

§ 9 The conclusion, validity and content of a contract

- a contract is a bilateral or multilateral legal transaction, in which a legal result is to be achieved by (at least two) concurring declarations of intent

I. The conclusion of the contract through *offer and acceptance*

(sect. 145 et seq. BGB)

1) The offer (sect. 145, 146 BGB)

- the offer must be intended to be binding
 - therefore, it must be specific and contain all necessary details
- preparatory business activities do not yet constitute an offer
 - the advertisement online, in a newspaper or on the street is not yet binding
 - the display of goods in a store only constitutes an *invitatio ad offerendum*
 - the invitation to the customer to make an offer himself
 - the actual offer then consists of the customer placing the goods on the counter at the checkout
 - the store is still free to deny to sell the displayed goods

2) The acceptance (sect. 147 - 142 BGB)

- the offer needs to be accepted in due time (sect. 147, 148)
- the offer must be accepted exactly as it is
 - an "acceptance" altering the offer is considered a counteroffer, which then the original offerer can accept or reject (sect. 150(2))
- overt and hidden lack of agreement:
 - if parties have not agreed on a point on which agreement was considered necessary by one of them, the contract is, in case of doubt, not concluded (sect. 154)
 - if parties are not aware of their dissent, whatever is agreed is applicable if it is to be assumed that the contract would have been concluded even without a provision on this point (sect. 155)

3) The receipt of offer and acceptance

- both declarations of intent must not only be concurring but also need to be received by their respective addressee to become effective (see sect. 130 BGB and supra, § 5 II.2.b)

II. The validity of the contract

1) Contractual capability

- both parties need contractual capability, i.e. the *capacity to perform legal acts* [Geschäftsfähigkeit] (see supra, § 4 III)
- contracts concluded by minors generally require prior consent or subsequent approval of their legal representative (sect. 107 et seq. BGB, see supra, § 4 III)

2) No lack of form (sect. 125 BGB)

- a special form of the contract is only necessary if prescribed by statute or agreed (cf. sect. 126 - 127 BGB)
- a contract missing the legally prescribed form and in case of doubt also a contract missing the agreed form is void
- the prescribed form has the function
 - to warn the parties
 - to provide evidence
 - in the case of notarial recording to ensure professional advice

3) **No violation of statutory prohibitions** (sect. 134 BGB)

- a contract violating a statutory prohibition is void
- but this only applies if the prohibition is directed precisely against this legal transaction, not only against the circumstances
 - e.g. a service contract to kill someone or a purchase contract on drugs
 - e.g. not the contract to buy a beer in a bar that has exceeded legal closing time

4) **No offence of common decency** [Sittenwidrigkeit] (sect. 138 BGB)

- a contract offending common decency (an agreement contra bonos mores) is void
- decisive criterion: "the legal and moral instincts of all just and reasonable citizens"
 - they can change over time; example: prostitution contracts (valid contracts today)
- examples:
 - usury (sect. 138(2))
 - adhesion contracts unreasonable restraining trade or competition [Knebelungsverträge]
 - contracts supporting criminal activities
 - contracts incompatible with fundamental rights as objective values in the legal system or with other constitutional values

III. The interpretation of the contract (sect. 157 BGB)

1) General principles

- in principle, application of the common methods of legal interpretation (→ diagram 2)
- but interpretation as required by *good faith*, taking into consideration *customary practice*

2) Filling gaps by "supplementary interpretation" ["ergänzende Vertragsauslegung"]

- often the contracts do not provide provisions for certain issues that can occur in practice
- if the Civil Code does not provide a solution, the judge will fill in the regulatory gaps in the contract by supplementing the parties' intentions and eliminating contradictions
- the judge must proceed with caution so as not to unintentionally change the content of the contract; he may not disregard in any way the will of the contracting parties

IV. General terms and conditions [Allgemeine Geschäftsbedingungen] (sect. 305 et seq. BGB)

1) The issue of general terms and conditions

- an area of contract law with high practical importance, formerly regulated in a special law, since 2001 in the Civil Code
- general terms and conditions are (usually extensive collections of) provisions that have been pre-formulated by one party for the use in many cases and are incorporated into the contract without negotiation with the partner when the contract is concluded
 - e.g. in annexes to offers, displays in the shop or pop-up sites requiring agreement when installing apps or software
- general terms and conditions are often unfair because in business life the customer has virtually no choice to reject them; therefore, the law needs to regulate them

2) Restrictions on general terms and conditions in the German Civil Code

- individually agreed terms have always priority (sect. 305 BGB)
- surprising and ambiguous provisions will not form part of the contract (sect. 305c BGB)
- 15 different types of unfair provisions are strictly prohibited and thus invalid (sect. 309 BGB)
- 9 types of often but not always unfair provisions require valuation by the interpreter with regard to both parties' interests and are invalid in case of negative valuation (sect. 308 BGB)
- for other provisions there is a *general content check*: any provisions that *unreasonably disadvantage* the other party contrary to good faith, are invalid (sect. 307 BGB)

V. Special rules for consumer contracts [Verbraucherverträge] (sect. 312 et seq. BGB)

- background: strong expansion of consumer protection law in the last 30 years, *caused by the approximation of laws in the European internal market by EU legislation* (art. 114 et seq. FEU Treaty), which aims at a high level of consumer protection (art. 114(3))
- consumer contracts are concluded between a trader (acting in exercise of his trade, business or profession) and a consumer (acting privately) (see legal definition in sect. 310(3) BGB)
- special rules apply when *consumer pays* a price, regardless whether *in money or personal data* (sect. 312(1, 1a) BGB)
- these special rules do not follow the Civil Code's traditional approach of abstract regulation but are complicated, detailed and specific
- *enforcement by consumer rights associations*: according to the *Consumer Rights Enforcement Act* [Verbraucherrechtgedurchsetzungsgesetz] of 2023, registered consumer protection associations are entitled to initiate *class actions* or *model declaratory actions* to enforce consumer law; moreover, they can initiate *actions for injunction* against certain business practices violating consumer rights (e.g. unlawful general terms and conditions) under the *Act on Injunctive Relief* [Unterlassungsklagengesetz]

1) Principles applying in general to consumer contracts

- *detailed information obligations* of the trader on his identity, essential characteristics of the goods or services, the total price, the contract period, the consumer's right of withdrawal (where applicable) and other issues (sect. 312a(2) BGB, art. 246 Introductory Act to the Civil Code)
- a trader contacting a consumer by phone call to conclude a contract must *disclose* from the start his *identity and the commercial purpose* of his call (sect. 312a(1))
- extra payments by the consumer need to be agreed on expressly (sect. 312a(3))
- trader must provide customary payment method free of charge (sect. 312a(4))
- hotline for contract issues must be free (sect. 312a(5))

2) Special rules for special types of consumer contracts

- stricter special rules for *off-premises contracts* (concluded outside the trader's business premises) and *distance contracts* (concluded via telecommunication) (sect. 312b et seq. BGB)
 - more extensive information obligations, for a better protection against common unfair business tricks (sect. 312d BGB, art. 246a, 246b Introductory Act Civil Code)
 - *right of withdrawal* within 14 days (sect. 312g, 355(2) BGB)
- special rules for *e-commerce contracts* and *online marketplaces* (sect. 312i et seq. BGB)
 - e.g. mandatory option to terminate contract at the website (sect. 312k(2))
- special rules for consumer contracts on digital products (sect. 327 et seq. BGB), consumer credit agreements (sect. 491 et seq. BGB), contracts for delivery by instalments (sect. 510 et seq. BGB) and consumer construction contracts (sect. 650i et seq. BGB)

VI. Special rules against discrimination: the General Act on Equal Treatment

[Allgemeines Gleichbehandlungsgesetz]

- further reading: see the Guide to the General Equal Treatment Act
- a law once adopted for the implementation of four EU directives
- a law against discrimination on grounds of *race, ethnic origin, gender, religion, worldview (ideology), disability, age or sexual orientation* (cf. sect. 1),
 - in professional life, social security and education (cf. sect. 2 no. 1 - 7),
 - in business life for the supply with publicly available goods and services, incl. housing (cf. sect. 2 no. 8)
- *prohibition of disadvantageous treatment of employees* on the prohibited grounds (sect. 7)
 - except in case of narrowly defined justifying reasons (sect. 8 - 10)
- employer must take necessary measures to protect against discrimination (sect. 12)
- employees have right to complain, to refuse performance and to compensation in case of discrimination, and must not be disadvantaged for asserting their rights (sect. 13 - 16)

- *prohibition of disadvantageous treatment in private-law relations* on the prohibited grounds
 - when founding, executing or terminating *bulk businesses* or insurances (sect. 19(1))
 - on grounds of race or ethnic origin also when founding, executing or terminating other obligations under sect. 2(1) no. 5 to 8 (sect. 19(2))
 - except in case of narrowly defined justifying reasons (sect. 19(3-5), 20)
- discriminated persons can demand within two months the stop of the discriminatory conduct, sue for an injunction and require compensation of damages (sect. 21)
 - in litigations reversal of burden of proof if facts suggest that there has been a discrimination (sect. 22)
- discriminated persons can be supported - also before the courts - by anti-discrimination organisations (sect. 23)
- Federal Anti-Discrimination Agency with Independent Federal Commissioner for Anti-Discrimination for the promotion of equal treatment at work and in everyday life (sect. 25 et seq.)