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INTERNATIONAL CONTRACT MANUAL

COUNTRY HANDBOOK
SWITZERLAND

Chapter 76

Switzerland

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§ 76:1 Choice of law in international setting

In an international setting, the Federal Code of Private International Law (CPIL) of December 18, 1987 (as amended)\(^1\) states that, with regard to contracts, the primarily applicable law shall be the law chosen by the parties.\(^2\) It is not required that the applicable law be determined based on the jurisdiction with which the facts are most closely connected.\(^3\) However, international treaties have to be regarded, and in some cases a choice of law may not be permissible. Furthermore, Swiss courts will not apply foreign law if and to the extent it contradicts Swiss public policy or violates mandatory Swiss law.\(^4\) Vice versa, a Swiss judge may also apply mandatory foreign law if: (i) one of the parties has a legitimate and predominant interest; and (ii) there is a close factual connection with that foreign law.\(^5\)

The choice of law must either: (i) be made expressly in the agreement; or (ii) be clearly determinable from the terms of the agreement or the circumstances.\(^6\) A choice of law can be made or modified at any time by mutual agreement of the parties.

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\(^1\) Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 1 para. 1 lit. b (Switz.) (as amended).
\(^3\) Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 15 (Switz.) (as amended).
\(^4\) Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 17 and 18 (Switz.) (as amended).
choice of law made after the conclusion of an agreement has retroactive effect to the point of time of the conclusion.\footnote{Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 116 para. 3 (Switz.) (as amended).}

There is no case law as to whether the parties may also choose nongovernmental laws such as, e.g., the UNIDROIT Principles of International Commercial Contracts or lex mercatoria to be applicable. However, the majority of the Swiss legal doctrine argues that a pertinent choice of law clause should be valid, and in particular arbitral tribunals are expected to respect such a clause.

§ 76:2 Law applicable by default

Absent a choice of law, the applicable law has to be determined according to either: (1) a pertinent international treaty; or (2) the Federal Code of Private International Law (CPIL).

§ 76:3 Law applicable by default—International treaties

Switzerland is a signatory state to various international treaties, which govern particular types of contracts:

United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG):\footnote{As of April 27, 2006, the following states also were signatories: Argentina, Aruba, Austria, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Columbia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iraq, Iceland, Israel, Italy, Kyrgyzstan, Lesotho, Latvia, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, New Zealand, the Netherlands, Norway, Paraguay, Peru, Poland, Rumania; Russia, St. Vincent and the Grenadines, Sweden, Serbia and Montenegro, Singapore, Slovakia, South Korea, Spain, Syria, Uganda, Uzbekistan, United States of America, and Zambia.}

According to Article 1, the CISG applies to contracts of sale of goods between parties whose places of business are in different states, when: (i) the states are contracting states; or (ii) when the rules of private international law lead to the application of the law of a contracting state.\footnote{Art. 1, Nos. 2 and 3 CISG and Art. 2 to 5 further define the scope. In particular, the CISG does not apply to certain kinds of goods (Art. 2 and 3)
effect of any of its provisions. Therefore, if the parties wish to exclude the application of the CISG, they need to expressly state so in the contract.

The Hague Convention on the Law Applicable to International Sale of Goods of June 15, 1955: According to Article 1, the convention applies to international sales of goods, which includes sales based on documents, but not sales of securities, ships, registered boats, or aircraft, and sales upon judicial order or by way of execution. The mere declaration of the parties relative to the application of a law or the competence of a judge or arbitrator shall not be sufficient to make the convention applicable. Consequently, if the parties want the Convention to be applicable, they should expressly state so in the contract.

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) of June 22, 2001: According to Article 2, the convention is applicable to any contract of carriage according to which the port of loading or the place of taking over of the goods and the port of discharge or the place of delivery of the goods are located in two different states of which at least one is a state party to the convention. If the contract stipulates a choice of several ports of discharge or places of delivery, the port of discharge or the place of delivery to which the goods have actually been delivered shall determine the choice.

For the sake of completeness, it is also noted that Switzerland is a signatory state to the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes of June 7, 1930 and the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques of March 19, 1931, both of which contain rules regarding the applicable law in their respective field.

and to the liability of the seller for death or personal injury caused by the goods to any person (Art. 5).

3Art. 6 CISG.

4As of January 12, 2006, the following states also were signatories: Denmark, Finland, France, Italy, Niger, Norway, and Sweden.

5Art. 1, para. 4 of the Convention.

6As of February 23, 2005, the following states also were signatories: Croatia, Luxembourg, Romania, and Hungary.

In the absence of a choice of law, the contract is governed by the law of the jurisdiction with which it is most closely connected. The CPIL presumes that the closest connection exists with the jurisdiction in which the party obliged to perform the characteristic obligation of the contract either is habitually resident, or if the contract was concluded in connection with a professional or commercial activity, is domiciled.

The CPIL in general defines the “characteristic obligation” regarding certain types of contracts as follows:

- Contracts of alienation (disposal, transfer, assignment, sale): the performance of the alienator;
- Contracts of transfer for use: the performance of the transferor;
- Service contracts: the performance of the service;
- Contracts of deposit: the performance of the depositary;
- Guaranty / Personal security contracts: the performance of the guarantor or the surety.

§ 76:5 Law applicable by default—Particular contracts

In particular, the CPIL defines the applicable law with regard to certain types of contracts.

Real property: Contracts regarding the transfer or use of real property are in principle governed by the law of the state in which the real property is located (lex rei sitae). A choice of law is permissible, though. Formal requirements are also governed by the law of the state in which the real property is located, unless that law specifically allows a choice of a different law. However, formal requirements for real property located in Switzerland are governed by Swiss law only.

[Section 76:4]


[Section 76:5]

Consumer contracts: With regard to consumer contracts, a choice of law is not permissible. Consumer contracts are defined as contracts on the provision of ordinary goods and services: (i) which are intended for the personal use or the use within the family of a consumer; and (ii) which have no connection with the professional or commercial activity of the consumer. Such contracts are governed by the law of the jurisdiction in which the consumer is habitually resident, under the following alternative conditions:

- the provider or supplier accepted the offer in this jurisdiction;
- the provider or supplier offered or advertised prior to the conclusion of the contract in this jurisdiction, and the consumer in addition performed the legal acts required for the conclusion of the contract in this jurisdiction; or
- the provider or supplier induced the consumer to go abroad in order to place his order.

Employment contracts: The parties may submit the contract to the law of the jurisdiction in which: (i) the employee is habitually resident; or (ii) the employer has a place of business, or is legally or habitually resident. The same rule applies to the assignment of an employee’s claim based on an employment contract. In the absence of a choice of law, the employment contract is governed by the law of the jurisdiction in which the employee usually performs his work. If the employee usually performs his work in more than one jurisdiction, the law of the jurisdiction applies in which the employer has its domicile, or absent a domicile, its habitual residence.

Contracts regarding Intellectual Property Rights: A choice of law is permissible. Absent such a choice of law, the contract is governed by the law of the jurisdiction in which the party transferring the intellectual property right or transferring the use thereof is habitually resident. Contracts containing agreements on the rights to intellectual property that an employee

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2Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 120 (Switz.) (as amended).
3Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 121 (Switz.) (as amended).
5Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 122 (Switz.) (as amended).

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created in performance of an employment contract are governed by the law applicable to the employment contract.

§ 76:6 Law applicable by default—No response to an offer

The party which does not respond to an offer to conclude a contract may, with regard to the legal effect of his silence, rely on the law of the jurisdiction in which he is habitually resident.1

§ 76:7 Law applicable by default—Formal requirements

With regard to formal requirements, a contract is deemed valid if it fulfills the requirements of either: (i) the law applicable to contract; or (ii) the law of the jurisdiction in which the contract was concluded. If the parties are located in different jurisdictions when concluding the contract, the formal requirements of only one of the jurisdictions need to be met for the contract to be valid. In case the applicable law provides for formal requirements which have the purpose of protecting one party, the formal validity of the contract is governed exclusively by this law, unless the latter allows the application a different law.1

§ 76:8 Law applicable by default—Agency

Contractual agency is governed by the law applicable to the contract.1

The law of the jurisdiction in which the agent has his place of business2 governs the requirements according to which the acts of an agent may, with regard to third parties, bind the

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principal. If there is no jurisdiction in which the principal has a place of business or if such jurisdiction is not identifiable for the third party, the law of the jurisdiction is applicable in which the agent in such particular case primarily acts. The same rules apply with regard to the relation between the unauthorized agent and a third party.\(^3\)

\[\text{§ 76:9 } \text{Jurisdiction, prorogation—Lugano Convention}\]

Switzerland is a signatory state of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988 ("Lugano Convention").\(^1\) If a contract falls within the scope of the Lugano Convention,\(^2\) the parties may agree on a particular forum according to its Article 17 which reads as follows:

1. If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which is accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom

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\(^1\) As of June 29, 2005, the other signatory states are Belgium, Denmark, Germany, Finland, Greece, Ireland, Iceland, Italy, Luxembourg, the Netherlands, Norway, Austria, Poland, Portugal, Sweden, Spain, the United Kingdom, and Gibraltar.

\(^2\) See Art. 1 of the Lugano Convention. The Convention is applicable in civil and commercial matters, excluding in particular tax, customs, and administrative matters as well as matters regarding personal or marital status, wills and inheritance, bankruptcy, social security, and arbitration.

\(^3\) Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 126 para. 2 to 4 (Switz.) (as amended).
is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

5. In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen.


The parties may determine the court(s) that shall have jurisdiction with regard to claims in connection with a particular contract. Such a choice of forum should preferably be made in writing, but not necessarily so. A choice can also be made by telegram, telex, facsimile transmission, or in any other form that allows the party to prove the agreement by a text.1 Unless agreed otherwise, the court agreed upon has exclusive jurisdiction in this matter.

A choice of forum clause is deemed invalid if it was concluded to improperly deny one of the parties the jurisdiction of a court to which it is entitled under Swiss law.2

Moreover, the court which the parties agreed upon may not decline having jurisdiction: (a) if one of the parties is domiciled, is habitually resident or has a place of business in the Canton of that court; or (b) if Swiss law is applicable on the matter in dispute.3

§ 76:11  Jurisdiction, prorogation—Place of jurisdiction by default, Lugano Convention

As a principle, the courts of the state in which the defendant

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1Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 5, para. 1 (Switz.) (as amended). The wording of this definition implies to include communications by e-mail. However, there exists no pertinent case law in Switzerland.

2Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 5 para. 2 (Switz.) (as amended).

3Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 5 para. 3 (Switz.) (as amended).

In general: With regard to claims out of contracts, the Swiss courts at the place of domicile or habitual residence of the defendant are competent. Moreover, for claims in connection with the place of business, the courts at the place of business are competent.¹

Place of performance:² If the defendant has neither a domicile, nor a habitual residence, nor a place of business in Switzerland, but the obligation in dispute has to be performed in Switzerland, the Swiss courts at the place of performance have jurisdiction in this matter.

Consumer contracts:³ With regard to claims arising out of consumer contracts, the consumer may choose among the courts: (a) at the place of his domicile or habitual residence; or

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¹Art. 2, no. 1 Lugano Convention.
²Art. 3 Lugano Convention.
³Art. 4 Lugano Convention.
⁴Art. 5, no. 1 Lugano Convention.
⁵Art. 7 to 12a Lugano Convention.
⁶Art. 13 to 15 Lugano Convention.

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[Section 76:11]

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[Section 76:12]
(b) at the place of the domicile of the provider (or, if the provider does not have a domicile, at the place of its habitual residence). A consumer may not in advance waive his right to the place of jurisdiction at his domicile or habitual residence.

Employment contracts: For claims out of employment contracts, the Swiss courts: (a) at the domicile of the employee; or (b) at the place where the employee usually performs his work are competent. Moreover, the courts at the place of the employee’s domicile or habitual residence are competent for claims of the employee. For claims with regard to work and wage conditions, the Swiss courts at the place at which the employee has been dispatched from abroad for a limited time in order to perform at least a part of his work are competent.


Under Swiss law, any dispute of financial interest may be submitted to arbitration. The Federal Code on International Private Law sets out rules for all arbitrations if: (i) the seat of the arbitral tribunal is in Switzerland; and (ii) at least one of the parties did not have its domicile or habitual residence in Switzerland at the time of the conclusion of the arbitration agreement.

The arbitration agreement must be concluded in writing, by telegram, telex, or facsimile transmission or in any other form that allows the party to prove the agreement by a writing. Moreover, the arbitration agreement is valid if it is in conformity with either: (i) the law chosen by the parties; (ii) the law applicable to the matter in dispute (in particular, the law applicable to the main contract); or (iii) Swiss law. An arbitration agreement cannot be contested on the grounds that

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[Section 76:13]

1Federal Code of Private International Law (CPIL), Dec. 18, 1987, art. 177 (Switz.) (as amended).

the main contract is invalid or that it was made in connection with a future dispute.³

Article 179 to 194 CPIL further define matters concerning the role of the arbitrators, lis pendens, arbitration procedure, jurisdiction, decisions on the merits, finality, and annulment as well as enforceability. The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards.

§ 76:14 International arbitration—The Swiss rules of international arbitration of January 1, 2004

With effect as of January 1, 2004, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, and Zurich adopted uniform rules on international arbitration which replace the chambers' former rules of international arbitration.¹ These Swiss Rules of International Arbitration are based on the UNCITRAL Arbitration Rules. According to Art. 1, No. 1, the rules “shall govern international arbitrations, where an agreement to arbitrate refers to these Rules, or to the arbitration rules of the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, Zurich and any further Chamber of Commerce and Industry that may adhere to these Rules.”

The chambers recommend the following model arbitration clause:

Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. The number of arbitrators shall be . . . (one or three); The seat of the arbitration shall be . . . (name of city in Switzerland, unless the parties agree on a city abroad); The arbitral proceedings shall be conducted in . . . (insert desired language).


¹The Swiss Rules of International Arbitration may be downloaded at http://www.swissarbitration.ch.
§ 76:15 Principles of Swiss contract law—General nature of Swiss contract law

Swiss contract law is governed by the Swiss Code of Obligations (SCO) of March 30, 1911 (as amended). The Code contains general provisions with regard to obligations (Art. 1 to 183) and provisions on particular types of contracts (Art. 184 to 551), as well as provisions on company law (Art. 552 to 926), on the commercial register, company names, and commercial accounting (Art. 927 to 964), and on securities (Art. 965 to 1186). The general provisions contained in the Swiss Code of Obligations apply to all contractual relationships, unless deviant provisions on a particular type of contract prevail.

Two fundamental principles form the basis of Swiss contract law—freedom of contract and freedom of form.

The freedom of contract encompasses the freedom: (i) to conclude a contract; (ii) to deliberately choose the contracting party at one’s discretion; (iii) to amend or annul a contract by mutual consent; (iv) to determine the subject matter and terms of the contract within the legal framework; (v) to conclude a contract which cannot be subsumed (as a whole or in part) under a contract category contained in the Swiss Code of Obligations; (vii) to determine whether and to which extent a contract shall be binding among the parties; and (viii) to determine the remedies for nonperformance, default, etc. Accordingly, the rules set forth in the Swiss Code of Obligations may, in principle, be modified by the contracting parties unless a particular provision is qualified as mandatory by statutory law and/or prevailing case law.

Freedom of form means that a contract, in order to be valid, needs to meet particular formal requirements only if: (i)

[Section 76:15]

1The official text of the Swiss Code of Obligation is available in three languages (German, French, and Italian) at http://www.admin.ch/ch/d/sr/c220.html. The Swiss-American Chamber of Commerce provides an unofficial English translation prepared by Rebecca Brunner-Peters, Walter H. Diggelmann, Jerome H. Farnum, Martin Frey, Peter C. Honegger, Bernhard F. Meyer-Hauser, and Christian Reber (available at http://www.amcham.ch), from which most English citations of the SCO in his Handbook are taken.

2Swiss Code of Obligations (SCO), March 30, 1911, art. 19 (Switz.) (as amended).
expressly stated by the law; or (ii) so agreed among the parties. There are three types of forms:

- **Simple written form:** The contract must be in writing and signed by all parties. Simple written form is required, e.g., for assignments of obligations, promises to make a donation, credit orders, etc.

- **Qualified written form:** In addition to the simple written form, the contract (or parts thereof): (i) must be in holograph; or (ii) the contract must meet minimal requirements with regard to subject matter or terms. Qualified written form is required, e.g., for certain types of guarantees, travelling salesmen’s contracts, and last wills and testaments (unless notarized).

- **Notarization:** The contract needs to be drawn up before a notary. The procedure of notarization is governed by Cantonal law. Notarization is required, e.g., for sales of real property, certain types of guarantees, last wills

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3Swiss Code of Obligations (SCO), March 30, 1911, art. 11 (Switz.) (as amended).
4Swiss Code of Obligations (SCO), March 30, 1911, art. 16 (Switz.) (as amended).
5Personal signatures may be replaced by qualified electronic signatures according to the Federal Act on Electronic Signatures of December 19, 2003.
6Swiss Code of Obligations (SCO), March 30, 1911, art. 165 (Switz.) (as amended).
7Swiss Code of Obligations (SCO), March 30, 1911, art. 243 para. 1 (Switz.) (as amended).
8Swiss Code of Obligations (SCO), March 30, 1911, art. 408 para. 3 (Switz.) (as amended).
9Swiss Code of Obligations (SCO), March 30, 1911, art. 493 para. 2 (Switz.) (as amended).
10Swiss Code of Obligations (SCO), March 30, 1911, art. 347a (Switz.) (as amended).
11Art. 505 SCC.
12Swiss Code of Obligations (SCO), March 30, 1911, art. 216 (Switz.) (as amended).
13Swiss Code of Obligations (SCO), March 30, 1911, art. 492 para. 2 (Switz.) (as amended).
and testaments and inheritance contracts,\textsuperscript{14} and the transfer of quotas in limited liability companies.\textsuperscript{15}

\section*{§ 76:16 Principles of Swiss contract law—Conclusion of a contract, mutual assent}

A contract is concluded by an express or implied manifestation of the parties' mutual assent (consensus).\textsuperscript{1} When the parties have agreed with regard to all essential points of their contractual relationship (i.e., essentialia negotii and points which are, from the subjective viewpoint of the parties, sine qua non), it is presumed that the contract is binding even if the parties have made a reservation of ancillary points.\textsuperscript{2}

In principle, an offer to enter into a specific contract is binding,\textsuperscript{3} unless the offeror "adds to his offer a declaration that he declines to be bound, or if such reservation arises from the nature of the transaction or the circumstances."\textsuperscript{4} The contract is concluded if and when the offer is accepted.

It should be noted that under the concept of "factual contractual relationship" as developed by courts,\textsuperscript{5} contract law is applied to certain relationships which are of factual nature only and not based on a contract. For example, this concept has been applied to the continuing relationship between two parties who both acted and performed as if they had concluded a valid contract.

\section*{§ 76:17 Principles of Swiss contract law—Invalidity of a contract}

A contract is invalid under the following circumstances:

\begin{enumerate}
  \item No capacity to act: A contract is not valid if one (or more) of the parties has no legal capacity to contract.
\end{enumerate}

\begin{footnotes}
\textsuperscript{1}Art. 499/512 SCC.
\textsuperscript{2}Swiss Code of Obligations (SCO), March 30, 1911, art. 791 para. 4 (Switz.) (as amended).
\textsuperscript{3}Swiss Code of Obligations (SCO), March 30, 1911, art. 1 (Switz.) (as amended).
\textsuperscript{4}Art. 3 et seq. SCO.
\textsuperscript{5}Swiss Code of Obligations (SCO), March 30, 1911, art. 7 para. 1 (Switz.) (as amended).
\textsuperscript{6}BGE 108 II 112 et seq. (Swiss Federal Supreme Court 1982).
\end{footnotes}
ii. Lack of form: see above, § 76:15.

iii. Impossible content: If at the time of the conclusion of the contract its content provides for an objective impossibility, the contract is, to that extent, null and void.¹

iv. Illegal content or violation of bonos mores: A contract having illegal content or violating bonos mores is, to that extent, null and void.²

v. Overreaching: A contract which establishes an obvious disparity between the respective considerations given by the parties and the conclusion of which was induced by one of the parties exploiting the distress, inexperience, or improvidence of the other, may be rescinded by the party prejudiced thereby within one year from the conclusion of such a contract.³

vi. Errors: A person acting under material error at the conclusion of the contract is not bound by it.⁴ Material errors include: (1) the error with regard to the contract itself (error in negotio); (2) the error with regard to the thing or person the party in error had in mind (error in corpore / persona); (3) the error with regard to the extent of the contractual consideration (error in quantitate); and (4) the error related to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be a necessary basis of the contract.⁵ However, errors affecting only the motives for entering into the contract are not considered to be material.⁶ The party influenced by error must declare to the other party that he is not bound by the contract within one year from the time of the discovery

[Section 76:17]

¹Swiss Code of Obligations (SCO), March 30, 1911, art. 20 (Switz.) (as amended).
²Swiss Code of Obligations (SCO), March 30, 1911, art. 20 (Switz.) (as amended).
³Swiss Code of Obligations (SCO), March 30, 1911, art. 21 (Switz.) (as amended).
⁴Swiss Code of Obligations (SCO), March 30, 1911, art. 23 (Switz.) (as amended).
⁵Swiss Code of Obligations (SCO), March 30, 1911, art. 24 para. 1 (Switz.) (as amended).
⁶Swiss Code of Obligations (SCO), March 30, 1911, art. 24 para. 2 (Switz.) (as amended).

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of the error; otherwise the contract is deemed to be ratified.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 31 (Switz.) (as amended).}

vii. Willful Deception: If a party has been induced to enter into a contract by the willful deception of the other party, the contract shall not bind the deceived party even if the error so induced was not material.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 28 para. 1 (Switz.) (as amended).} The party influenced by willful deception must declare to the other party that he is not bound by the contract within one year from the time of the discovery of the deception; otherwise the contract is deemed to be validly concluded.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 31 (Switz.) (as amended).}

viii. Duress: If a contracting party has been unlawfully forced to conclude a contract while under material duress, whether originating from the other party or a third person, the party who acted under duress is not bound by the contract.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 29 para. 1 (Switz.) (as amended).} The party influenced by duress must declare to the other party that he is not bound by the contract within one year from the time of the removal of the threat; otherwise the contract is deemed to be ratified.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 31 (Switz.) (as amended).}

§ 76:18  Principles of Swiss contract law—General terms and conditions (“Allgemeine Geschäftsbedingungen,” AGB)

Under Swiss law, general terms and conditions are not generally binding. General terms and conditions are, in principle, only binding if and to the extent the contractual parties have adopted them expressly or implicitly. The agreement to include certain general terms and conditions in a particular contract quite often is made by reference in the main contract. The party agreeing to general terms and conditions must have reasonable access to the full text (which may be done by handing

\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 31 (Switz.) (as amended).}
out a copy of the full text to the customer or by displaying the full text prominently on the premises).

However, despite an agreement to include general terms and conditions, such terms and conditions do not apply, inter alia, in the following cases:

a) Individual agreements which contradict any of the general terms or conditions prevail.

b) Terms and/or conditions are invalid if and to the extent they are so unusual that the party accepting such general terms and conditions in good faith did or should not have to expect them.

c) Under certain circumstances, the agreement of a place of jurisdiction in general terms and conditions may be invalid.

d) The use of a General Terms and Conditions Form is deemed unfair competition, if such general terms and conditions are used in a deceptive manner to the detriment of a contractual party and contain rules that differ substantially from the applicable statutory rules or the nature of such contracts.¹

§ 76:19 Principles of Swiss contract law—Breach of contract and remedies—Nonperformance by the obligor—Supervening impossibility

If the performance of the obligation becomes impossible after the conclusion of the contract,¹ the obligation is deemed extinguished to the extent the impossibility is based on circumstances for which the obligor is not responsible.² The obligor then has to restitute anything already received as counter-performance (based on the concept of unjust enrichment).³ If

[Section 76:18]

¹Art. 8 Federal Act Against Unfair Competition of December 19, 1986.

[Section 76:19]

¹If the performance of an obligation is objectively impossible before the conclusion of the contract, the obligation is deemed to be null and void, see supra.

²Swiss Code of Obligations (SCO), March 30, 1911, art. 119 para. 1 (Switz.) (as amended).

³Swiss Code of Obligations (SCO), March 30, 1911, art. 119 para. 2 (Switz.) (as amended). It should be noted that this will not apply to cases in which the risk has already passed to the obligee prior to performance (due to

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the obligor is responsible for the impossibility, he is liable for damages arising therefrom.4

§ 76:20 Principles of Swiss contract law—Breach of contract and remedies—Nonperformance by the obligor—Default

If an obligation is due, the obligor will be in default upon being reminded thereof by the obligee.1 However, a reminder notice need not be sent out if a certain due date was agreed upon for performance, as the obligor will be in default upon the expiration of such date.2

If a party is in default as an obligor, it is liable for damages for any delayed performance, and is also liable for any accident without fault3.

If an obligor is in default as to the payment of a financial debt, he shall pay penalty interest at 5% p.a., even if the contract provides for a lower rate.4 As between merchants, penalty interest may be calculated at the usual bank discount rate at the place of payment, if such rate is higher.5

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statutory law or contractual agreements), Swiss Code of Obligations (SCO), March 30, 1911, art. 119 para. 3 (Switz.) (as amended).

1 Swiss Code of Obligations (SCO), March 30, 1911, art. 102 para. 1 (Switz.) (as amended).

2 Swiss Code of Obligations (SCO), March 30, 1911, art. 102 para. 2 (Switz.) (as amended).

3 Swiss Code of Obligations (SCO), March 30, 1911, art. 103 para. 1 (Switz.) (as amended). It should be noted that the obligor has certain defenses, e.g., that he defaulted without being at fault, art. 103 para. 2 SCO.

4 Swiss Code of Obligations (SCO), March 30, 1911, art. 104 para. 1 (Switz.) (as amended).

5 Swiss Code of Obligations (SCO), March 30, 1911, art. 104 para. 3 (Switz.) (as amended).
§ 76:21 Principles of Swiss contract law—Breach of contract and remedies—Imperfect performance by the obligor

If the obligee, in principle, does perform his contractual or accessory obligation(s), but imperfectly, or violates collateral duties, he defaults and is liable for damages¹.

§ 76:22 Principles of Swiss contract law—Breach of contract and remedies—Remedies

If one party of a bilateral contract defaults, the other party may set an appropriate time limit for subsequent performance.¹ If the defaulting party does not perform within that time limit, the other party may:

i. insist on performance and claim damages resulting from the delay of performance;

ii. waive the obligation to perform and instead claim damages for nonperformance (restitution of the so-called positive interest); or

iii. rescind the contract and claim damages in connection therewith (restitution of the so-called negative interest).²

Damages encompass actual losses (damnum emergens) and lost profits (lucrum cessans). If the creditor claims restitution of the positive interest, he has to be put in a position as if the contract would have been performed perfectly. If the creditor claims restitution of the negative interest, he has to be put in a position as if the contract would never have been concluded.

There is no concept of punitive damages under Swiss law.

The party claiming damages has to prove: (i) the impossibility, default, or imperfect performance; (ii) the actual damage(s); and (iii) the causal connection between (i) and (ii). The defaulting party’s fault is presumed by statutory law. This means

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¹Swiss Code of Obligations (SCO), March 30, 1911, art. 97 para. 1 (Switz.) (as amended).
²Swiss Code of Obligations (SCO), March 30, 1911, art. 107 para. 2 (Switz.) (as amended).
that the respondent, in order to avoid liability for damages, has to prove that it has not been at fault.\textsuperscript{3}

§ 76:23 Principles of Swiss contract law—Breach of contract and remedies—Default of the obligeer

If an obligeer refuses, without justification, to accept a performance duly tendered or to do any preliminary act which he is obligated to perform and without which the obligor is unable to perform, he defaults.\textsuperscript{1} With regard to performances in kind, the obligor is then entitled to deposit the object which he is bound to deliver at the obligeer’s risk and expense, or to have the object sold publicly if a deposit is not appropriate due to the nature of the object or the kind of business involved.\textsuperscript{2} As long as the obligeer has not yet declared acceptance, the obligor has the right to take back the deposited object.\textsuperscript{3} With regard to obligations other than performances in kind, the obligor may rescind the contract according to the rules on default by the obligor.\textsuperscript{4}

§ 76:24 Principles of Swiss contract law—Breach of contract and remedies—Liability for auxiliary persons

If a party performs its obligations through an auxiliary person, it is liable for damages caused by the acts of such auxiliary persons.\textsuperscript{1} Fault of the auxiliary person is required to claim damages, but such fault is determined by answering the hypothetical question whether the conduct of the auxiliary person would be faulty if the party itself had shown the same conduct.

\textsuperscript{3}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 97 para. 1 (Switz.) (as amended).}

\textsuperscript{1}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 91 (Switz.) (as amended).}

\textsuperscript{2}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 93 para. 1 (Switz.) (as amended).}

\textsuperscript{3}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 94 para. 1 (Switz.) (as amended).}

\textsuperscript{4}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 95 (Switz.) (as amended).}

\textsuperscript{1}\textit{Swiss Code of Obligations (SCO), March 30, 1911, art. 101 para. 1 (Switz.) (as amended).}

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§ 76:25  **Principles of Swiss contract law—Breach of contract and remedies—Limitation of liability**

An agreement to waive liability for gross negligence or unlawful intent is null and void if concluded in advance. Liability may, therefore, only be excluded for slight negligence. However, such a waiver of liability may also be considered null and void if the party making the waiver was employed by the other party at the time of the declaration, or if the liability arises out of the conduct of a business which is carried on under an official license by a public authority.

Liability for auxiliary persons may be limited or excluded by prior agreement.

§ 76:26  **Assignment of claims and assumption of obligations—Assignment of claims**

Claims may be assigned to a third party without the consent of the obligor. Assignments must be in writing in order to be valid. However, assignments of claims are not valid if the parties concluded a nonassignment agreement or if the law or the nature of the legal relationship does not allow an assignment. The obligor should be notified of the assignment as such notification deprives the obligor from the possibility to pay in good faith to the former obligee. The obligor may raise all de-
fenses he had against the assignor also against the assignee.\textsuperscript{5} In an assignment for value, the assignor warrants that the claim validly exists at the time of the assignment;\textsuperscript{6} he does not warrant that the obligor is solvent.

**§ 76:27 Assignment of claims and assumption of obligations—Assumption of obligations**

The assumption of an obligation in lieu of, and under discharge of, the previous obligor is effected by contract of the assuming party with the obligee\textsuperscript{1} or by satisfying the obligee.\textsuperscript{2} Unlike the assignment of a claim, such the assumption of an obligation is not subject to any formal requirement, but the consent of the obligee is required. The new obligor may raise the same defenses in connection with the obligation (but not personal defenses) which the previous obligor was already entitled to raise.\textsuperscript{3}

**§ 76:28 Assignment of claims and assumption of obligations—Assumption of assets and liabilities or of an enterprise**

Special rules apply to the acquisition of assets and liabilities, or enterprises. With the acquisition of assets and liabilities, or an enterprise with assets and liabilities, the acquirer becomes automatically liable to the obligees for the liabilities connected therewith, as soon as the acquisition has been notified to the

\textsuperscript{5}Swiss Code of Obligations (SCO), March 30, 1911, art. 169 para. 1 (Switz.) (as amended).

\textsuperscript{6}Swiss Code of Obligations (SCO), March 30, 1911, art. 171 para. 1 (Switz.) (as amended).

\textsuperscript{1}Swiss Code of Obligations (SCO), March 30, 1911, art. 176 para. 1 (Switz.) (as amended).

\textsuperscript{2}Swiss Code of Obligations (SCO), March 30, 1911, art. 175 para. 1 (Switz.) (as amended).

\textsuperscript{3}Swiss Code of Obligations (SCO), March 30, 1911, art. 179 para. 1 (Switz.) (as amended).
The previous obligor, however, remains jointly and severally liable for three more years.¹

However, if commercial companies, cooperatives, associations, foundations, and sole proprietorships are involved, such acquisitions are governed by the provisions of the Federal Mergers Act (see infra).²

§ 76:29  Set-Off

In order to be able to set one claim against another claim, the two claims: (i) have to exist among identical parties; (ii) must be of similar nature; and (iii) have to be due.¹

The obligor may set his claim against a counterclaim even if the counterclaim is contested.² Moreover, a claim forfeited by the statute of limitations may be set against another claim if at the time when it could have been set against the other claim, it was not yet forfeited.³ The right to set-off may be waived in advance.⁴

Special rules regarding the set-off of claims apply in case the obligor has been adjudged bankrupt.⁵

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¹Swiss Code of Obligations (SCO), March 30, 1911, art. 181 para. 1 (Switz.) (as amended).
²Swiss Code of Obligations (SCO), March 30, 1911, art. 181 para. 2 (Switz.) (as amended).
³Swiss Code of Obligations (SCO), March 30, 1911, art. 181 para. 4 (Switz.) (as amended).
⁴Swiss Code of Obligations (SCO), March 30, 1911, art. 120 para. 1 (Switz.) (as amended).
⁵Swiss Code of Obligations (SCO), March 30, 1911, art. 120 para. 2 (Switz.) (as amended).
⁶Swiss Code of Obligations (SCO), March 30, 1911, art. 120 para. 3 (Switz.) (as amended).
⁷Swiss Code of Obligations (SCO), March 30, 1911, art. 126 (Switz.) (as amended).
⁸See Art. 213 of the Federal Act on Debt Collection and Bankruptcy of April 11, 1889 (as amended).
§ 76:30 Statute of limitations

In general, claims are barred by the statute of limitations after 10 years. However, the time period is five years for rent, interest, and other periodic performances; for claims arising from delivery of foodstuffs, for board and restaurant debts; for claims arising from craftsmen’s work, the retail sale of goods, medication, the professional work of lawyers, legal counsels, holders of mandates and notaries, as well as claims by employees arising out of the employment relationship. These statutes of limitations may not be modified by the parties.

The limitation period starts to run when the claim becomes due. The running of the statue of limitations is interrupted: (i) by acknowledgement of the claim by the obligor; or (ii) by prosecution for debt, or by bringing suit or by raising a defense in court or in arbitration, as well as by filing a claim in a bankruptcy, or by a summons to appear in an official conciliation proceedings. With the interruption, the time period of the statute of limitations starts anew.

Besides, the time period is one year for actions based on a warranty for defects under purchase contract law (see supra). A one year period as from the knowledge of the damage (and an absolute period of 10 years) applies to claims in torts and unlawful enrichment. The time period is six months after the

[Section 76:30]

1 Swiss Code of Obligations (SCO), March 30, 1911, art. 127 (Switz.) (as amended).
2 Swiss Code of Obligations (SCO), March 30, 1911, art. 128 (Switz.) (as amended).
3 Swiss Code of Obligations (SCO), March 30, 1911, art. 129 (Switz.) (as amended).
4 Swiss Code of Obligations (SCO), March 30, 1911, art. 130 para. 1 (Switz.) (as amended).
5 Swiss Code of Obligations (SCO), March 30, 1911, art. 135 (Switz.) (as amended).
6 Swiss Code of Obligations (SCO), March 30, 1911, art. 137 para. 1 (Switz.) (as amended).
7 Swiss Code of Obligations (SCO), March 30, 1911, art. 60 (Switz.) (as amended).
8 Swiss Code of Obligations (SCO), March 30, 1911, art. 67 (Switz.) (as amended).
occurrence of a default with regard to the right of the borrower
to draw a loan, and the right of the lender to have it accepted.⁹

§ 76:31 Types of contracts
A number of types of contracts are regulated in the Swiss Code of Obligations. As described supra, the statutory rules may, in principle, be modified by the contracting parties unless a particular provision is qualified as mandatory by statutory law and/or prevailing case law.

The Swiss Code of Obligations regulates the following types of contracts:

(a) Purchase and Barter Contracts (Art. 184 to 238 SCO)
(b) Donations (Art. 239 to 252 SCO)
(c) Rental Agreements (Art. 253 to 274g SCO)
(d) Usufructuary Leases (Art. 275 to 304 SCO)
(e) Lendings (Art. 305 to 318 SCO)
(f) Employment Contracts (Art. 319 to 362 SCO)
(g) Work Contracts (Art. 363 to 379 SCO)
(h) Publishing Contracts (Art. 380 to 393 SCO)
(i) Mandates (Art. 394 to 418v SCO)
(j) Conducting Business without Mandates (Art. 419 to 424 SCO)
(k) Commissions (Art. 425 to 439 SCO)
(l) Contracts of Carriage (Art. 440 to 457 SCO)
(m) Procuration and other Commercial Mandates (Art. 458 to 465 SCO)
(n) Orders (Art. 466 to 471 SCO)
(o) Bailments (Art. 472 to 491 SCO)
(p) Guarantees (Art. 492 to 512 SCO)
(q) Gambling and Betting (Art. 513 to 515a SCO)
(r) Life Annuities and Contracts of Support for Life (Art. 516 to 529 SCO)
(s) Simple Partnerships (Art. 530 to 551 SCO)

§ 76:32 Types of contracts—Purchase contracts
According to Art. 184 para. 1 SCO, “a purchase contract is a contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to

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⁹Swiss Code of Obligations (SCO), March 30, 1911, art. 315 (Switz.) (as amended).

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the buyer, and the buyer obligates himself to pay the purchase price to the seller."

In principle (and other than under CISG rules\(^1\)), benefit and risk with regard to the object of the purchase pass to the buyer upon the conclusion of the contract, unless: (i) the parties agree otherwise or special circumstances create an exception,\(^2\) or (ii) the contract is subject to a condition precedent.\(^3\) In addition, if the object of the purchase is described only in a generic manner, it must have been segregated, and if it is to be shipped, it must have been placed in the possession of the shipper.\(^4\)

Art. 187 to 215 SCO contain rules on the purchase of chattels, including rules on the obligations of the seller (delivery, warranty with regard to the title transferred, and warranty against defect in the object of purchase) and obligations of the buyer (payment of price and acceptance of the purchased object, determination of purchase price, due date of, and interest on the purchase price, and default of buyer). Certain statutory provisions shall be highlighted below. Art. 216 to 236 regulate sales contracts regarding real estate.\(^5\)

§ 76:33 Types of contracts—Purchase contracts—Default in commercial transactions

In commercial transactions, if one of the parties defaults, the other party (be it buyer or seller) is free not to fulfill its obligation, may sell the goods in self-help, or make a covering purchase, and is entitled to damages. If the seller defaults with regard to the delivery of the goods, the buyer is obligated to declare immediately if he still wants the goods to be delivered. Otherwise, statutory law presumes that the buyer waives such

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\(^1\) Cf. Art. 67 and 69 CISG.

\(^2\) Swiss Code of Obligations (SCO), March 30, 1911, art. 185 para. 1 (Switz.) (as amended).

\(^3\) Swiss Code of Obligations (SCO), March 30, 1911, art. 185 para. 3 (Switz.) (as amended). In this case, benefit and risk pass to the buyer only upon fulfilment of the condition.

\(^4\) Swiss Code of Obligations (SCO), March 30, 1911, art. 185 para. 2 (Switz.) (as amended).

\(^5\) See also infra regarding purchase restrictions for persons abroad.
obligation and instead chooses to claim damages only.\footnote{1} If the buyer defaults with regard to payment, the seller shall notify the buyer that he either: (i) will not deliver and instead claim damages for non-performance; or (ii) rescind the contract, if this is more advantageous for him.\footnote{2}

§ 76:34 Types of contracts—Purchase contracts—Liability for damages

With regard to liability for damages in commercial transactions, the buyer may claim as damages the difference between the purchase price of the undelivered object of the purchase and the price he had to pay in good faith for replacement,\footnote{1} and the seller has the right to claim as damages the difference between the purchase price and the price at which he resold the object of the purchase in good faith.\footnote{2} If the goods have a market price or are quoted on an exchange, the buyer or seller may claim as damages the difference between the contract price and the price at the date fixed for performance.\footnote{3}

§ 76:35 Types of contracts—Purchase contracts—Warranty with regard to title transferred

The seller warrants that no third party, for reasons of a legal nature which already existed at the time of the conclusion of the contract, may deprive the buyer entirely, or partially, of the object of the purchase.\footnote{1} In case of an entire deprivation, the purchase contract is deemed to be cancelled, and the buyer is
entitled to damages.\(^2\) In case of a partial deprivation, the purchase contract is not deemed to be cancelled, but the buyer is entitled to damages.\(^3\)

§ 76:36 Types of contracts—Purchase contracts—Warranty against defects in the object of the purchase

The seller is liable to the buyer for: (i) express representations made; and (ii) that the object of the purchase has no physical or legal defects which eliminate or substantially reduce its value or its fitness for the intended use.\(^1\) The buyer has an obligation to examine the quality of the object of the purchase as soon as it customary according to usual business practice and shall notify the seller immediately of any defects, otherwise the object of purchase is deemed to be accepted by the buyer.\(^2\) If defects are discovered only at a later date, the buyer must notify the seller immediately upon their discovery.\(^3\) For clarity reasons, it is recommended to define examination and notification periods in the purchase contract. The buyer may either elect: (i) to claim rescission of the purchase contract.; or (ii) to claim for the reduction of the purchase price in order to be compensated for the reduction in value of the object of the purchase.\(^4\)

Special rules apply in case of long-distance purchases. If the goods are shipped to the buyer from a different place and the seller has no agent at the place of delivery, the buyer has a triple obligation: The buyer has to: (1) provide for temporary storage of the goods; (2) have the defects determined without delay; and (3) if the goods are in danger to perish quickly, he

\(^2\)Swiss Code of Obligations (SCO), March 30, 1911, art. 195 (Switz.) (as amended).
\(^3\)Swiss Code of Obligations (SCO), March 30, 1911, art. 196 (Switz.) (as amended).
\(^1\)Swiss Code of Obligations (SCO), March 30, 1911, art. 197 para. 1 (Switz.) (as amended).
\(^2\)Swiss Code of Obligations (SCO), March 30, 1911, art. 201 (Switz.) (as amended).
\(^3\)Swiss Code of Obligations (SCO), March 30, 1911, art. 201 para. 3 (Switz.) (as amended).
\(^4\)Swiss Code of Obligations (SCO), March 30, 1911, art. 205 para. 1 (Switz.) (as amended).
has the right and obligation to have the goods sold with the help of the competent authorities.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 204 (Switz.) (as amended).
}[Section 76:37]

§ 76:37 Types of contracts—Purchase contracts—Limitation of warranties

Statutory warranties may be limited, modified, or waived by the parties. However, such a waiver is not valid if the seller fraudulently concealed a defect of the goods.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 199 (Switz.) (as amended).}
[Section 76:37]

§ 76:38 Types of contracts—Purchase contracts—Statute of limitations

Actions based on a warranty for defects in the object of the purchase are barred at the end of one year after delivery to the buyer, even if the defect was only discovered by the buyer at a later date, unless the seller has assumed the liability for a longer period.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 210 para. 1 (Switz.) (as amended).}
[Section 76:38]

§ 76:39 Types of contracts—Work contracts

A work contract is a contract whereby the contractor obligates himself to produce a work (which may be tangible or intangible\footnote{BGE 112 II 41 et seq. (Swiss Federal Supreme Court 1986).}), and the principal to pay a compensation.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 363 (Switz.) (as amended).}
[Section 76:39]

Combinations of work and purchase contracts are possible\footnote{Cf. Swiss Code of Obligations (SCO), March 30, 1911, art. 365 (Switz.) (as amended).} and common.

If the parties did not fix the amount of the compensation (or only an approximate amount), it is determined pursuant to the

\footnotetext[5]{Swiss Code of Obligations (SCO), March 30, 1911, art. 204 (Switz.) (as amended).}
\footnotetext[1]{Swiss Code of Obligations (SCO), March 30, 1911, art. 199 (Switz.) (as amended).}
\footnotetext[2]{Swiss Code of Obligations (SCO), March 30, 1911, art. 363 (Switz.) (as amended).}
\footnotetext[3]{Cf. Swiss Code of Obligations (SCO), March 30, 1911, art. 365 (Switz.) (as amended).}
value of the labor and the expenditures of the contractor. If the amount of the compensation has been fixed (and unless under exceptional circumstances), the contractor may not claim a higher compensation, even if the completion of the work required more labor than anticipated.

If the contractor defaults with regard to the production and timely delivery of the work, the principal may rescind the contract. The contractor’s warranties for defects are largely similar to the warranties under purchase contract law (see supra). If the work has defects, the principal, like a buyer, may either elect to: (i) claim rescission of the work contract; or (ii) claim for the reduction of the compensation in order to be compensated for the reduction in value of the object of the work contract. In addition, the principal (unlike a buyer) may also require the improvement of the work without cost, and (in case of fault) claim damages.

Statutory warranties may be limited, modified, or waived by the parties. However, such a waiver is not valid if the contractor fraudulently concealed a defect of the work.

As under purchase contract law, actions based on a warranty for defects in the object of the work contract are barred at the end of one year after delivery to the principal, even if the defect was only discovered by the principal at a later date, unless the seller has assumed the liability for a longer period. Special rules apply for the construction of buildings.

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4Swiss Code of Obligations (SCO), March 30, 1911, art. 374 (Switz.) (as amended).
5Swiss Code of Obligations (SCO), March 30, 1911, art. 373 (Switz.) (as amended).
6Swiss Code of Obligations (SCO), March 30, 1911, art. 366 para. 1 (Switz.) (as amended).
7Swiss Code of Obligations (SCO), March 30, 1911, art. 368 (Switz.) (as amended).
8Swiss Code of Obligations (SCO), March 30, 1911, art. 371 para. 1 (Switz.) (as amended) (which refers to purchase contract law).
9Swiss Code of Obligations (SCO), March 30, 1911, art. 371 para. 2 (Switz.) (as amended).
§ 76:40 Types of contracts—Mandates

The statutory provisions on mandate contracts' include rules on the ordinary mandate and on particular types of mandates such as the mandate to broker a marriage or partnership, letters of credit and credit orders, brokerage contracts and agency contracts. Selected provisions of some of these types of contracts shall be highlighted as follows.

§ 76:41 Types of contracts—Mandates—Ordinary mandates

An ordinary mandate is defined as the obligation of the agent to carry out certain business transactions or render services according to the contractual agreement.\textsuperscript{1} The provisions regarding the ordinary mandate only apply unless the contract qualifies as another particular contract regulated in the Swiss Code of Obligations.\textsuperscript{2} The principal is obligated to remunerate the agent only if it is so agreed or customary.\textsuperscript{3} The agent: (i) has a duty of loyalty with regard to the principal and a duty of care with regard to the services;\textsuperscript{4} (ii) has an obligation to act according to the instructions of the principal;\textsuperscript{5} (iii) must perform his obligations personally, unless he is duly authorized or compelled by the circumstances to entrust a third person;\textsuperscript{6} and (iv) is obligated to submit a proper accounting of the performance

\textsuperscript{1} Art. 394 et seq. SCO.

\textsuperscript{2} Swiss Code of Obligations (SCO), March 30, 1911, art. 394 para. 1 (Switz.) (as amended).

\textsuperscript{3} Swiss Code of Obligations (SCO), March 30, 1911, art. 394 para. 2 (Switz.) (as amended).

\textsuperscript{4} Swiss Code of Obligations (SCO), March 30, 1911, art. 397 para. 1 (Switz.) (as amended).

\textsuperscript{5} Swiss Code of Obligations (SCO), March 30, 1911, art. 398 para. 3 (Switz.) (as amended).

\textsuperscript{6} Swiss Code of Obligations (SCO), March 30, 1911, art. 398 (Switz.) (as amended).
and to deliver to the principal everything he has received in the course of the mandate.\(^7\)

A mandate may be terminated anytime for any reason without any notice period.\(^8\) As the Federal Supreme Court has held repeatedly, this termination right may not be waived or modified by contractual agreement.\(^9\) Accordingly, ordinary mandates may not be concluded for a fixed term. Difficulties arise with regard to this mandatory termination right especially in mixed contracts which contain elements of an ordinary mandate, and consequently case law abounds on the issue of the validity of fixed-term agreements with mandate contract elements.

If termination is effected at an improper time, the terminating party is liable for damages\(^10\) (i.e., the costs of the contract, costs for dispositions which have become useless, and possibly loss of profits).

Statutory reasons for termination are death, lack of capacity to act, and bankruptcy.\(^11\)

§ 76:42 Types of contracts—Mandates—Brokerage contracts

A brokerage contract is defined as “an agreement whereby the broker is granted a mandate to provide against compensation an opportunity to conclude a contract or to act as an intermediary thereto.”\(^1\)

The broker is entitled to a brokerage fee as soon as a contract is concluded based on the broker’s providing of the opportunity

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\(^7\)Swiss Code of Obligations (SCO), March 30, 1911, art. 400 para. 1 (Switz.) (as amended).

\(^8\)Swiss Code of Obligations (SCO), March 30, 1911, art. 404 para. 1 (Switz.) (as amended).

\(^9\)See, e.g., BGE 115 II 464 et seq. (Swiss Federal Supreme Court 1989).

\(^10\)Swiss Code of Obligations (SCO), March 30, 1911, art. 404 para. 2 (Switz.) (as amended).

\(^11\)Swiss Code of Obligations (SCO), March 30, 1911, art. 405 (Switz.) (as amended).

[Section 76:42]

\(^1\)Swiss Code of Obligations (SCO), March 30, 1911, art. 412 para. 1 (Switz.) (as amended).
or acting as an intermediary.\textsuperscript{2} It is recommended to define in the contract in greater detail under which conditions the broker shall be entitled to a brokerage fee, on which amount(s) the brokerage fee shall be computed, and at which point of time payment of the brokerage fee shall be due.

Unless the broker has the exclusive right to act for a certain principal, he has no obligation to act. Nevertheless, the broker has a duty of loyalty with regard to the principal.

With regard to termination of the brokerage contract, the provisions of ordinary mandates apply (see supra), in particular the mandatory right of termination.

If a broker acts professionally and continually for a particular principal, he is considered an agent under agency contract law (see infra). Particular rules apply for stock-exchange brokers (securities dealers)\textsuperscript{3} and employment/placement services.\textsuperscript{4}

\section*{§ 76:43 Types of contracts—Mandates—Agency contracts}

In an agency contract, the agent “obligates himself to act on a continuous basis as an intermediary on behalf of one or several principals in business transactions or to conclude such transactions in their name and for their account without being in an employment relationship with such principals.”\textsuperscript{1}

The agent has a duty of loyalty with regard to his principal(s), a duty of care like an ordinary businessman,\textsuperscript{2} as well as a duty

\textsuperscript{2}Swiss Code of Obligations (SCO), March 30, 1911, art. 413 para. 1 (Switz.) (as amended).


[Section 76:43]

\textsuperscript{1}Swiss Code of Obligations (SCO), March 30, 1911, art. 418a (Switz.) (as amended).

\textsuperscript{2}Swiss Code of Obligations (SCO), March 30, 1911, art. 418c (Switz.) (as amended).
of confidentiality with regard to trade and business secrets.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 418d (Switz.) (as amended).} The agent is entitled to conclude contracts on behalf of the principal only if he has been authorized by the principal.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 418e (Switz.) (as amended).}

The agent has a statutory right to receive a brokerage or signing commission.\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 418g (Switz.) (as amended).} The Swiss Federal Supreme Court has held that this right is mandatory and may not be waived.\footnote{BGE 121 III 414 et seq. (Swiss Federal Supreme Court 1995).} It is recommended, however, to define in the contract in greater detail under which conditions the broker shall be entitled to a commission, on which amount(s) the commission shall be computed, and at which point of time payment of the commission shall be due.

In case of termination of the agency contract, the agent is further entitled to a compensation for clientele: “If the agent, through his activity, has substantially increased the principal’s clientele, and if, even after termination of the agency relationship, the principal or his successor in title benefits substantially from the business relations with the acquired clientele, the agent or his heirs have an inalienable right to an adequate compensation to the extent that such compensation is not inequitable."\footnote{Art. 418u para. 1 SCO.} Such compensation is limited to the net earnings for one year derived from the contractual relationship (computed on the average of the last five years), and is not due if the agency contract was terminated for a reason for which the agent was responsible.\footnote{Art. 418u para. 2/3 SCO.}

An agency contract may be concluded for a fixed term, and consequently ends at the end of such term. If an agency contract has been concluded for an indefinite term, it may be terminated by either party: (i) during the first year of the contract period with effect as of the end of a calendar month following the month during which notice given; and (ii) after the first year of the contract period with effect as of the end of

\footnote{Swiss Code of Obligations (SCO), March 30, 1911, art. 418d (Switz.) (as amended).}
a calendar quarter by giving two month’s notice. The parties may agree on a longer notice period or another termination date. However, notice periods may not be different for the principal and for the agent. For valid reasons, the contract may be terminated at any time without notice period. A valid reason exists if the terminating party can in good faith not be expected to continue the contractual relationship. It is highly recommended, for clarity reasons, to further define the term of “valid reason” in the contract.

§ 76:44 Types of contracts—Selected contracts not specifically regulated in the Swiss Code of Obligations

Only a certain number of contracts are specifically regulated by the Swiss Code of Obligations (see supra). Based on the principle of freedom of contracts (see supra), the parties are free to conclude, within the legal framework, a contract which cannot be subsumed under a contract category regulated by the Swiss Code of Obligations. The basic rules regarding four important types of contracts as developed by practice and case law shall be highlighted below.

§ 76:45 Types of contracts—Selected contracts not specifically regulated in the Swiss Code of Obligations—Distributorship agreements

Under a distributorship agreement, a supplier grants a distributor an exclusive purchase right with regard to a certain territory, certain goods or services, and/or a certain period of time. In return, the distributor stipulates, e.g., to buy a minimal stock of goods from the distributor, to buy exclusively from the distributor, or the like. It is, however, disputed by legal doctrine and the courts whether the distributor has a statutory duty of loyalty with regard to the supplier in analogy to agency contract law (see supra). The distributor may also be obliged to promote the sales of the contractual goods or ser-

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9Swiss Code of Obligations (SCO), March 30, 1911, art. 418q (Switz.) (as amended).
10Art. 418q para. 2 SCO.
11Art. 418q para. 3 SCO.
12Art. 418r para. 1 SCO.
13Art. 418r para. 2 SCO in connection with Swiss Code of Obligations (SCO), March 30, 1911, art. 337 para. 2 (Switz.) (as amended).
vices, or to provide certain customer services. Distributorship agreements usually also contain the licensing of the supplier's trademarks, know-how, etc. and pertinent confidentiality clauses. Certain clauses typically to be found in distributorship agreements such as customer or territorial restraints, resale pricing restraints, etc. may come under antitrust law scrutiny (see infra).

With regard to breach of contract and remedies, in principle the general rules apply (see supra). However, legal doctrine and the courts dispute whether the rescission right of Art. 107 et seq. SCO shall apply. With regard to warranties in connection with the purchase of the contractual goods, purchase contract law applies (see supra).

If a distributorship agreement lasts less than one year, it can be terminated by either party during the first year of the contract period effective as of the end of one calendar month following the month during which notice of termination was given. An agreement for a shorter notice period must be in writing. If the contractual relationship has lasted for a period of at least one year, then the contract may be terminated by giving six months’ notice. Moreover, either party may immediately terminate the contract, provided such termination is made for valid reasons. A valid reason exists if the terminating party can in good faith not be expected to continue the contractual relationship. It is highly recommended, for clarity reasons, to further define the term of “valid reason” in the contract.

In principle, the distributor is not entitled to a compensation for clientele in analogy to agency contract law (see supra). However, the Swiss Federal Supreme Court has held in an obiter dictum that, under exceptional circumstances, such compensation might nevertheless be equitable.1

§ 76:46 Types of contracts—Selected contracts not specifically regulated in the Swiss Code of Obligations—Licensing agreements

Under a licensing agreement, a licensor grants a licensee the right to use an intangible good such as intellectual property rights (patents, trademarks, design rights, and copyrights),

[Section 76:45]

1BGE 88 II 169 et seq. (Swiss Federal Supreme Court 1962).
know-how, trade secrets, etc. In return, the licensee agrees to pay a certain license fee.

A so-called simple licensing agreement is nonexclusive and allows the licensor to grant a similar license to an unlimited number of third parties, whereas under an exclusive licensing agreement the licensor is not allowed to grant a third party a license to use the same object. Under a sole license agreement, the licensor is allowed to jointly use the licensed object with the licensee. As it is disputed whether the licensor shall presumably have such a right of joint use, it is recommended to expressly address this issue in the contract. Similarly, the parties should include in the contract whether and to what extent the licensee shall have the right to grant sub-licenses.

Based on the characteristics of a licensing agreement, rules on rental contracts, purchase contracts, and on partnerships may be applied in analogy.

Moreover, intellectual property law governs certain particularities of licensing agreements. For example, there are compulsory licenses under patent law\(^1\) and under copyright law\(^2\). In order for a licensing agreement regarding intellectual property rights to be valid inter partes it is, in general, not necessary to register it in the patent, trademark\(^3\) or design rights register.\(^4\) However, if a licensing agreement is registered, an acquirer of the licensed intellectual property rights may not disregard the existing licensing agreement and is obliged to tolerate the rights granted to the licensee under the licensing agreement. With regard to infringements of the licensed intellectual property rights, the licensee of an exclusive licensing agreement regarding a design right is entitled to take legal action against an infringer independent of the rights owner, un-

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\(^{1}\)See, e.g., art. 36 (compulsory license for dependent inventions), art. 37 (compulsory license in case of non-use), and art. 40 (compulsory license based on public interest) of the Federal Act on Patents of June 25, 1954.

\(^{2}\)See, e.g., art. 23 (compulsory license for sound recordings) or art. 13 (statutory license regarding the rental of copyrighted material) of the Federal Act on Copyright and Neighbouring Rights of October 9, 1992.

\(^{3}\)However, licenses of collective trademarks have to be registered in the trademark register in order to be valid, see art. 27 of the Swiss Trademark Act of August 28, 1992.

\(^{4}\)Under Swiss law, there is no copyright register.
less the licensing agreement states otherwise. No similar statutory rule applies to the licensing of other intellectual property rights, and it is, therefore, recommended to regulate in the licensing agreement whether and to which extent the licensee shall be entitled to take legal action.

Certain clauses typically to be found in licensing agreements such as resale price restraints, territorial restraints, or restraints on production or delivery quantities may come under antitrust law scrutiny (see infra).

With regard to breach of contract and remedies, in principle the general rules apply (see supra), unless provisions on a particular type of contract (such as rental or purchase agreements) may be applicable by analogy.

Unlike distributorship or franchising agreements, there is no general rule with regard to termination and notice periods of licensing agreement if the parties have not agreed on a fixed term or on a particular notice period. The parties should, therefore, expressly agree on the term and/or termination and notice periods in the contract. Either party may however immediately terminate the contract, provided such termination is made for valid reasons. A valid reason exists if the terminating party can in good faith not be expected to continue the contractual relationship. It is highly recommended, for clarity reasons, to further define the term of “valid reason” in the contract.

§ 76:47 Types of contracts—Selected contracts not specifically regulated in the Swiss Code of Obligations—Franchising agreements

Under a franchising agreement, a franchisor grants a franchisee the (long-term) right to distribute certain goods and/or services by using the franchisor’s brands, trademarks, trade names and trade dress, know-how, etc. and by following the franchisor’s marketing system. In return, the franchisee will pay a franchise fee to the franchisor.

With regard to breach of contract and remedies, the general rules apply (see supra), unless provisions on a particular type of contract (such as licensing or mandate agreements) may be applicable by analogy.

If the parties have not agreed on a fixed term or on a partic-
ular notice period, a franchising agreement may be terminated with six month’s notice. Moreover, for certain reasons, a franchising agreement may also be terminated immediately, e.g., in case of death, lack of capacity to act, or bankruptcy of one of the parties or for valid reasons. A valid reason exists if the terminating party can in good faith not be expected to continue the contractual relationship. It is highly recommended, for clarity reasons, to further define the term of “valid reason” in the contract.

§ 76:48 Types of contracts—Selected contracts not specifically regulated in the Swiss Code of Obligations—Joint venture agreements

By concluding a joint venture agreement, two or more parties agree to jointly establish a company, to coordinate their voting rights in this company, and to enter into the satellite agreements required to achieve their common goal.

The majority of the Swiss legal doctrine qualifies a joint venture agreement as a simple partnership.¹ Most importantly, this means that each party (as a member of the simple partnership) can be held responsible personally for all liabilities of the partnership.

With regard to breach of contract and remedies, in principle the general rules apply, unless provisions on a particular type of contract (in particular the law of the simple partnership) may be applicable by analogy.

If the parties have not agreed on a fixed term or on a particular notice period, a joint venture agreement may, in principle, be terminated with six month’s notice.² Moreover, for certain reasons, a joint venture agreement may also be terminated immediately for valid reasons. A valid reason exists if the terminating party can in good faith not be expected to continue the contractual relationship, e.g., if there is a change of control regarding one party, or if the goal of the joint venture is put at risk. It is highly recommended, for clarity reasons, to further define the term of “valid reason” in the contract.

If the joint venture company assumes the functions of an independent economic entity, i.e., if it: (i) may act in the market

[Section 76:48]

¹Regulated in art. 530 et seq. SCO.
²In analogy to art. 546 para. 1 SCO.
either as a supplier or buyer of goods and/or services; (ii) may pursue its own business policy; and (iii) if the articles of incorporation and/or its resources allow for long-term business activity, it is considered a merger under antitrust law and comes, therefore, under merger control scrutiny.

§ 76:49 Other statutory regulations

Apart from the Swiss Code of Obligations, numerous other laws apply to particular types of contracts, a selection of which shall be outlined in the following sections.

§ 76:50 Other statutory regulations—Federal Act on Mergers, Demergers, Conversions, and Asset Transfers of October 3, 2003 (“Merger Act”)

The Merger Act governs mergers, demergers, conversions, and asset transfers by and between companies. Agreements regarding such transactions have to meet the requirements set forth in the Merger Act.

Of particular interest in connection with commercial contracts is the newly created instrument of an asset transfer. Under these new rules, assets, and liabilities of a legal entity may be transferred in their entirety to other legal entities on the basis of an inventory. All the assets and liabilities listed in the inventory are transferred on a single occasion to the acquiring legal entity. The formal legal requirements for the transfer of individual asset components do not have to be satisfied.

Asset transfers pursuant to the provisions of the Merger Act may be made by all companies entered in the commercial register and by sole proprietorships. For the latter, asset transfer is also the only possible form of restructuring.

The asset transfer procedure is straightforward: First, the top management or administrative bodies of the company must draw up a written transfer contract. This contract will contain an inventory designating the assets and liabilities to be transferred. There must in all cases be a surplus of assets. A decision by the shareholders is not necessary. The latter will

\[\text{§ 76:48}\]

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\[\text{§ 76:49}\]

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\[\text{Section 76:50}\]

\[\text{Art. 69 et seq. Merger Act.}\]
simply be informed in the annual statement of accounts or an-
nual report. The transfer of assets takes legal e/c141ect when it is
entered in the commercial register.

§ 76:51 Other statutory regulations—Federal Act on
Cartels and other Restraints of Competition of
October 6, 1995 (“Cartel Act”)

Swiss antitrust law is based on three fundamental pillars—
unlawful agreements, unlawful practices of enterprises having
a dominant position, and merger control.

The Cartel Act\footnote{An unofficial translation of the Cartel Act is available at the website of
the Competition Commission (http://www.weko.admin.ch/imperia/md/images/
weko/40.pdf).} contains a presumption whereby agreements
among actual or potential competitors lead to the effective
elimination of competition if they: (i) directly or indirectly fix
prices; (ii) restrict the quantities of goods or services to be
produced, bought, or supplied; or (iii) allocate markets
geographically or according to trading partners. Such horizon-
tal agreements encompass the “classic” cartels, in which, e.g.,
various manufacturers of a product (competitors) decide on the
pricing of their goods in a certain market.

An amendment of the Cartel Act in 2003 has introduced
vertical agreements as a new category of agreements which
come under antitrust scrutiny.\footnote{Art. 5 para. 1 Cartel Act.} A vertical agreement is an
agreement entered into between participants along the vertical
chain from the extraction of raw materials and production to
the ultimate consumer. Such agreements are presumed unlaw-
ful, e.g., if the manufacturer imposes minimum or fixed resale
prices or, in a distributorship agreement, territorial markets
are allocated in an absolute way so that sales by outsiders are
barred.\footnote{Art. 5 para. 4 Cartel Act.} The latter example also makes clear that parallel
imports of goods from outside of Switzerland are subject to the
scrutiny of the Act on Cartels,\footnote{Art. 3 para. 2 Cartel Act.} which offers instruments to op-
pose such market foreclosures. In its Notice of 2 July 2007 (ef-
fective as of 1 January 2008), the Swiss Competition Commis-
sion published guidelines on how it will treat vertical
agreements under competition law. In particular, the Notice

\footnotetext[1]{An unofficial translation of the Cartel Act is available at the website of
the Competition Commission (http://www.weko.admin.ch/imperia/md/images/
weko/40.pdf).}
\footnotetext[2]{Art. 5 para. 1 Cartel Act.}
\footnotetext[3]{Art. 5 para. 4 Cartel Act.}
\footnotetext[4]{Art. 3 para. 2 Cartel Act.}
contains definitions and provisions on presumed foreclosure of competition, resale price recommendations, significant anticompetitive effects of certain agreements and reasons for justification.

Such agreements can, however, be justified for reasons of efficiency, e.g., if they are necessary to lower production and distribution costs, to improve products or production procedures, to foster research, or to use resources more efficiently. The efficiency defense is only successful, though, if it can be shown that the agreement does not foreclose competition.

A special justification has been introduced for small- and medium-sized businesses. On December 19, 2005, the Competition Commission set up guidelines regarding the justification of agreements that aim at improving the competitive position of such businesses and have only limited negative effect on the market.

§ 76:52 Other statutory regulations—Federal Act Against Unfair Competition of December 19, 1986 (“Unfair Competition Act”)

According to the Unfair Competition Act, any behavior which is deceptive or otherwise against good faith and which affects the relationship among competitors or suppliers and customers is deemed unlawful.\(^1\) It is unlawful, inter alia, to use general terms and conditions in certain ways (see supra), or to induce a customer to a breach of contract in order to enter into an agreement with him.\(^2\)

§ 76:53 Other statutory regulations—Federal Act on Consumer Credits of March 23, 2001 (“Consumer Credit Act”)

An agreement by which a professional lender grants or stipulates to grant a credit to a consumer in the form of a deferred payment, a loan or a similar financing aid is consid-

[Section 76:52]

1\(^{st}\)Art. 2 Unfair Competition Act.
2\(^{nd}\)Art. 4 lit. a Unfair Competition Act.
ered to be a consumer credit agreement and is governed by the Federal Act on Consumer Credits.¹

Leasing agreements on chattels that the lessee uses for private purposes are considered consumer credit agreements if the agreements provides for an increase of the payments in case of an early termination of the agreement. Moreover, agreements regarding credit and customer cards and overdraft agreements are deemed to be consumer credit agreements if they contain a credit option.²

However, the Consumer Credit Act does not apply to certain credit agreements such as, inter alia, credits secured by a mortgage or other securities customary in banking, interest, and cost free credits, and credits in an amount of less than CHF 500 or more than CHF 80,000.³

Granting a credit is unlawful if it leads to the overindebtedness of the debtor, and therefore the lender has to formally check the debtor’s legal capacity to borrow.⁴

The Consumer Credit Act regulates in detail the form and content of the various credit agreements which fall within its scope as well as the rights and obligations of the parties.⁵

§ 76:54 Other statutory regulations—Federal Act on Package Holidays of June 18, 1993

Agreements on package holidays are specially regulated by the Federal Act on Package Holidays which contains mandatory provisions on: (i) the information of consumers before the conclusion of the contract and before the holiday; (ii) the content and amendment of such agreements; (iii) the termination; and (iv) nonperformance and default.

Any combination of at least two of the following services is considered a package holiday if it is offered at a package price and lasts at least 24 hours or includes: (a) an overnight stay; (b) transportation; (c) accommodation; (d) other tourist services which are not ancillary services with regard to transportation

[Section 76:53]

¹Art. 1 para. 1 Consumer Credit Act.
²Art. 1 para. 2 Consumer Credit Act.
³Art. 7 Consumer Credit Act.
⁴Art. 22 et seq. Consumer Credit Act.
⁵Art. 9 et seq. Consumer Credit Act.
⁶Art. 17 et seq. Consumer Credit Act.

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or accommodation and which constitute a substantial part of the overall performance.\(^1\)

§ 76:55 Other statutory regulations—Federal Act on the Acquisition of Real Estate by Persons Abroad of December 16, 1983

The Federal Law on the Acquisition of Real Estate by Persons Abroad (originally dubbed “Lex Friedrich,” now “Lex Koller”) serves as a mechanism to monitor and restrict the acquisition of immovable property in Switzerland by requiring persons abroad to obtain a permit from the appropriate Cantonal and Federal authorities before purchasing such property. Since the Agreement on the Free Movement of Persons concluded between Switzerland and the European Union entered into force on June 1, 2002, the term “persons abroad,” which can be individuals as well as legal entities, is defined as either foreigners domiciled abroad or foreigners that are in fact domiciled in Switzerland but are neither nationals of EU/EFTA member states nor holders of a valid settlement permit (“Niederlassungsbewilligung” or so-called C permit).

This means that nationals of EU/EFTA member states domiciled in Switzerland (i.e., in particular EU/EFTA nationals with a residence permit EU-EFTA (“Aufenthaltsbewilligung” or so called B permit) or a settlement permit EU-EFTA or, possibly, with a short residence permit EU-EFTA) as well as nationals of other foreign countries who are holders of a valid settlement permit (C permit) and are actually domiciled in Switzerland, are not subject to the “Lex Koller.” With respect to the acquisition of real estate, their position is equal to that of a Swiss citizen.

Legal entities are considered “persons abroad” if they are either domiciled abroad or are controlled by persons abroad. Control of a legal entity by persons abroad is deemed where such persons abroad: (a) own more than one-third of the company’s equity capital; (b) dispose of more than one-third of the voting rights, whether directly or indirectly, in the shareholders’ meeting of the company; or (c) provide the company with repayable funds representing more than one half of the difference between the company’s assets and its debts vis-à-vis persons that are not subject to the “Lex Koller.”

\(^1\)Art. 1 Federal Act on Package Holidays.

[Section 76:54]
The term “acquisition of immovable property” encompasses not only the direct purchase of real estate but also the acquisition of property rights (rights in rem) on the real estate as well as the procurement of a right of ownership or usufruct of a share of a legal entity with more than one-third of its total assets consisting of Swiss real estate, provided that persons abroad thereby obtain or reinforce a dominant position in such entity.

There are exceptions of the permit requirement for the acquisition of real estate for permanent business establishment, main residences, certain secondary residences, and holiday homes as well as hotel condominium units.

A permit, if required, is issued if there is no compelling reason for refusal. Such reasons for refusal include, inter alia, the acquirer's attempt to evade the law, the protection of national interests, and the prevention of mere capital investments.

It should be noted that on November 2, 2005, the Federal Council initiated the legal process to abolish the “Lex Koller” and to introduce instead, as accompanying measures, certain new land use regulations.


The Cultural Goods Transfer Act implements the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. The Act regulates the importation into Switzerland, passage in transit and exportation of cultural goods from Switzerland. Cultural goods are defined as a good which is, based on religious or worldly reasons, considered significant for archaeology, prehistory, history, literature, art, or sciences and which belongs to one of the categories according to Article 1 of the UNESCO Convention. Among such cultural goods are, inter alia, antiques and furniture that are older than 100 years as well as old musical instruments.

The Confederation maintains a federal inventory of cultural goods that are its property. Registered goods may not be acquired by adverse possession or in good faith, and there is no

[Section 76:56]

1Art. 2 para. 1 Cultural Goods Transfer Act.
statute of limitations with regard to an action of restitution.\textsuperscript{2} Cantons may also establish an inventory of cultural goods which may contain registrations of goods in private property.

The exportation of Swiss cultural goods registered in the federal inventory requires a permit\textsuperscript{3}. Federal institutions may not acquire cultural goods which: (a) have been stolen, got lost without the content of the owner, or have been excavated unlawfully; or (b) which are part of the cultural heritage of a state and which have been exported unlawfully from this state.\textsuperscript{4} The same applies to the transfer of cultural goods by art dealers and auction houses. Moreover, such persons have a number of duties of care such as the duty of identification of the seller and information of the buyer.\textsuperscript{5}

\section*{§ 76:57 Taxation}

General Remarks: The Swiss tax system is very complex. Taxes are levied at the federal, cantonal, and municipal levels. Federal tax law is standard throughout Switzerland. However, each of the 26 cantons has separate laws for cantonal taxes. Municipal taxes are levied as a multiple of cantonal taxes. The tax burden varies substantially from one canton to another and, within the same canton, from one municipality to another.

Taxation of Legal Entities: Legal entities that have their seat in Switzerland are subject to an unlimited tax obligation in Switzerland. Inter alia, legal entities are subject to a federal profit tax (currently 8.5%; or 7.8% taking into account the deductibility of the profit tax itself), and a 35% federal withholding tax, which is levied on the distributions by a legal entity to its shareholders or quotaholders. For non-Swiss residents, it is a final tax burden, unless the recipient is a resident of a country with which a tax treaty has been concluded and he or she is entitled to the benefits of such treaty. Moreover, all cantons levy taxes on profits, capital and reserves. Cantonal and municipal profit tax rates are graduated and vary greatly from canton to canton and the range is approximately 10% to 35%. Special tax privileges apply for service, holding, and domiciliary companies.

\begin{itemize}
\item \textsuperscript{2}Art. 3 Cultural Goods Transfer Act.
\item \textsuperscript{3}Art. 5 Cultural Goods Transfer Act.
\item \textsuperscript{4}Art. 15 Cultural Goods Transfer Act.
\item \textsuperscript{5}Art. 16 Cultural Goods Transfer Act.
\end{itemize}
Taxation of Individuals: An individual who has moved his centre of life to Switzerland or has a habitual abode of 30 days with employment activity or 90 days without employment activity in Switzerland is considered to be resident in Switzerland and therefore subject to unlimited taxation with regard to income and wealth. Such individual is obliged to declare his worldwide income and wealth in Switzerland. Income from real estate or permanent establishments situated outside Switzerland is not taxed in Switzerland but taken into consideration for the determination of the applicable tax rate. Non-resident individuals who derive income from employment, or who conduct business through a permanent establishment or own real estate in Switzerland are subject to limited taxation in Switzerland. The taxation is limited to the income derived from such employment, real estate, or permanent establishment. In Switzerland, no capital gains tax is due on privately held movable assets. However, the cantons levy capital gains taxes on the alienation of real estate located in Switzerland (so called real estate capital gains tax). The amount of capital gains tax usually depends on the size of the capital gain and the time the alienator was the owner of the real estate.

Value Added Tax: Value Added Tax (VAT) is due on the turnovers on: (i) delivery of goods or services for value within Switzerland; (ii) own consumption of goods and/or services within Switzerland; and (iii) delivery of services for value rendered by foreign enterprises, if they are generated by persons or entities who are subject to VAT. Subject to VAT is any person who generates an annual turnover with regard to a professional or commercial activity of more than CHF 75,000 or purchases services from foreign enterprises in the amount of more than CHF 10,000 per year. The current rate is, in general, 7.6%. Certain lower rates apply for particular goods and services such as food and groceries, pharmaceuticals, printed matter, etc., and certain goods or services are VAT exempt.