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COMMENTARY ON

Art. 84 CO

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D. Payment

I. National currency

Art. 84

¹ Pecuniary debts must be discharged in legal tender of the currency in which the debt was incurred.

² A debt expressed in a currency other than the national currency of the place of payment may be discharged in that national currency at the rate of exchange that applies on the day it falls due, unless literal performance is required by inclusion in the contract of the expression 'actual currency' or words to that effect.

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I. GENERAL

A. Scope of application and regulatory content of Art. 84 CO

- 1 Art. 84-90 CO deal with monetary payment as a form of fulfilment under the marginalia "Payment."¹ The **scope of application** of Art. 84 CO is limited to monetary debts. However, Art. 85-90 CO, which fall under the same marginalia, also apply to other forms of fulfilment.²
- 2 **Art. 84 para. 1 CO** states that a debtor must settle his monetary debt with the legal tender of the currency owed. **Art. 84 para. 2 CO** supplements this principle by stating that a foreign currency debt may also be paid in "local currency", provided this is not excluded by a clause using the term "actual currency" ("*effektiv*") or a similar clause.

B. Concept of money

- 3 The term "money" can be found in numerous provisions,³ yet it is not defined by law.⁴ Despite extensive literature⁵ no uniform definition of money has been established in theory either.⁶ The distinction between "money in a narrower sense" ("*Geld im engeren Sinne*") and "money in a broader sense" ("*Geld im weiteren Sinne*") appears to be expedient.⁷ **Money in a narrower sense** only includes legal tender, i.e. the money with which a debtor can fulfil his obligations in accordance to Art. 84 para. 1 CO.⁸ In Switzerland, legal tender is defined as coins issued by the Confederation (Art. 2 lit. a CPIA), banknotes issued by the Swiss National Bank (Art. 2 lit. b CPIA) and deposits denominated in Swiss francs at the Swiss National Bank (Art. 2 lit. c CPIA). **Money in a broader sense** includes every usable form of money and thus includes all means of payment de facto used in payment transactions.⁹ In addition to book money,¹⁰ this also includes cryptocurrencies and other privately issued virtual currencies.¹¹ Unless stated otherwise, most provisions of the CO and the CC are based on the concept of money in a broader sense.¹²

C. Forms of money and its legal nature

1. Cash

- 4 Cash includes domestic and foreign coins and banknotes.¹³ The **legal nature of cash is a matter of dispute**. It is usually described as a liability of the central bank,¹⁴ in favor of which is the fact that the

1. Gauch/Schluep/Schmid/Emmenegger, para. 2287; BK OR-Weber, Art. 84 N 4.
 2. Insofar, the marginalia "payment" is too restrictive (see BK OR-Weber, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 8, Art. 84 N 5).
 3. Art. 312 CO, Art. 466 CO, Art. 481 CO, Art. 941 no. 2 CO, Art. 1152 CO, Art. 401 para. 1 CC and Art. 935 CC.
 4. ZK OR-Schraner, Art. 84 N 4.
 5. See e.g. Omlor, p. 303 et seq. with further references; Simitis, p. 406 et seq.; Vischer, p. 4 et seq.; Weber, Elektronisches Geld, p. 28 et seq.
 6. BK OR-Weber, Art. 84 N 9 et seq. on the functional [*"Geld ist also, was als Geld fungiert"*, N 15] and other definitions; ZK OR-Schraner, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 2.
 7. Cf. BK OR-Weber, Art. 84 N 30; ZK OR-Schraner, Art. 84 N 6.
 8. Cf. BK OR-Weber, Art. 84 N 30.
 9. BK OR-Weber, Art. 84 N 30 ("*Verkehrsgeld*"); CHK-Mercier, para. 3.
 10. CHK-Mercier, para. 3; cf. BSK OR-Schroeter, Vor Art. 84-90 N 2; see also para. 5 below.
 11. Cf. Piller, p. 1428; Enz, Geldrecht, p. 93. This applies in any case as long as the technical design of the virtual currency allows it to be used as a means of exchange and payment. This categorisation is also consistent with Art. 2 lit. c of the AMLO-FINMA.
 12. In particular Art. 312 CO, Art. 466 CO, Art. 481 CO, Art. 941 para. 2 CO, Art. 1152 CO, Art. 401 para. 1 CC and Art. 935 CC (BK OR-Weber, Art. 84 N 31).

banknotes in circulation are always accounted for by central banks on the liabilities side of the balance sheet,¹⁵ meaning that banknotes appear as relative rights or claims against the central bank. Other academic voices, however, deny that banknotes have the character of claims,¹⁶ as banknotes - in contrast to book money - do not contain any claim to exchange for another asset (any more).¹⁷ The central bank owes the holders of cash nothing but cash.¹⁸ Kumhof et al. propose qualifying central bank money therefore as a “social equity”.¹⁹ Zellweger-Gutknecht suggests qualifying it as a form of equity of the central bank or as a type of participation right and classifies it as an absolute right,²⁰ which would imply respective balance sheet adjustments at the SNB.²¹

2. Book money

- 5 Book money represents a **claim of the account holder** against his account-holding bank for the surrender of national currency.²²
- 6 In addition to cash, the use of book money has long been established in everyday payment transactions.²³ Nevertheless, the legislator deliberately decided against declaring bank money as legal tender.²⁴
- 7 In contrast to the bank deposits of commercial banks, **sight deposits** denominated in Swiss francs **at the SNB** (cf. Art. 9 para. 1 lit. a NBA) are only available to a limited group of legal entities (in particular commercial banks).²⁵ These balances are used by account holders to comply with the statutory liquidity and minimum reserve requirements²⁶ as well as to access the interbank payment system (SIC).²⁷ Sight deposits at the SNB are not (or no longer) structured as claims.²⁸ The SNB can fully exempt itself by crediting sight deposits denominated in Swiss francs.²⁹

3. Further forms of money

a. Private monetary systems

- 8 Private entities can establish payment systems.³⁰ These do not constitute legal tender. One notable example is the WIR money ("CHW") created by the WIR Bank Cooperative.³¹ Such credit balances

13. BK OR-Weber, Art. 84 N 32 and 33; ZK OR-Schraner, Art. 84 N 11.

15. As does the SNB (see the SNB's balance sheet items, available at: <https://data.snb.ch/de/topics/snb#!/cube/snbbipo>, visited on 19/08/2024).

16. Bossone/Costa, p. 43 et seq.; Kumhof et al. p. 17; Vischer, p. 28 et seq.; Zellweger-Gutknecht, Landeswährung, para. 12 et seq.; Zellweger-Gutknecht Corinne, wCBDC, p. 216; NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 5.

17. The gold standard was revoked in the course of the last century (for details, see SGK BV-Hettich, Art. 99 N 3).

18. Kumhof et al., p. 17.

19. Kumhof et al., p. 41.

20. Zellweger-Gutknecht, Landeswährung, para. 12; Zellweger-Gutknecht, Bilanzsituation, para. 25 et seq.

21. Zellweger-Gutknecht, Bilanzsituation, para. 29.

22. Zellweger-Gutknecht, Landeswährung, para. 16; BK OR-Weber, Art. 84 N 40; see also Gauch/Schluemp/Schmid/Emmenegger, para. 2313.

23. SNB, Payment method survey, 2020, June 2021, p. 16 et seq., 17, 24; cf. ZK OR-Schraner, Art. 84 N 12.

24. For details, see NBA/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 15 et seq.

25. NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 6.

26. Cf. Liquidity Ordinance (LiqO; SR 952.06); Art. 4 para. 1 and 9 para. 2 lit. a and b Banking Act (BankA; SR 952.0); see also Zellweger-Gutknecht, Negativzins, para. 5 et seq.

27. SNB, Instruction Sheet, para. 2.1 For participation in the SIC payment system, each SNB giro account is linked to a clearing account, with the two accounts forming a single legal entity (SNB, Instruction Sheet, para. 2.1).

28. Zellweger-Gutknecht, Landeswährung, para. 14.

29. Zellweger-Gutknecht, Landeswährung, para. 14; NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 6.

30. ZK OR-Schraner, Art. 84 N 17.

31. In detail ZK OR-Schraner, Art. 84 N 18 et seq.; BK OR-Weber, Art. 84 N 53 et seq.

generally represent a **claim against the issuer** in line with commercial banks' book money. Any legal obligation to accept the private means of payment exists only for parties participating in the private payment system.³²

b. Cryptocurrencies

- 9 Since the beginning of 2009³³ cryptocurrencies and other assets based on distributed ledger technology have spread around the world. With one exception³⁴ cryptocurrencies are not legal tender in any country. The **legal nature** of cryptocurrencies is **controversial**.³⁵ Due to their special technical characteristics, cryptocurrencies such as Bitcoin and Ethereum cannot be qualified as either relative or absolute rights.³⁶ Nevertheless, cryptocurrencies have a measurable economic value and can be part of a transaction,³⁷ which is why they must at least be considered de facto assets (*"faktische Vermögenswerte"*).³⁸

c. Central Bank Digital Currency

- 10 Numerous central banks around the world are currently looking into the possibility of issuing central bank digital currency.³⁹ Central bank digital currency must in particular be distinguished from cryptocurrencies:⁴⁰ Cryptocurrencies are created by private actors whereas central bank digital currency is issued by the central bank. Within central bank digital currencies a distinction is made between a means of payment accessible to the public ("**retail CBDC**", rCBDC) and a restricted means of payment that can only be used by a certain group of financial market participants ("**wholesale CBDC**", wCBDC).⁴¹ The SNB is currently involved in wCBDC projects.⁴² The launch of an rCBDC appears to be off the cards for the SNB for the time being.⁴³ The legal nature of central bank digital currency will depend on its specific design.⁴⁴

32. ZK OR-Schraner, Art. 84 N 17; regarding the fulfilment in WIR money, see BGer 4A_200/2019 of 17.06.2019 E. 5.

33. The first block of the Bitcoin blockchain was generated on 9 January 2009, making it the first cryptocurrency transaction in history. The so-called "genesis block" can be viewed on the blockchain explorer, available at: <https://www.blockchain.com/de/explorer/blocks/btc/00000000839a8e6886ab5951d76f411475428afc90947ee320161bbf18eb6048>, visited on 19/08/2024.

34. El Salvador became the first country in the world to declare bitcoin as legal tender in June 2021 (El Salvador becomes first country to adopt bitcoin as legal tender, Sam Jones/Bryan Avelar, The Guardian, 09/06/2021, available at <https://www.theguardian.com/world/2021/jun/09/el-salvador-bitcoin-legal-tender-congress>, visited on 19/08/2024).

35. See Beck, p. 581 et seq.; Omlor, p. 306 et seq.; Zogg, p. 100 et seq.; see also Eggen, Retail CBDC, p. 152.

36. For details, see Zogg, p. 100 et seq.; see also Piller, p. 1428 et seq., who argues in favour of applying the provisions of property law; regarding the legal nature of stablecoins, see Eggen, Tokenisiertes Buchgeld, p. 297 et seq.

37. Zogg, p. 110 et seq.

38. Zogg, p. 110. This view is also shared by the Federal Council (BBl 2020, p. 242).

39. Zellweger-Gutknecht, Landeswährung, para. 2; see Eggen, Retail CBDC, p. 147 et seq.; see also Lanz, p. 5 et seq.; a continuously updated overview of the projects can be found in the Central Bank Digital Currency Tracker of the Atlantic Council, available at: <https://www.atlanticcouncil.org/cbdctracker/>, visited on 19/08/2024.

40. In this regard, there have been regular confusions in the public debate (see Central bank digital currency report, p. 5); for the distinction, see also Lanz, p. 4 et seq.

41. See Zellweger-Gutknecht Corinne, wCBDC, p. 217; see also Bech/Garratt, p. 59; Digital Central Bank Money Report, p. 10; see also the SNB glossary entry (available at: https://www.snb.ch/de/services-events/digital-services/glossary#_C, visited on 19/08/2024).

42. For the project "Helvetia", see the white paper on "Phase II" of the project, available at <https://www.snb.ch/en/mmr/reference/project_helvetia_phase_II_report/source/project_helvetia_phase_II_report.en.pdf>, visited on 19/08/2024; cf. also Zellweger-Gutknecht, kryptobasierte Sichtguthaben.

43. Thomas J. Jordan, Währungen, Geld und digitale Token, Jubiläum 30 Jahre WWZ und VBÖ, University of Basel, 5 September 2019, p. 6, available at: https://www.snb.ch/de/mmr/speeches/id/ref_20190905_tjn/source/ref_20190905_tjn.de.pdf, visited on 19/08/2024; see also Central bank digital currency report, p. 39 et seq. For general information on the risks of an rCBDC for central banks, see Baeriswyl Romain/Renyard Samuel/Swoboda Alexandre, Retail CBDC Purposes and Risk Transfers to the Central Bank, SNB Working Papers 19/2021, September 2021 (available at: https://www.snb.ch/n/mmr/reference/working_paper_2021_19/source/working_paper_2021_19.n.pdf, visited on 19/08/2024).

D. Monetary constitution

- 11 Monetary policy is the responsibility of the Confederation (Art. 99 para. 1 Cst.).⁴⁵ The monetary policy mandate is specified in the CPIA and the NBA.⁴⁶ The Confederation has a **monopoly on coins and banknotes** (Art. 99 para. 1 Cst.). Coinage monopoly is exercised by the Confederation itself (Art. 4 CPIA).⁴⁷ The banknote monopoly is exercised by the SNB as an independent⁴⁸ central bank (Art. 7 CPIA; Art. 99 Abs. 2 Cst.).

II. ART. 84 PARA. 1 CO

A. Concept of a monetary debt

- 12 A monetary debt represents the obligation to pay a certain **sum of money** ("*Summenschuld*").⁴⁹ Less common, but equally permissible, is the agreement of a monetary debt as a **debt by unit**⁵⁰ ("*Stückschuld*")⁵¹ or as a **debt by category** ("*Gattungsschuld*"; see Art. 71 CO).⁵² In the former case, the monetary denominations owed are determined individually.⁵³ In the latter case, the monetary denominations owed are determined by category (e.g. payment in a certain type of banknotes or in "Goldvreneli"⁵⁴; so-called "*Geldsortenschuld*").⁵⁵
- 13 Only in the case of a monetary debt must default interest be paid in accordance with Art. 104 para. 1 CO.⁵⁶
- 14 The fulfilment of a monetary debt by sum cannot become **impossible** in a legal sense.⁵⁷ In contrast, in the case of a monetary debt by unit, the debtor is released from the obligation to fulfil, if the individually designated monetary tokens have perished.⁵⁸ In the case of a debt by category, it is also possible that the agreed category of money is no longer in circulation at the time of fulfilment and has therefore ceased to exist.⁵⁹ In this case, the debtor must generally fulfil in the new category of money which replaces the old one.⁶⁰

44. Regarding wholesale CBDC (wCBDC), see Zellweger-Gutknecht Corinne, wCBDC, p. 228; regarding retail CBDC (rCBDC), see Eggen, Retail CBDC, p. 145 et seq.; see also Lanz, pp. 16, 21 et seq.

45. For the historical development of the Swiss monetary constitution, see BK OR-Weber, Art. 84 N 102 et seq.

46. For details, see SGK BV-Hettich, Art. 99 N 10 et seq.; see also BK OR-Weber, Art. 84 N 118 et seq.

47. The official federal mint is Swissmint (more information at: <https://www.swissmint.ch/swissmint/de/home.html>, visited on 19/08/2024).

48. See BBl 1998, p. 4044 et seq.

49. BGer 4A_474/2009 of 25 May 2010 E. 5.2; Gauch/Schluep/Schmid/Emmenegger, para. 2289; CHK-Mercier, para. 4; OFK-Kren Kostkiewicz, para. 2; ZK OR-Schraner Art. 84 N 141.

50. Insofar, the marginalia "payment" is too restrictive (see BK OR-Weber, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 8, Art. 84 N 5).

51. Cf. for instance BGE 80 II 49.

52. ZK OR-Schraner Art. 84 N 145 et seq., 147 et seq.

53. CHK-Mercier, para. 4; BK OR-Weber, Art. 84 N 136.

54. The "Goldvreneli" is Switzerland's best-known gold coin. It was minted from 1897 to 1949.

55. CHK-Mercier, para. 4; BK OR-Weber, Art. 84 N 139; ZK OR-Schraner, Art. 84 N 147.

56. Gauch/Schluep/Schmid/Emmenegger, para. 2289 and 2689.

57. The principle "*Geld muss man haben*" applies (Medicus Dieter, p. 489 et seq.); BGer 4A_474/2009 of 25 May 2010 E 5.2.

58. BK OR-Weber, Art. 84 N 138 (Art. 119 para. 3 CO; Art. 185 para. 1 CO); ZK OR-Schraner, Art. 84 N 146.

59. BK OR-Weber, Art. 84 N 140.

60. As was explicitly regulated with the introduction of the euro (cf. Art. 2 and 3 of the European Community Regulation No. 1103/97 of 17 June 1997; for details see BK OR-Weber, Art. 84 N 141 and 177); cf. ZK OR-Schraner, Art. 84 N 148 (according to which the debtor of the agreed category of money is only released from his obligation to perform under Art. 119 para. 1 CO if the agreed category of money was essential in view of the purpose of the contract).

- 15 The **amount owed** can be **determined** either **directly** (e.g. "CHF 150.00") or **indirectly** (e.g. with reference to a certain tariff of a professional association or a factual situation [e.g. price of a stock on a certain cut-off date]).⁶¹

B. Value of a monetary debt (nominal value principle)

1. General

- 16 By their very nature, monetary debts are debts of value and are therefore subject to **fluctuations in value**.⁶² Often there lies a certain period of time between the disposition and the executory agreement, which raises the question of the time of valuation of a monetary debt. In practice, this is particularly relevant in the context of inflation, which can lead to a shift in the balance between the reciprocal performances, especially in the case of long-term contractual obligations.⁶³

2. Nominal value principle

- 17 According to prevailing doctrine and case law, the (non-statutory)⁶⁴ **nominal value principle** applies,⁶⁵ according to which a monetary debt remains immutable from the time of its origin - irrespective of any fluctuations in value. The amount of money owed is always the amount to which the debt was denominated from the outset (*"Ein Franken bleibt ein Franken."*).⁶⁶ The risk of currency devaluation in the period between the origin and the payment of the debt is therefore generally borne by the creditor.⁶⁷ The nominal value principle also applies to foreign currency debts.⁶⁸

3. Exceptions to the nominal value principle

a. Value-retaining monetary debts

- 18 Value-retaining debts do not amount to a fixed sum.⁶⁹ Instead, they are geared towards compensation (e.g. damages⁷⁰) or the satisfaction of a specific need (e.g. alimony under family law).⁷¹ If the value-retaining debt is specifically quantified within a court ruling, it too becomes a monetary debt subject to fluctuations in value.⁷²

b. Contractual value retention

- 19 In order to protect the creditor of a monetary debt against any devaluation, the parties can contractually agree to retain the value of the monetary debt, which is particularly common in the case of long-

61. BK OR-Weber, Art. 84 N 152; ZK OR-Schraner, Art. 84 N 150.

62. BSK OR-Schroeter, Vor Art. 84-90 N 14 et seq.

63. Cf. BSK OR-Schroeter, Vor Art. 84-90 N 14.

64. BK OR-Weber, Art. 84 N 183; ZK OR-Schraner, Art. 84 N 77.

65. BK OR-Weber, Art. 84 N 179 et seq.; ZK OR-Schraner, Art. 84 N 73 et seq.; BSK OR-Schroeter, Vor Art. 84-90 N 15 et seq.; CHK-Mercier, para. 10 et seq.; BGE 51 II 303, 307 et seq.; BGer 4A_251/2021 of 16.07.2021 E. 2.1. The counterpart to the nominal value theory is the market value theory (valorism), according to which the monetary debt would have to be adjusted at the time of fulfilment to any fluctuation in value that may have occurred since the debt originated (see ZK OR-Schraner, Art. 84 N 79; BK OR-Weber, Art. 84 N 181).

66. ZK OR-Schraner, Art. 84 N 73; CHK-Mercier, para. 10.

67. BK OR-Weber, Art. 84 N 183; CHK-Mercier, para. 10.

68. See below para. 39; ZK OR-Schraner, Art. 84 N 78; BK OR-Weber, Art. 84 N 184, 320 et seq.

69. BK OR-Weber, Art. 84 N 197; BSK OR-Schroeter, Vor Art. 84-90 N 16.

70. In the case of a tortious act, for example, the amount of damages to be paid by the tortfeasor is only determined at the time of the judgement. Up to this point in time, the tortfeasor bears the monetary depreciation (BK OR-Weber, Art. 84 N 200; see also ZK OR-Schraner, Art. 84 N 82).

71. ZK OR-Schraner, Art. 84 N 81; BK OR-Weber, Art. 84 N 197 et seq.

term obligations.⁷³ The value of the monetary debt is only fixed at the time of fulfilment and corresponds to the intrinsic value of the monetary debt at the time the contract is concluded.⁷⁴ The most common of the various types of value retention clauses⁷⁵ is **indexation**,⁷⁶ whereby the value of the debt is linked to any changes in a specific index (e.g. national consumer price index)⁷⁷ and adjusted accordingly at the time of fulfilment. Value retention clauses are recognised as being valid,⁷⁸ although certain statutory provisions contain numerous explicit (e.g. Art. 269b CO) or analogous (e.g. Art. 783 para. 2 CC; Art. 794 para. 1 CC) restrictions.⁷⁹

c. Statutory or judicial adjustment

- 20 In exceptional cases, there is the possibility of a **statutory revaluation of** the Swiss franc,⁸⁰ which has only occurred once to date.⁸¹
- 21 Furthermore, in the event of a sudden collapse of a currency,⁸² the application of the **clausula rebus sic stantibus** provides the possibility of a judicial revaluation of a monetary debt, if the necessary prerequisites are met.⁸³

C. Fulfilment of a monetary debt

1. Obligation of the debtor to fulfil in legal tender

- 22 According to Art. 84 para. 1 CO, monetary debts are to be paid in legal tender⁸⁴ of the currency owed. The provision applies to both contractual and non-contractual monetary debts.⁸⁵ Art. 84 para. 1 CO **contains two elements regarding the fulfilment** of monetary debts by payment. On the one hand, it stipulates that monetary debts must be settled in the currency owed (*«Schuldzwährung»*) and, on the other hand, that a legal tender must be used for this purpose.⁸⁶ Both elements do not constitute mandatory provisions.⁸⁷

2. Obligations of the creditor

- 23 From the debtor's obligation to fulfil in national currency derives the creditor's obligation to accept it in payment, otherwise the creditor is in default (Art. 91 CO).⁸⁸ **Banknotes** must be accepted in payment without restriction (Art. 3 para. 2 CPIA), whereas **coins** in circulation may only be accepted up to 100 pieces per monetary debt (Art. 3 para. 1 sentence 1 CPIA).

72. ZK OR-Schraner, Art. 84 N 81.

73. BSK OR-Schroeter, Vor Art. 84-90 N 17.

74. BSK OR-Schroeter, Vor Art. 84-90 N 17.

75. In detail ZK OR-Schraner, Art. 84 N 106 et seq.

76. Gauch/Schluep/Schmid/Emmenegger, para. 2379.

77. Gauch/Schluep/Schmid/Emmenegger, para. 2379; ZK OR-Schraner, Art. 84 N 116; see BGer 4A_439/2007 of 28.02.2008 E. 3.2.

78. Gauch/Schluep/Schmid/Emmenegger, para. 2379; BK OR-Weber, Art. 84 N 255.

79. BK OR-Weber, Art. 84 N 247 et seq.

80. See ZK OR-Schraner, Art. 84 N 135; BK OR-Weber, Art. 84 N 261 et seq.

81. BK OR-Weber, Art. 84 N 261.

82. The nominal value principle is geared towards currency fluctuations and not currency collapse (ZK OR-Schraner, Art. 84 N 135, 139).

83. Cf. ZK OR-Schraner, Art. 84 N 135; BK OR-Weber, Art. 84 N 261 et seq.

84. See para. 2 above.

85. Gauch/Schluep/Schmid/Emmenegger, para. 2295.

86. ZK OR-Schraner, Art. 84 N 155 et seq.

87. CHK-Mercier, para. 2.

88. Gauch/Schluep/Schmid/Emmenegger, para. 2300; BK OR-Weber, Art. 84 N 142 et seq.

- 24 As not being legal tender, the creditor is under no obligation to accept **cashless payments** or book money.⁸⁹ If the contract does not contain a provision on the modality of fulfilment, it must be determined by construction whether it was in fact the presumed intention of the parties that the debt should be settled in cash.⁹⁰
- 25 The **agreement of a cashless payment** is to be assumed if the creditor discloses its payment details to the debtor (e.g. on the letterhead, on the invoice or in e-commerce on the website).⁹¹ For reasons of practicability and security, it must furthermore be assumed that the debt is to be settled cashless in the case of larger sums and remote payments.⁹²
- 26 Whether the mere **opening of a bank account** already constitutes tacit consent to accept a cashless payment is debatable.⁹³ The Federal Supreme Court affirmed this in a ruling of 7 November 1996.⁹⁴ In view of the fact that nowadays almost all individuals in Switzerland hold a bank account, it is argued that in this case payment in cash would have to be expressly stipulated in each transaction, which would be contrary to the provisions of Art. 84 para. 1 CO.⁹⁵ Within the scope of application of Art. 84 para. 1 CO, the mere opening or maintenance of a bank account without public disclosure of the payment details to a specific debtor can therefore not generally be interpreted as implicit and tacit consent to the acceptance of a cashless payment.
- 27 With regards to **sight deposits at the SNB**, creditors who have an account with the SNB are obliged to accept the credit of such deposits as payment (Art. 3 para. 3 CPIA). The public treasuries of the Confederation and the SNB are then obliged to accept regular issue coins, commemorative coins and bullion coins at nominal value without restriction (Art. 3 para. 1 sentence 2 CPIA).
- 28 **Other means of payment** (e.g. foreign banknotes or cryptocurrencies) do not have to be accepted by a creditor unless contractually agreed.⁹⁶

3. Method of fulfilment

a. Cash payment

- 29 Cash payment is becoming increasingly less popular.⁹⁷ Nevertheless, cash payment still represents the general statutory concept of payment⁹⁸ and in view of the fact that the only legal tender available to the public are banknotes and coins, cash payment will remain the fundamental form of fulfilment of a monetary debt.
- 30 As **physical objects**, banknotes and coins are subject to the provisions of **property law**. The transfer of cash is effected by physical delivery, i.e. by the transfer of possession of a movable object (Art. 714 para. 1 CC).⁹⁹ The transfer of the amount of cash with the nominal value of the sum owed settles the monetary debt.¹⁰⁰

89. BK OR-Weber, Art. 84 N 157; see Gauch/Schluep/Schmid/Emmenegger, para. 2315.

90. Gauch/Schluep/Schmid/Emmenegger, para. 2316.

91. BK OR-Weber, Art. 84 N 158.

92. Gauch/Schluep/Schmid/Emmenegger, para. 2316b.

93. Gauch/Schluep/Schmid/Emmenegger, para. 2316c; BK OR-Weber, Art. 84 N 158; CHK-Mercier, para. 7; ZK OR-Schraner, Art. 84 N 168; BSK OR-Schroeter, Art. 84 N 20.

94. Judgement of the Federal Supreme Court of 7 November 1996 in SemJud 1997, p. 245, p. 253.

95. Gauch/Schluep/Schmid/Emmenegger, para. 2316c.

96. BK OR-Weber, Art. 84 N 143.

97. SNB, Payment method survey, p. 18 (only for transactions below CHF 5.00 cash remains the most commonly used means of payment); see also BSK OR-Schroeter, Art. 74 N 40.

98. See BSK OR-Schroeter, Vor Art. 84-90 N 20 et seq.

99. Giovanoli, p. 98; BK OR-Weber, Art. 84 N 80 f.

b. Cashless payment

- 31 Most monetary debts today are settled using cashless means of payment (e.g. bank transfer, credit card, Twint, etc.).¹⁰¹ **The larger the transaction value, the smaller the proportion of cash payments.**¹⁰²
- 32 Both contracting parties require a (bank-)account to process cashless transactions. The legal basis consists of a contractual long-term agreement between the bank and the customer, which is subject to the provisions on **simple mandates** (Art. 394 et seq. CO).¹⁰³ It contains the agreement that the bank will handle any payment transactions for the contracting party.¹⁰⁴ The bank is obliged to execute transfer orders from the contracting party (active side of the agreement) as well as to credit transfer sums directed to the contracting party's account (passive side of the agreement).¹⁰⁵
- 33 When **processing a specific credit transfer**, this contractual level is supplemented by an instructional level.¹⁰⁶ The customer (instructing party) instructs his bank (instructed party) to credit a certain amount to a third party (recipient of the instruction).¹⁰⁷ The «hinge»¹⁰⁸ between the contractual and instructional levels is the payment order issued by the payment initiator, which on the one hand represents an instruction under contract law (Art. 397 para. 1 CO) from the payment initiator to his account-holding bank that specifies the existing contractual agreement and on the other hand represents an **instruction within the meaning of Art. 466 CO**.¹⁰⁹ The payment instruction (Art. 466 et seq. CO) does not constitute a contract.¹¹⁰
- 34 A valid cashless payment constitutes **fulfilment and not merely performance in lieu of fulfilment**.¹¹¹

4. Time and place of fulfilment

- 35 Monetary debts are generally debts to be **paid at the creditor's domicile** (Art. 74 para. 2 no. 1 CO; «*Bringschulden*»).¹¹²
- 36 The creditor must be able to dispose of the amount owed on **the last day** of the specific payment period.¹¹³ Furthermore, Art. 75 et seq. CO apply.

III. ART. 84 PARA. 2 CO

A. Concept of a foreign currency debt

- 37 A foreign currency debt is a monetary debt that is denominated in **foreign currency**¹¹⁴ from the perspective of the place of payment.¹¹⁵ The place of payment is determined in accordance with Art. 74

100. BK OR-Weber, Art. 84 N 154.

101. SNB, Payment method survey, p. 18.

102. SNB, Payment method survey, p. 18.

103. Buis, p. 38; von der Crone, p. 53 et seq.

104. Kleiner, p. 280.

105. Buis, p. 92 et seq.; Kramer, p. 33 et seq.

106. BGE 122 III 237 E. 1b p. 240; Bettschart, p. 184 et seq.; Buis, p. 20, 46; Schmid et al., para. 2106.

107. If the account of the beneficiary of the payment instruction is held with a third-party bank, the rules of interbank transfers apply (see Gauch/Schluep/Schmid/Emmenegger, para. 2324 et seq.).

108. See Bettschart, p. 185.

109. BGE 126 III 20 E. 3a/aa S. 22; Bettschart, S. 185; Buis, S. 45. For interbank payments with SNB sight deposits see Kramer, p. 104 et seq.

110. BGE 132 III 609 E. 5.2 p. 617; BGE 4A_10/2013 of 28.05.2013 E. 3.

111. BSK OR-Schroeter, Art. 84 N 25; Gauch/Schluep/Schmid/Emmenegger, para. 2317.

CO.¹¹⁶ Foreign coins, banknotes or other assets expressed in foreign currency are owed.¹¹⁷ This may also include a fully virtual currency.¹¹⁸

B. Defining the foreign currency debt

- 38 Usually, the currency in which the monetary debt is to be fulfilled is expressly stated in the contract.¹¹⁹ If the respective clause is **imprecise** (e.g. "dollar" instead of "US dollar" or "New Zealand dollar"), the contract must be **construed** in accordance with the rules of the applicable national law (see Art. 147 para. 2 PILA).¹²⁰
- 39 Art. 84 para. 2 CO does not address the determination of the amount of the foreign currency debt, merely the question of the right of conversion. Hence, foreign currency debts are likewise subject to the **nominal value principle**.¹²¹
- 40 **Contractual claims for damages** are generally denominated in the currency of the contract.¹²² In the case of **tort claims**, the currency owed must be assessed based on the specific circumstances of the individual case. As a rule, the foreign currency at the location where the damage occurred is likely to be determinant,¹²³ whereby this is usually the national currency at the domicile of the injured party.¹²⁴
- 41 If an **unjustly enriched person** is obliged to provide reimbursement but has already exchanged the unjustly received foreign currency amount into local currency, they are not obliged to exchange it back. Instead, reimbursement may be made in local currency.¹²⁵ The amount to be reimbursed in local currency is determined by the exchange rate of the local currency and the foreign currency obtained on the date of receipt.¹²⁶

C. Right of the debtor to fulfilment in local currency

- 42 Art. 84 para. 2 CO provides the debtor of a foreign currency debt whose place of payment is in Switzerland with the right to fulfil in Swiss national currency (Swiss francs, CHF). This right of the debtor represents a statutory **alternative authorisation**.¹²⁷ Primarily, payment is owed in the foreign currency. However, the debtor is free to fulfil in local currency without the creditor's consent.¹²⁸
- 43 On the other hand, **the creditor may only demand fulfilment in the foreign currency**.¹²⁹ If the creditor refuses the debtor's payment in foreign or national currency, he falls into creditor default (Art. 91 CO).¹³⁰

114. See Enz, Geldrecht, p. 129 and BSK IRPG-Dasser, Art. 147 N 6 et seq.

112. BGE 119 II 232 E. 2 p. 234.

113. In detail see BK OR-Weber, Art. 84 N 172; BGE 119 II 232 E. 2 p. 234 et seq.

116. BSK OR-Schroeter, Art. 84 N 29; ZK OR-Schraner, Art. 84 N 186.

117. BK OR-Weber, Art. 84 N 311.

118. For details see Bärtschi/Jacquemart/Meyer, p. 201 et seq. and BSK IPRG-Dasser, Art. 147 N 9 et seq.

119. CHK-Mercier, para. 14; BK OR-Weber, Art. 84 N 312; ZK OR-Schraner, Art. 84 N 176.

120. BK OR-Weber, Art. 84 N 312; ZK OR-Schraner, Art. 84 N 176.

121. BK OR-Weber, Art. 84 N 320. For the nominal value principle, see [para. 17](#) above.

122. BGer 4C.191/2004 of 07.09.2004 E. 6; BK OR-Weber, Art. 84 N 314.

123. BK OR-Weber, Art. 84 N 318; ZK OR-Schraner, Art. 84 N 182.

124. Vetter/Züst, p. 664.

125. ZK OR-Schraner, Art. 84 N 183 with further references.

126. BK OR-Weber, Art. 84 N 319.

127. BGE 134 III 151 E. 2.2 p. 154 et seq.; Gauch/Schluep/Schmid/Emmenegger, para. 2304.

128. ZK OR-Schraner, Art. 84 N 186. Generally on the statutory alternative authorisation see BK OR-Weber, Art. 72 N 67 et seq.

129. Gauch/Schluep/Schmid/Emmenegger, para. 2307; ZK OR-Schraner, Art. 84 N 186; BK OR-Weber, Art. 84 N 325; see BGer 4A_200/2019 of 17.06.2019 E. 5.

- 44 The statutory alternative authorisation in **Art. 84 para. 2 CO does not apply**, if literal performance is required by inclusion in the contract of the expression ‘actual currency’ or words to that effect.¹³¹ Furthermore, alternative fulfilment in national currency is excluded in the case of a monetary debt being defined specifically.¹³² Such a debt exists, for example, if the purchase of certain foreign currency denominations have been agreed.¹³³

D. Conversion of a foreign currency debt

1. Applicable conversion rate

- 45 According to Art. 84 para. 2 CO, foreign currency debts can be settled in local currency "at the rate of exchange that applies on the day it falls due". The amount converted into Swiss francs must therefore correspond in value to the amount owed in foreign currency at the time the foreign currency debt matures (Art. 75 CO).¹³⁴ This leads to the following implications: The right of substitution pursuant to Art. 84 para. 2 CO **only applies after the due date**, as the relevant exchange rate is not known beforehand.¹³⁵ The debtor can therefore not settle the debt in local currency before the due date.¹³⁶ Secondly, the creditor bears the exchange rate risk between the due date and the debtor's default, as the debtor is only liable for exchange rate losses from the time of default (Art. 103 CO).¹³⁷ If the debtor is not immediately dunned by the creditor on the due date, this leaves the former with a certain room for speculation.¹³⁸
- 46 Locally decisive is the **exchange rate** at the statutorily given or contractually agreed place of payment.¹³⁹ Which exchange rate is to be applied (bid or ask price) depends on the specific circumstances.¹⁴⁰ Generally, the **asking price** is decisive, since the creditor should be able to obtain the amount of foreign currency actually owed at the time of maturity.¹⁴¹

2. Damage from exchange rate fluctuations

- 47 If the debtor is in default (Art. 102 para. 1 CO), he is liable for any damages that occur as a result of exchange rate fluctuations (Art. 103 et seq. CO).¹⁴² If the creditor claims damages for delay in accordance to Art. 106 CO that exceed the default interest of 5% (Art. 104 CO), the **natural presumption** applies that the creditor would have changed the foreign currency received into national currency of its (domicile) country on the due date.¹⁴³ This presumption, which serves to ease the burden of proof for

130. BGer 4A_391/2015 of 01.10.2015 E. 3; CHK-Mercier, para. 15; BK OR-Weber, Art. 84 N 325 with further references; ZK OR-Schraner, Art. 84 N 186 with further references.

131. Such clauses are rare in practice (BSK OR-Schroeter, Art. 84 N 33); For virtual currencies, Enz argues that the agreement to pay in Bitcoin should be qualified as an effective clause (Enz, Vollstreckung, p. 593).

132. So-called «*Geldsortenschuld*», see para. 12 above; Gauch/Schluep/Schmid/Emmenegger, para. 2304.

133. Gauch/Schluep/Schmid/Emmenegger, para. 2304; BGE 51 II 199.

134. CHK-Mercier, para. 17.

135. This provision stands in contradiction to Art. 81 para. 1 CO (CHK-Mercier, para. 16).

136. Weber, Fremdwährungsschulden, p. 114.

137. BGE 76 II 371 E. 4a p. 375; 60 II 337 E. 2 p. 340.

138. Weber, Fremdwährungsschulden, p. 114; the alternative would be to use the exchange rate at the time of payment, as it is the case under German law (cf. BGB §244).

139. BK OR-Weber, Art. 84 N 329.

140. See ZK OR-Schraner, Art. 84 N 194 et seq.

141. ZK OR-Schraner, Art. 84 N 194. Regarding the different exchange rates, see BK OR-Weber, Art. 84 N 335 as well as ZK OR-Schraner, Art. 84 N 195.

142. ZK OR-Schraner, Art. 84 N 203.

143. BGE 123 III 241 E. 3a p. 243; BGE 117 II 256 E. 2b p. 258; BGE 109 II 436 E. 2 p. 440 et seq.; CHK-Mercier, para. 16.

the creditor in the event of exchange rate losses, must also be held to its disadvantage in the event of exchange rate profits, whereby the creditor is entitled to provide evidence to the contrary.¹⁴⁴

E. Offsetting foreign currency debts

- 48 If no clause within the meaning of Art. 84 para. 2 CO has been agreed, the **offsetting** of monetary debts denominated in different currencies is **permissible** according to the Federal Supreme Court,¹⁴⁵ provided a conversion rate exists between the different currencies.¹⁴⁶

F. Enforcement of a foreign currency debt

1. Prayer in the case of a foreign currency debt

- 49 A claim in a foreign currency must be filed in the agreed currency by the creditor.¹⁴⁷ **If the creditor files the claim in a different currency, the claim will be dismissed**, as the debtor may – according to Federal Supreme Court case law¹⁴⁸ – not be ordered to pay anything other than what is owed.¹⁴⁹ This practice is criticised in the doctrine.¹⁵⁰ Instead, the use of a value-based approach is proposed:¹⁵¹ In an action for monetary compensation, an abstract value or a “certain measure of purchasing power”¹⁵² is generally sought. The currency in which the monetary payment is denominated in the prayer should therefore not be decisive for the nature of the claim. Accordingly, the plaintiff would also be awarded “nothing different” (Art. 58 para. 1 CPC), if the claim is recognised in a currency other than the one claimed.¹⁵³
- 50 The Federal Supreme Court is aware of the criticism of the doctrine.¹⁵⁴ However, it adheres to its previous rulings.¹⁵⁵ An action in the wrong currency therefore continues to lead to dismissal.¹⁵⁶ Although, the Federal Supreme Court has affirmed that an action in the wrong currency has the effect of interrupting the limitation period, even if the action itself is to be dismissed.¹⁵⁷ Furthermore, the dismissal of a claim that was mistakenly filed in Swiss francs does not preclude a renewed claim for payment of the foreign currency amount actually owed.¹⁵⁸

2. Calculation of the value in dispute for a foreign currency debt

- 51 The value in dispute is determined by the prayers for relief (Art. 91 para. 1 CPC). In the case of a foreign currency claim, a **conversion into Swiss francs** must be carried out on the date of *lis pendens*

144. BK OR-Weber, Art. 84 N 339.

145. BGE 130 III 312 E. 6.2 p. 318; BGE 63 II 383 E. 5 p. 391 et seq.

146. BGE 130 III 312 E. 6.2 S. 318.

147. ZK OR-Schraner, Art. 84 N 216.

148. BGE 137 III 158 E. 4.1 p. 680; BGE 134 III 151 E. 2.5 p. 156 et seq.; BGE 52 III 134; BGer 4A_455/2022 of 26.01.2023 E. 3.2; BGer 4A_251/2021 of 16.07.2021 E. 2.1; BGer 4A_200/2019 of 17.06.2019 E. 4; BGer 4A_265/2017 of 13.02.2018 E. 5.

149. CHK-Mercier, para. 19; In this case, the creditor has the option of filing a new action in the foreign currency owed (BGer 4A_206/2010 of 15.12.2010, E. 5.2.2.2; see also Schwander, p. 466 and Carr, p. 166).

150. Carr, p. 161 et seq.; Koller, para. 9 et seq.; Ollivier/Geissbühler, p. 1439 et seq.; Schwander, p. 459 et seq.

151. See Carr, p. 162 et seq.

152. Carr, p. 163.

153. Carr, p. 163.

154. BGer 4A_503/2021 of 25.04.2022 E. 4.1.2.

155. BGer 4A_503/2021 of 25.04.2022 E. 3-5.

156. On the handling of this jurisprudence in practice, see Schwander, p. 464 et seq.

157. BGer 4A_298/2021 of 08.11.2022 E. 6.

158. BGer 4A_298/2021 of 08.11.2022 E. 5.2; BGer 4A_206/2010 of 15.12.2010 E. 5.2.2.2; ZK OR-Schraner, Art. 84 N 216.

(Art. 61 para. 1 CPC).¹⁵⁹ The applicable exchange rates are regarded as known by the court and do not have to be proven.¹⁶⁰

3. Debt enforcement of a foreign currency debt

- 52 Art. 67 para. 1 no. 3 DEBA requires that the amount of the claim be stated in the debt enforcement request in Swiss francs. This **conversion** is provided for reasons of expediency and does not lead to novation (Art. 116 CO); the claim is still owed in foreign currency.¹⁶¹ The debtor can therefore discharge himself by paying in foreign currency until the debt enforcement proceedings are terminated.
- 53 The **exchange rate at the place and on the day of the request for debt enforcement** is decisive for the conversion.¹⁶² If a request for continuation is made (see Art. 88 DEBA), the amount of the claim can once again be converted into national currency at the creditor's request at the exchange rate on the day of the request for continuation (Art. 88 para. 4 DEBA).
- 54 If the exchange rate changes in the course of the debt enforcement proceedings and the debtor has paid more as a result, he is entitled to **sue for recovery** (Art. 86 DEBA).¹⁶³ In the opposite case, the creditor can claim the difference by way of a **new debt enforcement procedure**.¹⁶⁴
- 55 Literal foreign currency debts within the meaning of Art. 84 para. 2 CO as well as monetary debts determined by category ("*Geldsortenschuld*")¹⁶⁵ are not enforced in accordance with the provisions of the DEBA, but by way of **enforcement in accordance with Art. 335 CPC et seq.**¹⁶⁶

4. Foreign currency debts in bankruptcy, attachment and probate

- 56 In the **bankruptcy petition**, the creditor must convert the claim into Swiss francs (see Art. 211 DEBA).¹⁶⁷ The **request for attachment** (see Art. 271 DEBA) must also be denominated in Swiss francs. If the debt enforcement proceedings have already been initiated, the conversion in accordance with the application for debt enforcement is decisive (Art. 67 para. 1 no. 3 DEBA), otherwise it is the time of the application for attachment.¹⁶⁸ In the case of an **ordinary debt restructuring agreement** (see Art. 314 DEBA) and a **debt restructuring agreement in bankruptcy** (see Art. 332 DEBA), no conversion is required.¹⁶⁹ However, in the case of a **debt restructuring agreement with assignment of assets** (see Art. 317 DEBA), a conversion must be made, whereby the conversion rate is based on the time at which the debt restructuring moratorium was granted.¹⁷⁰

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159. Stein-Wigger, ZPO-Komm, Art. 91 N 22; BK OR-Weber, Art. 84 N 347; BGE 63 II 34, 35.

160. BGE 135 III 88 E. 4.1 S. 90 (in this judgement, the Federal Supreme Court relied on the data from the website: <http://www.fxtop.com>).

161. BGE 134 III 151 E. 2.3 p. 155; Penon/Wohlgemuth, SchKG-Komm, Art. 67 N 23.

162. BGE 137 III 623 E. 3. S. 624; Penon/Wohlgemuth, SchKG-Komm, Art. 67 N 23.

163. BGE 134 III 151 E. 2.3 p. 155.

164. BGE 134 III 151 E. 2.3 p. 155.

165. See para. 12 above.

166. CHK-Mercier, para. 20; Kellerhals, Art. 335 N 30.

167. BGE 110 III 105 E. 3 p. 106 et seq.; CHK-Mercier, para. 20.

168. ZK OR-Schraner, Art. 84 N 239; CHK-Mercier, para. 21.

169. BGE 50 II 31 et seq.; CHK-Mercier, para. 21; BK OR-Weber, Art. 84 N 359 et seq.

170. BK OR-Weber, Art. 84 N 361.

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