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umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

Given that the declaration of intent is the cornerstone of all legal transactions in private law, the legislator stipulated **general rules** regarding said declaration and the legal transaction so formed, which hold true irrespective of the concrete legal field or transaction. This rather universal approach necessitates the use of very abstract terms: one cannot simply speak of offer and acceptance (instead of declaration of intent), because these terms seem unfit for unilateral legal transactions, e. g. the cancellation of a lease. For the same reason, the term *promise* would prove unfit for use for it might connote incurring a liability in some way which, however, is not involved where the legal transaction constitutes a disposition, e. g. the transfer of ownership under § 929. **3**

Further, as the person making a declaration of intent will not always be an offeror, acceptor, or even a promisor, again, a more **abstract term** is required. The German term used to refer to the person that is making a declaration of intent is *der Erklärende* which best translates to *declaring party* in English. **4**

It follows from this general and all-comprising approach that two types of declaration of intent exist under German private law. The first category comprises declarations of intent underlying bilateral legal transactions as well as those unilateral legal transactions that have immediate legal effects for someone else. These declarations of intent will only become effective upon receipt by the intended receiving party and are thus referred to as **declarations of intent requiring receipt** *(empfangsbedürftige Willenserklärungen)*. Again, the termination of a lease or offer and acceptance of a sales contract may serve as examples. The second category comprises unilateral legal transactions that have no immediate legal effects on others, such as the abandonment of ownership pursuant to § 959. For these declarations of intent to become effective, receipt by a receiving party is not required. They are thus referred to as **declarations of intent not requiring receipt** *(nicht empfangsbedürftige Willenserklärungen)*. **5**

The **elements of a declaration of intent** are objective and subjective in nature. The **objective element** requires a certain human behaviour by which the declaring party expresses his intention to create certain legal effects. This first criteria is purely objective; whether or not it is fulfilled is a matter of interpretation pursuant to §§ 133, 157.[2] Secondly, there are several **subjective elements**: the intention to act *(Handlungswille)*, the awareness of the legal relevance *(Eklärungsbewusstsein)*, and the intention to create certain legal consequences *(Rechtsfolgewille)*.[3] The intention to act requires that the declaring party acts consciously and wilfully. No intention to act can be established, e. g., where a third person forcefully raises the hand of the declaring party at an auction, thereby creating the impression that an offer was made. Awareness of legal relevance requires that the declaring party knows that the law attaches legal significance to his act. A person may lack the awareness of legal relevance e. g. where he waves at an auction to greet a friend, thereby objectively making a bid. The intention to create certain legal consequences is defective where the objective content of the declaration does not reflect the subjective intention with regard to a certain legal consequence, e. g. a person wants to offer to pay *15* but mistakenly offers *50*. **6**

Not all of these subjective elements are however indispensable. In fact, only the **intention to act** is an entirely indispensable subjective element of a declaration of intent. The awareness of legal significance on the other hand is only indispensable where the declaring party is unculpably unaware of the fact that his acting may objectively be interpreted as a declaration of intent. If the unawareness is due to negligence, the courts consider the declaration of intent to be effective.[4] The intention to create certain legal consequences is dispensable. A declaration of intent that lacks dispensable subjective elements is effective. It may however be may be avoided under the conditions set forth in §§ 119, 123.[5] **7**

[2] See → § 133 mn. 1.

[3] MüKo BGB/Armbrüster, Vorbemerkung vor § 116 BGB mn. 20–30; Jauernig BGB/Mansel, Vorbemerkungen vor § 116 BGB mn. 4–6.

[4] BGH 3.3.1956 – IV ZR 314/55, NJW 1956, 869.

[5] See → § 119 mn. 2 et seq.; § 123 mn. 4 et seq.

8 **Acts similar to legal transactions** *(geschäftsähnliche Handlungen):* not all acts of legal relevance are (unilateral) legal transactions or form part of a (bilateral) legal transaction. In several situations, the immediate effects of a declaration may be only factual in nature; e.g. a warning notice (§ 286(1)), setting a deadline (§§ 281(1), 323(1), issuing an invoice (§ 286(3)), requests for ratification (§§ 108(2), 177(2)), for damages (§ 286(4)), refusal (e.g. § 179(1)), notifications (e.g. §§ 149(1), 171, 409(1)). However, since the law attributes legal consequences to these acts, they are, for the most part, treated as if they were legal transactions. The majority of the provisions that deal with the requirements and effects of legal transactions are applicable, in particular §§ 104 et seq., §§ 116 et seq., §§ 130 et seq., §§ 133, 157; §§ 164 et seq., and §§ 182 et seq., unless the interests involved and the specifics of the individual case suggest otherwise.[6]

§ 116 Mental reservation

[1]A declaration of intent is not void by virtue of the fact that the person declaring has made a mental reservation that he does not want the declaration made. [2]The declaration is void if it is to be made to another person who knows of the reservation.

§ 116 Geheimer Vorbehalt

[1]Eine Willenserklärung ist nicht deshalb nichtig, weil sich der Erklärende insgeheim vorbehält, das Erklärte nicht zu wollen. [2]Die Erklärung ist nichtig, wenn sie einem anderen gegenüber abzugeben ist und dieser den Vorbehalt kennt.

A. Function

I. Purpose

1 The law deems irrelevant a person's mental reservation with regard to his declaration of intent save for the case that the receiving party knows of that mental reservation. The receiving party in the latter case does not require protection and the declaration is hence regarded as void.

II. Scope of application

2 The 1st St. applies to all declarations of intent, i.e. both implied and express, to declarations that are only valid if received by a receiving party and those which do not require receipt. Acts that technically do not qualify as declaration of intent but have similar effects *(geschäftsähnliche Handlungen)*[1] may also fall under the 1st St.[2] The 2nd St., on the other hand, only applies to declarations of intent that must be received by a receiving party.

B. Explanation

I. Mental reservation

3 It follows from the German term *geheimer Vorbehalt*, but not necessarily so from the English translation *mental reservation*, that the 1st St. only applies where the mental reservation is secretly made. It is sufficient if the secrecy of the reservation exists only in relation to the person for whom the declaration is intended, which is usually, but not necessarily, the receiving party. Further, the requirement of secrecy sets apart § 116 from § 118. The latter provision only applies where the declaring person assumes that the receiving party of his declaration will recognise the lack of seriousness, whereas under § 116 the person making the declaration of intent does not want the receiving party to know of his diverging actual intent.

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[6] Palandt BGB/Ellenberger, Überblick vor § 104 mn. 6–7.
[1] See → Introduction to §§ 116–144 mn. 8.
[2] HK-BGB/Dörner, § 116 BGB mn. 2; MüKo BGB/Armbrüster, § 116 BGB mn. 2.

II. Legal consequence

The 2nd St. stipulates that a declaration is *void* where the receiving party knows that the person making the declaration does not actually mean what he objectively declares. A different provision applies where neither the person making the declaration nor the receiving party want it to have effect; this situation is governed by § 117. Further, § 123 – not § 116 – applies if the mental reservation stems from the fact that a person is forced or put under threat to make the declaration of intent. In this case, the declaration is voidable pursuant to §§ 142, 123. **4**

III. Burden of proof

The burden of proof lies with the person invoking § 116; i.e. the party who argues that the declaration of intent is void must prove the mental reservation and the receiving party's knowledge thereof. **5**

§ 117 Sham transaction	§ 117 Scheingeschäft
(1) If a declaration of intent that is to be made to another person is, with his consent, only made for the sake of appearance, it is void.	**(1) Wird eine Willenserklärung, die einem anderen gegenüber abzugeben ist, mit dessen Einverständnis nur zum Schein abgegeben, so ist sie nichtig.**
(2) If a sham transaction hides another legal transaction, the provisions applicable to the hidden transaction apply.	**(2) Wird durch ein Scheingeschäft ein anderes Rechtsgeschäft verdeckt, so finden die für das verdeckte Rechtsgeschäft geltenden Vorschriften Anwendung.**

A. Function

I. Purpose

The law may consider effective a declaration of intent[1] which lacks a corresponding underlying of the declaring party if the protection of others who may rely on its effectiveness so requires. Where the lack of intention is known and the declaration of intent not taken to be effective, there is no reason for the law to intervene. Sub. 1 thus regards these transactions as ineffective. Third parties with an interest in the effectiveness of the agreement are protected primarily by §§ 171, 409, 892, 932 et seq., which, for the most part, concern dispositions over real rights. **1**

II. Scope of application

As is pointed out by the phrase *be made to another person*, Sub. 1 only applies to declarations of intent that in order to be effective must be received by a receiving party *(empfangsbedürftige Willenserklärungen)*. Marriages concluded in pretence do not fall under § 117 but are dealt with by the specific provisions of §§ 1314(2) No. 5 and 1353(1). In contrast to § 116, the provision of Sub. 1 only applies where the parties mutually agree that the declaration of intent should be made in **pretence** only, i.e. that it should not have the effects which it would normally entail.[2] **2**

[1] See → Introduction to §§ 116–144 mn. 1–8.
[2] BGH 24.1.1980 – III ZR 169/78, NJW 1980, 1572, 1573.

B. Explanation

I. Lack of intention

3 The distinctive feature of the sham transaction is the lack of intention to be legally bound by the declaration of intent. Where the declaration of intent is made to several receiving parties, all must have consented to its ineffectiveness.[3]

II. Objective

4 Where the objective pursued by the transaction requires that the contract be effective, there is no room for a sham transaction.[4] Therefore, it does not per se follow from the unusual composition of a contract alone that it is a sham transaction falling under Sub. 1. Transactions that are aimed at avoiding certain legal effects generally do not qualify as a sham but may be void for other reasons, e.g. illegality (§ 134).[5]

5 A contract that is entered into by one party solely for the benefit of someone else who, for whatever reason, does not want to appear as a contracting party, is not a sham transaction, even if the other party is aware of the person pulling the strings behind the scenes. It may only be regarded a sham transaction where no binding effect between the contracting parties is intended.[6]

III. Hidden legal transaction

6 Pursuant to Sub. 2, an agreement which the parties impliedly made by entering into the sham transaction is not ineffective for the sole reason that it is the by-product of that sham transaction. However, depending on the specific nature of the sham transaction, it may still be void for illegality under § 134 or for being contrary to public policy pursuant to § 138. The implied – or hidden – legal transaction may further be ineffective for lack of form (§ 125) or other requirements. The standard case falling under Sub. 2 is where the parties conclude, and have notarially recorded, a sales contract over a plot of land which provides for a lower sales price than actually agreed. Pursuant to Sub. 1, the recorded contract is ineffective for being a sham transaction, whilst the implied agreement on the higher price is ineffective for lack of notarial recording pursuant to §§ 125, 311b(1) 1st St.[7]

IV. Burden of proof

7 The party relying on the ineffectiveness of the sham transaction under Sub. 1 must prove that the parties consented on the declarations being made in pretence only.[8] The party invoking Sub. 2 must prove that the parties in fact entered into a different agreement which was covered by the sham transaction.

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[3] Palandt BGB/Ellenberger, § 117 BGB mn. 3; Staudinger BGB/Singer, § 117 BGB mn. 8.
[4] BGH 5.7.1993 – II ZR 114/92, NJW 1993, 2609, 2610.
[5] HK-BGB/Dörner, § 117 BGB mn. 4.
[6] Palandt BGB/Ellenberger, § 117 BGB mn. 6.
[7] HK-BGB/Dörner, § 117 BGB mn. 7.
[8] BGH 9.7.1999 – V ZR 12–98, NJW 1999, 3481, 3482.

§ 118
Lack of seriousness

A declaration of intent not seriously intended which is made in the expectation that its lack of serious intention will not be misunderstood is void.

§ 118
Mangel der Ernstlichkeit

Eine nicht ernstlich gemeinte Willenserklärung, die in der Erwartung abgegeben wird, der Mangel der Ernstlichkeit werde nicht verkannt werden, ist nichtig.

§ 118 applies where a person does not mean what he says and concurrently assumes that the receiving party of his declaration of intent[1] will recognise the lack of seriousness. This is the case where a person either makes a **joke** with good intentions or believes to enter into a **sham transaction** under § 117 while failing to realise that the other person takes the declaration seriously. From the perspective of the law, the only decisive element is the **expectation** of the person making the declaration. The perception of the other person is irrelevant. Accordingly, it is also entirely irrelevant whether the lack of seriousness was recognisable by the other person.[2] The declaring person may be held liable (§ 122(1)) unless the receiving party ought to have recognised the lack of seriousness (§ 122(2)).[3] However, where it is obvious to the person making the declaration that it is taken seriously by the other person, he is required to **disclose** the lack of seriousness. Failure to disclose will preempt him from relying on § 118 and the declaration is regarded to be valid.[4] **1**

§ 119
Voidability for mistake

(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.

(2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.

§ 119
Anfechtbarkeit wegen Irrtums

(1) Wer bei der Abgabe einer Willenserklärung über deren Inhalt im Irrtum war oder eine Erklärung dieses Inhalts überhaupt nicht abgeben wollte, kann die Erklärung anfechten, wenn anzunehmen ist, dass er sie bei Kenntnis der Sachlage und bei verständiger Würdigung des Falles nicht abgegeben haben würde.

(2) Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden.

Contents

[1] See → Introduction to §§ 116–144 mn. 1–8.
[2] MüKo BGB/Armbrüster, § 118 BGB mn. 6; Jauernig BGB/Mansel, § 118 BGB mn. 2.
[3] HK BGB/Dörner, § 118 BGB mn. 4.
[4] Palandt BGB/Ellenberger, § 118 BGB mn. 2; MüKo BGB/Armbrüster, § 118 BGB mn. 10.

A. Function

1 § 119 regulates the conditions under which a declaration of intent[1] is voidable for mistake. The provision applies to both declaration of intent and to actions that are similar to declarations of intent *(geschäftsähnliche Handlungen*[2]*)*.

B. Explanation

I. Requirements

2 A mistake within the meaning of § 119 is generally understood to refer to a discrepancy between the intention and the declaration.[3] The mistake must be **made unknowingly**,[4] but it is not required that the mistake be made inculpably. Hence, § 119 may also apply to a mistake that was due to gross negligence. Both the intention and the objective content of the declaration must be examined in order to establish such discrepancy. The content and meaning of a declaration of intent is determined from the perspective of an objective third party by asking how that person, were he in the position of the receiving party, ought to understand the declaration in question. It is not a requirement of § 119 that the mistake be recognisable to the receiving party of the declaration of intent. In this regard, § 119 differs significantly from rules in other jurisdictions that govern mistake as they often require the mistake to be recognisable. Reference must be made to both the principle of **good faith** and the customs of the relevant branch of business (§§ 133, 157).[5] Where a **declaration of intent** is to be construed as having a different meaning than what is intended by the person making that declaration, a mistake is established. However, not every mistake falls under § 119. It is only under **specific conditions** that the person who made a declaration not objectively reflecting his true intention is given the right to void the declaration. Pursuant to § 119, a declaration of intent can be voided only where the person making the declaration erred with regards to either the meaning of the declaration (Sub. 1 1st Alt.), the action that constitutes the declaration (Sub. 1 2nd Alt.), or the essential qualities or characteristics of a person or the object of contract (Sub. 2). Further, an **error in the transmission** of the declaration will provide the same grounds for avoidance (§ 120). Other mistakes, in particular concerning the motivation underlying the declaration of intent, do not render the declaration voidable.

II. Mistake as to contents

3 A mistake under Sub. 1 1st Alt. arises where the person making the declaration is aware of what he says but is unaware of what this means **objectively**. The mistake *happens* during the formation of his intention. He uses the signal he ultimately wanted to use, but the signal does not reflect his initial intention. Such a mistake may be established where an incorrect word or sign is used, e.g. where an art dealer sells *Work #2* from his catalogue, mistakenly assuming that #2 depicts work X whilst work X is in fact pictured as #3. Other examples of a mistake

[1] See → Introduction to §§ 116–144 mn. 1–8.
[2] See → Introduction to §§ 116–144 mn. 8.
[3] HK-BGB/Dörner, § 119 BGB mn. 4; Jauernig BGB/Mansel, § 119 BGB mn. 1.
[4] BGH 15.6.1951 – I ZR 121/50, NJW 1951, 705.
[5] See → § 133 mn. 5–9.

within the meaning of Sub. 1 1st Alt. may include mistakenly confusing seller A with seller B and contracting with B;[6] where a customer who wants insured shipping (*standard plus*) buys *standard shipping* which, in the company's terms, is uninsured shipping; where a client mandates a lawyer bearing the same name as the lawyer he actually wanted to mandate, or where a janitor orders *25 gross* of toilet paper rolls (3,600 rolls) assuming that 25 gross means 25 *big* rolls.[7] Sub. 1 1st Alt. may also apply to mistakes that pertain to the **legal consequences** of a transaction. However, it has been held that the actual legal consequences must deviate significantly from the expected consequences.[8] Where the unwanted legal consequences do not replace but merely add to the desired consequences, Sub. 1 1st Alt. has been held inapplicable.[9] It may be difficult in the individual case to establish whether a deviation from the intended legal consequences is essential. For instance, the BGH found for mistake where a party was not aware that a previous agreement between the parties would be altered significantly when entering into a new contract.[10] On the other hand, a mistake within the meaning of Sub. 1 1st Alt. was denied where a landlord was unaware of the strict liability under § 536[11] or where a seller mistakenly assumed he had an unconditional right to revoke the sales contract.[12]

III. Miscalculation

Uncertainty surrounds the question of whether a miscalculation may qualify as a mistake **4**
under Sub. 1 1st Alt. It is generally accepted that a calculation that has not been disclosed to the other party does not qualify as mistake. The courts consider an **undisclosed miscalculation** irrelevant for it merely concerns the motives of the declaration of intent.[13] Where the calculation itself was **disclosed**, the RG took the view that in this case a mistake within the meaning of Sub. 1 1st Alt. may be established.[14] This view of the RG was heavily criticised in academic literature where it is generally held that both a disclosed and an undisclosed miscalculation are irrelevant mistakes and do not fall under § 119.[15] As this suggests, in cases of disclosed miscalculation, determination of what the parties agreed on must be made by way of interpretation pursuant to §§ 133, 157. Where it cannot be concluded that the parties wanted to contract on the same terms, the contract may be void for lack of agreement on essential elements of the contract. In some cases, the courts may even resort to the principle of good faith (§ 242) barring the other party from relying on the lack of agreement.[16]

IV. Mistake in declaration

A mistake under Sub. 1 2nd Alt., on the other hand, may be established where a person **5**
mistakenly uses a different signal than what he had ultimately decided. Typically, the person would say something that he, even in that moment, did not want to say. For example, where a buyer wants to buy 19 units of X but mistakenly says or writes 91, this mistake falls under Sub. 1 2nd Alt. The BGH has held that Sub. 1 2nd Alt. would also apply where, due to a software bug, the prices for a product are stated incorrectly on an automated selling platform

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[6] Palandt BGB/Ellenberger, § 119 BGB mn. 11; MüKo BGB/Armbrüster, § 119 BGB mn. 76.
[7] LG Hanau 30.6.1978 – 1 O 175/78, NJW 1979, 721.
[8] Palandt BGB/Ellenberger, § 119 BGB mn. 15.
[9] BGH 29.6.2016 – IV ZR 387/15, NJW 2016, 2955, 2956; BGH 8.5.2008 – VII ZR 106/07, JW 2008, 2427.
[10] BGH 5.4.1973 – II ZR 45/71, NJW 1973, 1278.
[11] OLG Karlsruhe 6.5.1988 – 14 U 269/85, NJW 1989, 907, 908.
[12] BGH 10.7.2002 – VIII ZR 199/01, NJW 2002, 3100, 3103.
[13] BGH 28.2.2002 – I ZR 318/99, NJW 2002, 2312.
[14] RG 9.11.1906 – II 173/06, RGZ 64, 266, 268; RG 22.12.1905 – Rep. II. 395/05, RGZ 62, 201.
[15] See HK-BGB/Dörner, § 119 BGB mn. 14; Palandt BGB/Ellenberger, § 119 BGB mn. 19; Jauernig BGB/Mansel, § 119 BGB mn. 10.
[16] See Palandt BGB/Ellenberger, § 119 BGB mn. 21.

and during the sales process.[17] However, the declaration cannot be voided if the software functions properly but uses wrong data that was uploaded by mistake.[18]

V. Mistake as to legal relevance

6 Sub. 1 is also applicable by way of analogy in cases in which the declaring party lacks not only the intention to create a specific legal consequence by his conduct, but already the awareness that his conduct may be objectively construed as legally relevant *(fehlendes Erklärungsbewusstsein)*. However, the declaration of intent in this case is not voidable if his unawareness is due to negligence.[19]

VI. Mistake as to essential characteristics

7 Sub. 2 applies where the person who made the declaration erred with regard to the essential qualities or characteristics of the person or the object of contract. Sub. 2 is an exception to the rule that mistakes concerning the motives underlying the declaration of intent are irrelevant.

1. Characteristics

8 *Characteristics* within the meaning of Sub. 2 refers not only to characteristics that can be found in a person or object but also to their relationship with third parties or the public, to the extent that the relationship is customarily regarded to be of importance for their appreciation or usability.[20] However, in order for such a relationship to be relevant in the latter sense, it must be founded in, or characterise, the person or thing.[21] The characteristics must not be temporary or transient.[22]

2. Essential

9 In order to determine whether characteristics are customarily regarded as *essential* within the meaning of Sub. 2, one must first look at the individual transaction. Where the specific circumstances do not allow for conclusions to be drawn, one must turn to general customs and ask how the importance of said characteristics is generally perceived.

3. Person

10 A person's characteristic may fall under Sub. 2 primarily where that person is a contracting party, but third parties are not generally excluded. The courts have held, e.g., that the involvement of a licensed football player in a bribery scandal that would result in the termination of the license qualifies as an essential characteristic.[23] Further examples of what is considered an essential characteristic include: the scientology membership of a personnel consultant;[24] reliability and trustworthiness where they are particularly important for the specific contract;[25] age; specific knowledge and skills;[26] solvency with regard to credit contracts.[27] On the other hand, a person's characteristic has been considered irrelevant

[17] BGH 26.1.2005 – VIII ZR 79/04, NJW 2005, 976, 977.
[18] Palandt BGB/Ellenberger, § 119 BGB mn. 10.
[19] BGH 3.3.1956 – IV ZR 314/55, NJW 1956, 869.
[20] BGH 22.9.1983 – VII ZR 43/83, NJW 1984, 230, 231.
[21] BGH 18.11.1977 – V ZR 172/76, NJW 1978, 370.
[22] Palandt BGB/Ellenberger, § 119 BGB mn. 24.
[23] BGH 13.11.1975 – III ZR 106/72, NJW 1976, 565, 566.
[24] LG Darmstadt 18.12.1996 – 2 O 114-96, NJW 1999, 365, 366.
[25] BGH 19.12.1968 – II ZR 138/67, BeckRS 1968, 31172770.
[26] Palandt BGB/Ellenberger, § 119 BGB mn. 26.
[27] RG 18.10.1907 – Rep. II. 194/07, RGZ 66, 386, 387.