

Celebrating 100 Years Swiss Code of Obligations – a brief history of a remarkable codi- fication

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SIMPLICITAS AMICA LEGUM The Drafting of the Swiss Code of Obligations¹

When it comes to the origins of the Swiss Code of Obligations (“SCO”), the following story is often told about the mindset of Professor Eugen HUBER, the drafter of the Code. When embarking on the drafting of the new Code, HUBER defined two overriding principles: First, each provision should be made up of a maximum of three paragraphs. Second, each of these paragraphs should not be longer than one sentence. After one hundred years of experience with the Swiss Code of Obligations, the drafter’s intention is still respected; it is a federal act rooted in legal practice, flexible and accessible for its citizens.

1. The Evolution of the Code

In 1883, the first Swiss Code of Obligations, drafted by Professors Walther MUNZINGER (1830-1873) and Heinrich FICK (1822-1895), entered into force. This first draft federal codification of its kind laid the foundation for the subsequently revised and expanded Swiss Code of Obligations of 1912. The first version of the SCO inspired legislative work in countries such as Germany, Italy and the Turkish Republic. In 1884, Prof. Eugen HUBER (1849-1923) was entrusted with the drafting of the Swiss Civil Code, which was to cover the law of persons, family law, the law of succession and property law. In addition, the new and comprehensive Swiss Civil Code was to contain a modernized Swiss Code of Obligations as its fifth part. This version of the Code of Obligations, also drafted primarily by Prof. HUBER, was adopted unanimously by the Swiss parlia-

ment on 30 March 1911 and entered into force on 1 January 1912. The Code has been amended several times, but the vast majority of its provisions have remained unchanged.²

2. The Structure of the Code

While the Swiss Code of Obligations formally constitutes the fifth part of the Swiss Civil Code, it is in fact a separate code with its own numbering. The SCO is divided into three principal parts: “General Provisions”, “Types of Contractual Relationships”, “Commercial Enterprises and the Cooperative”.

- The “General Provisions” found in the first division of the SCO apply to all the subsequent sections provided no specific rules can be found there. However, it is important to note that, as a remnant of the attempt to unify the entirety of Swiss private law into one single codification, the first part of the Swiss Civil Code provides in its Article 7: “The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil matters.” The SCO thus applies to other civil matters covered by the Swiss Civil Code. However, the Swiss Civil Code is also relevant for the SCO: the Civil Code’s rules on the beginning of the legal personality as well as its provisions on the capacity to act and consent are all applicable to the Swiss Code of Obligations.
- The second division covers “Types of Contractual Relationships” and deals with numerous kinds of contracts, such as the sales contract (SCO Art. 184 et seqq.), the lease (SCO Art. 253 et seqq.), the employment contract (SCO Art. 319 et seqq.), the loan (SCO Art. 305 et seqq.), contracts for work and services (SCO Art. 363 et seqq.) and the agency contract (SCO Art. 394 et seqq.). Each of the specific contracts as well as the general provisions are structured in a uniform way in that they contain provisions on the creation, performance, non-performance and extinction of obligations.
- The third division encompasses “Commercial Enterprises and the Cooperative”. This division regulates the main legal entities recognized in Swiss law. This includes the provisions on the simple partnership (SCO Art. 530 et seqq.), the commercial partnership (SCO Art. 552 et seqq.), the limited partnership (SCO Art. 594 et seqq.), the stock corporation (SCO Art. 620 et seqq.), the partnership limited by shares (SCO Art. 764 et seqq.) and the limited liability company (SCO Art. 772 et seqq.).

3. Some Characteristics of the Code

In order to fully comprehend the characteristics of the Code, the following things have to be kept in mind: The Swiss Confederation is a federal state consisting of 26 cantons (i.e. sub-federal units). Switzerland comprises four linguistic and cultural regions: the German part, the French part, the Italian and the Romansh part. As a consequence, the Federal Constitution recognizes four national languages: German, French, Italian, and Romansh.

Switzerland is placed in the heart of Europe and exposed to many influences from neighboring countries. Therefore, it does not come as a surprise that the Swiss Code of Obligations absorbed those influences that, at the time, came from the German and the French tradition. It is interesting to note that the Swiss Code of Obligations as well as all other Swiss acts and laws have an official German, French and Italian version, all of which have equal legal validity. Furthermore, the Swiss Civil Code has also been translated into Romansh and more recently into English.³

As previously mentioned, both the Swiss Civil Code and the Code of Obligations were drafted in a strikingly understandable style.⁴ Prof. HUBER drafted the Swiss Civil Code and as part of it the Swiss Code of Obligations for the common population: Abstract legal terminology is rarely used, and sentences are short and simple. This accessible language was essential for the unanimous acceptance and support of the Code by the people and by parliament and is in line with the spirit of the political system of the Swiss Confederation: a direct democracy with far reaching civic rights, including the right to submit a constitutional initiative or a referendum to take part in the legislative process.

Moreover, the Swiss Code of Obligations consciously provides a mere framework, leaving room for courts and scholars to provide up-to date answers to developments in society. Indeed, the case law of the Federal Supreme Court has made important contributions to the understanding and interpretation of the Swiss Code of Obligations.⁵ Because of its strong ethical and legal principles and the overriding principle of good faith, the Swiss Code is open to flexibly integrate societal influences without losing the overwhelmingly accepted foundation that has grown over the last one hundred years and still continues to grow. Thus, because of its practical and flexible approach, the SCO is able to provide Swiss society, which is constantly undergoing substantial changes, with solutions suitable for past and future generations and adapted to their specific needs.

Unlike many other Western European jurisdictions, Swiss law does not include a distinct "Code of Commerce". This decision by the Swiss Parliament mirrors the notion that "any Swiss person is a merchant" and explains the absence of need for an individual Code of Commerce. There are, however, certain provisions in the Swiss Code

of Obligations that only apply to persons who operate a trading, manufacturing or other form of commercial businesses, thus leaving space for the particularities and habits of the respective business while protecting the “normal” consumer.

4. Its Influence on other Codifications

The influence of the SCO and the Swiss Civil Code outside of Switzerland is remarkable considering the population and size of Switzerland: The Swiss Civil Code and the Code of Obligations received considerable attention abroad and were often relied on as guidelines for codifications in countries such as Austria, Czechoslovakia, Hungary, Poland, Rumania and Yugoslavia.⁶

The most prominent example is modern Turkey, which adopted the Swiss Civil Code in its entirety with very few modifications and the Code of Obligations in its original form in 1926.⁷

The General Principles of the Civil Law of the People’s Republic of China was also influenced by the SCO, both in form and in content. For example, following the model of the Swiss Civil Code, the Civil Code of PRC also starts with “General Provisions” in its first chapter.⁸

5. Future Challenges

Today, the Swiss Code of Obligations is confronted with a multitude of international influences. First in line is the extensive lawmaking of the EU and the constant question of which developments the Swiss parliament should integrate, accept or adapt into its legal system. It is to be noted that the Swiss population, by means of the referendum, also exercises influence on this process. Further, concepts from the field of commercial law such as punitive damages or contingency fees, which have up until recently been unknown to the Swiss legal system, are constantly gaining influence. Last but not least, in a globalized, fast-paced world, the general tendency seems to lean towards regulation through a flood of individual acts or by means of jurisprudence rather than through time-consuming, intertwined codifications. For this reason, it is even more important to preserve the mechanisms of a codification with a “generalist approach” and to actively support it in performing its vital functions in the future.

6. Conference

In order to deepen the mutual understanding among Chinese and Swiss scholars and law professionals, Professor Sun Xianzhong of the Institute of Law of the Chinese Academy of Social Sciences (CASS) and Professor Stöckli of Fribourg University (Switzerland) will co-chair a conference on core concepts of civil law. The conference will feature speakers from both China and Switzerland and allow ample time for open discussions. The conference will take place at the CASS Institute of Law in Beijing on 27 and 28 October, 2012.

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¹ This quotation is attributed to the Roman Emperor Justinian I with reference to the Digest, but could according to Prof. Heinrich HONSELL equally apply to Eugen HUBER's draft of the Swiss Code of Obligations.

² Prof. Dr. PAHUD DE MORTANGES, René, Schweizerische Rechtsgeschichte – Ein Grundriss, Zurich 2007; Dr. Dr. h.c. Wilhelm SCHÖNENBERGER, Einleitung, in: Schweizerisches Obligationenrecht, Textausgabe mit Anhängen, Querverweisen, Sachregister und Anmerkungen, Prof. Dr. Dr. h.c. Peter GAUCH/Prof. Dr. Hubert STÖCKLI (Eds.), Zurich 2010 ; The translation of the SCO into Chinese language is yet to be launched.

³ All acts and laws, their translation as well as further information can be found on the official website of the Swiss Confederation: <http://www.admin.ch>

⁴ Prof. Heinrich HONSELL also refers to it as “volkstümlich” (demotic or popular), 100 Jahre Schweizerisches Obligationenrecht, in: Zeitschrift für Schweizerisches Recht, 2011(130) II, p. 17.

⁵ Website of the Federal Supreme Court: <http://www.bger.ch>

⁶ Prof. PAHUD DE MORTANGES, René, Schweizerische Rechtsgeschichte – Ein Grundriss, Zurich 2007.

⁷ Prof. Eugen BUCHER, Das Schweizerische Obligationenrecht – ein Markstein und ein Vorbild, in: NZZ of 10/11 June 2006, n° 132.

⁸ MI JIAN, Deutsches Recht in China seit der Politik der Reform und Eröffnung, ZChinR 2007.