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Contracts IV
Prof. Dr. M. Müller-Chen, February 12, 2024

"From insight to impact"

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A. Overview of the Different Types of Contracts

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Types of Contracts

- Nominate contracts (art. 184-551 CO)
- Innominate contracts

Contracts explicitly regulated in the CO or another Code versus not in a Code

- Exchange relationships
- Continuous obligations

Duration in which goods and services are exchanged

- Transfer of property (e.g. sale)
- Transfer for use (e.g. rent)
- Service (e.g. mandate or work)
- Distribution and security contracts (e.g. commission / guarantee)

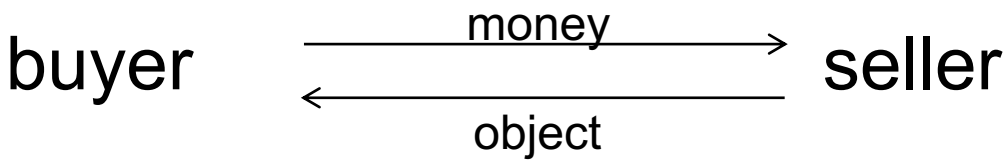
Categorization according to contract content

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B. Contract for the Sale of Goods

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Notion of a Contract for the Sale of Goods



Objectively essential elements of a sales contract must be at least determinable

- Parties
- Object of sale (esp. «things», claims, energy, IP-rights)
- Purchase price (money; parties may agree on alternatives)

Formation of a sales contract

- Applicability of the general provisions (art. 1 seq. CO)
- Special provisions for the contract for the sale of goods for auctions (at. 229 seq. CO)

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Form

- Freedom of form, with some exceptions (examples):
- Simple written form:
  - Merger contract (art. 12 para. 2 Merger Act)
  - Contract for the transfer of assets (art. 70 para. 2 Merger Act)
- Public deed:
  - Sale of real property (art. 216 CO)
- Other form questions are governed by the general provisions (art. 11 seq. CO)

Seller's obligations: Overview

Main obligation

- Transfer of the object at the right time and place (art. 184 para. 1 CO)
- Transfer of title (art. 184 para. 1 CO)

Ancillary obligations

- Cost of handover, in particular of measuring and weighing, unless otherwise agreed or customary (art. 187 para. 1 CO)
- Install, maintain goods (if agreed upon)
- Information about the object (may be required by law, the contract or good faith)

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Seller's Obligations in Detail

Delivery of the object

- **Movable objects**:
  - transfer the object itself
  - transfer the means through which the buyer obtains control of the object
- **Immovable objects**:
  - transfer the means by which the buyer can dispose of the property

Transfer of title

- **Movable objects**:
  - Valid contract
  - Parties' will to transfer the title to the buyer
  - Transfer of possession
- **Real estate**: entering the buyer in the land register
- **Claims**: Assignment

Buyer's obligations

Main obligation

- Payment of the purchase price (art. 211 seq. CO)
- "Duty" to accept goods (art. 211 para. 1 CO)

Ancillary obligations

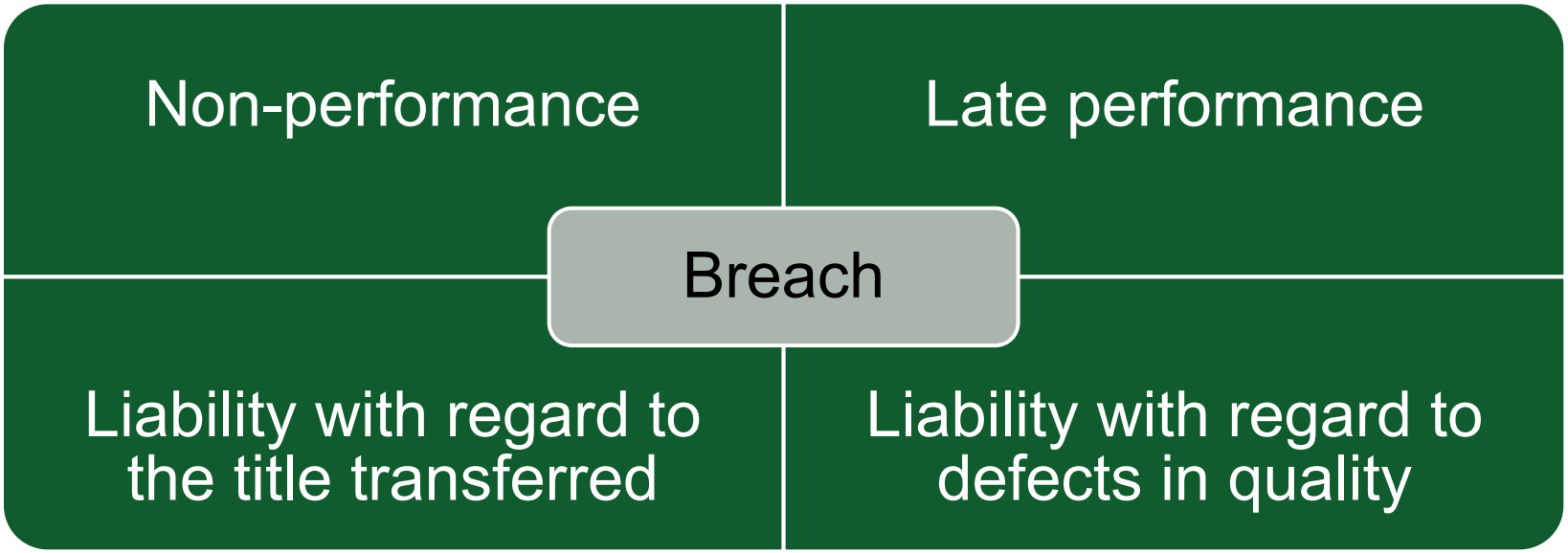
- Pay for notarization and acceptance of the goods (art. 188 CO)
- Transportation costs (unless otherwise agreed, art. 189 para. 1 CO)

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Breach of the Contract for the Sale of Goods

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Overview



Non-Performance due to impossibility (“transfer of risk”: art. 185 and art 119 para. 3 CO)

The seller cannot deliver the goods because they were destroyed after the formation of the contract through no fault of either party.

Question: Does the buyer still have to pay?

Answers

- In the case of a purchase of a specific good, the risk passes to the buyer upon the formation of the contract, i.e., from then on, the buyer must pay the purchase price without receiving the goods (Art. 185 para. 1 CO). This rule does not apply if there are "special circumstances or arrangements" (Art. 185 para. 1 CO).
- In the case of a generic purchase, the transfer of risk only happens
  - after separation of the goods (Art. 185 para. 2 CO);
  - after handing over the goods to the first carrier, if there is a sale by dispatch (Art. 185 para. 2 CO).
- In the event of a condition precedent, the risk shall pass upon the occurrence of the condition (Art. 185 para. 3 CO)

Quiz – Question 10

On October 20, 2023, Nora sells this Andy Warhol painting to Matt, to be delivered two days later, for CHF 5 Mio. It will be displayed in Matt's gallery at the occasion of the vernissage of a new Warhol retrospective on the day of delivery.



- Nora doesn't deliver the painting on October 22, because she sold it to Sally on October 21 for CHF 8 Mio. Sally immediately took the painting with her.
- Nora fails to deliver on October 22, because the painting was destroyed in fire in Nora's warehouse.

Late Performance

- Generally: art. 102 et seq. CO are applicable
- Seller's default: art. 190 seq.
  - only for contracts for the commercial sale of goods («buy to re-sale»)
  - There must be a specific time limit (e.g. January 10, 2023, at the lastest)
  - Presumption: Buyer forgoes delivery; if buyer wants delivery, he must notify seller immediately after the date of delivery (art. 190 II CO)
- Buyers default: see art. 214 seq. CO

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Liability with Regard to the Title Transferred

- A sells car to B. Afterwards, C claims that the car was stolen from him, and that he is the true owner. He successfully claims back the car in a court proceeding against B.
- Legal consequences (art. 195 para. 1 CO): The sale contract between A and B is terminated by law, and seller A
    - must restitute the price paid by B;
    - Pay damages to B (e.g., if B had to rent a car)

  because there was a defect in the legal title.

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Liability with Regard to Defects in Quality

- Defect in quality (art. 197 para. 1 CO is the discrepancy between the actual state of the goods and the state either agreed upon or the normal condition of the goods.
    - Breach of warranty
        - Promise of an objectively determinable characteristic
        - Physical, legal, or economic characteristic
        - Warranty must have influenced buyer's decision to buy
    - If there is no warranty: physical or legal defect substantially reducing the value of the object or its fitness for the designated purpose
        - Ex.: Wrong colour of car; machine can't be exported
        - No defects are financial losses, deficiencies in quantity, faulty packaging (art. 97 CO)
- Liability for defects in quality can be excluded (art. 199 CO)
- No liability if buyer knew defects (art. 200 para. 1 CO)

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Inspection of Goods and Notice of Defect (art. 201 CO)

Inspection

- At place of delivery
- «As soon as it is feasible in the ordinary course of action»
- Only open defects
- Large deliveries: random samples

Notice of defect

- Notice must show kind, content, and extent of defects
- Open defects: immediately
- Hidden defects: immediately after discovery

Buyer forfeits remedies for defects in quality if he fails to properly inspect goods and give notice (art. 201 para. 2 and 3 CO).

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Remedies for Defects in Quality: Overview

- Seller delivers the wrong thing: Default rules (art. 107 seq. CO)

- Seller delivers a defective object:
  - Buyers rights are:
    - Damages (art. 41 / 97 CO)
    - Substitute delivery in case of generic goods (art. 206 para. 1 CO)
    - Rescission and damages (art. 208 CO)
    - Reduction of purchase price (art. 205 CO) and damages (art. 97 CO)
  - No right to repair, unless contractually agreed
  - Seller has the right to deliver substitute goods (art. 206 para. 2 CO)

Prescription of Claims (I/II)

Liability with regard to title transferred: art. 127 CO (10 years)

Liability with regard to defects in quality

- 2 years after delivery (art. 210 para. 1 CO)
- 5 years if the goods have been integrated in a work of an immovable construction and caused this work to be defective (art. 210 para. 2 CO)
- 5 years for defects in the quality of a building (art. 219 para. 3 CO)
- 10 years if the seller has prevented the buyer from asserting his rights by willful deception (art. 210 para. 6 CO)

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Prescription of Claims (II/II)

Contractual amendment of the period of limitations

- Invalid in circumstances described in art. 210 para. 4 CO (consumer contracts)

Right of the seller to payment of the purchase price

- 10 year limitation period (art. 127 CO)
- 5 year limitation period in certain cases (art. 128 sec. 2 & 3 CO)

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Quiz – Question 11

George buys a new set of golf clubs in early spring. As he's very busy, he can only play his first round during his holidays four months later. On the first swing the driver head pops off. George immediately reports the defect to the vendor.

Has George acted correctly?

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Quiz – Question 12

George receives a new golf club in early spring. He tests it immediately, and it works fine. After three months of use he notices that the grip had become loose due to a production error, sending the club flying into the field with every swing. As he's very busy, he waits until he's got a free weekend three weeks later to report the defect to the vendor.

Has George acted correctly?

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Quiz – Question 13

On her visit to China, Sofia finds out that machines like the ones used in her factory in Switzerland could be bought much cheaper in Asia. After purchasing some machines and shipping them to Switzerland, Sofia discovers she's not allowed to use them there, as they violate safety regulations.

Assume that the sales contract is governed by Swiss law. What is the nature of the defect?

International sales contracts: the CISG (United Nations Convention on **C**ontracts for the **I**nternational **S**ale of **G**oods)

- 97 States adopted the CISG
- In Switzerland in force since March 1991
- Applicable
  - if parties' place of business is in a contracting state (art. 1 para. 1 letter a CISG)
  - If parties choose the CISG
- CISG covers contracts for the sale of goods (movable property, however, there are some exceptions in art. 2, 4, 5 CISG)
- CISG can be excluded or modified (which is done quite often)
- Contains rules pertaining to the formation of the sales contract, to the rights and obligations of the parties, and to the remedies for breach of contract

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E. The Work Contract

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Characteristics of a Work Contract (art. 363 CO)

principal —— pays money ——> contractor
principal <—— undertakes work —— contractor

Work = Objectively measurable result

Examples :

- A machine
- Build or repair a house
- Photo shooting
- Concert
- Construction plans







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Differentiating Work Contracts from Other Contracts

Sales contracts	Mandates	Architect and engineering contracts
• Promise to manufacture an object is a sale if it is mass produced; otherwise a work contract («contract for the supply of goods to be manufactured»)	• The agent, e.g. a medical doctor, does not promise a specific result, only that they will diligently work towards a certain goal	• Plans, drawings: work contract • Managing and supervising construction: mandate • If architect does both: mixed contract

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Contractor's Obligations

- Main obligations are to **construct** and **deliver** the work (art. 363 CO)
  - At the right place (art. 74 CO)
  - At the right time (otherwise default: art. 102-109 / 366 CO)
  - With the agreed or legally owed quality
  - Personally, unless personal skills are not important to construct the specific work (art. 364 para. 2 CO)

- Ancillary obligations
  - Duty of care (art. 364 para. 1 CO)
  - Duty of loyalty
  - Liability for materials (art. 365 CO)
  - Supply ressources and tools at own expense (art. 364 para. 3 CO)

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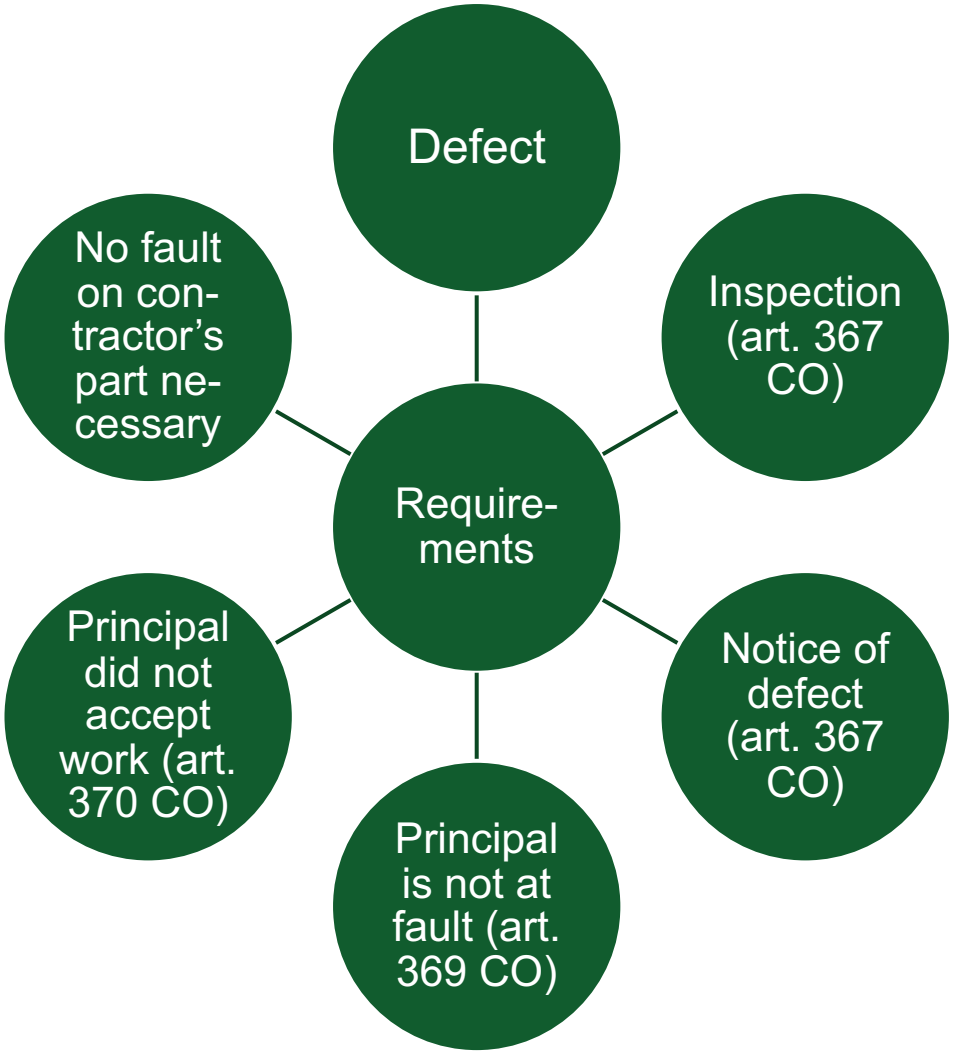
Principal's Obligations

- Main obligation is to **pay** for the work (art. 372-374 CO)
  - Payment is due when work is delivered (art. 372 para. 1 CO)
  - Calculation of payment
    - Payment is fixed in advance (art. 373 CO)
      - Lump sum, global price, fixed unit price
      - No adjustment, even in the event of higher or lower expenses
      - Exception: extraordinary circumstances (Art. 373 para. 2 CO)
    - Payment was not fixed at all (art. 374, 1st alternative CO)
      - E.g. the non-binding cost estimate (art. 375 CO)
      - Approximate price agreement (art. 374, 2d alternative CO)

- Ancillary obligations
  - Taking delivery of the work
  - Inspection of the work and giving notice of defect (art. 367 para. 1 CO)

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Liability for Defects in Quality (art. 368 CO)



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Principal's Rights Arising from the Contractor's Liability (art. 368 CO)

Rescission	Reduction of compensation	Cure	Payment of consequential damages
• Substantial defects • Work unusable or acceptance cannot reasonably be expected	• Less substantial defects • Reduction in value of the work	• Less substantial defects • Cure of the defect objectively possible • No excessive costs for contractor	• Losses as a consequence of the defect • the contractor is at fault
Retroactive termination and liquidation of contract	Reduction of the compensation	Gratuitous cure through contractor	Compensation for damages

Prescription

- **2 years** following delivery (art. 371 para. 1 CO)
- **5 years** if the defects of a movable work that has been built in an immovable work have caused this immovable work to be defective (art. 371 para. 1 CO).
- If the delivered work is an immovable work, the rights of the principal arising from defects against the contractor as well as against the architect or engineer that have rendered services for the building of the work, prescribe **five years** following delivery of the work (art. 368 para. 2 CO)

F. Mandate

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Elements of a Mandate (art. 394-406 CO)

principal — Gratuitous or for money → / ← Provides services — agent







Examples: Contract with a lawyer, consultant, doctor

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Differentiating Mandates from Other Contracts

Work contracts	Employment contracts	Doing a favor and giving advice
• Result is owed, not activity	• Subordination of the employee	• No intention to create a legally binding relationship

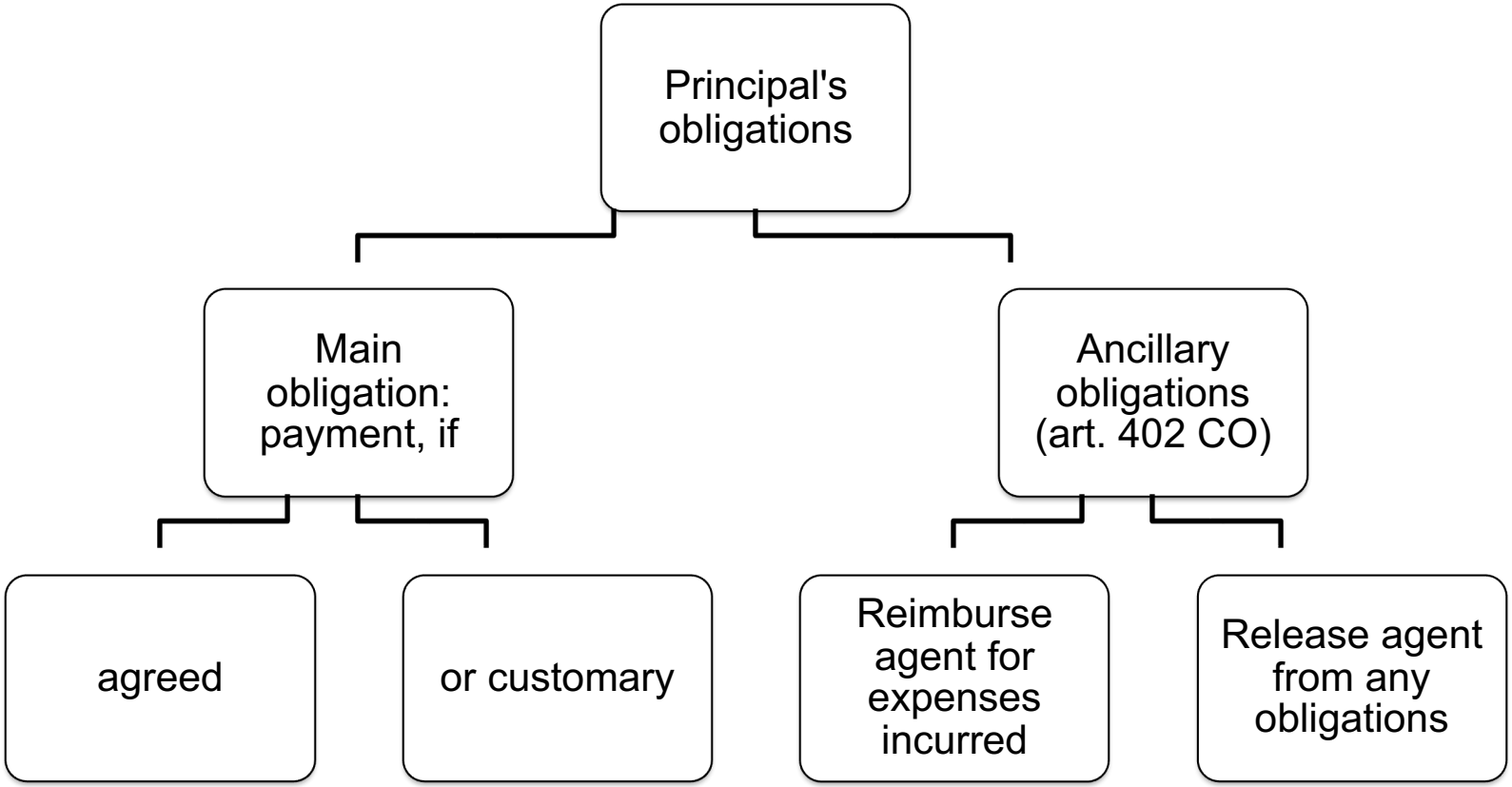
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Agent's Obligations

- Main obligation is to perform the service diligently, in conformity with the mandate, and with due care (art. 394 para. 1 / 398 para. 2 CO)
  - No breach of contract if agent acted diligently, yet unsuccessfully
  - Standard of care (art. 398 para. 1 CO) depends on the circumstances of the specific mandate.
- Agent must in principle act personally (art. 398 para. 3 CO)
  - Delegation is permitted under certain conditions
    - To an auxiliary person (art. 101 CO)
    - To a substitute person if authorized, compelled by circumstances, admissible by custom (art. 398 para. 3 CO); in that case limited liability for substitute (art. 399 para. 2 CO)
- Ancillary obligations
  - Duty of loyalty
  - Duty to render accounts (art. 400 CO)
  - Depending on circumstances duty to transfer acquired rights (art. 401 CO)

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Principal's Obligations



Consequences of a Breach of Contract

- Damages for breach of the duty of care: art. 97 et seq. / art. 398 para. 2 CO
- Damages require the agent to be at fault, i.e. at least acted negligently
- Agent does not perform at all or does not perform to the agreed extent: art. 102 et seq. CO

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Termination of the Mandate

- **One time mandate** is terminated when the service has been fulfilled correctly
- **Continuous mandate** is terminated after the agreed upon time
- In any case and at any time a mandate can be terminated by a notice of termination (art. 404 para. 1 CO)
  - Art. 404 CO is mandatory, and – due to art. 394 para. 2 CO – often applied to innominate contracts
  - Termination at an inappropriate time: valid, but liability for damages (art. 404 para. 2 CO)
- Termination because of death, legal incapacity or bankruptcy of either the principal or the agent (art. 405 CO)

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