

SWITZERLAND

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Liability for Human Rights and Environment Violations

Recovery Right of Insurer

Responsible Business Initiative



Responsible Business Initiative

- Popular Initiative

«For responsible business – to protect human rights and the environment»

Comply with international standards (for example UN Guiding Principles on Business and Human Rights)



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Responsible Business Initiative

- Popular Initiative
«For responsible business – to protect human rights and the environment»
Comply with international standards (for example UN Guiding Principles on Business and Human Rights)
- Democratic Process supported by 120'000 citizens 2016
- Parliamentary Discussions 2018/2019
- Referendum to be held in Switzerland

Aim and Content of the Initiative

The Responsible Business Initiative wants multinational companies to respect human rights and the environment in their activities abroad

- Companies have to undertake comprehensive risk-based due diligence examinations
- Companies have to report on the results of the examinations
- Companies are liable in case of violation of standards

Initiative Text on Liability

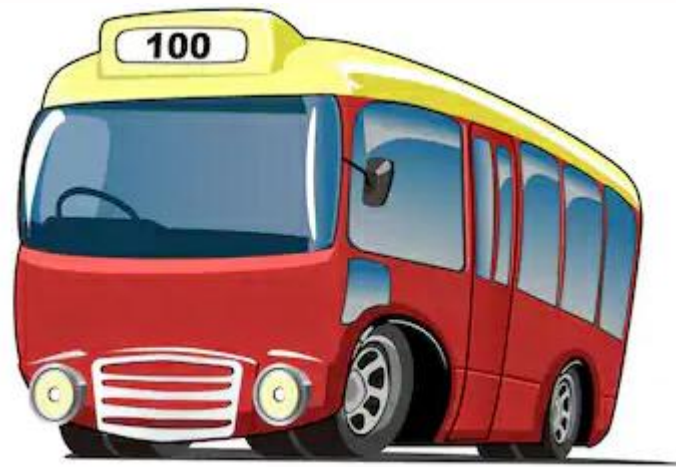
- **Companies are [...] liable for damage caused by companies under their control** where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards.
- **They are not liable under this provision however if they can prove that they took all due care [...] to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.**

Recovery Right of Private Insurers in cases of Strict Liability

Swiss Federal Court 144 III 209 of 7 May 2018

Fact

- Passenger was hurt during the bumpy arrival of a bus



- Private Insurer A seeks to recover its expenses from motor vehicle insurance provider of the bus company

Former Court Practice 1/2

- Federal Court: Private Insurers can only seek recovery against persons liable for tort (unlawful act of fault) but not against strictly liable persons (without fault)
- Recovery Rule for Insurer (Insurance Act 1908) is open: Compensation Claims against parties liable due to "unlawful acts" is transferred to insurer
- Recovery Rule of Code Obligations of 1911 is restrictive: "As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation."

Former Court Practice 2/2

- Motivation of strict Recovery Rule in Code of Obligations of 1911 was a Political Compromise:



Former Court Practice 2/2

- Motivation of strict Recovery Rule in Code of Obligations of 1911 was a Political Compromise:
Introduction of several new Strict Liability Rules (unlawful acts without fault) was politically only accepted when Insurers have no recovery rights against strictly liable parties
- Federal Court then interpreted the Recovery Rule for Insurers in a restricted way by adding the non written word "fault" to the written word "unlawful acts"

New Court Practice

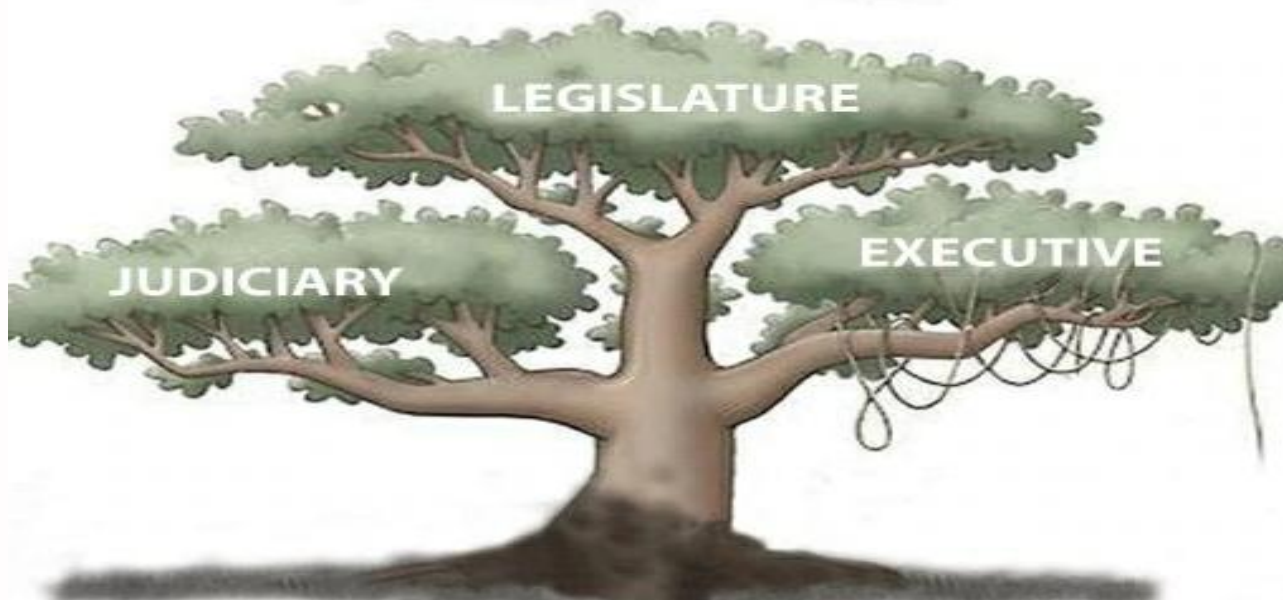
- Insurers do not pay because of a Contractual Liability for Breach of Duty but because of the Promise to Pay
 - Therefore the Insurers are outside of the Recovery Rule of the Code of Obligations
- The Recovery Rule of the Insurance Act literally does not limit Recovery to parties liable for "faulty unlawful acts"
 - Therefore the Insurers can seek Recovery in case of any "unlawful acts" including cases of strict liability

Commentary 1...

- The Insurance Act is under Revision since many years
- Private Insurers want a comprehensive Recovery and Subrogation Right as the Social Insurers already have

...Commentary 1

- In 2011 the Swiss Federal Court refused to change the former practice
 - in consideration of the separation of powers the Federal Court did not wish to overtake the legislator

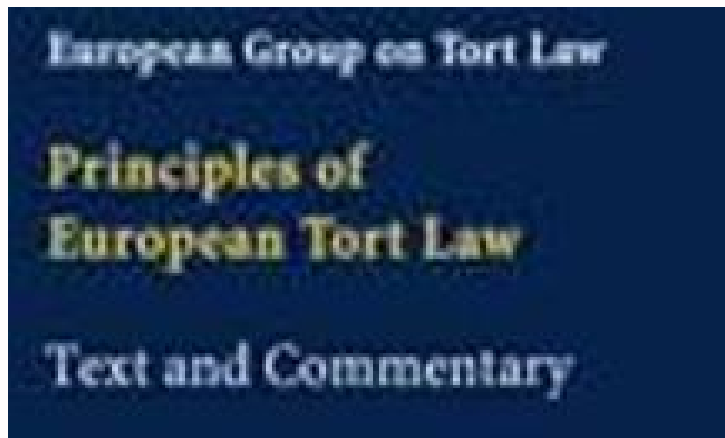


...Commentary 1

- In 2011 the Swiss Federal Court refused to change the former practice
 - in consideration of the separation of powers the Federal Court did not wish to overtake the legislator
- In 2013 the Total Revision of the Insurance Act failed
In 2017 a Partial Revision included the comprehensive Recovery Right and seems politically accepted by the important economic stakeholders and political parties
 - the change of the former practice by the Federal Court has already a certain democratic legitimation

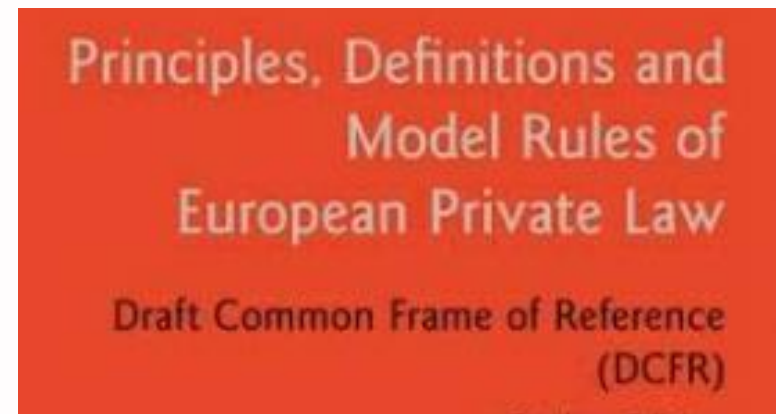
Commentary 2

- Does the concept of "unlawful act" include strict liability?
 - Driving a car is not unlawful...
- This question is avoided by the concept of...



"legally protected interest"

"legally relevant damage"



Commentary 3

- Economic Impact of the new Recovery Right for Private Insurers?



**Thank You
for Your Attention**

