Product liability in Switzerland

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PRODUCT LIABILITY IN SWITZERLAND

I. Introduction

Switzerland is not yet a member of the European Union. However, in the early 1990s Switzerland reviewed its legislation and enacted a number of statutes implementing the acquis communautaire of EC law in order to establish compatibility in the fields of law covered by the European Economic Area. Part of this process was the preparation of a Product Liability Act implementing EC Directive 85/374 on Product Liability. When the Swiss people rejected the EEA treaty in December 1992, the Swiss legislator decided nevertheless to adopt a Product Liability Act in order to adapt Swiss law to the liability standards in force in the European Union. The Act entered into force on 1st January 1994. It largely follows the wording of the Directive.

Before the enactment of the Product Liability Act 1994, the Swiss courts had adapted the liability regimes of the Swiss Code of obligations to the needs of victims of defective products.

For damages caused by genetically modified organisms the Swiss Federal legislator has recently adopted a special statute with a special liability system (Bundesgesetz über die Gentechnik im Ausserhumanbereich, Gentechnikgesetz = Swiss Federal Act on Genetic Engineering in the Non-Human Field, Genetic Engineering Act, art. 30-34). The Act came into force on 1st January 2004.

Today the Swiss product liability law is based on four pillars:

1) The provisions of the Code of obligations on contractual liability (II. A)
2) Tort liability contained in the Code of obligations (II. B.)

A person who has suffered damage due to a defective product may base its claim on either of these pillars (e.g. Arrêt Tribunal Fédéral (A.F.T)/BGE 113 II 247; 107 II 168; 99 II 321; 90 II 88; 64 II 202; for genetically modified organisms: art. 4 of the Genetic Engineering Act 2004), each of the liability regimes having its merits and deficiencies. The claimant has to establish the facts of the case, and the court will examine whether the conditions for a successful claim are met under one of the regimes.
II. The Four Product Liability Regimes

A. Contract

In Swiss law, contractual liability in principle only exists between the direct parties to a contract. If the parties have a direct contractual relationship, a claim for compensation for damages suffered from a defective good may be based either on the rules governing the Sale of Movable Goods (1) or the rules on liability for Breach of Contract (2).

1. The Rules on the Sale of Movable Goods

a) Legislation

The basic rule for liability under the rules on the sale of movable goods in the Swiss Code of obligations (hereafter: CO) is

Art. 197

1 The seller is liable to the buyer both for express warranties made and that the object of the purchase has no physical or legal defects which eliminate or substantially reduce its value or its fitness for the intended use.

b) State of the Law

Obligation of the seller: According to art. 197 of the Swiss CO the seller of movable goods is held to give an implied warranty of fitness of the goods sold for the purposes for which the seller declared them to be fit and for the purposes for which the goods could be reasonably expected to be fit. If the goods are not fit for these purposes, they are considered to be defective.

1 For the full text of art. 184–215 of the Code of obligations see below: Legislation, I.
Obligation to examine and to notify: Once the goods are delivered, the buyer has the obligation to examine the goods in due course and, upon discovery of a defect, to notify the seller immediately.

If the defect could have been discovered, and if the purchaser does not comply with his obligations to examine and to notify, he forfeits his rights vis-à-vis the seller (art. 201 II CO). If the defect could not have been discovered upon inspection, the purchaser has to notify the seller immediately after discovery of the defect in order not to forfeit his right to a remedy (art. 201 III CO). The Swiss courts take these obligations to examine and to notify very seriously.

Remedies: In case of a defect, the buyer may rescind the sale or reduce the price (art. 205 I CO). The court may, however, decide that the circumstances of the case do not justify rescission of the contract and that a reduction of the price is a sufficient remedy (art. 205 II OR). If the seller has to deliver generic goods, the buyer may also claim the delivery of replacement goods. These remedies do not depend on fault of the seller; the liability is strict (art. 197 II CO).

Where a defect leads to the rescission of the sale, the purchaser is entitled to recovery of the contract price and to the payment of damages for all losses which have been directly caused as a result of the (delivery of the) defective goods (art. 208 II CO). Loss of life and personal injury is considered direct damage even if the chain of causation is long. Under the rules governing the sale of movable goods, liability for direct losses is strict (art. 197 II CO).

In addition the seller is liable for any indirect loss caused by the defective goods (e.g. lost profit), unless the seller is able to prove that he did not commit any fault (art. 208 III CO).

The distinction between direct and indirect damage is difficult to draw and a source of much uncertainty. Damage to other property belonging to the buyer (i.e. damage to his property other than the goods sold) is considered direct damage (and the seller is strictly liable) if the damage was caused without any other interfering source. If, for example, a dishwasher which is sold is found to leak and as a consequence damages the buyer’s furniture, the floor of his apartment and even the apartment below, all this damage is considered to be direct damage and the seller’s liability is strict as regards this damage. If the leaking water gets into electrical installation and causes a fire, the resulting damage is considered indirect damage and the seller is exempted from liability if he proves that he did not commit any fault.
**Limitation period:** The limitation period for remedies under the law on sales of movable goods is one year from the date of delivery of the defective good (§ 210 CO). This short limitation period applies even if the defect is only discovered after the expiry of the one-year period.

2. **Liability for Breach of Contract**

The Swiss Federal Supreme Court has consistently held that the buyer of a defective good may also base his claim on the general rules on breach of contract (art. 97 CO et seq.), delivery of a defective good being considered a breach of contract (e.g. ATF/BGE 108 II 104).

a) **Legislation**

The basic rule for liability for breach of contract in the Code of obligation (CO) is

**Art. 97**

1 If the performance of an obligation cannot at all or not duly be carried out, the party on whom the obligation fell shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him.

2 [...].

b) **State of the Law**

According to art. 97 CO, the seller is liable for damages resulting from the non-execution of the contract unless he can prove that he did not commit any fault.

The seller can excuse himself and defeat liability if he manages to establish that he did not have knowledge of the defect and that even with all due care he could not have been aware of the defect. The Swiss Federal Supreme Court has held that intermediate traders and sellers are in principle not under a duty to examine the goods in order to identify undetected defects (ATF/BGE 49 I 473). Intermediate traders and sellers may therefore escape liability for certain damages by simply disclosing that they act purely as intermediaries.

However, in one case the Court has held that a retailer who is merely selling the product is liable for damages caused by defects he could easily have detected if he had reasonably double-checked the product before putting it on the market (Swiss Federal 2

For the full text of art. 97-109 of the Code of Obligations, see below: Legislation, I.
Supreme Court 14.5.1985 (G. c Société S. SA or: Chaises pliables = folding chairs), Journal des tribunaux 1986 I 571).

The Swiss Federal Supreme Court has consistently held that in order to succeed with a claim for damages for breach of contract, the buyer has to comply with all the requirements of the rules on the sale of goods described above as to the examination of goods and the notification of defects to the seller (ATF/BGE 114 II 131; 107 II 165 onwards).

The Court further held that the one-year limitation period of the rules on the sale of goods is also applicable to claims for defective goods based on general contract law (instead of the 10 year limitation period applicable to general contract claims). The idea is to have identical conditions for sales contracts both under the rules governing sales contracts and the general rules of contract law when applied to sales contracts (e.g. ATF/BGE 107 II 165).

**Contractual exclusion clauses / limitation of liability clauses / disclaimers:** The rules on contractual liability are at the disposal of the parties and their application may be excluded. In fact, parties to sale contracts often replace the right to rescind the sale and to reduce the price by a right for the sellor to deliver replacement goods fit for the purposes provided for in the contract. The gap between the law in the books and the law in action is considerable in this field of the law.

Art. 100 CO states, for contracts in general, that the seller may not exclude liability for gross negligence. Art. 199 CO states however that parties to a sales contract may exclude liability except for defects the seller fraudulently concealed. The Swiss Federal court has left the question open as to whether art. 100 CO is applicable to sales contracts where liability is based on art. 97 CO, or if art. 199 CO regulates this matter exclusively, i.e. leaves the possibility for the seller to exclude liability even for gross negligence (ATF/BGE 107 II 161).

Disclaimers are often included in the general conditions applicable to sale contracts. Whereas the European Union has a detailed regulation for standard conditions in contracts prohibiting certain standard clauses, Swiss law does not provide for such a comprehensive control of general contract conditions.

3. Merits and limits of the contract law-remedies

   a) Merits
The merits of contractual liability are that
- if the defective product itself is damaged, the buyer has a right to rescind the sale or reduce the price (art. 205 I CO)
- for damages and for all losses which have been *directly caused* as a result of the delivery of defective goods, liability is strict (art. 208 II, 197 II CO)
- for any *indirect loss* caused by the defective goods (i.e. lost profit) there is a presumption that the seller was at fault (art. 208 III)
- it also covers damage to property which is mainly used for professional purposes by the injured party
- it covers damage to land
- it covers damage caused by agricultural products
- for property damages there is no threshold for compensation.

b) **Limits**

In order to benefit from contract law remedies there has to be a direct contractual relation between the parties. Contract law remedies are, in principle, not available to third parties such as “innocent bystanders” suffering damage from a defective product.

Other important hurdles and major obstacles under Swiss contract law for the recovery of damages for loss caused by defective goods are due to:
- the severity of the product examination requirement (art. 201 CO),
- the requirement of immediate notification of any defect (art. 201 CO)
- the short one year limitation period beginning with the delivery of the defective goods (art. 210 CO)
- the possibility for the seller to (entirely or partly) contractually exclude or limit the obligations provided for in the Code of obligations (up to the limits provided for in art. 100 and art. 199 CO).

Other important limits of the Swiss rules on the sale of goods are:
- that there is a possibility for the seller to prove that he was not at fault and to hereby avoid liability for *indirect loss* (e.g. lost profits) caused by the defective goods (art. 208 III *in fine* CO)
- that under general contract law the seller who establishes that he was not at fault is not responsible for any damage caused by the defective goods (art. 97 I *in fine* CO).
In fact, in some of the most important leading cases on Swiss product liability law, the victim did not have a contractual relationship with the manufacturer of the defective product (Anilin-case, ATF/BGE 49 I 465, see below: II. B. 4. a) and Chaises pliables (folding chair)-case, Federal Supreme Court, Journal des tribunaux 1986 I 571, see below: II. B. 4. e). In other leading cases the victim could not establish that he had duly examined the product before use (Steiggurt-case, ATF/BGE 64 II 254, see below: II. B. 4. b.) or the short limitation period for contractual claims was passed (Friteusen or Thermostat-case, ATF/BGE 90 II 86, see below: II. B. 4. c.).

B. Tort

In Swiss law, if the injured person has not acquired the product from the person against whom she directs a claim, the claim can be based exclusively on tort.

1. The general rule for liability in tort

Traditionally and before the adoption of the Product Liability Act 1994, the problem of product liability was resolved by the courts by applying the general rules of the Code of obligations on contracts (above) or torts (below). These rules remain applicable to product liability even after the entry into force of the 1994 Act.

a) Legislation

The basic rule for liability in tort provides:

Art. 41

1 Whoever unlawfully causes damage to another, whether willfully or negligently, shall be liable in damages.
2 Equally liable in damages is any person who willfully causes damage to another in violation of bonos mores.

b) State of the Law

For the full text of art. 41–61 of the Code of obligations, see below: Legislation, I.
Conditions of liability: According to art. 41, the general rule in tort, four conditions must be met in order to establish liability:
- the claimant must have suffered damage
- the defendant’s act that caused the damage was unlawful
- there is a link of proximate causation between the wrongful act and the damage
- the defendant was at fault, i.e. he acted intentionally or negligently.

Damages will be treated in a separate chapter (below, 3. a.).

An act is considered *per se* unlawful if it causes damage to a so-called “absolute right”, i.e. a right which enjoys protection against anybody (ATF/BGE 112 II 128; 108 II 311). These rights include the right to life, physical integrity, freedom, other individual rights and the right to property. According to the decisions of the Swiss Federal Supreme Court there is a general duty on a person creating or maintaining a potentially dangerous situation to take appropriate measures in order to prevent damage (*Gefahrensatz*). Any violation of this general duty leading to the violation of an absolute right is considered unlawful. Putting a defective product on the market that causes injury although being used appropriately, is therefore considered unlawful (ATF/BGE 110 II 464 cons. 3a; ATF/BGE 64 II 250 et seq. cons. 10; ATF/BGE 49 I 473).

Damage to other rights and interests, for example the causing of pure economic or financial loss or the interference with contractual rights, is unlawful in the sense of art. 41 CO only if and to the extent that it violates a written or unwritten rule which the purpose of which is the protection of the violated right or interest (ATF/BGE 116 Ia 169).

Liability under the general rule of art. 41 CO depends on the fault of the defendant. Fault consists both of a subjective and of an objective element. If a person lacks discernment because of his age or mental distress, he cannot be held liable (art. 16 of the Swiss Civil Code, subjective element). The standard of care, however, is an objective one. If a manufacturer does not comply which the ordinary standards of care and professional experience, his act is considered to be negligent.

Consequences of liability: If the conditions of liability are met, the person held to be liable has to pay, in principle, for all damages caused, art. 43-46 CO. The aim is to put the victim into the position that existed without the damaging event. The injured person is entitled to receive payments for all his medical expenses, his loss of income during the rehabilitation period,
compensation for any future disadvantage arising out of partial or total disability to work, impairment of his economic future and lost expectations as to his professional career.

In case of death or personal injury or certain violations of individual rights, damages include payments for pain and suffering to the injured party or to his close relatives (death or severe injury of the injured party), art. 47 and 49 CO. Such payments do not necessarily depend on the existence of fault or negligence of the person held liable.

The burden of proof for all conditions of liability under art. 41 CO is, in principle, on the claimant, art. 42 I CO.

2. Liability of the principal for acts of his employees

Art. 55 CO establishes the liability of employers and manufacturing companies for acts of their employees and auxiliaries. Since the mid-eighties, art. 55 CO has been playing a central role in the development of Swiss product liability law.

a) Rules of the Code

Art. 55

C. Liability of the principal

1 The principal shall be liable for damages caused by his employees or other auxiliary persons in the course of their employment or business, unless he proves that he took all precautions appropriate under the circumstances in order to prevent damage of that kind, or that the damage would have occurred in spite of the application of such precautions.

2 The principal may claim recourse from the person who caused such damage to the extent that the latter is liable in his own right.

b) State of the law

Conditions of liability: The product defects may be due to individual negligence in the manufacturing process. Art. 55 CO establishes the vicarious liability of employers for acts of their employees and auxiliaries. In order for the employer to be liable, an employee or auxiliary (in the following: a subordinate) must, in the course of his employment, have committed an unlawful act that caused a damage to another. As in the case of liability under art. 41 CO, in order to establish liability under art. 55 CO, the injured person must establish

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4 For the full text of art. 41-61 of the Code of obligations, see below …
that he has suffered damage, that the defendant’s act that has caused the damage is unlawful (which is usually the case if a defective product is put on the market that might cause injury to an absolute right though used appropriately) and that there is a link of proximate causation between the wrongful act (i.e. the putting on the market of a defective product) and the damage.

Art. 55 presumes that the subordinate’s unlawful act was due to the employer’s breach of duty of diligence in:

a) the choice of the subordinate (cura eligendo, ATF/BGE 96 II 31 f; 81 II 226),

b) the subordinate’s instructions (cura instruendo, ATF/BGE 96 II 32 f.),

c) his supervision (cura in custodiendo, ATF/BGE 72 II 262; 47 II 334),

d) the duty to equip the employee with the appropriate instruments or materials (ATF/BGE 64 II 262; 58 II 35) or

e) the adequate organisation of the business (ATF/BGE 90 II 90) including an adequate control of the finished product.

In order to defeat liability, the employer has to establish that he has taken all necessary precautions to avoid the damage, i.e. that he has chosen, instructed and supervised his subordinates adequately, that he equipped them with the appropriate instruments or materials, and that he organized the business and the control of the finished product adequately.

The other way to escape liability is to prove that the damage would have occurred despite the application of all necessary precautions (art. 55 I in fine CO).

The victim does not have to identify the individual subordinate who committed an unlawful act. It is on the employer to prove that he complied with his duty of diligence, the burden of proof being with the employer.

Since the mid-eighties, the Federal Supreme Court has submitted employers to a rigid standard of care to a point that it seems very hard, if not in most situations almost impossible, for an employer to prove compliance with his duties where the product left his area of control with a defect (see the Schachtraumen case and the Folding chair case below).

Liability under art. 55 thus comes close to a strict liability for damages caused by defective products. (The employer may however prove compliance and hereby defeat liability if the damage was caused by a so-called “development risk”, i.e. a fault that could not have been detected even with all the technical knowledge available at the moment the product was put on the market – and at the moment the damage was caused, since the manufacturer is under a duty to follow the product and to warn the consumer of newly detected defects).
Consequences of liability: If the conditions of liability under art. 55 CO are met, the person held liable has to compensate, as under art. 41 CO, in principle, for all damages he caused. The aim, here again, is to put the injured party in the position that would exist had the damaging event not occurred.

3. Rules applicable to both art. 41 and art. 55 CO

a. Damages

In Swiss law damages are paid either as an annuity or (as most often occurs in practice) as a single payment lump sum (art. 43 CO). The courts usually award lump sums to the extent that lump sums have become a custom (comp. ATF/BGE 112 II 129). The function of the payment is merely compensatory. Exemplary or punitive damages are unknown and rejected by Swiss law even if the case is governed by foreign law (art. 135 II of the Swiss Act of Private International Law).

According to art. 47 and 49 CO, in cases involving bodily injury the injured person may also claim damages for pain and suffering and, in case of severe bodily injury or death, his next of kin are entitled to an indemnity for their grievance or to damages for bereavement. The amount of such payments in damages is determined by the judge.

b. Limitation period

According to art. 60 I CO, the limitation period for an action in tort is one year from the day when the victim has knowledge of the existence of the damage and of the identity of the person liable, i.e. the day he disposes of all the information that he needs to bring a claim. Whilst the damage is ongoing and whilst the injured party does not dispose of all the elements necessary to establish the damage, the limitation period does not start to run (ATF/BGE 109 II 420; 86 II 416; 81 II 446). The period is at most ten years from the day of the harmful event, art. 60 I in fine CO.

If the tort is punishable under criminal law and if the limitation period under criminal law is longer, this longer period applies also to a claim in damages, art. 60 II CO.

4. Leading cases
a) Federal Supreme Court 1.11.1923 \textit{(Anilin-case)} ATF/BGE 49 I 465 (legal basis: art. 41 CO)

\textit{Facts:} In what is probably the first Swiss product liability case, the defendant produced a colour to be used to blacken leather shoes. The colour contained anilin. A carpenter used this colour to blacken the plaintiff’s shoes. The plaintiff walked through wet grass wearing these shoes and developed severe eczema due to the anilin. She had to be hospitalized and needed two months of medical treatment in order to fully recover.

\textit{Held:} The defendant was held liable under art. 41 CO because as a professional manufacturer of a commodity he had violated his duty to the public to make sure that the goods he offered respected the health requirements and also his duty to enclose instructions that, if followed by a purchaser, would avoid damage to health.

b) Federal Supreme Court 25.5.1938 \textit{(Steiggurt-case)} ATF/BGE 64 II 254 (legal basis: art. 55 CO)

\textit{Facts:} An engineer charged with the repair work on overhead cables used a leather security belt. The belt had been repaired by the defendant saddler. Due to a poor repair work the belt didn’t work as security device and the engineer fell from the mast suffering severe injury.

Contractual claims did not succeed because the engineer could not establish that he had met the severe contract law requirement of product examination.

\textit{Held:} The court held that the existence of a contract did not exclude tortious liability in cases where the bad execution of the contract also constituted a tort. The poor repair of a security belt was considered to be not only a violation of a contractual obligation but exposed the engineer’s life and health to a severe danger and was therefore considered an unlawful act under tort law.

Since the repair work was carried out by an employee of the defendant, the court based its decision not on art. 41 CO but on art. 55 CO. The court held that the security of human life and health depended on the proper execution of the repair work. The defendant was therefore obliged to make sure that the correct material and a high standard of care were used by his
employees. Since the defendant had not even argued to have properly instructed and supervised his employees, he had not proven that he had taken all precautions which were appropriate under the circumstances in order to prevent damage of that kind and he was held liable under art. 55 CO.

c) Federal Supreme Court 16.3.1964 (Thermostat-case) ATF/BGE 90 II 86 (legal basis: art. 55 CO)

Facts: A thermostat was incorrectly installed in an oven used in a hotel kitchen. It overheated, leading to a fire which destroyed the kitchen and damaged the hotel. The thermostat had been installed by an electrician employed by the manufacturer of the oven. The limitation period for contractual claims against the seller / manufacturer had expired.

Held: In this second early case on art. 55 CO, the Federal Supreme Court held that the employer of the electrician who had committed the fault had all reasons to trust in the experience of his employee and that he had properly instructed him. The court held that the employer had proven that he had taken all precautions which were appropriate under the circumstances in order to prevent the damage and that, therefore, he was not liable under art. 55 CO.

In the mid-eighties, this decision was overruled by the two most prominent decisions on Swiss product liability law.

d) Federal Supreme Court 9.10.1984 (Schachtrahmen-case), ATF/BGE 110 II 456 (legal basis: art. 55 CO)

In the cases Schachtrahmen and Chaises pliables (folding chair), the Swiss Federal Supreme Court established much more severe standards for the employer’s proof of diligence under art. 55 CO and hereby overruled the principles of the Thermostat-case.

Facts: Some workers, in the course of their employment, lifted an asymmetric concrete block of 690 kilos with an excavator. The block was manufactured for covering a shaft. While being
lifted, due to a failure of a suspension hook, the block fell down and heavily smashed and crushed one of the workers’ right foot. The failure of the suspension hook was due to several construction defects of this specific hook and its inappropriate installation in the block.

The employee brought a claim against the producer of the concrete block. Such blocks were manufactured by two very experienced and reliable employers of the defendant and sold by the defendant to the claimant’s employer. It could not be established which of the two employees of the defendant had manufactured the defective block nor if it had been possible to detect the defect by a control of the finished product.

_Held:_ The Federal Supreme Court held that it could not be established that the defendant had violated any of his duties to choose adequate subordinates (cura eligendo), to supervise them (cura in custodiendo) and to instruct them adequately (cura instruendo). The producer’s duties were, however, not limited to these duties. The court held that the producer had to use all efforts to avoid such accidents with as much certainty as possible. He had to organize controls of the finished product and, if this was not appropriate or sufficient to detect the defect or if the defect could not have been detected at all, the producer had to change its design and choose a design which was safe. The court held that the defendant had violated this duty and was liable under art. 55 CO. The court left the question open as to whether liability also followed from art. 41 CO.

e) Federal Supreme Court 14.5.1985 (_Chaises pliables / Folding chair_), Journal des tribunaux 1986 I 571 (legal basis: art. 55 and 41 CO)

_Offcial: A folding chair was manufactured in Italy, imported by the defendant to Switzerland and finally sold to a dentist who used it in his practice. When the patient tried to sit down on the chair, it broke down due to a defective design and the patient’s spinal column was seriously injured. The patient brought a claim for 199,000 Swiss francs in damages against the importing company with which he did not have a contractual relationship.

_Held:_ The Court held that even though the importer is not under a duty to examine the quality of all products he buys and sells, he must examine the product as to the obvious and most apparent defects which are easy to check if the product is new on the market and has been manufactured by a producer not known to the importer or known to him but of whom he has
reason to doubt the quality of his products. In the case of a chair, the control must cover the parts exposed to the weight of the user.

f) Resume of the recent case-law

In applying art. 41 and art. 55 CO, the Swiss Federal Supreme Court focuses primarily, not on the defect of a product, but on the breach of the manufacturer’s duty to choose adequate subordinates, to supervise them, to instruct them adequately and – most importantly – to use all efforts to avoid accidents, i.e. to organize controls of the finished product and to change, if necessary, the product design and choose a design which is safe. The product liability system established by the Federal Supreme Court on the basis of art. 41 CO and, still more importantly, on the basis of art. 55 CO, comes, not in theory but in practice, close to a liability without fault.

C. Product Liability Act

In establishing a list of severe duties for manufacturers and in restricting the possibilities for an employer to escape liability under art. 55 CO, the Federal Supreme Court has adapted the Code of Obligation’s liability system to new needs and has considerably strengthened the position of persons injured by defective products.

In order to adapt Swiss law to the liability standards in force in the European Union and to bring Swiss law in line with European standards, the Swiss legislator has nevertheless decided to adopt a Product Liability Act. The Act largely follows the wording of the Directive while the arrangement of the articles was adapted to the Swiss legal system. The Act entered into force on 1st January 1994.

Like the European Directive of 1985, the Swiss Product Liability Act 1994 provides for liability independent of any fault on the part of the producer, based largely on the defect of a product. Like the product liability regime established by the Swiss Federal Supreme Court on the basis of art. 41 and art 55 CO, the Act of 1994 does not distinguish between injured persons who are in a contractual relationship with the producer and those who are not.

1. Federal Act on Product Liability of 18th June 1993 (SR 221.112.944)
Art. 1

The producer shall be liable for damage if a defective product causes:

a) the death of, or injury to, a person;

b) damage to, or the destruction of, an item of property of a kind ordinarily intended for private use or consumption and used by the injured person mainly for his own private needs.

The producer shall not be liable for damage to the defective product.

Art. 2

For the purposes of this Act, "producer" means:

a) the person who produced the finished product, a basic material, or a component;

b) any person who represents himself as its producer by putting his name, trademark or other distinguishing feature on the product;

c) any person who imports a product for sale, hire, lease-purchase or any other form of distribution in the course of his business; contrary provisions in international treaties remain reserved.

If the producer of the product cannot be identified, any person who supplied the product shall be deemed to be its producer unless he informs the damaged person, within a reasonable time after being requested to do so, of the name of the producer or of the person who supplied him with the product.

Paragraph 2 shall also apply to products, if the person who imported it cannot be identified, even if the name of the producer is indicated.

Art. 3

For the purposes of this Act, "product" means:

a) any movable, even if incorporated into another movable or immovable, and

b) electricity.

Agricultural products of the soil, products from animal breeding or fishing as well as game are deemed "products" only after they have undergone initial processing.

Art. 4

A product is deemed defective if it does not provide the safety which, taking all circumstances into account, a person is entitled to expect; this shall include in particular:

a) the way the product is presented to the public;

b) the use to which it could reasonably be expected to be put;

c) the point in time when the product was put into circulation.

A product shall not be considered defective solely because an improved product was put into circulation at a later stage.

Art. 5

The producer shall not be liable if he proves that:

a) he did not put the product into circulation;

b) under the circumstances, it is probable that the defect which caused the damage did not exist at the time when he put the product into circulation;
c) he manufactured the product neither for sale nor for any other form of distribution with a
commercial purpose nor manufactured or distributed it in the course of his business activities;
d) the defect is attributable to the product’s compliance with mandatory regulations decreed by
public authorities;
e) the defect could not be discovered in view of the level of scientific and technical knowledge at
the time when the product was put into circulation.

Furthermore, the producer of a basic material or of a component is not liable if he proves that the
defect is attributable to the design of the product in which the basic material or component was
incorporated, or to the instructions given by the producer of the product.

Art. 6

1 The damaged person shall self-assume property damages up to SFr. 900.
2 The Federal Council may adapt the amount set forth in paragraph 1 to a change of conditions.

Art. 7

If two or more persons are liable for the damage caused by a defective product, they shall be liable
jointly and severally.

Art. 8

Agreements waiving or limiting the liability of the producer to the damaged party as set forth in
this Act are null and void.

Art. 9

Claims under this Act are forfeited three years after the day upon which the damaged person
became aware, or should reasonably have become aware, of the damage, the defect, and the identity
of the producer.

Art. 10

1 Claims under this Act shall be extinguished 10 years after the day upon which the producer put the
product which caused the damage into circulation.
2 The limitation is considered to be avoided if the claim has been brought against the producer
within 10 years.

Art. 11

1 The provisions of the Code of Obligations shall be applicable, unless otherwise provided for by
this Act.
2 The damaged person shall continue to have a right to the recovery of damages based on the Code
of Obligations or other provisions of the Federal or cantonal public law.
3 This Act shall not apply to damages arising from nuclear accidents. Contrary provisions in
international treaties remain reserved.

Art. 12

The Nuclear Energy Liability Act of 18th March 1983, shall be amended as follows:
Art. 2, para. 1, subpara. b and c

1 “Nuclear damage” means:
   b) damage caused by another source of radiation within a nuclear plant;
   c) damage arising as a result of measures ordered or recommended by the authorities to avert or reduce an immediately impending nuclear threat with the exception of a loss of profit.

Art. 13

This Act shall apply only to products put into circulation after its entry into force.

Art. 14

1 This Act shall be subject to optional referendum.
2 The Federal Council shall decide on the date of its entry into force.

Expiry of the referendum period and entry into force

1 The referendum period for this Act expired on 4th October 1993; no referendum was filed.
2 This Act shall enter into force on 1st January 1994

2. Comments

According to Art. 3 II of the Product Liability Act 1994, following Art. 2 of the initial version of the EC Directive on Product Liability, agricultural products of the soil, products from animal breeding or fishing as well as game are deemed "products" only after they have undergone initial processing.

According to art. 5 I e) of the Product Liability Act 1994, the producer is not liable if he proves that the defect could not be discovered in view of the level of scientific and technical knowledge at the time when the product was put into circulation. The Swiss legislator used the EC Directive’s option to establish liability for so-called “development risks” only for genetically modified organisms, see below II. D.

In accordance with art. 9 (b) of the EC Directive, art. 6 of the Swiss Product Liability Act 1994 fixes a threshold of 900 Swiss Francs for damages to property.

The Product Liability Act 1994 does not contain a clause corresponding to the EC Directive’s art. 4 on the burden of proof (“The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage”). The distribution of the burden of proof provided for in the Directive follows already from art. 8 of the Swiss Civil Code which states that the burden of proof is, in principle, with the claimant.

For the consequences of liability, art. 11 I of the Swiss Product Liability Act 1994 refers to the provisions of the Code of Obligations. This reference includes the application of art. 47 and 49 CO so that in case of bodily injury the injured person may also claim damages for pain
and suffering. In case of severe bodily injury or death of the victim, his next of kin are entitled to compensation for their pain and suffering and for bereavement.

The Swiss Act does not contain a clause corresponding to art. 8 II of the EC Directive which provides for a reduction or disallowance of the producer’s liability in case of the injured party’s contributory negligence (“The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible”). Art. 44 I CO already allows for Swiss law to reach the same result.

3. Limits and merits of the system established by the Product Liability Act 1994

The system established by the Product Liability Act 1994 has some limits in respect of the Code of Obligation’s liability system for contracts and torts. These limits are:

- the threshold of 900 Swiss Francs for property damage (art. 6 of the 1994 Act)
- the exclusion of damage to property used mainly for professional purposes by the injured person (art. 1 I lit. b of the Act of 1994). The experiences of insurer’s show that most damages to property caused by defective products concern property used for professional purposes.
- the exclusion of damages to the defective product itself (art. 1 II of the Act of 1994)
- the exclusion of damages to land (art. 1 of the Act of 1994)
- the exclusion of damages caused by agricultural products unless they have undergone initial processing (art. 3 II of the Act of 1994)
- the possibility for the person potentially liable to escape liability for development risks (art. 5 I lit. e of the Act of 1994), although it is far from clear as to whether such liability exists under art. 41 or 55 CO and it is more probable than not that under Swiss law there is no such liability
- there is no liability for violations of the duty to observe the product once the product is put on the market and the duty to call back defective products once new defects are revealed (art. 5 I lit e of the Act of 1994).

The merits of the Product Liability Act 1994 in comparison with the liability system of the Swiss Code of Obligations are that:

- liability for damage covered by the Act is, in any case, strict (art. 1 of the Act of 1994)
- the limitation period is three years (art. 9 of the Act of 1994) instead of one year (under art. 210 CO and under art. 60 CO).
- the starting point for the limitation period is subjective (art. 9 of the Act of 1994). The period starts running the day upon which the damaged person became aware or should reasonably have become aware of the damage, the defect, and the identity of the producer, whereas the limitation period of Swiss contract law is objective and starts running as from the delivery of the product (art. 210 CO).
  However, the short limitation period of Swiss tort law (art. 60 CO) starts only the day the victim has positive knowledge of the all information which it needs to bring a claim. This period may in some (rather exceptional) cases be longer than the period provided for in the 1994 Act since the limitation period under the 1994 Act starts running when the damaged person should reasonably have become aware of the damage, the defect, and the identity of the producer.
- According to art. 8 of the 1994 Act, contractual clauses limiting liability or exempting liability/disclaimers are void.

4. Case law

For the interpretation of the Swiss Product Liability Act 1994, it is useful to remember that by enacting the Product Liability Act 1994, the Swiss legislator wanted to adapt Swiss law to the liability standards in force in the European Union and to make Swiss law euro-compatible. This aim can only be achieved if, in the interpretation of the Swiss Product Liability Act 1994, the interpretation of the EC Directive on Product Liability, given by the European Court of Justice, is followed.

In a decision of November 2003, the Swiss Federal Supreme Court adopted the view that statutes of Swiss law implementing the acquis communautaire shall be interpreted in conformity with EC law (TF/BG 26.11.2003, ATF/BGE 130 III 182).

There is no published case law yet on the application of the Swiss Product Liability Act 1994. One reason for this might be the threshold of 900 Swiss Francs for property damages in art. 6 of the Swiss Product Liability Act (or any of the other limits on liability under the 1994 Act mentioned above); this threshold provides an incentive both for parties and courts to base liability on art. 41 or on art. 55 CO instead of the 1994 Act.
Another important reason for the lack of decisions concerning the 1994 Act and for the scarcity of decisions on product liability in general is certainly that Swiss manufacturers and their insurers are most interested in settling product liability cases out-of-court in order to avoid the negative publicity of court proceedings.

D. Genetic Engineering in the Non-Human Field Act 2004
(Recueil Systématique = RS, 814.912)

1. Introduction

Since 1\textsuperscript{st} January 2004 damages caused by genetically modified organisms are subject to a special liability system, art. 30-34 of the Swiss Federal Act on Genetic Engineering in the Non-Human Field (Genetic Engineering Act 2004, or: GE Act 2004).

Under this law, every person who deals with genetically modified organisms in the non-human field (e.g. genetically modified seed or drugs containing genetically modified substances), and every person who wants to release such organisms for scientific or experimental purposes or who wants to commercialize them, is under a duty to notify and to obtain, in principle, permission by the competent authority (art. 10-12 of the Genetic Engineering Act 2004).

Genetically modified organisms present the particular danger that their genetic make-up may change again or that they might transfer their genetic information to other organisms. The Swiss legislator considered genetically modified organisms to be particularly dangerous and created a causal liability for damages caused by such organisms, independent of any fault of the person held responsible and, for certain types of such organisms, independent of any defect of the genetically modified organism.

2. The liability regime of the Genetic Engineering Act 2004

a) Conditions of liability
Under the new Act, a person who deals with genetically modified organisms in closed spaces or who releases such organisms for scientific or experimental purposes, is subject to strict causal liability (art. 30 I of the Genetic Engineering Act 2004).

The liability is focused and centralized on the person who, under the Act, is responsible for the genetically modified organisms, i.e. the person that received permission to deal with these organisms, or who should have applied for permission but has omitted to do so. In case of absence of permission, every person who puts such organisms into circulation or who contributed to their further circulation by any means whatsoever is subject to strict liability (art. 30 I and art. 5 V of the GE Act 2004).

The legislator distinguishes genetically modified organisms (GMO) used for agricultural purposes (e.g. genetically modified seeds, “Green GMO”) from drugs containing genetically modified components (“Red GMO”) and all other GMO.

Liability for “Green GMO” is independent of any defect of the GMO and exists even if all necessary administrative authorisations have been obtained (art. 30 II of the GE Act 2004). In disconnecting liability from a defect of the product, the legislator deviated from the standards of the Product Liability Act 1994. In order to establish liability, it is sufficient to show that the “Green GMO” was a link in the chain of causation that lead to the damage, even if third parties inappropriately used the GMO and hereby largely contributed to the causation of the damage. However, where a third party has acted negligently, the person responsible under the GE Act 2004 has a right of recourse against the third party, art. 30 III of the GE Act 2004.

Liability for “Red GMO” (e.g. drugs containing genetically modified components) and all other GMO put into circulation with permission is dependant upon the existence of a defect of the GMO, art. 30 IV of the GE Act 2004. The definition of “defect” is identical with the definition in the Product Liability Act 1994 (art. 30 V and VI of the GE Act 2004). However, liability for GMO also covers development risks, i.e. damages from defects that could not be detected using all technical knowledge available at the moment the product was commercialized – such risks being considered by the Swiss legislator a most typical risk of GMO. If damage caused by a genetically modified drug is due to the genetic modification, the liability of the holder of the permission thus exists even if the defect could not be discovered using all knowledge available at the moment the product was put on the market.

b) Damages, Causality and Burden of Proof
**Damages:** The Code of obligations rules on damages also apply to liability under the GE Act 2004 (art. 30 IX of the GE Act 2004).

In some important aspects the rules on damages of the Genetic Engineering Act 2004 differ however from those of the Product Liability Act 1994:

First, in the GE Act 2004 there is no threshold for the compensation of minor damages.

Second, whereas the Product Liability Act 1994 protects consumers and excludes damages to professionally used property, there is no such exclusion in the GE Act 2004. Damages suffered by farmers are expressly mentioned in the Act (art. 30 II GE Act 2004), one of the main objectives of the act being the protection of biological and natural farming.

According to art. 31 I of the GE Act 2004, the person liable also has to compensate for the expenses incurred to undertaking all necessary and appropriate measures to restore destroyed or damaged components of the environment or to replace them by equivalent components. This article includes damage to natural resources or “ecological damage”. The details of the application of this article are left to the courts.

If the destroyed or damaged components of the environment are not subject to any property rights or if the owner does not take adequate measures, the competent local community has right to ask for compensation. (During the legislative process the possibility of also granting this right to certain non-governmental organisations engaged in the protection of the environment was discussed. This proposal was finally rejected.)

**Causality and burden of proof:** The liability under the Act is limited to cases where the damage was caused by a genetic modification of an organism (art. 30 I, II, VII of the GE Act 2004). In principle, it is the claimant who must establish and prove causality (art. 33 I of the GE Act 2004). According to art. 33 II of the GE Act 2004, it is however sufficient for the claimant to establish that is was more probable than not that the damage was caused by the genetic modification of an organism. Moreover, the court is given the power to order investigations with the aim of establishing the relevant facts. In Swiss private law such a power of the court is most exceptional, the judge does not usually have the obligation nor the right to inquire by his own initiative.

c) **Limitation period**
The limitation period for an action under the Act is three years from the day when the injured party has knowledge of the damage and of the identity of the person liable, i.e. the day he disposes of all information he needs to bring a claim (art. 32 of the GE Act 2004). This period should not exceed 30 years.

E. Choice of Law / Private International Law


III. Practice and Procedure

Litigation in private law is subject to the Codes of civil procedure of the Swiss cantons which differ considerably due to the different histories of the cantons. Some Codes are influenced by the German and Austrian tradition, others by the French example. However, a Swiss Federal Code of civil procedure is being prepared and will most probably come into force before the end of this decade.

Pre-trial discovery, jury trials and class-actions as they are known in the US are unknown in the cantonal Codes on civil procedure. Under the rules of these Codes, the pre-trial procedure is, in principle, conducted in writing. The briefs of the parties include the statement of facts, the evidence, requests for the hearing of witnesses or for expert advice, and the precise request of the party. The judge may, at the request of one party, appoint an independent expert. The opinion of an independent expert usually has a higher persuasive value before the court than the advice of an expert produced by the parties.

The judge does not have the obligation nor the right to inquire by his own initiative (for an exception see the Genetic Engineering Act 2004 above). In his judgement, the judge is limited to the parties´ requests, i.e. he can not go beyond them (rule of ne ultra petita).
Court and procedural costs are to be advanced by the claimant and will finally be charged to the losing party. If the claim only partially succeeds, the judge divides the costs according to his reasonable discretion. In some cantons the losing party has to pay the winning party’s full costs for legal assistance, in others it merely has to contribute to these costs. Contingency fees are considered contrary to the dignity of the legal profession and contrary to the independence of attorneys. The aim of a fee agreed upon must always be to renumerate the attorney for his efforts. However, in certain cantons the parties can agree to renumerate the attorney with a share of the possible outcome of the litigation.

If the litigation value exceeds 8000 Swiss Francs, judgments of the cantonal high courts can be appealed to the Swiss Federal Supreme Court in Lausanne, the highest court of the country and the only federal court for civil law matters. The Federal Supreme Court limits its review to questions of law, including the federal rules of evidence.

**LEGISLATION**

I. Code of obligations

Tortious Obligations

**Art. 41**

A. Liability in general

I. Prerequisites for liability

1. Whoever unlawfully causes loss to another, whether willfully or negligently, shall be liable in damages.
2. Equally liable in damages is any person who willfully causes loss to another in violation of bonos mores.

**Art. 42**

II. Determination of damages

1. Whoever claims damages must prove the loss.
2. If the exact amount of damages cannot be established, the judge shall assess them using his discretion, having regard to the ordinary course of events and the measures taken by the injured party.
3. In the case of animals living in a domestic environment that are not kept for investment or income-earning purposes, treatment costs may be reasonably claimed even if they exceed the value of the animal.

**Art. 43**

III. Determination of compensation

1. The judge shall determine the nature and amount of compensation for the loss sustained, taking into account the circumstances as well as the degree of fault.
2. In the event of an injury or death of an animal living in a domestic environment, not kept for investment or
income-earning purposes, the judge may take into account to a reasonable degree the emotional value of such an animal to the keeper or the persons close to him.

2 Where compensation is awarded by way of an annuity, the liable party shall be simultaneously required to provide a security.

**Art. 44**

IV. Reasons for reduction

1 The judge may reduce or completely deny any liability for damages if the injured party consented to the act causing the loss, or if circumstances for which he is responsible have caused or aggravated the loss, or have otherwise adversely affected the position of the person liable.

2 If a liable person has caused the loss neither willfully nor by gross negligence, and would be subject to distress as a result of his paying the damages, the judge may also, for this reason, reduce the obligation to compensate.

**Art. 45**

V. Special cases

1 Death and bodily injury

a. Damages in case of death

1 Where a person has been killed, the ensuing expenses, in particular the funeral expenses, shall be compensated.

2 If death did not occur immediately, in particular the expense of medical treatment must also be paid as well as the losses resulting from an inability to work.

3 If other persons have lost their source of support as the result of the death, damages must also be paid for this loss.

**Art. 46**

b. Damages in case of bodily injury

1 A person who has sustained bodily injury is entitled to compensation for his expenses and for loss resulting from his total or partial inability to work, with due regard to the impairment of his economic future.

2 If, at the time of judgment, the consequences of the injury cannot be established with sufficient certainty, the judge may reserve the right to modify the judgment for a period of up to two years from the date of judgment.

**Art. 47**

c. Payment of damages

Where a person has been killed, or has sustained a bodily injury, the judge may, having due regard to the particular circumstances, award to the injured person, or to the next of kin of the deceased, an adequate sum of money as compensation.

**Art. 48**

2 ...  

_This provision has been replaced by the Federal Act on Unfair Competition._

**Art. 49**

3 In case of injury to individual inherent rights

1 A person who is injured in his personality may claim compensation for non-physical harm if this is justified by the seriousness of the injury and if the loss has not been otherwise compensated.

2 In lieu of, or in addition to, this payment, the judge may also award other kinds of reparations.

**Art. 50**

VI. Liability of several persons
1. In case of tort

1 Where several persons have jointly caused the loss, whether as instigators, principals, or accessories, they shall be jointly and severally liable to the injured party.
2 The judge, in his discretion, shall determine whether and to what extent they have a right of recourse against one another.
3 An abettor shall be liable only if, and only to the extent that, he has received a share of the profit or has caused loss by his participation.

Art. 51

2. In case of different legal grounds

1 If several persons are liable to the injured person for the same loss based on different legal grounds, whether due to tort, in contract, or as the result of a legal requirement, then the provision regarding recourse among persons who are jointly responsible for causing the loss shall be applied accordingly.
2 In this context, as a rule, the loss shall primarily be compensated by the person who caused it through an unlawful act, and in the last instance by a person who, without personal fault and without a contractual obligation, is liable based upon a legal requirement.

Art. 52

VII. Liability in the case of self-defence, distress and self-help

1 Whoever acts in justified self-defence resisting aggression shall not be liable for the damage which he may thus cause to the person or the property of the aggressor.
2 Whoever infringes upon the property rights of another in order to avert imminent damage or danger to himself or to another person shall be liable in damages at the judge's discretion.
3 Whoever, for the purpose of protecting a justified right, shall resort to self-help, shall not be liable in damages if, under the circumstances, the assistance of the authorities could not be obtained in due time, and the thwarting of the claim or the material impairment of its enforcement could only be prevented by self-help.

Art. 53

VIII. Relationship to criminal law

1 When judging fault or innocence, and capacity or incapacity to make a rational judgment, the judge shall not be bound by the provisions of criminal law concerning criminal liability, nor by an acquittal in a criminal court.
2 Likewise, the judgment of a criminal court as to guilt and the determination of damage is not binding upon a civil judge.

Art. 54

B. Liability of persons incapable of making a rational judgment

1 A judge may determine in equity that a person who has caused a loss shall be liable for partial or full damages even if such person is incapable of making a rational judgement.
2 If a person has caused loss while temporarily incapable of making a rational judgement, he shall be liable therefor unless he proves that his condition occurred through no fault of his own.

Art. 55

C. Liability of the principal

1 The principal shall be vicariously liable for loss caused by his employees or other auxiliary persons in the course of their employment or business, unless he proves that he took all precautions appropriate under the circumstances in order to prevent damage of that kind, or that the loss would have occurred in spite of the application of such precautions.
2 The principal may claim recourse from the person who caused such loss to the extent that the latter is liable in his own right.
Art. 56

D. Liability for animals
I. Obligation to compensate

1 The keeper of an animal is liable for loss caused by it unless he proves that he has taken all precautions appropriate under the circumstances as to its custody and supervision, or that the damage would have occurred in spite of the application of such precautions.

2 Unaffected thereby is his claim for recourse if the animal has been provoked by another person or another person's animal.

repealed

Art. 57

II. Attachment of an animal

1 The owner of real property has the right to seize animals belonging to third parties which cause damage on such real property as security for his claim for damages, and he may hold such animals and even, where the circumstances justify it, kill them.

2 He shall, however, be bound to notify the owner of such animals without delay and, where he does not know the owner, take the necessary measures to identify him.

Art. 58

E. Liability of the owner of a construction
I. Obligation to compensate

1 The owner of a building or other construction shall be liable for the damage which it causes due to its faulty design or construction, or due to inadequate maintenance.

2 The owner may, however, claim recourse from other persons who are responsible to him therefor.

Art. 59

II. Safety measures

1 Whoever is threatened with damage by another person's building or construction may require its owner to take the necessary measures to avert the danger.

2 Orders of the police for the protection of persons and property are not affected thereby.

Art. 60

F. Statute of limitations

1 A claim for damages or reparations is barred by the statute of limitations after one year from the date when the damaged person has received knowledge of the damage and of the identity of the person who is liable, but, in any event, after ten years from the date when the act causing the damage took place.

2 If the claim results from an act which is illegal under criminal law, however, and which, in accordance with criminal law is subject to a longer statutory limitation period, then the latter limitation period shall also apply to the civil claim.

3 If a tort gives rise to a claim by an injured person, the latter may refuse the performance of an obligation even if his claim in tort is barred by the statute of limitations.

Art. 61

G Liability of public officials and employees

1 The Confederation and the cantons may, by legislation, enact different provisions concerning the obligation of public officials or employees to compensate or give reparations for damage which they may cause in the exercise of their official activities.

2 As regards activities of a commercial nature performed by public officials or employees, however, the
provisions of the present chapter cannot be modified by cantonal law.

[...]  

Consequences of Non-performance

Art. 97

A. Nonperformance
I. Obligation to compensate by the obligor
1. In general

1 If the performance of an obligation can not at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him.
2 The means of enforcement are governed by the provisions of the Law on Debt Enforcement and Bankruptcy, and by the Federal and cantonal laws concerning execution.

Art. 98

2. In the case of obligations to act or to abstain from acting

1 If the obligor is obliged to act, the obligee can obtain the authorization to effect the performance at the expense of the obligor without affecting his claim for damages.
2 If the obligor is obliged to abstain from acting, he must compensate any damage arising from his mere non-observance.
3 Moreover, the obligee may require the curing of the breach of contract and the authority to cure it at the expense of the obligor.

Art. 99

II. Extent of liability and scope of damages
1. In general

1 In general the obligor is liable for any fault.
2 The extent of such liability shall be governed by the special nature of the transaction, and will, in particular, be judged less severely if the transaction is not intended in any way to benefit the obligor.
3 The provisions concerning the extent of liability in case of tort also apply by analogy to acts in breach of contract.

Art. 100

2. Contractual exclusion of liability

1 An agreement entered into in advance, according to which liability for unlawful intent or gross negligence would be excluded, is null and void.
2 Moreover, a waiver of liability for simple negligence declared in advance may be considered to be null and void at the discretion of the judge, if the party making the waiver was employed by the other party at the time of his declaration, or if the liability arises out of the conduct of a business that is carried on under an official licence.
3 The special provisions regarding contracts of insurance remain reserved.

Art. 101

3. Liability for auxiliary persons

1 If an obligor, even though authorized, has performed an obligation, or exercised a right arising out of a legal relationship through an auxiliary person such as a co-tenant or an employee, the obligor must compensate the other party for any damage caused by the acts of the auxiliary person.
2 This liability may be limited or excluded by prior agreement.
3 If the party making the waiver is employed by the other party, however, or if liability arises out of the conduct
of a business that is carried on under an official licence, such liability may at most be waived for simple negligence.

Art. 102

B. Default of obligor
   I. Conditions

1 If an obligation is due, the obligor will be in default upon being reminded thereof by the obligee.
2 If a certain due date was agreed upon for performance, or if such a date arises from a stipulated and duly exercised notice of termination, the obligor will already be in default upon the expiration of such a date.

Art. 103

II. Effect
   I. Liability for accident without fault

1 If the obligor is in default, he must pay damages for any delayed performance, and is also liable for any accident without fault.
2 He may relieve himself from this liability by proving that the delay occurred without any fault on his part, or that the accident would have affected the object of his performance to the detriment of the obligee even in the event of timely performance.

Art. 104

2. Default interest
   a. In general

1 If an obligor is in default as to the payment of a financial debt, he shall pay default interest at five percent per annum, even if the contract provides for a lower rate.
2 If a higher interest rate than five percent has been agreed upon in the contract, whether directly or by stipulation of a periodic bank charge, such higher interest may also be claimed during the default period.
3 Among merchants, when the usual bank discount at the place of payment is higher than five percent, default interest may be calculated at such higher rate.

Art. 105

b. Interest, pensions, donations

1 An obligor who is in default with the payment of interest, with the payment of pensions, or with the payment of a donated sum, must only pay default interest from the day from which enforcement is requested or upon the institution of a legal action.
2 An agreement to the contrary is to be handled in accordance with the principles regarding liquidated damages.
3 No penalty interest shall be calculated on penalty interest.

Art. 106

3. Further damage

1 If the obligee has incurred greater damage than that compensated by the penalty interest, the obligor will be obligated to also compensate such damage unless he proves that no fault is attributable to him.
2 If this additional damage can be estimated in advance, the judge may award it in the judgment regarding the principal claim.

Art. 107

4. Withdrawal from contract and damages
   a. Fixing a time limit

1 If the obligor is in default in the case of a bilateral contract, the obligee shall be entitled to fix an appropriate time limit for subsequent performance, or to have it fixed by the competent authority.
If, at the expiration of this time limit, there is no performance, the obligee may still sue for performance plus damages due to delay. Alternatively, if he so declares without delay, he may waive subsequent performance and ask for compensation for damage arising out of the non-performance or withdraw from the contract.

Art. 108

b. Without fixing a time limit

The fixing of a time limit for subsequent performance is not required:
1. if the behavior of the obligor indicates that this would be in vain, or
2. if, because of the delay of the obligor, performance has become useless to the obligee, or
3. if the contract indicates that it was the intention of the parties that performance was to be made exactly at a defined time, or prior to the end of an precisely defined time period.

Art. 109

c. Effect of withdrawal

1 Whoever withdraws from a contract may refuse the promised consideration and reclaim whatever he has already performed.
2 Moreover, he has a claim for compensation for damage arising out of the withdrawal from the contract, unless the obligor proves that no fault at all is attributable to him.

[...]

Second Division: The Individual Types of Contracts

Sixth Title: Purchase and Barter

First Chapter: General Provisions

Art. 184

A. Rights and obligations in general

1 A contract of purchase is a contract whereby the seller promises to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer, and the buyer promises to pay the purchase price to the seller.
2 Unless there exists an agreement or a custom to the contrary, both the seller and the buyer are obligated to simultaneously perform their obligations.
3 The price is sufficiently determined if it is determinable from the circumstances.

Art. 185

B. Benefit and risk

1 Unless special circumstances or agreements lead to an exception, benefit and risk with regard to the object of the purchase pass to the buyer upon conclusion of the contract.
2 If the object of the purchase is described only in a generic manner, it must, in addition, have been segregated and, if it is to be shipped, placed in the possession of a shipper.
3 Where the contracts are subject to a preliminary condition, benefit and risk with regard to the object sold pass to the buyer only upon the fulfillment of the condition.

Art. 186

C. Reservation of cantonal legislation

The restricting or excluding of the right to bring an action for claims arising from the retail sale of liquor, including the claims of innkeepers, is reserved to Cantonal legislation.
Second Chapter: Purchase of Chattels

Art. 187

A. Object

1 The purchase of a chattel is considered to be any purchase other than the purchase of real estate or of rights entered into the Real Estate Register as real property.
2 Constituent parts of real property, such as proceeds, or materials from buildings to be demolished, or from quarries, are the object of a purchase of a chattel if, after their separation from the real property, they are to be transferred to the buyer as movable property.

Art. 188

B. Obligations of the seller
   I. Delivery
      1. Costs of delivery

Unless otherwise agreed upon or customary, the costs of delivery shall be borne by the seller, in particular the costs for measuring and weighing. The buyer, on the other hand, shall bear the costs for documentary authentication and taking delivery.

Art. 189

2. Costs of shipping

1 If the object of the purchase must be shipped to a place other than the place of performance, the shipping costs shall be borne by the buyer unless otherwise agreed upon or customary.
2 If free delivery has been agreed upon, it is presumed that the seller shall bear the shipping costs.
3 If free delivery, customs charges paid, has been agreed upon, the payment of export, transit and import customs duties levied during shipment, with the exception of excise taxes levied upon receipt of the object of the purchase, are deemed to be the obligation of the seller.

Art. 190

3. Default as to delivery
   a. Withdrawal from contracts in commercial transactions

1 If in commercial transactions a fixed date for delivery has been agreed upon, and the seller defaults with regard to the delivery, it is presumed that the buyer waives delivery and claims compensation for damages arising from non-performance.
2 If the buyer prefers to require delivery, he must notify the seller immediately upon the expiration of the time limit.

Art. 191

b. Liability for, and calculation of damages

1 If the seller does not perform his contractual obligations, he must compensate the buyer for damages resulting therefrom.
2 In commercial transactions, the buyer may claim as damages the difference between the purchase price of the undelivered object of the purchase and the price he had to pay in good faith for replacement.
3 In the case of goods having a market price or being quoted on an exchange, the buyer may, without having to purchase a replacement, claim as damages the difference between the contract price and the price at the date fixed for performance.
Art. 192
II. Warranty with regard to title transferred
1. Obligation to warrant

1 The seller shall warrant that no third party, for reasons of a legal nature which already existed at the time of the conclusion of the contract, may deprive the buyer entirely, or partially, of the object of the purchase.
2 If the buyer, at the time of conclusion of the contract, knew of the risk of deprivation, a warranty of title exists only if the seller has made an express warranty to that effect.
3 An agreement eliminating or limiting the obligation to warrant is invalid if the seller intentionally concealed the right of the third party.

Art. 193
2. Proceedings
a. Notice of litigation

1 If a third party asserts his right to the object of the purchase covered by the seller's warranty, the seller, after having received notice of litigation, shall assist the buyer, or represent him in the litigation according to the circumstances and the rules of civil procedure.
2 If notice of litigation has been given in due time, a judgment against the buyer is also valid against the seller unless he can prove that the unfavorable judgment was due to malicious intent or to the gross negligence of the buyer.
3 If the omission of the notice of litigation cannot be attributed to the seller, he is released from his warranty to the extent that he can prove that a more favorable judgment could have been achieved if notice of litigation had been given in due time.

Art. 194
b. Relinquishment without court decision

1 The obligation to warrant title also exists if the buyer, in the absence of a court decision, acknowledges in good faith the right of a third party, or has agreed to submit himself to arbitration, provided that notice had been given to the seller in due time and that the opportunity to conduct the litigation had been offered to him without result.
2 The obligation to warrant title also exists if the buyer proves that he was obliged to relinquish the object of the purchase.

Art. 195
3. Claims of the buyer
a. In the case of complete deprivation

1 If deprivation is complete, the purchase contract is deemed to be cancelled, and the buyer has the right to claim:
   1. restitution of the purchase price paid plus interest, reduced by the value of proceeds and other benefits which he has collected or neglected to collect;
   2. compensation for expenditures incurred with regard to the object of the purchase, to the extent that such compensation cannot be obtained from the third party entitled to the object of the purchase;
   3. compensation for all judicial and extra-judicial costs incurred as a result of litigation, with the exception of those costs which could have been avoided by notice of litigation;
   4. compensation for all other damages directly caused by the deprivation.
2 The seller is also obliged to compensate for further damage, unless he proves that no fault at all is attributable to him.

Art. 196
b. In case of partial deprivation

1 If the buyer is only partially deprived of the object of the purchase, or if the object sold is subject to an encumbrance for which the seller is responsible, the buyer may not claim that the contract be canceled, but may only claim compensation for damage caused to him by the deprivation.
2 If, however, under the circumstances, it is to be assumed that the buyer would not have concluded the contract if he had foreseen the partial deprivation, he is entitled to demand cancellation of the contract.
In this case, the object of the purchase, to the extent that it has not been successfully claimed by the third party, must be returned to the seller together with the benefits collected in the meantime.

Art. 197

III. Warranty against defects in the object of the purchase
1. Object of warranty
   a. In general

1 The seller is liable to the buyer both for express warranties made and that the object of the purchase has no physical or legal defects which eliminate or substantially reduce its value or its fitness for the intended use.
2 The seller is liable even if he did not know of the defects.

Art. 198

b. In the livestock trade

In the livestock trade (horses, donkeys, mules, cattle, sheep, goats and swine), an obligation to warrant exists only to the extent that the seller has undertaken such an obligation in writing or has willfully deceived the buyer.

Art. 199

2. Agreement to exclude warranty

An agreement to exclude or to limit the obligation to warrant is invalid if the seller has fraudulently concealed the defects.

Art. 200

3. Defects known to the buyer

1 The seller is not liable for defects of which the buyer had knowledge at the time of the purchase.
2 For defects which the buyer, using normal attention, should have known, the seller is only liable if he has assured the buyer of their non-existence.

Art. 201

4. Notification of defects
   a. In general

1 The buyer shall examine the quality of the object of the purchase received as soon as it is customary in accordance with usual business practice, and shall immediately notify the seller in the event that defects exist for which the seller must warrant.
2 If the buyer fails to so notify, the object purchased is deemed to have been accepted to the extent that there are no defects involved which were not recognizable in the course of a customary examination.
3 If defects are discovered at a later date, notification must be given immediately upon their discovery. Otherwise the object of the purchase is deemed to have been accepted with respect to such defects.

Art. 202

b. In the livestock trade

1 If, in the livestock trade, a written warranty does not contain a time limit, and if no warranty as to pregnancy is involved, the seller is liable to the buyer only if the defect is discovered and notification thereof is given within nine days from the date of delivery or default of acceptance, and if within the same period of time a request is made to the competent authority for examination of the animal by experts.
2 The opinion of the experts shall be considered by the judge at his discretion.
3 Moreover, the procedure shall be regulated by an ordinance of the Federal Council.

Art. 203

5. Willful deception
If the buyer is willfully deceived by the seller, an omission of notification by the buyer shall not limit the warranty.

**Art. 204**

6. Proceeding in case of shipment from another place

1 If the object of the purchase shipped from another place is objected to, and if the seller has no agent at the place of receipt, then the buyer is obliged to provide for its temporary storage, and shall not return it to the seller without further action.
2 The buyer shall have the facts properly determined without delay, and, in default thereof, he shall have the burden of proof that the alleged defects already existed at the time of receipt.
3 If there is a danger that the object of the purchase shipped may quickly perish, the buyer has the right, and, to the extent that the seller’s interests so require, the duty, to have it sold with the cooperation of the competent authority at the place where the object of the purchase is situated. The buyer must, however, inform the seller thereof as soon as feasible to avoid liability for loss.

**Art. 205**

7. Content of buyer's action
   a. Action for rescission or reduction of purchase price

1 In the case of warranty against defects in the object of the purchase, the buyer may either elect to sue for rescission of the contract for sale of goods, or to sue for a reduction of the purchase price, in order to be compensated for the reduction in value of the object of the purchase.
2 Even if an action for rescission has been initiated, the judge is only free to adjudge compensation for the reduction in value provided that the circumstances do not justify a rescission of the purchase contract.
3 If the reduction in value claimed equals the purchase price, then the buyer can only demand rescission.

**Art. 206**

b. Replacement performance

1 Where the purchase contract provides for the delivery of a specified quantity of fungible objects, the buyer has the option either to sue for rescission of the sale, to sue for reduction of the purchase price, or to claim delivery of goods of the same kind of contract quality.
2 Unless the objects of the purchase have been delivered to the buyer from another place, the seller may preclude any further claim of the buyer by immediate delivery of goods of the same kind of contract quality, and by compensation for any damages.

**Art. 207**

c. Action for rescission in the case of destruction

1 An action for rescission of the purchase contract may be instituted even though the object of the purchase has been destroyed, either as a result of its defects, or by accident.
2 In such case, the buyer must return only such part of the object of the purchase which still remains with him.
3 If the object of the purchase was destroyed due to the fault of the buyer, or has been resold or converted by him, then he may only claim compensation for the reduction in value.

**Art. 208**

8. Execution of rescission
   a. In general

1 In the case of rescission of a purchase, the buyer must return the object of the purchase to the seller, together with any benefits collected in the meantime.
2 The seller must repay the purchase price paid, including interest, and, in addition, in compliance with the rules relating to complete deprivation, compensate the buyer for the costs of litigation, disbursements, as well as for such damage as has been directly caused to the buyer as a result of the delivery of the defective goods.
3 The seller is obligated to compensate for further damage unless he proves that no fault at all is attributable to
Art. 209

b. In case of purchase of several objects

1 If, in the case of several objects being sold together, or in the case of the sale of composite objects, only some of the items are defective, then an action for rescission may be initiated only with regard to such items.
2 If, however, separation of the defective items cannot be effected without material prejudice to either the buyer or the seller, then the action for rescission must extend to the entire object of the purchase.
3 An action for rescission covering the principal items also includes all other items, even though a separate price has been fixed for such other items, but an action for rescission covering other items does not entail rescission covering the principal items.

Art. 210

9. Statute of limitations

1 Actions based on a warranty for defects in the object of the purchase shall be barred at the end of one year after delivery to the buyer of the object sold, even if the defect was only discovered by the buyer at a later date, unless the seller has assumed liability for a longer period.
2 Objections made by the buyer based on existing defects remain valid if the required notice has been given to the seller within one year after delivery.
3 The one year statutory limitation may not be invoked by the seller if it can be proven that he willfully deceived the buyer.

Art. 211

C. Obligations of buyer

I. Payment of price and acceptance of purchased object

1 The buyer is obliged to pay the purchase price pursuant to the terms of the contract and to accept the purchased object if it is tendered to him by the seller pursuant to the terms of the contract.
2 Acceptance must take place immediately, unless otherwise agreed upon or customary.

Art. 212

II. Determination of purchase price

1 If the buyer has placed a firm order without indicating the price, it is presumed that the object of the purchase was ordered at the average market price in force at the time and at the place of performance.
2 If the purchase price is to be calculated based upon the weight of the goods, the weight of the packing materials (tare weight) must be deducted.
3 The above is subject to special commercial customs in accordance with which, for certain commercial articles, there is either a fixed or a percentage deduction from the gross weight, or the whole gross weight is included in the determination of the price.

Art. 213

III. Due date of, and interest on, the purchase price

1 Where no other point in time has been fixed, the purchase price becomes due for payment upon transfer of the object of the purchase into the buyer's possession.
2 Except for the provisions regarding default by reason of the expiration of a fixed maturity date, interest on the purchase price is payable without further notice, if it is customary, or if the buyer is in a position to collect benefits, or derive other proceeds from the object of the purchase.

Art. 214

IV. Default of buyer

1. Right of seller to withdraw from the contract
1 Where the object has been sold against prepayment of the price, or where performance for performance has been agreed to, the seller may, upon the buyer’s default with regard to payment of the purchase price, without further proceedings, withdraw from the contract.
2 If the seller intends to avail himself of his right of withdrawal, he must immediately notify the buyer.
3 Where the object of the purchase has been placed in the buyer's possession before payment of the purchase price, the seller may only rescind the contract because of the buyer's fault, and may only claim the return of the delivered object of the purchase, if he has expressly reserved such right.

**Art. 215**

2. Compensation of damage and calculation of damage

1 If, in commercial transactions, the buyer fails to meet his payment obligations, the seller has the right to claim as damages the difference between the purchase price and the price at which he resold the object of the purchase in good faith.
2 In the case of goods having a market price, or being quoted on an exchange, the seller may, without such sale, claim as damages the difference between the purchase price and the market price or the price quoted on the exchange prevailing at the time of performance.

II. **Product Liability Act 1994**

Full text above, II. C. 1.

III. **Genetic Engineering in the Non-Human Field Act 2004**

The text has not been translated into English yet.

**CASES**

- Federal Supreme Court 1.11.1923 (*Anilin-case*) ATF/BGE 49 I 465 (legal basis: art. 41 CO)
- Federal Supreme Court 25.5.1938 (*Steiggurt-case*) ATF/BGE 64 II 254
  (legal basis: art. 55 CO)
- Federal Supreme Court 16.3.1964 (*Thermostat-case*) ATF/BGE 90 II 86
  (legal basis: art. 55 CO)
- Federal Supreme Court 9.10.1984 (*Schachtrahmen-case*), ATF/BGE 110 II 456
  (legal: art. 55 CO)
- Federal Supreme Court 14.5.1985 (*Chaises pliables* = folding chair), Journal des tribunaux 1986 I 571 (legal basis: art. 55 and 41 CO)

  For the Facts and the Holdings, see above II. B. 4.

**Selected Bibliography**


