

## Introduction to Swiss Law in General

### I Switzerland as a Federal State

16 Since 1848, Switzerland has been a Federal State. Switzerland is a Confederation of **twenty-six Cantons**, namely: Aargau (AG), Appenzell Ausserrhoden (AR), Appenzell Innerrhoden (AI), Basel-Landschaft (BL), Basel-Stadt (BS), Bern (BE), Fribourg (FR), Genève (GE), Glarus (GL), Graubünden (GR), Jura (JU), Luzern (LU), Neuchâtel (NE), Nidwalden (NW), Obwalden (OW), St Gallen (SG), Schaffhausen (SH), Schwyz (SZ), Solothurn (SO), Thurgau (TG), Ticino (TI), Uri (UR), Valais (VS), Vaud (VD), Zug (ZG), and Zurich (ZH).<sup>1</sup>

17 There are **three different levels of government** in Switzerland's Federal structure, namely: (1) the Confederation; (2) the Cantons; and (3) the Communes. At the Federal level, the Federal Constitution defines the Confederation's tasks and responsibilities. Switzerland's Parliament or legislative branch (the Federal Assembly) is composed of the National Council and the Council of States. The government or executive branch (the Federal Council) is made up of seven federal councillors and the judicial branch (Federal Tribunal) is responsible for handing down national case law. At the cantonal level, each Canton has its own parliament, government, courts and constitution.<sup>2</sup>

### II Judicial System

#### A Federal Courts

18 There are **four Federal courts**. The first three are the Federal Criminal Court, the Federal Administrative Court and the Federal Tribunal Patent

<sup>1</sup> See Federal Chancellery, *The Swiss Confederation – a brief guide 2022*, available at <https://www.bk.admin.ch/bk/en/home/dokumentation/the-swiss-confederation-a-brief-guide.html> (accessed 15 January 2023), pp. 8, 10, 12.

<sup>2</sup> Federal Chancellery, *The Swiss Confederation – a brief guide 2022*, p. 12; Marc Thommen, *Introduction to Swiss Law* (Berlin/Bern: Carl Grossmann Verlag, 2018), p. 8.

Court, which are all Federal courts of first instance. The fourth Federal court is the Federal Supreme Court, which is the highest court and which hears appeals against the judgments of the other courts (including the other three Federal courts) and issues the final judgments in most cases.<sup>3</sup>

19 The **Federal Supreme Court** is composed of seven divisions including two which deal with Civil law. Decisions are written in German, French or Italian. In principle, three judges rule on a case and five judges rule on a case when the latter raises legal questions of fundamental importance or if one of the judges so requests.<sup>4</sup>

### *B Cantonal Courts*

20 Each Canton has its own **courts with jurisdiction over both Federal and Cantonal law**.<sup>5</sup>

21 In the Cantons, the judiciary is usually organised in **two levels**. The first level is composed of civil, criminal and administrative courts of first instance, generally with a single judge presiding over cases, and the second level is composed of civil, criminal and administrative courts of appeals, usually sitting as a panel of three judges.<sup>6</sup>

22 The **official websites** of some Cantons provide access to most of the decisions of the Cantonal courts.<sup>7</sup>

### *C Civil Law Disputes*

23 Civil law disputes, that is those subject to the Code of Obligations and Civil Code, are heard by a **first Cantonal instance**. Such disputes can be

<sup>3</sup> See Federal Chancellery, *The Swiss Confederation – a brief guide 2022*, pp. 21, 74.

<sup>4</sup> Federal Chancellery, *The Swiss Confederation – a brief guide 2022*, pp. 76–77; Thommen, *Introduction to Swiss Law*, p. 14.

<sup>5</sup> Joseph Voyame, 'Chapter 1: Introduction', in Dessemontet and Ansay (eds), *Introduction to Swiss Law*, 3rd edn (The Hague/Boston: Kluwer Law International, 2004), pp. 4–5.

<sup>6</sup> Martin Molina and Sandro Stich, *The Swiss Legal System and Research* (2019), available at [www.nyulawglobal.org/globalex/Switzerland1.html](http://www.nyulawglobal.org/globalex/Switzerland1.html) (accessed 15 January 2023), Section 1.3.

<sup>7</sup> For the case law of the Canton of Geneva, see <https://justice.ge.ch/fr/contenu/jurisprudence> (accessed 15 January 2023); for the case law of the Canton of Bern, see <https://www.justice.be.ch/fr/start/dienstleistungen/rechtsprechung> (accessed 15 January 2023); for the case law of the Canton of Basel Stadt, see [www.gerichte.bs.ch/gerichtsentscheide.html](http://www.gerichte.bs.ch/gerichtsentscheide.html) (accessed 15 January 2023); for the case law of the Canton of Zurich, see [www.gerichte-zh.ch/entscheide/entscheide-anzeigen.html](http://www.gerichte-zh.ch/entscheide/entscheide-anzeigen.html) (accessed 15 January 2023).

appealed to a **second Cantonal instance** and from this instance, they can thereafter be appealed to the **Federal Supreme Court**.<sup>8</sup>

### III Sources of Law

#### A Statutory Law

24 The Civil Code, the Code of Obligations and other Federal statutes are published chronologically in the **Official Compilation** (*Amtliche Sammlung* (AS), *Recueil officiel* (RO), *Raccolta ufficiale* (RU)).<sup>9</sup>

25 The **Classified Compilation** (*Systematische Rechtssammlung* (SR), *Recueil systématique* (RS), *Raccolta sistematica* (SR)) lists all Federal acts and ordinances in categories depending on their content. Category 2 contains Federal laws and ordinances relating to private law, civil procedure and enforcement. The classification number of the Civil Code is SR 210 and the classification number of the Code of Obligations is SR 220.<sup>10</sup> The Official Compilation and the Classified Compilation are also accessible online at [www.fedlex.admin.ch](http://www.fedlex.admin.ch) (accessed 15 January 2023).

26 Similar collections exist in the **Cantons**. The Cantons also provide access to online cantonal legislation.<sup>11</sup>

27 The official versions of these statutes are in German, French and Italian and are considered equally authoritative.<sup>12</sup> With respect to the Civil Code and the Code of Obligations, there is also an **unofficial translation in English**.<sup>13</sup> The translations used in the present book are based on these unofficial translations of the Civil Code and the Code of Obligations. However, in some cases, these translations have been modified slightly where the authors are of the view that there would be a more appropriate translation.

#### B Case Law

28 Judicial decisions, including those of the Federal Supreme Court are **only binding on the court whose decision has been attacked**.

<sup>8</sup> See Federal Chancellery, *The Swiss Confederation – a brief guide 2022*, p. 75.

<sup>9</sup> Voyame, 'Introduction', p. 6.

<sup>10</sup> Thommen, *Introduction to Swiss Law*, p. 31.

<sup>11</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 3.

<sup>12</sup> Voyame, 'Introduction', p. 11.

<sup>13</sup> See [fedlex.admin.ch/eli/cc/27/317\\_321\\_377/en](http://fedlex.admin.ch/eli/cc/27/317_321_377/en) for the English translation of the Code of Obligations and [fedlex.admin.ch/eli/cc/24/233\\_245\\_233/en](http://fedlex.admin.ch/eli/cc/24/233_245_233/en) for the English translation of the Civil Code (both accessed 15 January 2023).

Nonetheless, prior judicial decisions play a very significant role despite the fact that they are not binding on other courts.<sup>14</sup>

29 Since 1874, **leading decisions of the Federal Supreme Court** (DFSC; BGE or *Bundesgerichtsentscheid*, ATF or *Arrêt du Tribunal fédéral*, and DTF or *Decisione del Tribunale federale*) have been published in the Official Compilation (*Amtliche Sammlung*, *Recueil officiel*, *Raccolta ufficiale*) in German, French or Italian depending on the language used in the proceedings before the Federal Supreme Court. As a result of their publication in the Official Compilation, these decisions are regarded as *de facto* binding precedents.<sup>15</sup>

30 Each leading decision has a **specific citation**, for example, BGE, ATF, DTF or DFSC 130 III 66. The first three digits indicate the yearly volume (since 1874). The second group of Roman numerals corresponds to the branch of law concerned. III corresponds to civil and bankruptcy law. The last group of digits designates the relevant page within the volume. References are often made to a specific reason in the decision (reas.; E. or *Erwägung*, c. or *considérant*, c. or *considerando*). It is the judges involved in the case who decide whether the decision should be considered as a leading one.<sup>16</sup>

31 For each leading decision, the Federal Supreme Court publishes a **summary** (*Regeste*, *regeste*, *regesto*) of the main findings of the decision in all three official languages. It is important to note that only the most relevant parts of the original decision are published in the Official Compilation. In order to review the whole decision on the Internet (since 2000; see para. 32) or at the Federal Supreme Court building in Lausanne for a period of four weeks, one needs to know the case number, which can be found on the header of the published decision.<sup>17</sup>

32 Prior to 2000, only the leading decisions were published. Since 2007, however, all final decisions of the Federal Supreme Court, a large proportion of the decisions of the Federal Supreme Court from 2000–2007, as well as the leading decisions of the Federal Supreme Court since 1954 are published online at [www.bger.ch](http://www.bger.ch) (accessed 15 January 2023).<sup>18</sup>

33 Each case is assigned a **case number**, for example, 4A\_348/2015. The first number corresponds to the chamber, for example, 4 is the 1st Civil

<sup>14</sup> Voyame, 'Introduction', p. 7.

<sup>15</sup> Thommen, *Introduction to Swiss Law*, p. 33; Voyame, 'Introduction', p. 7.

<sup>16</sup> Thommen, *Introduction to Swiss Law*, p. 34.

<sup>17</sup> Thommen, *Introduction to Swiss Law*, p. 35.

<sup>18</sup> Thommen, *Introduction to Swiss Law*, p. 35.

Chamber and 5 is the 2nd Civil Chamber. The first letter corresponds to the type of procedure; for example, A is the appeal in civil matters. The second number corresponds to the chronological number of the case in that particular year.<sup>19</sup>

34 As stated above (see para. 29), only approximately 4 per cent of decisions of the Federal Supreme Court that are published in the Official Compilation are *de facto* **binding precedents**. The remaining 96 per cent, which are published exclusively online, are not binding precedents but are also referred to by courts of first and second instance, legal practitioners and scholars when considering a particular legal problem.<sup>20</sup>

35 In Switzerland, the Official Compilation is technically the only **official reporter**. Most other case law reporters, such as *Praxis des Bundesgerichts*, *Journal des Tribunaux* and *La Semaine Judiciaire* are unofficial but are widely used by lawyers and judges.<sup>21</sup>

36 The most significant online database for Swiss law is **Swisslex** ([swisslex.ch](https://www.swisslex.ch) accessed 15 January 2023). This database provides access to the decisions of the Federal courts as well as the decisions of most Cantonal courts of last instance, almost 500 commentaries on the law, and about 5,000 monographs, dissertations, anthologies and conference proceedings as well as commemorative publications. It also contains the archives and current issues of over seventy-five specialist journals as well as legally relevant articles from the daily press.<sup>22</sup>

### C Legal Doctrine

37 A judge will often base his or her decision on legal doctrine. In Switzerland, the legal doctrine which is considered to be the most important is the **commentaries**, annotated versions of the Codes and treatises.<sup>23</sup>

38 There are three commentaries in German: (1) the **Bernese Commentary** (in German *Berner Kommentar*, abbreviated to BK or BeKo); (2) the **Zurich Commentary** (in German *Zürcher Kommentar*, abbreviated as ZK or ZuKo); and (3) the **Basel Commentary** (in German *Basler Kommentar*, abbreviated to BSK, sometimes BaKo). The **Commentaire romand** is the latest of the Swiss commentaries and is the only one written in French. The commentaries are kept up to date through

<sup>19</sup> Thommen, *Introduction to Swiss Law*, p. 37.

<sup>20</sup> Thommen, *Introduction to Swiss Law*, p. 37.

<sup>21</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 4.

<sup>22</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 4.

<sup>23</sup> Voyame, 'Introduction', p. 8.

regular new editions and the writing of additional volumes where necessary. In addition, there is the Hand Commentary on Swiss Private Law (*Handkommentar zum Schweizer Privatrecht* in German) which is a commentary on both the Civil Code and the Code of Obligations and which is becoming increasingly important in practice.

39 The most important annotated version of the Civil Code and Code of Obligations in French is Andrea Braconi, Blaise Carron and Sabrina Gauron-Carlin, *Code civil suisse et Code des obligations annotés* (CC & CO), 11th edn (Basel: Helbing Lichtenhahn, 2020).

40 The **leading treatises and manuals** in the Swiss law of obligations and contracts are:

- (i) Jörg Schmid, Hubert Stöckli and Frédéric Krauskopf, *Schweizerisches Obligationenrecht – Besonderer Teil*, 2nd edn (Zurich/Basel/Geneva: Schulthess, 2016);
- (ii) Heinrich Honsell, *Schweizerisches Obligationenrecht – Besonderer Teil*, 10th edn (Bern: Stämpfli Verlag, 2017); and
- (iii) Alfred Koller, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 4th edn (Bern: Stämpfli Verlag, 2017);
- (iv) Claire Huguenin, *Obligationenrecht – Allgemeiner und Besonderer Teil*, 3rd edn (Zurich/Basel/Geneva: Schulthess Verlag, 2019);
- (v) Pierre Tercier and Pascal Pichonnaz, *Le droit des obligations*, 6th edn (Geneva/Zurich/Basel: Schulthess, 2019);
- (vi) Ingeborg Schwenzer and Christiana Fountoulakis, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 8th edn (Bern: Stämpfli, 2020);
- (vii) Christoph Müller, *Contrats de droit suisse – Présentation systématique des contrats les plus importants en pratique* (Bern: Stämpfli, 2021);
- (viii) Blaise Carron and Pierre Wessner, *Droit des obligations – Partie générale, Volume I: les concepts généraux et la représentation – l'enrichissement illégitime – la relation précontractuelle* (Bern: Stämpfli Editions 2022).

41 Many **law journals** in Switzerland can be found on Swisslex. There are, however, a limited number of Swiss law journals available on the Internet for free.<sup>24</sup> Some examples of Swiss law journals include: *Aktuelle juristische Praxis/Pratique Juridique Actuelle* (AJP-PJA); *Journal des Tribunaux* (JT) (Part I = Federal Law; Part II = Seizure and Bankruptcy;

<sup>24</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 6.1.

Part III = Cantonal Law; Part IV = Criminal Law); *Die Praxis des Bundesgerichts* (PR); *La Semaine Judiciaire* (SH) (since 1999: Part I = case law, Part II = opinions of legal scholars); *Schweizerische Juristen-Zeitung/Revue suisse de Jurisprudence* (SJZ-RSJ) and *Zeitschrift für schweizerisches Recht/Revue de droit suisse* (ZSR-RDS).<sup>25</sup> Some examples of Cantonal law journals include: *Zeitschrift des Bernischen Juristenvereins* (ZBJV); *Basler Juristische Mitteilungen* (BJM); *La Semaine Judiciaire* (SJ); *Journal des Tribunaux* (JT) (Part III = Cantonal law); and *Blätter für Zürcherische Rechtsprechung* (ZR).<sup>26</sup>

### Select Bibliography

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<sup>25</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 6.1.

<sup>26</sup> Molina and Stich, *The Swiss Legal System and Research*, Section 6.2.