Introduction to Swiss Law – Private Law

Law of Obligations I: Contract and Tort Law

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Overview

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I. Code of Obligations: Structure

- federal act on the amendment of the Swiss Civil Code (part five: Code of Obligations)
- No. 220 (classified compilation → www.fedlex.admin.ch)
- in force since 1 January 1912

Contract and Tort Law: Division one and two

Division One
General Provisions
(arts. 1-183 CO)

- **Creation of obligations (arts. 1-67)**
- Effect of obligations (arts. 68-113)
- Extinction of obligations (arts. 114-142)
- special Relationships relating to Obligations (143-163)
- Assignment of claims and assumption of debt (164-183)

Division Two
Types of Contractual Relationship
(arts. 184-551 CO)

II. Principles

Freedom of contract

Freedom…

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

(Unless there is a mandatory legal provision.)

a) Conclusion of a contract (I/II)

Conclusion of the contract, art. 1 CO

«[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.*»

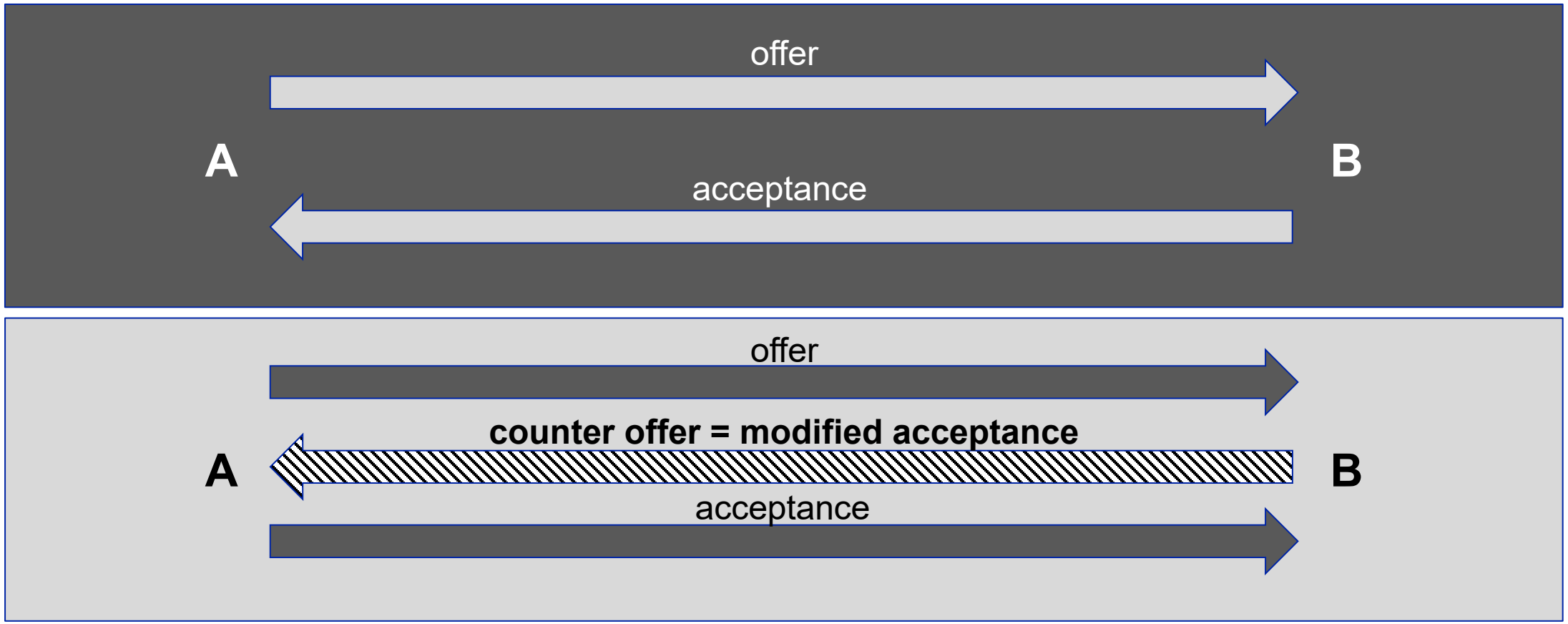
Consensus

- 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.

a) Conclusion of a contract (II/II)



b) 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?

b) 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.

c) 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)

→ Contract is (partial) null/void (arts. 11 and 20 CO)

d) Defects in consent

- Fundamental error (arts. 23 et seqq. CO)
- Fraud (art. 28 CO)
- Duress (arts. 29 et seq. CO)

→ Contract is «voidable» (art. 31 CO)

e) Unfair advantage

«Mixture» between defect in consent and defect in content (art. 21 CO)

→ Contract is «voidable» (art. 21 CO)

f) Claims according to the general provisions of the CO (I/VI)

1. Contractual claims

2. Unjust enrichment

3. Obligations in tort

f) Claims according to the general provisions of the CO (II/VI)

Contractual claims and breach of contract:

- **non-performance**
- **defective performance**
- **delayed performance**

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

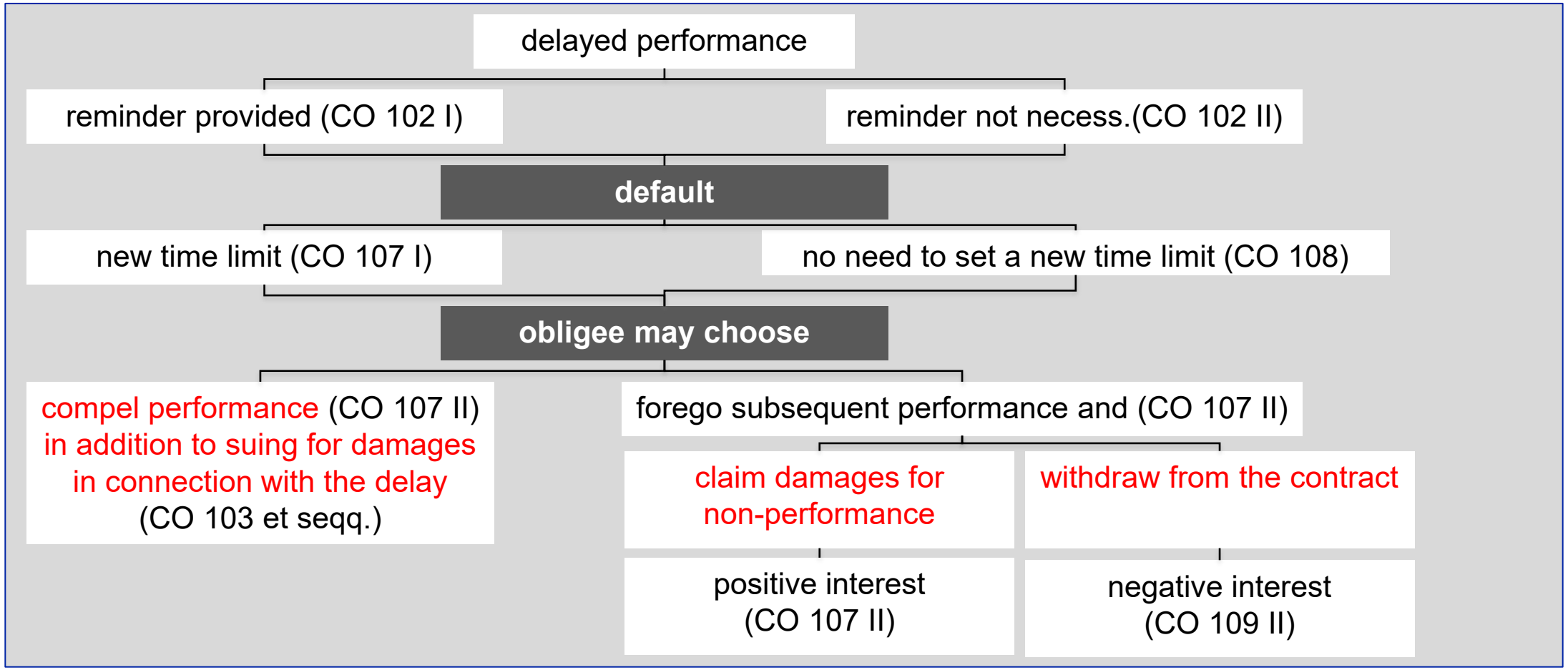
«[1] *An obligor who fails to discharge an obligation* ***at all*** *or* ***as required*** *must make amends for the resulting loss or damage unless he can prove that he was not at fault.*»

f) Claims according to the general provisions of the CO (III/VI)

Prerequisites for a liability after art. 97 CO:

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

f) Claims according to the general provisions of the CO (IV/VI)



Exercise I

Anna‘s preparations for her wedding on Friday, 6 November 2026

- **Wedding dress** ordered, agreement that dress will be finished on Friday 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 yet. The couple decides that the flower decoration will be so abundant, that the almonds are not needed any more.

Today (Friday, 16 October 2026) we are three weeks beofore the wedding.

How should Anna proceed?

f) Claims according to the general provisions of the CO (V/VI)

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

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

Obligations in tort:

arts. 41-61 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.»*
Prerequisites for a valid claim according to art. 41 CO	▪ damage ▪ Illegality (= harm to life and limb, property or violation of a rule protecting individual interests of the victim) ▪ causality between the damage and the illegal action ▪ misconduct attributable to the defendant

g) 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

g) Time limits (II/II)

obligations in tort*	art. 60 CO	**three years** from the date on which the person suffering damage became aware of the loss/damage/injury and of the identity of the person liable for it but in any event **ten years** after the date on which the harmful conduct took place or ceased
unjust enrichment	art. 67 CO	**three years** after the date on which the person suffering damage learned of his or her claim and in any event **ten years** after the date on which the claim first arose
***injury or death**	art. 128a CO art. 60 CO	**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

h) Types of contractual relationship (I/VII)

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)

h) Types of contractual relationship (II/VII)

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)

h) Types of contractual relationship (III/VII)

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

h) Types of contractual relationship (IV/VII)

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**

h) Types of contractual relationship (V/VII)

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)

h) Types of contractual relationship (VI/VII)

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

h) Types of contractual relationship (VII/VII)

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.*»

Exercise II

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. The Müller family pays for a cleaning session CHF 120 to Martha‘s Homeservices Ltd; Maria gets paid monthly by Martha‘s Homeservice Ltd.
4. The hairdresser fixes extensions in the hair of Natalia for CHF 300.
5. Natalia gets a hair implantation at the sunshine clinic for CHF 1‘000.
6. Dr. Kobler estimates the value of a diamond brooch for Karen.
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?

j) 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 (whicht is not the same as a lease contract!)
- exclusive distribution contract
- licence contract

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

Conclusion

Any questions left?

Thank you for your attention and good luck for the exam!

Exercise I: Solutions

- **Wedding dress:** reminder not necessary because deadline for performance of obligation set 3 weeks before the wedding (Friday, 16 October 2026), art. 102 para. 2 CO → dressmaker in default; no need to set a new time limit (art. 108 fig. 3 [and 1] CO); forego subsequent performance and claim damages for non-performance (art. 107 para. 2 CO) because: *wedding dress from original tailor useless, since Anna will order another one but she wants to have her extra costs covered (e.g. higher price due to express)*
- **New car:** reminder necessary because no deadline for performance (Art. 102 para. 1 CO); need to set a new time limit (Art. 107 para. 1 CO); compel performance in addition to suing for damages in connection with the delay (art. 107 para. 2 CO) because: *Anna still wants the car but she wants to have her extra costs covered (e.g. for a rental car)*
- **White almonds:** reminder probably needed (art. 102 para. 1 CO), because not sure if deadline set; setting of new time limit probably also needed (art. 107 para. 1 CO), no case of art. 108 CO; forego subsequent performance, withdraw from the contract, negative interest (art. 107 para. 2 CO) because: Anna does not want the almonds any more and she does not have costs that should be covered. She simply wants to cancel the contract.

Exercise II: Solutions

1. Lease (art. 253 CO): use of object vs. payment of rent
2. Chattel sale (arts. 184 and 187 CO): movable good vs. payment
3. 2 contracts:
   Maria & Martha‘s Homeservices Ltd: individual employment contract (art. 319 CO): work in the service of the employer for an unlimited period vs. monthly salary based on worked time
   Müller family & Martha‘s Homeservices Ltd: contract for work and services (Art. 363 CO): carry out work vs. payment
4. Contract for work and services (art. 363 CO): carry out work vs. payment (measurable result can according to federal supreme court be guaranteed)
5. Simple agency contract (art. 394 CO): provide service (vs. payment) (measurable result can according to federal supreme court not be guaranteed)
6. Simple agency contract (art. 394 CO): provide service (measurable result can not be guaranteed), no information about payment, is anyway not an essentialia for the simple agency contract
7. Mixed donation (innominate contract): 50% sale of immovable property (arts. 184 and 216 CO, immovable property vs. payment [mortgage]), 50% gift (art. 239 CO, inter vivos disposition to enrich another person)
8. Loan (art. 305 CO): making object available free of charge vs. returning it after having made use of it