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The contents of a contract

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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
- 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
 - implied terms

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 was 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?

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
- 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 1995 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 1990.

- 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 contract is void
 - 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? – introductive 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:

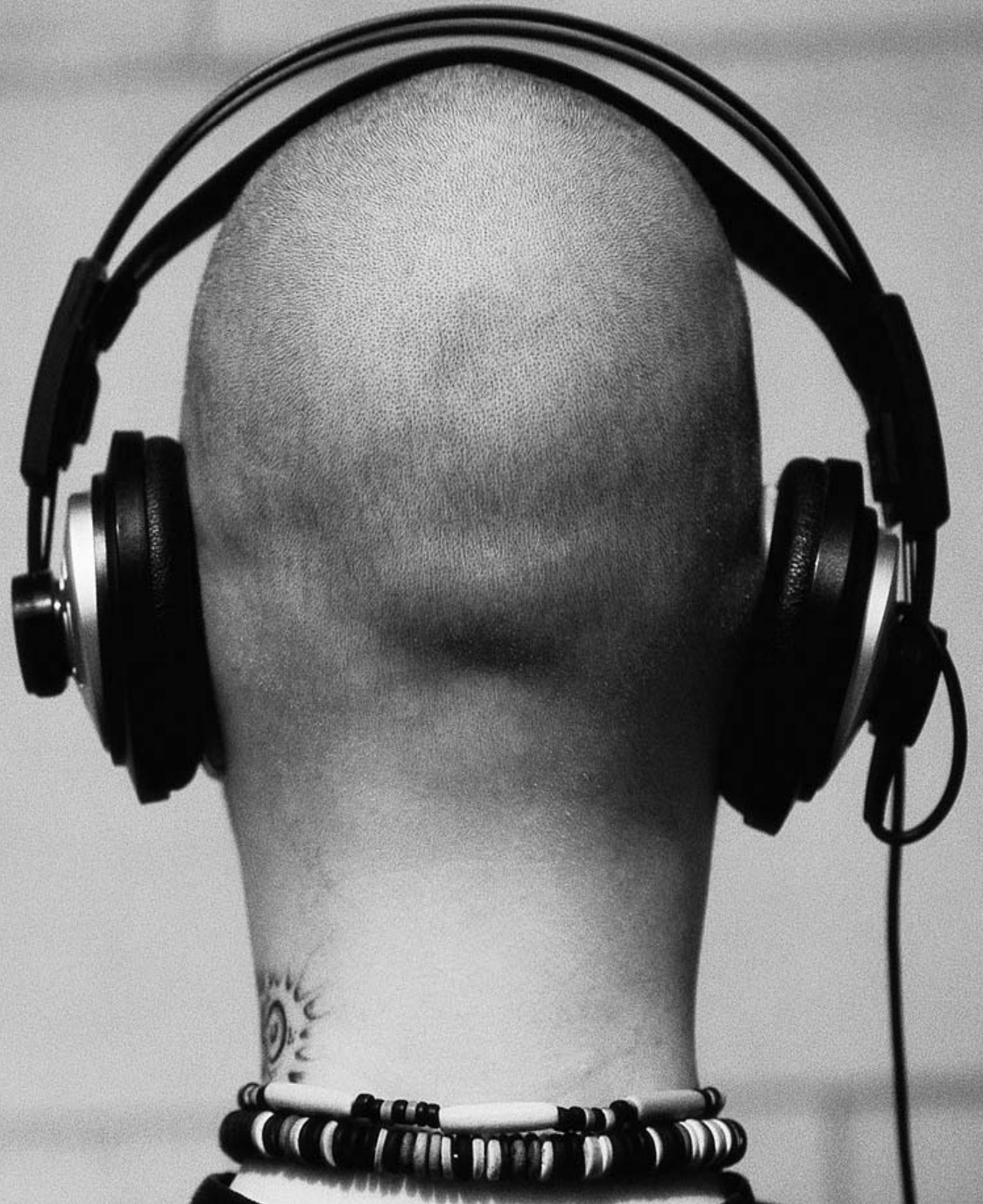
- as terms of use, for example the guidelines for using a homepage
- as annex of a contract, for example the small print of a contract of sale

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)

- 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

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)
- 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

- 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

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

- 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
 - 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...

- 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 community mark can be registered by its owner

Symbols ®, TM, SM

- **TM** 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

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 (®, ™, SM)

- 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 or musical works
- presented in a tangible medium such as a book, photograph or film
- 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

- 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