

Introduction to Swiss Law

Part 5

Swiss Contract / Company Law (Code of Obligations)



Thursday, September 25th 2014, RAI-J-031

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Introduction to Swiss Law

Overview



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1. Literature
2. Translations
3. Useful Links
4. Code of Obligations: Structure
5. Swiss Contract Law
6. Swiss Company Law

Introduction to Swiss Law

Literature



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Contract Law

- BUCHER EUGEN, The Law of Contracts (Chapter 8), in: François Dessemontet and Tugrul Ansay (eds.), Introduction to Swiss Law, 3rd ed., Zurich 2004, pp. 107-1144.

Company Law

- LENGAUER DANIEL/SCHAAD MARTIN/AMSTUTZ THERESE (eds.), Company Law in Switzerland, Zurich 2009.
- HANDSCHIN LUKAS, Swiss Company Law, Zurich/St. Gall 2014 (forthcoming).
- DÖRIG ADRIAN, Switzerland, in: Frank Dornseifer (ed.), Corporate Business Forms in Europe, A Compendium of Public and Private Limited Companies in Europe, Berne 2005, pp. 809-889.

Other literature

- VOGT NEDIM PETER/DROLSHAMMER JENS (gen. eds.), Swiss Law Bibliography, Basel/Geneva/Munich 2005.

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Translations



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English Translations of the Swiss Code of Obligations

- <http://www.admin.ch/ch/e/rs/2/220.en.pdf>.
- FEDERAL OFFICE OF JUSTICE (ed.): Swiss law (Civil Code, Code of Obligations, Private International Law: Arbitration), Berne 2012.
- SWISS-AMERICAN CHAMBER OF COMMERCE (ed.): Swiss Code of Obligations I, Contract Law (Articles 1-551), 6th ed., Zurich 2011.
- SWISS-AMERICAN CHAMBER OF COMMERCE (ed.): Swiss Code of Obligations II, Company Law (Articles 552-964), 5th ed., Zurich 2010.

An English version of each article of the code of obligations can also be found in:

AMSTUTZ MARC et al (eds.): Handkommentar zum Schweizer Privatrecht, 2nd ed., 12 volumes, Zurich 2012.

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Useful Links



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The Jurisdiction of the Swiss Federal Tribunal:

www.bger.ch

Federal Acts and Ordinances:

www.admin.ch/bundesrecht

Federal and Cantonal Jurisdiction, Literature (especially Law Journals and Commentaries):

www.swisslex.ch

Introduction to Swiss Law

Code of Obligations: Structure (I/II)



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The Swiss Code of Obligations

- federal act on the amendment of the Swiss Civil Code (part 5)
- in force since January 1th, 1912

Division One

General
Provisions
(arts. 1-183 CO)

Division Two

Types of
Contractual
Relationship
(arts. 184-551 CO)

Division Three

Commercial
Enterprises and
the Cooperative
(arts. 552-926 CO)

Division Four

The Commercial
Register, Busi-
ness Names
and Commercial
Accounting
(arts. 927-964 CO)

Division Five

Negotiable
Securities
(arts. 965-1186 CO)

- to be found in the classified compilation of federal law (No. 220)
- influenced by the German Code of Obligations, but much easier to read due to its straightforwardness and therefore often recommended as one of the best Civil Codes within Europe

Introduction to Swiss Law

Code of Obligations: Structure (II/II)



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Other federal acts (ordinances) beside the Swiss Code of Obligations (selection):

Contract Law

- Convention of International Sale of Goods (No. 0.221.211.1), «CISG»
- Consumer Credits Act (No. 221.214.1)
- Product Liability Act (No. 221.112.944)
- Package Travel Act (No. 944.3)

Company Law

- Merger Act (No. 221.301)
- Ordinance on the Commercial Register (No. 221.411)
- Fair Trade Act (No. 241)
- Cartel Act (No. 251)
- Banking Act (No. 952.0)
- Stock Exchange Act (No. 954.1)
- Collective Investment Schemes Act (No. 951.31)

Swiss Contract Law

Overview



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1. Principle of freedom of contract
2. Conclusion of a contract
3. Interpretation of a contract
4. Nullity of a contract
5. Defects in consent
6. Non-commercial agency
7. Breach of a contract
8. Quasi-contractual obligations
9. Obligations in tort
10. Restitution of an unjust enrichment
11. Order of «testing» claims
12. Time limits
13. Special types of contracts

Swiss Contract Law

1. Principle of freedom of contract (I/II)



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Freedom to conclude or not conclude a contract

No one has to conclude a contract unless there is a legal provision to conclude. A legal provision to conclude a contract would for example be the obligation of every car owner to effect an insurance.

Freedom to choose the contractual partner

Everyone has the right to choose his contractual partner unrestricted but there are cases where one can be forced to conclude a contract with someone else or cases where it's forbidden to conclude contracts with certain people (for example a real estate contract with a minor).

Freedom to establish the contracts content

The content of a contract may be chosen by the parties but it must not have an illegal content. If the content is forbidden by law the contract is null and void (art. 20 para. 1 CO).

Swiss Contract Law

1. Principle of freedom of contract (II/II)



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Freedom of formality

The Swiss Code of Obligations does in general not demand a special form to conclude a contract (art. 11 para. 1 CO). A contract may therefore be concluded orally or even without using words but by a consenting behaviour. There are a few exceptions where a special form is provided by law, examples are:

- A labour contract with an apprentice has to be «done in writing» (art. 344a CO).
- A sales contract about real estate. It's not only provided, that this contract has to be in written form, it even has to be «done as a public deed» (art. 216 CO).

Freedom to terminate or alter a contract

Freedom to conclude any kind of contract regardless of whether or not it's one of the individual types of contracts in the second division of the CO

Swiss Contract Law

2. Conclusion of a contract (I/II)



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Conclusion of the contract, art. 1 CO

«¹The conclusion of a contract requires a mutual expression of intent by the parties.»

«²The expression of intent may be express or implied.»

Consensus

The parties must consent in every basic point of the contract. Less important points may be left open.

Contract of sales, art. 185 CO:

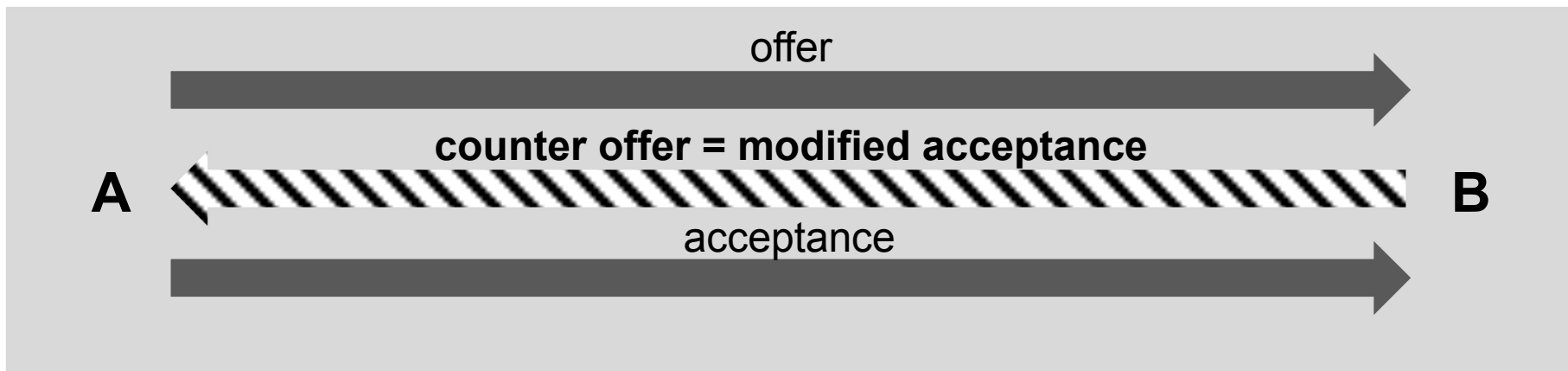
- Basic points that have to be determined: the **price of the good** and the **good itself**.
- Less important points may be for example: the place or the time of fulfillment of the contract.

Swiss Contract Law

2. Conclusion of a contract (II/II)



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Swiss Contract Law

3. Interpretation of a contract



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Subjective Interpretation: Principle of will, art. 18 para. 1 CO

«¹[...] 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»

Objective Interpretation: Principle of good faith (non-codified principle)

A declaration of intention is understood the way the other party of the contract could and did in good faith understand it.

Acting in good faith,
art. 2 CC (Code Civil)

«¹ Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.»

Swiss Contract Law

4. Nullity of a contract



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impossibility

art. 20 para. 1 CO

**unlawfulness,
immorality**

art. 20 para. 1 CO

non-respect of the required form

art. 11 CO

Nullity, art. 20 CO

«¹ A contract is void if its terms are impossible, unlawful or immoral.»

«² However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them.»

Formal requirements and significance in general, art. 11 CO

«¹ The validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law.»

«² In the absence of any provision to the contrary on the significance and effect of formal requirements prescribed by law, the contract is valid only if such requirements are satisfied.»

Swiss Contract Law

5. Defects in consent (I/II)



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Unfair advantage

art. 21 CO

art. 21 CO, unfair advantage

«¹ Where 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 straitened circumstances, inexperience or thoughtlessness, the injured party may [...] demand restitution of any performance already made.»

Error

arts. 23 et seqq. CO

art. 23 CO, error

«A party labouring under fundamental error when entering into a contract is not bound by that contract.»

art. 24 CO, cases of mistake

«¹ ...»

Fraud

art. 28 CO

art. 28 CO, fraud

«¹ A party induced to enter into a contract by the fraud of the other party is not bound by it even if his error is not fundamental.»

Duress

arts. 29 et seq. CO

art. 29 CO, consent to contract

«¹ Where a party has entered into a contract under duress from the other party or a third party, he is not bound by that contract.»

art. 30 CO, definition of duress

«¹ ...»

Swiss Contract Law

5. Defects in consent (II/II)



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Consequence of an error, fraud or duress:

Defect of consent negated by ratification of the contract, art. 31 CO

«¹ Where the party acting under error, fraud or duress neither declares to the other party that he intends not to honour the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified.»

«² ...»

«³ ...»

Swiss Contract Law

6. Non-commercial agency (I/II)



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Non-commercial agency (arts. 32-40 CO)

- contracts may not only be concluded by the parties themselves but also by an agent
- not to confound with a commercial agency (arts. 458-465 and 348b)

two types of non-commercial agency in the Swiss Contract Law:

The agent acts in the party's name and for account of the represented party (art. 32 para. 1 CO).

The agent acts in his own name but for account of the represented party (art. 38 para. 1 CO).

Swiss Contract Law

6. Non-commercial agency (II/II)



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The agent needs to be authorized by the represented person. The extent of authority depends on the type of authorization:

Scope of authority, art. 33 CO

«¹ Where authority to act on behalf of another stems from relationships established under public law, it is governed by the public law provisions of the Confederation or the cantons.»

«² Where such authority is conferred by means of the transaction itself, its scope is determined by that transaction.»

Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract (thus art. 38 para. 1 CO).

Failure to ratify, art. 39 CO

«¹ Where ratification is expressly or implicitly refused, action may be brought against the person who acted as agent for compensation in respect of any damage caused by the extinction of the contract unless he can prove that the other party knew or should have known that he lacked the proper authority.»

Swiss Contract Law

7. Breach of a contract (I/IV)



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non-performance

defective performance

default of performance

**Obligor's duty to compensate – in general,
art. 97 CO**

«¹ An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.»

Swiss Contract Law

7. Breach of a contract (II/IV)



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Suppositions for a liability after art. 97 CO:

1. damage

2. breach of a contract

3. causality between the damage and the breach

4. misconduct attributable to the obligor (assumed)

Swiss Contract Law

7. Breach of a contract (III/IV)



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Default, arts. 102 et seqq. CO

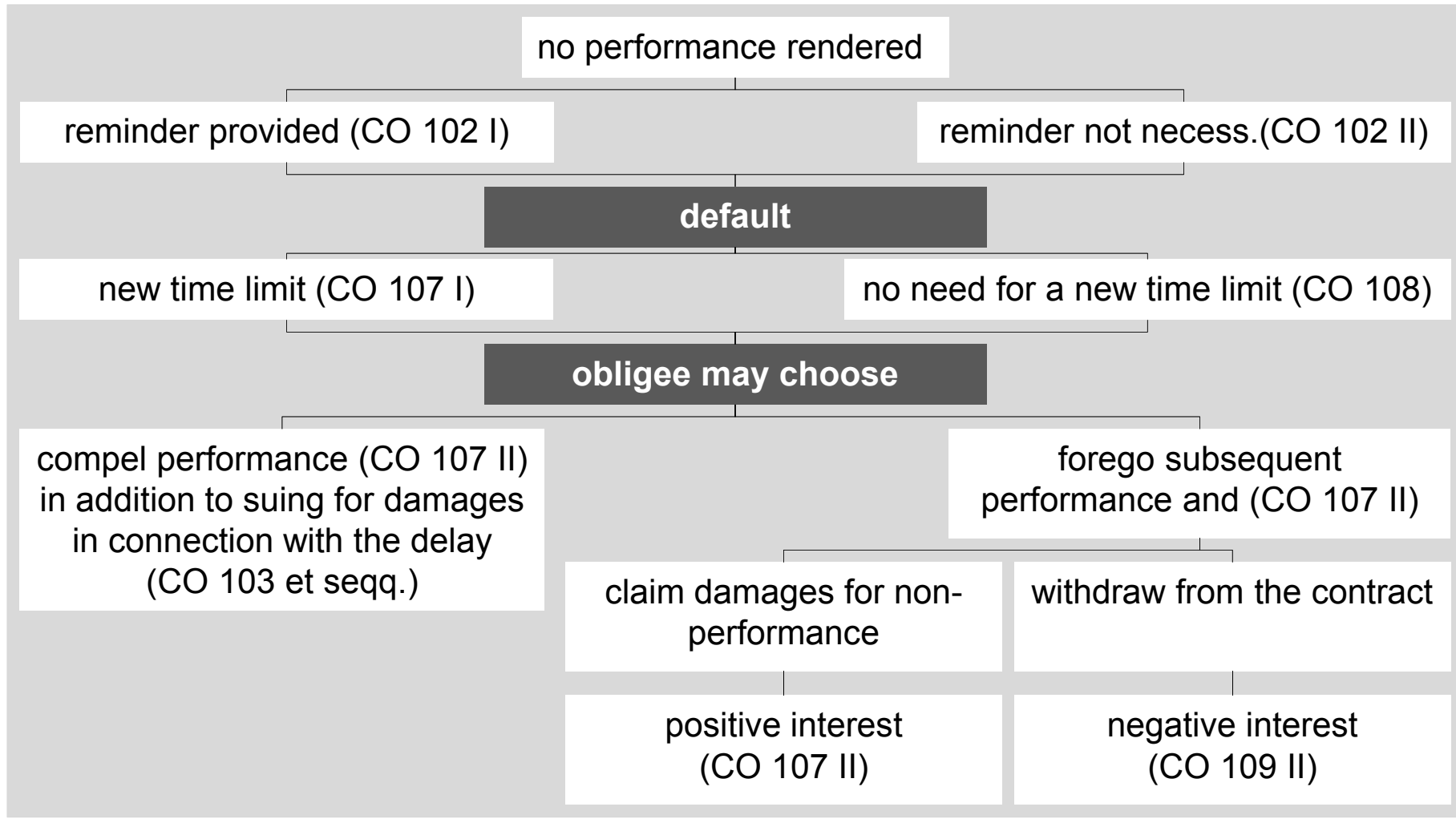
Requirement, art. 102 CO

«¹ Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee.»

«² Where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right of termination reserved by one party, the obligor is automatically in default on expiry of the deadline.»

Swiss Contract Law

7. Breach of a contract (IV/IV)



Swiss Contract Law

8. Quasi-contractual obligations (I/II)



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Suppositions for a liability after inspired **confidence**, bared on trust:

1. damage

2. supposition «breach of contract» for a liability after Art. 97 CO is replaced by:

- **special juridical connection**
- **creation** of inspired confidence, bared on trust that merits to be protected
- **violation** of inspired confidence, bared on trust that merits to be protected

3. causality between 1. and 2.

4. misconduct attributable to the obligor

Swiss Contract Law

8. Quasi-contractual obligations (II/II)



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Suppositions for a liability after **Culpa in contrahendo** (precontractual liability):

1. damage

2. «breach of contract» for a liability after Art. 97 CO is replaced by:

- **contractual negotiations**
- **violation** of a precontractual duty

3. causality between 1. and 2.

4. misconduct attributable to the obligor

Swiss Contract Law

9. Obligations in tort



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The paradigm «tort» consists of an act or omission by the defendant which causes damage to the claimant. The damage must be caused by the fault of the defendant and must be a kind of harm recognized as attracting legal liability.

arts. 41-61 CO

General principles – conditions of liability, art. 41 CO

«¹ A person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation.»

suppositions for a
compensation after
art. 41 CO

- damage
- illegality
- causality between the damage and the illegality
- misconduct attributable to the defendant

Swiss Contract Law

10. Restitution of an unjust enrichment



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No one shall be enriched by assets of someone else if there's no reason for the enrichment.

arts. 62-67 CO

Requirement – in general, art. 62 CO

«¹ A person who has enriched himself without just cause at the expense of another is obliged to make restitution.»

suppositions for a
restitution after
art. 62 CO

- enrichment of one person
- (loss of property/assets of another person)
- no justification for the enrichment

Swiss Contract Law

11. Order of «testing» claims



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Contractual claims

Quasi-contractual claims

Property law claims (CC)

Obligations in tort

Unjust enrichment claims

Swiss Contract Law

12. Time limits



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All claims become time-barred

Contract law	art. 127 CO	after ten years unless otherwise provided by federal civil law.
Obligations in tort	art. 60 CO	one year from the date on which the injured party became aware of the loss/damage and of the identity of the person liable; in any event ten years after the date on which the loss/damage was caused
Unjust enrichment	art. 67 CO	one year after the date on which the injured party learned of his claim and in any event ten years after the date on which the claim first arose

Swiss Contract Law

13. Special types of contracts (I/III)



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Codified contracts

- sale and exchange (arts. 184-238 CO)
- gifts (arts. 239-252 CO)
- lease and usufructuary lease (arts. 253-304 CO)
- loan (arts. 305-318 CO)
- employment contract (arts. 319-362 CO)
- contract for work and services (arts. 363-379 CO)
- publishing contract (arts. 380-393 CO)
- agency contracts (arts. 394-418 CO)
- agency without authority (arts. 419-424 CO)
- commission contract (arts. 425-439 CO)
- contract of carriage (arts. 440-457 CO)
- payment instruction (arts. 466-471 CO)
- contract of bailment (arts. 472-491)
- contract of surety (arts. 492-512 CO)
- gambling and betting (arts. 513-515 CO)
- life annuity contract and lifetime maintenance agreement (arts. 516-529 CO)

Swiss Contract Law

13. Special types of contracts (II/III)



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Non codified contracts

As for the freedom of contracts, every kind of contract may be concluded as far as its content is legal. Over time there have been built several new kinds of contracts, not provided in the CO.

To handle these contracts, the judges sometimes refer to rules from similar codified contracts or they build new rules for these special kinds of non-codified contracts.

Examples:

- «leasing» contract (which is not the same as a lease contract)
- franchise contract
- licence contract
- sponsoring contract

Swiss Contract Law

13. Special types of contracts (IIII/III)



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Example for a codified contract:

Rights and obligations of the parties in general, art. 184 CO

«¹ A contract of sale is a contract whereby the **seller undertakes to deliver the item sold and transfer ownership** of it to the buyer in return for the **sale price**, which the buyer undertakes to pay to the seller.»

«² Unless otherwise provided by agreement or custom, the seller and the buyer are obliged to discharge their obligations simultaneously *quid pro quo*.»

«³ The price is deemed sufficiently determined where it can be determined from the circumstances.»

Example for a non codified contract:

«Leasing» contract

Definition after the jurisdiction on leasing contracts:

A «lessor» passes a movable or immovable object to a „lessee“ in order to let the latter **use it for a certain period of time**. The «lessee» pays an **interest/rent** and for the **maintenance** of the object and he has to **bear the risk of loss/demolition** of the object. The **property right remains** with the «lessor».

→ **Components of a lease and a sale contract**

Swiss Company Law

Overview



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1. Definition of the term «company»
2. Difference between Swiss Contract and Company Law
3. Types of business associations
4. Legal entity, legal capacity and capacity to act
5. Commercial register
6. Business names
7. Commercial accounting
8. Commercial agency

Swiss Company Law

1. Definition of the term «company»



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An association of persons on a contractual basis pursuing a common purpose

association of persons

- simple partnership: at least 2 persons
- cooperative: at least 7 persons

contractual basis

the associates conclude a «partnership contract»

common purpose

the subject term of a partnership contract is the common purpose of the associates

Swiss Company Law

2. Difference between Swiss Contract and Company Law



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Closed number of company forms

There are **seven** different types of business associations, all to find in the Swiss Code of Obligations.

Unlike Swiss Contract Law, Swiss Company Law does **not provide freedom to build** any kind of company with its own provisions.

People are bound to choose from the types the law is offering.



Which type to choose depends on the intentions and interests of the partners.

Swiss Company Law

3. Types of business associations



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Partnerships

association of persons without separate legal existence

simple Partnership,
arts. 530-551 CO

general Partnership,
arts. 552-593 CO

limited Partnership,
arts. 594-619 CO

Corporations

legal entities

company Limited by Shares,
arts. 620-763 CO

partnership Limited by Shares,
arts. 764-771 CO

limited Liability Company,
arts 772-827 CO

cooperative,
arts. 828-926 CO

Swiss Company Law



4. Legal entity, legal capacity and capacity to act (I/III)

**Natural
Person
or
Physical
Person**



**Legal
Entity
or
Legal
Person**

Legal capacity
art. 11 CC (Civil Code)

Legal capacity
art. 53 CC (Civil Code)

Personality in general – legal capacity, art. 11 CC

«¹ Every person has legal capacity.»

«² Accordingly, within the limits of the law, every person has the same capacity to have rights and obligations.»

Legal Entities – legal capacity, art. 53 CC

«Legal entities have all the rights and duties other than those which presuppose intrinsically human attributes, such as gender, age or kinship.»

Swiss Company Law

4. Legal entity, legal capacity and capacity to act (II/III)



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Legal Entities: Capacity to act

Requirements, art. 54 CC

«Legal entities have capacity to act once the governing bodies required by law and their articles of association have been appointed.»

Action on behalf of the legal entity, art. 55 CC

«¹ The governing bodies express the will of the legal entity.»

«² They bind the legal entity by concluding transactions and by their other actions.»

«³ The governing officers are also personally liable for their wrongful acts.»

Swiss Company Law

4. Legal entity, legal capacity and capacity to act (III/III)



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Legal entities have legal standing in the eyes of law. A legal entity:

can enter into agreements or contracts;

can assume obligations;

can incur and pay debts;

can sue and be sued in its own right;

can be held responsible for its actions.

Swiss Company Law

5. Commercial register



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- public register administered by the government, legislated in the Ordinance on the Commercial Register (No. 221.411)
- purpose: to **provide important informations on legal entities** such as their name, legal form, registered seat, amount of capital, names of the executives
- commercial register extracts may be required by anyone on any company (www.zefix.ch)
- new admissions and modifications of inscriptions are published in the Swiss Official Gazette of Commerce (www.sogc.ch)

Swiss Company Law

6. Business names (I/II)



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Business names (arts. 944-956 CO)

General provisions, art. 944 CO

*«¹ In addition to the essential content required by law, each business name may contain information which serves to describe the persons mentioned in greater detail, an allusion to the nature of the company or an invented name provided that the content of the business name is **truthful, cannot be misleading and does not run counter to any public interest.**»*

Companies limited by shares, limited liability companies and cooperatives, art. 950 CO

«Companies limited by shares, limited liability companies and cooperatives may choose their business names freely, subject to the general principles of business name composition. The business name must however indicate the legal form.»

Swiss Company Law

6. Business names (II/II)



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Protection of business names, art. 956 CO

«¹ ...»

«² A party whose interests are injured by the unauthorised use of a business name may apply for an injunction banning further abuse of the business name and sue for damages if the unauthorised user is at fault.»

Swiss Company Law

7. Commercial accounting



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Duty to keep and archive ledgers, art. 957 CO

«¹ A person who is obliged to have his business name entered in the commercial register is obliged to keep and archive proper business ledgers of such scope and type as are necessary to indicate the financial situation of the business, the claims and debts arising from business operations and the results of each individual financial year.»

«² ...»

«³ ...»

«⁴ ...»

«⁵ ...»

Swiss Company Law

8. Commercial agency



**Non-
commercial
agency**
arts. 32-40 CO

**Commercial
agency**
arts. 458-465 /
348b CO

**Governing
bodies**

e.g. arts. 707 et
seqq. CO

**registered power
of attorney**
arts. 458-461 /
464-465 CO

**other forms of
commercial
agency**
arts. 462-465 CO

**commercial
traveller**
art. 348b CO

- entry in the **commercial register** required

- implicitly or explicitly, no form requirements

- Implicitly or explicitly, no form requirements