3

Introduction to Swiss Contract Law

I Code of Obligations as the Main Source of Law

42 The **most important source** of Swiss contract law is the Code of Obligations of 30 March 1911. The Code of Obligations constitutes the fifth part of the Civil Code of 10 December 1907.

43 Switzerland is the only European country that has **two codifications** regulating the various forms of private legal relationships. Other European countries such as France, Germany and Italy have just one code governing the rights and obligations of private individuals.

44 Contrary to Switzerland, these countries also have a separate **Commercial Code** that deals with specific legal questions relating to trade and commerce.

45 The Code of Obligations has the following **five main sections**:

- **General Provisions** (Arts 1–183 CO) dealing, in particular, with the creation of obligations arising from contracts (see para. 83), torts (see para. 85) and unjust enrichment (see para. 85), the performance, non-performance and extinguishment of obligations as well as the assignment of a claim and the assumption of a debt;
- **Specific Contracts** (Arts 184–551 CO) containing rules governing certain contractual relationships such as, for example, the contract of sale, the lease contract, the employment contract, the contract for work and services, the simple mandate contract and the simple partnership contract (see paras 565–3106);
- **Commercial Enterprises and the Cooperative** such as the corporation (Arts 530–926 CO);
- **Commercial Register, Business Names and Commercial Accounting** (Arts 927–664 CO); and
- **Negotiable Securities** such as the cheque (Arts 965–1186 CO).

46 The **Civil Code** contains an Introductory part (Arts 1–10 CC) and four sections with articles pertaining to the Law of Persons

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(Arts 11–89 CC), Family Law (Arts 90–456 CC), Inheritance Law (Arts 457–640 CC) and Property Law (Arts 641–977 CC).

47 The Civil Code and the Code of Obligations are formally two separate codes with individual sections and numbering. However, the rules contained in the Civil Code **also apply to the rules set out in the Code of Obligations**. The rules on the civil capacity to act of natural persons (Arts 11–19 CC), the general rules on legal entities (Arts 52–59 CC) and the articles on the acquisition of chattels (Arts 714–729 CC) and real estate (Arts 656–665 CC) are of particular significance for contract law. Likewise, the general provisions of the Code of Obligations also apply to the rules set out in the Civil Code, irrespective of their individual placement in the Code of Obligations (Art. 7 CC).[1]

48 Swiss contract law is more than just the Civil Code and the Code of Obligations. There are a number of **other statutes** containing rules that are relevant for contractual relationships such as the Federal Act on Insurance Policies of 2 April 1908 (IPA).

II Fundamental Principles of Contract Law

A Freedom of Contract

1 Principle

49 The principle of freedom of contract (*Vertragsfreiheit*, *liberté contractuelle*, *libertà contrattuale*) is an aspect of the broader concept of **private autonomy** (*Privatautonomie*, *autonomie privée*, *autonomia privata*).[2] The principle of private autonomy states that the subjects of law are – within the limits of the law – free to govern their own affairs.

50 The principle of private autonomy is derived from Articles 27 and 94 of the Swiss Federal Constitution on **economic freedom** (*Wirtschaftsfreiheit*, *liberté économique*, *libertà economica*).[3]

51 The principle of **freedom of contract** encompasses the freedom to enter into a contract and to choose a contractual partner at will (see paras 52–54), the freedom of content (see paras 55–57), the freedom of form (see paras 58–62), and the freedom to modify and to terminate the contract (see paras 63–65).

[1] DFSC 129 III 646 reas. 2.2, DFSC 127 III 1 reas. 3bb, DFSC 124 III 370 reas. 3a.
[2] DFSC 129 III 35 reas. 6.1.
[3] DFSC 143 I 395 reas. 4.1, DFSC 136 I 197 reas. 4.4.1.

2 Aspects

a Freedom to Enter into a Contract and to Choose a Partner at Will

52 The first aspect of the principle of freedom of contract is the freedom to conclude a contract. This freedom to enter into a contract means that a party has the (positive) right to **enter into a contract** at will as well as the (negative) right to **desist from entering into a contract**.[4]

53 Parties also have the right to **choose a contractual partner** with whom they wish to enter into a contract.[5]

54 This **freedom is restricted** (by statute or by contract) if a party is under an obligation to enter into a contract. (Public law) statutes may contain an obligation to enter into a contract. For instance, Article 3 of the Federal Act on Health Insurance of 18 March 1994 (HIA) provides that each person domiciled in Switzerland must be insured for health care in the event of illness. A contractual obligation to enter into a contract can be set out in a preliminary contract (Art. 22 CO; *Vorvertrag*, *promesse de contracter*, *promessa di contrattare*), which is a binding agreement to form a contract at a later date (see paras 890–893).

b Freedom of Content

55 The second aspect of the principle of freedom of contract is the freedom with respect to the content of the contract (*Inhaltsfreiheit*, *liberté du contenu*, *libertà di definire il contenuto del contratto*). Within the limits of the law, the parties are **free to determine the content of their contract** (Art. 19(1) CO).

56 The **limits** to this freedom can be found, *inter alia*, in Article 19(2) CO and, in particular, in Article 20(1) CO, which states that a contract is void if its terms are impossible, unlawful or immoral (see paras 201–211).

57 The principle of freedom of content means that the parties are free to create new types of contracts that are different from the specific contracts contained in the Code of Obligations, that is, **innominate contracts** (see paras 341, 2879–2915). The contracting parties may also modify and/or combine the contracts contained in the Code of Obligations (see paras 2888–2896).

c Freedom of Form

58 The third aspect of the principle of freedom of contract is the freedom with respect to the form of the contract (*Formfreiheit*, *liberté de la forme*,

[4] DFSC 102 Ia 533 reas. 10a.
[5] DFSC 102 Ia 533 reas. 10a.

libertà della forma). According to Article 11 CO, the validity of a contract is **not subject to compliance with any particular formal requirement** unless a particular formal requirement is prescribed by statutory law. This means that contracts only have to respect a certain formal requirement if a statute (Art. 11 CO) or an agreement between the parties (Art. 16 CO; see paras 196–198) requires it.

59 In the absence of such a statutory or contractual prerequisite, the parties can enter into their contract by conclusive actions, orally, in textual form, in writing (Arts 12–15 CO) or by public deed (see para. 185). This is consistent with the **principle of consent** (*Konsensprinzip*, *principe du consensualisme*, *principio del consenso*) according to which the mere consent of the parties suffices to create at least one obligation.[6]

60 The freedom with respect to the form of the contract means that any **modifications** to, or the **termination** of, the contract are not subject to any formal requirements (see Art. 12 CO).

61 If the statutory law or the contract requires the contract to be in a textual form, in writing or executed by public deed, the contract is only validly concluded if **all objectively and subjectively essential elements of the contract** meet this formal requirement (see Art. 11(1) CO):[7]

- The **objectively essential elements of a contract** (*essentialia negotii*; *objektiv wesentliche Punkte*, *éléments objectivement essentiels*, *elementi oggettivamente essenziali*) are those elements on which the parties must agree. If the parties are not able to agree on such an element, the contract suffers from a gap which neither the statutory law nor the arbitrator or judge can fill.[8] The following are objectively essential elements: (1) the identity of the parties bound by the contract and their respective positions (e.g., the contract of sale has to define who is the seller and who is the buyer); (2) the determination (or at least the determinability) of the main obligations to be performed by each party (e.g., the object for sale, the work to be carried out, the services to be rendered, etc.). The financial consideration does not need to be determined, it is sufficient if it is determinable (by statutory law or by contract). With respect to nominate contracts (see para. 340), the main

[6] Christoph Müller, 'Arts 1-18', in Christoph Müller, *Berner Kommentar: Art. 1–18 OR. Allgemeine Bestimmungen mit allgemeiner Einleitung in das Schweizerische Obligationenrecht* (Bern: Stämpfli, 2018) (cited as: Müller, 'BK-Art. X CO'), BK-Art. 11 CO, para. 12.

[7] Müller, 'BK-Art. 11 CO', paras 41, 160–180.

[8] Müller, 'BK-Art. 2 CO', para. 15.

obligations are often determined by the statutory definition of the contract in question (e.g., the object and the price for the contract of sale according to Article 184(1) CO; see paras 584–590). With respect to innominate contracts (see paras 341, 2879–2915), the main obligations have to be determined on the basis of the case law and commercial usages.[9] In practice, the parties regularly include clauses in their contracts which go well beyond the objectively essential elements.

- The **subjectively essential elements** (*subjektiv wesentliche Punkte*, *éléments subjectivement essentiels*, *elementi soggettivamente essenziali*) are those elements which at least one of the parties considers to be so important that such party does not want to be bound by the contract without agreement on these elements.[10] Thus, an element is subjectively essential if it is, at least for one of the parties, a *conditio sine qua non* in order for this party to be bound by the contract.[11] The party who intends to make the latter's willingness to be bound by the contract dependent on an agreement on a certain element must make this clear to the other party. Otherwise, the presumption of Article 2(2) CO applies in favour of a contractual agreement.[12] A party may consider any element of a contract as subjectively essential, for example, the terms of performance, the rules on non-performance, the applicable law, the dispute resolution method, etc.

62 **A lack of agreement** with respect to an objectively essential element prevents the conclusion of the contract, even if the parties wish to be bound by the contract. On the contrary, a lack of agreement with respect to a subjectively essential element prevents the conclusion of the contract because of the lack of consent of (one of) the parties to be bound.[13]

d Freedom to Modify and to Terminate the Contract

63 The fourth aspect of the principle of freedom of contract is the freedom to **modify and terminate the contract**.

[9] Müller, 'BK-Art. 2 CO', para. 17.
[10] DFSC 97 II 53 reas. 3, DFSC 4A_293/2015 and 4A_295/2015 of 10 December 2015 reas. 4.3.
[11] Müller, 'BK-Art. 2 CO', para. 21.
[12] DFSC 138 III 29 reas. 2.1.
[13] Peter Gauch, Walter Schluep, Jörg Schmid and Susan Emmenegger, *Schweizerisches Obligationenrecht Allgemeiner Teil, Vols I and II*, 11th edn (Zurich/Basel/Geneva: Schulthess, 2020), para. 342.

64 In general, a party can only **modify a contract** with the consent of the other party. Within certain limits, a contract can also grant to one party the right to unilaterally modify the contract (see paras 402–405). In exceptional circumstances, one party can modify the contract against the will of the other party. This might be possible, for example, if circumstances change after the conclusion of the contract due to an unforeseeable impediment beyond the control of the party wishing to modify the contract. However, the impediment must not be avoidable or be overcome easily, and it must lead to an imbalance between the rights and obligations of the parties (*clausula rebus sic stantibus*; see paras 395–411). Article 373(2) CO provides for the application of this principle to the contract for work and services (see paras 1598–1634).

65 The parties can always **terminate their contract** by mutual agreement (*actus contrarius*).[14] To the contrary, a party can only unilaterally terminate a contract if the contract or a statute allows it. This is, in particular, the case for contracts of duration (see para. 350) such as the lease contract (Arts 266a–o CO) or the employment contract (Art. 335–c CO) for which the statutory law provides for the right of either party to terminate the contract by a notice of termination (*Kündigung*; *résiliation*; *disdetta*, *risoluzione*) (see paras 2818–2827). Furthermore, according to case law, each party to a contract of duration has the right to terminate the contract for valid reasons if one cannot reasonably expect from this party to remain bound by the contract.[15] The parties cannot waive this right in their contract.

3 Mandatory and Optional Statutory Provisions

a Principle

66 The parties enjoy the principle of freedom of contract (see paras 49–70) only 'within the limits of the law' (Art. 19(1) CO). A contract with an illegal content is thus null and void (Art. 20(1) CO). The law imposes **two kinds of limits** on the parties' freedom of contract.

b Mandatory Provisions

67 The mandatory provisions (*zwingende Bestimmung*, *norme impérative*, *norma imperativa*) are **those from which the parties cannot validly derogate**.[16] Such provisions pursue a superior interest which overrides the will of

[14] DFSC 102 Ia 533 reas. 10a.
[15] DFSC 138 III 304 reas. 7, DFSC 4A_59/2017 of 28 June 2017 reas. 4.1.1.
[16] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 646.

the parties. As a consequence, an arbitrator or judge cannot apply an agreement between the parties which would run counter to a mandatory provision. Given the principle of freedom of contract (see paras 49–70), mandatory provisions are the exception rather than the rule, even though such provisions have become more and more numerous, in particular, in the consumer protection arena (see paras 363–368). Some statutory provisions explicitly state whether they are of a mandatory nature or not (e.g., Arts 100(1), 361–362 CO). Other provisions are considered mandatory even though the statutory law does not expressly characterise them as mandatory (e.g., Art. 404(1) CO; see paras 2402–2408). In some socially sensitive contracts, the statute presumes the mandatory character of the provisions, unless expressly provided by statute (e.g., Arts 273c(1) for the lease contract, 492(4) CO for the surety contract).

68 There are **two types** of mandatory provisions:

- The **absolutely** (or bilaterally) **mandatory provisions** (*zweiseitig zwingende Bestimmung*, *norme absolument impérative*, *norma assolutamente imperativa*) are those from which the parties cannot derogate, be it in favour of one or the other party (e.g., Art. 361 CO). The purpose of these norms is to protect a general interest which is deemed to be superior to the interests of the parties; and
- The **relatively** (or unilaterally) **mandatory provisions** (*einseitig zwingende Bestimmung*, *norme relativement impérative*, *norma relativamente imperativa*) are those from which the parties can derogate only in favour of one party, but not the other party (e.g., Art. 418a(2) CO; see para. 2514). The purpose of these norms is to protect the party which the legislator considers as being the economically weaker one.

c Optional Provisions

69 The **optional provisions** (*dispositive Bestimmung*, *norme dispositive*, *norma dispositiva*) are those from which the parties can validly derogate. Their role is, above all, to provide the parties with a balanced solution in the event that they have not provided for a contractual provision on a disputed issue. The optional provisions serve as a basis for the arbitrator or judge to fill the gap in the parties' contract (e.g., Art. 189(1) CO; see para. 663). The optional provisions may also serve to clarify the meaning of the contractual provisions in question (e.g., Art. 189(2) and (3) CO). Certain provisions explicitly state that they are optional (e.g., Art. 364(3) CO: 'unless otherwise required by agreement'; see paras 1262–1264).

70 There are **two types** of optional provisions:

- **Absolutely optional provisions** are those from which the parties can validly derogate in any form, even by conclusive actions; and
- **Relatively optional provisions** are those from which the parties can only derogate in writing (e.g., Art. 418g(1) 2nd sentence CO: 'unless otherwise agreed in writing'; see para. 2514). The legislator wishes to oblige the party (often considered to be the economically weaker one) to think before giving up a protection offered by the statutory law.[17]

B Good Faith

71 'Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations' (Art. 2(1) CC). This principle of acting in good faith (*Treu und Glauben*, *bonne foi*, *buona fede*) encompasses **(ethical or moral) values** such as trust, honesty, loyalty and fairness.

72 The most important application of the principle of acting in good faith in contract law is the **objective interpretation of declarations of intent according to the principle of trust** (see paras 131–132). Further important applications of the principle of acting in good faith include the pre-contractual duties imposed on negotiating parties (see paras 90–99), ancillary contractual duties (see paras 675, 704), liability for breach of trust (see paras 87–89) as well as the ascertainment of the parties' hypothetical intent to fill gaps in the parties' contract.

C Prohibition of an Abuse of Right

73 According to Article 2(2) CC, 'the manifest abuse of a right is not protected by law'. Where a party has a valid right against another party, the law usually supports the enforcement of such a claim. However, there are exceptional situations where the arbitrator or judge may refuse to assist such a party if the pursuit of the claim is considered to be abusive. In order to be manifestly abusive within the meaning of Article 2(2) CC, the assertion of the rights must be **blatantly improper** (*offenbarer Rechtsmissbrauch*, *abus manifeste d'un droit*, *abuso di diritto manifesto*).

[17] Müller, 'BK-Art. 18 CO', paras 46–59.

As Article 2(2) CC is a mandatory provision (see paras 67–68),[18] the arbitrator or judge must determine *ex officio* whether the parties have abused their rights.

74 The courts have developed **groups of cases** where the assertion of a right is deemed manifestly abusive within the meaning of Article 2(2) CC. The general prohibition of an abuse of right thus: (1) prohibits contradictory conduct (*venire contra factum proprium*); (2) prohibits the assertion of a right when one does not have any interest worthy of protection; (3) imposes the duty to exercise one's rights with moderation; (4) prohibits a dishonest acquisition of rights; (5) prohibits using a legal institution in a way that is contrary to its purpose; and (6) prohibits the assertion of one's rights when this would lead to a blatant imbalance between the relevant legitimate interests.[19]

D Burden of Proof

75 'Unless the law provides otherwise, the burden of proving the existence of an alleged fact lies with the person who derives rights from that fact' (Art. 8 CC). This fundamental provision on the burden of proof (*Beweislast*, *fardeau de la preuve*, *onere della prova*) provides that if the party who bears the burden of proof fails to prove the alleged facts, such party bears the negative consequences thereof, that is, the **dismissal of such party's claim**.

76 The law contains some **exceptions** to this rule. In the field of contract law, the most important exception is the one found at Article 97(1) CO, which presumes that the debtor was at fault. In this case, it is for the debtor to prove that it was not at fault (see paras 439–443).

III Obligation (as the Effect of the Contract)

A Definition

1 Duty to Fulfil and Right to Claim

77 An obligation (*Obligation, obligation, obbligazione*) is a **legal relationship between two persons (or groups of persons)**.[20]

[18] Heinz Hausheer and Regina Aebi-Müller, 'Art. 2', in Hausheer and Walter (eds), *Berner Kommentar: Art. 1–9 ZGB Band I. Einleitung und Personenrecht. 1. Abteilung. Einleitung* (Bern: Stämpfli, 2012) (cited as: Hausheer and Aebi-Müller, 'BK-Art. 2 CC'), para. 86.

[19] Hausheer and Aebi-Müller, 'BK-Art. 2 CC', paras 206–308.

[20] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 24.

78 The term 'obligation' encompasses the following **two indivisible aspects**:

- From the perspective of the debtor (*Schuldner, débiteur, debitore*), the obligation is the **duty to fulfil the debtor's debt** (*Schuld, dette, debito*); and
- From the perspective of the creditor (*Gläubiger, créancier, creditore*), the obligation is the **right to demand and receive the debtor's performance when it is due** (*Forderung, Forderungsrecht; créance; credito, pretesa*). If the debtor does not fulfil the debt, the creditor has the right to enforce the claim with the assistance of the court, respectively the arbitral tribunal, and the enforcement authorities (actionability of the claim).

2 Obligation as an *Inter Partes* Right

79 An obligation is an *inter partes* right (*relatives Recht*, *droit relatif*, *diritto relativo*) because it only has effects between the persons that are affected by the obligation through a **special relationship**. Such a special relationship can, for example, arise out of a contract (see para. 83).

80 The contrary of a relative right is an ***erga omnes* right** (*absolute right; absolutes Recht*, *droit absolu*, *diritto assoluto*). An *erga omnes* right gives the beneficiary the right to dispose of the object and to prevent others from having an influence over that object or right. The right is *erga omnes* because it can be asserted against anyone. The beneficiary has the right to demand that every person refrains from certain behaviour or tolerates the beneficiary's behaviour without the need for a special relationship between this person and the beneficiary.

81 There are **three types of *erga omnes* rights**:

- **Personal rights** (*Persönlichkeitsrecht*, *droit de la personnalité*, *diritto della personalità*) give the beneficiary absolute protection from unlawful interventions with respect to the latter's person, in particular life, health, privacy and confidential affairs, personal freedom, honour, economic freedom, photo, name, etc. (Arts 27–30a CC).
- **Rights *in rem*** (*Sachenrecht*, *droit réel*, *diritto reale*) give the beneficiary the immediate control of physical objects. The most important of the rights *in rem* is the action *in rem* for restitution (Art. 641 CC). It

encompasses complete control over an object and the unrestricted right to use the object, within the limits of the law; and

- **Intellectual property rights** (*Immaterialgüterrecht*, *droit de la propriété intellectuelle*, *diritto della proprietà intellettuale*) give the beneficiary the immediate control of intangible assets such as copyrights, patents or trademarks.

B Origins of Obligations

1 Principle

82 Any claim, that is, any right which the beneficiary wants to legally enforce, must have **at least one legal basis** (*Rechtsgrund*, *cause (juridique)*, *causa*; *causa*).[21] A claim may have several legal bases.

83 An obligation can originate from the parties' will (**voluntary legal basis**) or independently of the parties' will (**involuntary legal basis**):

- The most important voluntary legal basis of an obligation is the **contract** (*Vertrag*, *contrat*, *contratto*). The obligation comes into existence because two or more persons want it to. This is why the formation of a contract is a bilateral legal act (*zweiseitiges Rechtsgeschäft*, *acte juridique bilateral*, *atto giuridico bilaterale*). For the distinction between unilateral and bilateral contracts, see paras 344–345;
- The most significant involuntary legal basis of an obligation is a **statute** (*Gesetz*, *loi*, *legge*). For the different kinds of obligations arising out of statute, see para. 85;
- Some obligations do not have their legal basis in a statute but in **case law** (*Rechtsprechung*, *jurisprudence*, *giurisprudenza*). Case law has created such obligations based on the special relationship between the parties. For the different kinds of obligations arising out a special relationship, see paras 86–89 (see Figure 3.1).

[21] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 272.

84

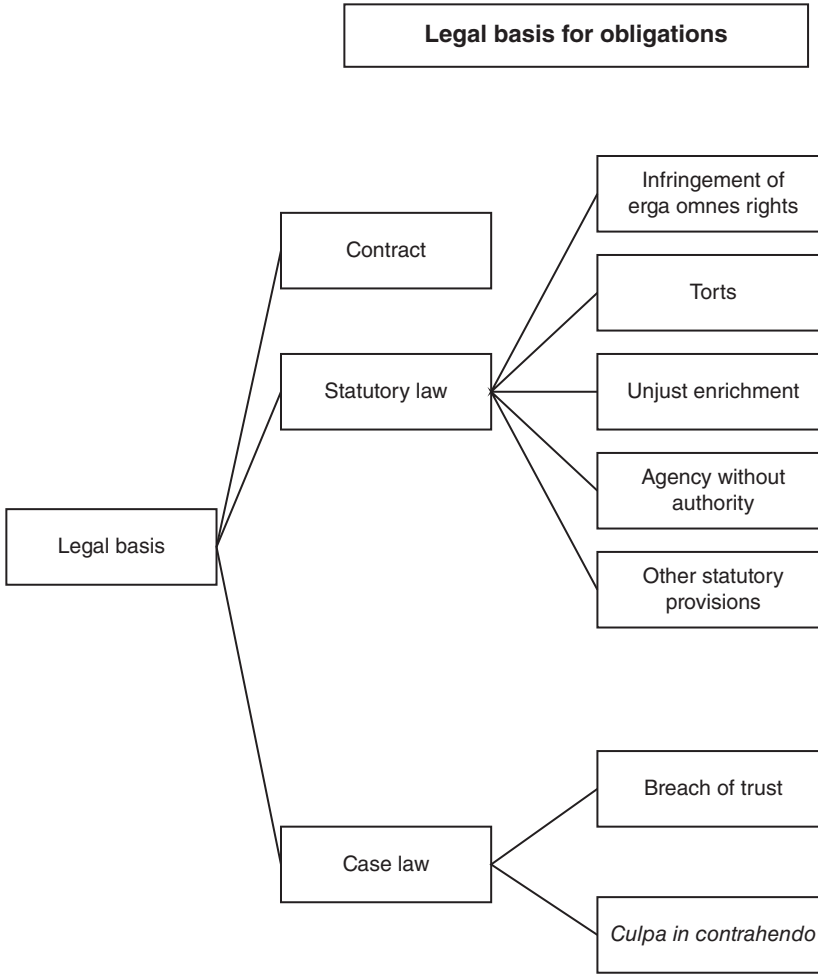

Figure 3.1: Origins of obligations

2 Obligations Created by Statute

85 The following **kinds of obligations** arise from statute:

- Obligations in **tort** (Arts 41–61 CO; *Haftpflicht*, *ausservertragliche Haftung*; *responsabilité civile*, *responsabilité délictuelle*, *responsabilité extra-contractuelle*; *responsabilità civile*, *responsabilità delittuale*,

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responsabilità extra-contrattuale): 'Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation' (Art. 41(1) CO). Article 41(1) CO is the basic statutory provision on liability in tort based on fault. Under Swiss law, there are also various kinds of strict liability;[22]

- Obligations arising out of **unjust enrichment** (Arts 62–67 CO; *ungerechtfertigte Bereicherung*, *enrichissement illégitime*, *arricchimento indebito*): 'A person who has enriched himself without just cause at the expense of another is obliged to make restitution' (Art. 62(1) CO). Articles 62–67 CO aim at offsetting transfers of assets without a legal basis (e.g., erroneous payment to someone else's bank account);
- Obligations arising out of **agency without authority** (Arts 419–424 CO; *Geschäftsführung ohne Auftrag*, *gestion d'affaires sans mandat*, *gestione d'affari senza mandato*): 'Any person who conducts the business of another without authorisation is obliged to do so in accordance with his best interests and presumed intention' (Art. 419 CO). 'The agent is liable for negligence' (Art. 420(1) CO); and
- **Further obligations** arising from statute: these can be found, in particular, in family law (e.g., the duty of assistance among the members of the family community, Arts 328–330 CC) or inheritance law (e.g., rights of the statutory heirs to the estate, Arts 560–579 CC).

3 Obligations Created by Case Law

86 The courts have created obligations in situations where the parties are in a **special relationship** (see para. 79), which impose on them a duty to act in good faith (Art. 2(1) CC; see paras 71–72). The most important obligations created by case law are claims for loss arising from pre-contractual liability (see paras 90–99) as well as from a breach of trust (see paras 87–89).

87 The Federal Supreme Court created the **liability for breach of trust** (*Vertrauenshaftung*, *responsabilité fondée sur la confiance*, *responsabilità fondata sulla fiducia*), in particular, through the *Swissair* case of 1994[23] and the *Ringier* (or *Grossen*) case in 1995:[24]

[22] See in general, Christoph Müller, *La responsabilité civile extracontractuelle* (Basel: Helbing Lichtenhahn, 2013).
[23] DFSC 120 II 331.
[24] DFSC 121 III 350.

- In the ***Swissair* case**, a company used the logo of the famous parent company Swissair for marketing purposes. In its letters, the company referred to the fact that the logo belonged to the Swissair corporate group. The company went bankrupt and the creditors claimed damages from the parent company Swissair alleging that they only did business with the company because they relied on the guarantee from the parent company Swissair due to the marketing documents. The Federal Supreme Court held that the parent company created a special legal relationship towards the creditors which led to the liability of Swissair.[25]
- In the ***Ringier* (or *Grossen*) case**, the Federal Supreme Court awarded damages to an athlete who had been selected by the latter's federation for the world championship and afterwards prohibited from participating without cause. According to the Federal Supreme Court, the federation's liability was based on a special relationship created by statute.[26]

88 Subsequently, the Federal Supreme Court has **widened the scope of application** of the liability for breach of trust to pre-contractual liability (see paras 90–99), liability in tort for advice and information (see para. 1929),[27] expert liability (see para. 1929)[28] and liability for legal appearance in the context of bills of exchange.[29] In recent years, however, decisions of the Federal Supreme Court on liability for breach of trust have become **rarer**, which is probably also related to the ongoing dogmatic and legal policy concerns of the legal doctrine.

89 According to case law, liability for breach of trust presupposes the following **six cumulative conditions**: (1) a special relationship between the party causing the loss and the party incurring the loss; (2) trust worthy of protection created by the party causing the loss in the party incurring the loss; (3) impossibility or unacceptability of entering into a contract; (4) breach of trust contrary to good faith; (5) natural and legal causation between the breach of trust and the loss; and (6) fault of the party causing the loss.[30]

[25] DFSC 120 II 331 reas. 5a.
[26] DFSC 121 III 350 reas. 6c.
[27] DFSC 134 III 390 reas. 4.3, DFSC 124 III 363 reas. II.5b.
[28] DFSC 142 III 84 reas. 3.3.
[29] DFSC 128 III 324 reas. 2.2.
[30] Christoph Müller, 'Einleitung in das OR', in Christoph Müller, *Berner Kommentar: Art. 1–18 OR. Allgemeine Bestimmungen mit allgemeiner Einleitung in das Schweizerische Obligationenrecht* (Bern: Stämpfli, 2018) (cited as: 'BK-Einl. CO'), paras 338–343.

IV Formation of Contracts

A Pre-contractual Liability

1 Principle

90 There is **no statutory provision** on pre-contractual liability (*vorvertragliche Haftung*, *responsabilité précontractuelle*, *responsabilità precontrattuale*; *culpa in contrahendo*) under Swiss law, contrary to various other legal systems of the Civil law tradition, such as under German (Section 241 (2) BGB), French (Art. 1112 *Code civil français* (French Civil Code, CCF)) and Italian (Art. 1337 *Codice civile italiano* (Italian Civil Code, CCI)) law. The Federal Supreme Court recognised pre-contractual liability in a decision of 1951.[31]

91 **Common law** legal systems, in contrast to Civil law legal systems, are reluctant to impose any duties on the parties during the pre-contractual phase. English courts do not recognise a general doctrine of fault in bargaining, or a general doctrine of good faith negotiations.[32] Instead, English law uses a mix of Common law and equitable doctrines to protect a negotiating party, such as, in particular, proprietary estoppel, unjust enrichment and misrepresentation.[33]

2 Conditions

a Principle

92 Pre-contractual liability presupposes the following **four cumulative conditions**:

- **Loss** suffered by the negotiating partner;
- **Violation of the principle of good faith (in business transactions)** (see paras 71–72);
- Natural and legal **causation** between the violation of the principle of good faith (in business transactions) (see para. 438) and the loss suffered by the negotiating partner; and
- **Fault** of the party causing the loss.

[31] DFSC 77 II 135.
[32] Neil Andrews, *Contract Law*, 2nd edn (Cambridge: Cambridge University Press, 2015), para. 2.03.
[33] Müller, 'BK-Einl. CO', paras 304–307.

b Violation of the Principle of Good Faith (in Business Transactions)

93 Whether there is a violation of the principle of good faith (in business transactions) can only be decided in individual cases on the basis of the specific circumstances. The specific rules of conduct to which a party is bound depend on what a reasonable person in the same situation could expect in good faith from the negotiating partner.[34] Indeed, anyone who enters into contractual negotiations is subject to the general duty to exercise his or her rights and obligations in good faith (Art. 2 CC; see paras 71–72). This general duty is the basis for various duties of care, protection and consideration, which are concretised in the pre-contractual phase in the form of certain **duties of conduct**.

94 This includes, in particular, the **duty of fair negotiations**, according to which parties must negotiate seriously and in accordance with their true intentions (duty to negotiate seriously).[35] It follows that a person who does not want to conclude a contract (any more) (with the same partner) should not enter into contract negotiations or should break off those already entered into.[36] Similarly, a party negotiates in bad faith if such party, negligently or intentionally, allows a contract that is formally (see paras 176–198) or substantively (see paras 199–220) null and void to be concluded, even though this party knows or should know that the negotiating partner trusts in the (formal and substantive) validity of the contract.[37] The same applies to the person who knows or should know that the conclusion of a valid contract is impossible, whether in fact (mistake as to facts, see paras 235–239; initial subjective impossibility of performance; see paras 210–211) or in law (e.g., impossibility of the subject matter of the contract; see paras 208–211).

95 The requirement to negotiate in good faith (Art. 2 CC; see paras 71–72) encompasses various **information duties**.[38] A distinction must be made between the duty to inform oneself and the duty to inform the negotiating partner:

- In principle, it is assumed that the partners have equally strong negotiating positions and therefore that each must look after their own

[34] Olivier Riske, '*La responsabilité précontractuelle dans le processus d'uniformisation du droit privé européen – Perspectives pour l'ordre juridique suisse – Analyse historique, comparative et prospective*', PhD thesis, University of Neuchâtel (Basel: Helbing Lichtenhahn, 2016), paras 484, 1466.
[35] DFSC 140 III 200 reas. 5.2.
[36] DFSC 77 II 135 reas. 2a.
[37] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 952
[38] Riske, '*La résponsabilité précontractuelle*', paras 584 et seq.

interests. From this it is deduced that **each negotiating partner must also obtain the information such partner considers necessary** for the conclusion of the contract;[39]

- With respect to the **duty to inform the other negotiating partner**, a distinction can be made between a general duty to inform and specific duties to inform. The general duty to inform is the duty to inform the negotiating partner spontaneously to a certain extent about (significant) facts which may influence the course of the negotiations, the decision to conclude the contract and the validity of the contract.[40] The statutory law establishes specific duties of disclosure if it assumes *in abstracto* that the negotiating parties have unequal opportunities to inform themselves about facts that are important for the conclusion or content of the contract. Such specific (or statutory) duties of disclosure can be found in the statutory law for the conclusion of certain contracts (e.g., Art. 256a CO with respect to the lease contract; Art. 330b CO with respect to the employment contract; Arts 3, 4 IPA with respect to the insurance contract) and in the area of consumer law (e.g., Art. 40d CO, Art. 3(1)(s) Federal Act on Unfair Competition of 19 December 1986 (UCA); see paras 363–368).

96 Similarly, certain **duties of care** (duties to protect) follow from the requirement to negotiate in good faith (Art. 2 CC; see paras 71–72). This includes, in particular, the duty of each negotiating party to take all protective measures within their own purview so that no (*erga omnes*) legal interests of the partner are impaired in the course of the negotiations (e.g., the duty to carefully store a sample collection received from the partner).

97 The obligation to negotiate in good faith, on the other hand, does **not establish a general duty of confidentiality**. If both partners wish the negotiations to be confidential, they can settle this question (and others, such as the exclusivity of the negotiations or the bearing of costs) by means of a negotiation agreement (*Verhandlungsvertrag*, *contrat de négociation*, *contratto di negoziazione*), that is, a non-disclosure or exclusivity agreement.[41] Otherwise, a negotiating partner can also clearly express the confidential nature of the information given unilaterally. A specific duty of confidentiality may also flow from the nature of the future contract or the circumstances in which a partner receives certain information.

[39] DFSC 120 II 331 reas. 5a, DFSC 4A_306/2009 of 8 February 2010 reas. 5.1.
[40] DFSC 105 II 75 reas. 2a, DFSC 4C.26/2000 of 6 September 2000 reas. 2bb.
[41] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 982n–988.

3 Consequences of Pre-contractual Liability

98 If **no contract** has been concluded due to a *culpa in contrahendo*, the injured party's claim is usually for damages. Based on Article 26(1) CO, negative interest damages (see para. 434) are owed.[42] The injured partner must therefore be placed in the same position as if the contract negotiations had never taken place. This applies, in particular, to (useless) expenses incurred by the negotiating partner in reliance on the conclusion of a contract (e.g., travel expenses, costs for expert opinions, etc.). If pre-contractual obligations are only breached at a later stage of the negotiations, only the expenses incurred after the breach are to be reimbursed.[43] Exceptionally, in case of gross negligence, positive interest damages (see para. 434) may also be awarded in equity according to Articles 26(2) or 39(2) CO.[44]

99 If a **disadvantageous contract** has been concluded due to a *culpa in contrahendo*, certain authors refer the injured party to the rules on unfair advantage (Art. 21 CO) and lack of consent (Arts 23–31 CO; see paras 221–273).[45] Other authors grant the injured party the right to terminate the disadvantageous contract in whole or in part.[46] In addition, damages may also be awarded.[47]

B Offer and Acceptance

1 Principle

100 According to **Article 1 CO**, '[t]he conclusion of a contract requires a mutual expression of intent by the parties'.

101 The formation of a contract therefore has the following **elements**: There must be at least two expressions of intent. This implies, firstly, that each party has developed an (inner) intent (see paras 102–103) and, secondly, that each party declares the intent to the other party (see paras 104–105). The expressions of intent, directed towards the conclusion of a contract, are called the offer and acceptance (see paras 106–121). They

[42] DFSC 140 III 200 reas. 5.2.
[43] DFSC 105 II 75 reas. 3a.
[44] DFSC 116 II 689 reas. 3a.
[45] Claire Huguenin, *Obligationenrecht – Allgemeiner und Besonderer Teil*, 3rd edn (Zurich/Basel/Geneva: Schulthess Verlag, 2019), para. 1562.
[46] Ingeborg Schwenzer and Christiana Fountoulakis, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 8th edn (Bern: Stämpfli, 2020), para. 47.14.
[47] Müller, 'BK-Einl. CO', para. 324.

have to be exchanged, which means that one party must take notice of the other party's intent (see paras 122–124). The parties must come to an agreement, that is, they must mutually consent to the contract. Both the offer and the acceptance must therefore have the same content (see paras 127–130).

2 Expression of Intent

102 The offer and acceptance are expressions of intent. The **expression of intent** (*Willensäusserung*, *Willenserklärung*; *manifestation de volonté*; *manifestazione della volontà*) is the expression of an intent to establish, amend or terminate an obligation or legal relationship.[48]

103 The expression of intent can be split into the following **three sub-elements**:

- The **intent to act** (*Handlungswille*), which is the will of the declarant to perform an act;[49]
- The **intent to legally bind oneself** (*Geltungswille*), which is the will of the declarant to perform a *legal* act;[50] and
- The **intent to trigger a certain legal consequence** (*Rechtsfolgewille*), which is the will of the declarant to bring about a certain legal consequence.[51]

104 With respect to the formation of a contract, it is not sufficient to have the will to act, the will to legally bind oneself and the will to trigger a certain legal consequence. This (purely internal) intent needs to be **communicated to the other party**.

105 The communication of the expression of intent may take **different forms**:

- The **explicit communication** of the expression of intent (*ausdrückliche Willensäusserung*, *manifestation de volonté expresse*, *manifestazione espressa della volontà*) is where the declarant expresses the intention to bring about a certain legal consequence by a socially recognised means of communication or by a means of communication agreed by the parties in the individual case.[52] These are usually oral or written statements (*expressis verbis*), that is, statements in the form of spoken

[48] Müller, 'BK-Art. 1 CO', para. 12.
[49] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 27.02.
[50] Müller, 'BK-Art. 1 CO', para. 17.
[51] Huguenin, *Obligationenrecht*, para. 170.
[52] Müller, 'BK-Art. 1 CO', para. 33.

or written words. The declarant may also express such intention by other socially recognised signs (e.g., nodding the head, shaking the head, raising the hand during an auction);[53]

- The **implicit communication** of the expression of intent (*konkludente Willensäusserung*, *manifestation de volonté par actes concluants*, *manifestazione della volontà per atti concludenti*) is where the intention of the declarant to bring about a certain legal consequence is not directly expressed in the declaration, but only results indirectly from the behaviour of the declarant or other circumstances;[54] and
- **Silence** (*stillschweigende 'Äusserung'*, *manifestation de volonté tacite*, *manifestazione tacita della volontà*) is the 'expression' of intent through simple passive silence or doing nothing.[55] In principle, silence – which is particularly important in practice – is a subcategory of the category of implicit communication. As a general rule, silence or doing nothing does not constitute an intent to bring about a certain legal consequence (see para. 121). Therefore, the rule '*qui tacet consentire videtur*' ('*qui ne dit mot consent*') only applies within narrow limits (see para. 121).

3 Offer

106 The offer (*Antrag*; *offre*; *offerta*, *proposta*) is the first **expression of intent in which the offeror authorises the offeree to enter into a contract of a specific content with the offeror**.[56] An expression of intent is only an offer if the person declaring the intent has the will to bring about a certain legal consequence (see para. 103), that is, to conclude a contract with a specific content.

107 The offer must be **received by the offeree**. Therefore, the validity of the offer depends on the addressee receiving the offer (see paras 122–124).

108 With respect to its **content**, the offer must include all (subjectively and objectively) essential elements (see para. 61) of the future contract.[57]

109 With respect to its **form**, according to the statutory law, the offer does not have to comply with any specific formal requirements in order to be binding (Art. 11(1) CO; see paras 180–189).

[53] See Section 864 *Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code) (ABGB).
[54] DFSC 123 III 53 reas. 5a, DFSC 4A_309/2016 of 31 August 2016 reas. 2.2.
[55] Müller, 'BK-Art. 1 CO', para. 43.
[56] DFSC 122 III 118 reas. 2b.
[57] DFSC 145 II 328 reas. 3.3.2, DFSC 122 III 118 reas. 2b.

110 The offer triggers the following two **consequences**:

- The offer **authorises the offeree to conclude a contract** with the content described in the offer by accepting it in accordance with the offer;[58] and
- The offer **binds the offeror**.[59]

111 The **binding effect starts**, in principle, when the addressee receives the offer (see paras 122–124).

112 The binding effect is **limited in time**. Articles 3, 4 and 5 CO serve to determine the duration of the offer's binding effect:

- **Offer limited in time**: if the offeror limits the offer in time, the offeror is bound by the offer until the time limit expires (Art. 3(1) CO). The offeror can limit the offer in time either by reference to a specific date (Art. 79 CO; e.g., 'until 3 October 2023') or a specific period of time (Art. 77 CO; e.g., 'within eight days'). The time limit can also arise out of the circumstances ('immediately after your return from England');
- **Offer unlimited in time**: if the offeror makes the offer without a time limit (which is not recommended), the time during which the offeror is bound by the offer depends on whether the offer was made in the parties' presence or absence. An offer is made in the parties' presence (*Antrag unter Anwesenden*, *offre entre presents*, *proposta fra presenti*; Art. 4 CO) if the offeror and the offeree are in direct, immediate communication so that a live exchange between the two is possible.[60] This is not only the case if the offeror and the offeree are face to face, but also if they are talking on the phone, or are communicating through an instant message program (MMS). An offer is made in the parties' absence (*Antrag unter Abwesenden*, *offre entre absents*, *proposta fra assenti*; Art. 5 CO) if the offeror and the offeree are communicating through a medium which involves a time lag (letter, e-mail, etc.). In this case, the offer remains binding on the offeror until such time as the latter might expect to receive a duly sent reply (Art. 5 (1) CO). The duration of the binding effect corresponds to the usual total duration of the following three periods: (1) the usual duration of the transmission of the offer from the offeror to the offeree; (2) the

[58] Müller, 'BK-Art. 1 CO', paras 62–63.
[59] Müller, 'BK-Art. 1 CO', paras 64–67; see Section 145 BGB.
[60] Müller, 'BK-Art. 4 CO', paras 11–15.

offeree's reasonable period of time for consideration; and (3) the usual duration of the transmission of the acceptance from the offeree to the offeror.[61]

113 If the positive reaction by the offeree reaches the offeror **too late**, it can, in principle, no longer trigger the consequences of an acceptance (see paras 116–121). However, if the acceptance was sent off in time but arrives too late, the offeror must react immediately by declining the acceptance if the offeror does not want to be bound by the original offer (Art. 5(3) CO).

114 An expression of intent without binding effect is not an offer but a (non-binding) **invitation to treat** (*Einladung zur Offertstellung*, *invitation à faire une offre*; *invito a fare un'offerta*; *invitatio ad offerendum*).

115 The binding effect of an expression of intent can be excluded in the following **three ways**:

- **Exclusion by declaration**: The offeror is not bound by the offer if the offeror has made an express declaration to that effect (*Antrag ohne Verbindlichkeit*, *offre sans engagement*, *proposta senza impegno*; Art. 7 (1) CO). In trade, clauses such as 'while stock lasts', 'without obligation' or 'on a non-binding basis', etc., are common;
- **Exclusion by statutory law**: According to Article 6a(1) CO, the sending of unsolicited goods does not constitute an offer. The recipient can freely dispose of the goods. The recipient is not obliged to keep or return such goods (Art. 6a(2) CO). However, where unsolicited goods have obviously been sent in error, the recipient must inform the sender. Furthermore, according to Article 7(2) CO, the sending of tariffs, price lists and the like does not constitute an offer. By contrast, the display of merchandise with an indication of the price does generally constitute a (binding) offer (Art. 7(3) CO). According to Articles 3(1) and 7–9 of the Ordinance on Price Indication of 11 December 1978 (OPI), store owners must put clear and easily readable prices on their products if they offer these products to consumers or if they advertise their products (Art. 2(1)(a) and (d) IPO);
- **Exclusion deriving from the circumstances**: An expression of intent in view of the establishment of a relationship arising from an act of kindness (*Gefälligkeitsverhältnis*, *rapport de complaisance*, *rapporto di cortesia*) does not have any (legally) binding effect (see paras 1924–1929).

[61] DFSC 4A_515/2008 of 16 January 2009 reas. 4.1.

Therefore, the relationship arising from an act of kindness does not give rise to any legal obligation to perform the promised act of kindness.[62]

4 Acceptance

116 The acceptance (*Annahme*, *acceptation*, *accettazione*) is the second **expression of intent by which the offeree**, that is, the addressee of the offer (see para. 107), **concludes a contract with the offeror with the content specified in the offer**.[63] By the acceptance, the acceptor agrees to conclude a contract with the content described in the offer (see Art. 1118 (1) CCF).

117 Like the offer (see para. 106), the acceptance must be **received by the offeror**. Therefore, the validity of the acceptance depends on the addressee receiving the acceptance (see paras 122–124).

118 The **content** of the acceptance is determined by the content of the offer (see para. 108). The offeree's will to conclude a contract must be congruent in terms of content with the objective (see para. 61) and (for the offeror, subjective; see para. 61) essential elements of the contract.[64] According to Article 2(1) CO, where the parties have agreed on all essential elements, it is presumed that the contract will be binding, notwithstanding any reservations as regards non-essential elements. In the event of a failure to reach an agreement on such non-essential elements after the contract is concluded, the arbitrator or judge must determine them with due regard to the nature of the transaction (Art. 2(2) CO).

119 If the content of the recipient's expression of intent differs from the offer due to amendments or additions regarding essential elements (see para. 61), there is no acceptance within the meaning of Article 3 CO. If such an expression of intent, which differs from the offer with respect to essential elements, expresses the intent of the recipient to conclude a contract (see para. 102), there is a **counter-offer** (*Gegenantrag*, *Gegenofferte*; *contre-offre*; *controfferta*), which, in turn, can be accepted by the original offeror.[65]

120 According to the statutory law, the acceptance, like the offer (see para. 109), is not subject to any particular **formal requirement** (Art. 11(1) CO; see paras 180–189).

[62] DFSC 137 III 539 reas. 4.1, DFSC 123 III 204 reas. 2f.
[63] Müller, 'BK-Art. 3 CO', para. 96.
[64] DFSC 4A_69/2019 of 27 September 2019, reas. 3.1, DFSC 4A_431/2013 of 10 January 2014 reas. 2.2.
[65] DFSC 38 II 90 reas. 2, DFSC 4A_152/2013 of 20 September 2013 reas. 2.5.

121 **Silence or doing nothing** (see para. 105) is generally not considered to be an acceptance (Art. 6 CO). However, a contract is concluded despite the offeree remaining silent or doing nothing in reaction to the offer, if this was to be expected because of 'the particular nature of the transaction or the circumstances' (Art. 6 CO). There are a series of typical circumstances in which the offeror may and must infer the offeree's will to accept the offer: (1) when the parties to the negotiation agreed that the silence of the offeree in reaction to the future offer would constitute an acceptance; (2) when the offeror unilaterally waives an express acceptance; (3) when the offeree previously expressed the will to conclude the contract; (4) when there exists an ongoing business relationship between the negotiating parties; and (5) when the contract negotiations have reached such a stage that their favourable outcome is practically fixed.[66] Article 395 CO sets out specific rules regarding the conclusion of the simple mandate contract (see paras 1937–1951).

5 Receipt of the Offer and Acceptance

122 Both the offer (see para. 106) and acceptance (see para. 116) are expressions of intent that **must be received by the addressee** in order to deploy any legal effect (*empfangsbedürftige Willensäusserung*, *manifestation de volonté sujette à réception*, *manifestazione della volontà soggetta a ricezione*; see Section 130 BGB). Receipt (*Empfang*, *Abnahme*, *Zugang*; *réception*;, *ricevimento*) is the entry of the expression of intent into the sphere of influence of the addressee.[67]

123 The exact point in time in which the expression of intent is received is **important** for questions such as the following: From what point in time is a person bound by the declaration made (see para. 111)? At what point in time is the contract concluded (see para. 126)? Can the expression of intent be withdrawn (see para. 125)?

124 The **principle of receipt** ('mailbox theory'; *Empfangstheorie*, *Zugangstheorie*; *théorie de la réception*;, *teoria dell'atto ricettizio*)[68] has the following two core elements:

- The expression of intent must have entered into the addressee's **sphere of influence** (*Einflussbereich*, *Machtbereich*; *sphère d'influence*; *sfera d'influenza*). The addressee's sphere of influence includes not only the latter's home, business premises and mailbox, but also the latter's

[66] Müller, 'BK-Art. 6 CO', paras 27–39.
[67] Müller, 'BK-Art. 1 CO', para. 93.
[68] DFSC 140 III 244 reas. 5.

post office box, answering machine, fax machine and e-mail server, electronic mailbox or wall in a social media service (Linkedin, etc.); and

- **Whether and when the addressee actually takes note** of the expression of intent is irrelevant. This means that the expression of intent must be brought to the attention of the addressee in such a way that, under normal circumstances, the addressee can be expected to take note of it.[69]

6 Withdrawal of Offer and Acceptance

125 Both the offer (see paras 106–115) and acceptance (see paras 116–121) can be withdrawn under certain **conditions** (Art. 9 CO): if the offer or acceptance and the corresponding withdrawal are received simultaneously, or if the corresponding withdrawal overtakes the offer or the acceptance, the relevant offer or acceptance is considered revoked.

7 Time of Conclusion of the Contract

126 Timewise, the contract is concluded **when the acceptance enters the offeror's sphere of influence**, pursuant to the principle of receipt (see para. 124).

8 Congruency of Offer and Acceptance

127 The contract is only concluded if the offer (see paras 106–115) and acceptance (see paras 116–121) are **congruent with respect to their content** (Art. 1(1) CO).

128 If the offer and acceptance are congruent, there exists a **consensus** (*Konsens*, *accord*, *consenso*) between the parties and the contract is concluded with the content corresponding to the parties' common intent.

129 If the offer and acceptance are incongruent, there exists a **disagreement** (*Dissens*, *désaccord*, *dissenso*) between the parties:

- If the parties are aware of this fact, there exists an **open disgreement** (*offener Dissens*; *désaccord patent*, *dissentiment manifeste*; *dissenso palese*) between them[70] and the contract is not concluded;
- If the parties are not aware of this fact, there exists a **hidden disagreement** (*versteckter Dissens*; *désaccord latent*; *dissentiment inconscient*,

[69] DFSC 145 II 328 c. 5.1, DFSC 140 III 244 reas. 5.1.
[70] DFSC 144 III 93 reas. 5.2.1, DFSC 123 III 35 reas. 2b.

dissenso occulto). This is, in particular, the case when the offer and acceptance are formally congruent, but each party understands them differently.[71]

130 In order to determine whether the parties have the same understanding of their mutual expressions of intent, the expressions of intent must be **interpreted** (see paras 131–132).

9 Interpretation of Expressions of Intent

131 The interpretation (*Auslegung*, *Interpretation*; *interprétation*, *interpretazione*) of expressions of intent aims at **determining the content of the expression of intent** insofar as this content is in dispute between the parties.[72]

132 Based on Article 18 CO, the Federal Supreme Court has developed the following **procedure in order to determine whether the parties' respective expressions of intent are congruent** (see paras 127–130) and, thus, whether the contract has been concluded:

- First, the **actual will of the person expressing the intent** (i.e., the declarant) needs to be determined (subjective or empirical interpretation; *subjektive Auslegung*, *empirische Auslegung*; *interprétation subjective*, *interprétation empirique*; *interpretazione soggettiva*, *interpretazione empirica*).[73] If the recipient understands this actual will in the same way as the declarant intended it, this shared understanding is decisive, irrespective of whether the declarant expressed the intent properly. This is because according to Article 18(1) CO, the actual intent of the parties is decisive, not any false expressions of such intent. If the interpretation leads to the result that both parties wanted the same thing, it is called an actual (or natural) consensus (*tatsächlicher Konsens*, *accord de fait*, *consenso di fatto*; see para. 128). According to the Federal Supreme Court, the parties' will and knowledge is a question of fact which it does not, in principle, review on appeal (Art. 105(1) of the Federal Act on the Federal Supreme Court of 17 June 2005 (FSCA));[74]
- Second, if the recipient misunderstands the declarant (i.e., the recipient does not understand the actual intent of the declarant), the question arises

[71] DFSC 144 III 93 reas. 5.2.1, DFSC 123 III 35 reas. 2b.
[72] Müller, 'BK-Art. 18 CO', paras 17, 31–45.
[73] DFSC 147 III 153 reas. 5.1, DFSC 144 III 327 reas. 5.2.2.1, DFSC 143 III 157 reas. 1.2.2, DFSC 4A_350/2020 of 12 March 2021 reas. 3.2.
[74] DFSC 142 III 239 reas. 5.2.1, DFSC 138 III 659 reas. 4.2.1, DFSC 4A_501/2021 of 22 February 2022 reas. 6.2.2.

whether the understanding of the declarant or the recipient's one should prevail. The intent must thus be objectively or normatively determined (*objektive Auslegung*, *normative Auslegung*; *interprétation objective*, *interprétation normative*; *interpretazione oggettiva*).[75] The basis for this interpretation is the **principle of trust** (*Vertrauensprinzip*, *principe de la confiance*, *principio dell'affidamento*). According to this principle, the arbitrator or judge determines how the recipient could and should, in good faith (Art. 2 CC; see paras 71–72), have understood the intent of the declarant under the circumstances.[76] In the context of the conclusion of the contract, the arbitrator or judge thus determines how each party could and should, in good faith, have understood the other party's expression of intent under the circumstances and to what extent these (normative) understandings are congruent (see para. 127). To the extent they are congruent, there exists a normative (or legal) consensus (*normativer Konsens*, *accord de droit*, *consenso normativo*; see para. 128). The Federal Supreme Court reviews this objective interpretation on appeal as a question of law. The Court, however, is bound by the factual determinations made by the Cantonal court with respect to the external circumstances of the parties' will and knowledge (Art. 105(1) FSCA).[77]

V Interpreting Contracts

A *Purpose*

133 The interpretation (*Auslegung*, *Interpretation*; *interprétation*; *interpretazione*) of contracts aims at **determining the content of the contract** insofar as this content is in dispute between the parties.[78] Each of the expressions of intent (offer and acceptance) must be interpreted to determine the actual (see para. 132) or normative (see para. 132) intent of the parties.

B *Means of Interpretation*

134 Means of interpretation (*Auslegungsmittel*, *moyen d'interprétation*, *mezzo di interpretazione*) are **sources of knowledge** for the arbitrator or

[75] DFSC 138 III 659 reas. 4.2.1, DFSC 4A_473/2021 of 27 September 2022 reas. 3.2.2, DFSC 4A_350/2020 of 12 March 2021 reas. 3.2.
[76] DFSC 147 III 153 reas. 5.1, DFSC 144 III 327 reas. 5.2.2.1, DFSC 143 III 157 reas. 1.2.2.
[77] DFSC 144 III 93 reas. 5.2.3, DFSC 4A_269/2022 of 5 October 2022 reas. 3.1.2.
[78] Müller, 'BK-Art. 18 CO', paras 17, 31–45.

judge when interpreting a contract.[79] The Federal Supreme Court has recognised the following seven means of interpretation.

1 Wording of the Contract

135 The **starting point** of any interpretation is the wording of the contract (literal interpretation).[80]

136 It is assumed that the parties understood the words they used in accordance with the **common usage** (*allgemeiner Sprachgebrauch*; *sens courant*, *sens habituel*; *linguaggio comune*) at the time of the conclusion of the contract.[81]

137 If a word has a **specific technical meaning** in a trade or in a professional circle (*Fachausdruck*, *sens technique spécifique*, *termine specifico*) and all contracting parties belong to this specialist circle, this specific meaning takes precedence over the general understanding of the word (see para. 136).[82]

138 The fact that the parties use **specific legal terms** is only decisive if the parties are business people who may be presumed to have a certain familiarity with legal terminology[83] or if the parties have been advised by persons with legal expertise.[84]

139 The parties may also understand a term in a **certain sense** which deviates from common usage (see para. 136).[85] They can formally exercise this liberty by explicitly defining the individual meaning of this term in their contract (definition clauses).

2 All Relevant Circumstances

140 Contracts are to be interpreted in the light of the relevant circumstances (*relevante Begleitumstände*, *circonstances relevantes*, *circonstanze rilevanti*) in which they were concluded.[86] **All accompanying circumstances** that have an influence on how a reasonable person could and should, in good faith (Art. 2 CC; see paras 71–72) have understood the

[79] Huguenin, *Obligationenrecht*, para. 286.
[80] DFSC 138 III 659 reas. 4.2.1, DFSC 4A_473/2021 of 27 September 2022 reas. 3.2.2.
[81] DFSC 144 V 84 reas. 6.2.1, DFSC 136 III 186 reas. 3.2.1.
[82] DFSC 122 III 426 reas. 5.
[83] DFSC 129 III 702 reas. 2.4.1, DFSC 5C.87/2002 of 24 October 2002 reas. 2.3.2.
[84] Müller, 'BK-Art. 18 CO', para. 135.
[85] DFSC 87 II 234 reas. 3.
[86] DFSC 143 III 157 reas. 1.2.2.

contract (or the expression of intent of another person; see para. 102) must be considered (background factual matrix).

141 The persons involved in the contract negotiations must have known these circumstances, or at least **been aware of them**.

3 Context

142 The individual expression or sentence is usually part of the contract as a whole and thus should be interpreted in its systematic context (**systematic interpretation**).

143 Context such as the sentence **structure**, the structure of the contractual document, the relationship to other documents exchanged, etc., must thus be considered.[87]

4 History and Genesis of the Contract

144 The contract is usually the result of a certain development (**historical interpretation**).

145 The **history of the contract** includes the previous relationships between the parties, in particular, previous contracts[88] as well as practices and customs existing between the parties.[89]

146 The **genesis of the contract** concerns, in particular, the entire conduct of the parties directly before and during the conclusion of the contract.[90] In particular, the statements exchanged during the contract negotiations,[91] draft contracts, minutes of meetings,[92] etc., are important for the interpretation. In addition, the other conduct of the parties before and at the time[93] of the conclusion of the contract is important (with respect to the parties' conduct *after* the conclusion of the contract, see paras 156–158).

147 Sometimes contracts contain an **entire agreement clause** (merger clause; *Ausschliesslichkeitsklausel*, *Integrationsklausel*; *clause d'intégralité*; *clausula di integralità*) by which the parties stipulate that the contract reflects all the points of their agreement and that all previous written or

[87] DFSC 142 V 129 reas. 5.2.2, DFSC 138 III 659 reas. 4.2.1, DFSC 4A_473/2021 of 27 September 2022 reas. 3.2.2.
[88] DFSC 77 II 154 reas. 4.
[89] See Art. 4.3(b) PICC.
[90] DFSC 144 III 93 reas. 5.2.3, DFSC 133 III 61 reas. 2.2.1.
[91] DFSC 103 Ia 505 reas. 2c.
[92] DFSC 142 III 239 reas. 5.2.1.
[93] DFSC 142 III 239 reas. 5.2.1.

oral agreements are not part of their contract.[94] However, as a contractual clause, the entire agreement clause is also open to interpretation. The arbitrator or judge is generally bound by such a clause if the parties have negotiated it individually (see para. 319).[95] However, an entire agreement clause only reinforces the presumption, which applies anyway, that the contract expresses all (important) aspects of the agreement between the parties.[96]

148 The **Common law** approach to this issue is not uniform. Whereas US law provides for a similar rule (Restatement Second of Contracts, Section 214),[97] English law has a diametrically opposed approach to the parties' behaviour prior to the conclusion of the contract.[98] However, the differences between English and continental European law should not be overstated. On the one hand, the exceptions to the principle, in particular, the special meaning exception, the estoppel by convention exception and the rectification exception,[99] are so significant that they call into question the principle that pre-contractual conduct cannot be taken into account.[100] On the other hand, parties often raise arguments relating to the interpretation and rectification of the contract at the same time, with the result that the courts of first instance cannot disregard the history and genesis of the contract.[101]

5 Parties' Interests and Purpose of the Contract

149 The contract must also be understood in light of the parties' respective interests and the purpose they were pursuing by its conclusion (**teleological interpretation**).

150 The **parties' interests** (*Interessenlage*, *intérêts respectifs des parties*, *interessi delle parti*) include the reasons and expectations which have led each party to conclude the contract.[102]

[94] See with respect to the parole evidence rule under US law, the Restatement Second of Contracts, § 215.

[95] See Art. 2.1.17 PICC, Art. 2:105(1) PECL, Art. II-4:104 DCFR.

[96] See Art. 2:105(2–4) PECL, Art. II-4:104 (2–4) DCFR, which also include this rule for entire agreement clauses that the parties have not individually negotiated.

[97] Restatement Second of Contracts, Section 214.

[98] The general exclusion of pre-contractual negotiations has been upheld by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 and by the Supreme Court in *Arnold v Britton* [2015] UKSC 36.

[99] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

[100] David McLauchlan, 'Common Intention and Contract Interpretation', (2011) *LMCLQ* 30–50.

[101] Richard Buxton, '"Construction" and Rectification after Chartbrook', (2010) *CLJ* 253–262.

[102] DFSC 122 III 426 reas. 5b.

151 The **purpose of the contract** (*Vertragszweck*, *but du contrat*, *scopo del contratto*) pursued by the parties is also important.[103]

152 The parties often declare their mutual interests and/or the purpose of the contract explicitly at the beginning of the contract, in the **preamble** or in the recitals (*Präambel, préambule, preambolo*).[104] If this is not the case, these means of interpretation must in turn first be determined by interpretation.[105]

153 In **English law**, the parties' interests and the purpose of the contract are also taken into account in the interpretation of the contract as 'original assumptions'.[106]

6 Trade Usages

154 Trade usages (*Verkehrsübung*, *usage commercial*, *uso commerciale*) are also a **means of interpretation**. The expressions used (see paras 135–139) and the conduct adopted by the parties (see paras 156–158) may and must, as a rule, be understood in the sense that they have in accordance with the trade usages of the industry in question.

155 The **INCOTERMS** (International Commercial Terms 2020) published by the ICC in Paris (see paras 958–959)[107] and the Uniform Customs and Practices for Documentary Credits (UCP 600) are examples of such trade usages.

7 Parties' Conduct after the Conclusion of the Contract

156 According to the Federal Supreme Court, the parties' conduct after the conclusion of the contract can only be considered when carrying out a **subjective interpretation** (see para. 132). With respect to the objective interpretation (see para. 132), the parties' subsequent conduct is of no importance.[108]

157 However, there is no convincing reason why the subsequent conduct of the parties should not also form an element of the circumstances in the context of an objective interpretation and thus also be used for the interpretation.[109] The purpose of interpretation, whether

[103] DFSC 143 III 558 c. 4.1.1, DFSC 142 III 671 reas. 3.3.
[104] Lina T. Stark, *Drafting Contracts: How and Why Lawyers Do as They Do*, 2nd edn (New York: Wolters Kluwer Law & Business, 2014), p. 80.
[105] DFSC 138 III 659 reas. 4.2.1, DFSC 4A_473/2021 of 27 September 2022 reas. 3.2.2.
[106] *Debenhams Retail plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868.
[107] DFSC 140 III 418 reas. 4.4.1.
[108] DFSC 143 III 157 reas. 1.2.2, DFSC 4A_216/2017 of 23 June 2017 reas. 3.2.
[109] Müller, 'BK-Art. 18 CO', paras 163–168.

subjective (see para. 132) or objective (see para. 132), is indeed to determine what reasonable parties acting under the circumstances **at the time of the conclusion of the contract** would have expressed and consequently intended by the use of their words or by their other conduct (see para. 132).

158 **Other legal systems**, such as the Italian[110] and Spanish[111] legal systems explicitly recognise the parties' subsequent conduct as a means of interpretation. English law, on the other hand, takes a restrictive stance and generally does not consider the parties' post-formation conduct as a means of interpretation.[112] However, there are exceptions to this principal stance when (1) it can be proven that the parties have specifically agreed to subsequently amend or terminate the contract;[113] and (2) in cases of estoppel by convention (see para. 148).

C Maxims of Interpretation

159 Maxims of interpretation are **general principles** according to which the interpretation must be carried out.[114] The Federal Supreme Court has recognised the following seven maxims of interpretation.

1 Necessity of Interpretation

160 Even a seemingly clear wording of an expression of intent or a contractual provision requires interpretation in order to ascertain its meaning. Therefore, the **wording alone may never be considered decisive**.[115] Swiss law therefore rejects any plain meaning rule (*Eindeutigkeitsregel*, *théorie de l'acte clair*, *interpretazione basata sul chiaro senso del testo*). The means of interpretation (see paras 134–158), for example, the context of the contract (see paras 142–143) or the purpose of the contract pursued by the parties (see paras 149–153), may in fact lead to the conclusion that a contractual provision does not correctly express the meaning of the parties' agreement.

[110] Art. 1362(2) CCI.
[111] Art. 1282 Spanish Civil Code.
[112] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL) 603 (Lord Reid).
[113] Edwin Peel, *Treitel on The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020), para. 6-026.
[114] Huguenin, *Obligationenrecht*, para. 286.
[115] DFSC 140 III 134 reas. 3.2, DFSC 4A_503/2020 of 19 January 2021 c. 5.2.

161 The rule that the interpretation must not stick to the literal sense of the words used (*Buchstabenauslegung*; *interprétation littérale*, *au pied de la letter*; *interpretazione letterale*)[116] is also found in **other legal systems**, such as under German,[117] Austrian,[118] French[119] and Italian[120] law, as well as in European harmonisation projects such as the Principles of European Contract Law (PECL)[121] and the Draft Common Frame of Reference (DCFR).[122] Spanish law[123] expressly provides for the plain meaning rule. In English law, there seems to be no actual plain meaning rule. The case law sometimes emphasises that the court should primarily give effect to the 'clear and unambiguous language' of a contractual provision.[124] The clearer the 'natural meaning' of an expression, the less easily the court should depart from it. Other decisions, on the other hand, emphasise that the interpretation must go beyond the natural meaning of the expression and seek other possible understandings based on the circumstances of the transaction in question.[125]

2 Priority of Clear Wording

162 According to the case law of the Federal Supreme Court, the clear wording enjoys **priority over other means of interpretation**.[126] If the other means of interpretation do not lead with certainty to a different result of interpretation, the wording shall prevail.

3 Interpretation in Accordance with Good Faith

163 Under an objective interpretation (see para. 132), contracts (and expressions of intent) must be interpreted in accordance with the principle of good faith (Art. 2 CC; see paras 71–72). This includes, in particular, the **principle of trust** (see para. 132).

164 The assumption underlying the interpretation of the contract that the parties intended an **appropriate solution** is also based on the

[116] DFSC 127 III 444 reas. 1b, DFSC 4A_254/2021 of 21 December 2021 reas. 5.2.2.
[117] Section 133 BGB.
[118] Art. 914 ABGB.
[119] Art. 1188(1) CCF.
[120] Art. 1362(1) CCI.
[121] Art. 5:101(1) PECL.
[122] Art. II.-8:101(1) DCFR.
[123] Art. 1281 Spanish Civil Code.
[124] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 (Lord Clarke).
[125] *Deutsche Trustee Co Ltd v Cheyne Capital (Management) UK LLP* [2015] EWHC 2282 (Ch).
[126] DFSC 133 III 406 reas. 2.2, DFSC 5A_544/2021 of 4 August 2021 reas. 3.1.

principle of good faith (Art. 2 CC; see paras 71–72).[127] If, however, the interpretation shows that the parties wanted a solution, in that specific individual case, which appears to the arbitrator or judge to be unreasonable, the arbitrators or judges may not substitute their own values for those of the parties.[128]

4 Contract Conclusion as the Relevant Point in Time

165 Within the framework of objective interpretation (see para. 132), the arbitrator or judge determines, with the help of the various means of interpretation (see paras 134–158), how the parties could, and should, have understood their contract **at the time of its conclusion**.

166 The contract must thus be interpreted '***ex tunc***', which means that the arbitrator or judge must mentally go back to the time of the conclusion of the contract and ask how the parties could and should have understood their mutual expressions of intent and the resulting contract at that time in view of all the accompanying circumstances known to them (see paras 140–141).[129]

5 Interpretation as a Whole

167 It follows from a **systematic interpretation** (see paras 142–143) that the individual contractual provision is to be interpreted in the overall context in which it stands.[130]

168 **Conflicting provisions** within a contract are therefore to be interpreted in a 'harmonising' manner as far as possible, so that they have an appropriate meaning as a whole. If different meanings of a contractual provision are justifiable, the meaning that does not contradict any other contractual provision and thus gives the contract as a whole an appropriate meaning shall prevail.[131]

6 *Contra Proferentem* Rule

169 According to the *contra proferentem* rule (*Unklarheitsregel*, *règle des clauses ambiguës*, *regola in case di dubbio*), ambiguities in a contract are to be interpreted in case of doubt to the detriment of the author of the contractual text (***in dubio contra stipulatorem***, *in dubio contra proferentem*). If the

[127] DFSC 140 III 134 reas. 3.2, DFSC 4A_460/2021 of 3 January 2022 reas. 3.1.4.
[128] Müller, 'BK-Art. 18 CO', para. 188.
[129] DFSC 132 III 626 reas. 3.1, DFSC 4A_169/2021 of 18 January 2022 reas. 3.2.1.
[130] DFSC 140 III 391 reas. 2.3; DFSC 4A_330/2021 of 5 January 2021 reas. 3.2.1.
[131] DFSC 133 III 607 reas. 2.2, DFSC 4A_262/2015 of 31 August 2015 reas. 3.4.

arbitrator or judge finds that there are two possible interpretations of a contractual provision (ambiguity), such arbitrator or judge must prefer the one that is less favourable to the author of the provision.[132]

170 Under Swiss law, the *contra proferentem* rule only applies when the following **three cumulative conditions** are met:

- The means of interpretation (see paras 134–158) do **not lead to a clear result**. It is therefore not sufficient that the parties disagree on the interpretation (see para. 133). Rather, it is necessary that several meanings are seriously arguable and the means of interpretation fail, with the result that the existing doubt ('*in dubio*') between the different meanings can only be resolved with the help of the *contra proferentem* rule;[133]
- The ambiguous part of the contract (clause or section) was **drafted exclusively by one party**;[134] and
- Of the two (or more) meanings, **one is less favourable** to the drafter of the contract text.

171 In practice, the *contra proferentem* rule is mainly used for the interpretation of General Terms and Conditions (**GTCs**), especially in the insurance sector (*in dubio contra assecuratorem*).[135] Case law has not yet clearly stated whether the scope of application of the *contra proferentem* rule should be limited to GTCs or not.[136]

172 This maxim of interpretation, which originates from Roman law, is widely recognised in **comparative law**. It is generally known in French,[137] Spanish[138] and Austrian[139] law, whereas in German[140] and Italian[141] law, it is limited to the interpretation of GTCs. English law also recognises the *contra proferentem* rule, namely, in connection with exclusion or exemption clauses[142] and unfair terms in consumer contracts.[143]

[132] DFSC 140 V 145 reas. 3.3, DFSC 4A_232/2019 of 18 November 2019 reas. 2.1.
[133] DFSC 142 III 671 reas. 3.9, DFSC 4A_232/2019 of 18 November 2019 reas. 3.3.
[134] DFSC 133 III 607 reas. 2.2, DFSC 4A_232/2019 of 18 November 2019 reas. 2.1–2.2, DFSC 4A_47/2015 of 2 June 2015 reas. 7.4.
[135] DFSC 142 III 671 reas. 3.1.
[136] Müller, 'BK-Art. 18 CO', para. 208.
[137] Art. 1190 CCF.
[138] Art. 1288 Spanish Civil Code.
[139] Section 915 ABGB.
[140] Section 305c(2), 310(3)(2) BGB.
[141] Art. 1370 CCI.
[142] Peel, *Treitel on the Law of Contract*, para. 7-015.
[143] Art. 69(1) Consumer Rights Act 2015 (UK) (CRA).

The rule has also found its way into the European GTC Directive,[144] which has been implemented in all EU Member States. International and European harmonisation projects such as the Unidroit Principles of International Commercial Contracts (2016) (PICC),[145] the PECL[146] and the DCFR[147] also include this rule.

7 Other Interpretation Maxims in Cases of Ambiguity

173 The *contra proferentem* rule (see paras 169–172) is the most important maxim for deciding cases of ambiguity. In addition, there are a number of **other maxims** that can be employed **in cases of ambiguity**, namely the following:

- ***Favor negotii***: Among several reasonable interpretations of a contractual provision, in case of doubt, the one which ensures its validity is to be preferred (*vertragserhaltende Auslegung*, *effet utile*, *interpretazione volta a salvaguardare l'efficacia del contratto*).[148] Comparatively, German,[149] French,[150] Italian,[151] Spanish[152] and English law[153] as well as the Common European Sales Law (CESL),[154] the PICC,[155] the PECL[156] and the DCFR[157] also include this rule of interpretation;
- **Interpretation in conformity with the non-mandatory provisions of statutory law**: Among several reasonable interpretations of a contractual provision, in case of doubt, the interpretation which is in conformity with the non-mandatory provisions of statutory law (see paras 69–70) is to be preferred. Non-mandatory statutory law usually provides for a solution that balances the interests of both parties.[158] Anyone who

[144] Art. 5 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (European GTCs Directive).
[145] Art. 4.6 PICC.
[146] Art. 5:103 PECL.
[147] Art. II.-8:103(1) and (2) DCFR.
[148] DFSC 120 II 35 reas. 4a, DFSC 4A_257/2020 of 18 November 2010 reas. 3.3.
[149] Section 2048 BGB.
[150] Art. 1191 CCF.
[151] Art. 1367 CCI.
[152] Art. 1284 Spanish Civil Code.
[153] Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract*, 31st edn (Oxford: Oxford University Press, 2020), p. 183.
[154] Art. 63 CESL.
[155] Art. 4.5 PICC.
[156] Art. 5:106 PECL.
[157] Art. II.-8:106 DCFR.
[158] DFSC 126 III 388 reas. 9d.

wishes to deviate from the non-mandatory law must therefore express this with sufficient clarity;[159] and

- **Restrictive interpretation of clauses deviating from non-mandatory statutory law**: It follows from the interpretation in conformity with the non-mandatory statutory law that provisions which deviate from the non-mandatory law are to be interpreted restrictively in case of doubt.[160] Therefore, notably waivers (*Verzichtserklärung*, *déclaration de renonciation*, *dichiarazione di rinuncia*),[161] exclusion clauses (*Freizeichnungsklausel*, *clause exclusive de responsabilité*, *clausola esclusiva di risponsabilità*; see paras 473–479)[162] and statements of receipt in full and final settlement (*Saldoquittung*, *quittance pour solde de compte*, *ricevuta a saldo*; see paras 3069–3070)[163] are to be interpreted restrictively.

VI Validity of Contracts

A Principle

174 If a contract was formed according to the principles described above (see paras 101–173), that is, if the parties have agreed on the (objectively and subjectively) essential elements (see para. 61), one has to verify whether the contract is valid. The following **two aspects** have to be examined:

- First, whether there are statutory rules regarding the **form** of the contract, and if so, whether the contract respects these rules (see paras 176–198); and
- Second, whether the **content** of the contract is impossible, unlawful or immoral (see paras 199–220).

175 Contracts that violate the relevant formal requirements are **null and void** (see paras 190–195). The same holds true for contracts with an impossible, unlawful or immoral content (see paras 216–220).

[159] DFSC 133 III 607 reas. 2.2.
[160] DFSC 130 III 686 reas. 4.3.
[161] Müller, 'BK-Art. 18 CO', para. 216.
[162] DFSC 130 III 686 reas. 4.3.1, DFSC 118 II 142 reas. 1a, DFSC 4A_444/2017 of 12 April 2018 reas. 5.1.
[163] DFSC 130 III 49 reas. 2.1, DFSC 5A_828/2010 of 28 March 2011 reas. 4.2.2, DFSC 4C.23/2005 of 24 June 2005 reas. 3.1.

B *Validity with Respect to Form*

1 Principle of Freedom of Form

176 The principle of freedom of form (*Formfreiheit*, *liberté de la forme*, *libertà della forma*) provides that the validity of legal transactions (*Rechtsgeschäft*, *acte juridique*, *atto giuridico*) does **not depend on their form**.[164] This means that, in principle, contracts can be formed orally, by conclusive actions or – in certain circumstances – even by doing nothing (see para. 121).

177 The principle of freedom of form means that the contract is, in principle, already concluded when the substantive requirements for its conclusion (see paras 100–132) are fulfilled, without any additional formal requirements having to be met. Since these substantive requirements essentially consist of the 'meeting of the minds' between the contracting parties (see paras 127–130), the principle of freedom of form is sometimes also referred to as the **principle of consent** (*Konsensprinzip*, *principe du consensualisme*, *principio del consenso*; see para. 59).

178 **Article 11 CO** expresses the principle of freedom of form as follows: '(1) The validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law. (2) In the absence of any provision to the contrary on the significance and effect of formal requirements prescribed by law, the contract is valid only if such requirements are satisfied.'

179 Freedom of form is one aspect of the **freedom of contract** (*Vertragsfreiheit*, *liberté contractuelle*, *libertà contrattuale*; see para. 49).

2 Statutory Formal Requirements

a Purpose of Formal Requirements

180 The legislator regularly pursues a **specific policy purpose** when it restricts the principle of freedom of form (see paras 58–62), which has nothing directly to do with the latter.[165]

181 Statutory formal requirements pursue the following **purposes**:[166]

- **Clarification and preservation of evidence**;
- **Protecting the parties from making rash decisions**, in particular, against carelessly entering into a contract;

[164] Müller, 'BK-Art. 11 CO', para. 11.
[165] DFSC 132 III 549 reas. 2.1.1.
[166] Müller, 'BK-Art. 11 CO', paras 46–59.

- **Legal certainty**, not only between the parties to the contract but also towards third parties;
- **Facilitating the keeping of registers**, in particular, in the case of real estate transactions (land register) and in connection with company law (commercial register); and/or
- Consumer information, in order to **protect the weaker party** (see paras 363–368).

b Types of Formal Requirements

182 There are the following **four types** of statutory formal requirements:

- Simple written form (see para. 183);
- Qualified written form (see para. 184);
- Public deed (see para. 185); and
- Text form (see para. 186).

183 **Simple written form**: A contract in simple written form (*einfache Schriftlichkeit*, *forme écrite simple*, *forma scritta semplice*) must fulfil the following two **conditions**:[167]

- **A declaration in written form**: The expression of intent is recorded permanently on a physical object (e.g., paper) in characters (Art. 13(1) CO).[168] The different expressions must not all be on one single document; and
- **Signature**:[169] The signature (*Unterschrift*, *signature*, *firma*) has the following two functions: (1) The declarant expresses the intent to make a declaration with the aid of the physical object, the content of which corresponds to the content of the physical object;[170] and (2) since the signature designates the declarant, it serves to identify the person making the declaration with the content of the expression of intent.[171] In general, a signature with a written last name is sufficient. According to Article 14(1) CO, the signature must be handwritten. However, an authenticated electronic signature combined with an authenticated time stamp within the meaning of the Federal Act on Certification

[167] Müller, 'BK-Art. 13 CO', paras 13–67.
[168] Müller, 'BK-Art. 13 CO', paras 17–30.
[169] Müller, 'BK-Art. 13 CO', paras 31–67.
[170] Müller, 'BK-Art. 13 CO', para. 35.
[171] DFSC 140 III 54 reas. 2.3.

Services in Relation to Electronic Signatures of 19 December 2003 (ESigA) is deemed equivalent to a handwritten signature, subject to any statutory or contractual provisions to the contrary (Art. 14(2bis) CO). The Federal Supreme Court has not yet clearly decided the question of whether an expression of intent transmitted by fax meets the simple written form requirement.[172] It appears, however, to approve the authors who recognise the fax as a simple written form.[173] An e-mail, a text message, or MMS, etc., is only sufficient for the simple written form if it fulfils the conditions for an authenticated electronic signature. This means that in the vast majority of cases, a contract requiring the simple written form cannot be concluded via e-mail. However (only) the declaration of the party on which the contract imposes obligations must be in written form (Art. 13(1) CO). Therefore, in a unilateral contract (see para. 344) such as the contract of donation (Arts 239–252 CO), only the promise of the person making the donation must adhere to the simple written requirement (Art. 243 (1) CO). The acceptance of the person receiving the donation is not subject to any formal requirement.

184 **Qualified written form**: A written formal requirement is qualified (*qualifizierte Schriftlichkeit*, *forme écrite qualifiée*, *forma scritta qualificata*) if further (substantive or formal) requirements (in comparison to the simple written form; see para. 183) are added by statute.[174] For instance, the non-competition clause at the expense of the agent must have a certain content in order to fulfil the simple written formal requirement (Art. 418d(2) CO in connection with Art. 340 et seq. CO; see paras 2636–2658). Similarly, if the guarantor is a natural person and the liability under the contract of surety does not exceed the sum of CHF 2,000, the guarantor has to indicate the amount for which the guarantor is liable in the latter's own hand in the contract of surety (Art. 493(2) CO).

185 **Public deed**: The public deed (notarisation; *öffentliche Beurkundung*, *acte authentique*, *atto pubblico*) is the strictest statutory formal requirement.[175] It is deemed necessary for particularly important or high-risk contracts and whenever the legal transaction is the basis for

[172] DFSC 128 III 212 reas. 2b/cc.
[173] DFSC 121 II 252 reas. 3; although not for acts before judicial authorities; see, e.g., DFSC 142 IV 299 reas. 1.1. and DFSC 142 V 152 reas. 4.5.
[174] Müller, 'BK-Art. 11 CO', paras 82–94.
[175] Müller, 'BK-Art. 11 CO', paras 111–149.

entry in a public register (see para. 900). By notarising a contract, the public notary records expressions of intent or legally relevant facts in a document or in electronic form (Art. 55a Final Title: Commencement and Implementing Provisions CC) in a prescribed form and in a regulated procedure that is different in each Canton (Art. 55(1) Final Title: Commencement and Implementing Provisions CC). However, Federal law imposes certain minimal requirements.[176]

186 **Text form**: The development of modern means of communication has led to rather recent statutes developing a new form, known as the text form (*Textform*, *forme textuelle*, *forma di testo*).[177] The text form is a facilitated form of the simple written form (see para. 183). Where the simple written form is considered too strict but the parties must nevertheless be protected by certain formal requirements, these statutes require the text form. This newer statutory form applies, in particular, to procedural contracts, such as the arbitration agreement (Art. 358 of the Swiss Civil Procedure Code of 19 December 2008 (CCP); Art. 178(1) of the Federal Act on Private International Law of 18 December 1987 (PILA)) or the forum selection agreement (Art. 17 CCP, Art. 5(1) PILA, Art. 23(1) Lugano Convention). The text form must fulfil the following two requirements: (1) permanent, unchanged reproducibility in the form of a text; and (2) identification of the parties.[178]

c Scope of the Formal Requirements

187 If the statute requires a certain form, the question arises as to **which parts of the expression of intent** must be in this form. Federal statutory law does not answer this question in general terms, and therefore the case law and legal doctrine have addressed this issue.[179]

188 The scope of application of the formal requirement depends on its **protective purpose** (see para. 181). Accordingly, only those contractual elements whose adherence to a formal requirement is indispensable for the realisation of the respective statutory protective purpose are subject to such formal requirements.[180]

[176] Müller, 'BK-Art. 11 CO', para. 117.
[177] Müller, 'BK-Art. 11 CO', paras 95–110.
[178] Müller, 'BK-Art. 11 CO', paras 103–110.
[179] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 536.
[180] Müller, 'BK-Art. 11 CO', para. 158.

189 As a **general rule**, all objectively essential elements (see para. 61) of a contract are subject to the relevant formal requirement. With respect to the subjectively essential elements (see para. 61), only those which are typical of this kind of contract are subject to the relevant formal requirement.[181]

3 Consequences of a Violation of Formal Requirements

a Principle of Nullity

190 If a contract does not respect the relevant statutory formal requirements, it is invalid (Art. 11(2) CO; see para. 906). A contract that is invalid is **null and void**.[182] This means that the contract has no legal effects. It is as if the parties had never concluded the contract.

191 The contract is already null and void **from the beginning**. This means that the contract is set aside with retrospective effect (*ex tunc*) to the point in time of its conclusion. Restitution of the obligations that were already performed must be made according to the rules on unjust enrichment (Arts 62–67 CO; see para. 85).[183]

192 The nullity is absolute and incurable. The arbitrator or judge must **automatically** (*ex officio*) take nullity into account. Nullity may be asserted by anyone, even a person not involved with the contract, at any time, if such person has a legal interest in doing so.[184]

b Mitigation through the Prohibition of an Abuse of Rights

193 The prohibition of an abuse of rights (Art. 2(2) CC; see paras 73–74) **mitigates the practical significance of the formal invalidity** to a large extent.[185]

194 According to case law, the invocation of the formal invalidity of the contract constitutes an abuse of rights (Art. 2(2) CC; see paras 73–74), in particular, in the following **three situations**:

- If both parties have fully **performed the formally invalid contract**, the invocation of formal invalidity is an abuse of rights if the following two cumulative conditions are met: (1) the party invoking the formal invalidity of the contract has performed its obligations voluntarily and with knowledge of the lack of form and the resulting formal

[181] DFSC 135 III 295 reas. 3.2, DFSC 4A_530/2016 of 20 January 2017 reas. 8.2.
[182] DFSC 137 III 243 reas. 4.4.6.
[183] DFSC 137 III 243 reas. 4.4.6.
[184] DFSC 112 II 330 reas. 2b.
[185] Müller, 'BK-Art. 11 CO', para. 193.

invalidity; and (2) the assessment of all circumstances of the individual case, in particular, the conduct of the parties at the time of, and after, the conclusion of the contract, does not clearly lead to the conclusion that there is no abuse of rights.[186] If the parties have voluntarily fulfilled the contract only 'for the main part', this, in combination with other circumstances, may also make the invocation of formal invalidity appear to be an abuse of rights;[187]

- If the party invoking the formal invalidity has **fraudulently caused or consciously accepted the violation** of the relevant formal requirements;[188] or
- If the invocation of the formal invalidity serves a **purpose that is alien to the formal requirement** (see paras 180–181), for example, in order to evade warranty claims (Arts 197–201 CO for the contract of sale, see paras 749–853; Arts 367–371 CO for the contract for work and services, see paras 1357–1576) or to benefit from the increase in value that the property has experienced after the conclusion of the contract.[189]

195 If the invocation of the formal invalidity of the contract is an abuse of rights (Art. 2(2) CC; see paras 73–74), the parties shall perform the contract **as if it had been validly concluded**.[190]

4 Formal Requirements Contractually Agreed Upon

196 If the statutory law does not impose any formal validity requirements on the contract in question, the parties can nevertheless **agree to subject their contract to a certain formal requirement** (see para. 182). The parties can also agree to subject their contract to a stricter formal requirement than the one imposed by the statutory law, for example, public deed (see para. 185) instead of simple written form (see para. 183).

197 If the parties have agreed to subject the conclusion of such a contract to the compliance with a certain formal requirement, it is assumed that the parties **do not intend to be bound** until such formal requirements are met (Art. 16(1) CO).

[186] DFSC 140 III 200 reas. 4.2, DFSC 5A_980/2014 of 27 August 2015 reas. 5.3, DFSC 4A_98/2014 of 10 October 2014 reas. 4.2.2.
[187] DFSC 104 II 99 reas. 4c.
[188] DFSC 138 III 401 reas. 2.3.1, DFSC 112 II 330 reas. 2a.
[189] DFSC 112 II 330 reas. 3a, DFSC 4A_573/2016 of 19 September 2017 reas. 5.3.
[190] DFSC 98 II 313 reas. 2.

198 If the parties reserve the use of the written form without further specifications, the requirement of the **simple written form** as defined by statute (Arts 13–15 CO; see para. 183) applies (Art. 16(2) CO).

C Validity with Respect to Content

1 Principle of Freedom of Content

199 Freedom of content (*Inhaltsfreiheit*, *liberté du contenu*, *libertà di definire il contenuto del contratto*) is the **substantive aspect of the freedom of contract** (see para. 49).

200 According to this principle, the parties may, within the limits of the law, establish the content of their content at their discretion (Art. 19 (1) CO).[191] The content of the contract must **not be unlawful, immoral or impossible** (Art. 20(1) CO).

2 Limits to the Freedom of Content

a Unlawfulness

201 The content of the contract must not be unlawful (*widerrechtlich*, *illicite*, *illecito*) (Art. 20(1) CO). The content is unlawful if it **violates mandatory provisions of Swiss law** (see paras 67–68). These provisions can be found in public as well as private law and in Federal as well as Cantonal law.

202 A contract can be unlawful for **several reasons**:[192]

- The **subject matter of the contract** is unlawful: The obligation agreed upon or the modalities of its performance are unlawful. The subject matter is unlawful, independently of whether one undertakes the obligation to perform it (e.g., contract for the sale of illegal narcotics);[193]
- The **conclusion of a contract** with the agreed content is unlawful, for example, the undertaking to commit a crime;[194] or

[191] DFSC 147 IV 73 reas. 7.1.
[192] DFSC 134 III 438 reas. 2.2, DFSC 4A_73/2021 of 1 June 2021 reas. 4.1.1.
[193] DFSC 121 IV 365 reas. 9a, DFSC 117 IV 139 reas. 3d/bb, DFSC 6B_994/2010 of 7 July 2011 reas. 5.3.3.2.
[194] Olivier Guillod and Gabrielle Steffen, 'Art. 19/20', in Thévenoz and Werro (eds), *Commentaire romand, Code des obligations I – Art. 1–529 CO*, 3rd edn (Basel: Helbing Lichtenhahn, 2021) (cited as: Guillod and Steffen, 'CR-Art. 19/20 CO'), para. 61.

- The underlying **purpose of the contract** is unlawful: This is the case, for instance, if a party grants the other a loan so that the latter can trade illegal narcotics.[195]

203 **Transactions** that attempt to **evade or circumvent a situation prohibited by law** (*Umgehungsgeschäft*; *acte de contournement*; *azione elusiva*, *atto di elusione*), are equally unlawful. This is the case if the parties attempt to escape the application of a mandatory statutory provision (see paras 67–68) by resorting to an atypical transaction which leads to an identical economic result. If the interpretation of the circumvented provision leads to the conclusion that the circumventing transaction should be covered as well, the latter is equally unlawful.[196] For instance, in Switzerland, giving a foreigner a similar status to that of an owner of real property is considered a circumvention of the provision forbidding the sale of real estate property to certain foreigners.[197]

b Immorality

204 The content of the contract must not be immoral (*sittenwidrig*, *contraire aux mœurs*, *contrario ai buoni costumi*) (Art. 20(1) CO). The content is immoral (against *bonos mores*) if it **violates 'prevailing morals**, i.e., the general sense of decency or the ethical principles and standards of value immanent in the overall legal system' (emphasis added).[198] Accordingly, the content of the contract is immoral if it violates social (moral-ethical) values that are, in society's view, considered to be more important than the freedom of contract (see paras 49–70).

205 For instance, the promise to pay **bribe money** is immoral.[199] However, contracts that are concluded because bribe money is paid are only considered to violate *bonos mores* if the contract's content was influenced by the bribe.[200] Similarly, a contract to distort competition by either paying someone not to bid in an auction (*pactum de non*

[195] DFSC 112 IV 47 reas. 4, DFSC 4A_753/2011 of 16 July 2011 reas. 6.4.
[196] DFSC 132 III 212 reas. 4, DFSC 4A_215/2019 of 7 October 2019 reas. 3.1.2.
[197] DFSC 107 II 440 reas. 1, DFSC 2C_1070/2016 of 3 October 2017 reas. 3.3.
[198] DFSC 147 IV 73 reas. 7.1, DFSC 136 III 474 reas. 3, DFSC 4A_350/2020 of 12 March 2021 reas. 5.2.2.
[199] DFSC 129 III 320 reas. 5.2, DFSC 119 II 380 reas. 4b.
[200] DFSC 147 IV 479 reas. 6.5.4.3, DFSC 129 III 320 reas. 5.2; Christoph Müller, 'The Impact of Corruption on the Contract, Including the Issue of Applicable Law', in Meier and Oetiker (eds), *Arbitration and Corruption, ASA Special Series No. 47* (The Netherlands: Wolters Kluwer, 2021), p. 39.

licitando)[201] or by having a front person bid on one's behalf (*pactum de licitando*)[202] has an immoral content.

206 If a contract subject to Swiss law **violates mandatory foreign law**, the Federal Supreme Court examines based on the criterion of immorality whether there is a violation of Swiss public policy.[203] According to case law, only legal transactions 'which seriously infringe Swiss public policy or violate moral concepts that are recognised and have remained constant over the course of time' are immoral.[204] Therefore, for example, the use, production and trade of war material for hostile areas is not always contrary to the general sense of morality in Switzerland.[205]

207 Contracts that **violate personal rights** (*Persönlichkeitsrecht*, *droit de la personnalité*, *diritto della personalità*) which are protected by Article 27(2) CC are also immoral. According to Article 27(2) CC, '[n]o person may surrender his or her freedom or restrict the use of it to a degree which violates the law of public morals' (see also Art. 19(2) CO; see para. 56). A contract violates personal rights if:

- The contractual obligation touches the **core personal sphere of a party** which cannot be subject to any contractual obligation.[206] This is the case of contracts which affect the social freedom of the person. For example, partners may withdraw from a simple partnership contract (Arts 530–551 CO) whose purpose is to bring criminal proceedings against a certain third party;[207] and
- The **contractual undertaking is excessive** (*übermässige Bindung*, *engagement excessif*, *impegno eccessivo*).[208] This can be determined by considering the intensity or duration of the contract and the adequacy of the consideration.[209] Contracts that last 'forever' (without the possibility of termination) are generally considered to violate personal rights because the parties' personal freedom is encroached upon in an excessive way.[210] According to a statutory presumption

[201] DFSC 109 II 123 reas. 2b, DFSC 82 II 21 reas. 1.
[202] DFSC 109 II 123 reas. 2b.
[203] DFSC 80 II 49 reas. 3, DFSC 4A_263/2019 of 2 December 2019 reas. 2.3, DFSC 4C.172/2000 of 28 March 2001 reas. 5d.
[204] DFSC 4C.172/2000 of 28 March 2001 reas. 5e.
[205] DFSC 4C.172/2000 of 28 March 2001 reas. 5e and 5f.
[206] DFSC 143 III 480 reas. 4.2, DFSC 129 III 209 reas. 2.2.
[207] DFSC 48 II 439, reas. 3.
[208] DFSC 136 III 401 reas. 5.4, DFSC 129 III 209 reas. 2.
[209] DFSC 117 II 273 reas. 3c, DFSC 114 II 159 reas. 2a, DFSC 104 II 108 reas. 5.
[210] DFSC 143 III 480 c. 4.2.

(Art. 340a(1) CO), a non-competition clause is considered excessive if it lasts for more than three years. Similarly, the unrestricted assignment of all present and future claims is considered to constitute a violation of personal rights.[211]

c Impossibility

208 The content of the contract must not be impossible (*unmöglich*, *impossible*, *impossibile*) (Art. 20(1) CO). The content is impossible if it is **objectively impossible to perform an obligation from the very beginning**, that is, already at the time of the conclusion of the contract.[212]

209 Impossibility can be based on **factual reasons** (e.g., the construction of a *perpetuum mobile*) or **legal reasons** (e.g., contract intending to transfer the right of residence even though this right is not transferable pursuant to Art. 776(2) CC).[213]

210 The obligation must already be impossible to perform at the time of the conclusion of the contract (see para. 126). This distinguishes **initial impossibility** (*anfängliche Unmöglichkeit*, *impossibilité initiale*, *impossibilità iniziale*) within the meaning of Article 20(1) CO from subsequent impossibility (*nachträgliche Unmöglichkeit*, *impossibilité subséquente*, *impossibilità sopravvenuta*) within the meaning of Article 97(1) CO (see para. 436) and Article 119 CO (see paras 484–490).

211 Impossibility must be objective (*objektive Unmöglichkeit*, *impossibilité objective*, *impossibilità oggetiva*). The obligation is **objectively impossible** if it cannot be performed by anyone, neither by the debtor itself nor by any third party (e.g., sale of a unique crystal vase that was destroyed). This distinguishes impossibility within the meaning of Article 20(1) CO from subjective impossibility (*subjektive Unmöglichkeit*, *impossibilité subjective*, *impossibilità soggettiva*). The obligation is merely subjectively impossible if it cannot be performed only by the debtor (e.g., sale of a crystal vase that belongs to a third party if this third party is not willing to transfer the vase; see para. 590) (see Figure 3.2).

[211] DFSC 114 II 159 reas. 2.
[212] DFSC 116 II 191 reas. 3a, DFSC 102 II 339 reas. 3, DFSC 5A_69/2018 of 21 September 2018 reas. 3.3.
[213] DFSC 102 II 339 reas. 3 (sale of claims), DFSC 96 II 18 reas. 2a (sale of shares).

212

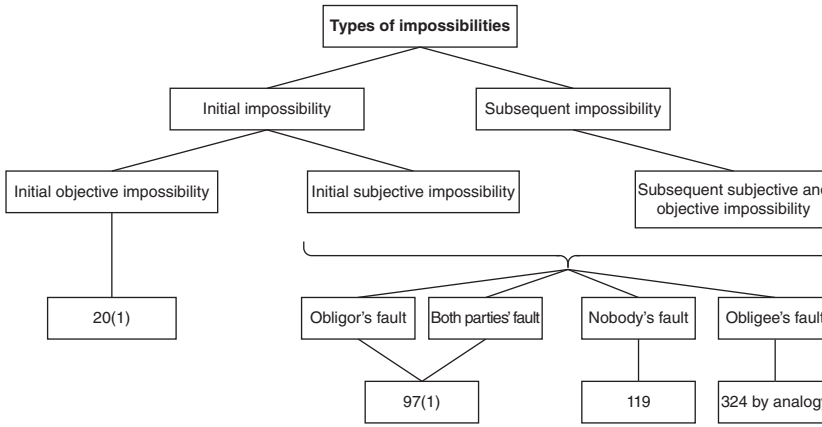

Figure 3.2: Types of impossibilities

d Unfair Advantage

213 According to the principle of freedom of contract (see paras 49–70), the parties are, in principle, **free to determine the financial value of the contractual performances**.

214 However, **Article 21(1) CO** protects the economically weaker party in the following terms: 'Where there is a **clear discrepancy** between performance and consideration under a contract concluded because of one party's exploitation of the other's **strained circumstances, inexperience or thoughtlessness**, the person suffering damage may declare within one year that he will not honour the contract and demand restitution of any performance already made' (emphasis added).

215 This objection must be raised within **one year after the conclusion of the contract** (Art. 21(2) CO).

3 Consequences of a Violation of the Limits to the Freedom of Content

a Principle of Nullity and Its Limits

216 According to Article 20(1) CO, a contract is **null and void** if its terms are impossible, unlawful or immoral (see para. 56).

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217 However, according to today's case law, nullity only occurs 'if this legal consequence is **expressly provided for by the statute** or results from the meaning and purpose of the violated norm' (emphasis added).[214] Furthermore, if one party knew or should have known of the risk of nullity, the legal consequence is not nullity but rather damages for breach of pre-contractual duties (see paras 98–99).[215]

218 Based on the principle of separability, forum selection and **arbitration clauses** remain valid insofar as they are intended, according to the parties, to be applicable to the dispute on the nullity of the contract.[216]

b Partial Nullity

219 According to **Article 20(2) CO**, '[h]owever, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them'. Partial nullity (*Teilnichtigkeit*, *nullité partielle*, *nullità parziale*) is an expression of the general principle that nullity should only extend as far as the protective purpose of the infringed norm requires.[217] The aim of the sanction is not the elimination of the contract but of the defect.[218]

220 In particular, in commercial contracts it is quite common to include a **severability clause** (severance clause; *salvatorische Klausel*; *clause de sauvegarde*, *clause de divisibilité*; *clausola salvatoria*). Such a clause typically states that if parts of the contract are deemed to be unenforceable for some reason, the remainder of the contract will remain valid.[219]

D Lack of Consent

1 Principle

221 According to the **principle of trust** (see para. 132), which dominates Swiss law, the declarant is bound by a declaration in the way the recipient of the declaration had to, and was allowed to, understand it objectively and in

[214] DFSC 143 III 600 reas. 2.8.1.
[215] DFSC 140 III 200 reas. 5.2, DFSC A-248/2021 of 27 September 2021 reas. 4.4.2.
[216] DFSC 140 III 134 reas. 3.3.2.
[217] DFSC 134 III 438 reas. 2.3, DFSC 4A_502/2012 of 22 January 2013 reas. 2.1.
[218] DFSC 120 II 35 reas. 4a, DFSC 4A_257/2020 of 18 November 2020 reas. 3.3.
[219] Sylvain Marchand, *Clauses contractuelles: Du bon usage de la liberté contractuelle* (Basel: Helbing Lichtenhahn, 2008), p. 246.

good faith (Art. 2 CC; see paras 71–72) according to the specific circumstances.

222 Under the title 'Lack of consent', however, **Articles 23–31 CO** cover a number of situations in which the actual intention and the declaration diverge in such a way that the declarant is entitled to liberate itself from what was not intended by avoiding the contract. However, the question of a possible lack of consent only arises when it is established, on the basis of interpretation according to the principle of trust (see para. 132), that the declarant is bound to a declaration that such declarant had not intended.[220] The issue of interpretation (Art. 18(1) CO; see paras 133–173) must therefore always precede an analysis based on lack of consent.

223 Cases of a lack of consent can be divided into the following **two main groups**:

- Cases in which a party **correctly formed an intent** to make a certain declaration, but the declaration does not correspond to such intent (mistake in declaration; see paras 226–234); and
- Cases in which a party **incorrectly formed an intent** to make a certain declaration because of a mistake (mistake concerning the basis for the conclusion of the contract, see paras 235–239; motive mistake, see paras 240–241) or because such party was under the influence of the contracting partner, respectively a third party (wilful deception, see paras 251–256; duress, see paras 257–261).

2 Mistake

a Principle

224 Mistake (*Irrtum*, *erreur*, *errore*) is a **discrepancy between reality and perception**. Whether a party is mistaken is a question of fact.[221]

225 The mistake must be **unconscious**. In case of doubt about the correctness of one's own perception, there is not a mistake; the person who acknowledges the possibility of a mistake from the outset and therefore lives with the possible mistake cannot invoke it afterwards.[222]

b Mistake in Declaration

i Principle

226 A mistake in declaration (*Erklärungsirrtum*, *erreur de déclaration*, *errore nella dichiarazione*) occurs when the **expression of intent**

[220] DFSC 129 III 320 reas. 6.2.
[221] DFSC 134 III 643 reas. 5.3.1.
[222] DFSC 4A_308/2016 of 28 October 2016 reas. 5.2.

understood by the recipient does not correspond to that which the declarant intended to communicate. Therefore, the mistake lies in the declaration.[223] There is a discrepancy between the declarant's internal intent and the declared intent, as understood by the recipient according to the principle of trust (see para. 132). The declarant has correctly formed the intent (see para. 102), but a mistake has occurred in the transmission of that intent.[224] Strictly speaking, the mistake in declaration is not a mistake within the meaning of Articles 23–27 CO, but rather a communication problem.

227 There is **no mistake in declaration**, if the recipient has nevertheless understood the declarant correctly (i.e., according to the latter's internal intent). In such a case, there is a factual consensus (Art. 18(1) CO; see para. 132). Accordingly, a mistake in declaration is only conceivable in the presence of a legal consensus (see para. 132). Nor is there a mistake in declaration if the recipient has (wrongly) misunderstood the declarant in a way that the principle of trust (Art. 18(1) CO; see para. 132) did not allow the recipient to understand it. Furthermore, there is no mistake in declaration if the parties make a 'common' mistake. The contract is then concluded in the sense actually intended by both parties.[225]

228 There are **different types** of mistakes in declaration:[226]

- **Mistake in declaration in the narrow sense** (main case): This is a mistake about the meaning of one's expression of intent. Either this mistake concerns the external form of the act of declaration, in that the mistaken party expressed something different from what such party wanted to express, that is, such party misspeaks (e.g., accidentally says 'donate' instead of 'sell') or writes information down incorrectly (e.g., accidently writes '100' instead of '1,000'); or the mistake concerns the meaning of the act of declaration, in that the mistaken party gives an expression (e.g., 'donation') a different meaning (e.g., 'sale') than the recipient understands (who was entitled to such an understanding according to the principle of trust; see para. 132). The examples of Article 24(1)(1.–3.) CO relate to this type of mistake in declaration:

[223] DFSC 110 II 293 reas. 5a, DFSC 4C.208/2005 of 23 September 2005 reas. 4.1.
[224] Pierre Tercier and Pascal Pichonnaz, *Le droit des obligations*, 6th edn (Geneva/Zurich/Basel: Schulthess, 2019), para. 846.
[225] Tercier and Pichonnaz, *Droit des obligations*, para. 847.
[226] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 815–819.

- **Transmission mistake**: A transmission mistake (*Übermittlungsirrtum*, *erreur de transmission*, *errore nella trasmissione*) occurs if the expression of intent is incorrectly communicated, by messenger or otherwise (e.g., by an interpreter). The provisions governing mistake in declaration in the narrow sense apply *mutatis mutandis* to the transmission mistake (Art. 27 CO); and
- **Mistake about the meaning of an unwanted declaration**: The mistaken party does not have any intent to bring about a specific legal consequence (see para. 103), but behaves in a way which another person is entitled to understand as an expression of intent based on the principle of trust (see para. 132). For instance, the 'declarant' makes a joke which the addressee is entitled to understand as a seriously meant declaration of (legal) intent.[227]

ii Fundamental Mistake in Declaration

229 The mistake in declaration can be of the following **two sorts**:

- The **fundamental mistake** (*wesentlicher Irrtum*, *erreur essentielle*, *errore essenziale*) makes the contract unilaterally non-binding (Art. 23 CO; see para. 263), but obliges the mistaken party who invokes it to pay damages (Art. 26 CO; see para. 269) if this mistaken party acted negligently;
- In the presence of a **non-fundamental mistake** (*unwesentlicher Irrtum*, *erreur non-essentielle*, *errore non essenziale*), the contract is binding upon all parties from the very beginning, with the content which the recipient could understand in accordance with the principle of trust (see para. 132), even though this content was not intended by the declarant.[228]

230 The **Code of Obligations** does not indicate in an abstract way when a mistake is fundamental. It merely lists in Article 24(1)(1.–3.) CO some examples of fundamental mistakes (see para. 231).

231 According to Article 24(1)(1.) CO, the following mistakes in declaration are **assumed to be fundamental**:

- Mistake concerning the **content of the contract** (*Irrtum bezüglich des Vertragsinhalts*, *erreur sur le contenu du contrat*, *errore sul contenuto del contratto*; *error in negotio*) (Art. 24(1)(1.) CO): The mistaken

[227] See Section 118 BGB (*Scherzgeschäft*).
[228] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 820.

party enters into a contract that is different from the contract that such party actually intended to enter into. For instance, the mistaken party intended to hire out an object, but sells it instead. The rights and obligations of the party under the contract actually formed must differ in an essential way from the contract that the mistaken party wanted to enter into. Therefore, a simple mistake in the legal characterisation of the contract is not a mistake regarding the content of the contract, since both parties agree as to the content of the contract. Thus, if a party believes that the contract entered into is subject to the rules of a contract of work and services within the meaning of Articles 363–379 CO (see paras 1117–1888) and not a simple mandate contract within the meaning of Articles 394–406 CO (see paras 1894–2505), this false legal characterisation corresponds to an erroneous denomination (see Art. 18(1) CO; see para. 132) with no impact on the contract;[229]

- Mistake concerning the **subject matter of the contract** (*Irrtum bezüglich des Vertragsgegenstandes*, *erreur sur l'objet du contrat*, *errore sull'oggetto del contratto*; *error in corpore*; Art. 24(1)(2.) 1st hypothesis CO): The mistaken party enters into a contract with respect to a subject matter that is different from the subject matter that such party actually intended. For instance, a party purchases a painting by Edouard Monet instead of Claude Monet in an auction. It is the identity of the subject matter that is decisive, not its qualities. If the mistake concerns the qualities of the subject matter, it may be a fundamental mistake (see paras 229–230), although it is true that the nuance is sometimes subtle;
- Mistake concerning the **contracting partner** (*Irrtum bezüglich des Vertragspartners*, *erreur sur l'autre partie*, *errore sul partner contrattuale*; *error in persona*; Art. 24(1)(2.) 2nd hypothesis CO): The mistaken party enters into a contract with a person that is different from the one that such party actually intended to contract with. For instance, a party contracts with the parent company, but actually intended to contract with the subsidiary company;
- Mistake concerning the **extent of an obligation** (*Irrtum bezüglich des Leistungsumfangs*, *erreur sur l'étendue des prestations*, *errore concernente lo scopo della prestazione*; *error in quantitate*; Art. 24(1)(3.) CO): The mistaken party enters into a contract in which the quantity is different from the one such party actually intended. For instance, a

[229] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 822.

party intended to hire an object for three months, whilst the other party understood three years. The extent of the obligation is decisive. A mistake about the value of an obligation or a consideration is a (simple) motive mistake (Art. 24(2) CO; see paras 240–241), at best a mistake concerning the basis for the conclusion of the contract (Art. 24 (1)(4.) CO; see paras 235–239); or

- Mistake concerning **any other factual element** (Art. 24(1) in fine CO ('in particular')), provided it is an essential aspect of the contract.

232 Outside the cases expressly mentioned in Article 24(1)(1.–3.) CO, the **arbitrator or judge must decide** whether the mistake is fundamental. The arbitrator or judge has a wide discretion in this respect (Art. 4 CC).

233 The **time of the conclusion of the contract** is decisive.[230]

234 Whether the mistake is fundamental is a **question of law**.[231]

c Mistake Concerning the Basis for the Conclusion of the Contract

235 A mistake concerning the basis for the conclusion of the contract (*Grundlagenirrtum*, *erreur de base*, *errore essenziale*), within the meaning of Article 24(1)(4.) CO, occurs when fundamental factual elements on which the mistaken parties have based their intent to conclude the contract do not correspond to reality.[232] The expression of intent is correctly understood by the recipient, but there is a serious defect in the process of forming the declarant's intention.[233]

236 In practice, a mistake concerning the basis for the conclusion of the contract is the **most common ground** for avoiding a contract.[234]

237 A mistake concerning the basis for the conclusion of the contract is a **qualified motive mistake** (see para. 241).[235] This is why the

[230] DFSC 5A_497/2020 of 30 June 2021 reas. 4.1, DFSC 4A_641/2010 of 23 February 2011 reas. 3.5.1.
[231] DFSC 132 III 747 reas. 1, DFSC 4A_108/2019 of 22 January 2020 reas. 2.1.1.
[232] Tercier and Pichonnaz, *Droit des obligations*, para. 858.
[233] DFSC 132 III 737 c. 1.3, DFSC 4A_92/2021 of 14 October 2021 reas. 3.1.
[234] Markus Müller-Chen, *Introduction to Business Law, Volume I: Contract Law*, 7th edn (Niederteufen: Schulthess, 2020), para. 309.
[235] DFSC 118 II 297 reas. 2, DFSC 4A_286/2018 of 5 December 2018 reas. 4.1.

(fundamental) mistake concerning the basis for the conclusion of the contract (see para. 235) must be distinguished from the (non-fundamental or simple; see para. 240) motive mistake.

238 A mistake concerning the basis for the conclusion of the contract within the meaning of Article 24(1)(4.) CO is fundamental 'where the mistake relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract'.

239 Therefore, the following **two cumulative characteristics** must be fulfilled for the motive mistake to be a mistake concerning the basis for the conclusion of the contract within the meaning of Article 24(1)(4.) CO:

- **Subjective characteristic**: The mistake must be so important that the mistaken party, if such party had known the reality, would not have concluded the contract or would not have concluded it on the same terms.[236] The other party must also have been aware of the subjectively fundamental nature of the mistake;[237] and
- **Objective characteristic**: Commercial fairness must allow the mistaken party to consider the subject matter of the mistake as a fundamental element of the contract.[238]

d Motive Mistake

240 'However, where the mistake relates solely to the reason for concluding the contract, it is not fundamental' (Art. 24(2) CO). Therefore, the (simple) motive mistake (*Motivirrtum*, *erreur sur les motifs*, *errore sui motivi*) is not fundamental within the meaning of Article 24(1) CO (see paras 230–234). The (simple) motive mistake is also a misrepresentation of reality, but relates to the reasons for the conclusion of the contract. The person who is mistaken must bear the consequences of such a mistake.

241 In order for the motive mistake to be fundamental, it must meet the conditions of a **mistake concerning the basis for the conclusion of the contract** within the meaning of Article 24(1)(4.) CO (see para. 235).

[236] DFSC 135 III 537 reas. 2.2, DFSC 4A_571/2019 of 1 February 2021 reas. 7.2.
[237] DFSC 118 II 297 c. 2b, DFSC 4A_571/2019 of 1 February 2021 reas. 7.2.
[238] DFSC 136 III 528 reas. 3.4.1, DFSC 5A_497/2020 of 30 June 2021 reas. 4.1; Ingeborg Schwenzer and Christiana Fountoulakis, 'Art. 23', in Widmer-Lüchinger and Oser (eds), *Basler Kommentar, Obligationenrecht I – Art. 1–529 OR*, 7th edn (Basel: Helbing Lichtenhahn, 2019) (cited as: Schwenzer and Fountoulakis, 'BSK-Art. 23 CO'), para. 4.

e Calculation Mistake

242 The calculation mistake (*Rechnungsfehler*, *erreur de calcul*, *errore di calcolo*) is a special kind of motive mistake (see paras 240–241). According to Article 24(3) CO, '[c]alculation errors do **not render a contract any less binding**, but must be corrected' (emphasis added).

243 A mere calculation mistake can occur if one of the parties makes a mistake when calculating the contractual performance (e.g., price or quantity) by, for example, making a mistake when adding or multiplying. However, a mere calculation mistake presupposes that the **parties agreed on the specific elements of calculation** (e.g., price/m^2).[239]

f Invoking Mistake

244 When the substantive conditions (see paras 224–243) are met, Article 31(1) CO requires the mistaken parties to inform their counterparties that **they do not consider themselves bound**. This is an expression of intent (see paras 102–105) which is not subject to any specific formal requirement (Art. 11(1) CO; see paras 182–189), even if the contract in question is subject to a particular formal requirement (see para. 1980).[240] Therefore, the mistaken party does not have to ask the arbitrator or judge to declare the nullity of the contract, since such party can do so by simply exercising this formative right (*Gestaltungsrecht*, *droit formateur*, *diritto formatore*).

245 The mistaken party may also knowingly **ratify** the defective contract, thereby renouncing the benefit of statutory protection. Tacit ratification is not easily accepted. For example, in a contract for the sale of a car which is tainted by a fundamental mistake, it does not necessarily result from the use of the car after the mistake has been discovered that the contract has been tacitly ratified.[241]

246 According to Article 31(1) and (2) CO, the mistaken party must invoke the mistake within a period of **one year from the discovery of the mistake**. If not, the contract is held to be (tacitly) ratified (see para. 245) and the mistaken party can no longer invoke its nullity on the grounds of mistake. This one-year period is a forfeiture deadline (*Verwirkungsfrist*, *délai de péremption*, *termine di perenzione*; see para. 505) and not a limitation period (*Verjährungsfrist*, *délai de prescription*, *termine di*

[239] DFSC 5A_99/2014 of 23 May 2014 reas. 4.1.
[240] DFSC 132 II 161 reas. 3.2.2.
[241] DFSC 109 II 319 c. 4c, DFSC 4A_62/2017 of 22 November 2017 reas. 3.1.

prescrizione; see paras 501–543).[242] The one-year period runs from the time that the mistaken party discovers the mistake (Art. 31(2) CO).

247 According to case law, there is **no absolute time limit** for invoking mistake.[243] Nevertheless, the claims that the mistaken party can derive from Article 31 CO (see para. 244) are often limited in time (see paras 501–543).[244] Thus, a mistaken party may invalidate the contract fifteen years after its conclusion, without necessarily being able to obtain restitution of its performance because of the ten-year statute of limitations on the action for recovery of undue payments (Arts 63 and 67 CO), which runs from the time of the defective conclusion of the contract (see para. 126).

248 Often, the mistaken party will have the choice between invalidating the contract on the grounds of a lack of consent and bringing an action on the basis of the **warranty of conformity** (Arts 197–210 CO for the contract of sale, see paras 749–853; Arts 376–371 CO for the contract for work and services, see paras 1357–1576). If the mistaken party chooses the warranty claim, such party is deemed to have (tacitly) ratified the contract within the meaning of Article 31 CO, as the warranty claim presupposes the existence of a valid contract.[245] A party who has lost its warranty of conformity rights in a contract for sale may (still) invoke a lack of consent if the conditions of Article 24(1)(4.) CO (see paras 235–239) are fulfilled.[246]

249 According to Article 25(1) CO, a party may only invoke a mistake in **compliance with the rules of good faith** (Art. 2 CC; see paras 71–72).[247] This rule does not refer to the existence of the mistake, but to the invoking of the mistake.[248] The rule applies, in particular, where it would be more reasonable to maintain the contract in force, for example, because the mistake is invoked in relation to a contract that has been performed for a long time. The mistaken party remains bound, in particular, if the other party agrees to conclude the contract in the way the mistaken party actually intended (Art. 25(2) CO). A party who invokes a mistake for which the latter is responsible does not necessarily

[242] DFSC 114 II 131 reas. 2b.
[243] DFSC 114 II 131 reas. 2b.
[244] E.g., for the claim for unjust enrichment, see DFSC 1C_53/2010 of 15 April 2010 reas. 3.4-3.5.
[245] DFSC 127 III 248 reas. 3b, DFSC 127 III 83 reas. 1b, DFSC 4A_535/2021 of 6 May 2022 reas. 7.1.
[246] DFSC 127 III 83 reas. 1b.
[247] DFSC 132 III 737 reas. 1.3, DFSC 4A_92/2021 of 14 October 2021 reas. 3.1.
[248] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 846.

act contrary to good faith given that negligence is no obstacle to invoking a mistake pursuant to Article 26 CO.

250 For the **consequences** flowing from a lack of consent due to mistake, see paras 262–273.

3 Wilful Deception

a Principle

251 Wilful deception (fraud; *absichtliche Täuschung*, *dol*, *dolo*) is also (see para. 237) a qualified motive mistake (see para. 241). The party is deceived about the facts which served to form the intent, but the mistake was **intentionally provoked by the other party** (Art. 28(1) CO), possibly by a third party with the other party's knowledge at the time of the conclusion of the contract (Art. 28(2) CO).

b Conditions

252 The following **two conditions** must be met in order for there to be a wilful deception within the meaning of Article 28 CO:

- **Mistake**: One party was mistaken as to the basis of the latter's intent (motive mistake; see paras 240–241). However, in contrast to a mistake according to Articles 23–27 CO, the deceived party may invalidate the contract even if the mistake was not fundamental (see paras 230–234) (Art. 28(1) CO).[249] It is sufficient that the deceived party was induced to enter into the contract. However, it must be the case that the deceived party would not have entered into the contract or would not have entered into it on the same terms on which this party did absent the wilful deception. There must accordingly be a causal link between the wilful deception and the mistake.[250] This is not the case if the deceived party recognized the true facts or if such party would have expressed the same intent even if the latter had known of the mistake; and
- **Fraud**: The victim has been deceived by the conduct of the other party (Art. 28(1) CO) or of a third party acting on such party's behalf (Art. 28(2) CO). This condition replaces the requirement that the mistake be fundamental (see paras 230–234). Therefore, the following two conditions must be met: (1) The deceiving party (or such party's auxiliary; Art. 101 CO, see paras 444–449) knew the real facts and realised that the deceived party did not or could not know of

[249] DFSC 136 III 528 reas. 3.4.2, DFSC 4A_345/2016 of 7 November 2016 reas. 2.2.1.
[250] DFSC 136 III 528 reas. 3.4.2, DFSC 4A_649/2020 of 26 May 2021 reas. 5.3.1.

them;[251] and (2) the deceiving party (or such party's auxiliary; Art. 101 CO, see paras 444–449) behaved in a way that effectively misled the deceived party or kept such party in error. This is the case if the deceiving party (actively) gives false information, but also if the deceiving party (passively) withholds certain facts that such party is obliged to share in accordance with the latter's pre-contractual duties (see paras 93–97).[252] However, if the deceiving party is merely negligent and does not disclose information in the pre-contractual phase, fraud cannot be invoked.[253]

c Invoking Wilful Deception

253 The deceived party must invoke wilful deception in the **same way as the mistaken party** (see paras 244–250).[254]

254 The one-year forfeiture deadline (see para. 246) runs from the time that the deceived party **discovers the fraud** (Art. 31(2) CO).

255 However, after the one-year period provided for in Article 31 CO (see para. 246), the deceived party still has a **defence** which this party may raise at any time against an action for specific performance (see Art. 60(3) CO).[255]

256 For the **consequences** of a lack of consent due to wilful deception, see paras 262–273.

4 Duress

a Principle

257 There is duress (*Furchterregung*, *gegründete Furcht*; *crainte fondée*; *timore ragionevole*), when a party is unlawfully forced to enter into a contract whilst being **threatened** (Arts 29–30 CO).[256] The threat can originate from the other party (Art. 29(1) CO) or from a third party (Art. 29(2) CO).

b Conditions

258 The following **four conditions** must be met in order for there to be duress within the meaning of Articles 29–30 CO:[257]

[251] DFSC 136 III 528 reas. 3.4.2, DFSC 4A_345/2016 of 7 November 2016 reas. 2.2.1.
[252] DFSC 4A_141/2017 of 4 September 2017 reas. 3.1, not published in DFSC 143 III 495, DFSC 4A_345/2016 of 7 November 2016 reas. 2.2.1.
[253] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 864.
[254] DFSC 4A_173/2010 of 22 June 2010 reas. 3.3.
[255] DFSC 127 III 83 reas. 1a, DFSC 4A_387/2019 of 5 August 2020 reas. 6.2.
[256] DFSC 111 II 349 reas. 2, DFSC 4A_514/2010 of 1 March 2011 reas. 4.2.2.
[257] DFSC 111 II 349 reas. 2, DFSC 4A_514/2010 of 1 March 2011 reas. 4.2.2.

- **Unlawful threat**: The other party or a third party must unlawfully threaten the life, body, honour, fortune or other rights (liberty, privacy, etc.) of the party or of one of the latter's relatives;
- **Duress**: The threatened party 'has good cause to believe that there is imminent and substantial risk' (Art. 30(1) CO) to this party's rights;
- **Author's intention**: The author of the threat intends to make the party under duress express an intent; and
- **Causal link**: There must be a causal link between the threat and the expression of intent of the party under duress, in the sense that the party under duress would not have entered into the contract or would not have entered into the contract on the same terms absent the threat.

c Invoking Duress

259 The party under duress must invoke duress in the **same way as the mistaken party** (see paras 244–250).

260 The one-year forfeiture deadline (see para. 246) runs from the time that the **duress ended** (Art. 31(2) CO).

261 With respect to the **consequences** of a lack of consent due to duress, see paras 262–273.

5 Consequences of a Lack of Consent

262 The lack of consent entails the following **three consequences**.

a Invalidation of the Contract

263 A lack of consent makes the contract unilaterally non-binding (Arts 23, 28(1), 29(1) CO). Unilaterally non-binding means that the party that was subject to mistake, wilful deception or duress is **not bound by the expression of intent to enter into the contract**.

264 By invoking the mistake (see paras 224–250), wilful deception (see paras 251–256) or duress (see paras 257–261), the victim of the lack of consent **invalidates** the contract. On the contrary, the other party is not entitled to invalidate the contract against the will of the victim of the lack of consent.[258]

265 According to the Federal Supreme Court, if one party invalidates the contract based on a lack of consent, the contract is **invalid** (*ungültig*,

[258] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 893.

invalide, *invalido*) for both parties from the very beginning (*ex tunc*).[259] Such invalidity has retroactive effect to the point in time when the contract was first formed. The contract has – as with respect to a contract that is null and void (Art. 20 CO; see paras 216–220) – no legal consequences.[260]

b Restitution

266 Given that the contract becomes invalid, the parties have the right to demand restitution of their respective performances. This is a claim originating from unjust enrichment (Arts 62–67 CO; see para. 85). Such a claim is barred ten years after the claim arose (Art. 67(1) CO). Accordingly, the restitution of performances due to mistake, wilful deception or duress is limited in time to **ten years after the performance of the undue obligation**.

267 Performances involving the transfer of property in objects are reclaimed by an action *in rem* for restitution (Art. 641(2) CC). Real estate is reclaimed by filing an action for deletion or modification of the entry into the land register (Art. 975 CC). Monetary and intellectual property rights are reclaimed according to the rules of **unjust enrichment** (Arts 62–67 CO; see para. 85). Restitution is made concurrently.[261]

268 In case of **contracts of duration** (see paras 350–351), the restitution of the performances received encounters practical difficulties, leads to unsatisfactory results or is even impossible.[262] For this reason, the consequences of the invalidation are limited to the future (*ex nunc*) and the parties enter into a contractual winding-up relationship (*Rückabwicklungsverhältnis*, *Liquidationsverhältnis*; *rapport de liquidation*; *rapporto di liquidazione*).[263] Restitution of obligations that are already fulfilled is not necessary. However, the parties are freed from their future obligations.

c Liability for Damages

269 According to Article 26(1) CO, '[a] party acting in error and invoking that error to repudiate a contract is **liable for any damage arising**

[259] DFSC 137 III 243 reas. 4.4.3, DFSC 4A_335/2018 of 9 May 2019 reas. 5.2.1, DFSC 4A_87/2018 of 27 June 2018 reas. 5.3.

[260] DFSC 114 II 131 reas. 3b, DFSC 4C.34/2000 of 24 April 2001 reas. 3a, not published in DFSC 127 III 300.

[261] DFSC 137 III 243 reas. 4.4.3, DFSC 5A_497/2020 of 30 June 2021 reas. 5.1, DFSC 4A_533/2013 of 27 March 2014 reas. 6.1.

[262] DFSC 137 III 243 reas. 4.4.4; Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 942–945.

[263] DFSC 129 III 320 reas. 7.1.2.

from the nullity of the agreement where the error is attributable to his own negligence, unless the other party knew or should have known of the error' (emphasis added). This liability for damages is the counterpart of the right to invalidate the contract (see paras 263–265). The other party may not object to the mistaken party invalidating the contract (see para. 263), but the former must not suffer any disadvantages.

270 The mistaken parties must have been at fault. The fault lies in the fact that the mistaken parties did not take sufficient precautions before the conclusion of the contract, in particular, through such parties' duty to inform themselves. This is therefore a case of **pre-contractual liability** (see paras 90–99). Accordingly, fault is not presumed, but must be proven by the party claiming compensation.

271 In principle, the law only allows compensation for the **'negative' interest**, that is, the interest that the other party had in the contract not being concluded (see para. 434). Compensation for the 'positive' interest, that is, the interest the other party had in the performance of the contract (see para. 434), is not recoverable, except in certain special cases (see Art. 26(2) CO).

272 Wilful deception (see paras 251–256) and duress (see paras 257–261) are also **wrongful acts**,[264] that is, the wrongful breach of the duty to inform the other party correctly (see para. 95). Accordingly, if the deceived party or the party under duress suffers a loss, this party can claim compensation subject to the conditions of pre-contractual liability (see paras 92–97) or tort liability (Arts 41–61 CO; see para. 85).[265]

273 According to **Article 31(3) CO**, '[t]he ratification of a contract made voidable by duress or fraud does not automatically exclude the right to claim damages'.

VII Agency

A Principle

274 In principle, one is only able to bind oneself by acting on a personal basis, **in one's own name and on one's own behalf**. The general rule is that no one can create an obligation in another's place.

275 As an exception to this basic principle, the law allows, under certain conditions, that one person may bind another by **agency** (*Vertretung*,

[264] DFSC 4A_285/2017 of 3 April 2018 reas. 6.1.
[265] DFSC 108 II 419 reas. 5, DFSC 4A_285/2017 of 3 April 2018 reas. 6.1.

représentation, *rappresentanza*). According to Article 32(1) CO, '[t]he rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, not to the agent'. Agency is therefore the legal institution which allows one person (the agent) to perform legal acts with a third party in such a way that the effects occur directly in the person of another (the principal).[266]

276 Agency is dealt with mainly in **Articles 32–40 CO**. Articles 458–465 CO on the registered power of attorney and other forms of commercial agency also play a certain role.

277 Agency must be distinguished from the **management of a legal entity** (*juristische Person*, *personne morale*, *persona giuridica*). Due to their nature, legal entities cannot act on their own. They must do so through natural persons (*natürliche Person*, *personne physique*, *persona fisica*) who are responsible for their management (see Art. 55(1) CC). These are the organs or governing bodies of the legal entity. Governing bodies are not agents within the meaning of Articles 32–40 CO. They are part of the legal entity for which they may act. There are specific provisions describing the legal status of these governing bodies. These can be found in private law and in company law, as well as in public law for governmental governing bodies. If there are no specific provisions, the provisions on agency (Arts 32–39 CO) apply by analogy to the governing bodies and to associations of persons (Art. 40 CO).

B Direct and Indirect Agency

278 In the case of **direct agency** (*direkte Stellvertretung*, *représentation directe*, *rappresentanza diretta*), the (direct) agent acts in the name and on behalf of the principal (for the simple mandate contract, see paras 1966–1970). Accordingly, the principal has the rights and obligations resulting from the contract entered into on the principal's behalf between the agent and the third party.

279 In the case of **indirect agency** (*indirekte Stellvertretung*, *représentation indirecte*, *rappresentanza indiretta*), the (indirect) agent bears the contractual rights and obligations (for the simple mandate contract, see para. 1971). The legal act only has direct effects between the agent and the third party. There is no legal relationship between the principal and the third party. However, the ultimate goal of the indirect agency is that eventually the legal (and economic) effects of the legal act are attributed to

[266] Tercier and Pichonnaz, *Droit des obligations*, para. 411.

the principal (Art. 32(3) CO). The indirect agency has practical significance in areas where the necessary trust in the transaction is only present between the agent and the third party, or where the principal wants to remain in the background (e.g., art business) or where the principal does not have access to the business in question (e.g., stock exchange).[267] The indirect agency is only partially regulated in the Code of Obligations (e.g., Arts 32(3), 401, 425–439 CO). The principal only acquires rights and obligations arising from the contract formed by the indirect agent if they are subsequently transferred to the principal (Art. 32(3) CO; with respect to the simple mandate contract, see para. 1962). Claims are transferred by the rules of assignment (Arts 164–174 CO; see paras 544–550). Obligations are transferred by the rules of assumption (Arts 175–183; see paras 557–564) and rights *in rem* are transferred according to the rules of property law (e.g., Art. 714 CC; see paras 633–635).

C Conditions

1 Principle

280 The following **four conditions** must be met for the principal to be liable for the consequences of a contract formed by the agent:

- **Authority to act for someone else** (see paras 281–294);
- **Acting in the name of someone else** (see paras 295–297);
- The agent has **capacity of discernment** within the meaning of Article 16 CC; and
- **Contract permits agency**: The contract in question must permit agency. This is the case, in particular, in contract law. However, there are, in particular, in family law (e.g., marriage) and inheritance law (e.g., testamentary disposition), legal acts that do not permit agency. In these highly personal areas, persons must act for themselves.

2 Authority to Act for Someone Else

a Principle

281 A principal will only be bound by the acts of the agent if the agent has the authority to act for the principal (*Vertretungsmacht*, *pouvoirs de representation*, *poteri di rappresentanza*).[268] This first prerequisite for agency is of a **legal nature**.[269]

[267] Müller-Chen, *Business Law*, para. 359.
[268] DFSC 146 III 121 reas. 3.2.1, DFSC 126 III 59 reas. 1b.
[269] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1320.

282 Such authority can stem from a **legal act**, that is, an expression of intent by which the principal grants this authority (power of attorney; see paras 285–294) or by **statute** (e.g., the authority of the parents for their underage children pursuant to Art. 304 CC).

283 This principle is intended to **protect the principal** who can only be bound if, and to the extent that, such principal has given the agent the right to act on the principal's behalf.

284 If the **agent acts without authority**, there is, in principle, no agency. However, the Code of Obligations nevertheless provides for an agency effect in certain situations, in particular, to strengthen the position of the *bona fide* third parties (Arts 33(3), 34(3) CO) (see para. 303).

b Power of Attorney

285 The power of attorney (*Vollmacht*, *procuration*, *procura*) is the **authority granted to the agent by a legal act** (see para. 282).[270] The granting of the (internal)[271] power of attorney is an expression of intent (see paras 102–105) by which the principal expresses an intent to authorise the agent to represent the principal towards third parties.[272]

286 The granting of the power of attorney is a **unilateral legal act**.[273] Accordingly, it does not require a declaration of acceptance from the agent. The power of attorney leads to legal consequences as soon as it enters the agent's sphere of influence (see para. 124).[274] The power of attorney grants the agent the right to act, but not the obligation.

287 The granting of the power of attorney is **not subject to any specific formal requirement** (Art. 11 CO; see paras 176–198), even when the act to be made by the agent is subject to a certain formal requirement (e.g., contract of sale for real estate pursuant to Art. 216 CO; see paras 894–909).[275] However, for certain internal powers of attorney, statute requires compliance with a specific formal requirement (e.g., Art. 493(6) CO for the contract of suretyship).

288 In general, the power of attorney is based on an **underlying legal relationship** (*Grundverhältnis*, *relation juridique de base*, *relazione di*

[270] DFSC 141 III 289 reas. 4.1 and 4.3, DFSC 4A_562/2019 of 10 July 2020 reas. 5.1.2.
[271] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1343.
[272] DFSC 130 III 87 reas. 3.3.
[273] DFSC 78 II 369 reas. 2a, DFSC 4A_270/2007 of 19 February 2008 reas. 4.1.2.
[274] DFSC 101 II 117 reas. 4, DFSC 4A_270/2007 of 19 February 2008 reas. 4.1.2.
[275] DFSC 112 II 330 reas. 1a, DFSC 99 II 39 reas. 1, DFSC 4C.24/2001 of 25 June 2001.

base) between the principal and the agent. However, the power of attorney is a legal act which is independent from the underlying legal relationship (see paras 1964–1965). The underlying legal relationship is often a simple mandate contract (Arts 394–406 CO; see paras 1894–2505).

289 The principal has the right to determine the **scope of the power of attorney** (Art. 33(2) CO). It is up to the principal to decide which powers such principal intends to confer.

290 The principal can **limit** the power of attorney in various respects:[276]

- With respect to the authorised **content**, the power of attorney can be special (*Spezialvollmacht*, *procuration spéciale*, *procura speciale*; concerning one or a few specific acts; e.g., the purchase of an e-bike), generic (*Gattungsvollmacht*, *procuration générique*, *procura limitata a determinati atti*; concerning a specific type of act; e.g., e-bike sales contracts) or general (*Generalvollmacht*, *procuration générale*, *procura generale*; concerning a range of acts; e.g., the management of an estate or a building). The power of attorney can also be limited (for acts not exceeding a certain amount; e.g., orders under CHF 3,000) or unlimited;
- With respect to the authorised **persons**, the power of attorney can be individual (*Einzelvollmacht*, *procuration individuelle*, *procura individuale*) authorising the agent to act alone, or joint (*Kollektivvollmacht*, *procuration collective*, *procura collettiva*) making the validity of the act subject to the joint intervention of several persons (e.g., collective signature of two persons).

291 The agent's powers are limited in two situations which entail increased risks due to the conflict of interest in which the agent may find itself, that is, **double representation** (*Doppelvertretung*, *double représentation*, *doppia rappresentanza*; see para. 2117) and the **contract with oneself** (*Selbsteintritt*, *Selbstkontrahieren*; *contrat avec soi-même*; *contratto con se stesso*; see para. 2117).

292 The power of attorney **expires** for the following reasons:

- **Voluntary grounds**: The agency can be terminated by the parties' intent, that is, the performance of the act (in case of a special power of attorney; see para.), the expiry of a term set by the principal, the termination of the underlying legal relationship (with respect to the simple mandate contract, see para. 2382), the revocation (*Widerruf*, *révocation*, *revoca*) of the power of attorney by the principal (Art. 34(1)

[276] Tercier and Pichonnaz, *Droit des obligations*, paras 449–450.

CO) or the renunciation by the agent. The principal has the mandatory right (Art. 34(2) CO) to revoke the power of attorney at any time, without notice and without having to give any special justification.[277]

- **Statutory grounds**: In certain cases, the expiry of the power of attorney is assumed by statute (Art. 35 CO). It generally expires on the loss of the civil capacity to act (Arts 394–395 CC), death (Arts 31–34 CC), declaration of presumed death (Art. 35–38 CC), bankruptcy (Arts 159–176 of the Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889 (DEBA)), and disappearance of a legal person or dissolution of a company entered into the commercial register (see Art. 465(2) CO). The power of attorney only expires due to a statutory ground if the principal did not state anything to the contrary or if the circumstances do not indicate the contrary (Art. 35(1) CO; Art. 405(1) CO, see paras 2447–2480). In this way, the power of attorney can last past the death of the principal (*post mortem* power of attorney; with respect to the simple mandate contract, see para. 2454). The agent then represents the legal heirs. The legal heirs can revoke the power of attorney at any time.

293 When the powers of attorney have expired, the agent who has a **document evidencing the powers**, must return it to the principal or deposit it with the court (Art. 36(1) CO). If the principal or the latter's successors have omitted to insist on the return of such document, they are liable to *bona fide* third parties for any loss arising from this omission (Art. 36(2) CO).

294 If the power of attorney expires for one of these reasons (see para. 292), the agent can **no longer legally act on behalf of the principal**. However, there are exceptions to this rule to protect the principle of reliability and foreseeability of legal transactions (see paras 298–304).

3 Acting in the Name of Someone Else

295 The second prerequisite for agency is that the agent indeed acts in the name of someone else. This second prerequisite is of a **factual nature**.[278]

296 In principle, there is only an agency if **the (authorised) agent indeed acts towards the third person in someone else's name**.[279] The

[277] DFSC 127 III 515 reas. 2a.
[278] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1327.
[279] DFSC 126 III 59 reas. 1b, DFSC 4A_473/2016 of 16 February 2017 reas. 3.1.2.

agent may express this intent explicitly ('by making himself known as such' pursuant to Art. 32(2) CO). In case of a dispute between the agent and the third party, the declaration is interpreted according to the principle of trust (see para. 132). If such an interpretation leads to the conclusion that the agent has indeed acted in someone else's name, the effect of agency occurs even if the agent did not have the will to represent someone else.[280] If the validity of the contract concluded by the agent is subject to formal requirements (Art. 11 CO; see paras 176–198) and if these requirements cover the parties to the contract, the identity of the represented parties must also comply with these formal requirements (with respect to the contract of sale of real estate, see paras 894–909). The authorised agent may also implicitly express the intention to act towards the third person in someone else's name (i.e., 'if the other party must have inferred the agency relationship from the circumstances' pursuant to Art. 32(2) CO).

297 In exceptional cases, there is an agency **even though the (authorised) agent does not act towards the third person in someone else's name**. This exception applies when the third person 'did not care with whom the contract was made' (Art. 32(2) CO).

4 Agency without Authority

298 In principle, if the person claiming to be the agent (pseudo-agent) acts without authority, there is **no agency** (see para. 294).

299 Consequently, the **principal** for whom the agent has acted without authority, is not bound (Art. 38(1) CO). However, the principal can ratify the acts of the agent (Art. 38(1) CO; see para. 303).

300 The **third person** towards whom the agent has acted without authority, is bound in the sense that such third person must accept the ratification by the principal (Art. 38(2) CO).

301 The **absence of authority** may be due to the fact that the powers: (1) were never granted; (2) had expired before the act was performed (see paras 292–294); (3) did not (or no longer) extend to the act that was performed; or (4) were exercised in violation of the rules of a joint power of attorney (see para. 290).[281]

302 If the third party suffers a loss, the latter can claim **compensation** from the pseudo-agent (Art. 39 CO). The third party can obtain compensation for the latter's negative interest damages (Art. 39(1) CO), that is,

[280] DFSC 120 II 197 reas. 2b/aa, DFSC 4A_421/2015 of 11 February 2016 reas. 4.3.2.
[281] Tercier and Pichonnaz, *Droit des obligations*, para. 464.

the third party must be put in the financial situation in which this party would have been in if the contract had never been concluded. If the pseudo-agent is at fault and if equity so requires, the third party can even claim compensation for positive interest damages (Art. 39(2) CO), that is, the third party must be put in the financial situation in which the latter would be in had the contract been performed.[282]

303 The principle of nullity of the act performed by the pseudo-agent introduces insecurity in commercial transactions. This is why the statutory law provides for the following **important exceptions**:

- **Ratification**: The pseudo-principal can retroactively validate the act that the pseudo-agent has done by a ratification (*Genehmigung*, *ratification*; *approvazione*, *ratifica*) (Art. 38(1) CO; see para. 299). The third party is bound until the pseudo-principal decides on the ratification, since the third party has validly committed itself (Art. 38(2) CO; see para. 300). The third party becomes free as soon as the principal refuses to ratify the act, expressly or implicitly (Art. 39(1) CO; see para. 302). Until the ratification or refusal, the act of the pseudo-agent remains in abeyance. It might become valid or not, depending only on the principal.[283] In order to clarify the situation, the third party may set a suitable time limit for the pseudo-principal to ratify the act or not (Art. 38(2) CO). If the pseudo-principal ratifies the act, the contract is validly concluded. If the pseudo-principal does not ratify the act, the third party is freed. If the pseudo-principal does not react within the set time limit, the ratification is deemed to be implicitly rejected and the third party is not bound any longer;
- **Protection of the qualified appearance**: Irrespective of the principal's will, Articles 33(3) and 34(3) CO protect the third party where the latter has relied in good faith (Art. 2 CC; see paras 71–72) on an appearance created by the principal. These rules aim at ensuring contractual security and make the pseudo-principal bear the risk that arises from an appearance created by the latter.[284] The Code of Obligations provides for the protection of the qualified appearance in the following three cases: (1) The pseudo-principal has made it known to the third party that the agent has an authority which goes beyond the authority actually conferred (Art. 33(3) CO). In such a case, the scope of the authority is

[282] DFSC 116 II 689 reas. 3a.
[283] DFSC 4A_478/2015 of 20 May 2016 reas. 3.1 (termination by agent without authority), with reference to DFSC 128 III 129 reas. 2b and 2c.
[284] Tercier and Pichonnaz, *Droit des obligations*, para. 474.

determined according to the wording of the communication made to the third party (Art. 33(3) CO), which means that the effect of agency occurs to this extent, without regard to the scope of the (internal) authority.[285] This presupposes, however, that the third person relies in good faith on the communication;[286] (2) The pseudo-principal has brought to the attention of the third party an authority which such pseudo-principal has never been granted (Art. 33(3) CO *a fortiori*);[287] and (3) The pseudo-principal fails to inform the third party of the withdrawal or restriction of the authority that such principal had made known to the third party (Art. 34(3) CO).

- **Specific case of Article 37 CO**: The agent (and the third party, Art. 37 (2) CO) are not aware of the expiry pursuant to Article 35 CO (see para. 292) or the revocation of the agent's authority (Art. 37(1) CO).

304 An (internal) authority can also be based on **conclusive actions** (*konkludente Handlung*, *acte concluant*, *atto concludente*; see para. 176). In particular, it may result from the two following situations:

- **Agency by estoppel**: Where the principal knows that another party is representing such principal against its will, but the principal does not object to this unsolicited agency, there exists an (internal) agency by estoppel (*Duldungsvollmacht*, *procuration par tolérance*, *procura apparente*). Such agents may therefore infer that they have received the authority by estoppel;[288] or
- **Apparent authority**: Where, on the one hand, the principal is unaware that another party is pretending to be its agent but should have become aware of this by exercising the care that could be expected of such principal and, the agent could interpret the principal's conduct in good faith as a grant of authority, there exists an apparent (internal) authority (*Anscheinsvollmacht*, *procuration apparente*, *procura apparente*).[289]

[285] DFSC 146 III 37 reas. 7.1.2.1.
[286] DFSC 135 III 464 reas. 3.3.4, DFSC 4A_137/2022 of 30 August 2022 reas. 4.3.2.
[287] DFSC 53 III 171 reas. 2.
[288] DFSC 146 III 37 reas. 7.1.1, DFSC 4A_137/2022 of 30 August 2022 reas. 4.3.1.
[289] DFSC 146 III 37 reas. 7.1.1 and 7.1.2.1, DFSC 4A_341/2021 of 15 December 2021 reas. 6.3.2.

VIII General Terms and Conditions

A Notion and Statutory Regime

305 General terms and conditions (GTCs, standard terms; *allgemeine Geschäftsbedingungen*, *conditions générales (d'affaires)*, *condizioni generali*) are **non-negotiable preconditions** which a party (user) formulates as contractual provisions in order to impose them on an indefinite number of future contractual partners (customers) when concluding similar contracts.[290]

306 Despite the widespread use (see paras 308–312) and the resulting dangers of various kinds (see para. 313), the Swiss legislator has so far only **rudimentarily regulated** GTCs. Whilst there are no provisions on GTCs in the General Part of the Code of Obligations, isolated statutory provisions only regulate partial aspects of the problem. This is the case for the lease contract and the usufructuary lease contract (e.g., Arts 256(1) and 288(2)(a) CO, according to which the lessor cannot exclude the warranty of conformity in GTCs); the insurance contract (Arts 2(2), 3(2) and Art. 35 IPA); the package travel contract (Art. 4(1) and (2) of the Federal Act on Package Travel of 18 June 1993 (PTA)) as well as for unfair competition (Art. 8 UCA).

307 In contrast to Swiss law, all **surrounding legal systems** have more or less detailed statutory regulations on GTCs. German law, for example, has had a law regulating GTCs since 1976, the provisions of which were incorporated almost unchanged into the BGB as Sections 305–310 by the Act on the Modernisation of the Law of Obligations of 2002. French law provides for the possibility of controlling unfair GTCs (*clauses abusives*) in consumer contracts in the *Code de la consommation* (Arts L212–1 to L212–3). In Italian law, the *Codice civile* of 1942 has a pioneering role with regard to the control of GTCs (see paras 314–326). Today, the specific law on GTCs based on EU law is regulated in the *Codice del Consumo* (Arts 33–38). In English law, unfair terms in consumer contracts have been uniformly regulated in the Consumer Rights Act 2015. EU law has also had a Directive on Unfair Terms in Consumer Contracts (93/13/EEC) since 1993. The reform projects for the unification of European private law also contain provisions on GTCs, such as the PECL (Arts 2:104 and 2:209 (3)) and the DCFR (Art. II.-9:103). Likewise, the CESL (Art. 7(1)) and the PICC (Art. 2.1.19) contain similar provisions.

[290] DFSC 4A_47/2015 of 2 June 2015 reas. 5.1.

B *Importance, Purposes and Dangers*

308 Articles 1–10 CO on the formation of contracts (see paras 100–132) are implicitly based on the model of an individual contract negotiated by the parties point by point. However, the industrial revolution has led to the fact that goods and services are today mostly produced, offered and distributed in bulk. This development has also influenced contract law, which serves the exchange of goods and services. The individual contract has been replaced by the **standardised mass contract**. The conclusion of contracts on the basis of GTCs is a result of this development.

309 It is therefore no longer possible to imagine modern business life without GTCs. All production companies (e.g., manufacturers of cars, electronic devices or software) and service companies (e.g., banks, insurance and transport companies) that deal with a large number of customers, as well as their distribution channels, now **systematically use GTCs** to conclude their contracts. The distribution of goods and services via the Internet has reinforced this development.

310 GTCs are used for various purposes. On the one hand, GTCs serve to **streamline legal transactions** and the course of business. By not having to negotiate and draft a different contract with each individual customer, the user saves time and reduces transaction costs. In addition, the user can employ less legally qualified personnel to conclude even more complicated contracts.[291] Finally, the user can make the performance of its mass contracts more efficient by providing for uniform delivery and payment conditions for all customers in their GTCs.[292]

311 On the other hand, GTCs serve to **specialise and modernise contract law**. They comprehensively regulate a legal relationship of a certain sector (e.g., between a bank and its customers), whereas the statute often only provides incomplete or inappropriate non-mandatory norms.[293] Over time, standardised innominate contracts (see para. 2880) can develop from such GTCs, which is also conducive to legal certainty. Inappropriate provisions of the Code of Obligations are developed further in GTCs, for example, regarding the transfer of the risk and benefits

[291] Alfred Koller, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 4th edn (Bern: Stämpfli Verlag, 2017), para. 23.05.
[292] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 44.02.
[293] Ernst A. Kramer, Thomas Probst and Roman Perrig, *Schweizerisches Recht der Allgemeinen Geschäftsbedingungen* (Bern: Stämpfli, 2016), para. 2.

(Art. 185 CO; see paras 869–884) or the buyer's right to reparation under the law on the contract of sale (see para. 817).

312 Finally, GTCs also serve to **shift the risks**. This is probably the most important purpose of the recourse to GTCs. Practically all GTCs are characterised by the endeavour to strengthen the rights of the user and to weaken those of the customer. If there are non-mandatory statutory provisions (see paras 69–70) for a type of contract, the user's aim is to improve the latter's legal position vis-à-vis the customer in comparison to the non-mandatory statutory provisions. Exclusion or limitation of liability clauses, that is, clauses that exclude or limit the liability of the user (Arts 100 and 101 CO; see paras 473–479), are the most important means of such risk transfer.[294]

313 The widespread use of GTCs entails the following **dangers**:

- There is the risk that the user has recourse to the GTCs in order to unilaterally and systematically **exploit the user's position of economic power** vis-à-vis the customer in the user's favour. The resulting disadvantage of the weaker contracting party affects not only consumers, but also small- and medium-sized enterprises (SMEs) in contracts with large companies or States.[295] The weakening of the consumers' position is particularly disturbing because the Federal government has the constitutional mandate to take measures to protect these structurally weaker market participants (Art. 97(1) of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst.); see paras 366–367);[296]
- Furthermore, there is a danger that the widespread use of GTCs as law created by business itself will **generally displace non-mandatory statutory law** (see paras 69–70). This is problematic because non-mandatory statutory law strives to take the parties' contradictory interests into account in a balanced way (see para. 69), whereas GTCs mainly ensure the interests of the user (see para. 310). This is also problematic because non-mandatory statutory law is enacted by the State legislature and on the basis of a democratic legislative process, whereas GTCs are imposed by powerful private market participants;[297]
- The widespread use of GTCs also entails the risk of **unduly restricting the principle of freedom of contract** (see paras 49–70) **of the party**

[294] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 44.02.
[295] Kramer, Probst and Perrig, *Allgemeine Geschäftsbedingungen*, para. 97.
[296] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1121a.
[297] Jörg Schmid, Hubert Stöckli and Frédéric Krauskopf, *Schweizerisches Obligationenrecht – Besonderer Teil*, 2nd edn (Zurich/Basel/Geneva: Schulthess, 2016), paras 25–26.

with the weaker market position. This danger stems from the fact that the users in numerous industries (e.g., banking, insurance, telecommunications) use similar GTCs, which means that the weaker party cannot switch to other providers of the relevant good or service. Competition is therefore not able to induce users to formulate more balanced GTCs. The weaker party in the market thus only has the choice of submitting to the GTCs of one of the users or doing without the goods or service in question altogether.[298] Freedom of contract is reduced to a 'take it or leave it' situation, because the weaker party does not have the possibility of influencing the formulation of the contract; and

- The excessive restriction of contractual freedom (see paras 49–70) ultimately has the consequence that the customer, despite the unbalanced distribution of risk (see para. 312), does not take note of the GTCs at all or only very superficially, at least *before* they become part of the contract. In most cases, therefore, the customer does not recognise the scope and significance of the GTCs or, in view of the low probability that the critical contractual clauses will ever attain practical significance, shies away from the effort that would be required to negotiate changes (study of the GTCs, comparison with other GTCs, obtaining legal advice, formulation of counterproposals, etc.). This leads to a '**consensus gap**' between the user and the customer, in that the user's consent to the GTCs is usually much stronger than the customer's consent.[299]

C Judicial Control

1 Overview

314 Due to the incomplete statutory regulation in Switzerland (see para. 306), **case law and doctrine** have had to counter the dangers associated with GTCs with the general rules, in particular, of the Code of Obligations.

315 The following **three control levels** are to be distinguished:

- **Consensus control**: GTCs are contractual provisions and not general and abstract statutory norms.[300] Nor are GTCs to be characterised as (contractually codified) customary law or as a source of law of their own kind.[301] In themselves, therefore, GTCs have no legal significance

[298] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1121c.
[299] Koller, *Schweizerisches Obligationenrecht*, paras 23.11–23.17.
[300] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 45.01.
[301] Müller, 'BK-Art. 1 CO', para. 301.

whatsoever. In order for GTCs to become part of a contract at all, the parties must reach a consensus on them. GTCs therefore only apply if the parties incorporate them in a specific contract. Whether this is the case in an individual situation is determined by the general rules on consensus (see paras 100–132). However, because of their special nature and dangers (see paras 308–313), case law and legal doctrine have developed additional rules on GTCs (see paras 316–322);

- **Interpretation control**: If the parties have reached a consensus with respect to the incorporation of GTCs, the further question of their meaning arises, which may require interpretation. Interpretation is also carried out according to the general rules on interpretation (see paras 133–173). However, case law and legal doctrine have developed specific rules for this as well (see paras 323–324); and
- **Content control**: If the parties have reached a consensus with respect to the incorporation of the GTCs and if their meaning has been determined by interpretation, if necessary, the final question is whether the GTCs are valid with respect to their content. This question is also basically determined according to the general rules on the validity of contracts with respect to their content, in particular, according to Articles 19–21 CO (see paras 199–220). In addition, however, specific aspects of GTCs, in particular, the content limits set by Article 8 UCA, must also be taken into account (see paras 325–326).

2 Consensus Control

316 The parties agree to apply the GTCs subject to the following **two cumulative conditions**: (1) the parties incorporate the GTCs into their contract (see para. 317) and (2) there are no deviating individual agreements between them. If the customer incorporates the GTCs only globally (see para. 317), the following two additional cumulative conditions must be met: (3) the customer had the opportunity to obtain knowledge of the content of the GTCs in a reasonable manner prior to the conclusion of the contract (see para. 318) and (4) the GTCs do not contain any clauses that the customer did not expect and, from the latter's point of view, did not have to expect at the time of the conclusion of the contract (unusualness rule; see para. 321).

317 GTCs are only valid if the parties make them part of their specific contract. The parties must therefore **incorporate the GTCs into their contract** by a concordant expression of intent (Art. 1(1) CO; see para. 127). The parties can incorporate the GTCs either expressly or tacitly. If

the customer consents to the incorporation of the GTCs without taking note of them or understanding their scope, this is referred to as a global incorporation (*Globalübernahme*, *intégration globale*, *ripresa globale*).[302] The contrary of the global incorporation is the total incorporation (*Vollübernahme*, *intégration globale*, *ripresa totale*), which is the case when the customer indeed reads the GTCs, understands them and accepts them (expressly or tacitly).[303] However, mere clauses of 'style' (*Vertragsfloskel*, *clause de style*, *clausula di stile*) are deemed not to have been incorporated.[304] Clauses of 'style' are contractual clauses that neither party wants, and in the case of a GTC clause not even in the sense of a global incorporation.

318 If a customer merely agrees to GTCs globally (see para. 317), the GTCs can only be considered to be covered by consensus according to the principle of trust (see para. 132) if the user provides the customer with a **reasonable opportunity to take note of the content of the GTCs** at the latest when the contract is concluded.[305] Consequently, the GTCs must be formulated in a comprehensible manner and presented in a print-readable way.[306] In addition, the GTCs must be drafted in a language customary at the place of conclusion of the contract vis-à-vis domestic customers. In the case of international customers, it is advisable to prepare the GTCs in English as a worldwide language. In general, the language of negotiation and the language of the contract shall be authoritative vis-à-vis foreign-language customers. If the customer negotiates in a foreign language, then the latter must bear the language risk with regard to the GTCs drafted in this language, unless the user was able to recognise that the customer did not have sufficient command of this language.[307] In e-commerce, the customer must be able to download the GTCs easily using an average IT infrastructure, save them on the latter's device in reproducible form and print them out in good quality at the latest when the customer makes a declaration of intent. A clearly visible direct hyperlink to the downloadable and printable GTCs (e.g., in pdf format) or a pop-up window (scroll box)

[302] DFSC 119 II 443 reas. 1, DFSC 5A_511/2012 of 8 October 2012 reas. 5.1.
[303] Kramer, Probst and Perrig, *Allgemeine Geschäftsbedingungen*, para. 116.
[304] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1128e.
[305] DFSC 100 II 200 reas. 5d.
[306] Kramer, Probst and Perrig, *Allgemeine Geschäftsbedingungen*, paras 141–150.
[307] DFSC 131 III 606 reas. 4.2.

on the order page of a website is sufficient. A clear reference to the availability of the GTCs on the Internet may also be sufficient, provided the reference is made in an e-mail that is relevant for the conclusion of the contract.[308] In e-commerce as well, the GTCs must be written in a language that is understandable for the customer.

319 If the parties have (validly) incorporated the GTCs (see para. 317) and at the same time (or even later), have concluded an **individual agreement** (negotiated terms; *Individualabrede*, *accord individuel*, *condizione individuale*) deviating from them, the individual agreement prevails.[309]

320 In business transactions, it often happens that each party tries to include their own GTCs in the contract (**battle of the forms**). This is the case, for example, when the seller refers in the offer to the seller's terms of delivery and the buyer refers in the acceptance to the buyer's terms of purchase. GTCs typically do not concern objectively essential elements of the contract (see para. 61), which is why the collision of GTCs does not prevent the contract from being validly concluded (see paras 100–132). The GTCs of both parties become part of the contract insofar as they do not contradict each other.[310] This solution deserves preference over the theory of the last word (*Theorie vom letzten Wort*, *théorie du dernier mot*, *teoria dell'ultima parola*). According to this theory, the GTCs of the accepting party apply in principle, provided that the offeror has started to perform the contract without reservation.[311] If, on the other hand, the offeror expresses from the outset that the latter will not accept the deviating GTCs of the offeree, neither the one nor the other GTCs would become part of the contract if they contradict each other. The theory of the last word must be rejected for the following reasons: First, it contradicts the general rules of consensus-building, according to which an acceptance that deviates from the offer in insignificant points is not a counter-offer (see paras 118–119). Second, it leads to random results, depending on which of the two parties in the chronological sequence is the offeror or the offeree.[312] In contrast to US law (Art. 2.207 Uniform Commercial Code), however, English law still operates according to the

[308] DFSC 139 III 345 reas. 4.4.1.
[309] DFSC 135 III 225 reas. 1.4; see also Art. 2.1.21 PICC.
[310] Müller, 'BK-Art. 1 CO', para. 353.
[311] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 1130a.
[312] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 45.15.

'last shot analysis'.[313] English authors also accuse the trust theory analysis of disregarding the decisive sequence of offer and acceptance.[314]

321 If the customer only globally agrees to the GTCs (see para. 317), disadvantageous clauses which the customer did not expect (subjectively) and, from the customer's point of view, could not reasonably have expected at the time of concluding the contract (objectively), do not apply. Such **unusual or surprising clauses** (*ungewöhnliche Klausel*, *überraschende Klausel*; *clause insolite*; *clausola inusuale*) do not become part of the contract.[315] German law (Section 305c(1) BGB) and the PICC (Art. 2.1.20) expressly include this rule. One has to assess the unusual character of a clause at the time of the conclusion of the contract.[316] Unusual clauses to which the user draws the customer's attention become part of the contract. In this case, the user may assume that a customer, even one who is inexperienced in business, consciously agrees to the unusual GTC clause in question. Consequently, a customer who has been made aware of a GTC clause that is highlighted in bold print and larger font cannot (any longer) invoke the unusualness rule.[317]

322 If there is **no consensus** between the parties on the incorporation of GTCs, they do not become part of the contract. However, this does not necessarily mean that the contract has not been concluded.[318] Any gaps in the contract resulting from this may have to be filled by the arbitrator or judge (see para. 342).[319]

3 Interpretation Control

323 A dispute on the interpretation of GTCs presupposes that the parties have made the GTCs part of a specific contract by incorporating them (see para. 317). If this is the case, GTCs are in principle interpreted according to the **same method** (see paras 131–132), with the **same**

[313] *Tekdata Intercommunications v Amphenol Ltd* [2009] EWCA Civ 1209, [2009] 2 CLC 866 [23] (Dyson LJ) applied in *Dana UK Axle Ltd v Freudenberg FST GMBH* [2021] EWHC 1751 (TCC); see also *TRW Limited v Panasonic Industry Europe GmbH*, *Panasonic Automotive Systems Europe GmbH* [2021] EWCA Civ 1558.

[314] Andrews, *Contract Law*, para. 3.35.

[315] DFSC 138 III 411 reas. 3.1, DFSC 4A_196/2019 of 10 July 2019 reas. 2.1, DFSC 4A_499/2018 of 10 December 2018 reas. 3.3.

[316] DFSC 138 III 411 reas. 3.1, DFSC 4A_196/2019 of 10 July 2019 reas. 2.1, DFSC 4A_499/2018 of 10 December 2018 reas. 3.3.3.

[317] DFSC 4A_475/2013 of 15 July 2014 reas. 5.3.1, not published in DFSC 140 III 104.

[318] See Section 306(1) BGB.

[319] See Section 306(2) BGB.

means (see paras 134–158) and based on the **same maxims** (see paras 159–173) as any contractual provision.[320]

324 Although GTCs are pre-formulated for a large number of contracts (see para. 308), they must be **interpreted individually as part of the concrete specific contract**, that is, taking into account all the circumstances surrounding the conclusion of the contract in question. The Federal Supreme Court rejects the view held in Germany[321] that GTCs should be interpreted without regard to the individual case and the parties' ideas (principle of uniform interpretation).[322]

4 Content Control

325 According to **Article 8 UCA**, '[s]hall be deemed to commit an act of unfair competition, anyone who, in particular, uses GTCs that create a significant and unjustified imbalance between contractual rights and obligations, thus infringing the principle of good faith to the detriment of the consumer'. The idea behind this statutory provision, which came into force on 1 July 2012, is that GTCs can lead to unfair competition if they affect the market negatively. Notwithstanding, Article 8 UCA only protects consumers, not, for example, SMEs, even though these might need to be protected as well.

326 Outside of consumer contracts (see paras 363–368), Swiss courts only verify the content of GTCs in a **limited way**, that is, according to the general rules on the validity of contracts with regard to their content (Arts 19–20 CO; see paras 199–220).

IX Categories of Contracts

A Criteria for Distinction

327 The Specific Part of the Code of Obligations classifies the contracts using the **characteristic obligation** of the contract in question as the criterion for distinction (see paras 330–338).

328 **Other classifications** based on different criteria for distinction are imaginable, such as:

- The existence of a **specific statutory regime** (see paras 339–342);

[320] DFSC 146 III 339 reas. 5.2.3, DFSC 142 III 671 reas. 3.3.

[321] Jan Busche, '§ 133', in Säcker, Rixecker, Oetker and Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 9th edn (Munich: Verlag CH Beck, 2021), para. 25.

[322] DFSC 142 III 671 reas. 3.3.

- The **number of obligations undertaken** (see paras 343–347);
- The **relationship of the obligations to time** (see paras 348–353);
- The **consequences of the conclusion of the contract** (see paras 354–362); and
- The existence of a **consideration** (see paras 359–362).

329 The category of **consumer contracts** will form part of a separate chapter (see paras 363–368).

1 Classification Based on the Characteristic Obligation

330 The classification found in the **Specific Part of the Code of Obligations** which is based on the characteristic obligation (*charakteristische Leistung*, *prestation caractéristique*, *prestazione caratteristica*) distinguishes between the following contracts.

331 The **contracts of disposition** (*Veräusserungsvertrag*, *contrat d'aliénation*, *contratto di alienazione*) are those in which one party undertakes to transfer (permanently) to another the ownership of an object or a right, whether free of charge or in exchange for payment.[323] The contract of sale (Arts 184–236 CO; see paras 567–1109), the contract of exchange (Arts 237–238 CO) and the contract of donation (Arts 239–252 CO) belong to this category.

332 **Contracts for the transfer of use** (*Gebrauchsüberlassungsvertrag*, *contrat de cession d'usage*, *contratto di cessione d'uso*) are those in which one party transfers to another the use or enjoyment of an object, a right, or even a value for a certain period of time, whether free of charge or in exchange for payment.[324] The lease contract (Arts 253–273c CO), the usufructuary lease contract (Arts 275–304 CO), the contract of loan for use (Arts 305–311 CO) and the fixed-term loan (Arts 312–318 CO) belong to this category.

333 **Employment contracts** (*Arbeitsvertrag*, *contrat de travail*, *contratto di lavoro*) are those in which one party places itself at the service of another in a relationship of subordination, for a certain period of time.[325] The individual employment contract (Arts 319–342 CO) and the specific individual employment contracts such as the apprenticeship contract (Arts 344–346a CO), the commercial traveller's contract (Arts 347–350a CO) and the homeworker's contract (Arts 351–355 CO) belong to this category.

[323] Christoph Müller, *Contrats de droit suisse – Présentation systématique des contrats les plus importants en pratique* (Bern: Stämpfli, 2021), para. 33.
[324] Müller, 'BK-Einl. CO', para. 113.
[325] Müller, *Contrats de droit suisse*, para. 35.

334 **Service contracts** (*Dienstleistungsvertrag*, *contrat de services*, *contratto di servizio*) are those in which one party undertakes to independently carry out a specific activity for the benefit of another.[326] The contract for work and services (Arts 363–379 CO; see paras 1113–1888), the publishing contract (Arts 380–393 CO) as well as the simple mandate contract (Arts 394–406 CO; see paras 1894–2505) and all specific types of mandate contracts such as the marriage or partnership brokerage contract (Arts 406a–h CO), the letter of credit and the loan authorisation (Arts 407–411 CO), the brokerage contract (Arts 412–418 CO), and the commercial agency contract (Arts 418a–v CO; see paras 2506–2878) belong to this category. This category of contracts can be further divided into the following two subcategories:

- **Contracts with a duty to achieve a certain result** (*Vertrag mit Erfolgspflicht*, *contrat de résultat*, *contratto con l'obbligo di raggiungere determinati risultati*) are those contracts in which the service provider promises to achieve a result expected by the other party (e.g., contract for work and services; see paras 1113–1888). In order to determine whether the services have been rendered in accordance with the contract, the result obtained will be compared with the result promised, in principle, disregarding the behaviour of the party responsible for achieving it;[327] and
- **Contracts with a duty of diligence** (*Vertrag mit Sorgfaltspflicht*, *contrat de moyens*, *contratto con un obbligo di diligenza*) are those contracts in which the service provider promises only to perform the services diligently and with a view to the result expected by the other party, but not to achieve the result itself (e.g., simple mandate contract; see paras 1894–2505). In order to determine whether the services have been rendered in accordance with the contract, the manner in which the service provider has rendered the services will be assessed, irrespective of whether or not the intended result has been achieved.

335 **Guarantee or surety contracts** (*Sicherungsvertrag*; *contrat de garantie*, *contrat de sûreté*; *contratto di garanzia*) are those in which one party undertakes to provide another with specific security for the

[326] Müller, 'BK-Einl. CO', para. 115.

[327] Pierre Tercier, Laurent Bieri and Blaise Carron, *Les contrats spéciaux*, 5th edn (Zurich/Basel/Geneva: Schulthess, 2016), para. 420.

performance of an obligation.[328] The contract of surety (Arts 492–512 CO) belongs to this category.

336 **Random contracts** (*zufallsbedingter Vertrag*, *contrat aléatoire*, *contratto aleatorio*) are those with a random element. The contract of gambling and betting (Arts 513–515a CO) as well as the life annuity contract and the lifetime maintenance contract (Arts 516–529 CO) belong to this category. The insurance contracts (*Versicherungsvertrag*, *contrat d'assurance*, *contratto di assicurazione*) by which one party (the insurance company) undertakes, in return for payment of premiums, to provide a benefit to another (the insured person) in the event of occurrence of a specific risk, are close to this category.[329]

337 The **simple partnership contract** (*einfache Gesellschaft*, *société simple*, *società semplice*) is governed by Articles 530–551 CO. Despite its name, the simple partnership is a contract and not a company. It is one of the contracts by which the parties undertake to perform obligations in order to achieve a common goal.

338 The **interest of this classification** lies in the structure of the Specific Part of the Code of Obligations. The same criterion of characteristic obligation is used by Article 117 PILA to determine the law applicable to an international contract in the absence of a choice of law by the parties.

2 Classification Based on the Existence of a Specific Statutory Regime

339 The classification based on the **existence of a specific statutory regime** distinguishes between the following contracts.

340 The **nominate contracts** (*Nominatvertrag*, *contrat nommé*, *contratto tipico*) are those for which the legislator has developed a specific statutory regime.[330] This definition calls for the following two clarifications:

- It does **not matter where the specific statutory regime is located**. It may be the Code of Obligations, other domestic statutes or international law;
- The statutory regime must be **specific**, in the sense that it must achieve a certain level of detail. Some contracts are regulated in detail by statute (e.g., lease contract, Arts 253–273c CO), whilst others are regulated in a much more summary manner (e.g., the simple mandate contract, Arts

[328] Müller, *Contrats de droit suisse*, para. 37.
[329] Tercier, Bieri and Carron, *Contrats spéciaux*, para. 423.
[330] Müller, 'BK-Einl. CO', para. 120.

394–406 CO; see paras 1894–2505), or even only by allusion (e.g., guarantee of performance by third party, Art. 111 CO). The delimitation with respect to the innominate contracts is therefore a question of degree and not of kind.

341 The **innominate contracts** (*Innominatvertrag*, *contrat innommé*, *contratto innominato*) are those for which the legislator has not developed a specific statutory regime.[331]

342 The **interest of this classification** lies in the application of the statutory regime and the regime of gap-filling in the contract (see para. 69). In the case of a nominate contract (see para. 340), the parties must comply not only with the general mandatory rules (see paras 67–68), but also with those specific to the contract in question (e.g., Art. 404 CO for the simple mandate contract; see paras 2382–2446). When there is a gap in a nominate contract, the arbitrator or judge will, in principle, fill it using the (mandatory and optional) statutory regime governing the contract in question. This is not the case if the parties have reserved their agreement on one or more secondary points (Art. 2(2) CO; see para. 118), without finally fixing it. In such a case, the arbitrator or judge fills the gap taking into account the 'nature of the transaction' (Art. 2(2) CO) and without being bound by the optional statutory provisions (see paras 69–70).[332] Innominate contracts are examined in detail below; see paras 2879–2915.

3 Classification Based on the Number of Obligations Undertaken

343 The classification based on the **number of obligations undertaken** by the parties distinguishes between the following contracts.

344 **Unilateral contracts** (*einseitiger Vertrag*, *contrat unilatéral*, *contratto unilaterale*) are those in which only one party promises the performance of an obligation to the other.[333] The typical example is the contract of donation (Arts 239–252 CO). These contracts can be found in other Civil law countries (e.g., Art. 1106(2) CCF, according to which a contract is unilateral 'when one or more parties bind themselves towards one or more parties without the latter assuming a reciprocal obligation'),

[331] Müller, *Contrats de droit suisse*, para. 43.
[332] Müller, 'BK-Art. 2 CO', paras 61–67.
[333] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 3.19.

whereas Anglo-American laws show restraint and require, in principle, a counter-performance (consideration) for the formation of a contract.[334]

345 **Bilateral contracts** (*zweiseitiger Vertrag*, *contrat bilatéral*, *contratto bilaterale*) are those in which both parties undertake an obligation to each other.[335] Contrary to multilateral contracts (see para. 346), the respective interests of the parties are opposed (e.g., in the contract of sale, the buyer is interested in the object, whereas the seller is interested in the price). Within the category of bilateral contracts, a distinction is made between the following two subcategories:

- **Perfect bilateral or synallagmatic contracts** (*vollkommen zweiseitiger Vertrag*, *synallagmatischer Vertrag*; *contrat bilatéral parfait*, *contrat synallagmatique*; *contratto bilaterale perfetto*, *contratto sinallagmatico*) are those contracts in which the parties undertake obligations which are in an exchange relationship (synallagma). One party undertakes an obligation only because the other party in turn also undertakes (another) obligation in exchange (*do ut des*). The typical example is the contract of sale (Art. 184 CO: the seller undertakes to transfer ownership of the object sold to the buyer in return for the sale price; see paras 580–590). When the statutory law refers to the bilateral contract (Arts 82–83, 107, 119(2) CO), it refers to the perfect bilateral contract;[336] and
- **Imperfect bilateral contracts** (*unvollkommen zweiseitiger Vertrag*, *contrat bilatéral imparfait*, *contratto bilaterale imperfetto*) are those contracts in which only one party undertakes (free of charge) a main obligation, while the other party undertakes only a secondary obligation which is not in an exchange relationship. The typical example is the simple mandate contract concluded free of charge (Art. 394(3) CO; see paras 2332–2337), in which the agent undertakes to render services, while the principal does not undertake to pay any fees, but is simply bound by Article 402(1) CO to reimburse the expenses incurred by the agent in the proper performance of the simple mandate contract (see paras 2269–2295).

346 **Multilateral contracts** (*mehrseitiger Vertrag*, *contrat multilatéral*, *contratto multilaterale*) are those contracts in which two or more persons undertake obligations that are combined to achieve a common goal (and

[334] Andrews, *Contract Law*, pp. 109–111.
[335] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 256.
[336] Müller, 'BK-Einl. CO', para. 130.

are therefore not in an exchange relationship).[337] The typical example is the simple partnership contract (Arts 530–551 CO).

347 The **interest of this classification** lies in the fact that certain provisions of the Code of Obligations only apply to perfect bilateral contracts:[338]

- If a party **fails to perform an obligation** which is in an exchange relationship with the consideration, the other party is entitled to retain the consideration (Art. 82 CO; see para. 394);
- In case of **delay** in the performance of an obligation which is in an exchange relationship, the other party has the rights mentioned in Article 107(2) CO (see para. 461);
- If the performance of an obligation which is in an exchange relationship with the consideration becomes **impossible**, the other party is released from the obligation to provide the consideration (Art. 119(2) CO; see paras 489–490).

4 Classification Based on the Relationship of the Obligations to Time

348 The classification based on the **relationship of the obligations to time** distinguishes between the following contracts.

349 **Simple contracts** (*einfacher Vertrag*, *contrat simple*, *contratto semplice*) are those contracts which have as their object isolated (often one-off) obligations which are performed at a specific point in time.[339] The contract of sale (Arts 184–236 CO; see paras 567–1109) with the obligations to transfer ownership of an object on the one hand and to pay the price on the other is a typical example. Within the category of simple contracts, the following subcategories are distinguished:

- **Contracts with immediate performance** (or manual contracts) (*Handgeschäft*, *Bargeschäft*; *contrat manuel*, *contrat à exécution immédiate*; *contratto ad esecuzione immediata*) are those contracts in which the conclusion and the performance of the contract coincide in time.[340] Although the statutory model of a contract creating obligations is based on the idea that the conclusion and performance of the contract occur at different times (see paras 389–394), the vast majority

[337] Müller, *Contrats de droit suisse*, para. 48.
[338] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 3.23.
[339] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 94, 264.
[340] Müller, 'BK-Einl. CO', para. 135.

of everyday transactions are manual contracts (e.g., buying a newspaper at a kiosk). In contrast to the classical model, where the parties promise each other future benefits, manual contracts are therefore characterised by promises of immediate benefits;[341] and

- **Contracts with differed performance** (*Vertrag mit aufgeschobenem Erfüllungstermin*, *contrat à exécution différée*, *contratto ad esecuzione differita*) are those contracts in which at least one party has the right to perform the obligation some time after the conclusion of the contract.[342]

350 **Contracts of duration** (*Dauervertrag*, *contrat de durée*, *contratto di durata*) are those contracts which have as their object an obligation which is continuous in time (*Dauerschuld*, *dette durable*, *rapporto obbligatorio di durata*) and which the debtor must perform for the duration of the contractual relationship.[343] Such an obligation is not extinguished by performance, but must be performed until it is extinguished by the passage of time or for some other reason, in particular, termination of the contract (see para. 353).[344] A typical example is the lease contract (Arts 253–273c CO): The landlord must transfer the use of the apartment continuously and for the entire time of the lease contract.

351 The distinction between simple contracts (see para. 349) and contracts of duration (see para. 350) should not be confused with the one between **short-term contracts** (*kurzfristiger Vertrag*, *contrat de courte durée*, *contratto a breve termine*) and **long-term contracts** (*langfristiger Vertrag*, *Langzeitvertrag*; *contrat de longue durée*; *contratto a lungo termine*). Thus, a contract of duration can be a short-term contract. For example, a bicycle can be rented for only one hour. The short duration of this lease contract does not change the fact that the lease contract is a contract of duration. In contrast, a long-term contract in which the (one-off) performance of the contract only takes place a long time after the contract has been concluded (e.g., conclusion of a contract of sale today and transfer of ownership and payment of the price only in one year) remains a simple contract. The same applies to a simple contract which is carried out in several instalments, but over a long period of time. The life of a simple contract can thus be spread out over time without becoming a contract of duration.

[341] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 265–268.
[342] Müller, *Contrats de droit suisse*, para. 51.
[343] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, paras 94, 263.
[344] DFSC 128 III 428 reas. 3.

352 The **sale with successive deliveries** (*Sukzessivlieferungsvertrag*, *vente à livraisons successives*, *vendita con consegne successive*), for example, of electricity, gas, water or beer, can be a simple contract or a contract of duration. In a sale with successive deliveries, one party undertakes to make periodic partial deliveries of goods, the total quantity of which is defined in advance or only according to the needs of the other party. If the total quantity is known at the time the contract is concluded (e.g., a carpenter buys 10 square metres of wood which he can order for one year), the sale with successive deliveries is a simple contract (see para. 349). If, on the other hand, the number of partial deliveries depends on the duration of the contract (e.g., a brewery delivers 2,000 litres of beer per quarter to a restaurant owner until further notice), the sale by successive deliveries must be qualified as a contract of duration (see para. 350).[345]

353 The **interest of this classification** lies in the fact that simple contracts and contracts of duration do not follow the same regime with respect to the end of the contract:[346]

- In terms of terminology, a party puts an end to a simple contract by **rescission** (*Aufhebung*, *résolution*, *recesso*), whereas a party puts an end to a contract of duration by **termination** (*Kündigung*; *résiliation*; *disdetta*, *risoluzione*);
- The termination of a simple contract has a **retroactive effect** (*ex tunc*), which means that the parties have to make restitution to each other with respect to the performances already rendered, according to the rules of unjust enrichment (Arts 62–67 CO; see para. 85). This regime is not adapted to the termination of a contract of (indefinite) duration, which can only have a **prospective effect** (*ex nunc*). Indeed, once the landlord has transferred the use of the flat for a certain period of time, it is no longer possible to go back and pretend that the tenant has never occupied the premises;
- The same applies in case of **nullity or invalidity** (e.g., due to a lack of consent; see paras 263–265) of a contract of duration which the parties have already started to perform. It is then equally impossible to return (in particular, non-pecuniary) performances which the parties have already rendered in the belief that their contract was (or would remain) valid. This is the solution provided for in Article

[345] Huguenin, *Obligationenrecht*, para. 2362.
[346] Müller, 'BK-Einl. CO', para. 138.

320(3) CO for employment contracts, which can be generalised to all contracts of duration;[347] and

- Unlike simple contracts, parties can terminate contracts of duration by **ordinary termination** or extraordinary termination. When a party terminates a contract of duration in an ordinary way, such party has to respect notice periods and terms (e.g., Art. 418q CO with respect to the commercial agency contract; see paras 2818–2827). In addition to ordinary termination, the statutory rules of several contracts of duration also provide for **extraordinary termination** for valid reasons (e.g., Art. 418r CO with respect to the commercial agency contract; see paras 2828–2857). Even though there is a lack of such statutory provisions for certain contracts of duration, the general principle is that either party to a contract of duration may terminate it at any time for valid reasons, that is, if the party concerned can no longer reasonably be expected to remain bound by the contractual duration commitment.[348]

5 Classification Based on the Consequences of the Conclusion of the Contract

354 The classification based on the **consequences of the conclusion of the contract** distinguishes between the following contracts.

355 **Contracts giving rise to obligations** (*Schuldvertrag*, *contrat générateur d'obligations*, *contratto con effetti obbligatori*) are those which give rise to (at least) one obligation.[349] Contracts giving rise to obligations contain (at least) one act giving rise to obligations (*Verpflichtungsgeschäft*, *acte générateur d'obligations*, *atto generatore di obbligazioni*), that is, a legal act which gives rise to an obligation to do or refrain from doing, on the part of at least one party. All contracts in the Specific Part of the Code of Obligations are obligation-generating contracts. The following two phases can be distinguished in the 'normal' life of an obligation-generating contract:

- The **conclusion** (*Abschluss*, *conclusion*, *conclusione*), which is the obligation-generating act. This generates an obligation for at least one of the parties. The obligation-generating act leads only to *in personam* effects and not to *in rem* effects. It merely increases the liabilities on the

[347] DFSC 129 III 320 reas. 7.

[348] DFSC 138 III 304 reas. 7, concerning the delimitation agreement of a trademark; DFSC 128 III 428 reas. 3, concerning the fixed-term loan; DFSC 4A_59/2017 of 28 June 2017 reas. 4.1–4.1.2, concerning the lease contract.

[349] Müller, *Contrats de droit suisse*, para. 57.

balance sheet of at least one of the parties. The conclusion of a contract of sale thus obliges, on the one hand, the seller to transfer possession and ownership of the object to the buyer and, on the other hand, the buyer to pay the price (Art. 184(1) CO; see paras 580–590). However, the conclusion of the contract of sale does not (yet) change anything regarding the ownership rights of the object, as the seller remains the owner of the object sold and the buyer remains the owner of the price until the contract is performed;

- The **performance** (*Erfüllung*, *exécution*, *esecuzione*), which takes place by means of an act of disposal (*Verfügungsgeschäft*, *acte de disposition*, *atto di disposizione*), that is, a legal act by which the author transfers, modifies or extinguishes a right.[350] The act of disposal thus directly and definitively affects the existence or content of a right of the author. The act of disposal has *in rem* effects. It reduces the assets of the balance sheet of at least one of the parties. For example, when performing a contract of sale, the seller hands over the chattel to the buyer and thus transfers possession and ownership of the object sold to the latter (Art. 714 CC). The chattel sold thus leaves the seller's assets and enters the buyer's assets (see paras 622–672).

356 **Contracts of disposal** (*Verfügungsvertrag*, *contrat de disposition*, *contratto di disposizione*) are those whose content is (only) an act of disposal (see para. 355). Contracts of disposal directly diminish the assets of their author. The assignment of a claim (Arts 164–174 CO; see paras 544–550) and the conventional extinguishment of a claim (*Schulderlass*, *remise de dette*, *annullamento mediante convenzione*; Art. 115 CO) are typical examples.[351]

357 **Status contracts** (*Statusvertrag*, *contrat relatif à un statut*, *contratto relativo a uno statuto*) are those which result in the formation, modification or termination of a community relationship.[352] Examples are the conclusion of a marriage (Art. 102 CC), the founding of an association (Art. 60 CC) or the joining of a simple partnership (Art. 542 CO).

358 The **interest of this classification** lies, in particular, in the *in personam* or *in rem* effects produced by the conclusion of the contract.

[350] Müller, 'BK-Einl. CO', para. 158.
[351] Müller, *Contrats de droit suisse*, para. 141.
[352] Müller, 'BK-Einl. CO', para. 142.

6 Classification Based on the Existence of Consideration

359 The classification based on the **existence of consideration** distinguishes between the following contracts.

360 **Contracts concluded in return for payment** (*entgeltlicher Vertrag*; *contrat conclu à titre onéreux*; *contratto a titolo oneroso*) are those contracts in which the obligation of one party is in an exchange relationship with a principal obligation of the other.[353] Contracts concluded in return for payment are always perfect bilateral contracts (see para. 346).

361 **Contracts concluded free of charge** (*unentgeltlicher Vertrag*, *contrat conclu à titre gratuit*; *contratto a titolo gratuito*) are those contracts in which the obligation of one party is not in an exchange relationship with a principal obligation of the other.[354] The party receiving the performance for no consideration may, however, be subject to secondary obligations, such as the obligation of the principal to reimburse the agent for expenses in a simple mandate contract concluded free of charge (Art. 402(1) CO; see para. 2273). Contracts concluded free of charge are therefore never perfect bilateral contracts (see para. 345), but unilateral contracts (see para. 344) or imperfect bilateral contracts (see para. 345). Contracts concluded free of charge in the Specific Part of the Code of Obligations are the contract of donation (Arts 239–252 CO), the contract of loan for use (Arts 305–311 CO), the interest-free fixed-term loan (Art. 313(1) CO), the simple mandate contract concluded free of charge (Art. 394(3) CO; see paras 2332–2337), the contract of bailment concluded free of charge (Art. 472(2) CO) and the life annuity contract concluded free of charge (Arts 516–520 CO).

362 The **interest of this classification** lies in the fact that contracts concluded free of charge are subject to certain special rules.[355] The Code of Obligations thus takes account of the fact that the main characteristic obligation is provided without any consideration and that one of the parties is therefore at an economic advantage.[356] The Code of Obligations sets out such special rules:

- In relation to the **form**. According to Article 243 CO, only the donor's promise to give is subject to a written formal requirement, whereas the

[353] Müller, 'BK-Einl. CO', para. 144.
[354] Müller, 'BK-Einl. CO', para. 145.
[355] Müller, *Contrats de droit suisse*, para. 64.
[356] Schmid, Stöckli and Krauskopf, *Schweizerisches Obligationenrecht*, paras 152–158.

beneficiary's acceptance may also be made by conclusive actions (see para. 176);

- In relation to the possibilities of **restitution or early revocation**. The donor can revoke a promise to give that has already been performed (Art. 249 CO) or not yet performed (Art. 250 CO) in certain cases. The same applies to a loan for use concluded free of charge (Art. 309(1) CO). Article 476(1) CO provides for the same regime for the contract of bailment, irrespective of whether the contract was concluded in exchange for payment or not;[357]
- In relation to **termination at any time**. In the case of a contract of loan for use, the lender can terminate the contract 'whenever the lender likes' (Art. 310 CO). The same applies to the simple mandate contract (Art. 404(1) CO; see paras 2382–2446), which the Code of Obligations regards as a contract concluded free of charge (Art. 394(3) CO; see paras 2327–2329). However, this principle also applies when the simple mandate contract has been concluded in exchange for payment (see paras 2323–2331). The same applies to the contract of bailment (Art. 476(2) CO); and
- In relation to **liability**. Article 248(1) CO provides that the donor is only liable for the loss incurred by the beneficiary due to the donation in the case of fraud or gross negligence (see also Art. 248(2) CO). Article 99(2) CO expresses the same idea in a general way.

B Consumer Contracts

363 Since the early 1980s, consumer contracts (*Konsumvertrag*, *Konsumentenvertrag*; *contrat de consommation*; *contratto concluso con i consumatori*) have found their place in Swiss law, particularly under the influence of EU law. It is not easy to give a **definition** of the consumer contract.[358] As a general rule, they are contracts in which one party (the provider, the professional) offers, in the context of such party's trade, commercial, industrial or professional activity, to another party (the consumer), goods and/or services serving primarily to cover the latter's

[357] Schmid, Stöckli and Krauskopf, *Schweizerisches Obligationenrecht*, para. 157.

[358] Dario Hug, '*La formation du contrat de consommation*', PhD thesis, University of Neuchâtel (Basel: Helbing Lichtenhahn, 2020), paras 665–863; Dario Hug, 'La notion de consommateur: un ectoplasme juridique?', *Jusletter* of 29 March 2021.

personal or family needs.[359] However, domestic statutes (other than the Code of Obligations and the Federal Act on Consumer Credit of 23 March 2001 (CCA)) contain broader (e.g., Art. 2 PTA) or narrower definitions (e.g., Art. 1 of the Federal Act on Product Liability of 18 June 1993 (PLA); Art. 32 CCP as well as Arts 114 and 120 PILA). The Code of Obligations and other domestic statutes refer expressly (Art. 40a CO; Art. 1 CCA; Art. 32 CCP; Art. 120(1) PILA) or implicitly (Art. 6a CO; Arts 1 and 2 PTA; Art. 1 PLA; Art. 8 of the Federal Act on Product Safety of 12 June 2009 (ProdSA); Art. 15 Lugano Convention and Art. 8 UCA) to this type of contract.

364 Consumer contracts are, in principle, perfect bilateral contracts (see para. 345), contracts which give rise to obligations (see para. 355) and contracts concluded in exchange for payment (see para. 360). The criterion of exclusive or principal coverage of the consumer's private needs is aimed not so much at the content as at the purpose of the contract, more precisely, the basis for the conclusion of the consumer contract (Art. 24(1)(4.) CO; see paras 235–239). Therefore, the concept of consumer contracts is **functional or transversal in nature**.[360] It does not refer to a certain type of contract, but to any contract that meets this criterion.[361]

365 Consumer contracts are also called business to consumer (**B2C**), as opposed to B2B or commercial contracts (*Handelsvertrag*, *contrat commercial*, *contratto commerciale*).

366 Article 97(1) Cst. obliges the Swiss Federal Confederation to take 'measures to protect consumers' (see para. 367). The Federal legislator has therefore enacted certain specific provisions for consumer contracts, which are intended above all to remedy the **structural imbalance** between professionals and consumers. This imbalance manifests itself, in particular, in a lack of information and in the limited economic power of consumers vis-à-vis professionals.[362]

367 Certain consumer **protection mechanisms** are characteristic of this particular private law:

[359] Ariane Morin, 'Art. 1', in Thévenoz and Werro (eds), *Commentaire romand, Code des obligations I – Art. 1–529 CO*, 3rd edn (Basel: Helbing Lichtenhahn, 2021) (cited as: Morin, 'CR-Art. 1 CO'), para. 71.
[360] Morin, 'CR-Art. 1 CO', para. 74.
[361] DFSC 132 III 268 reas. 2.2.2, DFSC 121 III 336 reas. 5d.
[362] Hug, '*La formation du contrat*', paras 202–210.

- Mechanisms with respect to the **conclusion of the contract**: The professional's pre-contractual duty of information aims to rebalance the asymmetry between the parties in terms of information which is useful for the conclusion of the contract (e.g., Art. 3 IPA). Formal requirements (e.g., Art. 9 CCA) also fall into this group of mechanisms. The same applies to mechanisms which provide for a (fourteen-day) right of revocation in favour of the consumer (e.g., Art. 40a–f CO; Art. 16 CCA), with the result that the entry into force of the contract depends on whether the consumer exercises the right of revocation within a certain period;
- Mechanisms with respect to the **content of the contract**: Article 14 CCA, which sets the maximum interest rate for a consumer credit, is an example. However, a violation of this relatively mandatory provision (see para. 68) (Art. 37 CCA) does not lead to nullity in the sense of Article 20 CO (see paras 216–220), but to nullity *sui generis*. Indeed, this statute directly regulates the consequences of a violation of Article 14 CCA in Article 15 CCA, giving priority to the interests of the consumer over those of the provider.[363] Another more recent example is to be found in Article 210(4)(a) CO (see para. 813), according to which the limitation period for warranty claims in a consumer sale may not be 'less than two years or, in the case of the sale of second-hand goods, less than one year';
- Mechanisms with respect to the **termination of the contract**: Under the CCA, the consumer can terminate the contract not only for valid reasons, but also without cause (e.g., Art. 17(1) and (2) CCA). Sometimes, however, the consumer will have to pay compensation to the provider in case of termination (also without cause) (e.g., Art. 17(3) CCA); and
- Mechanisms with respect to the **enforcement of contractual rights**: These include not only rules on the forum (e.g., Art. 32 CCP), which the consumer cannot waive before the dispute arises or by tacit acceptance (Art. 35 CCP), but also rules of evidence (Art. 40e(3) CO).

368 **GTCs** (see paras 305–326) play a very important role in consumer contracts[364] (see Figure 3.3).

[363] Schmid, Stöckli and Krauskopf, *Schweizerisches Obligationenrecht*, para. 172.
[364] Schwenzer and Fountoulakis, *Schweizerisches Obligationenrecht*, para. 44.02.

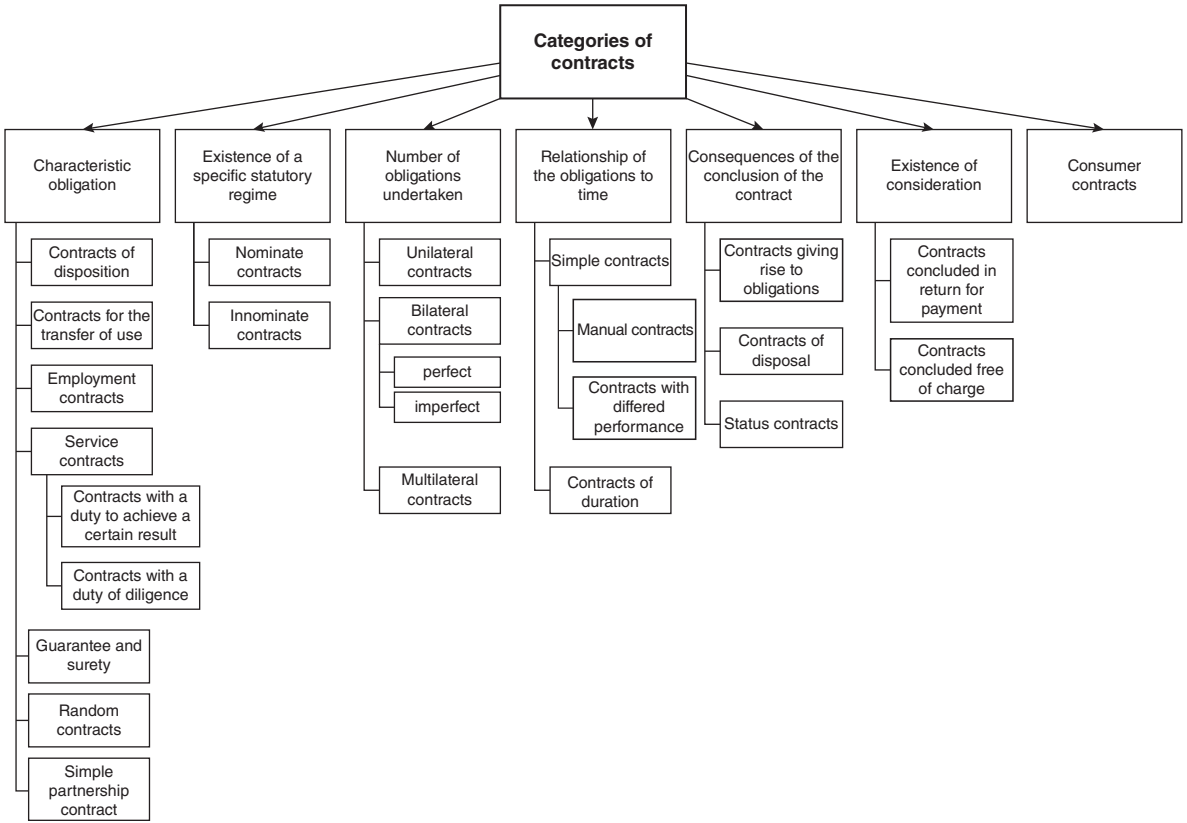

Figure 3.3: Categories of contracts

Source: Christoph Müller, *Contrats de droit suisse – Présentation systématique des contrats les plus importants en pratique* (Bern: Stämpfli, 2021).

X Performance of the Contract

A Overview

369 Once the parties have formed a contract (see paras 90–132), they must **perform the obligations arising from the contract according to their agreement**.

370 If the parties did not agree on certain aspects of performance, they must look to **Articles 68–90 CO** for guidance. In essence, these non-mandatory statutory provisions (see paras 69–70) address the following issues:

- The **parties** who are to perform the obligation (Art. 68 CO; see paras 372–380);
- The **content** of the obligation to perform (Arts 69–73 CO; see paras 381–382);
- The **place** of performance (Art. 74 CO; see paras 383–388); and
- The **time** of performance (Arts 75–90 CO; see paras 389–394).

371 Lastly, the effect of a **change of circumstances** on the contract must be determined (see paras 395–411).

B Parties Performing the Obligation

1 No Personal Performance

372 The debtor is only bound to perform personally where **performance depends on the debtor's person** (Art. 68 CO).

373 This is particularly the case with respect to **service contracts** (see paras 1110–1112). The simple mandate contract (Art. 398(3) CO; see paras 1894–2505) and the contract for work and services (Art. 364(2) CO; see paras 1113–1888) illustrate this.

374 In **non-service contracts** (see paras 567–1109), the debtor can delegate performance to a third party. The contract can then be performed either by a substitute (Art. 399 CO for the simple mandate contract; see paras 1993–1995) or by an auxiliary (Art. 101 CO; see paras 1996–1998).

375 A third party can also perform the obligation **against the debtor's will**. The debtor is thereby freed of the obligation.[365]

376 The admissible performance by a third party does not, in principle, **entail that the debtor recognises the obligation**.[366]

[365] DFSC 4C.69/2005 of 14 April 2005 reas. 3.
[366] DFSC 4A_116/2012 of 28 June 2012 reas. 4.4.

2 Several Debtors

377 Sometimes an obligation must be **performed by several debtors**. Such plurality of debtors does not necessarily have to exist from the time of the conclusion of the contract (see paras 100–132). Additional debtors might also be joined at a later stage.

378 The most frequent case of several debtors is that of **joint and several liability** (Art. 143–149 CO; *Solidarschuld*, *solidarité passive*, *debito solidale*). In this case, each debtor must perform the whole obligation (Art. 143(1) CO). In other words, each debtor remains bound towards the creditor until the whole claim is satisfied (Art. 144(2) CO). From the perspective of the creditor, this means that the latter can choose to demand partial or whole performance from each jointly and severally liable debtor (Art. 144(1) CO). Joint and several liability arises directly from statute (Art. 143(2) CO; e.g., according to Art. 50(1) CO in the field of tort liability: 'where two or more persons have together caused damage') or from the contract (Art. 143(1) CO). With respect to the external relationship between the different debtors and the creditor, the debtors share a common fate, which means that: (1) one debtor cannot impair the position of the other debtors by its personal act unless otherwise provided (Art. 146 CO); and (2) performance of the obligation by one debtor frees the other debtors from the obligation as well (Art. 147(1) CO). The internal relationship between the different debtors is governed by the following two principles: (1) Unless the legal relationship between the debtors indicates otherwise, each must assume an equal share of the payment made to the creditor (Art. 148(1) CO); and (2) if a debtor pays more than the latter's share, the debtor has a right of recourse (*Regress*; *recours*; *ricorso*, *regresso*) against the other debtors for the amount that such debtor paid in excess of the latter's share (Art. 148(2) CO).

3 Several Creditors

379 Sometimes an obligation must be **performed in favour of several creditors**.

380 The most frequent case of several creditors is that of **joint and several claims** (Art. 150 CO; *Solidarforderung*, *solidarité active*, *credito solidale*). In this case, each creditor can claim performance of the obligation from the debtor. The debtor can be released from the obligation by performing the obligation in favour of one of the creditors (Art. 150(2) CO). It is within the discretion of the debtor as to which creditor the debtor pays as long as none of them has taken legal action against the

debtor (Art. 150(3) CO). Joint and several claims arise directly from statute (e.g., Art. 399(3) CO with respect to the simple mandate contract; see paras 2014–2027) or from the contract (Art. 150(1) CO).

C *Content of the Obligation to Perform*

381 With respect to the content of the obligation to perform, it is possible to distinguish between the **specific obligation** (*Speziesschuld*, *dette d'un corps certain*, *debito riguardante una cosa specifica*) and the **generic obligation** (*Gattungsschuld*, *dette d'une chose de genre*, *debito riguardante una cosa generica*) (Art. 71 CO). For the equivalent distinction between a specific object and a generic object in the contract of sale, see paras 645–650.

382 Furthermore, one has to distinguish between the following **two types of obligations**:

- **Alternative obligation**: In the presence of an alternative obligation (*Wahlobligation*, *obligation alternative*, *obbligazione alternativa*), the debtor must perform one of (at least) two obligations. Article 72 CO assumes that the debtor can choose which obligation to perform, unless otherwise determined by the contract; and
- **Alternative authorisation obligation**: In the presence of an alternative authorisation obligation (*Alternativermächtigung*, *obligation avec faculté alternative*, *obbligazione con facoltà alternativa*), which is not expressly regulated by the Code of Obligations, the debtor must perform only one obligation, but the latter is entitled to perform the obligation by the performance of another obligation.[367] The possibility for the debtor to pay the contractual penalty instead of performing the main obligation (Art. 160(1) CO) is an example.

D *Place of Performance*

383 Another issue to be resolved in connection with performance is **where the debtor must and/or can perform**. This is the place of performance (*Erfüllungsort*, *lieu de l'exécution*, *luogo dell'adempimento*).

[367] Ulrich Schroeter, 'Art. 72', in Widmer-Lüchinger and Oser (eds), *Basler Kommentar, Obligationenrecht I – Art. 1–529 OR*, 7th edn (Basel: Helbing Lichtenhahn, 2019) (cited as: Schroeter, 'BSK-Art. 72 CO'), para. 6.

384 The determination of the place of performance is **important**, as the debtor is only validly discharged if the debtor performs at this place. The debtor runs the risk of being in default (Arts 102–109 CO; see paras 453–464) if the latter does so at another place.

385 As a rule, the place of performance is determined by the parties in their **contract**. In international trade, parties often determine the place of performance by using the INCOTERMS (with respect to the contract of sale, see paras 958–959).

386 In the absence of contractual rules, the place of performance is determined by **statute**, either in specific rules (e.g., Art. 477 CO for the contract of bailment) or in general rules, in particular, Article 74 CO, it being specified that the former take precedence over the latter.

387 **Article 74 CO** determines the place of performance depending on the content of the obligation:

- **Monetary debt**: Monetary debts (*Geldschuld, dette d'argent, debito pecuniario*) must be paid at the place where the creditor is domiciled at the time of payment (Art. 74(2)(1.) CO; for Art. 57(1)(a) of the UN Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG), see para. 1039).[368] These are known as 'portable debts' (*Bringschuld*, *dette portable*, *debito portabile*), because it is up to the debtor to deliver them (with respect to the contract of sale, see para. 691). Where money is wired from one bank account to another, the place of performance is the creditor's account.[369] With a payment by post, the place of performance is the post office where the money had been paid;[370]
- Debts concerning a **specific object** must be performed at the place where the object was located at the time of the conclusion of the contract (Art. 74(2)(2.) CO; for Art. 31(c) CISG, see 652, 1011). These are called 'retrievable debts' (*Holschuld*, *dette quérable*, *obbligazione da debito chiedebile*), because it is up to the creditor to take delivery of them (with respect to the contract of sale, see para. 652; with respect to the contract for work and services, see para. 1278);

[368] DFSC 142 III 466 reas. 6.1.4, DFSC 130 III 462 reas. 4.1.
[369] DFSC 119 II 232 reas. 2.
[370] DFSC 124 III 145 reas. 2a.

- **All other obligations** must be performed at the place where the debtor was domiciled at the time of the conclusion of the contract (Art. 74(2) (3.) CO; for Art. 31(c) CISG, see para. 1011). This principle of 'portable debts' applies, in particular, to services.

388 For the distinction between the place of performance and the place of destination of the object in the **contract of sale with a duty of dispatch**, see paras. 660–663.

E Time of Performance

389 A final issue to be resolved in relation to performance is **when the debtor must and/or can perform**. This is the time of performance (*Zeit der Erfüllung*, *moment de l'exécution*, *momento dell'esecuzione*).

390 The determination of the time of performance is **important**, as the debtor is only validly discharged if the debtor performs at this time. The debtor runs the risk of being in default (Arts 102–109 CO; see paras 453–464) if the latter does so at a later point in time.

391 With respect to the time of performance, the following **three moments** have to be distinguished:

- **Executability**: Executability (*Erfüllbarkeit*, *exécutabilité*, *eseguibilità*) is the point in time at which (or from which) the debtor has the right to perform the obligation. Unless the creditor can show valid reasons, the debtor's right is matched by the creditor's incumbency (*Obliegenheit, incombance, incombenza*) to receive the performance offered in accordance with the contract, under penalty of the creditor's default (Arts 91–96 CO; see paras 465–470). The debtor can therefore choose the moment at which the latter wants to perform, even before it becomes due;
- **Maturity**: Maturity (*Fälligkeit*, *exigibilité*, *esigibilità*) is the moment at which (or from which) the creditor has the right to claim performance from the debtor. As soon as the claim is mature, the creditor can claim performance and freely choose the due date . The time of maturity is generally the starting point for the running of the limitation period (Art. 130(1) CO; see paras 512–516). As long as the creditor does not claim performance by a reminder (Art. 102(1) CO; see para. 393), the debtor has the defence of non-performance, which allows the debtor not to perform (Art. 82 CO; see para. 394). In practice, maturity and the due date often coincide, in particular, when the parties have provided for a fixed term in their contract (see para. 462); and

- The **due date** (*Verfalltag*, *échéance*, *scadenza*) is the time at which the debtor must perform. The debtor must perform and the creditor has an incumbency (*Obliegenheit, incombance, incombenza*) to receive performance (see paras 698–701, 1282) at that time. The due date is the starting point of the default of the debtor within the meaning of Articles 102–109 CO (see paras 453–464).

392 In the absence of contractual rules, the Code of Obligations contains the following two principles with regard to **executability** (see para. 391):

- The debtor **may perform immediately**. This is the counterpart of immediate maturity (see para. 393) (Art. 75 CO); and
- The debtor may perform **before maturity** (see para. 391) **or before the due date** (see para. 391) (Art. 81 CO).

393 In the absence of contractual rules, the Code of Obligations contains the following principle with regard to **maturity** (see para. 391): The creditor has immediately the right to claim performance (Art. 75 CO). The creditor can thus immediately trigger the due date by a reminder (Art. 102(1) CO; see para. 457).

394 Despite maturity (see para. 391), the debtor may oppose performance by invoking one of the two following **suspensory defences** (*aufschiebende Einrede*, *exception dilatoire*, *eccezione sospensiva*):

- **Defence of non-performance** (Art. 82 CO): The defence of non-performance (*Einrede des nicht erfüllten Vertrages*, *exception d'inexécution*, *eccezione di mancato adempimento del contratto*; *exceptio non adimpleti contractus*) allows debtors to withhold their performance (even though such performance is mature; see para. 391) as long as their contractual partners have not performed or at least not seriously offered to perform[371] their own obligation (Art. 82 CO). This does not apply if 'the terms or nature of the contract allow [the contractual partner] to do so at a later date' (Art. 82 CO); and
- **Defence of insolvency** (Art. 83 CO): The defence of insolvency (*Einrede der Zahlungsunfähigkeit*, *exception d'insolvabilité*, *eccezione dell'insolvenza*) allows the debtor to withhold performance (even though such performance is mature; see para. 391) in the event of the

[371] DFSC 127 III 199 reas. 3a, DFSC 4A_351/2021 of 26 April 2022 reas. 3.1.1, DFSC 4A_262/2021 of 30 September 2021 reas. 5.1.

insolvency of the debtor's contractual partner who has not yet performed until the latter has provided the debtor with appropriate security (Art. 83(1) CO). If the debtor does not obtain appropriate security within a reasonable period of time, the debtor can even withdraw from the contract (Art. 83(2) CO).

F Adaptation of the Contract to Changed Circumstances

1 Principle

395 In **long-term contractual relationships**, in particular contracts of duration (see para. 350), the problem often arises that the factual or legal framework under which the contract was concluded changes in the course of time, which can lead to an aggravation of performance for the debtor or a devaluation of performance for the creditor. The question then arises whether (and if so, how) the contract can be adapted to the new circumstances or whether it must be fulfilled as agreed despite the disturbance of the equilibrium (*Äquivalenzstörung, déséquilibre, squilibrio*) that has occurred.

396 The answer to the question of whether the contract should be adapted to the changed circumstances depends on the **distribution of risk** between the parties. Which party should bear the risk that circumstances change between the conclusion and the performance of the contract?

397 This question may be **regulated in advance**, either by the parties themselves in their contract (see paras 402–405) or by statute (see paras 406–407). If this is not the case, the arbitrator or judge has to decide the question of adjustment by the arbitrator or judge of the contract (see paras 408–411).[372]

398 In principle, a contract is to be performed as it was concluded (principle of **sanctity of contract**; *Vertragstreue*, *fidélité contractuelle*, *fedeltà contrattuale*; ***pacta sunt servanda***).[373] This rule applies, in principle, without restriction and is part of public policy (and of customary international law),[374] when parties with equal rights and comparable market power enter into a contract.[375] As long as performance does not subsequently become objectively impossible (Art. 119 CO; see paras 484–490), a party can therefore, in principle, not invoke the fact that the

[372] Müller, 'BK-Art. 18 CO', para. 561.
[373] DFSC 142 III 442 reas. 3.1.4.
[374] DFSC 142 II 35 reas. 3.2, DFSC 4A_93/2013 of 29 October 2013 reas. 4.2, DFSC 4P.143/2001 of 18 September 2001 reas. 3a.
[375] DFSC 142 III 442 reas. 3.1.4.

(above all economic) framework conditions of the contract have changed in favour of one party after the conclusion of the contract. The allocation of the risk of change is therefore not based on parity or solidarity, but is, in principle, unilaterally at the expense of the party who is adversely affected by the change in circumstances.[376]

399 **Adaptation of the contract** (*Vertragsanpassung, adaptation du contrat, adattamento del contratto*) is an exception to the principle of the sanctity of contract (see para. 398), which is based on the fact that the parties tacitly assume the continuation of certain circumstances when concluding their contract (***clausula rebus sic stantibus***).

400 Swiss law does **not have a general statutory provision** on contract adjustment.

401 **Various legal systems** have a general clause for adjusting the contract to changed circumstances, namely the German (Section 313 BGB), the French (Art. 1195 CCF) and the Italian (Art. 1467 CCI) legal systems. English law resolves the influence of changed circumstances on contractual obligations using the doctrine of frustration.[377]

2 Contractual Adjustment Rules

402 Within the scope of their freedom of contract (Art. 19(1) CO; see paras 49–70), the parties can **regulate from the outset the consequences of changed circumstances on their contract**.

403 The parties can regulate this issue in their contract in the **two following ways**:

- **Positive adjustment rules**: Positive adjustment rules are contractual provisions which (positively) order an adjustment of the contract to changed circumstances for certain cases.[378] Such rules regularly contain the conditions for adjustment (in the form of a condition within the meaning of Arts 151–157 CO) as well as the adjustment consequences (e.g., index clauses or hardship clauses); and
- **Negative adjustment rules**: Negative adjustment rules are contractual provisions which (negatively) exclude an adjustment of the contract to changed circumstances in certain cases.[379]

[376] DFSC 104 II 314 reas. a.
[377] *National Carriers Limited v Panalpina (Northern) Limited*, [1980] UKHL 8, [1981] AC 675, 700 (Lord Simon). For a recent major case on the doctrine of frustration, see *Canary Wharf (BP4) T1 Limited v European Medicines Agency* [2019] EWHC 335 (Ch).
[378] DFSC 135 III 1 reas. 2.5.
[379] See DFSC 5A_39/2010 of 25 March 2010 reas. 3.3.

404 Positive and negative contractual adjustment rules are subject to the **general rules on the validity of contracts** (see paras 174–273). The envisaged changes in circumstances as well as the scope of adjustment must be contractually determined or at least determinable. Furthermore, adjustment clauses must, of course, comply with the general limits of Article 27 CC (see para. 207). Thus, the complete exclusion of a contractual adjustment, irrespective of a possible fundamental change in circumstances, may in certain cases violate Article 27 CC.[380]

405 If the contract grants a party the right to adapt it by unilateral declaration, this can also be problematic under Article 27 CC (see para. 207). According to the Federal Supreme Court, a **unilateral right to adjust the contract** is in any case only valid if 'both the expected event and the scope of the adjustment are determined by contract. An undefined right to unilaterally change contractual performance obligations would contradict the nature and purpose of the contract, which is intended to define the rights and obligations of each contracting party.'[381] However, even in the case of a unilateral adjustment clause that withstands this scrutiny, the general principle applies that the party entitled to adjust must exercise the unilateral contractual right of adjustment in accordance with equitable discretion (Art. 2(2) CC; see paras 73–74).[382] If such an adjustment clause is contained in GTCs (see paras 305–326), it might be invalid on the basis of the unusualness rule (see para. 321) in the case of mere global incorporation of the GTCs (see para. 317).[383]

3 Statutory Adjustment Rules

406 In the absence of contractual adjustment clauses, **statute may provide for (positive and negative) adjustment rules**. Such clauses can refer to a specific ground for adjustment (e.g., Art. 405 CO for the death of one of the parties in the simple mandate contract; see paras 2454–2458) or an extraordinary and unforeseeable change in circumstances (e.g., Art. 373 (2) CO with respect to the contract for work and services; see paras 1598–1634).

[380] DFSC 5A_39/2010 of 25 March 2010 reas. 3.3.
[381] DFSC 135 III 1 reas. 2.5.
[382] DFSC 123 III 246 reas. 3a.
[383] DFSC 135 III 1 reas. 3.3.

407 As a consequence of adjustment, **positive statutory adjustment rules** generally provide for the termination of the contract, with (*ex tunc*) or without (*ex nunc*) retroactive effect.[384] Negative statutory adjustment rules are less common.

4 Judicial Adjustment

408 If the contract does not provide for any (positive or negative) adjustment clause (see paras 403–405) and statute does not contain any such rules either (see paras 406–407), it is ultimately **up to the arbitrator or judge to decide** whether or not the contract should be adjusted to the changed circumstances.

409 Swiss courts only (judicially) adjust contracts **with restraint**.[385]

410 The following **five strict conditions** must be met:

- **Change of circumstances**: The basic prerequisite for contract adjustment is a change in the circumstances which influences the interests of the parties between the conclusion and the performance of the contract (see para. 395);
- **Unforeseeability of the change**: If the disadvantaged party could have foreseen the change in circumstances at the time of the conclusion of the contract or even actually foresaw it, a judicial adjustment of the contract is excluded. In this case, the disadvantaged party would have been in a position to guard against the risk of a change of circumstances. If such party fails to do so, the realisation of this risk is, in principle, at the latter's expense (see para. 399);[386]
- **Inevitability of the change**: The change in circumstances must also be unavoidable for the party invoking it and asking the arbitrator or judge to adjust the contract.[387] *A fortiori*, such party must not have caused or even been at fault with respect to the change in circumstances;[388]
- **Serious disturbance of the contractual equilibrium**: An adjustment of the contract is generally only possible if the contractual equilibrium (equivalence relationship) between performance and consideration is seriously disturbed;[389] and

[384] Müller, 'BK-Art. 18 CO', para. 620.
[385] DFSC 131 III 345 reas. 2.2.3, DFSC 4A_263/2019 of 2 December 2019 reas. 6.3.
[386] DFSC 138 V 366 reas. 5.1, DFSC 2C_825/2013 of 24 March 2014 reas. 6.1.
[387] DFSC 127 III 300 reas. 5b.
[388] DFSC 107 II 331 reas. 4, DFSC 5A_128/2020 of 13 April 2021 reas. 4.1, not published in DFSC 147 III 215.
[389] DFSC 138 V 366 reas. 5.1, DFSC 2C_825/2013 of 24 March 2014 reas. 6.1.

- **No unconditional performance**: If the disadvantaged party performs the contract unconditionally despite the change in circumstances, such party cannot subsequently invoke the change in circumstances in order to have the contract adjusted by the arbitrator or judge.[390]

411 With respect to the method, the arbitrator or judge bases its adjustment of the contract on the **hypothetical intent of the parties**. It must therefore determine what reasonable and honest (in good faith; Art. 2(1) CC, see paras 71–72) parties in the situation of the contracting parties would have agreed if they had been aware of the specific change in circumstances at the time of the conclusion of the contract.[391]

XI Breach of Contract

A Overview

412 **Breach of contract** (*Vertragsverletzung, violation du contrat, violazione del contratto*) or **non-performance** (*Nichterfüllung, inexécution, inadempimento*) occurs whenever an obligation is not performed at all by the debtor or is violated in some other way.

413 The Code of Obligations deals with non-performance in a general way in **Articles 97–109 CO**. The Code distinguishes between non-performance (Arts 97–101 CO) and delay (Arts 102–109 CO).

414 Articles 97–101 CO also contain rules on **enforcement** (see para. 421).

415 In addition, there are **numerous specific rules** for certain types of contracts in the Specific Part of the Code of Obligations (see para. 45), for example, the provisions on warranty of title in the contract of sale (Arts 192–196 CO; see paras 723–748) or the provisions on warranty of conformity in the contract of sale (Arts 197–210 CO; see paras 749–853) or in the contract for work and services (Arts 366–371 CO; see paras 1357–1576).

416 Articles 97–109 CO **apply, in principle, to all obligations**, regardless of their cause or content. However, certain provisions apply only to certain

[390] DFSC 127 III 300 reas. 5b.

[391] DFSC 127 III 300 reas. 6a, DFSC 4A_50/2018 of 5 September 2018 reas. 4.4, DFSC 5A_122/2008 of 30 July 2008 reas. 3.4.

types of obligations. Thus, Article 98(2) CO applies only to obligations to refrain from action, Articles 104–106 CO only apply to monetary debts, and Articles 107–109 CO are limited in principle to perfect bilateral (or synallagmatic) contracts (see para. 345).

417 The text of the Code of Obligations distinguishes between the following **three types of statutory legal measures in case of non-performance**:

- **Enforcement**: The first measure is enforcement (see paras 421–426). It consists in granting the creditor the right to apply to the State authorities in order to obtain the condemnation of the debtor and, where possible, the enforcement of the performance due;
- **Contractual liability**: The second measure is contractual liability (see paras 427–452). It consists in ordering the debtor to compensate the creditor for the loss that the debtor has caused as a result of the non-performance. This remedy applies not only when it is no longer possible to obtain the performance which was due, but also and more generally for any breach of a contractual obligation. The compensation which the debtor has to pay replaces the performance due or supplements it. Termination of the contract is also possible; and
- **Debtor's default**: The third measure is the debtor's default (see paras 453–464), which applies if the debtor has not performed the obligation by the due date (see para. 394).

418 This differentiated system of general (see paras 413–414) and specific (see para. 415) measures is essentially a **legacy of Roman law**. In Common law legal systems, there is a uniform system of no-fault liability (with possible exoneration) for all cases giving rise to appropriate damages, supplemented by specific rights derived from equity. Its influence can be seen in the CISG, with its general and uniform notion of 'breach of contract' (see paras 1043–1044), and the various texts aimed at harmonising this issue.[392]

419 According to the principle of freedom of contract (Arts 19 and 20 CO; see paras 49–70), the parties have the right to **derogate from the statutory regimes**.

420 They can do so in the **two following ways**:[393]

[392] See Arts 7.1.1, 7.2–7.4 PICC; Art. 9:101–9:510 PECL; Art. III-3:301 to 3:713 DCFR.
[393] Tercier and Pichonnaz, *Droit des obligations*, paras 1225–1227.

- By **extending the creditor's rights**: The parties may extend the creditor's rights by easing the statutory conditions under which the creditor can assert a statutory remedy or by granting the creditor additional remedies, for example, through a security *in personam* (*Personalsicherheit, sûreté personnelle, garanzia personale*) or a security *in rem* (*Realsicherheit, sûreté réelle, garanzia reale*) or a penalty clause (Arts 160–163 CO; see para. 452); and
- By **reducing the creditor's rights**: The parties may also reduce the creditor's rights, by subjecting the statutory remedies to stricter conditions or by waiving them altogether, subject to certain statutory limitations (see paras 473–479).

B Enforcement

421 Enforcement (*Zwangsvollstreckung*, *exécution forcée*, *esecuzione forzata*) allows the creditor to **obtain the performance of the obligation due with the help of the State authorities**.

422 Enforcement implies the following **two stages**:

- **Condemnatory judgment or award**: The creditor has a claim for specific performance (*Erfüllungsklage*, *action en exécution*, *azione d'esecuzione*), which, in case of success, leads to the rendering of a condemnatory judgment (*Leistungsurteil, jugement condamnatoire, sentenza di condanna*) by a State court or a condemnatory award by an arbitral tribunal; and
- **Enforcement measures**: If the debtor refuses to comply with the condemnatory judgment or award rendered against the latter, the creditor may seek direct enforcement, with the help of the State authorities.

423 The enforcement measures are based on the fact that **most obligations have a monetary value**. This is not only the case of monetary debts in the strict sense (*Geldschuld*, *dette d'argent*, *debito pecuniario*), but also for all those whose breach is the basis for contractual liability (see para. 430). In this case, the performance originally due is replaced by the payment of damages, which sanctions the breach of the obligation. The contractual obligation is thus transformed into a monetary debt.

424 Enforcement of **monetary debts** is governed by the DEBA.

425 Enforcement of **other types of obligations** is governed by Articles 335–352 CCP.

426 However, **Article 98 CO**[394] completes these provisions in the following respects:

- **Ordinary personal performance**: In the case of ordinary personal performance, that is, an obligation which must not necessarily be performed by the debtor (see para. 372), the creditor may obtain permission from the arbitrator or judge to have it performed by a third party (or the creditor may perform the obligation) at the debtor's expense, pursuant to Article 98(1) CO (and Art. 343(1)(e) CCP) (in the context of the contract for work and services, see paras 1240–1252). However, the creditor must first have the merits of the claim established by a judgment on the merits.[395] In case of performance by way of substitution, the debtor no longer has to perform personally, but has to reimburse the price of the performance by the third party. The creditor can obtain reimbursement of the price of the substitute performance by means of enforcement (see paras 421–426).[396] Performance by way of substitution does not require any fault on the part of the debtor, as it is an enforcement measure (see para. 422). This mechanism cannot be applied in the presence of a qualified personal performance, that is, an obligation which can only be performed by the debtor (see paras 372–373); and
- **Performance of an obligation to refrain from action**: If the breach has already occurred, the creditor may obtain permission from the arbitrator or judge under Article 98(3) CO to remove what has been done in breach of the obligation to refrain from action. Like Article 98(1), however, Article 98(3) CO presupposes that the creditor's claim has first been recognised in a judgment on the merits.[397] In addition to enforcement by way of substitution, the creditor can claim damages (Art. 98(2) CO). If the breach has not yet occurred, the creditor may request the arbitrator or judge to order the debtor to comply with the obligation to refrain from action, possibly under the threat of criminal sanctions (Art. 292 of the Swiss Criminal Code of 21 December 1937 (CrimC)) or civil sanctions ('*astreintes*', provided the applicable rules allow for this means). In urgent cases, the creditor can do so by way of provisional measures. The parties may also include penalty clauses in their contract (Arts 160–163 CO; see para. 452).

[394] With respect to the procedural nature of this statutory provision, see DFSC 142 III 321 reas. 4–5.
[395] DFSC 142 III 321 reas. 4.4.2, 4.5 and 5.
[396] With respect to the possibility of requiring advance payment of costs in the case of substitute performance, see DFSC 136 III 273 reas. 2.4, DFSC 130 III 302 reas. 3.4.
[397] DFSC 142 III 321 reas. 4.4.2, 4.5 and 5.

C *Contractual Liability*

1 Overview

427 In general terms, **liability** (*Haftung, responsabilité, responsabilità*) is the obligation of a person to compensate another for the loss caused to the latter.[398]

428 In the Swiss law of obligations, the general provisions on liability can be found in **Articles 41–61 CO**. However, these rules are primarily concerned with liability in tort or extra-contractual liability (*ausservertragliche Haftung; deliktische Haftung; responsabilité civile, responsabilité délictuelle, responsabilité extracontractuelle; responsabilità civile, responsabilità delittuale, responsabilità extra-contrattuale*). This regime is, in principle, applicable to the compensation of all losses, including those resulting from a breach of contract (Art. 99(3) CO).

429 **Articles 97–101 CO** set out some specific rules concerning contractual liability (*vertragliche Haftung, responsabilité contractuelle, responsabilità contrattuale*).

430 Contractual liability distinguishes itself from liability in tort by the following **three main features**:[399]

- **Presumption of fault**: As in tort, contractual liability presupposes, in principle, fault on the part of the debtor. However, in tort, the burden of proof lies with the creditor (victim) (Art. 41(1) CO), whereas in contractual liability such fault is presumed (Art. 97(1) CO). Therefore, it is up to the debtor to prove that the latter has not committed any fault (see paras 439–443). The creditor still has to prove the other conditions of contractual liability (see paras 431–438);
- **Vicarious liability**: As in tort, the debtor may be liable for the behaviour of third parties. However, in tort, the responsible persons have the possibility of freeing themselves from liability (Art. 55(1) CO),[400] whereas in contract, debtors are liable for the acts of all persons whom they have entrusted with the performance, without being able to show that they have not committed any fault in selecting, instructing or supervising them (Art. 101 CO; see paras 444–449); and
- **Statute of limitations**: All liability claims are subject to a statute of limitations. However, in tort, the ordinary limitation period expires three years after the knowledge by the victim of the latter's loss and of

[398] Müller, *La responsablité civile extracontractuelle*, para. 1.
[399] Müller, *La responsablité civile extracontractuelle*, paras 25–28.
[400] Müller, *La responsablité civile extracontractuelle*, paras 271, 288–296.

the person liable for compensation (Art. 60(1) CO), whereas in contractual liability the ordinary limitation period of ten years applies (Art. 127 CO; see para. 509).

a Conditions of Contractual Liability

431 According to the wording of Article 97(1) CO, any action for contractual liability requires **three general conditions** to be met, namely a loss (see paras 432–435), a breach of contract (see para. 436) and causation (see paras 437–438). In addition, there must be a head of liability, either for one's own act (see paras 439–443) or for the act of another (see paras 444–449).

i Loss

432 **Loss** (*Schaden; prejudice; danno, perdita*) is an involuntary diminution of a person's net assets.[401]

433 In a commercial context, the loss is mainly a **pecuniary loss**. Pecuniary loss (*Vermögensschaden, dommage, danno pecuniario*) is the involuntary diminution of a person's (i.e., the creditor's) net assets.[402] This diminution includes all effects which the breach of contract has had on the creditor's assets, namely the value of the performance due, the costs incurred and any other loss resulting from the breach. According to the theory of difference (*Differenztheorie, théorie de la différence, teoria della differenza*), the loss corresponds to the difference between the actual amount of the creditor's assets (after the breach of contract) and the amount of the same assets if the contract had not been breached.[403] The diminution of the assets can consist of a decrease in assets or an increase of liabilities (*damnum emergens*) as well as a non-increase in assets or a non-decrease in liabilities (*lucrum cessans*).[404]

434 When the contractual relationship ends without the contract having been fulfilled, the following two types of damage can be distinguished:

- The **negative interest damage** (*negatives Vertragsinteresse, intérêt négatif, interesse negativo*) corresponds to the creditor's interest in not concluding the contract (cf., e.g., Art. 109(2) CO; see para. 463). This is a kind of reliance loss. The negative interest damage includes all

[401] Müller, *La responsablité civile extracontractuelle*, para. 75.
[402] DFSC 133 III 462 reas. 4.4.2, DFSC 8C_110/2021 of 26 January 2021 reas. 8.3.2.
[403] DFSC 147 III 463 reas. 4.2.1, DFSC 144 III 155 reas. 2.2, DFSC 4A_407/2021 of 13 September 2022 reas. 5.1 (to be officially published).
[404] DFSC 147 III 463 reas. 4.2.1, DFSC 145 III 225 reas. 4.4.1, DFSC 4A_407/2021 of 13 September 2022 reas. 5.1 (to be officially published).

the losses the creditor has suffered (and all the gains that the creditor has missed) as a result of the negotiation and conclusion of the broken contract. If the compensation is to make the creditor whole, the damages must put the creditor in the situation in which the latter would have been if the parties had never concluded the contract; and

- **The positive interest damage** (*positives Vertragsinteresse, intérêt positif, interesse positivo*) corresponds to the creditor's interest in the (correct) performance of the contract. It corresponds to the loss of the value which the performance of the contract represented for the creditor (expectation loss). The positive interest damage includes all the losses the creditor has suffered (and all the gains that the creditor has missed) as a result of the breach of contract. If the compensation is to make the creditor whole, the damages must put the creditor in the situation in which the creditor would have been if the contract had been (correctly) performed.

435 In a commercial context, the loss might rarely also be a **moral wrongdoing** (*immaterielle Unbill, tort moral, torto morale*). Moral wrongdoing is the involuntary diminution of a person's (i.e., the creditor's) well-being. Such a wrongdoing entitles the victim to be compensated for the physical and psychological suffering endured as a result of an illegal attack on the latter's personality.[405]

ii Breach of contract

436 Breach of contract (*Vertragsverletzung, violation du contrat, violazione del contratto*): The creditor's claim presupposes that the **debtor has breached the contractual obligation** incumbent on the latter.

iii Causation

437 Causation (*Kausalität, causalité, causalità*): There must be a **causal link between the breach of contract** (see para. 436) **and the loss** (see paras 432–435).

438 The following **two types** of causation should be distinguished:

- **Natural causation**: Natural causation (causation in fact; *natürliche Kausalität, causalité naturelle, causalità naturale*) is the logical (scientific) relationship between the breach of contract and the loss: the breach is the natural cause of the loss if it is one of the *sine qua non* conditions. There is thus a natural causal link if, without the breach of contract, the

[405] DFSC 137 III 303 reas. 2.2.2, DFSC 4A_482/2017 of 17 July 2018 reas. 4.1.

loss would not have occurred.[406] The cause of loss may not only be an action, but also an omission. From a purely logical point of view, however, an omission cannot cause loss (*ex nihilo nihil fit*). However, if the law imposes an obligation to act on the debtor and the debtor does nothing, the debtor is held liable (hypothetical causation; *hypothetische Kausalität, causalité hypothétique, causalità ipotetica*); and

- **Legal causation** (causation in law; *adäquate Kausalität, causalité adéquate, causalità adeguata*): Natural causation is not sufficient to determine legal liability. Once natural causation has been established, the arbitrator or judge must make a legal policy choice among all the natural causes, selecting those causes that are legally relevant.[407] The Federal Supreme Court uses the following (empty) formula to determine the legal adequacy of a natural cause: 'the cause of the injury must be an event which, according to the ordinary course of events and the general experience of life, is such as to produce an effect of the kind that has occurred, so that the occurrence of that result appears to be generally favoured by the event in question' (objective retrospective prognosis).[408]

iv Fault

439 Fault: In principle, the debtor is only liable for the latter's personal act (with respect to vicarious liability, see paras 444–449), if the debtor can be accused of a **fault** (*Verschulden, faute, colpa*). The fault may be the direct act of the natural person who is the debtor, but also of an organ of a legal person (Art. 55 CC).

440 Fault consists of **two elements**, namely an objective element, that is, the breach of a duty imposed by the law or the contract, and a subjective element, the capacity of discernment. The capacity of discernment is the ability to appreciate the meaning and effects of one's behaviour and the ability to act freely in accordance with this reasonable appreciation (Art. 16 CC).[409]

441 **Article 97(1) CO presumes fault** ('unless he can prove that he was not at fault'; see para. 430) and thus reverses the burden of proof for this prerequisite of contractual liability.

442 In principle, the **debtor is liable for any fault** (Art. 99(1) CO), whether intentional or by negligence, whether serious, moderate or

[406] DFSC 143 II 661 reas. 5.5.1, DFSC 133 III 462 reas. 4.4.2.
[407] DFSC 142 III 433 reas. 4.4, DFSC 123 III 110 reas. 3a.
[408] DFSC 143 II 661 reas. 5.5.2, DFSC 119 Ib 334 reas. 3c.
[409] Müller, *La responsablité civile extracontractuelle*, para. 245.

minor. However, the seriousness of the fault is relevant for the exclusion or limitation of contractual liability (see paras 473–479).

443 In some cases, the statute imposes **strict liability** on the debtor, that is, without the debtor necessarily having committed a fault personally. This is particularly the case for the liability of the debtor for auxiliaries (Art. 101 CO; see paras 444–449) and the liability of the debtor in default for accidental loss (Art. 103(1) CO; see para. 458).

b Vicarious Liability

444 The debtor is, in order to perform the latter's obligations, in principle, entitled to have recourse to third parties (Art. 68 CO; see para. 372). In return for the benefits the debtor derives from the use of third parties, Article 101 CO imposes a **stricter liability** on the debtor, that is, vicarious liability (*Haftung für Hilfspersonen, responsabilité pour les auxiliaires, responsabilità per persona ausiliaria*).

445 In addition to the general conditions of loss (see paras 432–435), breach of contract (see para. 436) and causation (see paras 437–438), the following **two additional conditions** must be met:

- **Conduct of an auxiliary**: The debtor is only held liable if the loss was caused by the conduct of an auxiliary (*Hilfsperson, auxiliaire, persona ausiliaria*). This is any person, natural or legal, to whom the debtor entrusts the performance (in whole or part) of a contractual obligation. It does not matter what legal relationship the person has with the debtor, as long as the auxiliary acts with the authorisation of the debtor. In particular, it is not necessary for there to be a subordinate relationship, as required under Article 55 CO for the employer's liability in tort.[410] The auxiliary can therefore also be an independent subcontractor (with respect to the contract for work and services, see para. 1164). With respect to the distinction between an auxiliary and a substitute, see paras 1996–1998; and
- **Connection with the contract**: It is necessary that the auxiliary has not in the simple mandate contract shown, in the performance of the obligation, the diligence that the creditor would have been entitled to expect from the debtor if the debtor had performed the obligation personally. It is not necessary for the auxiliary to have committed a fault (see paras 439–443), although this will usually be the case.

[410] Müller, *La responsablité civile extracontractuelle*, para. 285.

446 If the debtor entrusts an auxiliary with the performance of an obligation which the debtor is **obliged to perform personally** (see para. 372), there is a breach of contract (Art. 399(1) CO for the simple mandate contract; see paras 2007–2013; Art. 364(2) CO for the contract for work and services, see paras 1237–1275), irrespective of the act of the auxiliary, because the debtor has breached the latter's contractual obligations (Art. 97(1) CO).

447 The debtor has **no possibility of exonerating itself from liability** (*Entlastungsbeweis, preuve libératoire, prova liberatoria*), in contrast to the employer's liability in tort (Art. 55 CO).[411] The debtor cannot escape liability by proving that the latter exercised the necessary care in the selection (*cura in eligendo*), instruction (*cura in instruendo*) or supervision (*cura in custodiendo*) of the auxiliary. The only way to escape liability is to prove that the auxiliary has acted with the same diligence as the debtor would have done if the debtor had acted, according to what the creditor was entitled to expect in the performance of the obligation.

448 Article 101(3) CO prohibits an exemption from liability, if the creditor is in the service of the debtor or if liability arises in connection with an activity conducted under official licence (e.g., banking activity).[412] In other cases, however, an agreement may provide for a partial or total **exclusion of liability for auxiliaries** (Art. 101(2) CO; see paras 473–479).

449 The auxiliary could also incur **personal liability** towards the creditor. However, since there is no contractual relationship between the auxiliary and the creditor, the creditor would have to show that the conditions for liability in tort (Arts 41–61 CO) are fulfilled. The auxiliary may also be called upon to compensate for the loss that the latter has caused to the debtor for whom the latter was acting. The matter is then governed by the internal relationship between them.

c Consequences of Contractual Liability

450 When the conditions for liability (see paras 431–449) are met, the debtor is under a (new; see para. 417) **obligation to compensate the loss** that the debtor has caused. As a rule, this will consist of a sum of money.[413]

451 This **compensation** (*Schadenersatz, indemnité, indennità*) is determined in accordance with the principles governing tort liability, that is, Articles 42–61 CO (Art. 99(3) CO).

452 It is therefore necessary to distinguish the following **two phases**:

[411] Müller, *La responsablité civile extracontractuelle*, paras 288–296.
[412] DFSC 132 III 449 reas. 2.
[413] Müller, *La responsablité civile extracontractuelle*, para. 649.

- **Evaluation of the loss** (*Schadensberechnung, évaluation du préjudice, valutazione del danno/della perdita*): It is up to the creditor to establish the exact amount of the loss that the latter has suffered (Art. 8 CC; Art. 42(1) CO; see paras. 75–76). However, the debtor must provide the creditor with the information at the former's disposal which is necessary to establish the amount of the loss.[414] The creditor is also entitled to **compensatory interest** (*Schadenszins, intérêt compensatoire, interessi del danno*) which accrues between the time when the breach of contract has (negative) financial consequences for the creditor's assets and the time when the compensation is paid.[415] The purpose of compensatory interest is to place the creditor in the position that the creditor would have been in if the latter's claim for compensation had been satisfied at the time the loss occurred. The compensatory interest is part of the compensable loss. Compensatory interest, unlike default interest (see para. 459), does not require that the conditions for the debtor's default under Article 102(1) CO (see paras 453–464) be fulfilled. The annual rate of compensatory interest is 5 per cent (Art. 73(1) CO).[416] This generalised rate constitutes a rebuttable presumption, with the result that the creditor retains the possibility of establishing a higher loss.[417] On the other hand, the creditor has the **incumbency** (*Obliegenheit, incombance, incombenza*) to reduce the latter's loss.[418] If the creditor cannot establish the exact amount of the loss or cannot reasonably be expected to do so, the arbitrator or judge 'shall **estimate the value** at its discretion in the light of the normal course of events . . .' (Art. 42(2) CO, emphasis added). In this case, the creditor must establish that the latter is unable to prove the exact amount of the loss. Article 42(2) CO makes it easier for the creditor to prove, but does not release the creditor from the burden of proof. Thus, where possible and reasonably required, the creditor must provide the arbitrator or judge with all factual elements that constitute indications of the existence of the loss and allow or facilitate the estimation. If the creditor does not fully comply with the duty to provide all information necessary to estimate the loss, one of the conditions for the application of Article 42(2) CO is not fulfilled and

[414] DFSC 143 III 297 reas. 8.2.5.2.
[415] DFSC 131 III 12 reas. 9.1, DFSC 130 III 591 reas. 4, DFSC 4D_5/2021 of 16 July 2021 reas. 4.1.
[416] DFSC 131 III 12 reas. 9.1 DFSC 4D_5/2021 of 16 July 2021 reas. 4.1.
[417] DFSC 131 III 12 reas. 9.4.
[418] Müller, *La responsabilité civile extracontractuelle*, paras 563–564.

the facilitated proof must be excluded.[419] The parties may fix the amount of the loss, respectively the damages in the contract as a lump sum (**liquidated damages**; *pauschaler Schadenersatz, indemnisation forfaitaire, risarcimento forfettario*). Liquidated damages are to be distinguished from the **penalty clause** (*Konventionalstrafe; clause pénale, peine conventionnelle; pena convenzionale*), which allows for the award of a predetermined amount even in the absence of loss (Arts 160–163 CO).

- **Determination of the compensation** (*Schadenersatzbemessung, fixation de l'indemnité, determinazione dell'indennità*): The arbitrator or judge may set the compensation lower than the loss if there are reduction factors, such as those provided for in Articles 43 and 44 CO for tort liability, in particular the concomitant fault of the creditor.[420]

2 Debtor's Default

a Overview

453 The debtor's default (*Schuldnerverzug, demeure du débiteur, mora del debitore*) is the (unfavourable) legal situation in which the debtor is in if the debtor does **not perform the obligation on or before the due date** (see para. 391).

454 The debtor's default is dealt with generally in **Articles 102–109 CO**. There are also numerous specific rules applicable to particular types of contracts, such as for the seller (Arts 190–191 CO; see paras 709–722), the buyer (Arts 214–215 CO; see paras 854–868) in a commercial sale or the contractor in the contract for work and services (Art. 366(1) CO; see paras 1293–1300).

455 The system comprises the following **two stages**:

- **Simple default** (see paras 456–459), applicable to all obligations; and
- **Qualified default** (see paras 460–464), applicable to obligations that are in an exchange relationship (synallagmatic; see para. 345).

b Simple Default

456 A simple default (*einfacher Verzug, demeure simple, mora semplice*) occurs when, without justification, the **debtor of a (mature) obligation**

[419] DFSC 144 III 155 reas. 2.3, DFSC 4A_359/2020 of 18 November 2020 reas. 6.3.2, DFSC 4A_6/2019 of 19 September 2019 reas. 4.3.

[420] Müller, *La responsabilité civile extracontractuelle*, paras 659–689.

(see para. 391) does **not perform the obligation on the due date** (see para. 391) (Art. 102 CO).

457 The following **four conditions** must therefore be met:

- **Maturity** of the obligation (see para. 391);
- **Due date** (see para. 391): The due date can be set by the contract (Art. 102(2) CO) or by a formal reminder (Art. 102(1) CO). In the first case, the due date was set either by mutual agreement in the contract or subsequently by one of the parties 'as a result of a duly exercised right of warning reserved by one party' (Art. 102(2) CO; *Kündigung; avertissement, dénonciation; disdetta*). The debtor is in simple default, without further intervention by the creditor, if the debtor does not perform the obligation at that time (or until that time). This is known as a comminatory term (*Verfalltag, terme comminatoire, termine comminatorio*). In the second case, that is, if the contract does not fix the due date, the creditor must call upon the debtor to perform with a reminder (*Mahnung; interpellation, sommation, mise en demeure; interpellazione*). The reminder is an unequivocal invitation of the creditor to the debtor to perform the obligation without delay.[421] In some cases, the creditor is exempted from sending a reminder, in particular, if the debtor has clearly indicated the intention not to perform the obligation (Art. 108(1) CO by analogy; see para. 462);
- **Non-performance of the obligation**: On the due date, the debtor has not yet (fully) performed the obligation or has not done so properly, even though the debtor could have performed the obligation (see para. 210);[422] and
- **Lack of valid reasons**: The debtor is not (or no longer) in default if the latter has valid reasons for refusing performance.[423] This is the case, in particular, if the creditor is itself in default (creditor's default, Arts 91–96 CO; see paras 465–470),[424] or if the debtor has a defence that allows the latter to refuse performance temporarily, for example, defence

[421] DFSC 143 II 37 reas. 5.2.2, DFSC 130 III 591 reas. 3, DFSC 4A_605/2020 of 24 March 2021 reas. 7.1.

[422] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 2658.

[423] Corinne Widmer-Lüchinger and Wolfgang Wiegand, 'Art. 102', in Widmer-Lüchinger and Oser (eds), *Basler Kommentar, Obligationenrecht I – Art. 1–529 OR*, 7th edn (Basel: Helbing Lichtenhahn, 2019) (cited as: Widmer-Lüchinger and Wiegand, 'BSK-Art. 102 CO'), para. 12–12a.

[424] DFSC 45 II 250 reas. 2, DFSC 4A_40/2009 of 9 June 2009 reas. 4.3.

of non-performance (Art. 82 CO; see para. 394) or defence of insolvency (Art. 83 CO; see para. 394)[425] or definitively, for example, statute of limitations (Arts 127–142 CO; see paras 501–543) or in the event of impossibility of performance not attributable to the debtor (Art. 119 CO; see paras 484–490).

458 Simple default does not change the debtor's obligation to perform. However, the Code of Obligations imposes the following **two additional obligations** on the debtor in simple default:

- **Liability for the loss caused by late performance**: The debtor is liable for the loss caused to the creditor by the debtor's late performance (Art. 103(1) CO; *Verspätungsschaden, Verzugsschaden; dommage 'moratoire'; danno dovuto a mora*),[426] unless the debtor proves that no fault was committed (Art. 103(2) CO);[427] and
- **Liability for accidental loss**: The debtor in simple default is also liable for accidental loss (Art. 103(1) CO; *Zufall, cas fortuit, caso fortuito*). This means that the debtor is liable pursuant to Article 97(1) CO, even if performance of the obligation becomes impossible for a reason that is not attributable either to the debtor or to the creditor (e.g., destruction of the object sold by an accidental fire). The debtor can only be released from this liability if the debtor proves that the accidental loss would have occurred even if the debtor had performed on time (Art. 103(2) CO).

459 With respect to **monetary debts** (see para. 423), Articles 104–105 CO set out a specific regime, at the following two levels:

- **Default interest**: Article 104 CO imposes an obligation to pay default interest (*Verzugszins, intérêt moratoire, interesse moratorio*) on a debtor in simple default. The debtor owes default interest even in the absence of any fault, contrary to the conditions of Article 103 CO (see para. 458), and of any actual loss.[428] The rule aims at avoiding unjust enrichment of the debtor who continues to receive interest on the due amount. With respect to the distinction with compensatory interest, see para. 452. The interest rate is 5 per cent (Art. 104(1) CO), unless the contract provides for a higher rate (Art. 104(2) CO). However, in

[425] DFSC 68 II 220 reas. 3.
[426] DFSC 116 II 441 reas. 2b.
[427] DFSC 123 III 16 reas. 4c, DFSC 4C.77/2005 of 20 April 2005 reas. 5.1.
[428] DFSC 143 III 206 reas. 7.2.

business dealings, the applicable rate is the discount rate charged by banks in the place of payment (Art. 104(3) CO), provided that it is higher than 5 per cent. The creditor has to prove the agreed rate if it does not result directly from the contract.[429] After termination of the contract, if the contract is silent on the applicable interest rate, the statutory rate of 5 per cent applies.[430] However, if the debt already bore interest before the debtor's default at a higher rate than the statutory rate, the contractual rate applies in any case as the rate of default interest;[431] and

- **Compensation for additional loss**: The defaulting debtor must compensate the creditor for any additional loss which exceeds the default interest (see para. 459).[432] This is only an application of the general liability rule of Articles 97(1) (see paras 431–449) and 103 CO (see para. 458) to monetary debts.

c Qualified Default

460 Qualified default (*qualifizierter Verzug, demeure qualifiée, mora qualificata*) is a specific regime which grants **additional rights to the creditor of a contractual obligation in an exchange relationship** (see para. 345). The term 'additional' indicates that the qualified default grants rights to the creditor which go beyond those the creditor already has because the debtor is in simple default (see paras 456–459).

461 The creditor may, in any case, claim **specific performance** of the debtor's obligation (see para. 422) and default damages subject to the conditions of Articles 103 (see para. 458) and 106 CO (Art. 107(2) CO).

462 Default is qualified provided the following **two conditions** are met:

- **Non-performance after a grace period**: The creditor must set the debtor an additional (grace) period (*Nachfrist, Gnadenfrist; délai de grâce; termine supplementare, termine di grazia*) for the performance of the obligation (Art. 107(1) CO). The grace period must be appropriate which means that it must be sufficient to enable the diligent debtor to

[429] DFSC 134 III 224 reas. 7.2, DFSC 4A_69/2018 of 12 February 2019 reas. 7.1.1.
[430] DFSC 130 III 312 reas. 7.1.
[431] DFSC 137 III 453 reas. 5.1, DFSC 4A_73/2018 of 12 February 2019 reas. 8.1.1.
[432] DFSC 123 III 241 reas. 4b.

comply with it.[433] If the time limit is objectively too short, the debtor must immediately complain to the creditor and request an extension.[434] The setting of this time limit is not subject to any particular formal requirements. The creditor can already set it together with the reminder (see para. 457).[435] The creditor does not need to set an appropriate grace period in the following three situations: (1) The setting of such a grace period would be an unnecessary formality (Art. 108(1) CO; e.g., the debtor has declared that the obligation would in any case not be performed);[436] (2) It is no longer in the creditor's interest to receive the late performance (Art. 108(2) CO; e.g., the bride has not received the wedding dress on the day of the wedding ceremony); and (3) The contract provides for a fixed term (*Fixgeschäft, terme fixe, contratto a termine fisso*) or ultimate term (*Fatalfrist, délai fatal, termine ultimo*) (Art. 108(3) CO). This is the case when, according to the intention of the parties, the debtor could only perform the obligation at, or up to, a specific time.[437] This presupposes a more precise determination than the simple fixing of a comminatory term (see para. 457), for example, by the use of words such as 'at the latest'[438] or 'by the end of 1920 at the latest';[439] and

- **Immediate declaration by the creditor**: The creditor who wants to make use of the additional rights (see para. 460 and para. 463) must declare this immediately after the expiry of the grace period (Art. 107(2) CO), indicating which right this creditor is invoking. The creditor may also announce when setting the grace period which right the creditor will choose at its expiration.[440] In some cases, the statutory law presumes the contrary (e.g., Art. 190 CO for the commercial sale; see para. 714). The creditor must also immediately communicate the choice when the latter does not need to set a grace period under Article 108 CO. However, where the debtor

[433] DFSC 105 II 28 reas. 3.
[434] DFSC 116 II 436 reas. 2a, DFSC 4A_647/2015 of 11 August 2016 reas. 5.2.3, to the extent not published in DFSC 142 III 557.
[435] DFSC 103 II 102 reas. 1a, DFSC 4C.216/2000 of 11 December 2000 reas. 2a.
[436] DFSC 136 III 273 reas. 2.3, DFSC 4A_691/2014 of 1 April 2015 reas. 3, DFSC 4A_96/2014 of 2 September 2014 reas. 3.
[437] DFSC 116 II 436 reas. 2b, DFSC 96 II 47 reas. 2, DFSC 4A_271/2019 of 14 November 2019.
[438] DFSC 96 II 47 reas. 2.
[439] DFSC 49 II 220 reas. 5.
[440] DFSC 116 II 436 reas. 3, DFSC 4A_23/2011 of 23 March 2011 reas. 4, DFSC 4A_603/2009 of 9 June 2010 reas. 2.4.

clearly, finally and unconditionally refuses to perform (Art. 108(1) CO), the creditor is not obliged to declare the choice immediately.[441] If the creditor does not make this declaration immediately, the latter can still ask for specific performance (see para. 461) and damages (see para. 461). But if the creditor then wants to assert the additional rights under Article 107(2) CO, the latter will have to set a new grace period.[442]

463 If the creditor renounces specific performance by the debtor (see para. 461), Article 107(2) 2nd sentence CO allows the creditor to **choose** between:

- **Upholding the contract**: If the creditor chooses to uphold the (synallagmatic; see para. 345) contract, it is unilaterally modified. The debtor's performance transforms into a debt for damages corresponding to the positive interest (in the performance of the contract, Art. 107 (2) CO; see para. 434) and the creditor will remain liable to perform the obligation. Concretely, the creditor can demand to be put back in the financial situation that such creditor would have been in if the debtor had correctly performed the obligation. Although Article 107(2) CO does not mention fault (for the default) as a condition for the claim for damages, this is an oversight on the part of the legislator. Fault is presumed and the debtor may escape the obligation to pay damages if the debtor proves a lack of fault;[443] or
- **Rescission of the contract**: If the creditor choses to rescind the (synallagmatic; see para. 345) contract, both parties are released from their obligations. According to case law, the contract is then transformed into a contractual or winding-up relationship (*Abwicklungsverhältnis, Liquidationsverhältnis; rapport de liquidation, rapporto di liquidazione*).[444] Therefore, the parties remain bound by a contractual relationship which gives each of them the right to restitution of the performance already made. As this right to restitution is of a contractual nature, the ten-year contractual statute of limitation of Article 127 CO applies (see para. 509).[445] In addition, the creditor is entitled

[441] DFSC 143 III 495 reas. 4.3.2.
[442] Tercier and Pichonnaz, *Droit des obligations*, para. 1409.
[443] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 2768.
[444] DFSC 133 III 356 reas. 3.2.1, fundamental: DFSC 114 II 152 reas. 2c, DFSC 4A_298/2019 of 31 March 2020 reas. 9.2.2.
[445] DFSC 137 III 243 reas. 4.4.2; fundamental: DFSC 114 II 152 reas. 2c et seq.

to damages corresponding to the negative interest (arising from the rescission of the contract, Art. 109(2) CO; see para. 434). Concretely, the creditor may request to be put back into the financial situation that the creditor would have been in if the contract had never been concluded.[446] The debtor may again be released from the obligation to pay damages by establishing that the latter was not at faults.[447]

464 By application of the principle of **freedom of contract** (Arts 19 and 20 CO; see para. 51), the parties may modify this regime in their contract (see paras 471–479).

3 Creditor's Default

a Overview

465 The creditor may be required to assist the debtor in the performance of the latter's obligation, for example, the buyer's duty to take delivery of the object (see paras 698–701). Such duties do not constitute debts in the proper sense, but **incumbencies** (*Obliegenheit, incombance, incombenza*).

466 Violation of such incumbencies leads to the creditor's default (*Gläubigerverzug, Annahmeverzug; demeure du créancier; mora del creditore*). Creditor's default is the (unfavourable) legal situation in which the creditor is in if the creditor **refuses without reason to assist the debtor's performance**.[448]

467 Creditor's default is dealt with in **Articles 91–96 CO**, which are construed by analogy with the rules on the debtor's default (see paras 453–464).

b Conditions

468 The following **three conditions** must be met in order for the creditor to be in default (Art. 91 CO):

- **Proper offer of performance**: The debtor must have effectively offered to perform to the creditor. It is not sufficient that the debtor has merely

[446] DFSC 123 III 16 reas. 4b, DFSC 4A_232/2014 of 30 March 2015 reas. 14.2, to the extent not published in DFSC 141 III 106.
[447] Tercier, Bieri and Carron, *Contrats spéciaux*, para. 576.
[448] Tercier and Pichonnaz, *Droit des obligations*, para. 1499.

shown the intention to do so, but the debtor must have actually attempted to do so;[449]

- **The creditor's breach of duty**: The creditor does not carry out the necessary preparatory, acceptance or accompanying acts; and
- **Lack of valid reasons**: The creditor is not in default if the creditor is entitled to behave as the latter does. This is primarily the case if the debtor's performance does not correspond to what was due, for example, if the seller offers an object which is not in conformity with the contract (*aliud*; see para. 772).[450]

c General Consequences

469 The creditor's default has the following **two general consequences**:

- **Exclusion of the debtor's default**: As a result of the creditor's breach of the incumbency, the debtor is unable to perform the obligation or is entitled to refuse to perform. This is why as long as the creditor is in default, the debtor cannot be in default within the meaning of Articles 102–109 CO (see paras 453–464);[451] and
- **Passing of the risks to the creditor**: As soon as the creditor is in default, it is the creditor who bears the risk of the object (e.g., Art. 376 (1) CO for the contract for work and services; see paras 1710–1738). The solution is therefore the same as in the case of the debtor's default (Art. 103(1) CO; see para. 458), subject to any statutory provisions to the contrary (e.g., Art. 185(1) CO; see paras 873–883).

d Debtor's Additional Rights

470 The creditor's default gives the debtor the following **two additional rights**:

- **Deposit and sale of the object**: If the debtor has to deliver an object, but cannot do so because of the creditor, Articles 92–94 CO give the debtor the right to deposit and to sell the object (for the contract of sale, see para. 701); and
- **Termination of the contract**: If the debtor's performance does not consist in the delivery of an object, in particular, a service, the debtor can withdraw from the contract pursuant to Article 95 CO, that is, in accordance with the provisions governing the debtor's default (Arts 107–109 CO; see paras 453–464).

[449] DFSC 119 II 437 reas. 2, DFSC 5A_367/2021 of 14 December 2021 reas. 4.3.3.
[450] DFSC 68 II 220 reas. 4.
[451] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 2434.

4 Conventional Modifications of Contractual Liability

a Overview

471 According to the principle of freedom of contract (Arts 19 and 20 CO; see paras 49–70), the parties may, by agreement, **modify the statutory regime of contractual liability** (see paras 431–452). They may elaborate on it, extend it or, on the contrary, restrict it.[452]

472 In order to **extend liability**, the parties may, in particular, facilitate the conditions for bringing an action (e.g., the rules on the statute of limitations; see paras 501–543), eliminate the conditions concerning fault (see paras 439–443) or vicarious liability (see paras 444–449).

b Limitation or Exclusion of Liability Clauses

473 Limitation or exclusion of liability clauses (*Haftungsausschlussklausel*, *Haftungsbefreiungsklausel, Haftungsbeschränkungsklausel*, *Freizeichungsklausel*; *clause exclusive ou limitative de responsabilité*; *clausola di esonero o di limitazione di responsabilità*) are any contractual provisions which have the effect of **releasing the debtor (totally or partially) from contractual liability** (see paras 431–452).[453]

474 Exclusion or limitation of liability clauses can take a **variety of forms**: they can exclude any contractual liability, elaborate on or restrict the notion of fault (see paras 439–443; e.g., restriction to gross negligence), limit the compensation of loss to a certain amount (see para. 452), shorten the time limits for bringing an action, etc.

475 Such clauses can often be found in **GTCs** (see paras 305–326).

476 The determination of the scope of an exclusion or limitation of liability clause follows the usual rules of contractual interpretation (see paras 133–173). In case of doubt, such clauses are **interpreted restrictively**.[454] The parties must therefore clearly express their common will to depart from the statutory regime.[455]

477 As such, the validity of these clauses is subject to the **general rules** (Arts 19 and 20 CO; see paras 174–273), in particular, those applicable to GTCs (see paras 314–326).

478 In addition to the general rules, the Code of Obligations contains the following **two specific provisions** regarding the validity of exclusion or limitation of liability clauses:

[452] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3078.
[453] Tercier and Pichonnaz, *Droit des obligations*, para. 1356.
[454] Müller, 'BK-Art. 18 CO', para. 217.
[455] DFSC 126 III 59 reas. 5a, DFSC 4A_226/2009 of 20 August 2009 reas. 3.2.2.

- **Personal liability**: A clause is void (Art. 20 CO; see paras 216–220) if it excludes or limits the debtor's personal liability for fraud or gross negligence (Art. 100(1) CO). This is the case if the debtor has acted intentionally or has violated the elementary rules of conduct which any reasonable person in the same situation would be obliged to observe.[456] However, nothing prevents the exclusion of liability for moderate or minor negligence,[457] subject to the following specific case: The arbitrator or judge can extend the prohibition of exclusion or limitation of liability clauses to moderate or minor negligence in the case where a creditor in a dependent position was obliged to accept the clause. This is the case if the creditor was in the service of the debtor at the time the clause was agreed or if the debtor carries out an activity conducted under official licence (Art. 100(2) CO);[458] and
- **Vicarious liability**: As such, the debtor can exclude vicarious liability (see paras 444–449) (Art. 101(2) CO). However, if the debtor is in the creditor's service or if liability arises in connection with an activity conducted under official licence, the parties may only exclude or limit liability for moderate or minor negligence (Art. 101(3) CO).

479 With respect to exclusion and limitation of liability clauses in the context of the **contract of sale**, see paras 850–853, and of the **contract of work and services**, see para. 1362.

XII Extinguishment of Obligations

A Overview

480 **Articles 114–142 CO** deal with the 'extinguishment of obligations'. This terminates the creditor's right to claim performance and the debtor's obligation to perform.

481 The ordinary cause of extinguishment (*Erlöschungsgrund*, *cause d'extinction*, *causa d'estinzione*) is the **performance of the obligation** (Art. 114(1) CO *a contrario*; see paras 369–411).

482 The extraordinary causes of extinguishment are facts which extinguish the obligation without it having been performed. Due to their

[456] DFSC 146 III 326 reas. 6.2, DFSC 119 II 443 reas. 2a.
[457] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3083.
[458] DFSC 132 III 449 reas. 2.

practical importance, the following **three extraordinary causes of extinguishment** will be presented:

- **Impossibility** (Art. 119 CO; see paras 484–490);
- **Set-off** (Arts 120–126 CO; see paras 491–500); and
- **Statute of limitations** (Art. 127–142 CO; see paras 501–543).

483 The extinguishment of the obligation must be distinguished from the **extinguishment of the contract**. The legislator did not specifically regulate the extinguishment of contracts in the General Part of the Code of Obligations because the legislator only intended to cover obligations and not contracts (see para. 45). On the other hand, the Specific Part of the Code of Obligations contains certain rules which relate to the extinguishment of contracts (e.g., Arts 404–406 CO for the simple mandate contract, see paras 2382–2505). Causes for the extinguishment of contracts are, for instance, the agreement to terminate the contract (*Aufhebungsvertrag*, *contrat de résiliation*, *contratto di annullamento*; *contrarius actus*), the termination of the contract by one party (e.g., for the commercial agency contract; see paras 2818–2827) or the invalidation of the contract by one party (see paras 263–265).

B Impossibility

1 Overview

484 The problem of subsequent objective impossibility (*nachträgliche objektive Unmöglichkeit*, *impossibilité objective subséquente*, *impossibilità oggettiva sopravvenuta*) arises when, after a valid obligation (respectively contract) has arisen, **circumstances occur which are not attributable to the debtor and which prevent (in whole or in part) the debtor's performance**.[459]

485 The question is which party bears the **risk of the performance** (*Sachleistungsgefahr*, *Leistungsgefahr*, *Sachgefahr*; *risque de la prestation*; *rischio della prestazione*; that is, does the debtor nevertheless owe performance despite the impossibility of providing the object of the obligation?) and which party bears the **risk of the consideration** (risk of the price; *Preisgefahr*, *Vergütungsgefahr*; *risque du prix*; *rischio legato al*

[459] See Art. 7.1.7 PICC.

prezzo; that is, does the creditor of the obligation which has become impossible to perform nevertheless have to provide the consideration?).[460]

486 The problem of subsequent objective impossibility relates to the period **between the moment when the obligation arises and the moment when it has to be performed**. If the obligation becomes impossible to perform before the moment when it arises (in principle, before the conclusion of the contract), the contract is null and void (initial impossibility pursuant to Art. 20 CO; see paras 208–211).

487 Subsequent objective impossibility is, in general, dealt with in **Article 119 CO**. The rule in Article 119 CO is non-mandatory law (see paras 69–70). According to the principle of freedom of contract (Arts 19 and 20 CO; see paras 49–70), the parties can therefore derogate from this provision.[461]

2 Conditions

488 The extinguishment of the obligation is only justified when the following **three conditions** are met:[462]

- **Objective impossibility**: The debtor's performance must be objectively impossible to perform in the sense that it can no longer be performed either by the debtor or by any third party acting in the debtor's place. The impossibility must also be permanent. Impossibility must be distinguished from a change of circumstances (see paras 395–411)
- **Subsequent impossibility**: The impossibility must arise subsequent to the conclusion of the contract. Subsequent impossibility must be distinguished from initial impossibility which renders the contract null and void (Art. 20(1) CO; see paras 208–211 and 486); and
- **Impossibility not attributable to the debtor**: The debtor does not have to answer for the impossibility under any contractual or statutory provision. In other words, the impossibility must not fall within the debtor's sphere of risk.[463] This is the case if the debtor is at fault (Art. 97(1) CO; see paras 431–443), if the debtor is liable for the acts of the latter's auxiliaries (Art. 101 CO; see paras 444–449) or if the debtor is in default (Art. 103(2) CO; see paras 453–464).

[460] Tercier and Pichonnaz, *Droit des obligations*, para. 1580.
[461] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 2539.
[462] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, paras 2532–2535.
[463] DFSC 111 II 352 reas. 2a, DFSC 2C_390/2016 of 6 November 2017 reas. 5.3.1.

3 Consequences

489 When the conditions for impossibility (see para. 488) are met, the impossibility **extinguishes the debtor's obligation** (Art. 119(1) CO). The debtor is released from the performance of the obligation that the latter owes. The debtor is not obliged to compensate the creditor for the loss thus caused. It is therefore the creditor who bears the risk of the impossibility. The debtor may, however, be obliged under the conditions of Article 97(1) (see paras 431–443) or Article 101 CO (see paras 444–449) to compensate the creditor for the loss if the debtor breaches an ancillary duty, in particular, that of informing the creditor in good time of the existence of the impossibility.[464]

490 In a **synallagmatic contract** (see para. 345), the debtor's impossibility to perform as such does not prevent the creditor from performing the obligation. However, as both parties accepted to perform in exchange for the performance by the other party, Article 119(2) and (3) CO provides the following solutions:

- **Extinguishment of the counterclaim**: In principle, the creditor 'loses his counter-claim to the extent it has not been satisfied' (Art. 119(2) CO). Furthermore, the debtor must return what the latter has already received, according to the rules on unjust enrichment (Arts 62–67 CO; see para. 85). Article 119(2) CO therefore spreads the risk between the two parties: the creditor bears the risk of the performance (Art. 119(1) CO; see para. 489) and the (liberated) debtor bears the risk of the consideration, that is, the risk of the price (Art. 119(2) CO);[465]
- **Passing of risk**: 'This does not apply to cases in which, by law or contractual agreement, the risk passes to the creditor prior to performance' (Art. 119(3) CO). This provision thus reserves statutory (and contractual) provisions which exclude the extinguishment of the creditor's counterclaim and oblige the creditor to bear the consequences of the impossibility. This is the case, for example, with Article 185(1) CO for the contract of sale (see para. 873), Article 378 CO for the contract for work and services (see paras 1845–1863) and Article 418m CO for the commercial agency contract (see paras 2792–2806). Under these provisions, the debtor (seller, contractor, commercial agent) keeps the counterclaim and does not have to return what the latter has already received from the creditor (buyer, customer, principal).

[464] Tercier and Pichonnaz, *Droit des obligations*, para. 1600.
[465] DFSC 107 II 144 reas. 3.

C *Set-off*

1 Overview

491 Set-off (*Verrechnung*, *compensation*, *compensazione*) is the **extinguishment of a debt by the sacrifice of a counterclaim that the debtor has against the creditor**.[466]

492 The Code of Obligations deals with set-off in **Articles 120–126 CO**.

493 Set-off requires the existence of **two (or more) claims between two parties**:

- The **offsetting claim** (*Verrechnungsforderung*, *créance compensante*, *credito in compensazione*) which the offsetting party (*Verrechnender*, *Kompensant*; *compensant*; *soggetto che dichiara la compensazione*) has against the set-off party (*Verrechnungsgegner*, *Kompensat*; *compensé*; *soggetto a cui viene richiesta la compensazione*); and
- The **set-off claim** (or main claim; *Gegenforderung*, *Hauptforderung*; *créance compensée*; *credito da compensare*) which the set-off party has against the offsetting party.

494 Under Swiss law, set-off is **not automatic** (statutory set-off; *gesetzliche Verrechnung*, *compensation légale*, *compensazione legale*), contrary to French law (Art. 1347 CCF, which is, however, restricted by case law). It can only result from the exercise of the offsetting party's right to set off.

495 Under Swiss law, set-off does **not require a court decision** (judicial set-off; *gerichtliche Verrechnung*, *compensation judiciaire*, *compensazione giudiziale*), contrary to certain hypotheses of set-off in English law[467] and to other laws, such as Italian law which has a system of statutory set-off (see para. 494) and must facilitate its implementation by relaxing the conditions for its application (Art. 1243(2) CCI).

2 Conditions

496 The following **six conditions** must be met for set-off:

- **Reciprocity of claims**: The offsetting claim (see para. 493) and the set-off claim (see para. 493) must be reciprocal (*Gegenseitigkeit der*

[466] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3202.

[467] With respect to the distinction between legal and equitable set-off under English law, see e.g., *Fearns (t/a 'Autopaint International') v Anglo-Dutch Paint & Chemical Company Ltd & Ors* [2010] EWHC 2366 (Ch) (23 September 2010) stating that legal set-off can only be asserted in legal proceedings and equitable set-off can be relied on outside the context of legal proceedings.

Forderungen, *réciprocité des créances*, *reciprocità dei crediti*). The offsetting claim must be directed against the set-off party and the set-off claim must be directed against the offsetting party.[468] The reciprocity of claims may be problematic in the presence of a triangular relationship or partnerships (*Personengesellschaft*, *société de personnes*, *società di persone*). This is why the Code of Obligations contains specific provisions on the contract of surety (Arts 492–512 CO) in Article 121 CO,[469] on contracts conferring rights on third parties (Art. 112 CO) in Article 122 CO, for the assignment of a claim (Arts 164–174 CO; see paras 544–550) in Article 169(2) CO and for partnerships in Article 573 CO;

- **Identity of the claims**: According to Article 120(1) CO, the offsetting claim (see para. 493) and the set-off claim must be identical in kind (*Gleichartigkeit der Forderungen*, *identité des créances*, *identità dei crediti*). This prerequisite is unproblematic if both claims are for money or another interchangeable object of the same kind. Monetary debts (see para. 423) are identical, regardless of the currency,[470] since debts of different currencies can be converted, in principle (Art. 84 CO; see paras 687–689). However, the condition of identity of the claims does *not* require that the claims are (1) connected,[471] that is, that they arise from the same legal ground (such as the same contract); (2) equivalent, that is, of the same amount (see Art. 124(2) CO); or (3) uncontested (Art. 120(2) CO;[472] cf. Art. 1347–1 CCF, which requires that the claims are '*liquides*');
- **Offsetting claim is due**: According to Article 120(1) CO, the offsetting claim (see para. 493) and the set-off claim (see para. 493) must both be due. In reality, only the offsetting claim must be due. For the set-off claim, executability (see para. 391) is sufficient.[473] Under Article 123(1) CO, the condition that the offsetting claim be due is no longer specifically required when the debtor is in bankruptcy. Indeed, the debtor's bankruptcy renders all the debtor's debts due (Art. 208(1) DEBA);

[468] DFSC 134 III 643 reas. 5.5.1.
[469] DFSC 138 III 453 reas. 2.2.1.
[470] DFSC 130 III 312 reas. 6.2.
[471] DFSC 91 II 213 reas. 3c, DFSC 63 II 133 reas. 3b.
[472] DFSC 136 III 624 reas. 4.2.3, DFSC 9C_293/2014 of 16 October 2014 reas. 3.3.4.
[473] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3227.

- **Actionability of the offsetting claim**: The offsetting claim (see para. 493) must be actionable (*Klagbarkeit der Verrechnungsforderung*, *possibilité de faire valoir la créance compensante en justice*, *possibilità di far valere il credito di compensazione davanti al giudice*). In principle, the offsetting claim must thus not be time-barred (see paras 501–543). However, Article 120(3) CO provides for the following exception: 'A time-barred claim may be set off provided that it was not time-barred at the time it became eligible for set-off.' The set-off claim (see para. 493), on the other hand, need not be actionable;
- **No contractual exclusion of set-off**: The parties must not have waived the set-off. Indeed, the parties may exclude the right for the debtor to extinguish the debt by set-off.[474] Article 126 CO does not expressly provide for this possibility, but simply confirms the freedom of contract regarding its content of Article 19(1) CO (see paras 55–57). This waiver must be made by agreement (*pactum de non compensando*) and not by a unilateral act of one of the parties.[475] However, the debtor is, of course, free simply not to exercise the formative right (*Gestaltungsrecht*, *droit formateur*, *diritto formatore*) to set off on his own and voluntarily. Due to the protection that the set-off offers to the debtor, the Code of Obligations prohibits the exclusion of set-off for certain (weaker) parties. This is the case for the tenant's or lessee's claims (Arts 265, 294 CO) and the employee's claims (Art. 323b(2) CO); and
- **No statutory exclusion of set-off**: The set-off must not be excluded by statute. Indeed, Article 125 CO excludes the set-off, in particular, for the following obligations: (1) obligations to restore or replace objects that have been deposited, unlawfully removed or retained in bad faith (Art. 125(1) CO);[476] (2) obligations that by their nature require actual performance by the creditor,[477] such as maintenance claims and salary payments that are absolutely necessary for the upkeep of the creditor and the latter's family (Art. 125(2) CO); and (3) obligations under public law in favour of the State authorities, in particular, tax law claims (Art. 125(3) CO). Article 125 CO only excludes the extinguishment of the claim by set-off against the creditor's will, but the creditor

[474] DFSC 138 III 453 reas. 2.2.3.
[475] DFSC 130 III 312 reas. 5.2, DFSC 2C_889/2008 of 21 September 2009 reas. 4.2, DFSC 4C.60/2000 of 11 January 2001 reas. 4a.
[476] DFSC 136 III 437 reas. 3.5.
[477] DFSC 136 V 286 reas. 8.2.

can always waive the specific protection afforded by this statutory provision. Articles 213 and 214 DEBA provide for further exclusions in case of bankruptcy.

3 Declaration of Set-off

497 If the aforementioned conditions (see para. 496) are fulfilled, the right to set-off exists. This is a **formative right** (*Gestaltungsrecht*, *droit formateur*, *diritto formatore*).

498 The right to set-off is exercised by means of a **unilateral declaration of intent** by the offsetting party (Art. 124(1) CO; see para. 103). The declaration is addressed to the set-off party and must thus be received by the latter (see para. 122). The content of the declaration is that the main claim (of the set-off party) will be extinguished by sacrificing their own offsetting claim. The following principle thus applies: No offsetting effects (see paras 499–500) without an offsetting declaration.[478] The declaration of set-off may be an express or an implied (e.g., payment only of the difference between the two claims) declaration.

4 Consequences

499 When the conditions (see para. 496) are fulfilled and the offsetting party has declared the set-off to the set-off party (see paras 497–498), the two **claims are extinguished to the extent of the lower one** (Art. 124(2) CO). As a result, where the amount of the set-off claim is greater than that of the offsetting claim, the set-off party must be satisfied with a partial payment, in derogation of the principle in Article 69(1) CO.

500 The offsetting effect occurs from the **point in time** when the claims 'first became susceptible of set-off' (Art. 124(2) CO). The claims are therefore not extinguished only at the time of receipt of the declaration of set-off.

D Statute of Limitations

1 Overview

501 The statute of limitations (*Verjährung*, *prescription*, *prescrizione*) is the institution which allows the debtor to **paralyse the creditor's right of action as a result of the passage of time**.[479]

[478] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3248.
[479] Tercier and Pichonnaz, *Droit des obligations*, para. 1653.

502 In Swiss law, the statute of limitations is an institution of **substantive law**, and not of procedural law.[480]

503 The statute of limitations is dealt with in a general way at **Articles 127–142 CO**.

504 The statute of limitations has the following two **main objectives**: (1) protection of legal certainty in the public interest, that is, the creditor shall no longer be entitled to sue the debtor if the creditor has not made efforts to enforce the claim for a long period of time; and (2) preventing litigation in which the evidence has become unreliable.[481]

505 The statute of limitations must be distinguished from **forfeiture** (*Verwirkung*, *péremption*, *perenzione*). Forfeiture entails the loss of a substantive right as a result of the expiry of the period within which the holder must exercise it, such as asserting a lack of consent (Art. 31 CO; see para. 244) or complying with the incumbencies of the warranty of conformity (Art. 201 CO for the contract of sale, see paras 749–853; Arts 367 and 370 (2) CO for the contract for work and services, see paras 1357–1576). Unlike the statute of limitations, the forfeiture entails the extinguishment of the substantive right as such (and not only the (procedural) right of action attached to the right) and the judge must take it into account *ex officio*.

506 In principle, **all claims** are subject to the statute of limitation, with the exception of some claims (e.g., claims secured by a pledge on real estate pursuant to Art. 807 CC).

507 To determine when a claim is time-barred, it is **necessary to know**:

- The **duration** of the limitation period (see paras 508–511);
- The **starting point** of the limitation period (see paras 512–516);
- **Possible extension** of the limitation period (see paras 517–534); and
- The **point at which the limitation period expires** (see paras 535–536).

2 Duration of the Limitation Period

508 The duration of the limitation period is, in principle, **fixed by statute**, but the parties can partially derogate from it (see paras 542–543).

509 According to Article 127 CO, claims are generally time-barred after an **ordinary limitation period of ten years**. This ordinary limitation period applies to all claims, 'unless otherwise provided by Federal civil law' (Art. 127 CO).

[480] DFSC 146 III 25 reas. 8.1.1.
[481] DFSC 137 III 16 reas. 2.1, DFSC 9C_132/2019 of 3 July 2019 reas. 5.

510 Many specific provisions provide for **extraordinary limitation periods**:

- **Five years**: Article 128(1.)-(3.) CO provides for a limitation period of five years in the following three cases: (1) 'claims for agricultural and commercial rent and other rent, interest on capital and all other period payments' (Art. 128(1.) CO); (2) 'claims in connection with the delivery of foodstuffs, payments for board and lodging and hotel expenses' (Art. 128(2.) CO); and (3) 'claims in connection with work carried out by tradesmen and craftsmen, purchases of retail goods, medical treatment, professional services provided by advocates, solicitors, legal representatives and notaries, and work performed by employees for their employers' (Art. 128(3.) CO; see paras 1705–1708, 2376); and
- **Twenty years**: Article 128a CO, which came into force on 1 January 2020, provides that '[c]laims for damages or satisfaction arising from an injury or death in breach of contract are time-barred three years from the date on which the person suffering damage became aware of the damage, but in any event twenty years after the date on which the harmful conduct took place or ceased'.

511 Statutory law also sets out **numerous specific rules** which take precedence over both the general rule of Article 127 CO (see para. 509) and the specific rules of Articles 128 (see para. 510) and 128a CO (see para. 510). This is the case, for example, for warranty claims in the contract of sale (Art. 210 CO; see paras 807–813) and the contract of work and services (Art. 371 CO; see paras 1443–1471).

3 Starting Point of the Limitation Period

512 As a rule, the limitation period commences as soon as the **claim is** (mature respectively) **due** (Art. 130(1) CO).[482] A claim becomes (mature respectively) due immediately when it arises, unless otherwise provided by statute, contract or the nature of the legal relationship (Art. 75 CO; see paras 389–394). It is only then that the creditor can act against the debtor and that the creditor can be reproached for delaying to act.

513 The time **when the creditor becomes aware of the existence or the amount of the claim** is not decisive for the beginning of the limitation period.[483] The limitation period for a contractual claim may

[482] DFSC 143 III 348 reas. 5.3.2, DFSC 4A_601/2021 of 8 September 2022 reas. 9.1.
[483] DFSC 143 III 348 reas. 5.3.1, DFSC 4A_148/2017 of 20 December 2017 reas. 4.2.2.

therefore start to run even before the creditors are aware of the existence of their claim.

514 In the case of an action for contractual liability (see paras 427–452), the Federal Supreme Court considers that the limitation period already begins to run from the date of the **breach of the contract**, even if the loss does not appear until later.[484]

515 Similarly, it does not matter for the commencement of the limitation period whether the debtor is in **default** or not (see paras 453–464).

516 Some **specific provisions** provide for different starting points, for example, for claims becoming due on the issuance of a reminder (Art. 130(2) CO; see para. 457), tort claims (Art. 60(1) CO) and unjust enrichment claims (Art. 76(1) CO).

4 Impediment and Suspension of the Limitation Period

517 The limitation period does not run in the following two situations: (1) **impediment** (*Hinderung*, *empêchement*, *impedimento*), that is, when the limitation period does not start to run; and (2) **suspension** (*Stillstand*, *suspension*, *sospensione*), that is, when the limitation period that has already begun to start to run does not continue (Art. 134(1) CO).

518 The **grounds** for impediment or suspension of the limitation period are listed exhaustively in Article 134(1) CO.[485]

519 They can be divided into the following **four groups**:

- As long as the **creditor is particularly closely connected to the debtor** or is dependent on the debtor in a special way (Art. 134(1)(1.)–(4.) CO) or cannot take action against the debtor for legal reasons (Art. 134(1)(5.) CO);
- As long as the creditor is prevented from asserting the claim before an arbitrator or judge for **objective reasons** (Art. 134(1)(6.) CO);
- For the duration of the **public inventory procedure**, for claims made by or against a testator (Art. 134(1)(7.) CO);
- For the **duration of settlement talks**, mediation proceedings or any other extra-judicial dispute resolution procedure, provided the parties agree thereon in writing (Art. 134(1)(8.) CO; see paras 3085–3090).

520 In case of impediment (see para. 517) or suspension (see para. 517), the **limitation period does not run** (*praescriptio dormit*). This has the effect that the limitation period is extended by the time during which

[484] DFSC 146 III 14 reas. 4, 5.1 and 6.1.2, DFSC 140 II 7 reas. 3.3, DFSC 137 III 16 reas. 2.3-2.4.3.

[485] DFSC 141 III 522 reas. 2.1.3.1, DFSC 134 III 294 reas. 2.1, DFSC 100 II 339 reas. 4.

it does not run (in case of impediment) or no longer runs (in case of suspension). In the case of suspension (see para. 517), therefore, the limitation period that has already expired is not lost (unlike in the case of interruption; see para. 521).

5 Interruption of the Limitation Period

521 There is an **interruption** (*Unterbrechung*, *interruption*, *interruzione*) of the limitation period when certain qualified events related to the performance of the obligation occur.[486]

522 The **grounds** for interruption are listed in Article 135 CO.

523 They can be divided into the following **two groups**:

- **Acknowledgement of debt by the debtor**: The limitation period is interrupted, 'if the debtor acknowledges the claim and in particular, if he makes interest payments or part payments, gives an item in pledge or provides surety' (Art. 135(1.) CO). The debtor's acknowledgement of the debt interrupts the limitation period without further ado, even if the intention is not (specifically) directed towards interrupting the limitation period.[487] It is sufficient that the creditor may understand the debtor's explicit or implicit behaviour in good faith (Art. 2(1) CC; see paras 71–72) as confirmation that the debtor's obligation exists in principle.[488] The fact that the amount actually owed has not yet been determined or is disputed does not prevent a debt from being acknowledged.[489]
- **Interruptive acts by the creditor**: The limitation period is also interrupted 'by debt enforcement proceedings, an application for conciliation, submission of a statement of claim or defence to a court or arbitral tribunal, or a petition for bankruptcy' (Art. 135(2.) CO). It is therefore not sufficient to merely require the debtor to perform. Purely private acts, such as sending a reminder, even by registered letter, or issuing a collection order, are not sufficient. Furthermore, the interruptive effect only occurs for the claim and the amounts that are claimed by the creditor.[490]

[486] Tercier and Pichonnaz, *Droit des obligations*, para. 1692.
[487] DFSC 134 III 591 reas. 5.2.1, DFSC 4A_404/2013 of 29 January 2014 reas. 4.1.
[488] DFSC 145 II 130 reas. 2.2.6, DFSC 2C_278/2020 of 15 July 2020 reas. 2.2.2.
[489] DFSC 134 III 591 reas. 5.2.2, DFSC 4A_404/2013 of 29 January 2014 reas. 4.1.
[490] DFSC 133 III 675 reas. 2.3.2, DFSC 4A_543/2013 of 13 February 2014 reas. 4.2.

524 The interruption of the statute of limitation has the effect of **starting a new period of time** which begins with the interruptive act (Art. 137(1) CO). The new period is of the same duration (see paras 508–511) as the interrupted period. There are various exceptions to this rule (e.g., Arts 137(2), 138(1), 138(3) CO, etc.). Unlike in the case of impediment (see para. 517) or suspension (see para. 517), no account is taken of the time already elapsed. The limitation period that has already expired is disregarded and the limitation period is extended in this sense.

525 Only a **running limitation period** can be interrupted. Interruptive acts after the expiry of the limitation period do not lead to a new commencement of the limitation period.

526 **Periods of forfeiture** (*Verwirkungsfrist, délai de péremption, termine di perenzione* see para. 505) may not be interrupted on the basis of Article 135 CO.

6 Waiver of the Statute of Limitations

527 Waiver of the statute of limitations (*Verjährungsverzicht*, *renonciation à la prescription*, *rinuncia alla prescrizione*) is an (innominate; see paras 2879–2915) contract between the debtor and the creditor by which the **debtor undertakes not to avail itself of the limitation period**.[491] The debtor may also waive the statute of limitation defence in relation to a claim that is already time-barred by simply refraining from raising the defence during the proceedings. Article 142 CO indeed prohibits the arbitrator or judge in such a case from taking the statute of limitations into account *ex officio* (see para. 538).

528 According to Article 141(1) CO, '[t]he debtor may waive the right to invoke the statute of limitation, in each case for a **maximum of ten years** from the start of the limitation period' (emphasis added). With respect to the starting point of the limitation period, see paras 512–516. The time limit of Article 141(1) CO applies irrespective of the applicable limitation period, that is, even if the limitation period is shorter than ten years (e.g., five years according to Art. 128 CO (see para. 510) or three years pursuant to Art. 60(1) CO).[492]

529 According to Article 141(1bis) CO, '[t]he waiver must be **in writing**' (emphasis added). For the written form requirement (Arts 12–15 CO), see paras 183–184.

[491] Christoph Müller, 'Verjährungsverzicht: 13 praxisrelevante Fragen unter dem neuen Recht', (2020) 3 *AJP/PJA* 288–295, 289–290.

[492] DFSC 132 III 226 reas. 3.3.8.

530 'Only the user of **general terms and conditions** of business may waive the statute of limitations defence in such terms and conditions' (Art. 141(1bis) CO; emphasis added). With respect to the GTCs, see paras 305–326.

531 The waiver of the statute of limitation **extends the limitation period by the time agreed by the parties** (to a maximum of ten years; see para. 509).[493]

532 'A waiver granted by a **joint and several debtor** does not bind the other joint and several debtors' (Art. 141(2) CO; emphasis added).

533 'The same applies to **co-debtors of an indivisible debt and to the surety** in the event of waiver of the principal debtor' (Art. 141(3) CO; emphasis added).

534 According to Article 141(4) CO, '[a] waiver granted by a debtor shall bind the **debtor's insurers** and vice versa, provided a direct claim exists against the insurer' (emphasis added).

7 Expiry of the Limitation Period

535 The expiry of the limitation period is the **last day on which the creditor can assert the claim without running the risk of the defence of the statute of limitations being raised** by the debtor. The creditor must therefore have brought an action or requested arbitration before that date.

536 'When computing limitation periods, the date on which the limitation period commences is not included and the period is not deemed to have expired until the end of the last day' (Art. 132(1) CO). Otherwise, by virtue of the reference in Article 132(2) CO, the general rules on the **computation of time limits** apply, that is, Articles 76–77 CO.

8 Consequences of the Statute of Limitations

537 The Code of Obligations deals with the statute of limitations under Title III ('Extinguishment of Obligations'; see para. 480). However, the statute of limitations only **paralyses the creditor's (procedural) right of action** (see para. 501).

538 This means firstly that the **(substantive) claim remains**. The creditor keeps the right to sue the debtor after the expiry of the limitation period (see paras 535–536). The arbitrator or judge must grant the claim if the debtor does not raise the statute of limitation defence. Indeed, '[a] court may not apply the statute of limitation defence ex *officio*' (Art. 142 CO). If

[493] Christoph Müller, 'La renonciation à soulever l'exception de la prescription', in Bohnet and Dupont (eds), *Le nouveau droit de la prescription* (Basel/Neuchâtel: Helbing Lichtenhahn, 2019) pp. 89–127, pp. 110–112.

the debtor performs the obligation, the latter's performance is valid (cf. Art. 120(3) CO; see para. 496). The debtor will not be entitled to claim restitution based on unjust enrichment (Art. 63(2) CO; see para. 85).

539 This means secondly that the **(substantive) claim is subject to the statute of limitation defence** (*Einrede der Verjährung*, *Verjährungseinrede*; *exception de la prescription*; *eccezione di prescrizione*). It is sufficient (but necessary) for the debtor to raise the statute of limitation defence for the right to enforcement to be paralysed. The arbitrator or judge does not have the power to invoke it *ex officio*.

540 The fact that the main claim is time-barred means that the claim for interest and other **ancillary claims** are also time-barred (Art. 133 CO).

541 In certain circumstances, the raising of the statute of limitations defence may constitute an **abuse of rights** (Art. 2(2) CC; see paras 73–74). It is an abuse of rights to invoke the statute of limitations if the debtor cunningly causes the creditor not to act in due time or if the debtor's conduct, without malicious intent, causes the creditor to refrain from acting within the time limit and the delay appears understandable, according to a reasonable assessment based on objective criteria.[494]

9 Contractual Modifications of the Limitation Period

542 Under the principle of **freedom of contract** (Arts 19–20 CO; see paras 49–70), the parties may partially agree to adopt other rules. They may, in particular, shorten or extend the limitation period or fix a different starting point. However, according to Article 129 CO, '[t]he limitation periods laid down under this Title may not be altered by contract'.

543 The Federal Supreme Court has clarified the meaning of this **limitation of the parties' freedom of contract** in its landmark case DFSC 132 III 226 as follows:

- **Before the limitation period has begun to run** (see para. 512), it cannot be **extended** (cf. Art. 141(1) CO; see para. 528). This rule applies to all limitation periods of the Code of Obligations, that is, to the 'ordinary' limitation periods of the Third Title, that is, of Articles 127 (see para. 509), 128 (see para. 510) and 137(2) CO, as well as to all other limitation periods, for example, Article 60 CO for tort claims, Article 67 CO for unjust enrichment claims, Article 210 CO for lack of conformity claims in the contract for sale (see paras 807–813) or

[494] DFSC 143 III 348 reas. 5.5.1, DFSC 131 III 430 reas. 2, DFSC 4A_235/2018 of 24 September 2018 reas. 4.2.

Article 371 CO for lack of conformity claims in the contract for work and services (see paras 1443–1470);

- **Once the limitation period has started to run** (see paras 512–516), an **extension** of the limitation period is allowed. This rule also applies to all limitation periods of the Code of Obligations. For the permissible duration of the extension, see para. 509;
- The parties are generally prohibited from **shortening** the 'ordinary' limitation periods found in the **Third Title**, that is, Articles 127 (see para. 509), 128 (see para. 510) and 137(2) CO. This rule should not apply to the 'extraordinary' limitation periods which have been recently introduced into the Third Title, that is, Articles 128a (see para. 510) and 139 CO (right of recourse in the event that joint and several liability is time-barred).[495] However, the parties are entitled to shorten limitation periods outside the Third Title, for example, the periods of Articles 60, 67, 210 or 371 CO).

XIII Assignment of a Claim

A Overview

544 In principle, the debtor must render the performance to the original creditor and only the latter has the right to claim performance (see 372–376). However, there is nothing to prevent a claim from being **transferred to a new creditor** and thus being a tradable asset.

545 The assignment of a claim (*Abtretung der Forderung*, *Zession*; *cession de créance*; *cessione di credito*) is dealt with in **Articles 164–174 CO**.

546 According to Article 164(1) CO, '[a] creditor may assign a claim to which it is entitled to a third party without the debtor's consent unless the assignment is forbidden by law or contract or prevented by the nature of the legal relationship'. It follows from this provision that the assignment of a claim is a **contract of disposition** (see para. 331) **by which a creditor assigns the claim to a third party without the agreement of the debtor**.

547 The assignment of a claim concerns the following **three parties**:

- The **assignor** (*Zedent*, *cédant*, *cedente*), who was the original holder of the claim and who transfers it to the assignee;

[495] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, para. 3377a.

- The **assignee** (*Zessionar*, *cessionnaire*, *cessionario*), who is the party to whom the claim is transferred and who will in future be the sole holder of the claim; and
- The **debtor of the assigned claim** (*Zessus*, *Drittschuldner*; *débiteur cédé*; *debitore ceduto*; *debitor cessus*), who is the one whose debt passes from the assignor to the assignee.

548 The debtor is not a party to the contract between the assignor and the assignee. The assignment is therefore possible without, or even **against, the debtor's will**.[496] However, the statute lays down a number of conditions designed to protect the debtors: in particular, the debt must not be increased as a result of the assignment and the debtors must know how to validly discharge themselves (see para. 549).

B Conditions

549 The following **two conditions** must be met for the assignment of a claim:

- **Assignable claim**: It follows from Article 164(1) CO that, in principle, all claims are assignable. This applies regardless of the legal grounds (contract, tort, unjust enrichment, etc.; see paras. 82–89) on which they arose.[497] Formative rights (*Gestaltungsrecht*, *droit formateur*, *diritto formatore*) are not claims and can therefore, in general, not be assigned. In particular, warranty of conformity rights within the meaning of Articles 205 (for the contract for sale; see paras 749–853) and 368 CO (for the contract for work and services; see paras 1357–1576) cannot be assigned. However, claims arising from the exercise of warranty of conformity rights may be assigned (see paras 1573–1576). Contractual purchase rights (see paras 927–933), pre-emption rights (see paras 939–950) and repurchase rights (see paras 934–938) are assignable under Article 216b CO only if so agreed between the parties. According to Article 164(1) CO, the assignment of a claim may be excluded: (1) by statute; (2) by contract: the parties to the original contract agree that (some) claims arising from their contractual

[496] Daniel Girsberger and Johannes Lukas Hermann, 'Vor Art. 164–174' and 'Art. 164', in Widmer-Lüchinger and Oser (eds), *Basler Kommentar, Obligationenrecht I – Art. 1–529 OR*, 7th edn (Basel: Helbing Lichtenhahn, 2019) (cited as: Girsberger and Hermann, 'BSK-Vor Art. 164-174 CO'/'BSK-Art. 164 CO'),'BSK-Vor Art. 164–174 CO', para. 1.

[497] Girsberger and Hermann, 'BSK-Art. 164 CO', para. 5.

relationship may not be assigned to a third party (*pactum de non cedendo*) or may only be assigned subject to certain conditions. Such an agreement may be express or implied. According to Article 164(2) CO, '[t]he debtor may not object to the assignment on the grounds that it was excluded by agreement against any third party who acquires the claim in reliance on a written acknowledgment of debt in which there is no mention of any prohibition of assignment'; (3) by the nature of the legal relationship: Claims that are connected with the person of the creditor in such a way that the change of creditor leads to a *de facto* change in the nature, content and purpose of the claim are also not assignable. In particular, an assignment is excluded if a change of creditor would result in a considerable worsening of the debtor's position.[498] The assignment of a non-assignable claim is invalid, with the result that the 'assignor' remains the creditor; and

- **Valid contract**: The assignment is composed of the promise to assign the claim and actual disposal of the claim. Since the assignment is an act of disposal (*Verfügungsgeschäft*, *acte de disposition*, *atto di disposizione*; see para. 355), it must be based on a valid title of acquisition or legal basis (*Rechtsgrund*, *cause (juridique)*, *causa*; *causa*). This title or legal basis, which is the cause of the assignment, is called the 'assignment agreement' (*Abtretungsvertrag*, *contrat de cession*, *contratto di cessione*; *pactum de cedendo*). It may be a contract for sale (Arts 184–236 CO; see paras 567–1112) or any other contract.[499] The promise to assign is not subject to any formal requirements (Art. 165(2) CO), unlike the assignment itself. In order for the actual disposal of the claim to be valid, the creditor must have the power to dispose of the claim (*Verfügungsmacht*, *pouvoir de disposition*, *potere di disposizione*). Where the same claim is assigned to two different assignees (double assignment), the second assignment is void, because the creditor, by (validly) assigning the claim to the first assignee, has lost the power of disposal.[500] According to Article 165(1) CO, '[a]n assignment [i.e., the act of disposal] is valid only if done in writing'. With respect to the written form requirement within the meaning of Articles 12–15 CO, see paras 183–184. The formal requirement is in the interest of legal certainty: third parties, above all the assigned debtor, but also the creditor of the assignor and the assignee should be able to determine

[498] DFSC 135 V 2 reas. 6.1, DFSC 122 III 145 reas. 4c.
[499] DFSC 130 III 417 reas. 3.3.
[500] DFSC 134 III 52 reas. 1.2, DFSC 4C.7/2000 of 5 June 2000 reas. 4c.

who is involved in the claim.[501] Only the assignor, but not the assignee, is subject to the statutory written formal requirement (Art. 13(1) CO; see para. 183).[502] The claim to be assigned must be sufficiently determined or at least determinable and the assignor's will to assign the claim must be evident.[503] If the written form is not observed, the assignment is invalid (Art. 165(1) CO).

C Consequences of the Assignment

550 The valid assignment of the claim triggers the following **consequences for the three parties involved**:

- **For the assignee**: The assignee becomes the (new) creditor of the assigned claim. After the assignment, only the assignee can assert the claim against the debtor. According to Article 170(1) CO, '[t]he assignment of a claim includes all preferential and accessory rights except those that are inseparable from the person of the assignor'.[504] Furthermore, the assignor has the (ancillary) duty to hand over to the assignee all means of enforcing the claim (debt certificate, means of proof) and to provide all necessary information (Art. 170(2) CO).
- **For the assigned debtor**: In order to be validly discharged, the assigned debtor must now perform the latter's obligation vis-à-vis the assignee. However, as the debtor is not a party to the assignment which may have been concluded without the latter's knowledge, the debtor can only properly perform the obligation if the latter has been notified (Art. 167 CO). Before the notification (*Anzeige*, *Notifikation*, *Denunziation*; *notification*, *avis*; *notificazione*, *avviso*), the assigned debtors can validly discharge themselves by performing to their former creditors provided they do so in good faith (Art. 2(1) CC; see paras 71–72).[505] However, as the former creditor will have received the performance without cause, the assignee can sue for restitution based on unjust enrichment (Arts

[501] DFSC 122 III 361 reas. 4c, DFSC 4A_172/2018 of 13 September 2018 reas. 4.4.1–4.4.3.
[502] DFSC 4C.39/2002 reas. 2b.
[503] DFSC 105 II 83 reas. 2.
[504] With respect to the question of whether an arbitration agreement, as an ancillary right to the claim, has been validly assigned, see DFSC 134 III 565 reas. 3.2, DFSC 4A_528/2019 of 7 December 2020 reas. 3.1.
[505] DFSC 131 III 586 reas. 4.2.1, DFSC 4A_133/2009 of 3 June 2009 reas. 2.5.

62–67 CO; see para. 85). After the notification, the assigned debtor can only be discharged by performing to the assignee. If there is a dispute between the assignee and the assignor (*Prätendentenstreit*), the assigned debtor can deposit the amount which has the effect of discharging the latter (Art. 168(1) CO).[506] As the assignment was made without the assigned debtor's consent, the assigned debtor should not be prejudiced by the change of creditor. The debt must therefore remain qualitatively the same (*Grundsatz der Identität*, *principe de l'identité*, *principio dell'identità*). For this reason, the assigned debtor may raise various defences against the assignee, that is, (1) the personal defences that the debtor has against the assignee (e.g., set-off; see paras 491–500); (2) the defences arising from the assigned claim (e.g., statute of limitations; see paras 501–543); (3) the personal defences that the assigned debtor had against the assignor (Art. 169(1) CO; e.g., set-off; see paras 491–500); and (4) the defences that arise directly from the relationship between the assignor and the assignee (e.g., invalidity of the assignment). The regime of defences is not mandatory law, with the result that the parties can derogate from it.

- **For the assignor**: The assignor no longer has any rights against the assigned debtor. The assignor can no longer claim or receive the performance. As far as the internal relationship between the assignor and the assignee is concerned, Articles 171–173 CO provide for a special guarantee regime in the event that the assignee cannot obtain performance of the assigned claim. If the assignment has been made free of charge, the assignor is not liable for the existence of the claim or the solvency of the assigned debtor (Art. 171(3) CO), unless the assignor has given a specific undertaking. If the assignment was made in exchange for payment, the assignor is liable for the existence of the claim (Art. 171(1) CO), but not for the solvency of the assigned debtor (Art. 171(2) CO).

D Transfer of a Contract

551 The assignment of a claim (see paras 544–550) is to be distinguished from the transfer of a contract. The legislator only deals with the assignment of a claim (Arts 164–174 CO) and the assumption of a debt (Art. 175–183 CO; see paras 557–564), that is, with the transfer of the individual obligation and **not of a whole contract**. There are, nevertheless,

[506] DFSC 143 III 102 reas. 2.1, DFSC 134 III 348 reas. 5.3.

statutory provisions which envisage the transfer of a contract (e.g., Art. 263(3) CO with respect to the lease contract, Art. 333(1) CO for the employment contract, Art. 54(1) IPA for the insurance contract).

552 The transfer of a contract is **common in practice**.

553 Contrary to the assignment of a claim, the transfer of a contract (*Vertragsübernahme, transfert/reprise de contrat, cessione/trasferimento del contratto*) needs the **consent of all contractual parties**.[507]

554 There is a transfer of a contract (*Vertragsübernahme*, *transfert/reprise de contrat*, *cessione/trasferimento del contratto*) when **one party to a contractual relationship is replaced by another** one which takes over the whole relationship as it is. This means that the same contractual relationship continues, simply with another party.[508]

555 The transfer of a contract may arise from statute (see para. 551), from a constitutive judgment (*Gestaltungsurteil, jugement constitutif, sentenza costitutiva*) or from an agreement, that is, a **transfer contract** (*Übernahmevertrag*, *contrat de transfert*, *contratto di trasferimento*).

556 The transfer of contract is not merely a combination of an assignment of a claim (see paras 544–550) and an assumption of a debt (see paras 557–564). The transfer contract can be analysed in the following **two ways**:

- **Tripartite innominate contract *sui generis*** (see para. 2901) between the remaining party, the departing party and the joining party;[509] or
- **Bilateral contract** between the departing party and the joining party conditioned by the (anterior, concurrent or subsequent) approval of the remaining party (e.g., Art. 263(1) CO).[510]

XIV Assumption of a Debt

A Overview

557 In principle, the obligation binds the creditor and the (original) debtor until the obligation is extinguished. Thus, the debtor alone is obliged to perform and only the debtor can be compelled by the creditor

[507] DFSC 4A_313/2014 of 9 September 2014 reas. 3.
[508] Gauch, Schluep and Schmid, *Schweizerisches Obligationenrecht*, para. 3547.
[509] DFSC 4A_30/2017 of 4 July 2017 reas. 4.1, DFSC 4A_650/2014 of 5 June 2015 reas. 6.1.
[510] DFSC 139 III 353 reas. 2.1.1.

to perform (see paras 372–373). However, under certain conditions, a **third party may substitute itself for the debtor** and assume the debt.

558 The assumption of a debt (*Schuldübernahme*, *reprise de dette*, *assunzione di debito*) is dealt with in **Articles 175–183 CO**.

559 The assumption of a debt is the legal institution by which a **third party substitutes itself for the debtor through a contract with the creditor**.

560 The assumption of a debt connects the following **three parties**:

- The **debtor** (*Schuldner*, *débiteur*, *debitore*), whose debt is taken over;
- The **creditor** (*Gläubiger*, *créancier*, *creditore*), who accepts that the debt is taken over by the third party; and
- The **(third-party) debt acquirer** (*Schuldübernehmer*, *tiers-reprenant*, *assuntore*), who agrees to take over the debt.

561 Depending on the consequences of the assumption, the following **two main forms** can be distinguished:

- **Extinguishing assumption of a debt**: The extinguishing assumption of a debt (*privative Schuldübernahme*; *reprise extinctive de dette*, *reprise privative de dette*; *assunzione esclusiva di debito*) extinguishes the debt of the original debtor and gives rise to a 'new' debt of the same content to be borne by the debt acquirer. The creditor is thus confronted with a new debtor whose creditworthiness may not be the same as that of the original debtor. This is why the assumption of a debt always requires the creditor's consent, unlike the assignment of a claim which can take place without the debtor's consent (see para. 546). The Code of Obligations deals only with the extinguishing assumption of a debt; and
- **Cumulative assumption of a debt**: In a cumulative assumption of a debt (*kumulative Schuldübernahme*, *reprise cumulative de dette*, *assunzione cumulativa di debito*), the debt acquirer becomes a debtor of a debt of which the original debtor is not discharged. They both remain liable, in principle, as joint and several debtors (Art. 143 CO; see paras 377–378). The Code of Obligations does not deal with the cumulative assumption of a debt.

B Statutory Regime

562 The assumption of a debt includes the following **three relationships**:

- **Relationship between the debtor and the debt acquirer**: The internal relationship between the debtor and the debt acquirer is a contract in

which the debt acquirer promises to release the debtor from the latter's debt.[511] This contractual relationship is called the internal assumption of a debt (Art. 175(1) CO; *interne Schuldübernahme*, *reprise de dette interne*, *assunzione interna di debito*). Any debt can be the object of an internal assumption of a debt.[512] Even conditional, time-barred (see paras 501–543) or (within the limits of Art. 27 CC; see para. 207) future debts may be assumed internally, provided they are determined or determinable. The internal assumption of a debt is not subject to any formal requirement. This is also the case if the original legal transaction between the creditor and the debtor is subject to a particular formal requirement (see paras 180–189). The debt acquirer may release the debtor from the latter's obligation 'either by satisfying the creditor or by taking the debtor's place with the consent of the creditor' (Art. 175 (1) CO). The internal assumption of a debt does not in itself effect a change of debtor. Therefore, if the debt acquirer does not perform its promise, the original debtor will remain obliged to perform the debt. However, the debtor who is not released from the latter's debt may request that the debt acquirer provide security (Art. 175(3) CO). Furthermore, the debtor cannot demand performance of the promise until such debtor has performed the obligations arising under the assumption of a debt towards the debtor acquirer (Art. 175(2) CO). The creditor must accept performance of the debt by the debt acquirer insofar as the debtor was not obliged to personally perform (see paras 372–376);

- **Relationship between the debt acquirer and the creditor**: The external relationship between the debt acquirer and the creditor is a contract in which the debt acquirer and the creditor agree that the debtor is released from the debt and that the debt acquirer takes the debtor's place.[513] This second contractual relationship is called the external assumption of a debt (*externe Schuldübernahme*, *reprise de dette externe*, *assunzione esterna di debito*). The debtor is not a party to this second contract. The conclusion of this contract follows the general rules of Articles 1–40 CO. However, Articles 176 and 177 CO set out

[511] DFSC 4A_390/2020 of 9 February 2021 reas. 4.2, DFSC 4A_445/2018 of 20 February 2020 reas. 4.1.
[512] DFSC 4A_82/2016 of 6 June 2016 reas. 3.3.1.
[513] DFSC 4A_486/2020 of 15 July 2021 reas. 6.1, DFSC 141 V 546 reas. 5.2, DFSC 4A_390/2020 of 9 February 2021 reas. 4.3.

some specific rules which derogate from the general regime. In contrast to the assignment of a claim (see para. 545), this contract is valid despite the fact that it does not comply with any formal requirements. Any debt can be the object of an external assumption of a debt, provided that it is determined or determinable. It may even be a service which, according to its content, is to be provided by the debtor personally (see para. 372). In this case, if the creditor accepts the debt acquirer, the creditor declares at the same time that the latter accepts the performance by the debt acquirer. The main effect of an external debt assumption is that the creditor now has a new debtor.[514] With this proviso, the debt is identical (*Grundsatz der Identität*, *principe de l'identité*, *principio dell'identità*; for the assignment of a claim, see para. 550). In particular, the rights that are accessory to the debt remain unaffected by the change of debtor (Art. 178(1) CO). With respect to the security provided by third parties, they 'remain in place in favour of the creditor only provided the pledgor or surety has consented to the assumption of debt' (Art. 178(2) CO). With regard to defences, the debt acquirer can raise against the creditor the defences arising from the debt itself (Art. 179(1) CO; e.g., statute of limitations, see paras 501–543) and the defences that the debt acquirer may have personally against the creditor (e.g., set-off; see paras 491–500). However, the debt acquirer cannot raise against the creditor the defences that were personally available to the debtor against the creditor (Art. 179(2) CO), or the defences arising from the relationship between the debtor and the debt acquirer, that is, the internal assumption of debt (Art. 179(3) CO). If the debtor has waived the right to raise a defence against the creditor prior to the assumption of a debt, such waiver is also binding on the debt acquirer;

- **Relationship between the debtor and the creditor**: The extinguishing assumption of a debt releases the debtor, in contrast to the cumulative assumption of a debt (see para. 561).

563 Article 180 CO addresses the rare situation where the external assumption of a debt (see para. 562) **becomes invalid**.

564 Article 181 CO sets out specific rules for the **assignment of assets or a business with assets and liabilities**.[515]

[514] DFSC 121 III 256 reas. 3b.
[515] Gauch, Schluep and Emmenegger, *Schweizerisches Obligationenrecht*, paras 3624–3639.

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