

Swiss Law of Contracts

General Principles

Nicolas Kuonen

Titular Professor at the University
of Fribourg (Switzerland)

in collaboration with
Tamara Grigoras, LL.M. (Amsterdam)

Table of contents

Bibliography	XIII
Abbreviations	XV

§ 1 General notions

I. Obligation	1
A. In general	1
B. Components of the obligation	1
1. Parties	1
2. Content	1
3. Cause	2
4. Enforceability	2
II. Contract	3
A. Definition and distinctions	3
B. General effects of the contract	4
C. Distinctions between different types of contracts	5
1. Named and unnamed contracts	5
2. Instantaneous contracts and continuing contracts	6
3. Unilateral, bilateral or multilateral contracts	7
4. Rules applicable to the contract (hierarchy of norms)	7

§ 2 Parties and agency

I. Parties	9
A. Passive legal capacity	9
B. Active legal capacity	9
II. (Direct) agency	10
A. Notion and distinctions	10
B. Conditions for direct agency	11
1. Acting in the name and on behalf of the principal	12
2. Powers	13
a. Authority (power of attorney)	13
b. Extinction or restriction of powers	14
C. Direct agency despite lack of powers	15
1. General situation	15

Table of contents

2. Exception 1: Appearance of authority	16
3. Exception 2: Ratification	17
4. Pre-contractual liability of the agent	17
§ 3 Freedom of contract	
I. Contractual freedom	19
II. Contractual interventionism	20
III. Components of freedom of contract	20
A. Freedom to enter into a contract	20
1. Voluntary obligation to enter into a contract: Agreement to conclude a contract	21
2. Statutory obligation to enter into a contract	21
B. Freedom of form	22
1. Voluntary mandatory form	22
2. Statutory mandatory form	22
C. Freedom of content	22
1. Restrictions on the content of the contract	22
2. Restrictions on the balance between mutual contractual obligations	23
§ 4 Negotiations and formation of contract	
I. Precontractual duties and liability	25
II. Mutual assent	30
A. In general	30
B. De facto, de iure and simulated contracts	30
C. Minimal content of the contract	31
D. Offer and acceptance	32
1. Offer	33
a. Definition	33
b. Effects	33
c. Form	34
2. Acceptance	34
a. Definition	34
b. Effects	34
c. Form	35
E. Effects of mutual assent	36

§ 5 Determination of the content of the contract

I. Contract interpretation	39
A. Subjective interpretation	40
1. Principle	40
2. Means of interpretation	40
B. Objective interpretation	41
1. Principle	41
2. Means of interpretation	41
3. Rules of interpretation	41
C. Relationship between subjective and objective interpretation	42
II. Gap filling	43
A. Principle	43
B. Means of gap filling	43

§ 6 Form Requirements

I. Conventional form	45
II. Legal form	46
A. Principle and purposes	46
B. Types of legal forms	47
1. Written form	47
2. Authentic form (public deed)	48
C. Scope of form requirement	48
D. Consequences of non-compliance with the form requirement	49

§ 7 Content requirements

I. Unlawfulness	51
II. Immorality	52
III. Impossibility	53
IV. Sanction	53

§ 8 Consent requirements

I. Unfair advantage	55
II. Error	56
A. Concept	56
B. Error of declaration	56
C. Error on motives	57
III. Fraud	58
IV. Duress	59
V. Sanction	60
A. Requirement of invalidation	60
B. Conditions for invalidation	60
C. Effects of invalidation	62

§ 9 General terms and conditions

I. Validity check	65
A. Incorporation	65
B. Unusual clauses	66
C. Battle of the forms	67
II. Interpretation check	67
III. Content check	68

§ 10 Remedies

I. For the creditor	69
A. Specific performance	69
B. Damages	71
1. In general	71
2. Positive damages (expectation damages) vs. negative damages	72
3. Grounds for reduction	74
4. Agreements on damages and related instruments	74
a. Liquidated damages clauses	74
b. Penalty clause	75
c. Earnest and forfeit money	77
C. The special case of monetary debts (in case of default)	78

D.	Termination	79
1.	Conditions for termination	79
2.	Effects of termination: <i>ex tunc</i> or <i>ex nunc</i>	80
3.	Special case: termination due to insolvency	81
II.	For the debtor	82

§ 11 Conditions for damages (liability)

I.	Breach of contract	87
A.	Negative breach of contract (non-performance)	87
B.	Positive breach of contract	88
II.	Fault	89
A.	In general	89
B.	Faulty performance	90
1.	Faulty impossibility	90
2.	Faulty default	91
3.	Faulty positive breach of contract	92
III.	Causation	92
A.	Natural (factual) causation	92
B.	Adequate (normative) causation	93
IV.	Vicarious liability	93
A.	Principle	93
B.	Specific conditions	94
V.	Conventions on liability	95

§ 12 Usual grounds for extinction

I.	Performance	97
A.	Involved persons	97
1.	Person performing the obligation	97
a.	Performance by a third party as a possibility	97
b.	Performance by the debtor herself as a requirement	98
c.	Performance by a third party as a requirement	98
2.	Beneficiary of the obligation	98
B.	Object of performance	99
1.	Complete performance	99

Table of contents

2. Object defined in generic terms	100
3. Alternative obligation	100
4. Possibility (necessity) to perform differently	101
5. Monetary debts	101
C. Place of performance	103
D. Time of performance	103
1. Enforceability	103
2. Right of the debtor to refuse performance (defenses)	104
3. Conditions affecting the contract	105
E. Effects of performance (and extinction)	108
II. Ordinary termination	108

§ 13 Unusual grounds of extinction

I. Non-contractual extinction	109
A. Impossibility	109
1. Conditions	109
2. Effects	110
B. Set-Off	111
1. Conditions	111
2. Effects	112
C. Confusion	112
II. Contractual extinction	113
A. Debt forgiveness and <i>contrarius actus</i>	113
B. Novation	113
1. Conditions	113
2. Effects	114

§ 14 Statute of limitation

I. Notion, distinction and scope	115
II. General principles	116
A. Beginning of the limitation period	116
B. Duration of the limitation period	116
III. Stay, interruption and waiver	117
A. Stay	117

B.	Interruption	118
C.	Waiver	120
1.	Notion	120
2.	Conditions	120
3.	Effects	121

§ 15 Assignment, assumption and transfer of claims

I.	Assignment of claims	123
A.	Notion	123
B.	Conditions	124
C.	Effects	126
1.	Position of the new creditor (assignee)	126
2.	Position of the debtor	126
a.	Payment to the wrong creditor	126
b.	Deposit	127
c.	Defenses	128
3.	Position of the former creditor (assignor)	129
II.	Assumption of debt	130
A.	Notion	130
B.	Conditions	130
1.	Internal assumption of debt	130
2.	External assumption of debt	131
C.	Effects	132
1.	Internal assumption of debt	132
2.	External assumption of debt	133
III.	(Voluntary) contract transfer	134
A.	Notion	134
B.	Conditions	134
C.	Effects	135

§ 16 Multiplicity of parties

I.	Several debtors	137
A.	Partial debtors	137
B.	Collective debtors	137

Table of contents

C.	Joint and several debtors	137
1.	Notion	138
2.	Conditions	139
3.	Effects	139
a.	External relationships	139
b.	Internal relationships	141
II.	Several creditors	143
A.	Partial creditors	143
B.	Collective creditors	143
C.	Joint and several creditors	144
1.	Notion	144
2.	Conditions	144
3.	Effects	145
a.	External relationship	145
b.	Internal relationships	145