



University of
Zurich^{UZH}

Swiss Contract and Tort Law

Introduction to Swiss Law – Private Law

Friday, October 4th 2019, KOL-G-221

Dr. Tina Huber-Purtschert
attorney at law and public notary
tina.huber-purtschert@uzh.ch



Overview

- I. Objectives
- II. Literature in English
- III. Translations
- IV. Useful Links
- V. Code of Obligations: Structure
- VI. Swiss Contract and Tort Law
- VII. Did we meet the Objectives?



Objectives

being able to **find** the **law text** and secondary **literature**

getting to **know** the **structure** and **functioning** of the Swiss code of obligations

being able to **enumerate** and **apply** general **principles** of swiss contract and tort law
and being able to **find** the **respective provisions** in the law text

starting **reflexions** about the **similarities** and **differences** to the jurisdiction of the
respective „homecountry“



Literature in English

Law of Obligations

- HUBER-PURTSCHERT TINA, Law of Obligations, in: Marc Thommen (ed.), Introduction to Swiss Law, Berlin/Berne 2018, pp. 305

Contract and Tort Law

- BUCHER EUGEN, The Law of Contracts (Chapter 8), in: François Dessemontet and Tuğrul Ansay (eds.), Introduction to Swiss Law, 3rd ed., The Hague 2004, pp. 107-1144
- TERCIER PIERRE / DREYER DOMINIQUE, Torts (Chapter 9), in: François Dessemontet and Tuğrul Ansay (eds.), Introduction to Swiss Law, 3rd ed., The Hague 2004, pp. 145-164



Translations

English Translations of the Swiss Code of Obligations

- <http://www.admin.ch/ch/e/rs/2/220.en.pdf>
- Federal Office of Justice (ed.): Swiss law (Civil Code, Code of Obligations, Private International Law: Arbitration), Berne 2012
- Swiss-American Chamber of Commerce (ed.): Swiss Code of Obligations I, Contract Law (Articles 1-551), 6th ed., Zurich 2011

An English version of each article of the code of obligations can also be found in:

- Amstutz Marc et al (eds.): Handkommentar zum Schweizer Privatrecht, 3rd ed., 10 volumes, Zurich/Basel/Geneva 2016



Useful Links

Federal Acts and Ordinances:

www.admin.ch/bundesrecht or www.bundesrecht.admin.ch (choose EN)

The Jurisdiction of the Federal Supreme Court:

www.bger.ch

Federal and Cantonal Jurisdiction, Literature (especially Law Journals and Commentaries):

www.swisslex.ch; www.legalis.ch



Swiss Code of Obligations: Structure (I/II)

- federal act on the amendment of the Swiss Civil Code (part five: Code of Obligations)
- No. 220 (classified compilation)
- in force since January 1th, 1912

Contract and Tort Law		Company Law (including Law on Securities)		
Division One General Provisions (arts. 1-183 CO)	Division Two Types of Contractual Relationship (arts. 184-551 CO)	Division Three Commercial Enterprises and the Cooperative (arts. 552-926 CO)	Division Four The Commercial Register, Busi- ness Names and Commercial Accounting (arts. 927-964 CO)	Division Five Negotiable Securities (arts. 965-1186 CO)



Swiss Code of Obligations: Structure (II/II)

Other federal acts (ordinances) beside the Swiss Code of Obligations (selection):

Contract and Tort Law	Company Law
<ul style="list-style-type: none">▪ Convention of International Sale of Goods (No. 0.221.211.1), «CISG»▪ Consumer Credits Act (No. 221.214.1)▪ Product Liability Act (No. 221.112.944)▪ Package Travel Act (No. 944.3)	<ul style="list-style-type: none">▪ Merger Act (No. 221.301)▪ Ordinance on the Commercial Register (No. 221.411)▪ Fair Trade Act (No. 241)▪ Cartel Act (No. 251)▪ Banking Act (No. 952.0)▪ Stock Exchange Act (No. 954.1)▪ Collective Investment Schemes Act (No. 951.31)



Swiss Contract and Tort Law: Overview

- a) Principles
- b) Conclusion of a contract
- c) Interpretation of a contract
- d) Defects in the conclusion of a contract
- e) Defects in consent
- f) Unfair advantage
- g) Claims according to the general provisions of the CO
- h) Quasi-contractual claims
- i) Time limits
- j) Types of contractual relationship
- k) Innominate contracts



a) Principles

Freedom of contract

Freedom...

- to **conclude** or not conclude a contract
- to **choose the contractual partner**
- to establish the contracts **content**
- of **formality**
- to **terminate** or **alter** a contract

(Unless there is a mandatory legal provision.)



b) Conclusion of a contract (I/II)

Conclusion of the contract, art. 1 CO

«¹The conclusion of a contract requires a mutual expression of intent by the parties.»

«²The expression of intent may be express or implied.»

Consensus

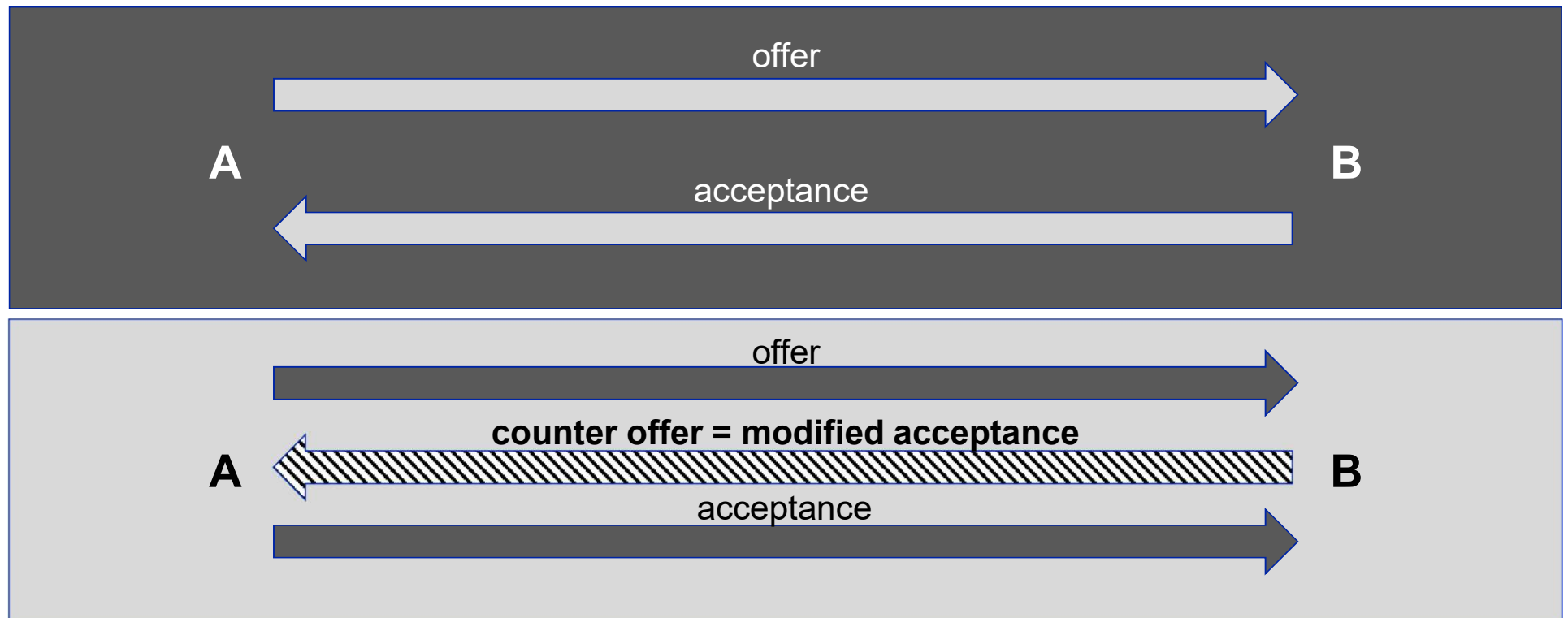
- parties must consent in every basic point of the contract (**essentialia negotii**)
- less important points may be left open

e.g. contract of sales, art. 185 CO:

- Basic points that have to be determined: the **price of the good** and the **good itself**.
- Less important points may be e.g.: the place or the time of fulfillment of the contract.



b) Conclusion of a contract (II/II)





c) Interpretation of a contract (I/II)

Principle of will: subjective interpretation → natural consensus

art. 18 para. 1 CO:

«¹[...] the **true and common intention of the parties** must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.»

But: What is to do when there is a doubt about the true and common intention of the parties?



c) Interpretation of a contract (II/II)

Principle of good faith: objective interpretation → normative consensus

Acting in good faith,
art. 2 CC (Civil Code)

«¹ Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.»

A declaration of intention is understood the way the other party of the contract could and did in good faith understand it.



d) Defects in the conclusion of a contract

impossibility

art. 20 para. 1 CO

unlawfulness,
immorality

art. 20 para. 1 CO

non-respect of the required form

art. 11 CO

Nullity, art. 20 CO

«¹ A contract is **void** if its terms are impossible, unlawful or immoral.»

«² However, 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.»

Formal requirements and significance in general, art. 11 CO

«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.»



e) Defects in consent (I/II)

Fundamental Error arts. 23 et seqq. CO	Fraud art. 28 CO	Duress arts. 29 et seq. CO
<p>art. 23 CO, error</p> <p>«A party labouring under fundamental error when entering into a contract is not bound by that contract.»</p> <p>art. 24 CO, cases of mistake</p> <p>«¹ An error is fundamental in the following cases in particular:</p> <ol style="list-style-type: none">1. where the party acting in error intended to conclude a contract different from that to which he consented;2.-3. ...4. where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract. <p>²... ³...»</p>	<p>art. 28 CO, fraud</p> <p>«¹ A party induced to enter into a contract by the fraud of the other party is not bound by it even if his error is not fundamental.»</p>	<p>art. 29 CO, consent to contract</p> <p>«¹ Where a party has entered into a contract under duress from the other party or a third party, he is not bound by that contract.»</p> <p>art. 30 CO, definition of duress</p> <p>«¹ A party is under duress if, in the circumstances, he has good cause to believe that there is imminent and substantial risk to his own life, limb, reputation or property or to those of a person close to him. ²...»</p>



e) Defects in consent (II/II)

Effect of an error, fraud or duress:

Defect of consent negated by ratification of the contract, art. 31 CO

«¹ Where the **party acting under error, fraud or duress** neither **declares** to the other party that he intends not to honour the contract nor seeks restitution for the performance made **within one year**, the contract is deemed to have been ratified.»

«² The one-year **period runs** from the time that the error or the fraud **was discovered** or from the time that the duress **ended**.»

«³ ...»



f) Unfair advantage

Unfair advantage

art. 21 CO

art. 21 CO, unfair advantage

«¹ Where there is a **clear discrepancy** between **performance** and **consideration** under a contract concluded as a result of **one party's exploitation** of the other's straitened circumstances, inexperience or thoughtlessness, the injured party may **declare within one year** that he will **not honour** the contract and **demand restitution** of any performance already made.

² The one-year period runs from the time that the error or the fraud was discovered or from the time that the duress ended.

³ ...»



Discussion

Have a «mini-conference» (5') with your neighbour and find examples for:

- null/void contracts
- voidable contracts





g) Claims according to the general provisions of the CO (I/VII)

1. Contractual claims

2. Unjust enrichment

3. Obligations in tort



g) Claims according to the general provisions of the CO (II/VII)

Contractual claims and breach of contract:

non-performance

defective performance

delayed performance

Obligor's duty to compensate – in general, art. 97 CO

*«¹ An obligor who fails to discharge an obligation **at all** or **as required** must make amends for the resulting loss or damage unless he can prove that he was not at fault.»*



g) Claims according to the general provisions of the CO (III/VII)

Prerequisites for a liability after art. 97 CO:

- damage
- breach of the contract
- causality between the damage and the breach
- misconduct attributable to the obligor (assumed)



g) Claims according to the general provisions of the CO (IV/VII)

Default of obligor (arts. 102 et seqq. CO)

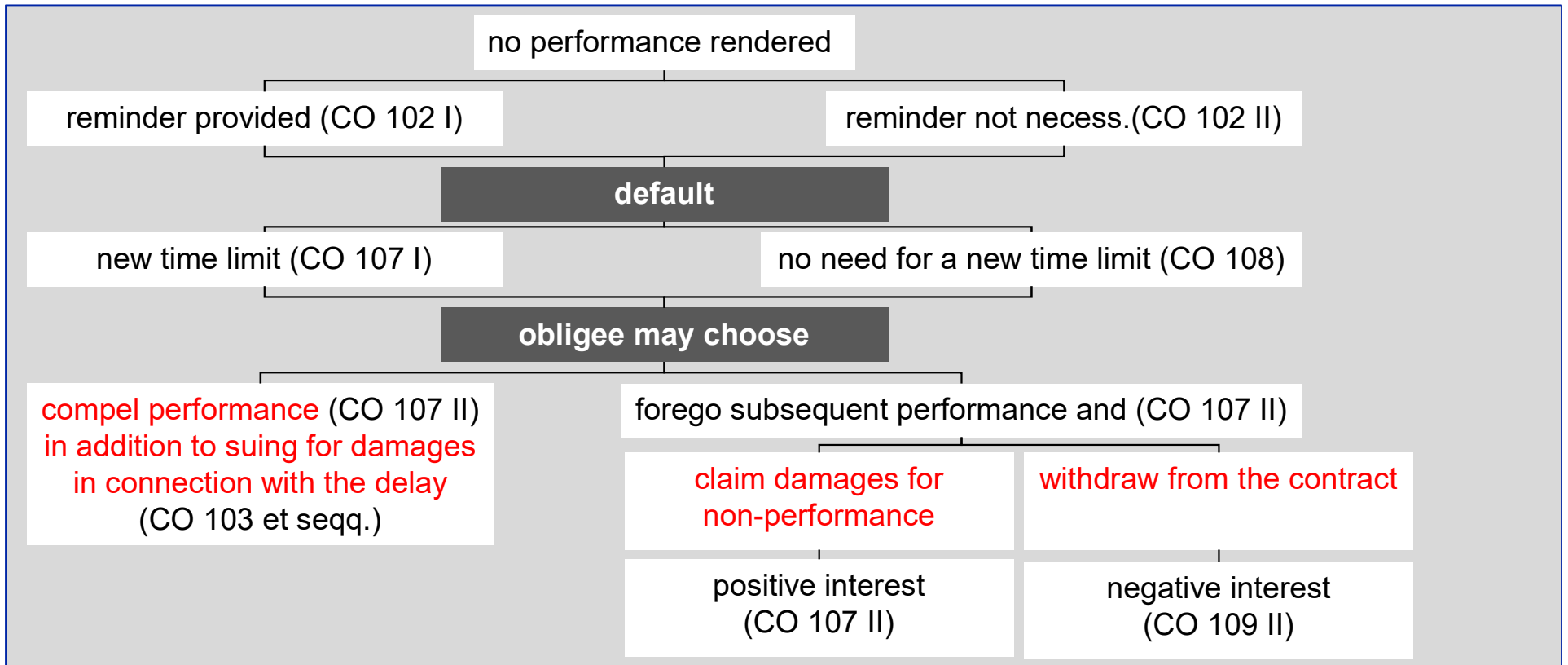
Requirement, art. 102 CO

«¹ Where an obligation **is due**, the obligor is **in default** as soon as he receives a **formal reminder** from the obligee.»

«² Where a **deadline for performance** of the obligation **has been set by agreement** or as a result of a duly **exercised right of termination** reserved by one party, the obligor **is automatically in default** on expiry of the deadline.»



g) Claims according to the general provisions of the CO (V/VII)





Discussion

Anna's preparations for her wedding on Friday October 25th 2019

- **Wedding dress** ordered, agreement that dress will be finished 3 weeks before wedding day, dressmaker has not even started, other dressmaker can tailor one in a hurry, which costs 1/3 more than the originally ordered one.
- **New car** ordered quite some time ago, it did not arrive yet, but the couple wants to go on the honeymoon with it.
- **White almonds** («confetti») ordered. Anna's intention was to decorate the wedding table with them. The almonds did not arrive. The couple decides that the flower decoration will be so abundant, that they are not needed any more.

Today (Friday, 4th October 2019) we are three weeks before the wedding.

How should Anna proceed? Discuss with your neighbour. (10')



g) Claims according to the general provisions of the CO (VI/VII)

Unjust enrichment:

arts. 62-67 CO

Requirement – in general, art. 62 CO

«¹ A person who has **enriched himself without just cause at the expense of another is *obliged to make restitution.***»

Prerequisites
for a restitution according to
art. 62 CO

- enrichment of a person
- (loss of property/assets of another person)
- no justification for the enrichment



g) Claims according to the general provisions of the CO (VII/VII)

Obligations in tort:

arts. 41-61 CO

Prerequisites
for a valid claim according to
art. 41 CO

General principles – conditions of liability, art. 41 CO

«¹ A person who **unlawfully** causes **loss or damage** to another, whether **willfully or negligently**, is obliged to provide compensation.»

- damage
- illegality
- causality between the damage and the illegality
- misconduct attributable to the defendant



h) Quasi-contractual claims (I/II)

Quasi-contractual claims

- parties interact in a **contractual context** but act **without a contract**
- (at least partial) application of contractual provisions leads to a more appropriate result than application of non-contractual ones
- CO provides **only a few** quasi-contractual claims, e.g. art. 26 para. 1 CO
- Court-practice and doctrine widened the category of quasi-contractual claims
 - Liability after inspired confidence based on trust
 - Liability for the fault in concluding a contract (culpa in contrahendo = c.i.c)



h) Quasi-contractual claims (II/II)

Landmark Case: Swissair-Case (BGE 120 II 331)

Liability after inspired confidence based on trust introduced

- Claimant concluded a contract with a subsidiary company of the Swissair Group concerning membership rights to use luxurious residences near golf courses and paid CHF 90'000.
- Project came to nothing, subsidiary company went bankrupt.
- Claimant had no contractual claim nor obligation in tort against Swissair.
- Federal Supreme Court recognised liability after inspired confidence based on trust of Swissair since
 - the subsidiary company **emphasized in publicity heavily its affiliation to the Swissair group** and the latter's approval of the project
 - Swissair group had **tolerated the behaviour of the subsidiary company.**



f) Time limits (I/II)

(almost) all claims become time-barred

Contract law

art. 127 CO

after **ten years** unless otherwise provided by federal civil law.

art. 128 CO

after **five years**:

- **rent**, interest on capital, other periodic payments
- claims in connection with delivery of food, lodging, hotel
- claims in connection with work of trades-/craftsmen, medical treatments, legal representatives, notaries, **work of employees**

art. 131 CO

Limitation period is counted from the moment debt becomes due



f) Time limits (II/II)

obligations in tort	art. 60 CO	one year from the date on which the injured party became aware of the loss/damage and of the identity of the person liable; in any event ten years after the date on which the loss/damage was caused
unjust enrichment	art. 67 CO	one year after the date on which the injured party learned of his claim and in any event ten years after the date on which the claim first arose
new January 1st 2020	arts. 60, 67 CO	three years (relative time limit)
	arts. 60, 128 CO	twenty years (absolute time limit) when killing or bodily injury of a human



j) Types of contractual relationship (I/X)

Nominate contracts (codified contracts)

- **sale** and exchange (arts. 184-238 CO)
- gifts (arts. 239-252 CO)
- **lease** and **usufructuary lease** (arts. 253-304 CO)
- loan (arts. 305-318 CO)
- **employment contracts** (arts. 319-362 CO)
- **contract for work and services** (arts. 363-379 CO)
- publishing contract (arts. 380-393 CO)
- **agency contracts** (arts. 394-418 CO)
- agency without authority (arts. 419-424 CO)
- commission contract (arts. 425-439 CO)
- contract of carriage (arts. 440-457 CO)
- payment instruction (arts. 466-471 CO)
- contract of bailment (arts. 472-491)
- contract of surety (arts. 492-512 CO)
- gambling and betting (arts. 513-515 CO)
- life annuity contract and lifetime maintenance agreement (arts. 516-529 CO)



j) Types of contractual relationship (II/X)

Nominate contracts (codified contracts)

Secondary terms, art. 2 CO

«¹ Where the parties have agreed **on all essential terms**, it is presumed that the contract will be binding [...].»



characterized by **standard principal obligations** of the contractual parties
(«standard» essentialia negotii)



every type of contract has his own «particularities», (depending also on the fact, how much protection is needed in the eyes of legislation for the «weaker» party)

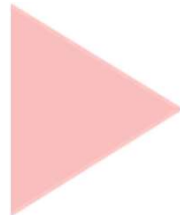


j) Types of contractual relationship (III/X)

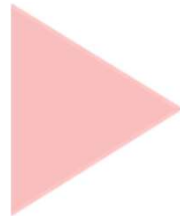
Nominate contracts (codified contracts)

Sale, art. 184 CO

- Seller:
«**deliver the item sold and transfer ownership**»
- Buyer:
«**payment of the sale price**»



Chattel sale,
arts. 187-215 CO



Sale of immovable property,
arts. 216-221 CO



j) Types of contractual relationship (IV/X)

Nominate contracts (codified contracts)

Lease, art. 253 CO

- landlord or lessor:
granting «*a tenant or lessee the use of an object*»
- tenant or lessee:
payment of a **rent**

Usufructuary lease, art. 275 CO

- lessor:
granting a «*lessee the use of a productive object or right and the benefit of its fruits or proceeds*»
- lessee:
payment of a **rent**



j) Types of contractual relationship (V/X)

Nominate contracts (codified contracts)

individual employment contract, art. 319 CO

- employee:
«*work in the service of the employer for a limited or unlimited period*»
- employer:
payment of «*a salary based on the amount of worked time (time wage) or the tasks performed (piece work)*»



apprenticeship contract
(arts. 344-346a CO)



commercial traveller's contract
(arts. 347-350a CO)



homeworker's contract
(arts. 351-354 CO)

- collective employment contract (arts. 356-358 CO)
- standard employment contract (arts. 359-360f CO)



j) Types of contractual relationship (VI/X)

Nominate contracts (codified contracts)

contract for work and services, art. 363 CO

- contractor:
«*carry out work*»
- customer:
payment for the work

simple agency contract, art. 394 CO

- agent:
conduct a business or provide a service
- principal:
paying a remuneration if agreed or customary



j) Types of contractual relationship (VII/X)

Landmark Case: Market Value Estimate-Case (BGE 127 III 328) (I/II)

Delineation between a contract for work and services and a simple agency contract

- Matter in dispute was **market value estimate** of the defendant **of a piece of real estate**
- Estimate was basis of claimant's share in an inheritance case, five years after the estimate the claimant sold the real estate for a price almost 25% below the estimate
- Claimant sued the estimator for the damage, since his inheritance share had been calculated on an inaccurate high estimate of the real estate's value
- To define rules of liability which the defendant's conduct was to be measured against, Federal Supreme Court started by considering what type of contract had been concluded



j) Types of contractual relationship (VIII/X)

Landmark Case: Market Value Estimate-Case (BGE 127 III 328) (II/II)

Delineation between a contract for work and services and a simple agency contract

- Conclusion: Estimate of a real estate is based on discretion and the result of such an expert opinion cannot be measured objectively
- contract qualified as a simple agency contract (and not contract for work and services)
- case is key example for practical importance of delineating between a contract for work and services and a simple agency contract



j) Types of contractual relationship (IX/X)

Nominate contracts (codified contracts)

contract for work and services, art. 363 CO

- contractor:
«*carry out work*»
- customer:
payment for the work

simple agency contract, art. 394 CO

- agent:
conduct a business or provide a service
- principal:
paying a remuneration if agreed or customary

art. 404 para. 1 CO

«*The agency contract may be **revoked or terminated at any time** by either party.*»



j) Types of contractual relationship (X/X)

Landmark Case: Revocability of Simple Agency Contracts (BGE 115 II 464)

Revocability at any time of simple agency contract is compulsory

- Advisory contract concerning accounting services
- According to Federal Supreme Court art. 404 para. 1 CO is compulsory and can not be altered by contractual provisions
- Court negated the argument, that the revocability at any time of simple agency contracts should be restricted to contracts governed by personal trust and
- according to the Court clear wording of the law text does not allow for such a differentiation



Discussion

1. Barbara lends Eva her electro bike for CHF 50/month.
2. Matteo hands Selina his bike over for CHF 250.
3. Maria from Martha's Homservices Ltd cleans every week the flat of the Müller family.
4. Natalia does hair extensions at the hairdressers for CHF 300.
5. Natalia does a hair implantation at the sunshine clinic for CHF 1'000.
6. Dr. Kobler estimates the value of the brilliant brooch for Karin.
7. A mother hands her house over to her daughter; the daughter takes over the mortgage which amounts to 50% of the value of the house.
8. For one month, Peter allows Martin to use his car for free.

What kind of contract do you identify? Discuss with your neighbour. (5')



k) Innominate contracts

Innominate contracts (non-codified contracts)

Principle of freedom of contract →
parties can conclude contracts, that do not follow characteristics of a nominate (= codified) contract

- Examples:
- «leasing» contract (which is not the same as a lease contract!)
 - exclusive distribution contract
 - licence contract

- Handling:
- **General provisions** of the CO apply
 - Legal practice and doctrine regulate where **provisions of the nominate contracts** are to be applied **directly** or **analogously**



Discussion

Think about the jurisdiction of your own country.

- Where do you see the main difference in contract and tort law to Switzerland?
- Are there any questions regarding swiss contract and tort law?

Discuss with your neighbour. (5')



Did we meet the objectives?

being able to **find** the **law text** and secondary **literature**



getting to **know** the **structure** and **functioning** of the Swiss code of obligations



being able to **enumerate** and **apply** general **principles** of swiss contract and tort law and being able to **find** the **respective provisions** in the law text



starting **reflexions** about the **similarities** and **differences** to the jurisdiction of the respective „**homecountry**“

