



103 Basic Contract Law Principles in Europe

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Faculty Biographies

Michel P. Cloes

Michel Cloes is the Paris-based european counsel for Dana Corporation. Dana is a \$9 billion automotive parts supplier based in Toledo, Ohio and listed on the NYSE. Mr. Cloes has a wide range of legal experience in Europe, Asia, India, and the United States where he worked for about ten years.

Prior to joining Dana, he was European and Asian counsel for Denver-based Gates Corporation. Prior to that, he was in private practice in Los Angeles where he also worked for EuroDisneyland Corporation.

Mr. Cloes is a member of the California Bar and the Los Angeles County Bar Associations. He is a former member of the Brussels Bar. He is admitted to practice before the U.S. Court of International Trade. He is the founding president of ACC Europe, the European Chapter of ACC. He is also a member of ACC's Board of Directors. Mr. Cloes is co-author of European Union Business Law. He was a visiting lecturer at the Mexico U.S. Law Institute in San Diego. He is a frequent speaker on corporate social responsibility, law department management and benchmarking, and the shared service center models.

He holds a J.D. from the Faculty of Law at Liège State University, in Belgium and a L.L.M. from the University of San Diego School of Law.

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- CONTRACT FORMATION
- JURISDICTION AND CHOICE OF LAW
- RETENTION OF TITLE
- SARBANES OXLEY'S IMPACT ON CONTRACTS IN EUROPE
- SOFT FACTORS



Contract formation/ Liability for "pre-contractual" negotiations

I. Implied contractual duty of good faith

- § 242 of the German Civil Code (BGB), worded as a general clause, rules duties of conduct for contracting parties (duty of good faith)
- Following this abstract clause, a number of precedents defines various standard examples of BAD faith resulting from unlawful exercise of rights.
- As legal consequence the detrimentally affected party may make a contract nil and void retroactively, if the other party shows one of the following behaviors:



I. Implied contractual duty of good faith (cont. p. 2)

1. **Dishonest achievement of the own legal status** (comparable to objection of „unclean hands“), i.e. the claim from a contract that was signed with the knowledge of lack of power of attorney/ authority.
2. **Excessive use of a legal status**, i.e. the use of a legal status that is subject to restrictions or only valid for a internal relationship (i.e. rules of authority or voting rights)
3. **Absence of a sufficient interest of one party worth to protect**, i.e. a claim for informational rights in order to spy out business secrets or a claim for the publication of an apparently false counterstatement.
4. **Contradictory behavior** (lat. “Venire contra factum proprium), i.e. a buyer of software who installed and used it for a longer period, is not entitled to claim a right of retention pretending the software was delivered without a handbook.



II. LOI/ MOU

- The Letter of Intent (LoI) as well as Memorandum of Understanding (MoU) are known and accepted by the German Legal System, yet not codified:
- The LoI is understood as a declaration of ONE party in a very early stage of contract formation in order to express the intention for a later binding agreement. Yet, German jurisdiction does not assess any binding effect to a LoI itself.
- The MoU is signed by TWO or more parties
- common during advanced contract negotiations
- record the status of the achieved points. This has a binding character.

Note: Contract negotiations and related written statements are subject to the principle of “falsa demonstratio non nocet”: No matter how a document is headed, the content is decisive.



Jurisdiction and Choice of Law Clauses

- Introduction
- Jurisdiction
- Choice of Law
- Arbitration Clauses
- Example : distributorship

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Jurisdiction

Council Regulation 44/2001 (22/12/2000)

- Enforcement
- Scope
- Express agreement on a valid jurisdiction clause
- No express agreement on a (valid) jurisdiction clause

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Council Regulation 44/2001 Enforcement

Enforcement

- 01/03/2003
- All EU Member States (except for Denmark)



Council Regulation 44/2001

Scope

- The Regulation directs the opposed parties to the Member State whose courts have jurisdiction, without designating the competent individual courts within the Member States.
- In Civil & Commercial matters, excluding revenue, customs & administrative matters



Council Regulation 44/2001

- Are also excluded from the scope of the Regulation:
 - Bankruptcy
 - Arbitration
 - Social Security
 - Status or legal capacity of natural persons, matrimonial matters, wills & successions



Council Regulation 44/2001 Valid Jurisdiction Clause

- **Art. 23. “If parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.”**



Council Regulation 44/2001 Valid Jurisdiction Clause

- A jurisdiction clause falls under the scope of the Regulation if:
 - At least one party has its domicile in a EU Member State, and
 - The clause indicates the competence of the courts of one of the Member States, and
 - There is an international conflict.



Council Regulation 44/2001 Valid Jurisdiction Clause

● Examples :

- UK & B party : Calif. Courts > art. 23 ⇒ Regulation will not apply
 - UK & US party : Calif. Courts > art. 23 ⇒ Regulation will not apply
 - US & B party : UK Courts > art. 23 ⇒ Regulation will apply
 - US & B party : B Courts > art. 23 ⇒ Regulation will apply
- However,*
⇒ quid US party goes to US Courts
- ⇒ B party cannot impose Regulation to US party



Council Regulation 44/2001 Valid Jurisdiction Clause

- Formal requirements :
 - in writing, or
 - in a form which accords with the practices between the parties, or
 - with regard to trade & commerce following the customs

- Jurisdiction is presumed to be exclusive



Council Regulation 44/2001 No Valid Jurisdiction Clause

- **Basic rule : domicile defendant**

The courts of Member State in which the defendant is domiciled shall have jurisdiction regardless of the nationality of the defendant



Council Regulation 44/2001
No (Valid) Jurisdiction Clause

● **Special rules of jurisdiction**

A. With respect to contracts, Plaintiff has choice between :

- Defendant's domicile, and
- Rules set out in Art. 5.1



Council Regulation 44/2001
No (Valid) Jurisdiction Clause

Article 5.1:

5.1.a) where the contractual obligation is to be performed



Council Regulation 44/2001 No (Valid) Jurisdiction Clause

5.1.b) “unless otherwise agreed” the place of performance of the obligation shall be :

- sale of goods : place in the Member State where, “under the contract”, the goods were or should have been delivered
- provision of services : place in the Member State where services were or should have been provided



Council Regulation 44/2001 No (Valid) Jurisdiction Clause

- “unless otherwise agreed”
- “under the contract”
- “sale of goods/provision of services”



Council Regulation 44/2001 No (Valid) Jurisdiction Clause

B. In certain matters, plaintiff has the choice between

- defendant's domicile, and
- other forum:

In consumer contracts, insurance & individual employment contracts : the dealer / insurer / employer can be sued before the courts of the place where the consumer / insured / employee is domiciled (or carried out employment)



Council Regulation 44/2001 No (Valid) Jurisdiction Clause

● **Exclusive jurisdiction**

● In :

- in consumer contracts
- in insurance contracts
- in individual employment contracts

consumer / insured / employees can only be sued before courts of the Member State of their domicile

- Registered rights (trademarks, patents, designs, ...)



Council Regulation 44/2001
No (Valid) Jurisdiction Clause

- **“First come first served”** rule



Choice of Law
Convention of Rome of 19/06/1980

- Scope
- Principles
 - Express agreement between parties on a (valid) applicable law clause
 - No express agreement between parties on a (valid) applicable law clause
 - Basic rule
 - Special rules



Choice of Law

Convention of Rome of 19/06/1980

Scope

- contractual obligations in situations invoking a choice of laws - even where the law it designates is that of a non-contracting state
- The convention does not apply to :
 - Arbitration agreements
 - Questions governed by the law of companies
 - Evidence & procedure



Choice of Law

Convention of Rome of 19/06/1980

Principles

- Express agreement
 - ⇒ general terms & conditions
- No express agreement :
 - Basic Rule : Law of the country with which it is most closely connected
 - Special Rules :
 - employment contracts
 - consumer contracts



Choice of Law - Convention of Rome

Law of the country with which it is most closely connected:

Connection can be :

- place of habitual residence
- place of central administration of the party performing the contract
- (principal) place of business of the party responsible for performing the contract

However, contract concerning immovable property

→ Law of country where party is located



Choice of Law - Convention of Rome

Consumer contracts :

- unless parties decide otherwise, law of country in which consumer has his habitual residence
- the choice of law may not disadvantage the position of the consumer or deprive him of the protection afforded by the law of his country of residence when it is more favourable



Arbitration Clauses

- Excluded from the scope of the Regulation & Convention
- Convention of New York 10/06/58



Distributorship

- Mandatory Belgian Law on termination of distributorship
- Escape routes ? (I)
 - Choice of law : no, Belgian statute is mandatory
 - Choice of forum : no, Belgian statute is mandatory, but...
 - Arbitration : no if leads to application of foreign law



Distributorship

● Escape routes ? (II)

- Choice of forum : yes, if within the Regulation, in favour of court in Member State other than Belgium
- Combined with express choice of law other than Belgian law, provided chosen law does not refer back to substantive Belgian Law



Retention of title (Germany example)

One foundation of German Civil Code (BGB) implies the Principle of "Abstraction"

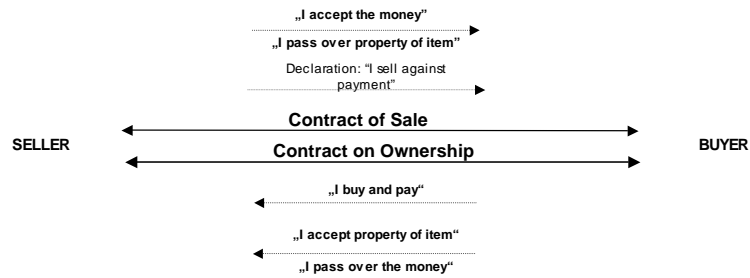
=> Differentiation between 'Law of Obligations' and 'Law of Properties'
=> Result: a simple sale of a product actually contains three contracts:

- I. Contract of Sale (regarding the obligation to fulfill the contract by ruling the essential conditions as the description of the item, the price, etc.) => Law of Obligations
- II. Two Contracts of Ownership (regarding the change of ownership of the **item** and the change of ownership of the **money** [purchase price]) => Law of Properties



Retention of title II

Principle of Abstraction



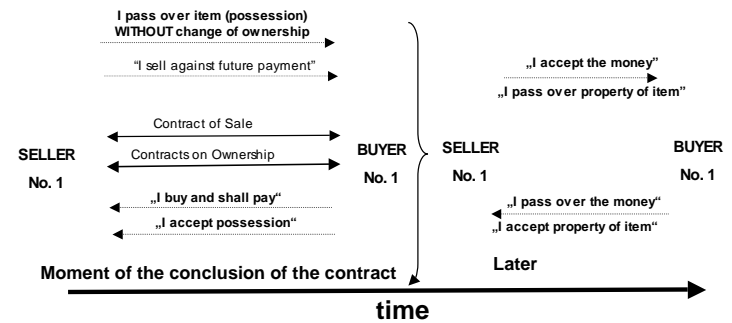
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Retention of title III

Retention of Title: Simple form



Consequence of the retention of title: Seller has an additional securing mean; a creditor of the buyer would not be entitled to distress on the item that is subject to the retention of title.

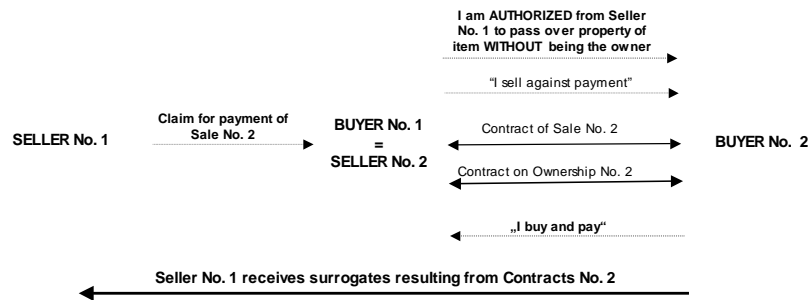
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Retention of title IV

Retention of Title: **Extended form**



Contracts - SOX implementation

European views on SOX implications for outsourcing

Sarbanes-Oxley-Act - Statement on Auditing Standards (SAS) 70 Type II Report Introduction

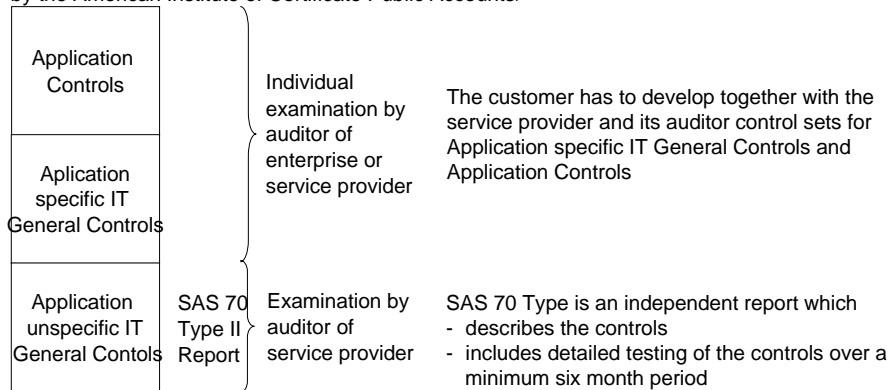
Enterprises that outsource accounting tasks to service provider are required to evidence that their own controls and the controls of the service provider are in place to comply with the requirements of the Sarbanes-Oxley-Act. The service provider can provide its customer with a SAS 70 Type II Report to verify the effectiveness of its Application unspecific IT General Controls.



Contracts - SOX implementation

Scope of the SAS 70 Type II Report

The SAS 70 Type II Report is an internationally recognized auditing standard developed by the American Institute of Certificate Public Accounts.



Contracts - SOX implementation

- The SAS 70 Type II Report is an independent auditor's report of service provider
- describes the service provider's description of controls
- includes detailed testing of the controls over a minimum six month period
- Report has to be repeated every year
- Auditor will express an opinion on:
 - relevant aspects of the controls are fairly material described
 - designed to achieve specific control objectives were achieved
 - operating with sufficient effectiveness to provide reasonable, but not absolute, assurance that the control is effective
- Thus both the outsourcing enterprise and the service provider receive valuable information of those controls regarding Application unspecific IT General Controls.



Contracts - SOX implementation

- **Further Requirements to achieve enterprise SOX requirements**
- In general the SAS 70 Type II report will cover the application unspecific IT General Controls
- It will not give evidence to the application specific IT General Controls and the Application Controls.
- Vary from customer to customer.
- service provider has to develop control sets for the application specific IT General Controls and the Application Controls to achieve the requirements of the Sarbanes-Oxley-Act for the enterprise.
- Coordination with enterprise auditor grants that the controls are suitably designed to achieve specific control objectives.
- Alternatively the enterprise supports the service provider with its auditor coordinated control sets.
- Risk that the service provider is not able to implement the Control Sets.



Soft Factors / Cultural differences

Cross Border negotiations bring out cultural differences

The best textbook for the international practitioner:

The Spirit of the Laws – (Chapter: The theory of climates)
Montesquieu (1748)

Recommendations for lawyers, working cross-border:

- => understand more than the legal framework of another country.
- => understand the culture and history of the other party.
- => learn and remind yourself of your own culture and preconceptions.
- => learn about THEIR preconceptions about YOUR culture.
- => do not trust hear-say/ gossip

ABOVE ALL, HAVE A SENSE OF HUMOR!



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III. Soft Factors/

1. German Lawyer's education:

I. Statutory intention: Education of legal Generalists/ Allrounders
Designed for the profession of judge, prosecutor or attorney

II. Course of education:

- **Studies at Universities of Legal Sciences** including all major Legal Fields, especially Civil (Private), Public and Criminal Law; Graduation with the "First State Exam"; this entitles candidates for a
 - **"Post-Graduate Civil Service Traineeship"**: a 24 months period where trainees/ clerks spend assignments with civil/ criminal judges, prosecutors, administrative agents, lawyers and legal counsels; Graduation with the "Second State Exam"
 - ⇒ Requirement for Lawyers Bar Admission
 - ⇒ German Lawyers feel (pretend) to be qualified to deal with many legal topics in a contract
 - ⇒ Good legal judgment



III. Soft Factors/

2. Cultural differences

Intercultural negotiations show a certain perception of

| <u>Americans</u> | and | <u>Germans</u> |
|--------------------------------------|-----|-------------------------------------|
| (overly) Self-confident | | (overly) Serious |
| Informal (rude) | | Formal (stiff, humorless) |
| Risk Takers (foolish, reckless) | | Dislike Risk (excessively cautious) |
| Mix Business and Humor (not serious) | | Don't mix (stiff, humorless) |

Recommendations for lawyers, working cross-border:

- ⇒ understand more than the legal framework of another country.
- ⇒ understand the culture and history of the other party.
- ⇒ learn about and remind yourself of your own culture and preconceptions, to help you to anticipate conflicts.
- ⇒ learn about THEIR preconceptions about YOUR culture.
- ⇒ do not trust hear-say/ gossip



IV. Terms and Conditions

1. Limitations of liability:

Depending on the grade of default and the type of loss, the Statutes of the German Civil Code (§§ 249, 305-310 BGB) allow an individually negotiated limitation of liability according to this chart:

| Type of loss: | Grade of default: | Limitation: |
|-------------------------------------|-------------------|---------------|
| Personal injury/Death | intention | no limitation |
| | slight negligence | limitable |
| | gross negligence | limitable |
| General losses/ Loss of property | intention | no limitation |
| | slight negligence | limitable |
| | gross negligence | limitable |



IV. Terms and Conditions (cont.p. 2)

Chart above is valid for individual contracts, when both parties **actively negotiated**. As a consequence of consumer protection regulations, those General Terms and Conditions, formulated for a multitude of contract partners, are subject to a further compliance check according to §§ 305-310 BGB.

For example, General Terms and Conditions must not limit the liability for personal injuries in case of negligence or the liability for general losses in case of gross negligence (§ 309, Nr. 7, lit. a) b) BGB).



IV. Terms and Conditions (cont. p. 3)

2. Exclusions of types of loss:

Implication of a damaging event can be far reaching. Even very distant spheres can be concerned.

German Civil Code (§§ 249, 823 BGB) entitles only those to assert a damage claim who have suffered a **direct loss**.

Distinction between **direct and indirect losses**; one has to check the attribution of the damaging event to the loss.

1) "Theory of equivalent consideration" (Äquivalenzprinzip);
damaging event must be the (natural) cause for loss.

2) If 1) positively applicable, check of the coherence between the damaging event and the loss "Theory of adequate causation" (Adäquanzprinzip): In short, it is a question of an objective attribution of the loss to the damaging event.



IV. Terms and Conditions (cont. p. 4)

3. Guarantees and Warranties

The terms 'Guarantee' and 'Warranties' are known in German Law.

Note: Not the same meaning:

**German Guarantee ("Garantie") =
US-American Guarantee =**

**US-American Warranty
German Warranty
("Zusicherung" =>
statutory system of
remedies according
the BGB)**

A guarantee can be given by the Seller to the Buyer in addition to his already existing statutory rights (§ 443 BGB).

Finally, it must not be confounded with a Bank Guarantee.



V. Retention of title I

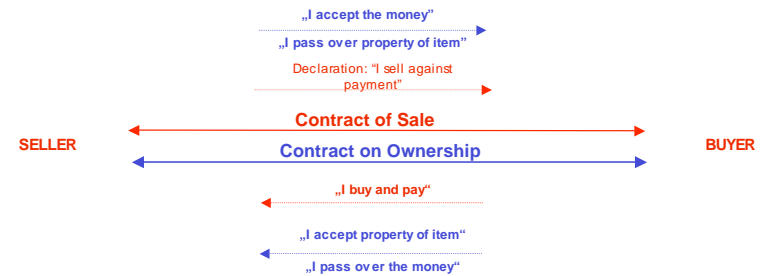
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 => Differentiation between 'Law of Obligations' and 'Law of Properties'
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V. Retention of title II

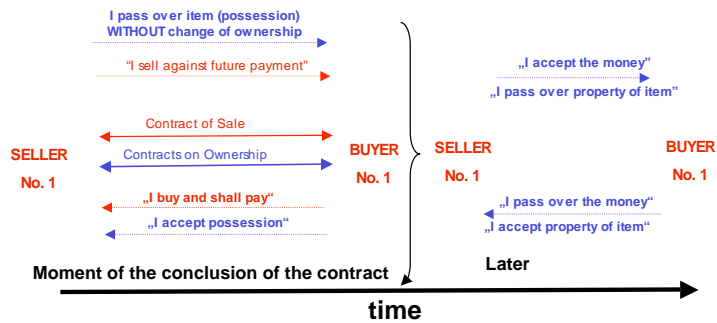
Principle of Abstraction





V. Retention of title III

Retention of Title: Simple form



Consequence of the retention of title: Seller has an additional securing mean; a creditor of the buyer would not be entitled to distraint on the item that is subject to the retention of title.



V. Retention of title IV

Retention of Title: Extended form





VI. Distribution and Sales law

Protection for agents:

- § 89 b HGB (German Commercial Code) defines a **compensatory claim for ex-Agents** against their contractors:
- Additional commission to the Agent, as the customer base that has been acquired by the Agent may be positive for the contractor in the future and also after the termination of the Agency Agreement
- Prerequisites:
 1. Termination of the Agency Agreement by Contractor
 2. Benefit for the Contractor due to Agent's activity and beyond the period of the Agency Agreement
 3. Loss of commissions for acquired clients that can not be realized by the Agent as a consequence of the termination of the Agency Agreement.
 4. Equity checkup (Circumstances of the termination)

Note: Claim is binding law, it can not be excluded by the Agency Agreement in advance



VII. EU Legislation/ WEEE

Purpose: Implementing of

- the EU-Directive on waste electrical and electronic equipment (WEEE)
 - Private Households are able to dispose all Electronical Equipment without royalty/ fee
 - Producers have to finance the disposal of Electronical Equipment
- Absolute obligations for Producers
 - Collecting and take back of electronic equipment
- Registration at the Clearing House („Gemeinsame Stelle“), until latest November, 23th 2005
- from March, 24th 2006
 - special treatment and recovery obligations
 - information and reporting obligations towards the Clearing House („Gemeinsame Stelle“)



VII. WEEE (cont. p. 2)

- Further absolute obligations for Producers
 - Financial Guarantee by each Producer for the accruing costs for collecting and take back
 - no Guarantee necessary for equipment, which is not used in private households or which is not usually used in private households
 - Guarantee may be provided e.g.:
 - in form of an insurance policy
 - a frozen bank account
 - participation in an appropriate system to fund WEEE disposal
- Producer: Somebody, who
 - a) manufactures and places electrical and electronic equipment under **own** brand on the market for the first time
 - b) resells under **own brand** produced by other suppliers
 - c) imports other brands/ products for the first time electrical and electronic equipment to a member state of the EU and directly to users in that country



VII. WEEE (cont. p. 3)

- Products: A Product is
 - Equipment, which is dependent on electric currents or electromagnetic fields in order to work properly **OR**
 - Equipment for generation, transfer and measurement of such currents and fields **AND**
 - unless it is designed for use with a voltage rating not exceeding 1000 volts for alternating voltage (AC) and 1500 voltage for direct voltage (DC) **OR**
 - unless it is part of another type of equipment not included in the scope of the ElektroG (e.g. electronic Equipment within cars)
- Labeling
 - Electrical and electronic Equipment placed on the market must be indelibly marked
 - Labelling is absolute necessary after August, 13 th 2005
 - Producer must be easily identifiable
 - it must be recognizable, that the equipment was placed on the market after that date
 - Equipment must also be marked with the following symbol





VIII. Contracts - SOX implementation

European views on SOX implications for outsourcing

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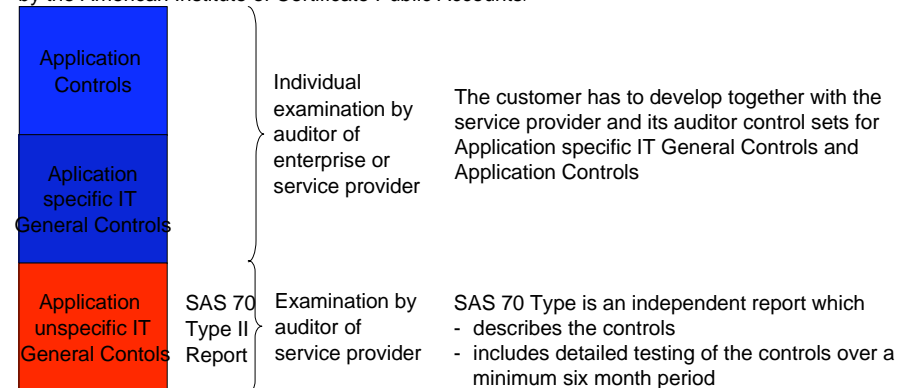
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List of Materials/ Literature:

IX. Statutes (see also http://www.gesetze-im-internet.de/bundesrecht/GESAMT_index.html)

BGB § 242 Leistung nach Treu und Glauben

Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

BGB § 242 Performance in good faith

The obligor must perform in a manner consistent with good faith taking into account accepted practice.

BGB § 249 Art und Umfang des Schadensersatzes

(1) Wer zum Schadensersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre.

(2) Ist wegen Verletzung einer Person oder wegen Beschädigung einer Sache Schadensersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen. Bei der Beschädigung einer Sache schließt der nach Satz 1 erforderliche Geldbetrag die Umsatzsteuer nur mit ein, wenn und soweit sie tatsächlich angefallen ist.

BGB §249 Kind and circumference of the damage substitute

(1) Who is obliged to the damage substitute, has to produce the state which would exist if the fact obliging to the substitute had not entered.

(2) If damage substitute is to be performed because of injury of a person or because of damage of a thing, the believer can require the monetary amount necessary in addition instead of the production. By the damage of a thing the monetary amount necessary after sentence 1 encloses the sales tax only with, as far as possible it has really resulted.



IX. Statutes

BGB § 309 Klauselverbote ohne Wertungsmöglichkeit

Auch soweit eine Abweichung von den gesetzlichen Vorschriften zulässig ist, ist in Allgemeinen Geschäftsbedingungen unwirksam:

(BGB § 309, Nr. 7, lit. a) b)

7. (Haftungsausschluss bei Verletzung von Leben, Körper, Gesundheit und bei grobem Verschulden)

a) (Verletzung von Leben, Körper, Gesundheit)

ein Ausschluss oder eine Begrenzung der Haftung für Schäden aus der Verletzung des Lebens, des Körpers oder der Gesundheit, die auf einer fahrlässigen Pflichtverletzung des Verwenders oder einer vorsätzlichen oder fahrlässigen Pflichtverletzung eines gesetzlichen Vertreters oder Erfüllungsgehilfen des Verwenders beruhen;

b) (Grobes Verschulden)

ein Ausschluss oder eine Begrenzung der Haftung für sonstige Schäden, die auf einer grob fahrlässigen Pflichtverletzung des Verwenders oder auf einer vorsätzlichen oder grob fahrlässigen Pflichtverletzung eines gesetzlichen Vertreters oder Erfüllungsgehilfen des Verwenders beruhen;



IX. Statutes

die Buchstaben a und b gelten nicht für Haftungsbeschränkungen in den nach Maßgabe des Personenbeförderungsgesetzes genehmigten Beförderungsbedingungen und Tarifvorschriften der Straßenbahnen, Obusse und Kraftfahrzeuge im Linienverkehr, soweit sie nicht zum Nachteil des Fahrgastes von der Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen vom 27. Februar 1970 abweichen; Buchstabe b gilt nicht für Haftungsbeschränkungen für staatlich genehmigte Lotterie- oder Ausspielverträge.

BGB § 309 Clauses whose invalidity is not subject to any appraisal

Even where derogation from the statutory provisions is permissible, the following are invalid in standard business terms: (BGB § 309, Nr. 7, lit. a) b)

7. (exclusion of liability for death, injury to body and health and for gross fault)

a) (death and injury to body and health)

exclusion or limitation of liability for losses arising out of death, injury to body or health caused by Negligent breach of duty by the user or a deliberate or negligent breach of duty by his statutory agent or a person employed by him to perform the contract;

b) (gross fault)

exclusion or limitation of liability for other losses caused by a grossly negligent breach of duty by the user or a deliberate or grossly negligent breach of duty by a statutory agent of the user or by a person employed by him to perform the contract;



IX. Statutes

a) and b) above do not apply to restrictions of liability in the terms of transport, authorised in accordance with the Passenger Transport Act, of trams, trolley buses and motor vehicles in scheduled services, in so far as they do not derogate, to the detriment of passengers, from the Regulation concerning the terms of transport by tram and trolley bus and by motor vehicles in scheduled services of 27 February 1970; b) above does not apply to restrictions of liability for State-approved lottery or raffle contracts.

HGB (German Commercial Code) § 89b

(1) Der Handelsvertreter kann von dem Unternehmer nach Beendigung des Vertragsverhältnisses einen angemessenen Ausgleich verlangen, wenn und soweit

1. der Unternehmer aus der Geschäftsverbindung mit neuen Kunden, die der Handelsvertreter geworben hat, auch nach Beendigung des Vertragsverhältnisses erhebliche Vorteile hat,
2. der Handelsvertreter infolge der Beendigung des Vertragsverhältnisses Ansprüche auf Provision verliert, die er bei Fortsetzung desselben aus bereits abgeschlossenen oder künftig zustande kommenden Geschäften mit den von ihm geworbenen Kunden hätte, und
3. die Zahlung eines Ausgleichs unter Berücksichtigung aller Umstände der Billigkeit entspricht. Der Werbung eines neuen Kunden steht es gleich, wenn der Handelsvertreter die Geschäftsverbindung mit einem Kunden so wesentlich erweitert hat, dass dies wirtschaftlich der Werbung eines neuen Kunden Entspricht.



IX. Statutes

(2) Der Ausgleich beträgt höchstens eine nach dem Durchschnitt der letzten fünf Jahre der Tätigkeit des Handelsvertreters berechnete Jahresprovision oder sonstige Jahresvergütung; bei kürzerer Dauer des Vertragsverhältnisses ist der Durchschnitt während der Dauer der Tätigkeit maßgebend.

(3) Der Anspruch besteht nicht, wenn

1. der Handelsvertreter das Vertragsverhältnis gekündigt hat, es sei denn, dass ein Verhalten des Unternehmers hierzu begründeten Anlass gegeben hat oder dem Handelsvertreter eine Fortsetzung seiner Tätigkeit wegen seines Alters oder wegen Krankheit nicht zugemutet werden kann, oder
2. der Unternehmer das Vertragsverhältnis gekündigt hat und für die Kündigung ein wichtiger Grund wegen schuldhaften Verhaltens des Handelsvertreters vorlag oder
3. auf Grund einer Vereinbarung zwischen dem Unternehmer und dem Handelsvertreter ein Dritter anstelle des Handelsvertreters in das Vertragsverhältnis eintritt; die Vereinbarung kann nicht vor Beendigung des Vertragsverhältnisses getroffen werden.

(4) Der Anspruch kann im voraus nicht ausgeschlossen werden. Er ist innerhalb eines Jahres nach Beendigung des Vertragsverhältnisses geltend zu machen.



IX. Statutes

(5) Die Absätze 1, 3 und 4 gelten für Versicherungsvertreter mit der Maßgabe, daß an die Stelle der Geschäftsverbindung mit neuen Kunden, die der Handelsvertreter geworben hat, die Vermittlung neuer Versicherungsverträge durch den Versicherungsvertreter tritt und der Vermittlung eines Versicherungsvertrages es gleichsteht, wenn der Versicherungsvertreter einen bestehenden Versicherungsvertrag so wesentlich erweitert hat, daß dies wirtschaftlich der Vermittlung eines neuen Versicherungsvertrages entspricht. Der Ausgleich des Versicherungsvertreters beträgt abweichend von Absatz 2 höchstens drei Jahresprovisionen oder Jahresvergütungen. Die Vorschriften der Sätze 1 und 2 gelten sinngemäß für Bausparkassenvertreter.

Umgesetzt auf der Grundlage der:

Richtlinie 86/653/EWG des Rates vom 18. Dezember 1986 zur Koordinierung der Rechtsvorschriften der Mitgliedstaaten betreffend die selbständigen Handelsvertreter

Transposition into German Law according to:

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents



IX. Statutes

§ 89 b HGB

- (1) The sales representative can require from the enterpriser for ending of the contractual relationship an adequate balance, as far as possible
1. the enterpriser from the business connection with new customers which the sales representative has won over has considerable advantages also after ending of the contractual relationship,
 2. the sales representative loses claims to commission as a result of the ending of the contractual relationship which he would have with continuation of the same from already concluded or from now on coming about shops with the customers won over by him, and
 3. the payment of a balance corresponds taking into account all circumstances of the cheapness.
- (2) The balance amounts at most to one after the average of the last five years of the activity of the Sales Representative calculated annual commission or other annual reimbursement; with shorter duration of the contractual relationship the average is authoritative during the duration of the activity.
- (3) The claim does not exist if
1. the sales representative has discontinued the contractual relationship, unless a behaviour of the enterpriser has given moreover reasonable occasion or cannot be expected of the sales representative a continuation of his activity because of his age or because of illness
 2. the enterpriser has discontinued the contractual relationship and was for the notice an important reason because of culpable behaviour of the sales representative, or



IX. Statutes

3. on grounds of an arrangement between the enterpriser and the sales representative a third enters instead of the sales representative into the contractual relationship; the arrangement cannot be dripped before ending of the contractual relationship.
 - (4) The claim cannot be excluded beforehand. He is to be asserted within one year after ending of the contractual relationship.
 - (5) The sales 1, 3 and 4 count to insurance agent with the possible specification that to the place of the business connection with new customers which the sales representative has won over the mediation of new contracts of insurance steps by the insurance agent and it is on a par with the mediation of a contract of insurance if the insurance agent has so substantially extended an existing contract of insurance that this corresponds economically to the mediation of a new contract of insurance.
- The balance of the insurance agent amounts deviating from sales 2 at most to three annual commissions or to annual reimbursements. The regulations of the sentences 1 and 2 count basically to „Bausparkassenvertreter“ (Sales representative of state-run public banks).



X. Literature

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- **LoI/ MoU:** Jurisdiction:
 - OLG Frankfurt, 3. Zivilsenat, Urteil vom 9.7.1998 (Az.: 3 U 61/97)
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- **Cultural Differences:** „Understanding American and German Business Cultures“ by Patrick L. Schmidt, published by the German American Chamber of Commerce Inc., New York 2003
- **Terms and Conditions/ Retention of Title :** Commentaries to the German Civil Code (see above)
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103 Basic Contract Law Principles in Europe

Christopher Roberts

**SVP Legal, General Counsel
Reckitt Benckiser**



Contents

- Pre-contractual statements
- Letters of intent/MOU
- Contract terms
- Exclusions and limitations of liability
- Guarantees and warranties
- Unfair Commercial Practices Directive
- Agents
- Retention of title



PRE-CONTRACTUAL STATEMENTS

- Statements which have induced a reasonable person to enter into a contract
- Remedy under misrepresentation
- Types of misrepresentation:
 - Fraudulent
 - Negligent
 - Innocent
- Remedies
- Can representations become terms of contract?
- Excluding or limiting liability for misrepresentation



Letter of Intent/MOU

- 'intention to create legal relations'
- 'subject to contract'
- facts



EXPRESS TERMS

- Conditions
- Warranties
- Innominate terms



IMPLIED TERMS

- In the absence of an express term, a term may be implied
 - By custom
 - In fact
 - In law eg Sales of Goods Act 1979



EXCLUSIONS AND LIMITATIONS

- Historical purpose
- Evolution
- Ground rules



DEVELOPMENT OF THE RULES ON UNFAIR TERMS

- Unfair Contract Terms Act 1977 (UCTA)
- Unfair Terms in Consumer contracts Regulations 1999 (UTCC)
- Desire to streamline legislation
- Effect on :
 - ⇒ Consumer contracts
 - ⇒ Business to business contracts
 - ⇒ Small business contracts
- “Fair and reasonable test”

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel



UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2005/29

- To be implemented in October 2007
- Applies to anyone selling goods, services or advertising in the EU
- Key objectives:
 - 1) establish “fair” commercial practices
 - 2) harmonise advertising and marketing laws of member states
 - 3) increase consumer protection
 - 4) establish enforcement guidelines

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UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2005/29 - cont'd

- Focus “unfair commercial practices”
- Test of unfairness “average consumer”
- Black list for misleading and aggressive practices
- Vulnerable consumers protected



SALES AGENTS

- EU inspired legislation
- Agent - contracts in name of principal
- Termination of Agency agreement: compensation/indemnity



RETENTION OF TITLE

- Retention of Title clause (or 'Romalpa' clause)
Gives seller of goods priority over secured and unsecured creditors of the buyer if the buyer fails to pay for the goods because it is insolvent
- Basic Form = title to goods is retained by seller until it has received full payment for the goods
- All monies clause = where the seller has made several deliveries of the goods, no ownership will pass in any until buyer has paid for all delivered goods



RETENTION OF TITLE cont'd

- Mixed Goods clause = when the goods are incorporated into other goods, specific right to "disincorporate" goods
- Tracing into proceeds of sale = where the goods have been sold on, proceeds of sale recoverable
- Limitations in effectiveness