



# University of Zurich

Faculty of Law  
Fall Semester 2012

## Law & Economics Contract Law - Introduction

Prof. Dr. iur. Andreas Heinemann, Dipl.-Ök.

# Two Different Systems

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1. Common Law
2. Civil Law

# Structural Differences

## 1. Common Law: Separate Fields

- Contracts
- Torts

## 2. Civil Law: Unified Concepts

Switzerland: The **Code of Obligations** covers at the same time

- Contracts and
- Torts

➔ Contracts and torts are just another way for obligations to arise. Once an obligation is created, the same rules apply.

# 1. Common Law

## ■ Contracts: Bargain Theory

- *Cooter/Ulen*, p. 277: "Traditionally, courts have been cautious about enforcing promises that are not given in exchange for something."

➔ Three main building blocks of a contract

1. Consent of the parties
2. Object of the contract
3. Consideration (anything of value; *quid pro quo*)

## 2. Civil Law

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### ■ Contracts: Theory of Consent

*Cooter/Ulen, p. 279: "meeting of minds"*

See **Art. 1 Swiss Code of Obligations:**

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

*2 The expression of intent may be express or implied.*

## 2. Civil Law

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➔ Two main building blocks of a contract

1. Offer (containing the *essentialia negotii*, inter alia contracting party, object and price)

2. Corresponding acceptance (containing the same *essentialia negotii*)

## 2. Civil Law

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→ No consideration is required (*do ut des* concerns only specific types of contracts, i.e. reciprocal contracts).

→ Overhasty promises are subject to formal requirements.

See for example the rules on gifts in the Swiss CO:

Art. 243 (1) The promise of a gift is valid only if done in writing.

Art. 242 (1) A gift from hand to hand is made when the donor presents the object to the recipient.

# 3. Comparison

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- The spirit of civil law is conceptual and philosophical ("consent"): The binding effect of contracts is based on liberty and autonomy. Contracts are valid because the parties want them to be valid.
- The spirit of common law is rooted in the economic reality of reciprocal agreements. The approach is utilitarian, i.e. welfare is to be maximized. No (enforceable) contract without consideration.



# Comparison

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*Cheshire/Fifoot*: "An Englishman is liable, not because he has made a promise, but because he has made a bargain."

➔ The starting point of L&E is Common Law.