

Legal English and civil-law concepts

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The widespread use of English in Swiss commercial and financial practice creates a legal problem that goes beyond translation. English legal terms carry the concepts of the common law, which differ in structure and content from those of Swiss civil law. When a contract governed by Swiss law uses English terms, the parties and the judge must decide whether these terms carry their common-law meaning or the meaning of the nearest Swiss concept. The following chapter discusses the drafting techniques that address this difficulty. Here it suffices to identify the main areas in which it arises.¹

The trust is the clearest example. Swiss law has no domestic law of trusts, although Switzerland ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition with effect from 1 July 2007 and recognises foreign trusts. The concepts of legal and equitable ownership, of the trustee's fiduciary duties and of the beneficiary's equitable interest have no direct equivalent in Swiss property law, which knows only full ownership and limited real rights. Swiss lawyers have used the fiduciary contract, the *fiducie*, as a functional substitute. A draft Swiss trust law was discussed for several years before the Federal Council decided not to pursue it. Earlier Parts of this book touched on the role of trusts in Swiss private client work.²

Other concepts raise similar questions. The common-law doctrine of consideration, under which a promise is binding only if something of value is given in return, has no counterpart in Swiss law, which enforces gratuitous promises subject to form requirements. The English term "best efforts" or "reasonable endeavours" describes a graded obligation that English courts have interpreted in a body of case law, while a Swiss judge would assess the scope of such an obligation according to the intention of the parties and the principle of good faith. The common-law "representations and warranties" of an acquisition agreement differ from

the statutory warranty regime of the Swiss law of sale. The English "indemnity" does not correspond exactly to any single Swiss institution. The duties of directors under Article 717 of the Code of Obligations overlap in part with the fiduciary duties of the common law, whose content English and American courts have shaped over centuries.³

Lawyers who have practised in common-law jurisdictions bring an awareness of these differences to Swiss practice. The author's own years of practice in Singapore and Hong Kong, where contracts are negotiated and drafted in English under common law, illustrate the kind of experience that helps to bridge the two legal worlds. In Basel, where English-language contracts governed by Swiss law are the daily business of the pharmaceutical groups and the banks, this bridging function is an essential part of legal advice.⁴

1 Notes

1. See chapter IV of this Part. On the interpretation of contracts under Swiss law according to the true and common intention of the parties, see Art. 18 para. 1 of the Code of Obligations and the case law of the Federal Supreme Court on the principle of trust (Vertrauensprinzip). To be verified. ↩
2. Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (SR 0.221.371), in force for Switzerland since 1 July 2007, and Art. 149a et seq. PILA. On the abandoned draft for a Swiss trust law, see the Federal Council's communications on the consultation launched in 2022. Status to be verified. ↩
3. On the reception of common-law contract terms in Swiss practice, see the literature on Swiss M&A practice and on the interpretation of anglicised contracts, for example the contributions on "Anglo-amerikanische Vertragsmuster im schweizerischen Recht". On Art. 717 CO, see the commentaries on Swiss company law. To be verified. ↩
4. On the author's professional background, see the preface of this book. ↩

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