

§ 5 Declaration of intent and legal transaction

I. Two closely related key concepts of German private law

- the declaration of intent [Willenserklärung] is the foundation of every legal transaction [Rechtsgeschäft]
 - some legal transactions consist solely of a single declaration of intent

II. The declaration of intent (sect. 116 et seq. BGB)

1) The concept of declaration of intent

- definition: expression of an intent (will) aimed at bringing about a certain legal outcome

a) Subjective element: the intent

aa) Intention to act [Handlungswille]

- not in case of force, speaking in sleep or uncontrolled twitching

bb) Intention to make a declaration to be legally bound

α) Willingness to be legally bound [Rechtsbindungswille]

- a purely mental reservation not wanting to be bound is irrelevant (sect. 116 BGB)

β) Intention to make a declaration about the will to be bound [Erklärungswille]

- the problem of a *negligently created impression* of this intention

- the CONTROVERSIAL case of raising a hand to greet a friend at an auction

- FEDERAL COURT: deemed as intention if addressee understands it in this way

- not necessary but a ground for avoidance (→ II.3.a): the will to be bound in a specific way, with specific legal consequences (e.g. to give away, not just to lend) [Geschäftswille]

cc) Intention to communicate this declaration to the addressee [Kundmachungswille]

b) Objective element: the declaration

- the expression of the intent to the outside world (→ II.2)

2) The making (expression, form, receipt) of a declaration of intent

a) The expression of the intent

- can in principle consist in any human behaviour that reveals, obviously or after interpretation, the will to be legally bound in a specific way
- verbally, in writing (sect. 126 BGB), electronically (sect. 126a BGB), in text form (sect. 126b), notarised (sect. 128 BGB) or publicly certified (sect. 129 BGB)
- in daily life often *implicitly* by *conclusive conduct*
 - e.g. nodding the head, raising the hand, inserting a coin, placing goods or money on the counter
- special **form** only necessary *if prescribed by statute or agreed* (cf. sect. 126 - 127 BGB)
 - consumer protection clauses limit the right of providers to require written form for subscriptions
- silence usually not a declaration of will, except
 - in some cases considered as refusal (e.g. sect. 108(2), 177(2) BGB)
 - in others considered as consent (e.g. sect. 416(1), 455 BGB, commercial letters of confirmation)

b) The receipt of the declaration of intent [Zugang]

- a declaration that needs to be made to another person becomes effective
 - among those present, if addressee notices it
 - in absentia, when it reaches the addressee (sect. 130(1) BGB), i.e. when it comes *within his sphere of influence* (e.g. letter box, e-mail server during his business hours)
 - even if he does not read it...
 - even if the declaring person dies in between (sect. 130(2))
 - but not if a revocation reaches the addressee previously or at the same time (e.g. by a phone call)
 - the exact time of receipt can have important legal consequences
- the receipt can be substituted by service by the bailiff (sect. 132)

3) The avoidance of a declaration of intent [Anfechtung]

- certain common defects of a declaration of intent do *not* render it *void but voidable*
- it will become ineffective *ex tunc* if its author avoids it in time

a) Grounds for avoidance

aa) Mistake about the content of the declaration of intent [Inhaltsirrtum]

(sect. 119(1) 1st alternative BGB)

- e.g. about the contract partner, the subject or scope of the transaction or other relevant circumstances
- e.g. about characteristics of a person (e.g. solvency) or thing (e.g. authenticity of the painting) that are regarded as essential in business (sect. 119(2))
- however, an *internal error of motive* is *irrelevant*
- e.g. calculation error, buying a wedding dress for the daughter who actually will not marry

bb) Mistake in the utterance (sect. 119(1) 2nd alternative BGB)

- no intention of the author to make a declaration with this content at all
- esp. mistake in writing or speaking (e.g. offer for 10.00 instead of 1000 €)

cc) Incorrect transmission (sect. 120 BGB)

dd) Deceit (sect. 123(1) 1st alternative BGB)

ee) Duress (unlawful threat) (sect. 123(1) 2nd alternative BGB)

b) Declaration of avoidance

- is a declaration of intent itself
- must be made within the *period for avoidance* (sect. 121, 124)
 - in cases aa to cc *without culpable delay* after obtaining knowledge of the ground for avoidance
 - in cases dd and ee within one year
 - in any case within 10 years

c) Liability in reliance damage of the partner (sect. 122 BGB)

- not if partner knew or ought to have known the ground for avoidance

4) The interpretation of a declaration of intent

- focuses on the *true intention*, not the literal meaning of the declaration (sect. 133 BGB)

III. Legal transactions [Rechtsgeschäfte]

- the most important tool for the individual to structure his private affairs of his own initiative

1) The concept of legal transaction

- definition: a process consisting of *one or more declarations of intent* which, either alone or in conjunction with other elements, is aimed to *bring about a legal result because it is intended* by the parties involved
 - the primary reason for the legal result to occur is not the acting but the *intention* of the acting parties
 - while the declaration of intent is aimed at a legal consequence, the legal transaction actually brings it
 - another element can be, for example, the delivery of a movable thing for the transfer of ownership (sect. 929 BGB)
 - the legal result brought about can be complex and include legal consequences not specifically intended by the parties (e.g. applicability of the rules on irregularities in performance...)

2) Unilateral, bilateral and multilateral legal transactions

a) Unilateral legal transactions

aa) Strictly unilateral legal transactions

- e.g. last will, offer of a reward, endowment transaction for a foundation

bb) Unilateral legal transactions requiring receipt

- e.g. termination of / withdrawal from a contract, declaration of avoidance, conferment of authority

b) Bi- and multilateral legal transactions

aa) Contracts

- require two (or more) concurring declarations of intent
- bi- and multilateral contracts

bb) Overall acts

- identical parallel (not reciprocal!) declarations of intent
- e.g. constitutive act for an association
- e.g. resolution of a company's shareholder meeting

3) Other categorisations of legal transactions

- legal transactions under the German Civil Code and under special legislation
 - under the law of obligations, property law, family law, law of succession
 - under commercial law, labour law, company law, banking law etc.
- unilaterally binding and bilaterally binding legal transactions
 - unilaterally binding: e.g. donation, suretyship
- legal transactions between the living and on account of death
- obligation transactions and disposition transactions (→ see infra, § 6)
- abstract and causal legal transactions
 - a categorisation closely linked to the distinction between obligation and disposition transactions
 - abstract legal transactions (e.g. transfer of property) are independent of their legal reason
 - causal legal transactions (e.g. purchase contract) constitute the legal reason for an abstract legal transaction
- others (discussed among scholars)