

Art. 1 CO: Conclusion of a Contract by Mutual and Concordant Expression of Intent

Function and Place of the Provision

Art. 1 CO sets out the basic rule of Swiss contract law. A contract is concluded when the parties express their intent mutually and concordantly (para. 1). That expression may be express or tacit (para. 2) **Art. 1 OR**. The provision says only that consensus is required. How consensus is established is left to the neighbouring provisions and to case law: when secondary points may remain open (Art. 2 CO), when silence suffices (Art. 6 CO), which form must be observed (Art. 11 et seq. CO) and how declarations are interpreted (Art. 18 CO) **Art. 2 OR Art. 6 OR Art. 11 OR Art. 18 OR**.

The Federal Supreme Court stresses that under Art. 1 CO the conclusion of a contract «vom Vorliegen übereinstimmender Willensäusserungen - und nicht vom wirklichen Willen der Vertragspartner - abhängt» (depends on the existence of concordant declarations of intent, not on the parties' actual intent) **BGE 105 II 16**. The core of the provision is how this primacy of the declaration relates to actual intent (see below on actual and normative consensus).

The current text of paras. 1 and 2 carries no amendment note. In 2005 the Federal Council restated the article in the same wording as today **BBi 2006 685**.

Technological Neutrality and Electronic Contracting

The legislative debate on Art. 1 CO has centred on electronic commerce. The Control Committee of the National Council (GPK-N) stated: «Ein intransparentes Bestellverfahren steht einer klaren Willensäusserung der Konsumentin und des Konsumenten entgegen, so dass die Voraussetzungen des Artikels 1 OR nicht erfüllt sind.» (An opaque ordering process prevents a clear expression of intent by the consumer, so that the requirements of Article 1 CO are not met.) It asked the Federal Council to propose rules giving concrete form to Art. 1 CO for online trade **BBi 2005 4967**.

The Federal Council declined: «Artikel 1 OR steht damit einem Vertragsabschluss auf elektronischem Weg nicht entgegen.» (Article 1 CO therefore does not prevent a contract from being concluded electronically.) The only exception concerns contracts subject to form requirements, and for these Art. 14 para. 2bis CO already provides a basis **BBi 2006 685**. In the Federal Council's view, the provider bears the risk of a lack of transparency. Only a transparent ordering process prevents the contract from failing for lack of consensus or from being successfully challenged for defect of consent. The Federal Council also rejected a statutory duty to confirm receipt of an order, because such a duty would create doubt as to whether and when a contract is concluded **BBi 2006 685**.

The Legal Affairs Committee of the National Council followed this position by 11 votes to 7 with 2 abstentions. Its majority considered that a parliamentary initiative seeking to give concrete form to Art. 1 et seq. CO for electronic commerce would violate the principle of freedom of contract

Kommission für Rechtsfragen des Nationalrates: Bericht vom 14. September 2007 zu 06.457

The National Council decided not to proceed with the initiative **AB 2007 N 2054**. Online contracts are therefore assessed by the general criteria: consensus, the principle of reliance, incorporation of

general terms and conditions, and defects of consent. The Federal Council conceded that many of these questions «zuerst durch Lehre und Rechtsprechung beantwortet werden müssen» (must first be answered by legal scholarship and case law) **BBi 2006 685**.

Intention to Be Legally Bound: Contract, Gratuitous Favour, Declaration of Intent, Preliminary Contract

Contract or Gratuitous Favour

Art. 1 CO presupposes that the parties intend to be legally bound: «Vertragliche Bindung setzt einen tatsächlichen oder normativen Konsens voraus, auf seiten des Verpflichteten einen ausdrücklich oder vertrauens-theoretisch erklärten Rechtsfolgewillen.» (A contractual bond requires actual or normative consensus and, on the part of the obligor, an intention to create legal effects declared expressly or according to the principle of reliance.) **BGE 116 II 695** Where actual intent cannot be established, the intention to be bound is likewise determined by the principle of reliance.

A catalogue of criteria separates a contract from a non-binding gratuitous favour: «Ob Vertrag oder Gefälligkeit vorliegt, entscheidet sich nach den Umständen des Einzelfalles, insbesondere der Art der Leistung, ihrem Grund und Zweck, ihrer rechtlichen und wirtschaftlichen Bedeutung, den Umständen, unter denen sie erbracht wird, und der bestehenden Interessenlage der Parteien.» (Whether there is a contract or a favour depends on the circumstances of the individual case, in particular the nature of the performance, its reason and purpose, its legal and economic significance, the circumstances in which it is rendered and the parties' interests.) **BGE 116 II 695** An intention to be bound is indicated by the performing party's own legal or economic interest, or by the beneficiary's recognisable interest in receiving expert advice. In the leading case, the building owner could not infer from help with buying materials and from isolated instructions that the defendant had taken on overall coordination of a heating installation **BGE 116 II 695**. Similarly, in 4C.291/2003 the Federal Supreme Court upheld the finding that the garden design had been discussed only «in einem relativ unverbindlichen Rahmen» (in a relatively non-binding setting). To that extent there was no intention to be bound **4C.291/2003**.

According to 4A_104/2012, favours are rendered free of charge, unselfishly and occasionally. A person who acts at least partly in their own interest is therefore not rendering a favour at all **4A_104/2012**. Conversely, the Federal Supreme Court classified short-term childminding by a neighbour as a favour. Liability then follows Art. 41 CO, measured by the care the person customarily applies in their own affairs **4A_275/2011**. The Zurich High Court, as the lower instance, had relied on the fact that services among neighbours, acquaintances or relatives are typically favours **LB090097**.

The classification also affects pre-contractual liability. If the services are rendered «subjektiv wie vertrauens-theoretisch bloss Gefälligkeitshalber, bleibt für die Annahme von Vertragsverhandlungen und damit für eine culpa in contrahendo kein Raum» (merely as a favour, both subjectively and under the principle of reliance, there is no room for assuming contract negotiations and hence for culpa in

contrahendo) **BGE 116 II 695**.

Declaration of Intent, Letter of Intent and Binding Clause

Whether a clause merely expresses an intention or creates an obligation is a matter of interpreting the intention to be bound. In 4C.409/2005 the parties had expressly limited the binding effect of a letter of intent to the treatment of guarantee deposits and to confidentiality. Otherwise the document merely recorded the intention to continue negotiating in good faith. It was neither a binding offer nor a preliminary contract, because it contained no obligation to conclude a contract («La condition essentielle du précontrat, à savoir l'obligation de conclure un contrat, fait donc défaut.» - the essential condition of a preliminary contract, namely the obligation to conclude a contract, is therefore missing) **4C.409/2005**. A letter of intent can thus be binding in part and non-binding for the rest.

4A_277/2023 is the opposite case. In a share purchase agreement, the clause «The Buyer commits to buy» was not a non-binding declaration of intent but an obligation limited in time until the end of July 2019 (a put option) **4A_277/2023**. Subsequent conduct of the parties plays no role in interpretation under the principle of reliance. At most, it may support an inference about actual intent in the assessment of evidence **4A_277/2023**.

Preliminary Contract

Under Art. 22 para. 1 CO, a contract may create an obligation to conclude a future contract. Where the law prescribes a form for the main contract to protect the parties, that form also applies to the preliminary contract (para. 2) **Art. 22 OR**.

A preliminary contract is valid if its content is determined or determinable. If it already contains all essential elements of the main contract, an action for performance may be brought directly. Technical details of a building or the allocation of parking spaces are not among the essentialia **BGE 118 II 32**. A preliminary contract for a general contractor agreement was sufficiently determined because it specified the work and that it was to be remunerated. Where such a contract is breached, the positive interest under the unperformed main contract must be compensated, and a condition prevented in bad faith is deemed fulfilled under Art. 156 CO **4A_302/2022**.

The extension of the form requirement matters above all in sales of real property: notarial authentication is required both for the sale and for the promise to sell **4A_615/2010**. The Ticino Court of Appeal classified an agreement styled a «riservazione di acquisto» (purchase reservation) as a preliminary contract for the sale of land. Lacking notarial authentication, it was in principle void **12.2009.121**.

Liability Before Conclusion of the Contract

Where no consensus is reached, liability for culpa in contrahendo may arise. It rests on the duty of the parties to act in good faith during negotiations. This includes negotiating in accordance with one's actual intentions and, to a certain extent, informing the other party of facts relevant to its decision **BGE 105 II 75**.

The starting point is freedom to contract. Each party may in principle break off negotiations without giving reasons; liability for breaking them off is accepted only in exceptional situations **4C.409/2005**. Liability attaches to a party who, contrary to its actual intentions, raises the other party's false hope that the transaction will be concluded and thereby induces it to make dispositions **BGE 140 III 200**.

- Liability affirmed: In BGE 105 II 75 a bank negotiated for months without ever disclosing that the contract required approval from its head office. «Es widersprach Treu und Glauben, die Verhandlungen unbekümmert um interne Befugnisse fortzuführen, das Zustandekommen des Vertrages dann aber an der Genehmigung durch den Hauptsitz scheitern zu lassen, als der definitive Textvorlag.» (It was contrary to good faith to

continue negotiations regardless of internal authority and then let the contract fail for want of head-office approval once the final text was available.) Even a negligent breach of the duty to inform suffices **BGE 105 II 75**.

- Contracts subject to form requirements: Here liability is accepted with even greater restraint, because form requirements are meant precisely to protect against ill-considered commitments. It nevertheless remains contrary to good faith to give unreserved agreement in principle and then refuse authentication at the last minute without reason **4A_615/2010 BGE 140 III 200**. In 4A_615/2010 a written confirmation of the price and some conditions in a sale of land did not create a legitimate expectation that the contract would be concluded. Without authentication the buyer had to reckon with the seller withdrawing, and liability was denied **4A_615/2010**. In BGE 140 III 200 the Federal Supreme Court held that liability was possible in principle where a sale of land had been signed without the required form, but remanded the case for further findings of fact **BGE 140 III 200**.
- Reliance liability in general: In addition to a special relationship, it requires that legitimate expectations were raised and then disappointed in a manner contrary to good faith **4C.291/2003**.

Only the negative interest is recoverable; the party at fault is not to be treated as if the contract had been concluded **BGE 105 II 75**.

According to Ticino decision 16.2019.18, the injured party is to be placed in the position it would have been in had the negotiations never taken place. Lost profit is included only where a specific transaction with a third party was turned down because of the negotiations. The lost rent from the unconcluded lease was therefore not recoverable **16.2019.18**. Nor was the lost resale profit recoverable after a preliminary contract void for lack of form **12.2009.121**. The contrast with breach of a valid preliminary contract, where the positive interest is owed, is of considerable practical importance **4A_302/2022**.

Actual and Normative Consensus

Order of Examination

A court examines in two stages whether a contract has been concluded. BGE 123 III 35 sets out the scheme: «Im Konsens- wie im Auslegungstreit hat das Sachgericht daher vorab zu prüfen, ob die Parteien sich tatsächlich übereinstimmend geäußert, verstanden und in diesem Verständnis geeinigt haben.» (In disputes over consensus as in disputes over interpretation, the trial court must therefore first examine whether the parties actually expressed themselves concordantly, understood each other and agreed on that understanding.) If so, there is actual consensus **BGE 123 III 35**. Only where actual consensus cannot be established are the declarations interpreted under the principle of reliance, that is, as they could and had to be understood in light of their wording, their context and all the circumstances **4A_580/2012**. The Federal Supreme Court derives this primacy of subjective intent from Art. 18 para. 1 CO. Once an actual concordant intent has been established, normative interpretation is excluded **4A_643/2020**.

The primacy of the actual understanding works in both directions. In BGE 105 II 16 a telex had, owing to an internal misunderstanding, been worded as an offer to sell. Since the recipient understood it as it was meant, the contract was concluded. The error about the parent company's instruction was an irrelevant error in motive under Art. 24 para. 2 CO **BGE 105 II 16**.

For normative interpretation, the relevant time is the conclusion of the contract **4A_580/2012**. What counts are the circumstances that preceded or accompanied the declaration of intent, not later events **4A_526/2007**. Later conduct remains evidence of actual intent (see above on 4A_277/2023).

Normative Consensus and Non-Mandatory Law

Normative consensus binds the parties just as actual consensus

does. In 4A_229/2009 the buyer was entitled in good faith to understand the seller's declaration as a commitment to a purchase price of CHF 15,382. The non-mandatory price rules of Art. 184 para. 3 and Art. 212 para. 1 CO therefore did not apply, since they come into play only where «kein natürlicher oder normativer Konsens über einen bestimmten Kaufpreis besteht» (there is no natural or normative consensus on a specific purchase price) **4A_229/2009**.

Normative Consensus and Error in Declaration

Normative consensus answers only the question whether a contract was concluded. A party held to an unintended declaration under the principle of reliance may, in some circumstances, invoke a defect of consent. In PP130047 the Zurich High Court first found normative consensus on a compensation agreement, because the claimant was entitled to understand an insurer's e-mail as a final offer. Since the insurer's representative had only intended to send a list for discussion, however, there was a fundamental error in declaration. The insurer had invoked it within the one-year period, so the agreement was not binding on it **PP130047**. On the relationship between dissent and defect of consent, see below under the consequences of lack of consensus.

Essential Points, Secondary Points and Counter-Offer

Consensus must extend to all objectively and subjectively essential points. Once the parties have agreed on these, the contract has been concluded with the agreed content **BGE 103 II 190**. Under Art. 2 para. 1 CO, reserving secondary points is presumed not to prevent the contract from being binding **Art. 2 OR**.

- Objectively essential points follow from the type of contract. In a sale of land, these are the object of sale and the price. Payment terms are by their nature not part of the sale contract and can be determined under the general rules on performance **4A_331/2010**.
- An objectively secondary point is subjectively essential if it is recognisably a condition of conclusion for one party. In 4C.72/2006 the reply introduced a deadline for performance that was «d'une manière reconnaissable pour les deux parties, un point subjectivement essentiel» (recognisably for both parties, a subjectively essential point). The reply was therefore not an acceptance but a counter-offer, and absent agreement no contract was concluded **4C.72/2006**. Likewise, the Ticino Court of Appeal denied that a contract for work had been concluded even though product and price were settled, because the completion date had not been agreed and was recognisably essential for the customer **12.2011.171**.

Where there is no agreement on secondary points, a distinction must be drawn. For reserved secondary points, the court decides under Art. 2 para. 2 CO «nach der Natur des Geschäftes» (according to the nature of the transaction). The court is guided by the nature and purpose of the contract, and the nature of the transaction takes precedence over non-mandatory statutory law. In BGE 107 II 411 the Federal Supreme Court accordingly set a notice period appropriate to the circumstances instead of applying the six-month period of Art. 290 CO by analogy **BGE 107 II 411**. For non-reserved secondary points, according to BGE 83 II 522 Art. 2 para. 2 CO does not apply. The point is decided under non-mandatory law, and trade usages apply only if adopted expressly or tacitly **BGE 83 II 522**. BGE 103 II 190 makes clear that a lack of agreement on non-reserved secondary points likewise does not prevent conclusion of the contract **BGE 103 II 190**. The two decisions can be reconciled: in both situations the contract exists; only the standard for supplementing it differs (nature of the transaction or non-mandatory law).

Dissent

BGE 123 III 35 distinguishes three situations **BGE 123 III 35**:

- Open dissent: The parties understood each other concordantly but did not agree; no contract is concluded.
- Hidden dissent: The parties expressed themselves concordantly but understood each other differently. A contract nevertheless arises if one party's understanding deserves protection under the principle of reliance; there is then normative consensus.
- No protection of reliance: If neither party may rely on its understanding, the hidden dissent stands.

1C_613/2015 illustrates the last case. In a servitude agreement concluded in expropriation proceedings, it was unclear how «Anker» (anchors) were to be compensated. Neither the expropriated owner's understanding nor the canton's was protected under the principle of reliance. Since the point was not a subordinate one for either side, «führt der versteckte Dissens zur vollständigen Unwirksamkeit des Vertrages» (the hidden dissent leads to the contract being wholly ineffective). The court nevertheless notes that hidden dissent may also lead to merely partial nullity **1C_613/2015**.

Dissent on a secondary point, by contrast, is harmless (on supplementation, see above on Art. 2 CO). In BGE 103 II 190 the disagreement concerned security for part of the price, which was not subjectively essential for either party **BGE 103 II 190**. The Ticino Court of Appeal held that a settlement had been concluded although the parties remained at odds over the payment terms, and itself fixed payment in instalments **10.1998.24**.

Identifying the Contracting Parties

Who is a party to the contract is likewise determined first by actual intent and, failing that, by the principle of reliance. The Federal Supreme Court freely reviews, as a question of law, which conclusion of contract must be assumed under the principle of reliance. In 4A_580/2012 the contract wording and SIA terminology clearly pointed to the defendant as the customer. The signature of an officer on behalf of another company did not change this, given that officer's dual role **4A_580/2012**. In 4A_526/2007 the Federal Supreme Court held that relying on facts after conclusion of the contract to identify the partners of a simple partnership was untenable **4A_526/2007**.

Cantonal practice shows the range of outcomes. The Cantonal Court of Basel-Landschaft treated a hotelier who appeared as director as a contracting party, because the operating company never became recognisable during the negotiations **410 13 7**. In the alternative, that decision also relies on conduct after withdrawal from the contract, which is hard to reconcile with 4A_526/2007. Conversely, in another decision of the same court, a company limited by shares was, under the principle of reliance, merely a paying agent and not a contracting party **400 11 310**. The Cantonal Court of Vaud, applying good faith, treated buyers who behaved like building owners as the customers under a contract for work **CACI ji14-015226-286/2017**.

Express and Tacit Expression of Intent

Conclusion by Conduct

Under Art. 1 para. 2 CO, intent may also be expressed tacitly, in particular by conduct **Art. 1 OR**. A simple partnership, for example, can arise by conduct without the participants needing to be aware of this legal consequence. The Federal Supreme Court draws the limit clearly: «einen beidseitig unbewussten und ungewollten Vertragsschluss gibt es nicht» (there is no such thing as a contract concluded unconsciously and unintentionally by both sides). The conduct must point to a partnership with sufficient clarity. In 4C.24/2000 there was no intention to form a partnership, because the participants did not want to be bound without the fifth intended partner. Nor could the bank rely in good faith on the four signatories being bound, since it knew that five persons were to take part **4C.24/2000**.

Performance is a typical case of acceptance by conduct. The Ticino

Court of Appeal found acceptance of a counter-offer in the fact that the recipient paid the amount demanded on the very next day and made further payments without any reservation **12.2021.17**.

Statutory Fiction in Employment Contract Law

Under Art. 320 para. 2 CO, an employment contract is deemed concluded if the employer accepts work in its service for a period of time that, in the circumstances, can be expected only against payment of wages **Art. 320 OR**. According to the Federal Supreme Court, the contract thus arises even without concordant intent on all essential points; only the objective fact of acceptance of the work matters. In 4C.307/2001 that fact was missing, because the sole competent officer of the legal entity knew nothing of the work: «Es genügt nicht, dass der Arbeitnehmer glaubt, für einen bestimmten Arbeitgeber zu arbeiten.» (It is not enough for the employee to believe that he is working for a particular employer.) **4C.307/2001** The Zurich High Court found an employment contract under this provision and placed on the defendant the burden of proving an expressly agreed absence of pay **RA110007**. The provision is a special rule that modifies the consensus requirement of Art. 1 CO for this type of contract.

Amendment and Termination by Conduct

Amending a contract is merely a particular form of concluding a contract and therefore follows the same rules, namely Art. 1 et seq. and Art. 18 CO **4A_431/2019**. In 4A_431/2019 the property management knew that each of two flats was occupied by the tenants of the other and that those occupants paid the rent. From this the Federal Supreme Court inferred an amendment of the leases by conduct, under which the actual occupants had become the tenants **4A_431/2019**.

Restraint is called for with termination by conduct. For the immediate termination of an employment contract by mutual agreement through conduct, the Ticino Court of Appeal requires a clear and unambiguous intent of the parties («la volontà delle parti deve essere chiara e univoca» - the parties' intent must be clear and unequivocal). The sale of the employee's shares was not enough. Moreover, such an agreement without mutual concessions would have violated Art. 341 CO **12.2005.55**.

Silence and Commercial Letters of Confirmation

Silence is in principle not an expression of intent. Under Art. 6 CO, the contract is deemed concluded only if, owing to the special nature of the transaction or the circumstances, express acceptance is not to be expected and the offer is not rejected within a reasonable time **Art. 6 OR**. The Federal Supreme Court stresses the exceptional nature of this rule: «En principe, le silence ne vaut pas acceptation» (in principle, silence does not amount to acceptance). In 4A_231/2010 no such circumstances existed; silence in response to two letters about an alleged commission agreement was not acceptance **4A_231/2010**.

According to the Federal Supreme Court, an uncontested commercial letter of confirmation has the effect of creating rights «es sei denn, sein Inhalt weiche derart vom erzielten Verhandlungsergebnis ab, dass sein Verfasser nach Treu und Glauben nicht mit dem Einverständnis des Empfängers rechnen dürfte» (unless its content departs so far from the outcome of the negotiations that its author could not, in good faith, expect the recipient's agreement). In 4A_178/2025 this made effective a jurisdiction clause contained in the terms of sale and delivery, which was reproduced in the order confirmations **4A_178/2025**. The principle of reliance sets the limit: silence has significance only if the sender could, in all the circumstances, take it as consent. A letter that rejects the recipient's position and proposes a different solution is not a letter of confirmation at all **4C.174/2006**.

Cantonal practice turns on the circumstances. The Ticino Court of Appeal treated the silence of an experienced sole board member in

response to a confirmation of his assumption of debt as tacit acceptance, especially since no form was prescribed **12.2017.99**. The Cantonal Court of Vaud, by contrast, denied that the recipient was bound. Art. 6 CO did not apply directly to a letter of confirmation, and there was no reason to object immediately, since there had been no prior negotiations on a second contract and the work had already been performed **CACI pt20-051522-152/2025**. A letter of confirmation thus presupposes negotiations; it cannot replace them.

Statutory and Reserved Form

Contracts require a special form only where the law prescribes one; where it does, validity in principle depends on compliance with that form (Art. 11 CO) **Art. 11 OR**. For a statutory form, its scope is decisive. In a sale of land, the authentication requirement covers only the objectively and subjectively essential points typical of a sale contract. Obligations of a different kind that do not form part of the exchange as an additional counter-performance need not be authenticated; a merely causal link between two contracts is not enough. A repurchase right granted in a credit agreement therefore did not require authentication **4A_530/2016**.

If the parties have reserved a form for a contract not otherwise subject to form requirements, Art. 16 para. 1 CO presumes that they do not intend to be bound until that form is satisfied **Art. 16 OR**. Case law adds three key points:

- Burden of proof: The party relying on the ineffectiveness of what was agreed orally must prove the reservation of form **4A_409/2017**.
- Rebuttal: The presumption falls away if the parties actually declared their concordant intent to conclude, even if not in the agreed form **4A_409/2017**. A reservation can also arise from conduct: according to BGE 105 II 75, sending duplicate copies of the contract for signature is to be understood as reserving written form **BGE 105 II 75**. By contrast, if draft contracts are exchanged only after the contract has been concluded, no reservation of form agreed by conduct can be inferred **4A_277/2023**.
- Waiver: If performance is rendered and accepted without reservation despite non-compliance with the reserved form, a waiver of the form is to be assumed. A contract amendment observed in practice for 13 years could no longer be contested on the ground of form **4A_431/2019**.

Incorporation of General Terms and Conditions

Pre-formulated contract terms apply only if and insofar as the parties have adopted them expressly or by conduct; their incorporation is a question of consensus under Art. 1 CO **4A_47/2015**. For a global acceptance, it suffices that the party could reasonably take note of the terms. In 4A_47/2015 a signed acknowledgement of receipt of the insurance conditions was enough **4A_47/2015**.

The unusualness rule limits global acceptance. It excludes unusual clauses to whose existence the weaker or less experienced party was not specifically alerted. Unusualness is judged from the perspective of the consenting party at the time the contract was concluded. Objectively, the clause must substantially alter the character of the contract or depart to a considerable extent from the statutory framework of the contract type **BGE 135 III 1**.

- Unusual: In BGE 135 III 1 a clause excluded the policyholder's right to terminate in the event of a contract adjustment ordered by the authorities. This ran counter to the expectation that, in long-term contracts, an adjustment clause is coupled with a right to terminate; the clause could not be relied on against the policyholder **BGE 135 III 1**. In 4A_372/2022 the Federal Supreme Court applied the rule between commercial companies as well, because the provider specialised in IT while the customer merely needed software. A 30-day period for complaints by registered mail and a lump-sum compensation of CHF 107,289 on

termination were unusual **4A_372/2022**. The Thurgau High Court held that a trade-in clause in small print, not highlighted, in a car purchase was inapplicable **RBOG 2009 Nr. 12**.

- Not unusual: A territorial exclusion of cover upon moving abroad in a supplementary insurance policy concerns a typical subject of insurance conditions **4A_47/2015**.

Incorporation must be distinguished from content review under Art. 8 UCA (UWG), which covers unfair terms to the detriment of consumers

Art. 8 UCA. In a case of online contracting, the Cantonal Court of Schwyz held that breaches of unfair-competition requirements in the ordering process do not render the contract void under Art. 20 CO. Moreover, a challenge for defect of consent presupposes that a contract has been concluded **ZK2 2019 8**.

Consequences of Lack of Consensus

Dissent and Defect of Consent

Lack of consensus and defects of consent must be kept strictly apart. According to BGE 129 III 320, a flawed formation of intent does not prevent consensus; at most it gives the affected party a right to challenge the contract. «Umgekehrt setzt diese Anfechtung notwendigerweise einen Konsens voraus» (Conversely, such a challenge necessarily presupposes consensus); effective dissent and defect of consent are mutually exclusive **BGE 129 III 320**. A party resisting a contractual bond must therefore first plead lack of consensus and, in the alternative, challenge the contract under Art. 23 et seq. CO, which must be declared within one year (see above on PP130047) **PP130047**.

No Contractual Claim; Restitution

Without consensus, no contractual claims arise, and therefore no contractual default interest either **1C_613/2015**. A party who has performed without a contract claims restitution under the law of unjust enrichment. Art. 62 para. 2 CO expressly covers benefits conferred without valid cause or for a cause that did not materialise **Art. 62 OR**. The Ticino Court of Appeal applied Art. 62 CO to a down payment for a contract that was never concluded after the negotiations; the parties had never agreed that the payment would be non-refundable **12.2023.125**.

Where a party voluntarily pays a debt that is not owed, restitution under Art. 63 para. 1 CO requires proof of an error as to the obligation to pay **Art. 63 OR**. In 4A_451/2017, absent a specific agreement on ancillary costs, those costs were included in the rent, and the tenants' payments were payments of a debt not owed. A person who knew that nothing was owed for lack of consensus cannot claim restitution. A person who merely ought to have known can, however, since even an inexcusable error suffices **4A_451/2017**. Under the version in force since 1 January 2020, the enrichment claim becomes time-barred three years after the claimant learns of it and in any event ten years after it arose **Art. 67 OR**.

No Substitute for Consensus Through a De Facto Contractual Relationship

The Federal Supreme Court resorts to the concept of a de facto contractual relationship only in special situations, for instance where an invalid long-term contract is performed in ignorance of the defect. In BGE 119 II 437 the parties had agreed neither on the amount nor on the principle of remuneration for use of the inventory after the lease ended. Compensation was therefore based not on a de facto contractual relationship but on unjust enrichment **BGE 119 II 437**. Actual dealings do not substitute for missing consensus; special rules such as Art. 320 para. 3 CO for an employment contract later found invalid remain reserved **Art. 320 OR**.

Proof and Review in Litigation

Burden of proof. Under Art. 8 CC, a party deriving rights from an alleged fact must prove that fact **Art. 8 CC**. A party suing on a contract must prove that it was concluded. In 4A_550/2008 an architect's fee claim failed because he could not prove the engagement. Once the evidence has produced a result, however, the allocation of the burden of proof no longer arises **4A_550/2008**. The Ticino Court of Appeal stresses that the claimant must prove agreement on the essential points; the opposing party need not prove that there was no contract **12.2012.199**. A party alleging an individual agreement departing from non-mandatory law bears the burden of proving it **4A_10/2007**. Whether silence amounts to acceptance is assessed under Art. 6 CO, not Art. 8 CC; if the alleged agreement remains unproven, the claim must be dismissed **4A_231/2010**. On the burden of proof for a reservation of form, see above on Art. 16 CO.

Questions of fact and of law. Whether the parties actually understood each other is a question of fact that binds the Federal Supreme Court under Art. 105 para. 1 FSCA (BGG), unless the finding is manifestly incorrect. Establishing objective intent under the principle of reliance, by contrast, is a question of law reviewed freely **4A_643/2020**. The same applies to the question with which party a contract was concluded under the principle of reliance **4A_580/2012**. The Federal Supreme Court reviews the assessment of evidence only for arbitrariness (Art. 9 Cst.), and an anticipated assessment of evidence does not violate Art. 8 CC **4A_10/2007**. Under the principle of party presentation, the parties must themselves designate the evidence for disputed facts **4C.174/2006**.

Practical Guidance

- A party conducting negotiations without wishing to be bound should record expressly that they are non-binding and clearly delimit the binding parts (confidentiality, costs) **4C.409/2005**. Internal approval requirements should be disclosed **BGE 105 II 75**.
- Subjectively essential points (such as deadlines) must be identified to the other party, recognisably, as a condition of conclusion; a reply introducing new essential points is a counter-offer **4C.72/2006**.
- A reservation of written form must be agreed before the contract is concluded and proven by the party relying on it; performance without reservation may eliminate it **4A_409/2017 4A_431/2019**.
- A letter of confirmation departing from the outcome of negotiations should be contested immediately **4A_178/2025**.
- Unusual clauses in general terms and conditions should be specifically highlighted, including towards businesses with less specialist knowledge **4A_372/2022**.
- Actual consensus should be pleaded and proven before the cantonal courts, because the Federal Supreme Court is bound by that finding (see above on questions of fact and of law).