INDIRECT AND CONSEQUENTIAL LOSS CLAUSES UNDER SWISS LAW

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1. INTRODUCTION

As commercial transactions grow ever more international, more and more contracts under Swiss law are being written in English. The lawyer responsible for drafting such a contract has to face the difficulty of expressing concepts of Swiss law using terms which originate from common law notions. Increasingly, model contracts drafted within a common law context are being imported to serve where Swiss law applies. This saves time, and fulfils many clients' expectation of finding more or less the same clauses in any international contract. But "standard" contract language may be interpreted differently when read against a Swiss, rather than an English, legal background.[2]

This dilemma is illustrated by the example of the following exclusion clause: "Neither party shall be liable to the other for any indirect or consequential losses whatsoever." Clauses of this type appear frequently in contracts for the sale or construction of industrial machines, and are usually intended to express the seller's unwillingness to participate in the economic risk of the buyer's production process. As the causes of malfunctions are often technically difficult to establish and, as any one cause is often only contributory, liability for a buyer's lost production presents a hazard to a seller. Moreover, a defect may require a kind of double compensation, that is, not only a reduction of the price ("*Minderung*"), but also compensation for the machine (with the reduced price) not performing to the capacity of a machine with the full price.

This article attempts to elucidate the possible meaning of such an "indirect and consequential loss" clause under Swiss law. After a summary of the principles applicable to the interpretation of contracts under Swiss law

[1] We wish to thank Marco Scruzzi and Frances Miller for their helpful comments.
[2] E.g., clauses referring to the doctrine of misrepresentation.

(heading 2), we will examine how the English wording "indirect or consequential loss" can be understood under English law (heading 3) and Swiss law (heading 4). To conclude, we will consider what the Swiss understanding of a typical indirect and consequential loss clause would be (heading 5).

2. INTERPRETING CONTRACT CLAUSES UNDER SWISS LAW

A contract will be interpreted according to the common intent of the parties at the moment the contract was concluded.[3] Consequently, it is not possible to make a generally valid statement as to what an expression like "indirect and consequential loss" will mean. The specific factual and contractual context (such as preliminary negotiations or customary practices between the parties) must be considered.[4]

However, if the actual intent of the parties is not obvious, several rules of interpretation are applied to determine the meaning which would reasonably have been within the contemplation of honest and fair parties in the same situation.[5] Unclear contract terms are interpreted so as to give effect to all the terms rather than to deprive some of them of effect,[6] and they shall be interpreted so as to give a *reasonable* meaning.[7] There is also the rule that unclear language be interpreted against the party who seeks to rely on it ("*contra proferentem* rule which also applies under English law").[8] As in all civil law systems, it is an important rule of interpretation under Swiss law that, if ever there is doubt about the meaning of a contract, the contract is to be construed according to the default rules of the law of contract.[9]

Although there are many rules of interpretation which might be relevant to interpret a particular clause on "indirect and consequential loss", we focus on the rule according to which, if specific technical terms of law are used, one might assume that the parties wanted that expression to have the specific meaning the term has in law.[10] This rule applies only if the legal term used is

[3] Swiss Code of Obligations, Art 18(2); Peter Gauch, Walter R Schluep, Jörg Schmid and Heinz Rey, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, Vol I (7th ed., Zurich, 1998), para. 1200; Theo Guhl, *Das Schweizerische Obligationenrecht* (9th ed., Zurich, 2001), p. 102 ; *cf.* UNIDROIT Principles for International Commercial Contracts, Art 4.1, French Civil Code, Art 1156.

[4] Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1212 *et seq.*; UNIDROIT Principles for International Commercial Contracts, Art 4.3.

[5] Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1201.

[6] *Ibid.* para. 1235; *cf.* UNIDROIT Principles for International Commercial Contracts, Art 4.5, and French Civil Code, Art 1157.

[7] BGE 110 II 146; 115 II 268; 117 II 621; Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1201.

[8] BGE 115 II 268; 117 II 622; 122 V 146; 124 III 158; Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1231; *cf.* UNIDROIT Principles for International Commercial Contracts, Art 4.6.

[9] BGE 119 II 372; 117 II 621; 115 II 268; *cf.* Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1201; Ernst A Kramer, "Art 1 Swiss Code of Obligations" at para. 220, *Berner Kommentar*, Vol VI/1 (Berne, 1986); Wilhelm Schönenberger and Peter Jäggi, "Art 1 Swiss Code of Obligations" at para. 490, *Zürcher Kommentar*, Vol V.

[10] Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 1209.

clear enough.[11] In a contract which is subject to Swiss law but uses terms of English law, it is worth looking at both legal regimes to assess whether there is a sufficiently clear legal meaning.[12]

3. AN ENGLISH UNDERSTANDING

Obligations under English law are derived principally from statute law and/or common law. The rules regarding indirect and consequential loss have been developed over the last 150 years via common law. The starting point for assessing damages for breach of contract (in the absence of specific contractual provisions) under English law is as set out in the nineteenth century case of *Hadley* v. *Baxendale*[13] which still remains law. When assessing damages for breach of contract, the courts must draw a line between what is reasonable and what is unreasonable. In *Hadley* v. *Baxendale* the court held that damages should be:

(1) such as may fairly and reasonably be considered as arising naturally from the breach (in other words, according to the usual course of things) (an objective test); or
(2) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the possible result of the breach of it (a subjective test).

As Sedley LJ in *Hotel Services Ltd* v. *Hilton International Hotels (UK) Ltd*[13a] said of the rule in *Hadley* v. *Baxendale* it "... is not dichotomous but a continuous classification bringing into the region of recoverability all loss which the parties must in the nature of things or for known reasons have anticipated". These general principles, which can be read as one integrated principle (namely, what damage was within the contemplation of the parties?) is commonly split up into the first and second limbs of the rule in *Hadley* v. *Baxendale*. The theory behind the rule is that an innocent party should not be entitled to profit from his loss over and above what he would have made had the contract been properly performed. The first limb covers damages which, a reasonable person knows will result from the ordinary course of things. The second limb covers damages which flow from special circumstances which were known (via communication or otherwise) to the contract breaker at the time the bargain was made. When assessing damages, the court will delve into the circumstances of the bargain that was struck in order to assess what (if anything) is due from the contract breaker in respect of the breach.

So what type of loss is recoverable under this principle? Loss of profits is

[11] BGE 113 II 438.

[12] In BGE 113 II 438 the Swiss Supreme Court had to examine the meaning of the words "unlimited guarantee" in an English language contract under Swiss law. The court examined whether the wording "unlimited guarantee" had a clearly defined legal meaning in the "Anglo-American legal orders" ("*im anglo-amerikanischen Rechtskreis*").

[13] (1854) 9 Exch 341.

[13a] [2000] BLR 235.

often claimed as a result of a breach of contract. The success of such a claim will depend on the facts surrounding the case. Whilst it is correct to draw the line between direct and indirect or consequential losses along the boundary between the first and second limits of *Hadley* v. *Baxendale*, loss of profits does not necessarily always tack with the second limb (i.e. consequential losses). In fact writers such as McGregor state that consequential losses are not limited to the second limb of the rule in *Hadley* v. *Baxendale* and the distinction between the first and second limbs of *Hadley* v. *Baxendale*. A consequential loss could fall within the first limb.[13b]

It may be useful to examine, briefly, the position regarding the recovery of consequential loss under English tort law. Tort law has, like contract law, evolved over many years. The established cases distinguish between losses for pure economic loss and physical damage. Pure economic loss is not normally recoverable in negligence apart from in certain cases of negligent misstatement.[14] Physical damage can be recoverable if the claimant's person or property is damaged.

As mentioned above, many contracts, especially for the manufacture and/or supply of machinery, include exclusion clauses excluding liability for consequential or indirect losses. One may be forgiven for thinking that loss of profit suffered as a result of, for example, defective ship engines being supplied, would fall within such an exclusion which was included in the supply contract (the shipowner was deprived of the use of his ship for a period). However the court held in this case that the damage was not "indirect or consequential" and loss of profits was recoverable.[15]

The judge in *Saint Line* v. *Richardsons Westgarth* also considered the meaning of the word "consequential". Atkinson J said: "The word 'consequential' is not very illuminating, as all damage is in a sense consequential; but there is definition in the *Oxford Dictionary* . . .: 'Of the nature. of a consequence, merely; not direct or immediate; eventual.' Then there is a definition from Wharton: 'Consequential damages: losses or injuries which follow an act, but are not direct or immediate upon it'. "[16]

Limitation of liability clauses in contracts such as these have been considered extensively by the courts in a number of varying cases.[17]

In *Deepak*, Davy sold to Deepak a process licence, the design and know-how for a proposed design, construction and operation of a methanol plant in India. Davy's contract with Deepak stated that Davy did not assume liability for anticipated profits, indirect or consequential damages. The methanol plant exploded and had to be rebuilt. Deepak sued Davy for breach of contract including loss of profit resulting from the explosion. Stuart-Smith LJ said:

[13b] *McGregor on Damages* (16th ed., London, 1997), para. 26.
[14] See, for example, *Hedley Byrne & Co* v. *Heller & Partners* [1964] AC 465.
[15] *Saint Line* v. *Richardsons Westgarth* [1940] 2 KB 99.
[16] At p. 103.
[17] See, for example, *Deepak Fertilisers and Petrochemicals Corporation* v. *ICI Chemicals and Polymers Ltd* [1999] BLR 1 and *Hotel Services Ltd* v. *Hilton International Hotels (UK) Ltd* [2000] BLR 235.

> "The direct and natural result of the destruction of the plant was that Deepak was left without a methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no more remote as losses than the cost of reconstruction. Lost profits cannot be recovered because they are excluded in terms, not because they are too remote."

The Court of Appeal in *Hilton* had to decide whether Hilton's claim for loss of profit suffered as a result of the malfunction of the defendant's mini-bars which was expressly excluded by the exclusion clause in the hire contract. The court held that loss of profits was not consequential but direct. It was not, therefore, covered by the exclusion clause.

It looks very much as if, therefore, subject to wording in a contract to the contrary and to the specific circumstances of the case, loss of profits is recoverable as direct losses following on from a breach of contract and, therefore, falls within the first limb of the rule in *Hadley* v. *Baxendale*. The same seems to be the case for wasted overheads[18] and interest or financing charges incurred as a result of breaches of contract other than late payment.[19]

4. "INDIRECT AND CONSEQUENTIAL LOSS" UNDER SWISS LAW

(a) "Indirect loss"

The term "indirect loss" ("*indirekter Schaden*" or "*mittelbarer Schaden*") is frequently used in Swiss legal doctrine on tort law and sometimes also in relation to contract law.[20]

Tort law

The term "indirect loss" does not appear in the statutes. Nevertheless the expression is used in doctrine, and with two different meanings: the first arises from a distinction based on proximity of the causal link,[21] while the other distinguishes damage suffered by third parties (such as dependants of the victim) as a consequence of a tort from that suffered by the direct victim of the tort.[22]

The distinction based on proximity of the causal link is without practical significance, since liability in tort always covers both direct and indirect

[18] See *Deepak*, above.

[19] *F G Minter* v. *Welsh Health Technical Services Organisation* (1980) 13 BLR 1.

[20] One could also mention company law, in particular the issue of personal liability of board members and auditors in case of bankruptcy (BGE 125 III 88): creditor's and shareholder's rights depend on whether they suffered harm indirectly (because board members or auditors reduced a company's assets in violation of norms protecting the asset base of the company) or whether they suffered harm directly (because board members or auditors violated norms protecting the individual interests of creditors or shareholders). Except in a context of this kind, an exclusion clause for "indirect damage" will hardly ever relate to these issues.

[21] Most authors use the expressions "*mittelbarer Schaden*" and "*unmittelbarer Schaden*".

[22] Most authors use the expression "*direkter Schaden*"/"*Reflexschaden*".

damage.[23] Despite the practical irrelevance, legal writers agree that indirect damage results from a rather distant cause, while direct damage is the immediate consequence of the injurious event.[24] Lost profit is considered to be indirect damage.[25]

The second meaning of "indirect loss" in tort law relates to the general principle that only loss suffered by the direct victim of a tort is considered to be compensatable. Indirect damage is a loss flowing not to the direct victim of a tort but solely to a third party,[26] usually because of that party's special relationship to the direct victim.[27] A typical example is indirect damage suffered by an employer because an employee has been incapacitated by a tort. As a general rule there is no compensation in tort for indirect damage, although some exceptions exist.[28] Since this meaning of "indirect damage" relates to damage suffered by third parties, it is obviously no reference for exclusion clauses on "indirect damages", given that third parties are by definition not in privity of contract.

Contract law

Reference to "directly caused" damage appears in the statutes on sales. A buyer has a right to compensation for damage "directly caused" by deprivation (Code of Obligations, Article 195(1), (4)) or "directly caused" as result of the delivery of defective goods (Code of Obligations, Article 208(2)). If, on the contrary, damage is only indirect, the seller may escape liability by proving that there was no fault attributable to him.[29]

The distinction of indirect from direct damage under Articles 195 and 208 of the Code of Obligations is controversial in legal doctrine.[30] Most legal writers agree that the distinction should be based on the proximity of the causal link, but opinions differ on the application of this principle to consequential damage to a buyer's other goods. Some authors consider all consequential damage to be indirect damage,[31] while others believe that

[23] Anton K Schnyder, "Art 41 Swiss Code of Obligations" at para. 4, *Basler Kommentar* (Basel, 1992).

[24] Heinz Rey, *Ausservertragliches Haftpflichtrecht* (2nd ed., Zurich, 1998), para. 334; Karl Oftringer and Emil W Stark, *Ausservertragliches Haftpflichtrecht*, Vol I, §2, para. 26; Max Keller and Sonia Gabi, "Haftpflichtrecht", in Max Keller, *Das Schweizerische Schuldrecht*, Vol II (2nd ed., Basel, 1988), p. 12; Henri Deschenaux/Pierre Tercier, *La responsabilité civile* (2nd ed., Berne, 1982), §3, para. 24; Schnyder, *op. cit.*, "Art 41 Swiss Code of Obligations" at para. 4.

[25] Rey, *op. cit.*, para. 342; Schnyder, *op. cit.*, "Art 41 Swiss Code of Obligations" at para. 4; Ingeborg Schwenzer, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (2nd ed., Berne, 2000), para. 14.27; Keller/Gabi, *op. cit.*, p. 12.

[26] Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 2686.

[27] Rey, *op. cit.*, para. 354; see also Schwenzer, *op. cit.*, para. 14.19.

[28] In particular, damage suffered by dependants of a person killed, see Swiss Code of Obligations, Art 45(3); Schwenzer, *op. cit.*, para. 14.21 *et seq.*

[29] Swiss Code of Obligations, Arts 195(2) and 208(3).

[30] Although the government proposed an amendment in January 2001 (*Vernehmlassungsvorlage: Bundesgesetz über den elektronischen Geschäftsverkehr*), it will not be surprising if the debate continues on a new wording.

[31] Heinrich Honsell, *Basler Kommentar* (2nd ed., Basel, 1996), "Art. 208 Swiss Code of Obligations" at para. 9.

consequential damage is direct damage if caused exclusively by a defect.[32] Another theory makes the distinction along the lines of *damnum emergens* (damage) and *lucrum cessans* (lost profit),[33] whereas others place the distinction between loss of bargain ("*positives Vertragsinteresse*") and reliance loss ("*negatives Vertragsinteresse*").[34] To summarise, it can be said that most authors agree that *lost profit is to be considered indirect damage,* while it remains unclear what other damage falls under this category. This is distinct from the position under English law where lost profit can be recoverable for breach of contract as a direct loss (see above). Although the notions of direct and indirect damage are subject to academic controversy, their practical interest seems to be somewhat limited, since the test applied to assess absence of fault is rather strict and it is therefore rare for a seller to be found not liable for "indirect" damage.[35] In addition, the provisions of the Code of Obligations on sale are of limited importance in international sales, as these contracts are subject to the United Nations Convention on Contracts for the International Sale of Goods (except when provided otherwise by the parties). This Convention does not use the terms "indirect damage" or "consequential damage".

(b) "Consequential loss"

The term "consequential loss" ("*Folgeschäden*") does not exist in the Code of Obligations, but is used in case law and doctrine in the context of liability for damage consequential to defects in works ("*Mangelfolgeschäden*"). Outside the field of contracts for works, the expression appears only rarely.[36]

"Damage consequential to defects" ("*Mangelfolgeschäden*") is damage caused by defects in delivered goods.[37] The notion of damage consequential to defects ("*Mangelfolgeschäden*") includes not just cost or physical harm caused by a defect,[38] but also loss of profit so caused.[39]

The distinction between "defect" and "damage consequential to defects" ("*Mangelfolgeschäden*") is due to the fact that Swiss law follows the tradition of Roman law, which did not subject defects in delivered goods to the general rules on breach of contract. Defect liability is treated with special notice requirements[40] and special remedies[41] apply. Since these special remedies

[32] Willi Fischer, *Der unmittelbare und der mittelbare Schaden im Kaufrecht*, PhD Thesis (Zurich, 1985), p. 290; Max Keller and Kurt Siehr, *Kaufrecht* (3rd ed., Zurich, 1995), pp. 63 and 90; Rolf Doerig, *Ersatz sogenannter "Mangelfolgeschäden" aus Kaufvertrag (Art. 208 OR)*, PhD Thesis (Zurich, 1985), pp. 57 *et seq.*, pp. 97 *et seq.*

[33] BGE 79 II 381; Pierre Engel, *Contrats de droit suisse* (Berne, 2000), p. 43; Hans Giger, *Berner Kommentar* (Berne, 1979), "Art 208 Swiss Code of Obligations" at para. 35.

[34] Guhl, Koller, Schnyder and Druey, *op. cit.*, p. 388.

[35] Engel, *op. cit.*, p. 43; see BGE 82 II 141; 121 IV 15.

[36] See Decision of the Cantonal Court of Lucerne, in LGVE 1999, I/15, pp. 39 *et seq.*, which was about jurisdiction of a Swiss court under the Private International Law Statute (IPRG).

[37] Peter Gauch, *Der Werkvertrag* (4th ed., Zurich, 1996), para. 1855.

[38] Gauch, para. 1872.

[39] *Ibid.* para. 1870.

[40] Swiss Code of Obligations, Art 367(1).

[41] *Ibid.* Art 368.

pertain only to the defect and not to its consequences, the distinction between the two is of importance. This distinction is along the following lines: a defect consists in delivered goods lacking qualities which are contractually required.[42] As long as only the delivered goods are involved, the worsening of existing defects is not considered to be "consequential", but part of the initial defect.[43] However, if a defect causes harm to other goods, this damage is "consequential".[44] The lower value of defective goods is considered to be part of the defect,[45] while financial loss caused by the defectiveness of goods (e.g., loss of profit caused by low production due to a defect[46]) is consequential loss.

Given that the notion of "defect" applies only to the delivered goods themselves, the notion of "damage consequential to defects" ("*Mangelfolgeschäden*") is rather broad, and includes basically any other damage or loss caused by the defect.

(c) "Direct damage"

As shown in the preceding sections, it is only in the fields of tort law, sales contracts and works contracts that "indirect loss" and "consequential loss" are part of the established legal terminology of Swiss private law.[47] When these terms are used in a contract clause which is neither part of a sales contract (Code of Obligations, Articles 184 *et seq.*) nor of a works contract (Code of Obligations, Articles 363 *et seq.*), they have no generally accepted legal meaning.

In BGE 126 III 388 *et seq.* the Supreme Court had to decide on the meaning of a clause contained in the general conditions of the Swiss Architect's and Engineer's Association (SIA). This clause limited the architect's liability to "direct damage" ("*dommage direct*"). Contrary to the opinion of some legal writers,[48] the Supreme Court considered that this clause was not sufficiently clear to overcome the default rule of the Code of Obligations, according to which an agent's liability is not limited to a specific category of damage. The Supreme Court therefore interpreted the clause as a restatement of the basic

[42] Gauch, *op. cit.*, para. 1356.

[43] *Ibid.* para. 1864.

[44] E.g. BGE 77 II 243 *et seq.*, where a defective escape (defect) caused a building to burn down (consequential damage).

[45] As a special remedy for this, Swiss Code of Obligations, Art 368(2), gives the principal a right to reduce the compensation ("*Minderung*").

[46] Peter Gauch, *op. cit.*, para. 1870.

[47] In public law a similar distinction exists in *Opferhilfegesetz* (Aid to Victims of Crime Act), Art 2(1).

[48] Urs Hess, *Der Architekten-und Ingenieurvertrag: Komm. zu den rechtlichen Bestimmungen der Ordnungen SIA 102, 103 und 108 für Leistungen und Honorare der Architekten* (Dietikon, 1986), paras 26 *et seq.*; Corinne Jeanprêtre, *La responsabilité contractuelle du directeur des travaux de construction*, PhD Thesis (Neuenburg, 1995; Berne, 1996), pp. 118 *et seq.*; Hannes Zehnder, *Die Haftung des Architekten für die Überschreitung seines Kostenvoranschlages*, PhD Thesis (2nd ed., Fribourg, 1994), paras 336 *et seq.*

principle that liability is always limited to those losses which have an adequate causal link to the damaging event (theory of "adequate causality").[49]

Therefore, outside the contexts of tort, sales and contracting, the Supreme Court's decision in BGE 126 III 388 *et seq.* means that contract clauses limiting liability to "direct damage" or excluding liability for "indirect damage" risk being understood as no contractual limitation of liability at all, but as mere repetition of the basic principle of adequate causation. In essence, the theory of adequate causality[50] submits the question whether a causal nexus is "adequate" to the equitable discretion of the judge.[51] The Supreme Court tends to consider even very exceptional and indirect causal links as "adequate".[52]

5. A LIKELY SWISS UNDERSTANDING

Assuming that the clause "Neither party shall be liable to the other for any indirect or consequential losses whatsoever" appears in a contract for sale of an industrial machine, a likely understanding would be as follows:

In general, both parties' liability would not be any more limited than under the default rules of Swiss law, according to which liability is limited to those losses which have an adequate causal link with the damaging event (see section 4(c), above). It seems that under English law, a party will be able to claim loss of profit if it can be shown that it falls under the first limb of *Hadley* v. *Baxendale.*

However, so far as the context of defect liability is concerned, the usual understanding of that clause would differ from its general meaning, as the terms "indirect damage" and "consequential damage" have a specific legal meaning in the context of defect liability. Although there is some debate about the definition of "indirect damage" (see section 4(a), above), it is at least clear that a loss of profit resulting from a defect is to be considered "indirect" and "consequential" damage (see section 4(a) and (b)). Nevertheless, it may be risky for a seller to rely too much on such an interpretation, because the buyer could argue that the wording of a clause concerning liability in general cannot have a distinct meaning for defect

[49] BGE 126 III 391, confirming Rainer Schumacher, "Die Haftung des Architekten aus Vertrag", in Peter Gauch and Pierre Tercier (Eds), *Das Architektenrecht* (3rd ed., Fribourg, 1995), para. 558 ; Patrick Krauskopf and Thomas Siegenthaler, "Architektur- und Bauingenieurverträge", in Peter Munch, Peter Karlen and Thomas Geiser (Eds), *Beraten und Prozessieren in Bausachen* (Basel, 1998), para. 8.68.

[50] The applicable formula has been quoted by the Supreme Court on many occasions, for example, in BGE 123 III 112 : "Danach hat ein Ereignis dann als adäquate Ursache eines Erfolgs zu gelten, wenn es nach dem gewöhnlichen Lauf der Dinge und nach der allgemeinen Lebenserfahrung an sich geeignet ist, einen Erfolg von der Art des eingetretenen herbeizuführen, der Eintriff des Erfolges also durch das Ereignis allgemein als begünstigt erschein."

[51] BGE 123 III 112: "Die Beantwortung der Adäquanzfrage beruht somit auf einem Werturteil"; Rey, para. 528; Schwenzer, *op. cit.*, para. 19.03; Thomas Ackermann, *Adäquanz und Vorhersehbarkeitsregel: ein transparenter methodischer Ansatz dargestellt am Beispiel des schweizerischen Haftpflicht-und Vertragsrechts, des Wiener Kaufrechts und des schweizerischen Sozialversicherungsrechts* (Berne, 2001), p. 80.

[52] See also Gauch, Schluep, Schmid and Rey, *op. cit.*, para. 2723; Schwenzer, *op. cit.*, para. 19.06.

liability only. This argument could be reinforced by a reference to English law, where neither the term "indirect loss" nor the term "consequential loss" has a distinct meaning.

The wording of exclusion clauses of this type should, therefore, be carefully chosen. If there is any doubt as to whether particular losses will be caught by an exclusion clause, reference should be made to the specific categories of loss instead of to "indirect and consequential" losses.