

# **LECTURE LAW**

**Information and Contract Law, IaCL**

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**Winter Term 2019/20 RA Horst Speichert**

# **Horst Speichert**

e|s|b Rechtsanwälte Stuttgart

**Lawyer  
Lectures**

IT-Contract Law  
International Law  
Computing Law  
Internet Law  
IT-Security  
Data Protection

# Please note

It's the same with any legislation, certain terms used in an act or contract have a quite specific meaning.

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# Contract Law

# What is a contract?

- Definition: Contract Law

„Contract Law provides rules which help to decide whether a legally binding agreement has come into existence and what the consequences are.“

- Definition contract:

a contract is a...

- legally enforceable agreement
- between two or more persons
- which is created by consent

# Legally enforceable

- Example: Bob does not arrive as agreed to play squash with his friend Lisa.
- Is Lisa entitled to claim for damages?

# Legally enforceable

- that may cause unpopularity, but Bob cannot be sued in court
- compared to a professional boxer who will be legally liable if he doesn't turn up to his fight as agreed
- not all agreements are legally enforceable
- for example when they are of a mere social nature without any intent to be legally bound

# Why is contract law important, also for you?

- the whole modern economic system is built on contract law
- as well in the field of Information Technology and Engineering
- Contracts are involved in every business action
- in particular as well in scientific or technical projects
- every relation between the involved parties is determinated by contract clauses
- the financing of a project is not possible without contracts

A black silhouette of two people, a man and a woman, facing each other. They are holding a large, light-colored rectangular document between them. The document has the text "Conclusion of the Contract" printed on it.

**Conclusion  
of the  
Contract**

# Conclusion of the contract

有約束力的合同

- How does a binding contract come into existence?
- Requirements for a valid contract:
  - Offer and acceptance
  - Intention to create legal relations
  - Sufficient clarity and certainty for the terms of the agreement
  - Form, for example written form

# Offer and acceptance

- Every contract comes into being after an offer has been made by one party to another
- Offeror/promisor = party who declares the offer
- Offeree/promisee/acceptor = party to whom the offer is made
- „*invitatio ad offerendum*“
  - an offer must be distinguished from an „*invitation to treat*“, for example the display of a shop in the display window
  - Advertisement is not an offer in the legal sense
  - the price displayed on goods (e.g. in supermarkets) is not the offer, it is only the invitation for the customer to make an offer
  - the customer makes the offer when he presents the goods at the cash desk
  - the acceptance is made by the cashier when he accepts the money

# Formation

- an offer/acceptance may be made ....
  - in writing
  - orally
  - by conduct 通過行為
- a contract needn't be concluded in writing, most contracts are concluded orally or by conduct
- Purpose of formal requirements:
  - to achieve legal certainty
  - to avoid disputes

→ Advantage of a written document: you are able to prove the content of a contract, you cannot be sued easily

# in writing

- What contracts must be in writing?
  - there may be minor differences due to national legislation
- usually must be in writing, e.g. in Germany :
  - Contracts of employment
  - Contracts of guarantee
  - Consumer credit agreements
  - etc
- Contracts which must be made by deed
  - Contract drawn up before a notary 公證人
  - sealed document, a specific written form
  - e.g. purchase of real estate, marriage contract, etc
- If such a contract does not comply with the necessary form  
it is void

契約

# in writing

- Example:

Bob is surfing on the internet. Suddenly he finds a very interesting car on the website of Mercedes-Benz. He is very excited and writes immediately an e-mail in which he offers 10,000 € for the car. A few minutes later he receives an acceptance via fax from Mercedes-Benz.

- Has Bob concluded a binding contract?

# in writing

- Yes of course the contract is valid
- Contracts can also be concluded in an electronic form...
  - via e-mail
  - via fax
  - by telegram
  - by mouse click
- **But please note!** The digital or electronic form does not fulfil an obligatory written form. A contract of guarantee, e.g., cannot be concluded on the internet.
- Exception: qualified electronic signature which is equated to the written form by law

# by conduct

- Requirements: sufficient clarity and certainty
- Examples:
  - Sale at auction 拍賣
  - E-commerce, contracts by mouse click
  - the customer who makes the offer,  
when he presents the goods at the cash desk of a  
supermarket,  
    口頭評論  
he need not make any verbal comment
  - the cashier when he accepts the money of the  
customer without any words

# Termination of an offer

合約終止

an offer terminates...

- on the death of one of the parties **before** acceptance
  - if one of the parties dies after acceptance, the contract will be valid
- by non-acceptance within the agreed period or within a reasonable time
  - reasonable time: it depends on the circumstances of each individual case: sometimes immediately, within a month or even longer
- by revocation **before** acceptance
- when rejected by the **offeree**
  - the rejection may be made by a counter-offer

接受前撤銷

# Communication of an offer

- Example:

Bob has lost a valuable watch, so he has advertised a public notice which promises a reward for the finder. Lisa finds the watch without having read the advertisement and returns it to Bob.

- Is Lisa entitled to claim the reward?

# Communication of an offer

- No, Lisa cannot claim the reward. She was unaware of the public offer because it was not communicated to her.
- an offer must be communicated before it can be accepted
- you cannot claim to have accepted an offer of which you were unaware
- Do you think that this result of the example is fair?

# Communication of an offer

- It's different from several national civil law legislation in other countries. In Germany, e.g., a public offer, e.g. a reward, is considered to be a legal transaction: obligation only for one party ("Auslobung")
- Consequence:
  - according to German Law Lisa is entitled to claim the reward regardless of whether she was aware of the public offer or not
  - according to Anglo-American Law the public offer is considered to be a contract and so communication is necessary

# Communication by post

- contracts can be concluded by correspondence, resp. by post
- **Offer** by post: is valid only when it reaches the offeree, not simply when the letter is posted by the offeror
- **Acceptance** by post, according to English Civil Law:
  - valid (so that the contract is concluded) already at the moment when the letter (acceptance) is posted, even if it never arrives
  - reversal of the general rule that acceptance must be received by the offeror
  - Reason: it is easier for the offeree to prove that he has posted the letter (acceptance) than to prove actual receipt by the offeror

# Communication by post

- **But please note!** These are the rules according to the English Civil Law, it's different in other legal systems, e.g., according to German Law the letter (acceptance) must be received by the offeror

# Revocation of an offer

- Example:

Bob wants to sell his horse to Lisa. He sends her a fax: “This offer is valid till Tuesday”. On Monday Lisa hears from the bank that the horse has already been sold to another buyer. Lisa still sends her acceptance to Bob on Tuesday.

- Is Lisa entitled to claim the horse?

# Revocation of an offer

- No she isn't, because a valid contract has not come into existence. The offer has been revoked on time. The message of revocation has come from the bank, a reliable person.
- when a valid acceptance has been made, the parties are bound
- until an offer has been accepted the offeror usually has the right to revoke
- Revocation must be communicated to the offeree
- Revocation must come directly from the offeror or from a reliable source

# Acceptance

- Example:

Bob offers his TV to Lisa for 100 €. Lisa answers she would pay 95 €. After Bob has rejected this counter-offer Lisa accepts the original offer of 100 €.

- Is Lisa entitled to claim the TV?

# Acceptance

- No she isn't. Even if the offeree accepts the original offer after a counter-offer, it's too late: the offer is terminated
- No contract has come into existence:
  - the original offer was terminated by Lisa's counter-offer
  - the counter-offer was rejected by Bob
- only if the offeror confirms again his original offer, a valid contract is concluded

# Acceptance

- can be expressed like an offer: in writing, orally or by conduct
- absolute and unqualified: the offeree must accept the offer consenting to all its terms
- an acceptance under different conditions is a counter-offer which terminates the offer: it means in effect:  
“I do not accept the offer, will you accept my offer?”

# Communication

- Example:

Bob is negotiating with Lisa regarding the purchase of Bob's car. Lisa offers Bob an amount of 1,000 € and adds: "If I hear no more, I will consider the car to be mine".

In the following Lisa does not hear anything from Bob.

- Is Lisa entitled to claim the car?

# Communication

- No she isn't.
- Acceptance must be **communicated** to the offeror
- you cannot substitute silence for acceptance
- A person who makes an offer may not  
規定 stipulate that absence of communication of acceptance within a certain period will be considered as an acceptance.

# Form of acceptance

- Example:

Bob has offered his bicycle on the internet (resp. on ebay) and has stated that acceptance **must** be sent back by e-mail (resp. by order on ebay).

Lisa who knows Bob sends back her acceptance by post.

- Is Lisa entitled to claim the bicycle?

# Form of acceptance

- No she isn't. Where an offer states that it can only be accepted in a certain way, the offeror is not bound by a differing acceptance
- **General rule: Any appropriate form of acceptance may be used,** unless a particular method of acceptance is demanded by the offer
- **Exception: Prescribed methods of acceptance are admissible**

明定的

# Form of acceptance

the prescription of a certain method of acceptance has usually a particular object in view,

- e.g., to secure a speedy acceptance
- a differing acceptance which accomplishes the object just as well or even better than the prescribed method, can also be binding

- Example:

The offeror requires a quick reply by e-mail. In this case a reply by fax to the same office is binding, because it accomplishes the object just as well. The contract is valid.



# The contents of a contract

# Terms of a contract

The parties have now fulfilled all the requirements for making a valid contract. It may then become necessary to determine exactly what the obligations under the contract are.

- Definition of terms:
  - The terms of a contract define the rights and duties of the parties
  - Contents of the contract: Undertakings, representations and promises contained in a contract 事業
- Example for terms:
  - Bob promises Lisa: "I will clean your flat".
  - Lisa promises Bob: "Then I will pay you 100 €".
- What does that exactly mean? There are a lot of questions, e.g.,....
  - How soundly has Bob to clean?
  - When does Lisa have to pay?
  - etc.
- Kinds of terms: The terms of a contract can be divided into two kinds:
  - express terms 表達條款
  - implied terms 隱含條款

# Express terms

- **Case study:**

Bob and Lisa were negotiating the possible purchase of Bob's motorcycle. Lisa asked if the motorcycle was accident-free. Bob didn't know that exactly, but he answered: „Yes, it is“. In the written contract of sale the issue has been omitted. A few days later Lisa phoned the previous owner of the bike who told her that the bike had had an accident.

- Is Lisa entitled to claim damages?

要求賠償損失

# Express terms

- Yes, she is. Even though the issue was not regulated in the written contract, Bob told her expressly, that the bike was accident-free. Bob's answer must be considered as a term of the contract and not as a mere representation.
- **Usually the material terms are stated expressly**
  - The parties are not allowed adducing evidence to add to, vary or contradict the existing written terms of the agreement 引誘 抵觸
- **Additional oral evidence is possible to prove that terms have been omitted**
  - a written contract is not complete and does not represent the whole transaction: oral evidence to prove a collateral agreement is needed
  - the decisive question is: is it a real contractual term or mere representation?

# Express terms

- **Modification:**

Lisa asked Bob about the year of construction of the bike. Bob didn't know that exactly, but showed her the registration document according to which it was a 2010 model. Lisa found out later that the registration document had been altered by an unknown third party and the actual construction date of the bike was 2005.

- Is Lisa entitled to sue for damages?

# Express terms

- No she isn't. Bob's information concerning the bike's year of construction was a mere representation, not a term of the contract. Bob had no special knowledge regarding the age of the bike and Lisa knew that he was relying on the date in the registration document. Therefore Bob cannot be made liable.

# Freedom of contract

- Freedom of contract = the parties are free to determine their own terms
  - Freedom to enter a contract
  - Freedom to choose the party (with whom the contract shall be entered)
- so, in general it is not the task of law or of the courts to define the terms of a contract
- **But please notice:** in some exceptional cases the law (resp. the courts) may **imply terms into a contract**, even though the parties have not expressly agreed on something in particular
- we call them: **implied terms** in contrast to express terms

# Implied terms

- Example:

Bob has bought a new car that breaks down after 10 km.

# Implied terms

- This case constitutes **a breach of contractual condition** by the seller, although the parties have not agreed that the car is in good condition.  
But the term is implied into the contract by law (e.g., by English Civil Law, the Sale of Goods Act)  
Please notice: It's a **new** car!
- Almost every national Civil Law states **for contracts of sale,**

# Implied terms

that sold goods have to....

- Correspond to their description
- be of merchantable quality  
(= common quality, resp. average quality which is normally accepted according to the trade practices, customs of the trade)
- be fit for the purpose for which they are sold
- belong to the person who sells them

● Implications into a **contract of service**,  
e.g., a service from a builder, craftsman, internet provider, bank etc.

it is implied that ...

- the service will be carried out within a reasonable time
- a reasonable price will be paid, if no price is mentioned

# Implied terms

- Consequences of a breach:  
if the seller/ service provider breaches any of the implied requirements,
  - the buyer/client has remedies 補救措施
  - the contract is void 收回
  - the buyer/client can reclaim the purchase money
- The courts will imply terms into a contract if they are....
  - obvious or self-evident
  - necessary to carry out the presumed intention of the parties
  - reasonable and well-known
  - part of trade practices, customs of the trade, e.g., the Incoterms

# Implied terms

Study case:

Bob and Lisa, both traders, are at the “Fabric and Fashion Trade Fair“ to clinch a deal about a range of golfwear. Bob offers the golfwear to Lisa for 2,900 €. After negotiating in private Lisa accepts the price. They clinch the deal by handshake and stipulate that Bob e-mails Lisa a confirmation with the details of the sale contract. After a few days Bob sends Lisa a confirmation by e-mail as agreed in which a price of 3,900 € is stated. Unfortunately Bob's e-mail is misguided into the **spam-folder**, because Lisa's spam-filter doesn't work correctly, so that Lisa takes no notice of Bob's e-mail.

Is Bob entitled to claim 2,900 € resp. 3,900 € ?

# Implied terms

Bob is entitled to claim 3,900 €.

The sale contract has been concluded orally by both parties. As a custom of trade it is part of trade practices (e.g., in Germany) that silence will be considered as acceptance, if both parties are traders. The term is implied into the contract, although the parties have not agreed that silence will be considered as acceptance.

# Terms and Conditions

What's that? – introductory case

Bob had an accident so he needs a new car.

His local car dealer offers him a good price. Anyhow the purchase take a long time because Bob is a careful guy who wants to read all details in the fine print of the contract of sale

- **Synonyms:**

- General terms and conditions
- Standard business conditions
- Standard form contracts

- **Form of appearance:**

- as terms of use, for example the guidelines for using a homepage
- as annex of a contract, for example the small print of a contract of sale

# Terms and Conditions

Requirements which need to be fulfilled if one party wants to incorporate its general terms and conditions effectively into the contract:

- The contract clauses which are contained within the general conditions of business must be notified before the conclusion of the contract **in a language the recipient party understands.**

# Intellectual Property Rights



# Intellectual Property Rights (IPR)

## Overview

- Copyright
- Patents
- Trademarks
- Personal Identity Rights
- They all are generally described as intellectual property or intangible property because they are property rights that cannot be touched or felt like personal property (car) or real property (land).

# Intellectual Property Rights (IPR)

- value of intellectual or artistic work is much more than the development costs for the product
  - or the material that is used to produce it
- comes from creativity, ideas, research, skills, labour and other nonmaterial efforts and attributes provided by the “creators”
- requires to protect this “thing”
  - to prevent others from copying it without permission

# Intellectual Property Rights (IPR)

無形的

- the “thing” that is protected is intangible
  - creative ideas, effort, etc.
  - but embodied in a physical form
- when you buy a book, a CD, a painting or a software product you buy physical carriers of information
  - not the plot
  - or the lyrics
  - or the organisation of ideas
  - or the presentation
  - or the characters and events

# Intellectual Property Rights (IPR)

- the owner of the physical product can give it away, or lend it, or sell it
- right to make copies lies with the owner of the “intangible” product
  - the owner of the “copyright”
- If it were not possible to protect this, would anyone bother to put effort into being creative?

# Copyright

獨家

Law gives copyright holder the exclusive right to

- be mentioned as the “creator” of the work
- make copies of the work
- produce derivative works
  - translations into other languages
  - making a film based on a book
- distribute copies
- perform the work in public (music, plays, etc.)
- display the work in public (artwork, films, etc.)
- grant licenses to others

# Copyright

- European Union
- Protection does not depend on
  - registering
  - or the use of the “©”
  - but requires that work shows a certain level of creativity (no banalities) 平庸
- Protection of computer software
  - even for simple programs without any inventive element
- Protection of databases
  - even if individual elements are not under copyright protection themselves
  - includes even lists/collections of hyperlinks

# International Copyright Law

## ● Jurisdiction 管轄權

- Courts of any country where unlawful information is intentionally spread by the infringer

## ● Copyright law

- of the country in which the creator seeks protection
- multinational agreements such as the “Berne Convention“ grant equal and mutual „national treatment“

# Copyright in Cyberspace

- No free download of sites under copyright without the author's consent
  - No working on/or altering of copied site for web use
- Is there in fact effective protection on the internet?
  - Infringer setting up host server in Mongolia
    - offering pirated software or music files (mp3) for downloading
  - Author enjoys copyright protection in Germany
    - but Mongolia grants no copyright
  - intentionally infringement takes place in Germany as well, by wilful spreading of information

# Copyright in Cyberspace

- Jurisdiction → German Courts

- German Copyright Law is applicable
- But if offender has no domicile here, **cyberspace is de facto a legally unprotected area**

網絡空間是實際上是一個沒有法律保護的區域

# Patents

- **Definition of patent:**
  - intangible right
  - for an invention
  - in order to grant the inventor the exclusive use of the invention
  - for a limited period of time
- **Invention:**
  - is granted for invention of new technical products or processes for industrial use
- Protect new ideas by giving inventor a monopoly on the invention for **a limited period of time**
  - e.g., in Germany: 20 years
  - aim is to reward inventor
  - and encourage disclosure of the invention so others/ the commonality benefit from it too

# Patents

基本思想

- Protect **underlying idea** of invention not just expression or implementation of it
  - Main difference to copyright; patent stronger and deeper, because of the protection of a whole function (and the corresponding idea) not only an expression
    - Copyright → expression (code)
    - Patent → function (idea)
  - Example: content of a scientific paper
    - Copyright → protects only the written code, expressed words and formulation
    - Patent → protects the whole content and idea
  - prevent anyone from using the idea without permission
  - Conclusion: only patent can protect a new technical invention effectively

# Patents

a product or process must be a **new technical invention** in order to be patentable

- **invention**

- problem solving approach of a certain complexity

- **technical**

- must have technical effect, especially cause a technical result
  - algorithm itself → mere Mathematics!
  - code itself → **linguistic** expression of a computer programming language → protected by copyright law  
→ no copying of the complete code or of essential and characteristic features of the program

# Patents

- which is new
  - not just a discovery, because a discovery already exists
- and may be used for industrial/commercial purpose

# Software Patents

- **Case study:** If the invention of “word processor” were patentable, all companies that produce and sell word processors would have to ...
  - reach agreement with the patent holder  
特許權使用費
  - pay royalties to the patent holder
- Should **software** be patented or copyrighted?
  - Is it an “invention” - a new idea?
  - Or is it a “writing” - an expression of ideas, algorithms and techniques?
  - Where are the risks of software patents?

# Software Patents

## ● Current situation

- technical effect vs. informatics/mathematics
- Patent law: „software as such“ not patentable
- but not a strict rule anymore (more and more weakened by national, e.g. German, and EU-dispensation)
- Political dimension: possible disadvantages compared to US- and Asian competitors, whose software is protected by patent law

## ● Prospects

- EU will probably abolish the current restriction so that software could become patentable → new European patent law is planned
- Open source software (OSS) shall still be protected

# Software Patents

## ● Risks for

- Innovation and inventiveness (injunctions; damages)
- Security (common standards open doors for crime)
- Independence (cartels; monopolization)

# Software Patents

- “Technical effect”, easy to circumvent
  - Interpretation of “no software as such” has recently been narrowed by dispensation
    - no patent protection only if no technical component is affected by the code (“code only-dispensation”)
    - but as soon as a CPU interacts with software and both components are applied for patent, there is a technical effect/function
    - Consequence: CPU or other hardware components in their specific function will lead to an indirect patent for the connected software as well → no patents „by halves“
    - only 1% of European patent applications are dismissed

# Software Patents

- Software within EU is covered by the protection of copyright law
  - even very simple programs
- Copyright is weaker than patent
  - while copyright infringement only is effective if main features of the code were copied
  - a patent prevents others from writing a completely different code with the same function

# Trademarks

## ● **Definition:** What is a trademark?

A trademark is...

標籤

- any particular name, design, label, etc. or combination of these
- that identifies and distinguishes a specific product or service from others in the market place or in trade
- and cannot be used by others (competitors)
- attempts to remain in the mind of the consumer
- used by consumers to choose between competing products
- **Example:** Bob has created a new soft drink. He cannot call it “Coca-Cola”, because this is a registered trademark!

# Trademarks

- Subject of protection in detail: any...
    - word (Poison)
    - name (Giorgio Armani)
    - symbol
    - slogan (Got Milk?)
    - package design (shape of the Coca-Cola bottle)
    - etc.
  - even..
    - a sound (NBC chimes)
    - color combination
    - smell
    - or hologram
- can be a trademark under some circumstances.

# Trademarks

- What is a **service mark**? A service mark is
  - similar to a trademark,
  - but it is used in the selling or advertising of services
  - to identify and distinguish the services of one company from those of others.
- The term trademark is often used interchangeably to identify a trademark or service mark.
- “**Community Trade Mark**“ (abbr. CTM):  
A CTM provides protection for a trademark in the current member countries of the European Union.
- A trademark, service mark or communtiy mark can be registered by its owner

# Symbols ®, TM, SM

- ™ is usually used
  - to indicate **an unregistered trademark**
  - informal notification that there is a public claim as a trademark
- SM represents an
  - **unregistered service mark**
  - also an informal notification that there is a public claim as a service mark
- ® is usually used
  - commonly pronounced "R-in-a-circle" or "Circle-R,"
  - a warning notice to advise the public that a trademark or service mark is **registered** in a respective system and their use provides legal benefits
  - can be used only with registered marks, use of a ® with any unregistered trademark may result in claims of fraud

詐騙

通用的

# Generic term

- word or phrase that is or has come to be the common term associated with or is known as a particular category of goods or services to which it relates
- trademark may potentially become generic if it becomes so **widely known** and used with a particular category of goods or services as to designate the category of goods or services (loss of trademark)
- **Generic designations are not registrable or protectable**
- **a previous registration for such a "mark" may be subject to cancellation by a third party**
- Examples of marks that have become generic over the time include “escalator,” “linoleum,” “zipper” and “yo-yo.”
- what is generic in one country may **not necessarily** be generic in another, for example, the designation ASPIRIN is generic in the U.S. but is not in other countries

# Trademarks

- trademark law gives owner the right to prevent others (usually competitors) from using the same mark or symbol to market their products, it grants
  - injunction, independent of having been used in good faith (not wilful infringement)
  - in case of deliberate infringement also the right to claim for damages
- trademarks are, as a rule vigorously protected by their owners

# Borderline

## ● Trademark (®, ™, ℠)

- protects a word, phrase, symbol and/or design etc.
- used with a product or service on the market
- Trademark rights may continue indefinitely, as long as the mark is neither abandoned by the trademark owner, or loses its significance in the marketplace as a trademark by becoming a generic term

## ● Copyright (©)

- protects the original way an idea is expressed, not the idea itself
- includes artistic, literary, dramatic, musical works or software
- presented in a tangible medium such as a book, photograph, film or data carrier
- is given to works to prevent unauthorized copying
- the general rule is that the copyright lasts for the author's lifetime plus 70 years after the author's death

# Borderline

## ● Patent

- protects a new and useful idea  
which includes a process and/or product
- is granted by the government
- provides an inventor with exclusive rights to make, use and sell a patented invention
- has a fixed term, usually 20 years

# Personal Rights

公開權

- often referred to as **Right of Publicity**
- less well known but fast developing subset of intellectual property laws
  - the right to personal attributes like your name and income
  - and to be protected from exploitation of these personal attributes by others for gain
  - mainly covered by data protection laws
  - but also by the legally acquired right to use a personal name as or in an Internet address such as a domain name

屬性

# Torts

© RA Spei



# Definition

- Broadly expressed:
  - A tort is a **civil wrong**,  
e.g., a car accident
  - that is done by one person to another and entitles the victim to claim **damages**
  - and for which the court will provide a remedy in the form of an action for damages.
- Consequence: liability for harm caused by a breach of duty
- Torts constitute a large subject area in litigation, in which a victim generally **claims money** from a person or corporation who harmed the victim.

訴訟

# Definition

- It might be possible to define a tort by enumerating the things that it is not. A tort is not
  - a crime
  - a breach of contract
  - necessarily concerned with property rights or problems of government

列舉

# Major areas

The easiest way to get a sense of torts is to list the major areas of tort litigation:

- personal injury (e.g., automobile accident, slip and fall, dog bite)
- medical malpractice
- products liability (e.g., defect in either manufacturing or design of product, failure to warn)
- wrongful death: survivor recovers economic value of remainder of decedent's life
- patent infringement; copyright infringement
- defamation (i.e., libel or slander) 謗謗
- intentional wrongs against a person: e.g., assault, battery, false imprisonment, intentional infliction of emotional distress, etc.

# Major areas

侵奪

- wrongs involving tangible property: conversion, "trespass to chattels" (N.B., same occurrence could also result in criminal prosecution for theft)  
起訴
- wrongs involving real property: nuisance against nearby landowner, trespass on land
- wrongs against a business, such as "unfair competition" or trademark infringement
- dignitary harms against a person, such as
  - invasion of privacy: intrusion on seclusion, unreasonable publicity given to private life, publicity placing person in false light
  - civil rights violations

**Please notice:** some of these torts, e.g., assault, battery, libel etc., can also be crimes

# Four elements

There are four elements to a tort which must be fulfilled to meet the requirements to claim damages:

- **Duty**

which is owed to the plaintiff by the defendant

- **Breach**

of the Duty

- **Causation**

因果關係

The defendant caused the harm to occur.

- **Injury/Damage:** The plaintiff suffers harm

# Fault

- The central idea in most torts is the **concept of fault**. The defendant's fault means the reason why the defendant is to blame for something which is wrong. In other words, fault is the breach of the duty mentioned above.
- In most torts the defendant's actions are negligent, but torts also cover wrongs where the defendant intended to harm the victim. There are two different possibilities to breach a duty:
  - **Negligence**  
lack of proper care; not doing a duty with the result that a person or property is harmed
  - **Intention**  
wanting or planning to do something; knowing that something will happen as the result of an action

# Strict liability

- The concept of fault applies to the most, but not to all torts. There are a few, but important, torts in which liability is imposed without finding fault with the defendant's conduct.
- This so-called **strict liability** is defined as: total liability for an offence which has been committed, whether you are at fault or not
- strict liability torts include:
  - Product liability
  - Keeping of wild or ferocious animals
  - Abnormally dangerous activities (e.g., storing, transporting, or using explosives in a populated area)

# Duty

- **Duty of care** = duty which everyone has in order not to act negligently
- In order to hold a defendant liable for negligence, the defendant must owe a duty of reasonable care to the plaintiff. Two issues arise in terms of duty of reasonable care:
  - Foreseeability
  - Standard of Care
- **Foreseeability**
  - Definition: ability to imagine correctly what is going to happen in the future
  - the breach of duty must be foreseeable
  - there is a general duty to prevent foreseeable injury to a victim
  - Test for foreseeability: A breach of duty is foreseeable if the plaintiff was in the zone of danger created by the defendant.

# Duty

- **Standard of Care**

- Normal quality of care
- the standard is set by what a “reasonable person of ordinary prudence” would have done in the same or similar circumstances (the standard of care that the defendant must exercise towards the plaintiff is that of a reasonable, ordinary and prudent person)  
    行使  
    謹慎

- **Factors to consider** that may or may not modify the circumstances include:

- **Physical characteristics**  
A person who has great physical strength will be judged according to an ordinary person of great physical strength.  
**Likewise**, a weak person will be judged according to a standard of what an ordinary weak person would do.
- **Mental ability**  
Everyone is judged as being of average mental ability and no accommodation is made for being extraordinarily intelligent.

# Duty

- **Knowledge**

same knowledge as an average member of community (group of people living or working in the same place)

It is presumed (it is supposed to be correct) to have common knowledge about known dangers in the community.

- **Professionals**

Professionals are judged according to other professionals in the same community.

- **Children**

Children are judged according to children of same age, education, intelligence and experience.

# Breach of the Duty

為了追究過失責任，原告必須低於標準。

- In order to be held liable for negligence the action by plaintiff must **fall below standard of care.**
- The primary issue is where to draw the line as to the standard of care. Factors to consider in drawing the line are:
  - **Custom in the community**  
違反法規
  - **Violation of statute (negligence per se)**  
Violating a statute creates a rebuttable presumption of negligence. Defendant is presumed to be liable for negligence if he breaks a law and cause harm to the plaintiff but he can rebut that presumption by showing that there was a custom to break the law.

# Breach of the Duty

- **"The thing speaks for itself."** (Latin: Res Ipsa Loquitur)  
This doctrine draws an inference of liability because the thing that caused the breach and injury (e.g., the results of an accident) was in the exclusive control of the defendant. In other words, it couldn't be anyone but the defendant who caused the harm.

# Causation

- The defendant caused the harm to occur. There are two types of causation:
  - Actual Causation
  - Proximate Causation
- **Actual Causation:** Did the defendant actually cause the harm to occur? There are two different tests you can use.
  - **Theory of Adequate Causation:** In most cases there is a **chain of causation** with several elements between the defendant's actions and the injury
  - **“But for” Test:** Ask yourself the question: “But for the defendant's actions, would the plaintiff's harm have occurred?”  
“But for” means: **Imagine the plaintiff's current situation without the defendant's actions and ask: “Is the plaintiff's harm nevertheless present?”**

# Causation

- **Substantial Factor Test:** If several causes could have caused the harm, then any cause that was a substantial factor is held to be liable.
- **Proximate Causation:** This sometimes difficult to grasp concept is actually very simple on most situations.  
**proximate** means: imminent, to be closely connected  
Be sure to check accurately but if in doubt, use the following generally accepted test:
  - **Foreseeability Test:** If harm is unforeseeable, then defendant is not held liable by reason that there is no proximate causation.

# Causation

- **Proximate cause – case study:**

Bob is a railroad guard. He pushes a man who thereupon drops his package. The package contains hidden fireworks that explode and cause injuries to plaintiff.

Is Bob liable for damages?

# Causation

This case illustrates that harm was not foreseeable by guard as to plaintiff so no proximate cause was set.

# Damages

- The plaintiff must suffer some harm. Two issues arise:
  - Was there actual harm?
  - Did plaintiff attempt to mitigate the harm?
- **Actual harm or injury:** Can be shown by the following:
  - Personal injury
  - Property damage 財產損失  
Plaintiff gets cost of repair or fair market value
  - Punitive Damages  
Extra damages beyond actual damage is available if the defendant's behavior was wanton and willful, reckless or malicious  
        肆意而任性

# Damages

- **Duty to mitigate or minimise loss:**

Plaintiff must not act in a manner that makes damages worse – e.g., not going to the doctor to get well.

**Defendant is not liable for damages where plaintiff did not mitigate.**

# Defenses to Negligence

- Even if a defendant is found liable for negligence, he can argue to be relieved of or share liability because of a valid defense. Defenses include:
  - Contributory negligence** 共同過失  
In these circumstance, the plaintiff contributed something to the negligent act. The defendant must prove that the plaintiff was negligent using the negligence test above.
  - Mutual fault** 相互過失  
If both parties are negligent, then the one with the last clear chance to prevent the damage is liable; otherwise both, plaintiff and defendant, share liability.

# Defenses to Negligence

- **Assumption of Risk**

If plaintiff knew the risk and voluntarily assumed the risk by engaging in the behaviour then the plaintiff will be denied recovery.

- **Emergency Doctrine**

Allows defendant to lower standard of care because an emergency required to act rashly in order to avoid a greater harm from occurring.

- **Custom**

Custom can be used to show that behaviour was in line with the behaviour of everyone else, thus resulting in no breach.

E.g., everyone drives at 80 km/h on that particular stretch of the highway even though it is requested to drive at 60 km/h.

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# Product Liability

# Product Liability

- **Definition:** Product liability is the liability of the maker of a product for negligence in the design or production of the product.
- Product liability cases are usually divided into three major groups:
  - cases involving **manufacturing or construction defects**
  - cases involving **design defects**
  - and cases involving **failure to warn** of an inherent danger.

# Manufacturing defect

- A manufacturing defect is a defect that affects **only one** or a few products of a whole product line.
- The exploding bottle cases, e.g., involve manufacturing defects. Only a few of all the bottles produced leave the assembly line with unnoticed defects, either because of a flaw in the glass or because the bottle has been too highly charged with carbonation.
- Generally it can be said that courts will always impose a **strict liability standard** in construction defect cases.

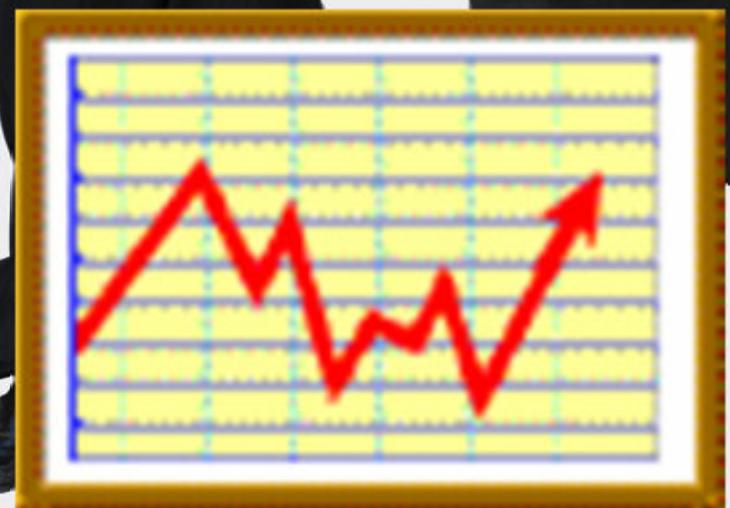
# Design defect

- A design defect is a defect in **all of the products** of a product line. It does not arise because a worker failed to be careful constructing the product as it passed through the assembly line, but rather because the way the product was made in general was defective.
- A case, e.g., involving a home workshop machine that had inadequate screws to hold the wood it was supposed to hold while the machine was in operation. Here all of these machines were essentially the same and all of them had inadequate screws for doing the job they were supposed to do.
- Design defect cases are more complex than construction defect cases, because the imposition of **strict product liability depends on** a number of factors.

# Failure to warn

- A failure to warn is a failure to **give consumers notice**
  - that a product can be dangerous if **incorrectly used**,
  - or that a product is dangerous but cannot be made any safer in light of the current **state of the art**.
- A failure to warn case may occur, e.g., in the pharmaceutical industry where the inherent danger in taking a medication was unknown to the manufacturer at the time the drug was marketed.  
製藥業
- Failure to warn cases present problems similar to design defect cases, because the failure to warn of a danger inherent to a product is often analyzed as being the same as a defect in the design of the product.
- Accordingly, the failure to warn cases often present interesting issues of **causation** and **burden of proof**.

# Company Law



# Types of business

- **individual proprietorship or sole trader**
  - the simplest form of business
  - e.g. a shop (in the US a store) or a taxi owned by a single person
- **partnership**
  - if several individuals wish to go into business together they can form a partnership;
  - partners generally contribute equal capital, have equal authority in management, and share profits or losses.
  - in many countries, **lawyers**, **doctors** and **accountants** are **not** allowed to form companies, but only partnerships with unlimited liability for debts - which should make them act responsibly.

# Types of business

- a partnership is not a legal entity separate from its owners; like sole traders, partners have **unlimited liability**: in the case of bankruptcy a partner with a personal fortune can lose it all

## ● **limited companies**

- consequently, the majority of businesses are limited companies (in the US = **corporations**) in which investors are only liable for the amount of capital they have invested.
- If a limited company goes bankrupt, its assets are sold (liquidated) to pay the debts; if the assets do not cover the debts, they **remain unpaid**, i.e. creditors do not get their money back.

# Types of business

- **private limited companies**

- In Europe, most smaller enterprises are private limited companies which **cannot offer shares** to the public;
- their owners can only raise capital from friends or from banks and other venture capital institutions
- in Germany: **GmbH** or **UG**

- **public limited company**

- A successful, growing business can apply to the Stock Exchange to become a public limited company;
- if accepted, it can publish a prospectus and offer its shares for sale on the open stock market
- In America, there is no legal distinction between private and public limited corporations, but the equivalent of a public limited company is one registered by the Securities and Exchange Commission.
- In Germany: **AG**

# Founding a company

- **Memorandum of Association**

- Founders of companies have to write a Memorandum of Association (in the US, a **Certificate of Incorporation**),
- which states the company's name, purpose, registered office or premises and authorised share capital

- **Premises**

- the technical term for the place in which a company does its business: an office, a shop, a workshop, a factory, a warehouse, etc.

- **Authorised share capital**

- means the maximum amount of a particular type of share the company can issue

# Founding a company

## ● Articles of Association

- Founders also write Articles of Association (US = Bylaws), which set out the rights and duties of directors and different classes of shareholders.
- Companies' memoranda and articles of association, and annual financial statements are sent to the **registrar of companies**, where they may be inspected by the public.
- a company that files its financial statements late is almost certainly in trouble

## ● “off-the-shelf” company

- founders can buy a ready-made “off-the-shelf” company from an agent, that is, a company formed and held specifically for later resale;
- the buyer then changes the name, memorandum, and so on

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CISG



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# Definition

- CISG = United Nations Convention on Contracts for the International Sale of Goods
- also known as the Vienna Convention, because it was signed in Vienna on 11 April 1980
- nowadays the CISG is already in force in 89 member states worldwide, but the number is still growing
- these include Germany and most European states, the USA, Brazil, Japan, Australia, China, Russia etc.
- so most of the important industrial nations are Contracting States; most Western countries are now signatories to the CISG
- important Non-Contracting-State: Great Britain, India, Pakistan

# Introduction

- The CISG is an **international set of rules** designed to provide clarity to most international sales transactions involving the **sale of goods**.
- What is the significance of the U.N. Convention on Contracts for the International Sale of Goods (CISG)?  
The CISG can be both a **discretionary** and **mandatory** set of rules:
  - It is discretionary when **both parties agree** to be bound by its rules;
  - it has mandatory application when the parties do not choose to use it but become bound to it by virtue of its **automatic application**.

# Introduction

- Please note the two possibilities of application:
  - both parties agree
  - automatic application
- As a result of the mandatory application of the CISG, **most** international sale of goods contracts with parties in western countries will be subject to the CISG, unless **specifically excluded** in accordance with the CISG's terms.

# Introductory case - typical situation

- Bob has just founded the company Earth Packs GmbH in Stuttgart to produce biodegradable packaging material. Bob needs high quality raw material. After some search on the internet he found a suitable company in Australia. During his Economic Studies Bob heard some legal lectures, so he is more or less informed about the German Contract Law, but has, nevertheless, great concerns regarding the contract conclusion because he knows nothing about the Australian Contract Law. During his primary negotiations with the Australian Sales Manager he realises that his counterpart has the same concerns.
- Both parties are afraid of accepting the foreign contract law because they are not informed about it. They need a compromise concerning the contract conclusion.
- the best solution for both parties is the CISG

# Sphere of application

- the CISG applies to
  - **sale of goods contracts**
  - between parties whose places of business are in **different states** (acc. Art.1 Para.1 CISG)
- Neither the **nationality** of the parties nor the **civil or commercial** character of the parties or of the contract is to be taken into consideration in determining the application of this Convention (acc. Art.1 Para.3 CISG).
- This means that the CISG applies **automatically** where at least one of the contracting parties is connected with one of the Contracting States of the CISG.

# Sphere of application

- Contracts for the **supply of goods** which have to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- This Convention does **not** apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists **in the supply of labour or other services**. (acc. Art.3 CISG).  
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# Types of contract

- **contract of sale** = between seller and buyer, seller does not manufacture the goods
- **contract of labour** (employment) = between employer and employee
- **contract of work and labour** = the goods are manufactured acc. to the special wishes of the customer, the deptor ows succes
- **contract of service** = the deptor only ows effort, to bother being successful, not the succes
- **contract of supply** (work and material) = supplier sell and manufacture the goods at the same time
- **SLA** = Service Level Agreement, it's necessary to define time of reaction, time to solve the problem, time of support, responsible persons, escalation procedure

升級程序

# Case study

- Modification of the introductory case:  
The Australian company, with its headquarters in Melbourne, has also a branch in Germany which concluded the contract with Bob. Does this fact change the situation?

# Case study

- Yes it does, because now both parties have bases in the same state, namely in Germany, so that in this case their places of business are not in different states as defined by the CISG.
- The nationality of the company or the place of the headquarters doesn't matter
- Consequence: the CISG does not apply to the contract

# Sphere of application

- furthermore the application of the CISG requires that...
  - the States are both **Contracting States**  
or
  - the rules of **Private International Law** lead to the application of the law of a Contracting State (acc. Art.1 Para.1 CISG)  
or
  - the parties to a contract **agree** upon the application of the law of a Contracting State  
or
  - the parties to a contract **agree** upon the CISG

# Sphere of application

## Please note!

- The application of the national law of a Contracting State
- as a result of
  - **the choice of law** by the parties, or
  - **the rules of Private International Law**
- leads automatically to the application of the CISG, because it has become a component of the national legal system of the Contracting State.

# Sphere of application

- If only **one party** is based in a Contracting State to the CISG, then the following situations need to be distinguished:

(acc. Art. 1 Para. 1 lit. b CISG together with Art. 4 Para. 1 and 2 of the Convention on the Law Applicable to Contractual Obligations, also known as "Rome Convention" of 19 June 1980)

- the CISG is applicable if the **seller** is based in a Contracting State
- the CISG is not applicable if the seller is based in a Non-Contracting State, e.g. in Great Britain, India, Pakistan
  - in spite of the buyer's base in a Contracting State
  - in this instance, as long as the parties have not made a choice of law, the law at the **habitual residence** of the seller is applicable → the contract gives no answer to the question whether the CISG applies, so the national law of the Non-Contracting State rules the contractual relationship

# Exclusion of application

## ● Caution! Common mistake!

The agreement that the national civil law of one of the parties (which is also a Contracting State) is applicable to the contract leads to the application of the CISG, although in most of these cases the parties intend to agree on exactly the opposite, namely the exclusion of the CISG.

## ● E.g., the following contract clauses:

- “German Civil Law applies to the contract”

or

- “The parties agree upon the application of German Civil Law” lead to the application of the CISG, because it was transferred into the German Law and is now part of it

# Exclusion of application

- To preclude the CISG the parties have to agree upon the national law to the exclusion of the UN Convention
  - E.g., the following contract clauses:
    - “German Civil Law applies to the contract excluding the UN Convention on the Sale of Goods“  
or
    - “The parties agree upon the application of German Civil Law to the exclusion of the UN Convention on the Sale of Goods“
- The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions. (acc. Art.6 CISG).
  - an appropriate agreement can be made expressly or impliedly by the parties

# Sphere of non-application

The CISG does **not apply** to sales...

- of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;  
→ that means: Purchases which are regarded as **consumer purchases** are excluded
- by auction; 拍賣
- on execution or otherwise by authority of law; 在執行或法律授權的情況
- of stocks, shares, investment securities, negotiable instruments or money; 股票，股份，投資證券，可轉讓工具或金錢
- of ships, vessels, hovercraft or aircraft;
- of electricity (acc. Art.2 CISG).

# Sphere of non-application

- The Contracting States may set limiting conditions concerning the application of the CISG.
- A Contracting State may declare at the time of **signature, ratification**, etc., that it will not be bound by Part II (resp. Art.14 to Art.24 CISG) of this Convention or that it will not be bound by Part III (resp. Art.25 to Art.88 CISG) of this Convention (acc. Art.92 Par.1 CISG).
- A Contracting State which set limiting conditions in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is insofar not to be considered as a Contracting State (acc. Art.92 Par.2 CISG).

# Summary - Sphere of application

From the viewpoint of a Contracting State, e.g. Germany,

- the CISG applies to...
  - all export business transactions
  - all imports from any other Contracting State
  - all delivery of goods contracts, if the contracting parties
    - have their habitual branch in different states, and
    - have adopted the national law of a Contracting State
- the CISG does not apply to...
  - all purely domestic business transactions
  - all contracts which exclude the CISG effectively
  - all imports from any Non-Contracting State (e.g., Great Britain, India, Pakistan), if the contract offers no comment on the application of the CISG

# Contents of regulation

If the preconditions, especially the discussed requirements of application, are met, the CISG determines terms concerning the following contents:

- **Formation of the contract**
- **Contractual obligations**
  - of the seller
  - of the buyer
- **Breach of the contract/ non-fulfillment of the obligations**
  - by the seller
  - by the buyer
- **Legal consequences**
  - Avoidance
  - Price reduction
  - Damages

# Contents of Regulation

## Please note!

- The CISG covers neither any point at issue nor the complete contract law. **Its contents of regulation are limited to**
  - **sales contracts, and**
  - **the main issues of contract law**
- If a point at issue isn't determined by the CISG, the contracting parties have to revert to the terms of further conventions, Private International Law and national contract law.
- In other words: the CISG is not an exhaustive regulation

詳細,全面的

# Formation of the contract

- According to the CISG a contract is traditionally concluded by an offer and a corresponding acceptance of such an offer.
- A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention (acc. Art.23 CISG).
- As we already know: a valid contract requires..
  - an offer by the offeror
  - an acceptance by the offeree
  - the mutual communication of the offer and the acceptance
- A contract may be modified or terminated by the mere agreement of the parties (acc. Art.29 Para.1 CISG).

# Offer

- A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance (acc. Art.14 Para.1 CISG).
- Requirements related by the **offer**:
  - sufficiently definite
  - intention to be bound
- A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the **quantity** and the **price** (acc. Art.14 Para.1 CISG).

# Offer

- A proposal other than one addressed to one or more specific persons is to be considered merely as an **invitation to make offers**, unless the contrary is clearly indicated by the person making the proposal (acc. Art.14 Para.2 CISG).
  - the term is equivalent to what we have already known as “**invitation to treat**“ (Latin: “*invitatio ad offerendum*“)
  - an offer must be distinguished from an „invitation to treat“, for example the display of a shop in the display window
- An offer becomes effective when it **reaches** the offeree (acc. Art.15 Para.1 CISG).
  - the term is equivalent to what we have already known as “communication“

# Offer

不可撤銷

撤銷

- An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer (acc. Art.15 Para.2 CISG).  
→ in this case the offer has not become operative yet, because **it has not been communicated to the offeree yet, so it could be withdrawn in any circumstances**
- Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance (acc. Art.16 Para.1 CISG).  
→ The situation in this case differs. The offer is already effective, because it has already been communicated to the offeree, so additional requirements are determined for revocation.  
**→the offer can be revoked only if the acceptance has not been dispatched yet**

# Offer

- However, **an offer cannot be revoked** (acc. Art. 16 Para.2 CISG):
  - if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer
- An offer, even if it is irrevocable, is terminated when a rejection reaches the offerer (acc. Art. 17 CISG).

# Acceptance

- A statement which is made expressly or by conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not automatically lead to acceptance (acc. Art.18 Para.1 CISG).  
同意
- Please note!  

If the CISG does not apply, the situation may be different according to the national civil law. In Germany, e.g., silence is considered to be an acceptance in certain circumstances. If a contract was at first concluded orally, e.g. during a trade fair, the main points of the contract are usually defined and emphasized after the fair in a written letter of confirmation. If the recipient does not reply to the sender, the silence will be considered as acceptance, provided that both parties are traders. As a result the decisive issues are determined, even if the written confirmation differs from the original oral agreement.

# Acceptance

- An acceptance of an offer becomes effective at the moment the assent **reaches** the offeror.
- An acceptance is not effective if the assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a **reasonable time**.
- An oral offer must be accepted immediately unless the circumstances indicate otherwise (acc. Art.18 Para.2 CISG).
- A reply to an offer which purports to be an acceptance but contains **additions, limitations** or other **modifications** is a rejection of the offer and constitutes a counteroffer (acc. Art.19 Para.1 CISG).

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# Acceptance

意味著

- However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do **not materially alter** the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, **objects** orally or in written form to the discrepancy.
- If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance (acc. Art.19 Para.2 CISG).
- Problem: What kind of discrepancies do alter the offer materially?

# Acceptance

- Additional or different terms relating to the...
  - price, payment, quality and quantity of the goods
  - place and time of delivery,
  - extent of one party's liability to the other, or
  - the settlement of disputes 解決争端are considered to alter the terms of the offer materially  
(acc. Art.19 Para.3 CISG).
- A late acceptance is nevertheless effective as an acceptance if, without delay, the offeror orally or in written form informs the offeree to that effect (acc. Art.21 Para.1 CISG).

# Acceptance

- An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective (acc. Art.22 CISG).

# Communication

- An offer, an acceptance or any other indication of intention becomes effective at the moment the indication of intention **reaches** the addressee (acc. Art.15 Para.1; Art.18 Para.2 CISG).
- So it is necessary to determine, when the indication of intention reaches the addressee.
- An indication of intention “reaches“ the addressee...
  - when it is made **orally**: immediately
  - when it is made in **written form**: with **delivery** to his place of business, mailing address or, if he does not have a place of business or mailing address, to his habitual residence (acc. Art.24 CISG).

# Communication

- If any notice, request or other communication is given or made by means appropriate in the circumstances, a delay or **error in the transmission** of the communication or its failure to arrive does not deprive the sending party of the right to rely on the communication (unless otherwise expressly provided in the CISG).
- In other words: **the sending party does not bear the risk of error in transmission**

# Obligations of the seller

- The seller must as required by the contract and this Convention (acc. Art.30 CISG).....
  - deliver the goods,
  - hand over any documents relating to them, and
  - transfer the property in the goods.
- **Place of delivery** (acc. Art.31 CISG): If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
  - if the contract of sale involves carriage of the goods, in handing the goods over to the first carrier for transmission to the buyer;
  - in other cases, in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

# Carriage of the goods

- If the seller is bound to arrange for carriage of the goods, he must
  - make such contracts as are necessary for carriage to the place fixed
  - by means of transportation appropriate in the circumstances
  - and according to the usual terms for such transportation.
- If the seller is not bound to effect **insurance** in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance (acc. Art.32 CISG).

# Date of delivery

The seller must deliver the goods:

- if a **date** is fixed by or determinable from the contract, on that date;
- if a **period of time** is fixed by or determinable from the contract, at any time within that period **unless circumstances indicate that the buyer is to choose a date**; or
- in any other case, within a **reasonable time** after the conclusion of the contract (acc. Art.33 CISG).

# Contractual conformity of the goods

- The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- Except where the parties have agreed otherwise, the goods are conform with the contract if they...
  - are fit for the purposes for which goods of the same description would ordinarily be used;
  - are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, (except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement)

# Contractual conformity of the goods

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- possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

- The seller is not liable for any lack of conformity of the goods if at the time of the conclusion of the contract the **buyer knew** or could not have been unaware of such lack of conformity (acc. Art.35 CISG).

# Duty of examination

- The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination (acc. Art.38 CISG).

# Lack of conformity – Time limitation

- The buyer loses the right to rely on a lack of conformity of the goods if he does not **give notice** to the seller specifying the nature of the lack of conformity **within a reasonable time** after he has discovered it or ought to have discovered it.
  - in this case **the time-limit (reasonable time)** begins to run after the **discovery** of the lack
- In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of **two years** from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee (acc. Art.39 CISG).
  - in this case **the time-limit (two years)** begins to run after the **handing-over (delivery)**
  - exception: if the period of guarantee is longer than two years

# Bad faith

- The seller is not entitled to rely on the provisions above, if the lack of conformity relates to facts of which he **knew** or could not have been unaware and which he did not disclose to the buyer (acc. Art.40 CISG).
  - the seller is dishonest face to face with the buyer, or **in bad faith**, because he doesn't disclose the lack of conformity
  - for this reason the seller loses the right to rely on time limitation, so he is not entitled to reject the buyer's claim for contractual conformity
  - the buyer doesn't lose the right to rely on a lack of conformity, nor after the expiry of the time-limit (period of two years)

# Contents of Regulation

The CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is **not** concerned with:

- the **validity** of the contract or of any of its provisions or of any usage;
- the effect which the contract may have on the **property** in the goods sold (acc. Art.4 CISG).
  - Although the seller is obliged to transfer the ownership of goods to the buyer (acc. Art.30 CISG), the CISG is otherwise silent to the matter.
  - The proprietary aspects of the sale contract are expressly excluded from the sphere of application of the CISG.

# Remedies of the buyer

- Remedies for breach of contract by the seller (acc. Art.45 CISG).
- If the seller fails to perform any of his obligations under the contract or the CISG, the buyer may...
  - fix an **additional period of time**
  - require delivery of **substitute goods**
  - require the seller to remedy the lack of conformity **by repair**
  - claim **damages** (for delay)
  - claim **price reduction**
  - claim **avoidance** of the contract

# Remedies of the buyer

- 被剝奪  
The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.  
→ the buyer may require substitution or repair at first, thereby **he doesn't lose the right to require compensation**

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# Performance, fulfillment

- The buyer may require **performance** of his obligations by the seller unless the buyer has resorted to a remedy which is inconsistent with this requirement (acc. Art.46 Para.1 CISG).
  - if, e.g., the buyer claims and sues for damages he cannot require fulfillment of the contract at the same time; in other words: he cannot require double performance
  - according to several National civil law systems, e.g. the Englisch Civil Law, entitlement to require performance/fulfillment is limited to particular exceptions, e.g. the delivery of goods of “**commercial uniqueness**”

# Performance, fulfillment

- If, in accordance with the provisions of the CISG, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the CISG (acc. Art.28 CISG).

# Delivery of substitute goods

- If the goods do not conform with the contract, the buyer may require “**delivery of substitute goods**“ only if the lack of conformity constitutes a **fundamental breach** of contract and a request for substitute goods is made
  - in conjunction with the notice of the lack of conformity given
    - within a reasonable time
    - within a period of two years
  - or within a reasonable time thereafter (acc. Art.46 Para.2 CISG).

# Delivery of substitute goods

- Please remember!  
The buyer loses the right to rely on a lack of conformity of the goods if he does not **give notice** to the seller within a reasonable time or within a period of two years from the date on which the goods were actually handed over to the buyer (acc. Art.39 CISG).
- The main question is: What is a **fundamental breach** of contract?
- Examples: the delivered goods are by all means not fit
  - for the purposes for which goods of the same description would ordinarily be used
  - for the particular purpose expressly made known to the seller at the time of the conclusion of the contract

# Repair

- If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by **repair**,<sup>遵守合同</sup> unless this is unreasonable having regard to all the circumstances.
- **Please note!** The requirements alter
  - repair = lack of conformity with the contract
  - delivery of substitute goods = fundamental breach of contract
- A request for repair must be made
  - either in conjunction with the notice of the lack of conformity given
    - within a reasonable time
    - within a period of two years
  - or within a reasonable time thereafter (acc. Art.46 Para.3 CISG).

# Damages

- Damages for breach of contract by one party consist of a sum **equal to the loss**, including loss of profit, suffered by the other party as a consequence of the breach.
- Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract (acc. Art.74 CISG).

# Additional time-limit

- The buyer may fix an **additional period of time** of reasonable length for performance by the seller of his obligations.
- Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, **resort to any remedy** for breach of contract.
- However, the buyer is not **deprived** thereby of any right he may have to claim **damages for delay in performance** (acc. Art.47 CISG).

# Price reduction

- If the goods do not conform with the contract and whether or not the price has already been paid,
  - the buyer may **reduce the price**
  - in the same **proportion** as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.
- However, if the seller remedies any failure to perform his obligations  
or if the buyer refuses to accept performance by the seller,  
the buyer may not reduce the price (acc. Art.50 CISG).

# Avoidance of the contract

- The **buyer may declare the contract avoided:**
  - if the failure by the seller to perform any of his obligations under the contract or the CISG amounts to a **fundamental breach of contract**;
  - or in case of **non-delivery**,
    - if the seller does not deliver the goods within the additional period of time fixed by the buyer
    - or declares that he will not deliver within the period so fixed (acc. Art.49 Para.1 CISG).
- However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided,  
unless he does so:

# Avoidance of the contract

- in respect of **late delivery**, within a reasonable time after he has become aware that delivery has been made;
- in respect of any breach **other than late delivery**, within a reasonable time:
  - after he knew or ought to have known of the breach;
  - after the expiration of any additional period of time fixed by the buyer, or after the seller has declared that he will not perform his obligations within such an additional period;
  - or after the expiration of any additional period of time indicated by the seller, or after the buyer has declared that he will not accept performance (acc. Art.49 Para.2 CISG).

# Obligations of the buyer

- The buyer must ....
  - **pay the price** for the goods
  - and **take delivery** of them

as required by the contract and this Convention (acc. Art.53 CISG).
- The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to **enable payment** to be made (acc. Art.54 CISG).

# Take delivery

- The buyer's obligation **to take delivery** consists:
    - in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery;
    - and in taking over the goods (acc. Art.60 CISG).
- the seller has to **make delivery**
- the buyer has to **take delivery**

# Fix the price

- Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to **the price generally charged** at the time of the conclusion of the contract for such goods sold **under comparable circumstances** in the trade concerned (acc. Art.55 CISG).

# Place of payment

- If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
  - at the **seller's place of business**;
  - or if the payment is to be made against the handing over of the goods or of documents, at the place where the **handing over** takes place.
- The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business **subsequent** to the conclusion of the contract (acc. Art.57 CISG).

# Time of payment

- If the buyer is not bound to pay the price at any other **specific time**, he must pay it when the seller **places** either the goods or documents controlling their disposition **at the buyer's disposal** in accordance with the contract and this Convention.
    - basic principle: handing over of the goods
    - exception: specific agreed time
- The seller may make such payment a **condition** for handing over the goods or documents.
- the seller may determine: handing over only against payment

# Time of payment

- If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer **except against payment** of the price.  
→ the seller may determine: cash on delivery
- The buyer is not bound to pay the price until he has had an **opportunity to examine** the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity (acc. Art.58 CISG).
- The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller (acc. Art.59 CISG).

# Incoterms

- In international trade prices are often quoted in "**Incoterms**" = **international commercial terms**
- What are Incoterms?  
Incoterms are **standardized shipping terms** defined by the International Chamber of Commerce, e.g., FOB, CIF, Ex-works, etc. **The terms divide the responsibility for the cost of carriage and liability for the safety of the goods between the buyer and seller.**
- Do Incoterms determine when title to goods passes?  
Contrary to general belief, Incoterms do **not** determine when title to goods passes. This is either determined by the applicable governing law, the CISG or specific provisions contained in the agreement.

# Incoterms

thirteen internationally accepted expressions for foreign trade contracts, established by the International Chamber of Commerce:

- EXW (Ex-works) means that the seller makes the goods available to the buyer at the seller's own premises, i.e. the buyer bears all the costs and risks involved in transporting the goods.
- Group F Incoterms, including FCA (Free carrier), mean that main carriage is not paid by the seller, who delivers the goods to a carrier named by the buyer.
- For example "FAS Rotterdam" means "free alongside ship, Rotterdam"; this price includes transport as far as the

# Incoterms

port; the buyer pays for loading onto the ship, shipping, and insurance.

- "FOB Liverpool" means "free on board, Liverpool"; in other words the seller's price also includes the cost of loading the goods onto the ship.
- Group C Incoterms are shipment contracts to a named destination port, with carriage paid by the seller;
- Group D terms are arrival terms, where the seller also bears all the risk needed to bring the goods to the country of destination.
- CFR is a price covering "cost and freight," but <sup>貨物</sup>not insurance, to a named port of destination

# Incoterms

- CIF is the same, except that the seller also arranges marine insurance.
- CPT means "carriage paid to" a destination, which could be Inland, with the risk of loss or damage transferred to the buyer,
- whereas CIP is “carriage and insurance paid”, where the seller is responsible for cargo insurance.
- DAF (plus named place) means "delivered at frontier": the seller delivers to the named point and place on the frontier, before customs clearance.
- DES means "delivered ex ship"; i.e. the seller makes the goods available to the buyer on board the ship,

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# Incoterms

- whereas DEQ means “delivered ex **quay** (duty paid)”: the seller makes the goods available to the buyer on the quay or wharf and pays the import duties.
- **DDP** is an inclusive price for goods "**delivered duty-paid** to the buyer's premises"; i.e. the seller pays all customs taxes and charges;
- **DDU**, “**delivered duty unpaid**,” is the same except that the buyer is responsible for importation charges.

# Passage of title

- Which issues hinge on the timing of **title passage** to the buyer in an international sale of goods transaction?
  - **Risk of loss:** Transfer of title affects the parties' rights in the event of total or partial loss and damage or destruction of the goods.
  - **Rejection of goods:** Once it has occurred, transfer of title may preclude the buyer from rejecting the goods despite valid complaints of quality, quantity or description.
  - **Payment for goods:** Once the buyer acquires title, the seller can sue the buyer for non-payment.
  - **Rights of action:** After acquiring title, the buyer can enforce its property rights against others through court action or otherwise.

# Dispute resolution

- What methods of dispute resolution are commonly used to resolve international business disputes?
  - **Litigation, arbitration and mediation** 訴訟，仲裁與調解
- Which dispute resolution method is currently the preferred method of dispute resolution in international business transactions?
  - Arbitration

# Dispute resolution

- What is arbitration?

**Arbitration** is a dispute resolution method in accord with which a panel of **one or three neutral third parties** (arbiters or arbitrators):

- presides over a hearing during which the disputants present their cases;
- and renders a ruling, which is **binding** on the parties.

- What is mediation?

**Mediation** is a dispute resolution method in accord with which

- **a neutral third party** (mediator)
- assists the disputants in **negotiating a settlement**,
- which is **not binding** on the parties.

# Procedural rules

- Which **procedural rules** are most commonly used in the arbitration of international business disputes? The procedural rules of the **International Chamber of Commerce** are currently the most commonly used procedural rules in the arbitration of international business disputes, but the International Commercial Rules of the American Arbitration Association are gaining in prominence.

# Data Protection - Privacy



# Data Protection Legislation

**Data protection** is concerned with

- the protection of your **right to privacy**,
- and your right to **exercise control** over how your personal information is processed and used.

**European legislation**

- **EU Directive 95/46/EC**
  - is commonly referred to as the "**Data Protection Directive**"
  - EU Directive 95/46/EC was dated and **substituted** by **GDPR**
- **EU Directive 2002/58/EC**
  - The European Directive on Privacy and Electronic Communications (or the „**E-Communications Directive**“) was published on 31 July 2002.
  - The Directive strengthens data protection rules across the whole telecommunications sector - including telephony, e-mails, internet use and SMS messaging

# Data Protection Legislation

- and will, for example, require companies to obtain positive "opt-in" consent before sending people unsolicited calls or e-mails.
- was supplemented by **EU Directive 2009/136/EG**, so called „**Cookie Directive**“, which requires express consent regarding cookies → confirmed by **European Court of Justice (ECJ)**, 01.10.2019 → requires consent for **Cookie Banner**

## ● EU Regulation 2016/679/EU

- **General Data Protection Regulation, GDPR**
- is effective and applicable **since 25th May 2018**
- **most important** Data Protection Legislation worldwide

## German legislation

### ● Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG)

- **effective since 25.05.18** → this Act serves to **complete the GDPR**

# GDPR – what is new ?

- as **Regulation** (different from a Directive) it does not require any enabling legislation to be transformed in national law
- Designation of the **Data Protection Officer (DPA)**, Art. 37 GDPR
  - processing is carried out by **public authority**
  - regular and systematic **monitoring** of data subjects on a large scale;
  - processing on a large scale of **special categories** of data acc. to Art. 9 GDPR or personal data relating to criminal convictions and offences, Art. 10 GDPR
  - new: **Group DPA**
- **Penalties:**
  - up to 4% of annual worldwide turnover or € 20 Million, whichever is the greater
  - worldwide turnover of the **whole Group** not the legal entity (!)
  - e.g. case of “Deutsche Wohnen” 14,5 Mio € because of missing erasure concept

# GDPR – what is new ?

- apply to both controllers and processors – therefore **Cloud Providers** are not excluded
- **Accountability**, Art. 5
- **Documentation Duties**, Art. 30
- **Order Data Processing Agreements**, Art. 28
- **Consent Concept** has to be reviewed, Art. 7
- **Right to forget, Erasure Concept**, Art. 17
- **Duty to notify** data subjects and Data Protection Authorities of a breach, Art. 33, 34
- stronger **Data Security Concept**, Art. 32
- **Privacy by Design**, Privacy by Default, Art. 25
- **Data Protection Impact Assessment**, Art. 35

# Terms and Definitions

- As with any legislation, certain terms used in the Data Protection Acts have a quite specific meaning. In the following therefore some important **Definitions**.
- Data protection:** also known as “**privacy**”, protecting information, such as records about private people, in a computer or network from being copied or used wrongly
- Personal data**
  - means any information relating to an identified or identifiable natural person ("data subject");
  - an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number (e.g. telephone number, IP address etc.) or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity
  - also IP addresses are considered as personal data, ECJ 19.10.2016

# Terms and Definitions

- **Processing of personal data** ("processing"): means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction  
→ in other words: **Processing** means the storage, modification, transfer, blocking and erasure of personal data.
- **Collection**: means the acquisition of data on the data subject
- **Personal data filing system** ("filing system"): means any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis

# Terms and Definitions

- **Controller:** means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law
- **Processor:** means a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller → **special contract necessary: Data Protection Agreement (DPA)** acc. to Art. 28 GDPR
- **Third party:** means any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data

# Terms and Definitions

- **Recipient:** means a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients  
    同意
- **Consent** (of the data subject): means any **freely** given specific and **informed** indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed
  - **Opt-in** is necessary
  - **Double-opt-in** process e.g. for newsletter consent
  - **Opt-out** is not sufficient, ECJ 01.10.2019

# Legal Basis for Data Processing

- **Requirements** of legal data processing: Processing may only be carried out where one of the following conditions has been satisfied
  - data subject has given his/her **consent**
  - processing is necessary for the performance of a **contract** with the data subject
  - processing is required under a **legal obligation**
  - processing is necessary to protect **vital interests** of the data subject or to carry out **public functions**
  - processing is necessary in order to pursue the **legitimate interests** of the business unless prejudicial to interests of data subject

# Basic principles

- **Admissibility of data collection, processing and use:** The collection, processing and use of personal data shall be admissible only if **permitted or prescribed by an Act** or any other legal provision or if the **data subject has consented**.
- **Data reduction and data economy:** Data processing systems are to be designed and selected in accordance with the aim of collecting, processing or using no personal data or **as little personal data as possible**. In particular, use is to be made of the possibilities for aliasing and rendering persons anonymous, in so far as this is possible and the effort involved is reasonable in relation to the desired level of protection.

# Basic principle: Proportionality

- The data processing, e.g., collection, storage, modification or transfer of personal data, shall be admissible in so far
  - as the means of data processing **can reach the purposes** of the data processing (**fit for the purpose, suitable**),
  - and as the data processing **is necessary** to safeguard justified interests of the controller of the filing system (**necessary, required**)
  - and there is no reason to assume that the data subject has an **overriding legitimate interest** in his data being excluded from processing or use (**appropriate, adequate**)

# Basic principle: Required purpose

- In connection with the collection of personal data,
  - the **purposes** for which the data are to be processed or used are to be stipulated in concrete terms (**required purpose of processing**).
  - Transfer or use for another purpose is not admissible.
- The processor has to ensure that data collected for different purposes can be processed separately.

# Data Security - tom

- Public and private bodies processing personal data shall take the **technical and organisational measures (tom)** necessary to ensure the implementation of the **data security** provisions of the Data Protection Acts
- e.g. acc. to **Art. 32 GDPR**, Security of processing
  - taking into account the **state of the art**, the **costs** of implementation and the **risks** for data subjects
  - **controller and the processor** shall implement **appropriate** technical and organisational measures including
    - the **Pseudonymisation** and **Encryption** of personal data;
    - **Confidentiality, Integrity, Availability** and **Resilience** of processing systems and services;
    - **restore the availability** in case of **incident**;
    - process for **regularly evaluating** the effectiveness of tom

# Data Security - tom

- Where personal data are processed or used automatically, the internal organisation of authorities or enterprises is to be arranged in such a way that it meets the specific requirements of data security. In particular, measures suited to the type of personal data or data categories to be protected shall be taken,
  - to prevent unauthorised persons from gaining access to data processing systems with which personal data are processed or used (**access control**)
  - to ensure that personal data cannot be read, copied, modified or removed without authorisation during electronic transmission or transport, and that it is possible to check and establish to which bodies the transfer of personal data by means of data transmission facilities is envisaged (**transmission control**)

# Data Security - tom

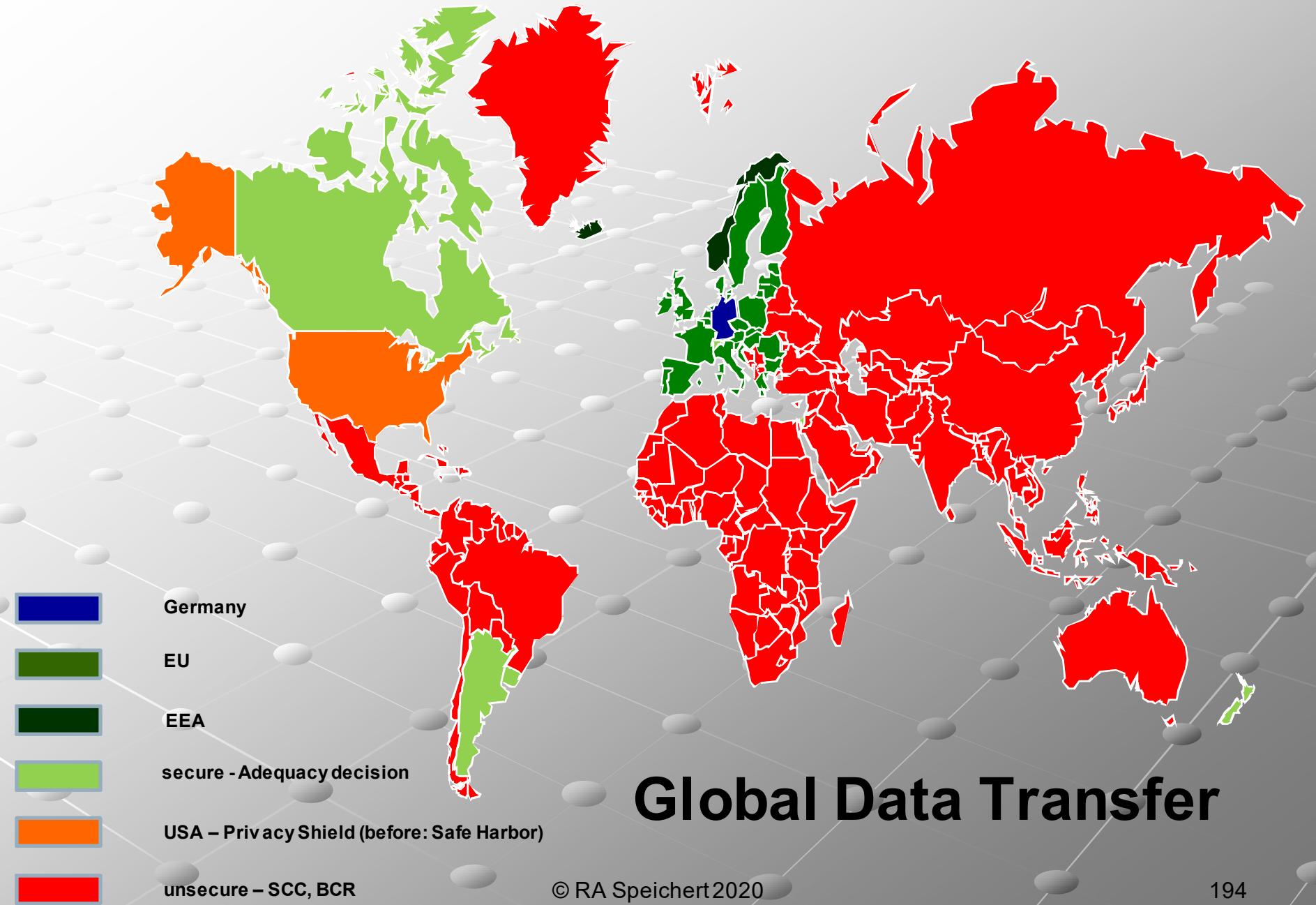
- to ensure that personal data are protected from accidental destruction or loss (**availability control**)
- to ensure that it is possible to check and establish whether and by whom personal data have been input into data processing systems, modified or removed (**input control**)

# Transfer of personal data abroad

- Transfer shall not be effected in so far as the data subject has a legitimate interest in excluding transfer, in particular if an **adequate level of data protection** is not guaranteed.
- The **adequacy of the afforded level** of protection shall be assessed in the light of all circumstances surrounding a data transfer operation or a category of data transfer operations; particular consideration shall be given to the nature of the data, the purpose, the duration of the proposed processing operation, the country of origin, the recipient country and the legal norms, professional rules and security measures which apply to the recipient.
- **adequate level of data protection** → free flow of personal data:
  - between Member States of the **EU** and **EEA**
  - **EU Adequacy decision:** States which are expressly listed by the EU:  
e.g. Canada, Switzerland, Argentina, Israel, Japan etc.

# Transfer of personal data abroad

- with respect to the protection of privacy, if the controller adduces **adequate safeguards**
- such safeguards may in particular result from **contractual clauses or binding regulations**
- the competent **Data Protection Authority** may authorise transfers of personal data
  - EU - USA: **Safe Harbour Principles** (recently judged inadmissible by ECJ), replaced by **Privacy Shield**
  - EU – Switzerland: **Privacy Shield**
  - EU-Standard Contractual Clauses (SCC)**
  - Individual Permission** by Data Protection Authority
  - Group of companies : **Binding Corporate Rules, BCR**



# Transfer of personal data abroad

- the transfer of personal data shall be admissible even if an adequate level of data protection is not guaranteed, in so far as
  - the data subject has given his consent
  - the transfer is necessary for the performance of a contract between the data subject and the controller
  - the transfer is necessary for the conclusion or performance of a contract which has been or is to be entered into in the interest of the data subject between the controller and a third party
  - the transfer is necessary on important public interest grounds, or for the establishment, exercise or defence of legal claims
  - the transfer is necessary in order to protect the vital interests of the data subject
  - the transfer is made from a register which is intended to provide information to the public

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# Internet Law

# Internet Law

- Act on the Utilization of Tele-Media-Services (Tele Media Act - Telemediengesetz TMG)
- Act on Digital Signature (Digital Signature Act - SigG)
- EU: E-Commerce Directive
  - Electronic Business Act
- Consumer Protection
  - EU Directive on Distance Sales
- other relevant, but not necessarily Internet-specific fields
  - IP and Unfair Competition (Domains, Mails, Web Contents)

# Liability in cyberspace

- Information provider
- Webhosting/ISP
- Access provider
- P2P und Usenet
- search engines
- hyperlinking and framing
- International law und jurisdiction of the courts

# Content Provider

- **Provider** in general
  - is a natural or legal person or association of persons
  - who make available either their own or third party services
  - or who provide access to the use of services
- for commercial offers, they shall indicate name & address as well as, in case of associations, name & address of representatives
- **Content** means useful (informative) data
- **Tele- and media services** mean all electronic information and communication services which are designed for the individual or general public use of combinable data such as characters, images or sounds and are based on transmission by means of telecommunication

# Liability for content

- European law: Important distinctions
  - own content
  - third party content
  - granting access to own or third party content
- generally responsible for their **own content**, which they make available for use
  - no privilege
- not responsible for any **third party content** which they make available for use unless
  - they have certain knowledge of such content, e.g., information obtained by police
  - and are technically able
  - and can reasonably be expected to block the use of such content
  - relative privilege
  - no obligation to check webhosted content

# Liability for content

- borderline: own content vs. third-party content
- information provider may adopt third party content
- consequences:
  - third-party content is assigned to the provider
  - provider is accountable for this content
  - becomes „own content“

# Access Providing

- not responsible for any third party content to which they only provide **access**
  - absolute privilege
- not responsible for the **automatic and temporary storage** of third party content (caching, proxy server) due to user request (resp. shall be considered as providing access)
  - absolute privilege

# Access Providing

- absolute privilege only if data are passed on blind
  - according to the model of mere transmission in telecommunications covers blind or neutral forwarding to other web site/content
  - if not censored, selected or in any other way influenced
    - e.g. e-mail provider
    - search engines
    - neutral lists of hyperlinks
    - IRC, Internet Relay Chat
- does not cover wilful forwarding
  - qualified links
  - inline/deep links
  - virtual mall

# Liability for content

- **Summary:** Responsibility and, as a consequence, liability for
  - own content: in general
  - third party content: only in case of certain knowledge
  - access only: not at all

# Liability for content

- However, the privileges are restricted to liability
  - as a consequence of responsibility
  - that refers to damages, due to blameworthiness (intent; negligence)
- Obligations to block the use of illegal content remain unaffected
  - if the provider obtains certain knowledge of such content and
  - if blocking is technically feasible and can reasonably be expected
  - no matter if hosted intentionally or negligently or innocently trusting

# Disclaimer

- e.g., forum discussion (virtual „domestic authority“)
- provider must not only dissociate himself seriously from the content
- but this must also follow objectively from the content itself, its selection, context and way of presentation on the web site
- disclaimer must not be used arbitrary or to circumvent responsibility
  - list of individually selected Hyperlinks
  - thematical or tendentious Hyperlinks
  - Hyperlinks replacing or completing own statement or making amendments
  - „qualified links“; „speaking links“
- Whether still third-party or adopted own contents to be judged from an objective view of the average user

# Infringements and international law

- applicable law
  - Criminal offence
    - law of the country where place of intentional dissemination of content lies
    - criteria: language, context, currency, recipients, implied target
  - Trademark and copyright infringements, **both**
    - place from where infringer acts
    - or place of intentional dissemination (see above)
  - Unfair competition
    - same as trademark/copyright
    - and, in addition where the conflict of commercial interests occurs

# Infringements and international law

- Jurisdiction of the courts:
  - follows in most cases the applicable national law

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# Domain Law

# Domains

- **Domain** = name of the website;  
a unique domain has a URL (uniform resource locator) in the format of http://www.sitename.com. It can also have a .org, .net, or other extension.
- the **mere use** of the domain may help to establish a particular business name or title, if the domain
  - is distinctive
  - has been used in good faith
  - does not interfere with a third party's prior right (trademark, name, etc.)→ in this case the prior domain right may overrule a trademark

# Domains

- **illegal use** of a domain...

- may be caused by an infringement of a name, a trademark, service mark or other intellectual property rights
- is considered as unfair competition

- **Infringement** requires:

- domain name is identical or confusingly similar to a name, trademark or service mark which the complainant owns
- domain name holder has no better rights or legitimate interests in respect of the domain name
- domain name has been registered and/or has been used in bad faith

# Domain Grabbing

- Bad faith = „Domain Grabbing“
- „Domain Grabbing“ means to grab a domain to sell it on to blackmail, hamper or harass the owner
- purpose of selling, renting, or otherwise transferring
- or to prevent the owner from reflecting the mark in a corresponding domain name
- or purpose of disrupting the business of a competitor
- or attempt to attract, for commercial gain, users to your web site or other online location,
  - by creating a likelihood of confusion with the mark
  - for sponsorship, affiliation or endorsement of your web site or location
  - or of a product or service on your web site or location.
- „**Canalisation**“: to monopolize a descriptive/generic name in order to concentrate users and hamper competitors, esp. by registering the name under a variety of Top Level Domains and/or in similar spellings (regarded as unfair competition)

# Domains

- Rights and legitimate interests of a potential domain grabber exist
  - before any notice of the dispute use of or preparations to use the domain name with a **bona fide** offering of goods or services
  - or if he is **commonly known** by the domain name, even without trademark or service mark rights
  - or in the case of legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue
- in Germany additional: no risk of confusion in the marketplace, misleading or dilution of an identical or very similar name or mark prior to the domain name

# E-Commerce

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# E-Commerce

- European Union: **E-Commerce Directive** deals with contractual obligations
- the Directive covers
  - „services in the information society“ = also known as “Information society services”
  - no matter if on payment or free
  - requirements regarding the role of national authorities
  - transparency requirements for web advertising
  - principles relating to contracting online
  - limitations to the liability of internet providers

# Information society service

- main idea: information society services shall not be subject to licensing or registration
- Information society services normally provide
  - for remuneration
  - or free of charge, e.g., funded by advertising or sponsorship revenue
  - at a distance, by means of telecommunication
  - and at the individual request of a recipient
  - business to business and business to consumer

# Information society service

- examples of sectors and activities covered:
  - online newspapers
  - online databases
  - online financial services
  - online professional services (such as lawyers, doctors, accountants and estate agents)
  - online entertainment services (such as video on demand)
  - online direct marketing and advertising (such as bulk mail) and services providing access to the Internet
- examples not covered:
  - Web TV/Web Broadcasting → not provided at individual request
  - private e-mail → not „commerce“

# Duty of information

- requirements of the e-Commerce Directive and transparency
- Information society services for business must in a clear and comprehensible way
  - distinguish between commercial and editorial content
  - provide permanently
    - name, address and legal representative of business
    - means of distance communication including e-mail
    - if appropriate, supervising authority (lawyers, doctors, etc.)
    - if appropriate, register and registration number
    - if appropriate, professional board (e.g., Stuttgart bar association for lawyers) and legal title of profession, professional codes of conduct and how accessible
    - if appropriate, ID-Number for provider

# Electronic contracts

- contracts can be concluded by a simple mouse click
- except in case of formal requirements
  - e.g., written; attested by a notary, etc.
  - online contracts are not in writing
  - breach of form (null and void)
- Germany: new type of form  
**= electronic form**
  - according to the technical and administrative standards of the Digital Signature Act
  - replaces/fulfills in most cases the legally required written form
  - contractual option to written form
  - establishes by law a refutable presumption for authenticity and accuracy of the electronic document

# Electronic contracts

- contracts require at least
  - the mutual communication
  - of an offer and an corresponding acceptance
- Online contracts (e-mail-correspondence; web-shop-forms) become effective...
  - offer by e-mail: with the acceptance per e-mail
  - offer by web shop:
    - usually not a legally binding offer by the web shop
    - „*invitatio ad offerendum*“: web shop invites customer to make an offer; shopkeeper can check stock or creditworthiness of client before he accepts
    - also in particular situations, such as online auctions
    - computerised/automated services (e.g., book or video on demand): offer under the condition „while stocks last“

# Burden of proof

- salesperson must prove
  - conclusion of the contract → acceptance correctly dispatched to client
  - terms and conditions
  - identity of the parties hereto
- no „prima facie“ evidence, no legal presumption, regarding the keeper of the IP address, internet access
  - IP-address allows only a traceback to a computer, not to a specific person
- no circumstantial evidence
  - even if registered as a client
  - personal data can be spied out
  - credit card number can be sniffed
  - e-mail address can be faked

# Burden of proof

- **Exceptions** if indisputable that a certain computer has been used
  - only if password protected account with previous **identity check**
  - computer is **under the control** of a person (parents) or legal body (employer)
    - accountability of parents/employer
    - due to lack of control and/or faulty organisation
    - obligation for performance of contract

# General terms and conditions

the smallprint is included in the contract only if the terms and conditions fulfill the subsequent pre-requisites:

- clear, comprehensible and unambiguous
- easily to be found
- printable and „downloadable“
- web forms should lead the client through all the terms before the use of the „order-button“
- mere hyperlinks risky
  - prominent place on web site is strongly recommended

# Distance contracts

## ● European legislation

- European Parliament and Council
- Directives
  - on the protection of consumers in respect of distance contracts
  - concerning the distance marketing of consumer financial services

## ● Objective:

To approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers.

# Distance contracts

## Definition: Distance contract

- any contract concerning **goods or services**
- concluded between a **supplier** and a **consumer**
  - only: B2C
  - not: B2B, C2B, C2C
- under an organized distance sales or service-provision scheme run by the supplier
  - not only occasional distance sellings
- if supplier makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded
  - TV Shopping (Teleshopping); e-mail; internet; telephone; catalogues

# Exemptions

- The following contracts are not included in the scope of the Directive:
  - contracts relating to financial services
  - contracts concluded by means of automatic vending machines/ commercial premises
  - contracts concluded with operators by using public telephones, telecommunication operators
  - contracts concluded at an auction
  - contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental

# Exemptions

- The Directive allows partial exceptions for goods intended for current consumption in the **household** supplied by regular roundsmen and contracts relating to **tourism** and **transport**.
  - contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home/residence/workplace
  - contracts for the provision of accommodation, transport, catering or leisure services, to provide these services on a specific date or within a specific period

# Provision of information

in good time prior to the conclusion of any distance contract the consumer must be provided with clear and comprehensible information concerning:

- the **identity** of the supplier and, in the case of contracts requiring payment in advance, his **address**
- the main characteristics of the goods or services
- the price including all taxes and delivery costs
- the arrangements for payment, delivery or performance
- the existence of a **right of withdrawal**
- the period for which the offer or the price remains valid
- the minimum duration in the case of contracts to be performed permanently or recurrently
- the cost of using the means of distance communication where it is calculated other than at the basic rate

# Prior information

- This information must comply with the principles of **good faith** in commercial transactions and the principles governing the **protection of minors**.
- Information shall be provided in a clear and comprehensible manner
- in any way appropriate to the means of distance communication
- in the case of telephone communications, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer

# Confirmation of information

- consumer must receive written confirmation of the information
- or confirmation in another durable medium available and accessible to him
  - paper document; CD-Rom; E-Mail; Website
- in good time during the performance of the contract
- at the latest at the time of delivery
  - unless the information has already been given prior to conclusion in writing or on another durable medium

# Confirmation of information

- The following information must also be given in writing:
  - written information on the conditions and procedures for exercising the right of withdrawal
  - geographical address of the place of business of the supplier to which the consumer may address any complaints
  - information relating to after-sales services and guarantees
  - the conditions for cancelling the contract, where it is of unspecified duration or a duration exceeding one year
  - conditions under which the contract may be **rescinded**.
- shall not apply to services performed through the use of means of distance communication (e.g., video-on-demand)
  - where supplied on only one occasion and invoiced by the operator of the means of distance communication
  - but the consumer must obtain the geographical address of the place of business of the supplier for complaints

# Right of withdrawal

- The consumer has a right of withdrawal
- Where the supplier has met his obligations relating to the provision of information, the consumer has a period of at least **seven working days**
  - Germany: two weeks
    - to withdraw from the contract
    - without penalty
    - and without giving any reason
- only charge to be made by the consumer is the direct cost of returning the goods
  - in Germany up to € 40
- Where the supplier has failed to meet his obligations as regards information, this period is extended to **three months**.

→ Germany: 6 months

# Right of withdrawal

Period for right of withdrawal **begins to run:**

- in the case of goods
  - with the day of receipt by the consumer where the obligations for written confirmation have been fulfilled
- in the case of services
  - with the day of conclusion of the contract
  - or with the day on which the obligations of written confirmation have been fulfilled
    - if they have been fulfilled **after** conclusion of the contract, provided that this period does not exceed the three-month period referred to in the following
- if the supplier has failed to fulfil the obligations of written confirmation the three-month period begins to run with the day of conclusion of the contract

# Consequences of withdrawal

- The supplier is obliged to **repay** the amounts paid by the consumer
  - free of charge except direct cost of returning the goods
  - such reimbursement must be carried out as soon as possible and in any case within **thirty days**
- The exercising of the right of withdrawal makes it possible to cancel **credit agreements** concluded with the supplier or with a third party on the basis of an agreement concluded by the latter with the supplier.

# Exemption of withdrawal

- The Directive establishes the types of contract to which the right of withdrawal does not apply. Consumer may not exercise the right of withdrawal in respect of contracts
  - for the provision of services if performance has begun, with the consumer's agreement, before the end of the withdrawal period
  - for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier
  - for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly
  - for the supply of audio or video recordings or computer software which were unsealed by the consumer
  - for the supply of newspapers, periodicals and magazines
  - for gaming and lottery services

# Performance, fulfillment

- In principle, the supplier has thirty days in which to perform the contract. He must execute the order within a **maximum of 30 days** from the day following that on which the consumer forwarded his order to the supplier.
- Where supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable consumer must be informed of this and must obtain a refund of any sums paid as soon as possible and in any case **within 30 days**.
- In some cases it is possible to supply an **equivalent good** or service.

# Performance, fulfillment

- In the event of fraudulent use of his payment card, the consumer may request cancellation of payment and reimbursement of the amounts paid.
- Where unsolicited goods are supplied, the consumer's failure to reply does not constitute consent.
- The use by the supplier of automatic calling devices or faxes requires the prior consent of the consumer.
- Other distance communication techniques may be used only where there is no clear objection from the consumer.

# Consumer protection

- Public bodies, consumer organisations and professional organisations may take action before the courts or before the competent administrative bodies in the event of disputes. The Member States must ensure that consumers are allowed judicial or administrative redress so that they are not deprived of protection under the law of a non-Member country.
- The Member States may adopt more stringent provisions, provided that these are compatible with the Treaty, such as a ban on the marketing of certain goods and services through distance contracts.

# Litigation

## ● applicable law:

- in principle, parties may determine the applicable law and the place of jurisdiction
- Exceptions according to European Union consumer protection law:
  - if the contract is concluded between a trading company (supplier) and a consumer
  - in the country of the consumer's domicile **or**  
as a result of a direct or explicit advertisement in this country
  - **consumer's national law** is applicable
- contrarie agreements are void

## ● Jurisdiction

- consumer may choose wheter to sue the other party in its country of domicile or the country of the other party's headquarters
- other party may sue consumer only in his country of domicile

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**Lawyer  
Lectures**

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International Law  
Computing Law  
Internet Law  
IT-Security  
Data Protection