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Law of Obligations

The Swiss Law of Obligations is mainly contained within the Code of Obligations, which is Part Five of the Swiss Civil Code and is officially known as the Federal Act on the Amendment of the Swiss Civil Code.[1] The Federal Assembly of the Swiss confederation decreed the creation of the Code of Obligations on March 30, 1911; together with the other parts of the Civil Code, it entered into force on January 1st, 1912. The Code of Obligations is filed in the classified compilation of federal legislation under the number 220 (the Civil Code is filed under the number 210).[2] The Code of Obligations exists in three official language versions, namely in French, German, and Italian.[3] For several years now, the confederation has also provided an English translation and since very recently a Romansh translation too. However, since English is not official language and Romansh only partial official language of the Swiss confederation, these translations are provided for information purposes only; they have no legal force.[4]

The Code is regularly subjected to both minor and major retouches, but its basis is now over one hundred years old and remains to this day a model of simplicity. The legislator followed one basic rule: no more than three paragraphs per Article and no more than one sentence per paragraph. This rule is largely still followed today. Thus, the basic aim of the Code is to codify the general rule rather than to enumerate each possible relevant scenario which may arise. The Code of Obligations draws key influence from the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), but due to the Swiss legislator's aforementioned ambitions of simplicity, it is much easier to read. Exemplifying this, the Swiss Code of Obligations is often chosen by the parties as the law applicable to their contracts, particularly in commercial arbitration.

The Code of Obligations consists of five divisions with the following titles:

- Division One: General Provisions (Articles 1–183)
- Division Two: Types of Contractual Relationship (Articles 184–551)

1 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations), SR 220.

2 For an explanation of the classified compilation of federal legislation see Chapter Swiss Legal System, pp. 31.

3 Article 70 I of the Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101 (Constitution); see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

4 See for the English version of the Code of Obligations www.admin.ch (https://perma.cc/AJ2U-V3MB).

- Division Three: Commercial Enterprises and the Cooperative (Articles 552–926)
- Division Four: The Commercial Register, Business Names, and Commercial Accounting (Articles 927–964)
- Division Five: Negotiable Securities (Articles 965–1186)

The code essentially covers two major subjects: contract and tort law in the first two divisions and company law (including the law on securities) in the subsequent three divisions. Since the two subjects cover different areas of the law, they will be discussed individually and chronologically in this chapter.

I. Contract and Tort Law

1. Codes

As mentioned above, the Articles about contract and tort law can be found in the first two divisions of the Code of Obligations. The first division with the general provisions contains the following subjects subdivided into five titles:

- Creation of Obligations (obligations arising by contract, obligations in tort, obligations deriving from unjust enrichment; Articles 1–67)
- Effect of Obligations (performance of obligations, consequences of non-performance of obligations, obligations involving third parties; Articles 68–113)
- Extinction of Obligations (Articles 114–142)
- Special Relationships relating to Obligations (joint and several obligations, conditional obligations, earnest money,[5] forfeit money,[6] salary deductions, and contractual penalties; Articles 143–163)
- Assignment of Claims and Assumption of Debt (Articles 164–183)

It is important to mention that several of the general provisions of the Code of Obligations have a broader application than just within the context of the Code of Obligations. Article 7 Civil Code[7] expressly states:

> *"The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil law matters."*[8]

5 Earnest money is a payment already made upon conclusion of a contract with the meaning that the contractual partner may retain the amount in the event of non-performance.

6 Forfeit money is a payment already made upon conclusion of a contract and which is a compensation for the right to withdraw from the contract.

7 Swiss Civil code of 10 December 1907, SR 210.

8 E.g. Article 18 about the interpretation of contracts and simulation is applicable to the interpretation of testamentary dispositions. The law of succession is contained in the Civil Code, starting at Article 457 Civil Code.

The general provisions have probably undergone the least change as compared to the rest of the Code of Obligations since its creation. Major reform projects traditionally face much resistance. For example, due to lacking consensus in the relevant consultation procedure, the Federal Council decided in 2009 to renounce plans to undertake a comprehensive revision and unification of the Articles concerning tort law, opting instead for minor retouches[9] only. Since then, an initiative from the law faculties of all Swiss universities with a law department has been launched, demanding that the general part of the Code of Obligations be rewritten. The focus of the "CO 2020" initiative is threefold: Apply modern, unified language where needed, codify generally accepted principles, and modernise certain subjects, e.g. the consequences of defect performance of a contract; all this with the aim of continuing the tradition of a simple, citizen-oriented code. The CO 2020 is available in French, German, Italian, and English.[10] In 2013, the Swiss parliament made a request (formally known as a postulate) to the Federal Council with reference to CO 2020 asking whether the Council would be willing to present entirely revised, more up-to-date general provisions of the Code of Obligations for Parliament to consider. In January 2018 the Federal Council answered Parliament that the consultation process has shown that there is not a societal consensus about the need of such a general revision.

Articles 184–551 cover different types of contractual relationship (so called nominate contracts), namely the following:

- Sale and exchange (Articles 184–238), including amongst others special provisions about the *sale of chattel* (Articles 187 et seqq.) and the sale of *immovable property* (Articles 216 et seqq.)
- Gift (Articles 239–252)
- *Lease* (Articles 253–274g) and usufructuary lease[11] (Articles 275–304)
- Loan for use (Articles 305–311) and fixed-term loan (Articles 312–318)
- Employment contracts (Articles 319–362), including the *individual employment contract* and special employment contracts such as the

9 The retouches implemented to date concern mainly the introduction of a liability in respect of cryptographic keys used to generate electronic signatures or seals (Article 59a).

10 See www.or2020.ch (https://perma.cc/5N9L-FG6T).

11 The usufructuary lease is a contract whereby the lessor undertakes to grant the lessee the use of a productive object or right and the benefit of its fruits or proceeds in exchange for rent (Article 275).

apprenticeship contract, the commercial traveller contract,[12] and the homeworker contract
- *Contract for work and services* (Articles 363–379)
- Publishing contract (Articles 380–393)
- Agency contracts (Articles 394–418), including the *simple agency contract* and special agency contracts such as the brokerage contract and the commercial agency contract
- Agency without authority (Articles 419–424)
- Commission contract (Articles 425–439)
- Contract of carriage (Articles 440–457)
- Payment instruction (Articles 466–471)
- Contract of bailment (Articles 472–491)
- Contract of surety (Articles 492–512)
- Gambling and betting (Articles 513–515)
- Life annuity contract and lifetime maintenance agreement (Articles 516–529)
- Simple partnership (Articles 530–551), although thematically these provisions belong to company law rather than contract law.[13]

Not all the regulated contracts have reached the same level of practical significance. Chattel sale, sale of immovable property, lease, individual employment contract, the contract for work and services, and the simple agency contract are probably the most widely used. The rest are, generally speaking, utilised on a significantly rarer basis.

Although contractual rules are generally located in the Code of Obligations, other federal acts (and not to forget treaties, on a higher level, and ordinances, on a lower level) aside from the Code of Obligations also contain contractual rules. Generally these other acts regulate a very specific contractual problem or relationship. Some notable examples include the Consumer Credit Act[14] (not [yet] available in English), the Product Liability Act[15] (not [yet] available

12 Under a commercial traveller's contract, the commercial traveller undertakes to broker or conclude all manner of transactions on behalf of the owner of a trading, manufacturing, or other type of commercial company off the employer's business premises in exchange for payment of a salary (Article 347).

13 See p. 325.

14 Federal Act on Consumer Credit of 23 March 2001, SR 221.214.1.

15 Federal Act on Product Liability of 18 June 2010, SR 221.112.944.

in English), or the Package Travel Act[16] (available in English). Also of importance is the United Nations Convention on Contracts for the International Sale of Goods (CISG),[17] which is also considered to be Swiss law due to Switzerland's ratification of it.

How do the general and the specific provisions of the two first divisions of the Code of Obligations interact? Essentially, while the general provisions of the Code of Obligations regulate basic questions and contain rules relating to all types of contracts, the provisions on the types of contractual relationship only stipulate rules for specific certain types of contracts. Thus, in any given case, one must first determine whether that case relates to a specific regulated contract. If so, the specific rules apply first and foremost, following the principle that the more specific law has priority over the more general one ("lex specialis derogat legi generali"). In all cases where the specific rules are not helpful, the general provisions apply. For example the provisions about the sale of chattle regulate the rights of the customer in the event of defects on the contractual object (Articles 197 et seqq.) and also the time limits applicable on these claims (two years after delivery of the object to the buyer, Article 210 I). But these provisions do not regulate the time limit for the payment of the purchase price. So we have to apply the general provisions which state that the time limit is ten years (Article 127).

2. Principles

Swiss contract law follows – within the limits of the law – the principle of *freedom of contract*. This means that no one is *obligated* to conclude a contract (unless there is a legal provision requiring this, e.g. the obligation of every car owner to secure insurance). It also means that everyone has the right to *choose* his or her contractual partner (as long as this partner has capacity to act[18]; a

16 Federal Act on Package Travel of 18 June 1993, SR 944.3; see for an English version of the Package Travel Act www.admin.ch (https://perma.cc/BB2D-84LN).

17 United Nations Convention for the International Sale of Goods of 11 April 1980 (CISG), SR 0.221.211.1.

18 A person who is *of age* and is *capable of judgement* has the capacity to act (Article 13 Civil Code). A person is *of age* if he or she has reached the age of 18 (Article 14 Civil Code). A person is *capable of judgement* within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication, or similar circumstances (Article 16 Civil Code).

toddler, for example, would not have the required capacity). Further, the *content* of the contract may be freely chosen by the parties (as far as its content is legal: for example, a contract regulating the sale of illegal drugs is not an available possibility). The scope of the word "content" here is wide. The parties not only have the freedom to define their mutual obligations but also to define the consequences for a breach of contract. Regarding the *form* of a contract, the Swiss Code of Obligations generally does not impose requirements: a contract may therefore be concluded orally or even through implicitly consenting behaviour (Article 1). Such an implicitly consenting behaviour can e.g. be seen in putting a good on the cashiers desk in a self-service shop. There are, however, a few exceptions where a special form is legally required, e.g. a sales contract about real estate must be concluded not only in written form but also as a public deed (Article 216 I). Finally, the freedom of contract also encompasses the right to alter or terminate a contract.

Hereinafter, the functioning of the contract law part of the Code of Obligations will be discussed grouped by topics chronologically following the lifespan of a contract.

a) Conclusion of a Contract

The conclusion of a contract requires a mutual expression of intent by the parties, which can be expressed or implied (Article 1). That means that the parties must consent on every basic point (essentialia negotii); only secondary terms may be left open (Article 2). The basic points of a contract are determined by the characteristics of the contract under discussion.[19] The usual process for concluding a contract is an offer and then the unqualified acceptance of this offer by the other contractual party, e.g. a shop offers a blouse for CHF 150 and the customer agrees by bringing the item to the cash desk.[20] But there can also be "loops" in the process, where an offer leads to a counter-offer (e.g. the customer asks the shop owner if she can have a discount of CHF 20 when she buys 2 blouses for CHF 280 altogether) which must then be accepted. Or Party A makes a request for an offer to Party B, which Party A can accept upon receipt (e.g. the customer asks for the total price of two blouses). It can be said

19 Nominate vs. innominate contracts, see pp. 321.

20 Note that the essentialia negotii of a chattle sale are that the seller undertakes to deliver the item sold and to transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller. So the seller and buyer have to agree on the item sold and the sale price.

that a valid offer and a valid acceptance are always needed at some point to conclude a contract.

It goes without saying that contractual parties must have capacity to act in order to create rights and obligations through their actions (Article 12 Civil Code). According to Article 13 Civil Code a person who is of age (Article 14 Civil Code: 18 years) and is capable of judgement (Article 16 Civil Code) has the capacity to act. A contract can be concluded not only by a party themselves but also by their representatives. Non-commercial representation is regulated in Articles 32–40, while commercial representation is covered by Articles 458–465.[21] Commercial representatives act on behalf of a trading, manufacturing, or other commercial business whereas the rules for non-commercial representation are applicable in all other cases of representation.

b) Interpretation of a Contract

The interpretation of a contract orients itself in the first place on the *principle of will* (subjective interpretation), or as stated in Article 18 I

> "[...] *the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement*."

If e.g. two parties call the subject of their sales contract congruently "cat" although it is biologically a dog, that does not matter. They willingly agreed on that specific pet, the cat is covered by their so called *natural consensus*.

Only where there is doubt about the common intention of the parties does the *principle of confidence* (objective interpretation) become relevant. As such, the principle of confidence is not codified in Swiss law; the basis of the principle is thus largely seen as stemming from the duty to act in good faith, established by Article 2 Civil Code:

> "*Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations*."

According to the principle of objective interpretation, a declaration of intention is to be understood the way the other party of the contract could

21 It should also be noted that representation rules are also contained in company law, e.g. Article 718 et seqq. for companies limited by shares.

and did in good faith understand it. If e.g. a customer orders "chips" in a Swiss restaurant, he has to expect potato crisps and not French fries (the latter are called "Pommes frites"). Therefore an English customer that orders chips concludes a contract on potato crisps and not French fries according to the so called *normative consensus* of the parties. Although the English customer has concluded a valid contract, he may invoke a defect in consent in order to invalidate the contract.[22]

If the diverging interpretations of both parties are equally admissible, there is no consent but rather *dissent* and therefore no contract has ever come into legal existence.

c) Defects in the Conclusion of a Contract

The Code of Obligations establishes three cases where there will be a defect in the conclusion of a contract. These defects in the conclusion of a contract result in the contract being null/void *ab initio*. First, a contract is void if its terms are (from the outset) impossible (Article 20 I, e.g. a sales contract about a specific item that was incinerated before the conclusion of the contract). Second, a contract is also void, when its terms are unlawful or immoral (Article 20 I, the classic case would be a contract for the sale of prohibited drugs). Finally a contract is void if a prescribed formal requirement has not been fulfilled (Article 11, e.g. according to Article 216 I a contract for the sale of immovable property must be concluded as a public deed).

d) Defects in Consent

Falling under defects in consent are error, fraud, and duress.

The error must be fundamental (Article 23). Article 24 enumerates the four cases where an error is fundamental. The cases in paragraph I No 1–3 describe situations where a contract has been concluded due to the principle of confidence (*normative consensus*) but where one party has a different intention (e.g. „when an English customer orders chips in a restaurant and realizes only upon delivery that the food he wanted consists in french fries and not chips or) when a customer orders a bunch of roses from a florist and realizes only upon delivery that the flowers he wanted are not roses but tulips). The case of fundamental error with the greatest impact (because often discovered only years after the conclusion of a contract) is paragraph

22 See below, d) Defects in Consent.

I No 4, where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract (e.g. the buyer thought it was a real Picasso he or she was purchasing for CHF 4 million rather than a copy).

In cases where a party is induced to enter into a contract by the fraud of the other party, the error does not have to be fundamental in order for the contract to be voidable (Article 28 I). An example of a fraud is when a jeweller intentionally sells a gold-plated bracelet as a pure gold bracelet.

Further, if a party enters into a contract under duress, he or she is not bound by that contract. A party is considered as being under duress from the other party if, in the circumstances, he or she has good cause to believe that there is imminent and substantial risk to his own life, limb, reputation, property, or to those of a person close to him (Article 30 I). A person enters a sales contract for e.g. restaurant equipment under duress, when the seller threatens the buyer that he will harm his restaurant business by telling everybody about the hygiene issues the buyer had.

Defects in consent have a different effect on a contract than defects in the conclusion of a contract. While in the latter case, a contract is null/void from the outset for both parties, in the former cases the contract is "just" voidable. This means that the party whose consent was defective must notify the other party of his or her defect in order to invalidate the contract. Where this party does not notify the other party of the defect in consent within one year (forfeiture limit), the contract is deemed to have been ratified (Article 31 I). The one-year limit starts at the time that the error or the fraud was discovered or from the time that the duress ended (Article 31 II).

e) Unfair Advantage

Somewhat of a "mixture" between defect in consent and defect in content is the case of unfair advantage. This is applicable when there is a clear discrepancy between performance and consideration under a contract concluded, as a result of one party's exploitation of the other's indigence, inexperience, or thoughtlessness. In such circumstances, the injured party is permitted to declare within one year that he or she will not honour the contract and demand restitution of any performance already made (Article 21 I). The one-year period commences from the point when the contract is concluded (Article 21 II). An example of an unfair advantage would be the sale of a wedding gown for ten times the price the night before the wedding to a braid who

is already at the wedding location and who had realized that her wedding dress has been stolen.

f) Claims According to the General Provisions of the Code of Obligations

According to the general part of the Code of Obligations, contractual claims can stem from different bases. The most powerful contractual claims are those deriving from defect-free contracts. Other claims have their basis in unjust enrichment or tort obligations.

- *Contractual claims and breach of contract:* As a general rule and unless the terms or nature of the contract mandate otherwise, a contractual party can demand performance immediately after discharging or offering to discharge his own obligation (Article 82). Breach of contract can not only result from *non-performance* but also from *defective* or *delayed performance*.
- According to the general rule, a party who does not correctly perform must compensate the other party for the damage sustained (Article 97 I). The prerequisites (aside from the breach of the contract) are damage, causality between the damage and the breach, and misconduct attributable to the obligor. All prerequisites must be satisfied in order for a claim to be valid. The last prerequisite is assumed in a contractual relationship, so that the burden of proof is shifted from the obligee (creditor) to the obligor (debtor). Due to this shift, it is rare that the non-performing debtor finds him or herself exonerated due to an evidentiary absence of fault. For example a lawyer who misses a deadline for a claim has to compensate his client for the lost claim (damage), since missing a deadline is a fundamental breach of a lawyer's duty of care (misconduct attributable to the obligor), missing the deadline was the cause for the lost claim (casualty between damage and the breach) and the lawyer cannot present any reason to exculpate himself (misconduct is attributable to the obligor).
- Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee. Where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default upon the expiry of the deadline (Article 102). These requirements are the basis for damages for delay in performance and, once in

default, the obligor is generally liable for further damages even if they are not attributable to him or her (Article 103 I). The creditor not receiving performance in due course is entitled to set a new, appropriate time limit for subsequent performance (Article 107 I). If performance has not been rendered by the end of that time limit, the obligee may either compel performance in addition to suing for damages in connection with the delay or instead forego subsequent performance (first right to choose) and either claim damages for non-performance or withdraw from the contract altogether (second right to choose) (Article 107 II).

- When claiming damages for non-performance, the obligee is entitled to receive the so called *positive interest*: this reflects the position the obligee would have been in had the defaulting party performed correctly. When withdrawing from the contract altogether, the obligee is entitled to receive the so called *negative interest*: this reflects the position the obligee would have been in had he never concluded the contract. Thus, in situations of delayed performance, an obligee must carefully assess which of the three options would best meet his needs.
- As a general rule compelled performance is sought if the specific contractual performance is essential, e.g. because no one else can provide it. If the performance can be provided by another supplier but is more expensive, damages for non-performance may be claimed in order to obtain the price difference. If one has lost the interest in the contractual object, it is best to withdraw from the contract. The same applies if the performance can be obtained cheaper from another supplier.

- *Unjust enrichment:* A person who has enriched oneself without just cause at the expense of another is obliged to make restitution (Article 62 I). The concept of this *condictio* dates back to Roman law. The most commonly occurring case of unjust enrichment is the restitution of assets due to unjust enrichment (money is the most common asset demanded in such claims), where the obligee made a transfer of assets having mistakenly assumed the existence of an obligation, only later learning that this duty does not exist. Typically such a case occurs when a party to a contract that suffers from a defect in consent performs his contractual duty (e.g. pays the sales price), subsequently discovers the defect in consent and successfully invokes it, thus invalidating the contract.

– *Obligations in tort:* The general provisions on civil liability (not to be confused with criminal responsibility which is dealt with by the Swiss Criminal Code) are stated in Articles 41 et seqq. While the general principles can be found in the Articles 41–53, the subsequent provisions set general principles for special cases, e.g. the liability of employers (Article 55) or the liability of property owners (Article 58 et seq.). The prerequisites for a valid claim according to Article 41 are, aside from damage and illegality, causality between the damage and the illegality, and misconduct attributable to the defendant. All these prerequisites must be met in order for the claim to be valid. It should also be noted that the last prerequisite is not assumed to exist as it would be in a contractual claim, meaning that the damaged party must prove all four prerequisites. For example a man who by accident drives into the garage door of his neighbour has to compensate the latter for that door (damage). Damaging the neighbour's property is prohibited (illegality). Driving into the garage door was the cause of the damage (causality) and the man's driving must at least have been negligent (misconduct).

In contrast, some of the claims for special cases are designed as strict liability cases (meaning that the defendant is also liable where there is an absence of misconduct attributable to him or her), e.g. the liability of property owners. Finally, such provisions can often be found in special codes (the code concerning road traffic[23] is probably the most relevant of these).

g) Quasi-Contractual Claims

Quasi-contractual claims arise when parties interact in a contractual context but act without a (valid) contract and when the (at least partial) application of contractual provisions leads to a more appropriate result than the application of non-contractual ones. The Code of Obligations provides only a few quasi-contractual claims. For example, in the case of a negligent error, where according to Article 26 I a party acting in error and invoking that error to repudiate a contract is liable for any loss or damage arising from the nullity of the agreement where the error is attributable to his or her own negligence, unless the other party knew or should have known of the error. So if a customer orders

23 Federal Act on Road Transport of 19 December 1958, SR 741.01.

roses but means tulips[24] she has to pay for the roses, if the florist cannot sell them to anyone else. The customer is not liable if she always orders tulips and the florist should have known this. Doctrine and court-practice, however, have widened the category of quasi-contractual claims. Prominent examples are the liability after inspired confidence based on trust[25] or the liability for the fault in concluding a contract (culpa in contrahendo or short c.i.c.).

h) Time Limits

Under Swiss law, all claims (with some exceptions, particularly in the field of real estate, e.g. Article 807 Civil Code, which states that claims regarding a mortgage that has been recorded in the land register are not subject to time limits) become time-barred after a certain amount of time, meaning that the claims cannot be enforced, regardless of their validity. The concept of time limits must be strictly distinguished from the concept of forfeiture limits. Whereas time-barred claims may still be enforced if the counter-party does not object (Article 142), the passing of a forfeiture limit leads to the extinguishment of the right in question. A time-barred claim e.g. may be set off provided that it was not time-barred at the time it became eligible for set-off (Article 120 III).

In general, claims become *time-barred after ten years* (Article 127), unless federal civil law provides otherwise. A limit of five years applies to claims resulting from rent and other periodic payments, payments for food, board, lodging and hotel expenses and claims in connection with professional services carried out by craftsmen, doctors, advocates, and notaries, and work performed by employees etc. (Article 128). The limitation period is counted from the moment the debt becomes due (Article 131 I).

Obligations in tort and obligations stemming from unjust enrichment do not only have to meet an absolute time limit; a relative time limit also must be respected. In tort cases claims become *time-barred one year* after the injured party became aware of the loss/damage and of the identity of the person liable. In unjust enrichment cases the period is one year after the date on which the injured party learned of their claim. Claims are barred in any event ten years after the date on which the loss/damage was caused (tort) or the claim first arose (unjust enrichment).[26]

24 See pp. 315.

25 See the Swissair-Case, p. 323.

26 Articles 60 I and 67 I.

i) Types of Contractual Relationship

The contracts codified in the Code of Obligations are characterised by standard principal obligations that apply to the contractual parties ("standard" essentialia negotii). These standard obligations are in general stated in the first Code of Obligation-Article(s) of the respective contract. Every type of contract has its own particularities. The most relevant types of contract are the following:

- *Sale* (Articles 184–236): According to Article 184 I, the seller undertakes to deliver the item sold and to transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller. The validity of a chattel sale contract is not subject to compliance with any particular form (Article 11 I), however a contract for the sale of immovable property is only valid if concluded as a public deed (Article 216 I).
- *Lease* (Articles 253–273c): Leases are contracts in which a landlord or lessor grants a tenant or lessee the use of an object in exchange for rent (Article 253). The compensation (rent) is compulsory in order for the contract to be characterised as a lease (while it is compulsory for a contract to make an object available free of charge in order for it to be characterised as a loan for use).
- *Individual employment contract* (Articles 319–355): Through an individual employment contract, the employee undertakes to work for the employer for a limited or unlimited period and the employer undertakes to pay him a salary based on the amount of time he works (time wage) or the number of tasks he completes (piece work) (Article 319 I).
- *Contract for work and services* (Articles 363–379): A contract for work and services is a contract whereby the contractor undertakes to carry out work and the customer undertakes to pay him for that work (Article 363). The essential characteristic of this type of contract is the contractor's duty to provide a certain result in the form of the agreed outcome. Usually, the agreed outcome will be something physical (e.g. a built-in wardrobe made by a carpenter), but it can also be something immaterial (e.g. static calculations by an engineer). The crucial criteria a contract must possess to qualify as a contract for work and services is agreement on a measurable result that can be guaranteed.[27]

27 See the Market Value Estimate-Case, p. 323.

– *Simple agency contract* (Articles 394–406): A simple agency contract is a contract whereby the agent undertakes to conduct a certain business or provide services in accordance with the terms of the contract (Article 394 I). A simple agency contract can be gratuitous or provide for remuneration (Article 394 III). The main duty of agents is to perform the business entrusted to them diligently and faithfully. They are not liable for the contract to have a successful result.[28] A simple agency contract is therefore the traditional type of contract governing activities of professionals like doctors and lawyers (who, for example, cannot guarantee the outcome of an operation or lawsuit but must act according to best practice in their respective fields). A simple agency contract may be mandatorily revoked or terminated at any time by either party (Article 404 I).[29] Since a key feature of the simple agency contract is the existence of mutual trust between the contractual parties, this option is considered to be in most cases acceptable. However, a party who revokes or terminates the contract at an inopportune point in time must compensate the other party for any resulting damage (Article 404 II).

j) Innominate Contracts

Articles 184–551 cover so called "nominate" contracts (in the sense of "regulated" types of contracts). Since the Code of Obligations follows the principle of freedom of contract, parties can also conclude contracts that do not follow the characteristics of a nominate contract. These contracts are called innominate contracts. Examples for common innominate contracts are leasing contracts, exclusive distribution contracts or licence contracts. As a basic rule, the general provisions of the Code of Obligations apply to such contracts, although legal practice and doctrine regulates where provisions of the nominate contracts are to be applied directly or analogously to innominate contracts.

28 In contrast to the contract for work and services, see the Market Value Estimate-Case, p. 323.

29 See the Revocability of Simple Agency Contracts-Case, p. 324.

3. Landmark Cases

a) Swissair-Case[30]

Liability after inspired confidence based on trust

The claimant concluded a contract with a subsidiary company of the Swissair Group concerning membership rights to use luxurious residences near golf courses at home and in foreign countries. The claimant paid an initial fee of CHF 90'000. Subsequently, the project came to nothing, the subsidiary company went bankrupt. The claimant then asked for its money back from the Swissair Group. However, the group denied the existence of a claim as it had not entered into the contract with the claimant. The Federal Supreme Court agreed that the claimant had no contractual claim or obligation in tort against the defendant. Nonetheless, it recognised that there was liability after inspired confidence based on trust of the defendant, since the subsidiary company emphasized in its publicity for the membership heavily its affiliation to the Swissair group and the latter's approval of the project. The Federal Supreme Court held that there was a violation of confidence based on trust that merited protection, since the Swissair group had tolerated the behaviour of the subsidiary company. With this ruling, the Swiss Federal Supreme Court introduced the concept of liability after inspired confidence based on trust into Swiss Law, although there is no direct basis for such a claim in the Code of Obligations itself.

b) Market Value Estimate-Case[31]

Delineation between a contract for work and services and a simple agency contract

The matter in dispute in this case was a market value estimate of the defendant of a piece of real estate. This estimate was the basis for the calculation of the claimant's share in an inheritance case. Five years after the estimate was given, the claimant sold the real estate for a price almost 25 % below the estimate. The claimant sued the estimator for the damage, since his inheritance share had been calculated on an inaccurately high estimate of the real estate's value. To define the rules of liability which the defendant's conduct

30 BGE 120 II 331.

31 BGE 127 III 328.

was to be measured against, the Swiss Federal Supreme Court started by considering what type of contract had been concluded regarding the market value estimation. It came to the conclusion that the estimate of a real estate is based on discretion and that the result of such an expert opinion cannot be measured objectively. Therefore, the Supreme Court qualified the contract as a simple agency contract and not as a contract for work and services: consequently, they denied a damage claim. This case is a key example of the practical importance of delineating between a contract for work and services and a simple agency contract.

c) Revocability of Simple Agency Contracts-Case[32]

Revocability at any time of simple agency contract is compulsory

The claimant and the defendant agreed on an advisory contract concerning accounting services. It was undisputed between the parties that the consultancy agreement qualifies as a simple agency contract. After a few months, the defendant terminated the contract based on Article 404 I without giving notice. The claimant sued the defendant for damages, arguing that the contract conferred a right to resign only at the end of a quarter and after a three month notice period had been given. According to the Swiss Federal Supreme Court, Article 404 I is compulsory and cannot be altered by contractual provisions. The court also negated the argument that the revocability at any time of simple agency contracts should be restricted to contracts governed by personal trust. According to the court the clear wording of the law text does not allow for such a differentiation.

32 BGE 115 II 464.

II. Company Law

1. Codes

As mentioned at the beginning of this chapter, the Articles about company law (including the law on securities) can be found in divisions three to five of the Code of Obligations (further, the last part of division two regarding the simple partnership belongs to company law rather than to contract law). Division three covers commercial enterprises and the cooperative (Articles 552–926) and is followed by division four which concerns the commercial register (Articles 927–943), business names (Articles 944–956), and commercial accounting (Articles 957–964). Division five is entirely dedicated to negotiable securities, covering registered securities, bearer securities, and instruments to order (Articles 965–1155) as well as bonds (Articles 1156–1186).

2. Principles

a) Company Forms

Unlike Swiss contract law, the provisions of Swiss company law do not provide for the freedom to create any kind of company. On the contrary, one's choice is limited to the types of company the law provides for. Most types of business associations are regulated in the Code of Obligations, while more variations can be found in the Civil Code and in the Federal Act on Collective Investment Schemes.[33] Which type is chosen in the circumstances depends on the intentions and interests of the people creating the company. The company forms can be grouped as follows:

33 Federal Act on Collective Investment Schemes of 23 June 2006 (Collective Investment Schemes Act, CISA), SR 951.31.

Type	Sole proprietorships	Partnerships	Corporations	Legal entities outside of the Code of Obligations
Characteristic	"One-man-business" without separate legal personality	Association of persons without separate legal personality	Legal entity with separate legal personality	Legal entity with separate legal personality
Forms	– **Non-registered** – Registered (Article 934, Article 36 ordinance on the commercial register)	– Simple partnership (Articles 530–551) – General partnership (Articles 552–593) – Limited partnership (Articles 594–619)	– **Company limited by shares (Articles 620–763)** – Partnership limited by shares (Articles 764–771) – **Limited liability company (Articles 772–827)** – Cooperative (Articles 828–926)	– Association (Articles 60–79 Civil Code) – Foundation (Articles 80–89a Civil Code) – Collective Investment Schemes Act (CISA) with inter alia the investment company with variable capital

Figure 1: Types of Business Associations

By far the far most common business form in Switzerland is the sole proprietorship (b.), followed by the company limited by shares (c.), and the limited liability company (d.), respectively. Thus, these three forms will now be studied in greater detail.

b) Sole Proprietorship

The easiest to create is the sole proprietorship. It has no separate legal personality from the person running the business.

Creation	– automatically created when a natural person starts his or her own commercial activity under his or her own name and own responsibility – If the turnover p.a. amounts up to at least CHF 100'000, a sole proprietorship must be registered in the commercial register; below that level, it is optional (Article 934, Article 36 ordinance on the commercial register). The entry is in any case not constitutive but only declaratory.
Liability	– As a sole proprietor, the founder is fully, personally liable for the liabilities of the business.
Company name	– Must contain the family name of the sole proprietor (Article 945)

Employment	– Founder is self-employed by working under his or her own name and at his or her own expense, autonomously, at own risk
Legal basis	– Article 934 (provision concerning registration in the commercial register) – Article 936a (business identification number) – Articles 945 et seq. (business name) – Articles 36–39 ordinance on the commercial register – tax law → Regulation is very basic
Applicability	– To embark upon first commercial activities – Where commercial activities are small – Generally for "one-man-show" with max. a few employees – Where budget is insufficient to set up a corporation

Figure 2: Sole Proprietorship

c) Company Limited by Shares

The flagship of commercial enterprises is the company limited by shares.

Creation	– Is established when the founding members declare by public deed that they are forming a company limited by shares, lay down the Articles of association therein, and appoint the governing bodies (Article 629 I) – Acquires legal personality upon being entered into the commercial register (Article 643 I) – Share capital must amount to at least CHF 100'000 (Article 621)
Liability	– Shareholders are not personally liable for the debts of the company (Article 620 II) – The company's liability is limited to its assets
Company name	– Can be freely chosen by respecting the general principles on the composition of business names, which means that the content of a company name has to be truthful, cannot be misleading, and does not run counter to any public interest (Article 944 I) – Must indicate the legal form (Ltd) in a national language (French, German, Italian, or Romansh) (Article 950)
Governing bodies	– General meeting (Articles 698–706b) as the supreme governing body – Board of directors (Articles 707–726) which leads the company. This role can be delegated to individual members of the board or third parties (directors) if provided for in the Articles of association. – External auditors (Articles 727–731b), by law, required intensity of the audit depends on the size of the company

Duties of a shareholder	– Shareholders may not be required to contribute more than the amount fixed for subscription of a share on issue (Article 680) → If more duties are intended, shareholders must regulate them among themselves by a separate contract (shareholders' agreement)
Where regulated	– Articles 620–763 – Article 936a (business identification number) – Articles 950 et seq. (business name) – Articles 43–70 ordinance on the commercial register – Tax law → Most intensively regulated business association
Applicability	– For commercial activities with a broader impact – Where is intention to employ people – Where existence and operation of the company should not depend on the people owning it – Where looking for limitation of the liability for the owners of the company – Where budget is sufficient to set up a company limited by shares

Figure 3: Company Limited by Shares (Ltd.)

d) Limited Liability Company

Also very popular is the limited liability company. After an initial niche existence it somehow experienced a boom in popularity. This change was due to the increase of the default minimum share capital needed for establishing a company limited by shares from CHF 50'000 up to CHF 100'000 in 1992 and a law reform of the limited liability company in 2008, consequently shaping the limited liability company as a personalized corporation.

Creation	– Is established when the founding members declare by public deed that they are founding a limited liability company, lay down the Articles of association therein, and appoint the management bodies (Article 777 I) – Acquires legal personality upon being entered into the commercial register (Article 779 I) – Nominal capital must amount to at least CHF 20'000 (Article 773)
Liability	– Members are not personally liable for the liabilities of the company (Article 794) – The company's liability is limited to its assets
Company name	– Can be freely chosen by respecting the general principles on the composition of business names, which means that the content of a company name has to be truthful, cannot be misleading, and does not run counter to any public interest (Article 944 I) – Must indicate the legal form (Ltd liab. Co) in a national language (French, German, Italian, or Romansch) (Article 950)

Governing bodies	– Members' general meeting (Articles 804–808c) as the supreme governing body of the company – Management (Articles 809–817) leads the company; company members are jointly responsible for the management unless Articles of association adopt alternative provisions – Auditor (Article 818 with reference to Articles 727 et seqq.), by law, required intensity of the audit depends on the size of the company
Duties of a member	– Company members are obliged to pay the issue price of their capital contributions and, if required by the Articles of association, must make additional material contributions (Articles 793, 795, 796) – Company members have a duty of loyalty and are subject to prohibition of competition (Article 803)
Where regulated	– Articles 772–827 – Article 936a (business identification number) – Articles 950 et seq. (business name) – Articles 71–83 ordinance on the commercial register – Tax law → Well-regulated business association
Applicability	– For commercial activities with a more local/regional impact – Where there is an intention to employ people – Where existence and operation of the company should depend on the people owning it – Where looking for limitation of the liability for the owners of the company – Where budget is insufficient to set up a company limited by shares

Figure 4: Limited Liability Company (Ltd liab. Co)

3. Landmark Cases

Generally, shareholders and corporations (as separate legal entities, e.g. a company limited by shares) are each liable "for their own business", and neither one is liable for the obligations of the other. But the Swiss Federal Supreme Court has recognised exceptions to that principle. This can be seen in its established practice of breakthrough (also known as "piercing the corporate veil") where the company is totally dominated by one shareholder and this shareholder has somehow used the company for his or her own purposes.

It can therefore be assumed that in accordance with the economic reality, there is an identity of the natural and the legal person and that the legal relations which bind one also bind the other; this is always the case where the

assertion of difference constitutes an abuse of rights or results in an obvious violation of legitimate interests of third parties.[34]

a) Breakthrough-Case I[35]

Liability of dominating shareholder for company limited by shares

The claimant, an engineer, sold a patent to a natural person. Under this licence contract, the buyer incurred some obligations, e.g. the obligation to refrain from exporting goods produced with the patent and to share experiences with the seller. The buyer then did not perform these obligations. The user of the patent was a company limited by shares that was dominated by the buyer as principal shareholder. The Federal Supreme Court stated that in the present case the natural person (buyer) and the legal person (the company limited by shares) were identical, although the buyer was formally not the sole shareholder. The court declared the other shareholders only as dummies and stated that it would be a violation of good faith if the company limited by shares did not have to execute the duties its dominating shareholder had incurred.

b) Breakthrough-Case II[36]

Liability of company limited by shares for dominating shareholder

To enforce a claim against an obligor, the claimant sequestrated a property. Formally the property had not belonged to the obligor but to a company limited by shares that he dominated. The Federal Supreme Court stated that in the present case the natural and legal person were identical and thus that it would be a violation of good faith if the obligor could escape his obligations by determining that the assets belonged to a separate legal entity.

34 BGE 121 III 319 Consideration 5.a)aa), confirmed e.g. in BGE 132 III 489 Consideration 3.2 or Judgment of the Federal Supreme Court 5A_330/2012 of 17 July 2012, Consideration 3.1.

35 BGE 71 II 272.

36 BGE 102 III 165.

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