GAUTSCHI, Bern Commentary SCO, Art. 456 n. 2; STAEHELIN, Basel Commentary SCO, Art. 456 n. 2.

33 Decisions of the Swiss Federal Court BGE 48 II 278, E. 1 and 47 II 203 E. 1; MARCHAND, Commentaire Romand SCO, Art. 456 n. 3.

34 C.f. STAEHELIN, Basel Commentary SCO, Art. 456 n. 9.

35 See e.g. the decision of the Swiss Federal Court of 2 June 1981, BGE 107 II 238 (international road transport, neither the CMR nor Art. 440 et seq. SCO were applicable). Another case in which no specific transportation law provision applies is the domestic carriage of persons by land in Switzerland provided by a non-licensed carrier.

36 Cf. Obergerichtshof Vienna, decision of 26. November 1996, 4 Ob 2336/96z, in: TranspR 1997, p. 281 et seq., p. 284, indicating that the carrier and the consignor can also have the same interest.

volume[37] or he may get favourable conditions from the subcontractor. Furthermore, two carriers may collaborate: instead of both carriers providing carriage to destinations A and B with half-empty trucks, one carrier may send a full truck to A and the other to B. In all these cases, the inclusion of the subcontractor is in the interest of the carrier, and the carrier therefore would be liable according to Article 101 SCO. The Swiss Federal Court, however, applied Article 449 SCO by analogy (although Articles 440 et seq. were in fact not applicable). The court considered that the carrier's liability for the acts and omissions of the subcontractor was closely associated with the contract of carriage so that it seemed obvious to the court to apply Article 449 SCO. Doing so, the court noted that Article 449 SCO corresponds to the general principle of Article 101 SCO.[38]

5. Unauthorised delegation to a subcontractor

34 The carrier, who without authorisation to do so delegates the performance of the carriage to a subcontractor breaches the contract. He remains responsible towards the consignor for the entire carriage.[39] If the carrier remains responsible in case of an authorised delegation of the carriage, this must be all the more so in case of an unauthorised delegation. The carrier is liable for the subcontractor's actions as if they were his own.

35 Furthermore, the carrier is liable towards the consignor (or consignee) pursuant to Article 97 para. 1 SCO (breach of contract)[40] and he may not invoke the liability limits or other provisions of the applicable transport act.[41]

37 Cf. BGE 107 II 238, E. 5b.

38 Cf. BGE 107 II 238, E. 5.

39 See Art. 27 § 1 CIM: «whether or not in pursuance of a right under the contract [to entrust the performance of the carriage to a subcontractor]»; similar Art. 4 para. 2 CMNI.

40 Cf. GAUCH, Nr. 177.

41 STAEHELIN, Basel Commentary SCO, Art. 449 n. 4; GAUTSCHI, Bern Commentary SCO, Art. 449 n. 6b; dissenting MARCHAND, Commentaire Romand SCO, Art. 449 n. 14 et seq.

D. Consignor and subcontractor

1. No contract

There is no contractual relationship between the consignor and the subcontractor.[42] The subcontractor does not carry the goods because it has entered into a contract with the consignor to do so, but because it has assumed this obligation from the contracting carrier.[43] Nonetheless, the subcontractor may be liable towards the consignor (or, as the case may be, towards the consignee). Subject to certain conditions, the consignor may even assert a contractual claim against the subcontractor. 36

2. International transport

According to the international conventions, with the exception of the CMR,[44] the subcontractor is liable towards the consignor, notwithstanding the fact that there is no contractual relationship between them. The subcontractor, referred to as «actual carrier», is subject to the conventions for that part which he actually carries out.[45] The subcontractor does not become a party to the contract of carriage – in terms of liability, however, he is treated *like* a party to the contract of carriage (legal fiction). Thus, the subcontractor becomes a «quasi contractual» partner.[46] RUHWEDEL calls the subcontractor a «haftungsrechtliche Kopie» (copy in terms of liability) of the carrier.[47] 37

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42 See e.g. BGE 44 II 280, E. 3; cf. also Art. 3 lit. b CIM. The subcontract for carriage does, in principle, not constitute a contract for the benefit of a third party according to Art. 112 SCO (subject to certain conditions, however, the subcontract may indeed confer rights on the consignee, see para. 48 hereinafter).

43 DETTLING-OTT, Frankfurt Commentary, Art. 39 n. 7. This fact distinguishes the subcontractor from the successive carrier.

44 The CMR does not explicitly provide a direct claim of the consignor against the subcontractor. The prevailing opinion in legal doctrine, however, does not preclude the possibility of a direct claim (MARCHAND, Commentaire Romand SCO, Art. 440 SCO n. 27; cf. STETTLER, Nr. 219; TEMME, 2007, Art. 13 n. 17; holding a different opinion HERBER/PIPER, Art. 17 n. 165). For lack of a legal basis in the CMR, the subcontractor may not be treated as an actual carrier; a direct claim may only be asserted in accordance with the applicable national law, under Swiss law pursuant to Art. 399 para. 3 SCO (see in this respect paras. 43 et seq. hereinafter).

45 Cf. Art. 27 § 2 CIM; Art. 40 MC; Art. 4 para. 2 CMNI; see also in Germany § 437 para. 1 of the German Commercial Code.

46 DETTLING-OTT, Frankfurt Commentary, Art. 40 n. 4.

47 RUHWEDEL, Luftbeförderungsvertrag, Nr. 606.

38 Apart from the subcontractor, any other person than the carrier that provides carriage with authorisation from the carrier is treated as actual carrier.[48] Therefore, also the owner of a vessel in a charter party or the code sharing partner of the carrier may be subject to the provisions applicable on the actual carrier. In accordance with the subject of this paper I will focus on the subcontractor.

39 The subcontractor is subject to the rules of the convention also if the part of the carriage provided by him is a national carriage.[49] The same is true even if the subcontractor is not aware of the fact that he provides part of the carriage in an international transport. The open wording of the conventions suggests this interpretation.[50] From the perspective of the subcontractor, such interpretation is not disadvantageous *per se*. The subcontractor's liability as actual carrier towards the consignor usually does not go beyond his liability towards the carrier. If this should be different in an individual case, the subcontractor may take recourse against the carrier who failed to inform him that his service is part of an international transport.[51]

40 The liability as actual carrier is limited to the part of the carriage the subcontractor actually carries out and to the types of damage regulated by the conventions (in particular: loss or destruction of the goods, damage to the goods and delay). Other events, such as failure to perform (Article 97 SCO) or default (Articles 102 SCO et seq.), are not subject to the conventions.[52]

41 Where the subcontractor is treated as actual carrier, the consignor (or the consignee, as the case may be) may bring a – contractual – action directly against the subcontractor.[53] Thus, the consignor may assert his claim against the person that actually caused damage.[54] In this way, the consignor may

48 Cf. JANKÖSTER, p. 61. Art. 39 MC requires the contractual carrier to authorise the actual carrier to perform the carriage; such authorisation can also be tacitly granted, as long as the consent of the contracting carrier is capable of being recognized (DETTLING-OTT, Frankfurt Commentary, Art. 39 n. 17).

49 HARTENSTEIN, TranspR 2012, p. 442; VON WALDSTEIN/HOLLAND, Art. 4 CMNI para. 5.

50 Art. 39 MC («performs, by virtue of authority from the contracting carrier, the whole or part of the carriage»); Art. 27 § 1 CIM («entrusted the performance of the carriage, in whole or in part»); Art. 4 para. 2 CMNI («entrusted the performance of the carriage or part thereof»).

51 See HARTENSTEIN, TranspR 2012, p. 442, with reference to different opinions.

52 RUHWEDEL, Luftbeförderungsvertrag, Nr. 106 and 609; cf. KOLLER, Aktivlegitimation, p. 338.

53 Explicitly stipulated in Art. 45 § 6 CIM. See also KOLLER, Aktivlegitimation, p. 338, who indicates that an action against the subcontractor may be risky in view of Art. 45 § 7 CIM.

54 Cf. BT-Drucksache 563/06, of 22 June 2001, p. 34.

resort to a second person that, in addition to the carrier, is jointly and severally liable (para. 51 et seq.).

42 The actual carrier (subcontractor) can call upon all the provisions of the applicable convention governing the responsibility of the carrier:[55] provisions on exoneration from liability, limitation of liability, duty of notification, forfeiture of liability claims et cetera. It is less clear, however, whether stipulations and acts under the main contract of carriage or the subcontract, respectively, do have an effect on the responsibility of the actual carrier (subcontractor) towards the consignor. The following situations shall be addressed:

- Any agreement between the carrier and the consignor or the consignee extending the carrier's responsibility according to the provisions of the applicable convention (e.g. a declaration of value or a declaration of a special interest in delivery) affects the actual carrier (subcontractor) only to the extent that he has agreed to it.[56]

- The terms and conditions of the consignor that have been accepted by the carrier, in principle, do not bind the actual carrier (subcontractor). On the other hand, the subcontractor in his relation towards the consignor or the consignee may not rely on the terms and conditions he incorporated in the subcontract.[57]

- The subcontractor may raise against the consignor (or the consignee) all objections that arise from his relationship to the carrier. For example, he may invoke a wrong instruction of the carrier.[58] Furthermore, the subcontractor may avail himself of all the objections invocable by the carrier under the contract of carriage (see in this sense Article 4 para. 4 CMNI) such as exoneration from liability, forfeiture of liability, lien et cetera.[59]

- Liability privileges (e.g. a limitation or a waiver of liability) agreed in the subcontract of carriage may, in principle, not be invoked by the

55 Art. 27 § 2 CIM; Art. 40 MC; Art. 4 para. 2 CMNI. The same applies if the consignor asserts a claim in tort based, under Swiss law, on Art. 41 or Art. 55 SCO (see in this respect HOCHSTRASSER, Nr. 1281 et seq.).

56 Art. 27 § 3 CIM; Art. 4 para. 4 CMNI; both require the actual carrier to agree to such extension of responsibility expressly and in writing. The MC remains silent; DETTLING-OTT, Lufttransportrecht, p. 253, who opines that a tacit agreement is sufficient (with respect to the Warsaw Convention).

57 Cf. RUHWEDEL, Luftbeförderungsvertrag, Nr. 609.

58 KOLLER, Transportrecht-Kommentar 2010, Art. 28 CIM n. 5.

59 Cf. VON WALDSTEIN/HOLLAND, Art. 4 CMNI n. 7.

subcontractor against the consignor or consignee.[60] Such limitation of liability has an effect only between the parties agreeing on it, not towards third parties. Only as an exception, only if the consignor is aware of the waiver and only if the waiver is objectively justified (e.g. if the consignor benefits from a favourable freight charge) is it conceivable that the subcontractor can invoke such privileges against the consignor or consignee.[61]

– The aggregate amount of compensation recoverable from the carrier and the subcontractor (and their servants) for the same loss shall not exceed the limits of liability provided for in the convention applicable on the main contract of carriage.[62]

– The subcontractor is not entitled to the exonerations and limits provided for in the convention governing the main contract or the subcontract if it is proved that he caused the damage by an act or omission either with the intent to cause such damage or recklessly and with the knowledge that such damage would probably result.[63] If it is proved that the carrier caused the damage in such way, only the carrier, not the subcontractor, forfeits the right to invoke the limits of liability.[64]

– In the event of delay in delivery, the conventions limit the liability to the amount of the freight[65] or a multiple thereof[66]. In such case, the freight of the subcontract determines the scope of the subcontractor's liability. It would be wrong to take reference to the freight of the main contract since, firstly, the subcontractor may often not be aware of the conditions of the main contract and, secondly, the price of the main contract is higher if the subcontractor provides only part of the carriage.[67]

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60 VON WALDSTEIN/HOLLAND, Art. 4 CMNI n. 7 state that the subcontractor might take recourse against the carrier.

61 See HOCHSTRASSER, Nr. 1181 et seq.; cf. also § 434 para. 2 of the German Commercial Code. Another issue to be considered is whether the carrier violates its duty of loyalty towards the consignor if he agrees to a limitation of the subcontractor's liability (cf. MONTANARO, p. 170).

62 Art. 27 § 5 CIM; Art. 20 para. 5 CMNI; see also Art. 44 MC and Art. 105 para. 6 of the Swiss Maritime Navigation Act.

63 The carrier is responsible for the acts and omissions of its servants or agents, including any subcontractor.

64 Cf. VON WALDSTEIN/HOLLAND, Art. 4 CMNI n. 9 with reference to Art. 21 para. 1 CMNI («he himself»); RUHWEDEL, Luftbeförderungsvertrag, Nr. 614.

65 Art. 20 para. 3 CMNI; Art. 23 para. 5 CMR.

66 Art. 33 § 1 CIM (four times the freight).

67 VON WALDSTEIN/HOLLAND, Art. 4 CMNI n. 8.

– Any notice of damage must be addressed, in principle, to the carrier. If the consignor intends to take action against the subcontractor, he is well-advised, however, to send a notice to the subcontractor too.[68] A sensible solution is provided by the Montreal Convention: According to Article 42 MC any complaint to be made or instruction to be given[69] to the carrier shall have the same effect whether addressed to the carrier or the subcontractor.

– The subcontractor is liable for all acts and omissions of its servants or agents, including any sub-subcontractor.

3. National transport

Under Swiss law, the consignor may take action directly against the subcontractor based on Article 399 para. 3 SCO.[70] This is of relevance for any contract of carriage that is subject to the Swiss Code of Obligations. Furthermore, it is relevant if Swiss law is subsidiarily applicable on an international road transport, since the CMR (in contrast to the CIM, the Montreal Convention and the Budapest Convention) does not treat the subcontractor as actual carrier. 43

Pursuant to Article 399 para. 3 SCO the consignor (or the consignee, as the case may be) may enforce claims held by the carrier against the subcontractor. Unlike in the conventions, the subcontractor is not treated like a party to the contract of carriage in terms of liability. The consignor does not enforce his own claim arising from the main contract of carriage but the claim of the carrier arising from the subcontract. However, it is generally recognised that contrary to the wording of Article 399 para. 3 SCO the consignor may claim his own damage.[71] 44

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68 HOCHSTRASSER, Nr. 1211 and 1400.

69 With the exception of disposition of the cargo pursuant to Art. 12 MC.

70 On a correct interpretation, Art. 399 para. 3 SCO applies also if the delegation of the business is in the interest of the carrier (and not the consignor). Only the liability privilege of Art. 399 para. 2 SCO (liability only for any failure to act with due diligence when selecting and instructing the subcontractor) does not apply in such case (cf. the decision of the Swiss Federal Court 4A_407/2007 of 14 March 2008, cons. 2.3 and DFC 103 II 59, cons. 1.a; GEHRER/GIGER, CHK-SCO, Art. 399 n. 5; RUSCH, Nr. 7 et seq. und 14; dissenting FELLMANN, Bern Commentary SCO, 398 n. 544 et seq.; GAUCH/SCHLUEP/EMMENEGGER, Nr. 3061). Apart from Art. 399 para. 3 SCO the consignor may assert a claim in tort based on Art. 41 or Art. 55 SCO against the subcontractor (see HOCHSTRASSER, Nr. 1281 et seq.).

71 Decision of the Swiss Federal Court of 27 June 1995, BGE 121 III 310, E. 4.a; see also E. 5.a.

45 The subcontractor's liability is limited to the part of the carriage he carries out.[72] The direct claim of the consignor is subject to the conditions of the subcontract, namely the exonerations from liability, limitations of liability, duty of notification, forfeiture of liability et cetera. The reflections on the actual carrier (para. 42 hereinabove) do not apply here, since pursuant to Article 399 para. 3 SCO the consignor enforces the claim held by the carrier. Thus, for example, a limitation of liability in the subcontract may be invoked by the subcontractor against the consignor.

46 By applying Article 399 para. 3 SCO the liability of the subcontractor is not extended. Rather, from the subcontractor's point of view, the number of entitled persons is increased.[73]

E. Subcontractor and consignee

47 The relationship between the subcontractor and the consignee depends on to whom the subcontractor has to deliver the goods. The carrier may instruct the subcontractor to deliver the goods to him (the carrier), to another subcontractor or to the consignee of the main contract.[74]

48 If the subcontractor has to deliver the goods to the consignee of the main contract, the subcontract is a contract for the benefit of a third party.[75] In that case the consignee may request delivery of the goods. Furthermore, he may exert the claims arising from the contract of carriage in case of loss or destruction of the goods, damage to the goods or delay.

V. Responsible carrier

49 The carrier, who entrusts the performance of the carriage in whole or in part to a subcontractor, nevertheless remains liable in respect of the entire carriage.[76]

50 Alternatively, the consignor (or the consignee, as the case may be) may bring an action against the subcontractor: CIM, Montreal Convention and Budapest Convention provide a direct claim against the «actual carrier»

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72 MARCHAND, Commentaire Romand SCO, Art. 449 n. 19 (speaking of a «parapluie percé»).

73 AISSLINGER, p. 52.

74 Cf. AISSLINGER, p. 52 fn. 118; KRAUSKOPF, Nr. 972.

75 Cf. BGH, judgement of 14 June 2007, I ZR 50/05, in: TranspR 2007, p. 425 et seq., cons. II.4.b.cc(1) (n. 30).

76 Art. 27 § 1 CIM; Art. 40 MC; Art. 4 para. 2 CMNI; Art. 449 SCO; Art. 3 CMR; see also BGE 44 II 280, E. 3.

for the part of the carriage executed by the subcontractor (paras. 37 et seq.).[77] Under Swiss law, the consignor has a direct claim pursuant to 399 para. 3 SCO (paras. 43 et seq.).

VI. Joint and several liability, right of recourse

If and to the extent both the carrier and the subcontractor are liable, their liability is joint and several.[78] The CIM and the Budapest Convention do not specify the legal consequences resulting from joint and several liability but leave this to the applicable national law. According to Article 45 of the Montreal Convention as well as to Article 144 SCO, it is for the claimant to decide at his discretion whether to pursue in law the carrier or the subcontractor.[79] 51

The carrier who has paid compensation has a right of recourse against the subcontractor (and vice versa). This is in accordance with general principles of Swiss liability law (Articles 50 et seq. SCO) and is explicitly provided for in the transportation law (e.g. Article 449 SCO).[80] 52

Pursuant to Article 50 § 1 CIM the carrier who has caused the loss or damage shall be solely liable for it (lit. a). When the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible or if it cannot be proved which of the carriers has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them (lit. b and c). In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge (Article 50 § 2 CIM). See also Article 51 CIM on the procedure for recourse. 53

The Montreal and the Budapest Convention do not provide such rules for the right of recourse, they rather leave the consequences to the applicable national law. In Swiss doctrine there is a dispute whether the right of recourse is 54

77 Art. 45 § 6 und Art. 27 § 2 CIM; Art. 40 MC; Art. 4 para. 2 CMNI.

78 Art. 27 § 4 CIM and Art. 4 para. 5 CMNI; as for the Montreal Convention cf. Art. 41 and Art. 45, DETTLING-OTT, Frankfurt Commentary, Art. 41 n. 1. Under Swiss law, this follows from Art. 51 para. 1 SCO (see also MARCHAND, Commentaire Romand SCO, Art. 449 n. 20).

79 Cf. Art. 45 MC and Art. 144 SCO.

80 See also Art. 27 § 6 CIM; Art. 48 MC and Art. 4 para. 5 CMNI. Art. 87 para. 1 of the Federal Act on Maritime Navigation under Swiss flag (MNA) refers to the SCO.

subject to Article 51 SCO or to Article 50 para. 2 SCO.[81] There is a consensus, however, that, in the end, the damage or loss should be borne by the one that was at fault. If the subcontractor was at fault (e.g. if he disregarded the traffic rules), the carrier may take recourse against the subcontractor. If the carrier was at fault (e.g. if he gave inadequate instructions), he has no right of recourse (cf. Article 51 para. 2 SCO).[82] If both the carrier and the subcontractor were at fault, the court determines at its discretion whether and to what extent they have right of recourse against each other (Article 50 para. 2 SCO). Finally, there is the situation that neither of the carriers was at fault. In such case, again the court decides (Article 50 para. 2 SCO), taking into account that the subcontractor undertook to transport the goods and to deliver them in good order and in time. As a rule, the court should admit the recourse of the carrier against the subcontractor. The carrier and the subcontractor are free to conclude an agreement regarding the right of recourse.

55 The carrier who pays compensation to the consignor (or consignee), when such compensation has not been determined by a court, exposes himself to a risk. If he pays too high an amount or if he wrongfully accepts a reduction of the freight charge, he risks that he will not be able to exercise his right of recourse.[83] The carrier that is held responsible may notify the subcontractor of the dispute (Article 78 para. 1 of the Swiss Civil Procedure Code). Thus, a result that is unfavourable to the carrier will be effective also against the subcontractor. The subcontractor, on the other hand, can intervene in favour of the carrier.[84]

VII. Excursus: GC Spedlogswiss

56 According to the statutory provision of Article 439 SCO, a forwarding agent or carrier who in return for payment undertakes to carry or forward goods for the consignor's account but in his own name is regarded as a commission agent but is subject to the provisions governing contracts of carriage in relation to the forwarding of the goods.

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81 In favour of Art. 51 para. 2 SCO GAUTSCHI, Bern Commentary SCO, Art. 449 n. 9b; AISSLINGER, p. 54; in favour of Art. 50 para. 2 SCO MARCHAND, Commentaire Romand SCO, Art. 449 n. 20; question left open by STAEHELIN, Basel Commentary SCO, Art. 449 n. 6.

82 Cf. GAUTSCHI, Bern Commentary SCO, Art. 449 n. 9b and AISSLINGER, p. 54.

83 Cf. BGE 107 II 238, E. 4; cf. Art. 39 para. 1 CMR e contrario; Art. 51 § 1 CIM e contrario.

84 Cf. STAEHELIN, Basel Commentary SCO, Art. 449 n. 6.

If the consignor contacts a forwarder he may not pay special attention as to whether concluding a forwarding contract (Article 439 SCO) or a contract of carriage (Articles 440 et seq.). In relation to the forwarding of the goods the forwarder is subject to the provisions governing the contract of carriage, anyway. 57

Swiss forwarders regularly make their service subject to the General Conditions of Spedlogswiss (GC Spedlogswiss), the Swiss Freight Forwading and Logistics Association.[85] Pursuant to Article 2 para. 1 GC Spedlogswiss the forwarder, as a rule, acts purely as an intermediary. Only in the three cases listed in Article 2 para. 2 has the forwarder the status of a carrier: (i) in the case of contracting in his own name; (ii) if he issues a transport document of his own containing a delivery undertaking such as a through bill of lading; or (iii) in purely European land transport, except in transport purely by rail, unless the forwarder expressly designates himself as an intermediary and acts as such. 58

So far, so good. The GC Spedlogswiss, however, deviate from the Code of Obligations. Article 21 GC Spedlogswiss stipulates: «If sub-contractors (carriers, forwarders, customs agents, warehousing companies etc.) are employed, the forwarder is liable only in respect of their careful selection and instruction.» This is the same arrangement as in the simple agency contract (Articles 394 et seq. SCO) for the authorised delegation of the business in the interest of the principal (Article 399 para. 2 SCO[86]). It is, however, entirely different than the statutory provisions governing contract of carriage, according to which the carrier is liable for all accidents and errors occurring during the carriage, regardless of whether he transports the goods to the final destination or sub-contracts the task to another carrier (Article 449 SCO). 59

There is nothing wrong with Article 21 GC Spedlogswiss *per se*. But to the consignor it may come as a surprise. I happened to come across two consignors, lately, that were convinced to have concluded a contract with a Swiss carrier – but were told by the «carrier» that he acted purely as an intermediary and that, in the first case, the carrier in fact was a French company and, in the second case, that the «carrier» had involved a Liechtenstein forwarder who for his part forwarded the goods to a Hungarian carrier. Suddenly, the con- 60

85 General Conditions (2005) of Spedlogswiss – Swiss Freight Forwarding and Logistics Association, valid from 1st July 2005 (<https://www.spedlogswiss.com/media/81B7B697-155D-5880-038E108588E8A719/GC%20SPEDLOGSWISS%20(2005)%20english%20v155830742.pdf> (accessed 27 June 2019)). Pursuant to Art. 1 the GC apply to all orders executed by members of SPEDLOGSWISS and its sections, insofar as they are not contrary to mandatory provisions of the law.

86 Art. 399 para. 2 SCO: «Where such delegation was authorised, he is liable only for any failure to act with due diligence when selecting and instructing the third party.».

signors who both had paid freight charges at a Swiss price level believing to have a responsible person in Switzerland were confronted with the option of pursuing a claim in France and Hungary, respectively.[87]

61 With all due respect for the forwarders, the use of the GC Spedlogswiss is contrary to the principle provided in Article 449 SCO that the carrier may entrust the performance of the carriage to a subcontractor without seeking the consent of the consignor but that, doing so, he remains responsible for the entire carriage.

62 The GC Spedlogswiss are pre-formulated clauses and as such subject to review. Article 21 GC Spedlogswiss is, in my view, an unusual clause that is ineffective in relation to a consignor that is the weaker party or not versed in business, unless the forwarder draws the consignor's attention to such clause. In relation to consumers, Article 21 GC Spedlogswiss might even be considered unfair within the meaning of Article 8 of the Swiss Federal Act against Unfair Competition.

VIII. De lege ferenda

63 The Swiss Code of Obligations is more than a hundred years old, it dates from 30 March 1911.

64 There is only one provision in the SCO that deals with the widespread practice of subcarriage, and a short one at that. Article 449 SCO stipulates that the carrier is liable for all accidents and errors occurring during the carriage of goods, regardless of whether he transports them to the final destination or sub-contracts the task to another carrier, subject to right of recourse against the sub-contractor to whom goods are entrusted.

65 Unlike in the international conventions there is no provision that expressly addresses the responsibility of the subcontractor towards the consignor. True, based on Article 399 para. 3 SCO the consignor may take action directly against the subcontractor (see paras. 43 et seq. hereinabove). However, Arti-

87 According to Art. 21 para. 2 GC Spedlogswiss in the event of loss or damage for which a subcontractor is responsible, the forwarder shall assert the claim of the customer against the responsible party. At the wish of the customer, and insofar as this is expedient, the forwarder shall proceed against the subcontractor for the account and at the risk of the customer. – Since it was not clear whether a mistake of the consignor had contributed to the damage in the second case mentioned in the text, the forwarder refused to proceed against the subcontractor. Hence, the consignor was confronted with the difficult decision of bringing an action against the Swiss forwarder, the Liechtenstein forwarder or the Hungarian carrier.

cle 399 para. 3 SCO is not tailored to the characteristics of the contract of carriage.

Therefore, it might be worthwhile inserting a provision into the SCO that governs the relationship between consignor and subcontractor. Article 4 CMNI and § 437 of the German Commercial Code may serve as an example for that purpose. § 437 has been adopted in the course of the reform of the German transportation law in 1998. The German lawmaker wanted to provide the consignor with a direct claim against the subcontractor. The consignor should be able to bring a claim, at his discretion, either against the carrier or the subcontractor. The German lawmaker followed the liability model contained in the recent conventions.[88] Article 449 SCO may be amended as follows: 66

> Article 449 SCO (Liability for subcontractors)
>
> The carrier is liable for all accidents and errors occurring during the carriage of goods, regardless of whether he transports them to the final destination or subcontracts the task to another carrier (subcontractor).
>
> The subcontractor is liable for any damage resulting from loss or destruction of the goods, damage in transit or late delivery during the part of the carriage performed by him, just as if he were the carrier.
>
> The carrier shall in all cases inform the consignor when he entrusts the performance of the carriage or part thereof to a subcontractor.
>
> Any agreement with the consignor or the consignee extending the carrier's responsibility affects the subcontractor only to the extent that he has agreed to it expressly and in writing. The subcontractor may avail himself of all the objections invocable by the carrier under the contract of carriage.
>
> If and to the extent that both the carrier and the subcontractor are liable, their liability is joint and several.

Furthermore, Article 456 SCO should be repealed. This provision is contrary to the principle set forth in Article 449 SCO that the carrier remains liable for the carriage delegated to the subcontractor, just as if he had performed the carriage himself (see para 28 et seq. hereinabove). There is no real need for this provision. 67

88 See BT-Drucksache 13/8445 of 29 August 1997, p. 73.