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**“Sales Contracts under the Law of the US - Risks and Chances
regarding Liability in B2B-Purchases from the Viewpoint of
Germans”**

Master Dissertation

LL.M. - Law in a European and Global Context

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Abbreviations

AAA	American Arbitration Association
AGB	Allgemeine Geschäftsbedingungen <i>(Terms and Conditions)</i>
A.2d	Atlantic Reporter, Second Series
BGB	Bürgerliches Gesetzbuch <i>(German Civil Code)</i>
b2b	Business to Business
b2c	Business to Consumer
Cal. App.	California Court of Appeals
Cal. Rptr.	California Reporter
CISG	Convention on Contracts for the International Sale of Goods
Cir.	Circuit
Conn. Supp.	Conneticut Supplement
D.Mass.	District of Massachusetts
D.N.H.	District of New Hampshire
E.D.Mich.	Eastern District of Michigan
E.D.N.Y.	Eastern District of New York
FAA	Federal Arbitration Act
Fla.	Florida Supreme Court
F.3d	Federal Reporter, Third Series
F. Supp.	Federal Supplement, Second Series
GVG	Gerichtsverfassungsgesetz <i>(German Act on the Constitution of the Courts)</i>
Inc.	Incorporated
Kan.App.	Kansas Court of Appeals
L.Ed.2d	Lawyers' Edition, Second Series
marg. num.	Marginal Number
Misc.2nd	Miscellaneous Reports, Second Series
NCCUSL	National Conference of Commissioners on Uniform State Laws

III

N.D.	North Dakota Supreme Court
N.D. Cal.	Northern District of California
NJW	Neue Juristische Wochenschrift
N.W.2d	North Western Reporter, Second Series
N.Y.City Civ. Ct	New York City Civil Court
N.Y.S.2d	New York Supplement, Second Series
Pa. Super.	Pennsylvania Superior Court
P.2d	Pacific Reporter, Second Series
RIW	Recht der Internationalen Wirtschaft
S.Ct.	Supreme Court Reporter
TCA	Transport Corporation of America
UCC	Uniform Commercial Code
U. L. A.	Uniform Laws Annotated
US	United States
U.S.	United States Reports
Wis.	Wisconsin Supreme Court
ZIP	Zeitschrift für Internationales Privatrecht

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1 Introduction

In 2011 the United States was one of the most significant trade partners of Germany, yet again. In 2010, 6,84 % of German goods were exported to the United States. The formation of the contract that guides the parties is a central matter in international trade. It is self-evident that parties feel more secure when contracting under the legal system they are most familiar with – i.e. the legal system of the country of residence. For US and German contractual relations, the question however becomes, which law should guide the contract, US-law or German law? The debate is headed by the dramatic difference of the legal families – the Common Law background of the US and the civil law structures of Germany.

Besides the possibility that a party is forced to contract under the law of the US because of superior negotiation power of the American party, there could be more reasons to conclude contracts in the international sphere under Common Law and/or other statutory law. Regarding transatlantic dealings the language is one of the reasons. Many business dealings are organized and concluded in English, since that is the language in which the parties are able to communicate with each other. Hence, the trials should be in English as well to avoid misunderstandings due to translation of the documents. Up to now, German and Sorbian are the only official languages of the German court system.¹ Voices from the northern part of Germany emphasize that it would be of great help to declare the English language as a second official language of the German courts.² As a consequence, German Law would be chosen more often and, thus, German business could request consultation from German lawyers instead of lawyers with an Anglo-Saxon background, mostly not resident in Germany. But yet, English is not a permissible language before German courts. What about alternative legal systems in English language? The destiny of a new “*Common European Sales Law*” is not clear at all.³ But referring to the experiences of the CISG one can assume that it might not be as successful as well, since lawyers tend to implement the law that they know best, i.e. the law of their country of residence.

One more reason to contract under the law of the US could be an extended possibility to conduct contracts with a higher degree of party autonomy. From the German perspective,

¹ § 184 GVG.

² <http://www.faz.net/aktuell/wirtschaft/recht-steuern/gerichtssprache-deutsche-gerichte-verhandeln-nun-auch-auf-englisch-1907201.html>, last request 2011-11-01.

³ Council of the European Union, Press Release of 3135th Council meeting, p 25.

party autonomy is still suffering from a jurisdiction with an increasing tendency to consumer protection. Liability is one of the most important subjects in contracts that forces companies to escape from German law. Zweigert and Kötz speak about the “*praesumptio similitudinis*” when they say that general needs in legal systems mostly are handled in a similar manner.⁴ Let us see if that is true. Maybe the devil is in the details.

This paper offers advice and suggestions of wordings to practitioners searching for solutions in contracts with the necessary background. After a short introduction into the legal systems and the difference in the legal environment, this paper will guide the reader through the German status quo and explain why alternative legal systems are important for the German business. Because of the importance of the law of conflicts, the framework in which business is acting will be explained. Arbitration can totally change the opportunities of the contract parties, since party autonomy can be exhausted more thoroughly. Therefore, a few words will be explained regarding this, though it is only indirectly a liability issue. Because of the very different procedures of US courts, some important practical considerations will be mentioned. The core of this discussion is in Chapter 4. Here, principles, crystallized doctrines and adjudication regarding important liability discussions will be addressed directly; the straight comparison to the German approach is integrated where necessary. A short scenario will give the reader the important practical scenery. A summary follows, which highlights the main points communicated in this paper. Finally, this paper will discuss possible changes in legislation or adjudication to give the reader an understanding of areas for potential development in this field. The focus of this work is on sales contracts; service contracts or contracts of work and labor exceed the framework of this dissertation. Furthermore, only post-contractual liability will be analyzed.⁵

⁴ There is the presumption that the rationality of legal systems cannot lead to absolutely contradictory results, *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, p. 39.

⁵ For a deeper investigation see *Páez-Maletz*, Der Schutz des Vertrauens auf das Zustandekommen von Verträgen im U.S.-amerikanischen Recht or *Wallow*, Risikozuweisung und Vertragshaftung.

2 Histories of the Compared Systems

2.1 Development of the Law of the US

2.1.1 General Development

If one takes a case book regarding, for example, US contract law, one will find cases from different courts with diverse names allotted all over the US. Sometimes, cases from the “Kings Bench”⁶ are quoted, which are usually quite old. How is it possible that in a case book regarding US law still cases from the Kings Bench are being stated? Since the US is rooted in British colonies the link to Common Law⁷ is evident. Along the East Coast the influence of the British origins lasted much longer, while at the West Coast the separation from the British Common Law is more apparent. Only after the American Independence in 1781 the field was plain for the development of a new, independent American law. Therefore, British sources were kept and adjusted with statutes where necessary.⁸ Every state was free to develop its own law, basically by the use of case law. Some states are well known for the sophisticated company law (Delaware), and others for their family law and the law governing divorces (Nevada).⁹ The law schools in US teach the relevant precedents regardless of the state of source, they do not limit their scope to the state in which they are.¹⁰ Precedents from other states can be adopted, if it seems appropriate. Nevertheless, the lawyer in US still has to pay attention to the national differences that could arise.¹¹ Regularly, federal legislation precedes state legislation.¹² But especially regarding business law it is not uncommon to have concurrent jurisdiction.

⁶ High Court of England and Wales.

⁷ Common Law can be understood as the opposite of Civil Law in the context of legal families. But it is also the expression - in a more particular sense - for the jurisdiction of the Kings’ Courts in England. Common Law developed from *writs*, which amounted to a number of approximately 75, gathered in the “*Registers of Writs*”. As the Chancellor got confronted with “hard conscience”, equity developed (see more in *Zweigert/Kötz*, p. 189 f.)

⁸ Due to geographical, social or other circumstances different from those in Britain.

⁹ *Zweigert/Kötz*, p. 251.

¹⁰ See the variety of sources of well-established case books, for instance Murray, *Contracts: Cases and Materials*, sixth edn, 2006, Lexis Nexis.

¹¹ In the comments to the UCC, the differences in jurisdiction of every state are quoted regarding nearly every section, see for example U.L.A., Volume 1 C Uniform Commercial Code Prior Art. 2 §§ 2-701 to end, p. 467,

¹² Supremacy Clause, Art. VI Bill of Rights.

2.1.2 Codification

As the question of codification arose, *David Dudley Field* drafted a Code of Civil Procedure, which did not reflect the British peculiarity by the name of “equity”.¹³ The procedural differences are probably the most incisive differences to a continental lawyer. Contrary to the legal procedures in England, in the United States the jury still plays an important role in every civil suit.¹⁴ Therefore the process itself cannot be compared to the process with a civil law background.¹⁵ *Field* also drafted a Civil Code, which is still in force in North Dakota, South Dakota, Idaho, Montana and California.¹⁶ The emerging case law got more and more confusing and the desire for clarity and orientation arose. The answer was the attempt of the American Law Institute to summarize the case law in abstracts, the “Restatements”.¹⁷ The Restatements are not binding, but “*means of easy access to the rules of American private law in the first instance*”.¹⁸

In several fields of law a consistent jurisdiction is more important, for instance in the commercial law. Hence, the *National Conference of Commissioners on Uniform State Laws (NCCUSL)* agreed on the *Uniform Commercial Code (UCC)*, published in 1956.¹⁹ The UCC is not binding as well, due to a lack of federal legislative competence. The states were free to adopt the UCC. Most of the states enacted a statute based on the UCC, except Louisiana, where the French legal tradition is still being applied. In all the other states the resulting statutes regarding commercial law are quite comparable because of the common basis the UCC.²⁰ For this work Art. 2 of the UCC *Sales* is significant. In the general part the scope of

¹³ “Equity” means “*not a group of maxims of fairness, but a part of substantive law distinguished from the rest by the fact that it was developed by the decisions of a particular court, the Court of Chancery*”, especially distinct in the rules of *trusts, injunctions* and *specific performance*. Decisions in equity are supplementary rules to the Common Law, not compensating rules (*Zweigert/Kötz*, p. 188 ff.).

¹⁴ More about the adversary procedure see in *Zweigert/Kötz*, p. 274.

¹⁵ Details about the process itself see in *Elsing/Van Alstine*, p. 44 ff.

¹⁶ Though the practical significance is different from, for example, the practical significance of the BGB for a German lawyer, see *Zweigert/Kötz*, p. 243.

¹⁷ The most important Restatement for Contracts is “Restatement (Second) of the Law - Contracts”, available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=29, last request April 8th, 2012.

¹⁸ *Zweigert/Kötz*, p. 252.

¹⁹ *Zweigert/Kötz*, p. 252.

²⁰ This work refers to the UCC Article 1 (2001); the following states have enacted this version: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin; see [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC Article 1, General Provisions \(2001\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC Article 1, General Provisions (2001)) last request 2012-05-30.

application is regulated. §2-105 I UCC²¹ designates several definitions related to the goods. Referring to our example (see 144), work and labor will surely be a part of the performance, since the analyzer systems will be sold individualized. This is also covered by the UCC, if the part of work and service does not monetarily exceed the part of the performance.²²

Besides the Restatements and the UCC one should bear in mind that the United Nations Convention on Contracts for the International Sale of Goods (CISG) preempts the general contract law and the UCC, if parties to the contract do not exclude its application. In contracts with the selection of US Law in a b2b context the application of CISG is excluded frequently.²³ The main reason may be that many lawyers are still not comfortable with, or, understand well enough the law of the United Nations. Therefore, the effects of CISG are not considered in this paper.²⁴

2.1.3 Doctrine of Consideration and Specific Performance

The doctrine of consideration and the extraordinary character of the remedy of specific performance are significantly different from the civil law concept and therefore should be highlighted,²⁵ though a specific risk regarding liability may not be present. In most of the contracts that are designed in a Common Law background, one finds a phrase regarding consideration close to the recitals or the preamble "...In consideration thereof the parties agree as follows...". Consideration has no German equivalent. One can remember § 336 BGB²⁶ *Draufgabe*, which is practically not necessary anymore; once it was important for contracts in the agricultural scene and animal trade. Consideration is designated in Restatement (Second) of Contracts § 71.²⁷ Since important conventions do not imply a necessity of consideration, one must truly question the consideration-requirement in an international context.²⁸ The precedent cases regarding consideration stated from *Murray* are

²¹ For convenience every quoted section is linked to the full text: The language see Annex C Quoted provisions – Uniform Commercial Code.

²² "When price of "hybrid" contract involving both goods and services does not include the cost of services, or the charge for goods exceeds that for services, the contract is more likely to be for goods, for purposes of determining whether contract is governed by Uniform Commercial Code (UCC)", *BMC Industries, Inc. v. Barth Industries, Inc.*, C.A. 11 (Fla.) 1998, 160 F.3d 1322, certiorari denied 119 S.Ct. 1807, 526 U.S. 1132, 143 L.Ed.2d 1010, see also U.L.A., § 2-105 note 86 p. 691.

²³ This is the practical experience of the author. CISG may guide most of the contracts in b2c spheres, but not in b2c cases when the applicable law was negotiated.

²⁴ For deeper information regarding CISG-consequences see *Keil* and *Raphael* in general.

²⁵ *Hay*, side no. 283.

²⁶ The language see Annex A Quoted provisions – German Civil Code.

²⁷ The language see Annex B Quoted provisions – Restatement (Second) of Contracts.

²⁸ see *Dalhuisen*, p. 625.

either about consumers²⁹ or other non-business parties, where consideration truly is a contentious issue. *Murray* concludes, that “*In a typical contract to purchase and sell any property – goods, real estate or any other property – the contract is clearly supported by consideration.*”³⁰. Not only recently it got quite common in business transactions that the buying side of a reciprocal contract pays with e.g. shares of its own public corporation. One could argue that contracts with performance from one side in this manner are not sufficient in consideration, if the stock price would never be positive or even rise. Also here *Murray* counters with the conclusion that consideration is not measurable.³¹ Hence, once the party granting the shares had the detriment of giving up the ownership of the shares, there is consideration. The only possibility when consideration could bear the risk of invalidity of the contract is an amendment to an existing contract. In this case the UCC § 2-209³² declares the doctrine of consideration as inapplicable. Against this background consideration is not a risk position innate to Common Law for German entrepreneurs.

Specific Performance used to be only an equitable remedy; generally, monetary compensation was the preceding remedy. This principle got blurred from the standpoint of the Official Comment 2, 2-716 UCC³³ that says:

*”Specific performance is no longer limited to goods which are already specified or ascertained at the time of contracting...Output and requirement contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases”.*³⁴

Due to the approximation of the new approach in the law of the US and the German standpoint³⁵ the assumption is near that little difficulties will arise out of this diminishing difference in the legal systems when it comes to the purchase of goods that are fungible.

²⁹ *Harris v. Time, Inc.* Cal. App., 237 Cal. Rptr. 584 (1987); *Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379, 386 (1903).

³⁰ *Murray*, p. 27.

³¹ See *Murray*, p. 30 “*There are no degrees of consideration*”.

³² The language see Annex C Quoted provisions – Uniform Commercial Code.

³³ The language see Annex C Quoted provisions – Uniform Commercial Code.

³⁴ See *Keil*, p. 9.

³⁵ See, for instance, § 439 I BGB in connection with 243 BGB; supplementary performance is the prior remedy.

2.2 Development of German Civil Law

2.2.1 General Development

The development of the German Civil Law in the early stages is rooted in Roman law, just as the Common Law. The difference crystallized as the principalities were much opener to a “reception of Roman law”.³⁶ In the absence of a system of facilities that should support a development of law more independently from the Roman law (e.g. lobbyism or guilds of lawyers not oriented towards Roman law, administrations etc.) the *Kaiser* always referred to Roman law in its origin pandect manner.³⁷ In the middle of the nineteenth century a first movement towards codification of a common German private law started.³⁸ Already those days *Menger*, one of the detractors of *Plank*, who finally provided a draft, had claimed that the freedom of contracts would lead to an oppression of socially lower positioned parties.³⁹ The BGB was biased, it was geared to the business and experienced contractors.⁴⁰ *Von Savigny* introduced the “*The Canon of Interpretation*”, which includes historical, grammatical, systematic and teleological interpretation.⁴¹ In addition regarding contracts, the good-faith approach of § 242 BGB⁴² opened the door for an interpretation taking into account custom and common usage. On this basis and also considering §§ 138, 157 BGB⁴³, an interpretation for the benefit of socially weaker could develop. As a clear codification of the resulting doctrines was requested,⁴⁴ the Act for the Control of the Law of General Conditions of Business (AGBG) outside the BGB became effective on April 1st, 1977. After the revision of the law of obligations, coming into force on January 1st, 2002, the AGBG was incorporated into the second book of the BGB, §§ 305 ff. Some important details in this context will be explained in 4.1.1 since this codification and the following jurisdiction developed to be quite a big rock in the shoes of the players in b2b transactions in Germany and in the international arena.

³⁶ *Zweigert/Kötz*, p. 133 ff.

³⁷ *Zweigert/Kötz*, p. 135.

³⁸ *Zweigert/Kötz*, p. 141.

³⁹ *Zweigert/Kötz*, p. 142.

⁴⁰ *Zweigert/Kötz*, p. 144.

⁴¹ F.C.v.Savigny, *System des heutigen römischen Rechts*, Bd.I, p.215.

⁴² The language see Annex A Quoted provisions – German Civil Code.

⁴³ The language see Annex A Quoted provisions – German Civil Code.

⁴⁴ in the 70s, see *Zweigert/Kötz*, p. 336.

2.2.2 Case Law

Besides the codification in Germany case law developed as well, since the legislation was and is not dynamic enough to reflect or remedy legal vacuum and questions arising from a quickly developing economy frequently. Some fields of law have never been codified, for instance large parts of labor law. The German case law is not as binding as the case law of the Common Law context.⁴⁵ Still, it is being followed by lower courts since the courts want to avoid successful appeals to appellate courts, which would probably follow the leading opinion of higher courts. In the long run the effects of *stare decisis* of the Common Law and the quasi-binding effect of decisions in the German legal system will be quite similar.⁴⁶

2.2.3 The Principle of Fault

The German principle of fault is rooted in §§ 280 I 2, 311a II 2 and 286 VI BGB, whereas the award of damages is granted upon fault-dependency by the debtor. This approach is different from the American approach of strict liability (see 4.2.2.1.1). The degree of fault is determined in § 276 I BGB⁴⁷, whereby the debtor is liable in case of intent and negligence. Strict liability is fixed in § 439 I BGB⁴⁸ where no excuse is permissible regarding claims for rectification of defects. This means that any excuse of the debtor is without effect. Because of the reversal of evidence in § 280 I second sentence BGB, the fault of the debtor is assumed. The debtor has to prove his innocence, if he wants to prevent the award of damages.

⁴⁵ Though the principle of *stare decisis* is losing its force there as well, see *Zweigert/Kötz*, p. 261 ff.

⁴⁶ *Zweigert/Kötz*, p. 263.

⁴⁷ The language see Annex A Quoted provisions – German Civil Code.

⁴⁸ *MüKo/Krüger/Westermann*, § 439 side number 2; the language see Annex A Quoted provisions – German Civil Code.

3 Conflict of Laws, Selection of US-Law

3.1 State Jurisdiction, Forum Selection

During the negotiations of a b2b contract, the applicable law and the forum mostly are and must be negotiation issues. Both parties should have an interest in declaring a certain legal system as the governing substantive law. The parties of an international contract regarding sales of goods are free to select the applicable law by means of the following framework.

Since December 17th, 2009 the decisive law of conflicts from the German perspective has been the *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law applicable to Contractual Obligations (Rome I)*.⁴⁹ The principle to determine the applicable law is the following: The law of the state in which the party with the most characteristic performance of the contract resides shall be decisive (see Art. 4 No 4 Rome I), for contracts of sales see Art. 4 No 1 a) Rome I. Regarding contracts of sales the delivery of the product is most characteristic, not the performance of payment. Thus, in the scenario (see 4) the applicable law resulting from the German law of conflicts is German law. If German law is applicable, as a necessary consequence the CISG is applicable as well.⁵⁰ German entrepreneurs cannot flee from §§ 305 ff BGB if they conclude contracts in the absence of an international set-up, i.e. if they have an agreement with another German contract party (see Art. 3 IV Rome I). But the international context is uncritical if the performance of payment or delivery means to cross the border.⁵¹

The rules on the conflicts of law from the perspective of the US lead to the same result as the German law of conflicts. Both are based on the principles of the Hague Convention⁵², which determines that the country of the seller's place of business shall provide the governing law.⁵³ § 188 Restatement (Second) on the Law of Conflicts rules that the law of the state with the "most significant relationship" shall be governing.⁵⁴ The similar attitude is reflected in

⁴⁹ Official Journal of the European Union, L 177, 04.07.2008, p. 6; Other questions related to international sales contracts like tort, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* are addressed in the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁵⁰ Germany is a member state of the Convention on the International Sale of Goods, April 11th 1980.

⁵¹ Beck OK/*Spickhoff*, VO (EG) 593/2008, Art. 3 side no. 34.

⁵² ABI EG 1980 L 266/1.

⁵³ West's Business Law, p. 351 (Choice of Law).

⁵⁴ *Gildeggen*, p. 22.

§ 1-105 UCC⁵⁵, which states that the parties may agree on the governance of a certain law, provided that a reasonable relation to the state of which law is chosen exists. But also the US has ratified the CISG. Art. 6 CISG⁵⁶ extends the narrow possibility of § 1-105 UCC and allows the parties to choose independent from a reasonable relation to the state of source.⁵⁷

Regarding the forum selection an adequate relationship to the state of the forum is indispensable.⁵⁸ An exemption grants the state New York that accepts jurisdiction regarding contracts with a contract volume higher than US \$ 1 Mio, though no relationship is at hand.⁵⁹

3.2 Arbitration, Alternative Dispute Resolution

3.2.1 The German Perspective

Arbitration in Germany has a long history. Already in the Roman law, arbitration was used to support the state jurisdiction.⁶⁰ Because of the supportive character, state jurisdiction always tried to keep the control over arbitration, inter alia because of the apprehension to lose authority.⁶¹ In the beginning business participants were reluctant to commit to arbitration. Compromises were said to be a losing game.⁶² As the tendency to arbitration invaded Continental Europe and international harmonization of arbitration agreements got increasingly desirable, the leading organization DIS was founded in Bonn in the year 1992. After the release of the UNCITRAL Model Law an amendment of the German Code of Civil Procedure (ZPO) followed. Now, §§ 1029 ff ZPO⁶³ stipulate the regulations on the commitment relating to the arbitration procedure including the enforcement. Generally, the parties have to agree on the arbitration clause in writing, see § 1031 ZPO. The arbitration experts play an important role in the arbitration procedure; therefore, the jurisdiction claims neutrality and impartiality.⁶⁴ The process regarding the appointment of arbitration experts and the necessary regulations have not been legislated yet. This seems to be a vacuum, which up to now has

⁵⁵ The language see Annex C Quoted provisions – Uniform Commercial Code.

⁵⁶ Article 6 CISG: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

⁵⁷ West's Business Law, p. 351 (Choice of Law); Of course, a clause in a contract that determines "US Law" as the applicable law of the contract, is void. The parties can only select the law of a certain state.

⁵⁸ *Elsing/Van Alstine*, p. 52.

⁵⁹ *Elsing/Van Alstine*, p. 52.

⁶⁰ *Schäfer*, p. 59.

⁶¹ *Schäfer*, p. 59.

⁶² *Schäfer*, p. 44.

⁶³ The language see <http://www.trans-lex.org/output.php?docid=600550>, last request 2012-05-28.

⁶⁴ BGH, 06.06.1994, II ZR 100/92, NJW 1994, 1314-1315.

been filled with the regulation § 317 BGB ff.⁶⁵ A right to termination in case of a partial arbitrator is stated in § 626 BGB.⁶⁶ The enforcement of arbitral awards is regulated in § 1055 ZPO.⁶⁷ Still, arbitration under German Law seems to be quite controlled by state legislation and furthermore lacks remedies. The German literature is demanding a higher flexibility, also inspired by the U.S. approach.⁶⁸ As a consequence the venue for arbitration should be located in a nation state with a better developed arbitration environment, or more sophisticated rules shall be selected in the contract.

3.2.2 The US Perspective

Though the arbitration system in the US is much younger, a rapid development close to practitioners took place.⁶⁹ Afraid of losing authority, also US courts decided adhesively towards arbitration and very often declared arbitration awards not enforceable.⁷⁰ In the 1920 finally, lobbyism supported arbitration generally and a change of case law regarding the acceptability of arbitration awards.⁷¹ Legislation followed, but not equal in all states of the US. Still, the states have different regulations regarding arbitration that leave the user puzzled.⁷² Nevertheless, organizations like the American Arbitration Association developed and took in a leading role.⁷³ Therefore, it is important to opt for independently developed regulations like, for instance, the Commercial Arbitration Rules of the AAA to safeguard a consistent arbitration procedure independent from national differences. The Federal Arbitration Act rules the enforcement of the awards, the recognition as a provision of enforcement is regulated in the New York Convention, Art. V. All in all arbitration in the US is booming and will be a negotiation issue in most of the contracts for sure.⁷⁴

If the regulation of liability issues seems to be an important point in a contract and if the parties wish to have a party autonomy to the highest level possible, they should opt for

⁶⁵ The language see Annex A Quoted provisions – German Civil Code Schäfer, *Die Verträge zur Durchführung des Schiedsverfahrens*, p. 46.

⁶⁶ The language see Annex A Quoted provisions – German Civil Code; BGH, 05.12.1979, VIII ZR 155/78-WM 1980, 108-112, jurisPK-BGB/Völzmann-Stickelbrock, § 317 side no 28.

⁶⁷ For eventual problems regarding the enforcement of arbitral awards see *Wagner*, p. 7ff.

⁶⁸ see *Sieveking*, p. 441.

⁶⁹ *Schäfer*, p. 59.

⁷⁰ *Schäfer*, p. 59.

⁷¹ The Uniform Arbitration Act, enacted in 1955 is a basis in many states, interstate commerce is governed by the FAA, enacted in 1925, see *West's Business Law*, page 40; *Schäfer*, p. 59.

⁷² *Schäfer*, p. 58.

⁷³ The New York Draft Act was guidance for the legislation of twelve states until 1933.

⁷⁴ *Elsing/Van Alstine*, p. 65.

arbitration.⁷⁵ Depending on the circumstances of the case arbitration may be recommendable anyway, since the parties benefit from a shorter timeframe; confidentiality of the procedures and the files very often is indispensable. But arbitration can also be critical, if a party is in a weaker position and, hence, takes the risk to lose the protective character that the German jurisdiction practices regarding § 305 ff BGB.⁷⁶

3.3 Procedural Highlights

3.3.1 Jury Trial

For German entrepreneurs the jury trial is quite an unknown field of forensic practice in civil matters. If legal remedies of Common Law are called upon, six to twelve jurymen or jurywomen sit aside the judge and support the decision-making, also regarding the amount of the damages awarded. The so called *treble damages*⁷⁷ can be the outcome of a jury trial, which often leads to capricious results.⁷⁸ Hence, the jury has a substantial influence although they have no practical experience or idea of the customs in professional spheres.⁷⁹ So it may be helpful to exclude the jury trial in the contract. The exclusion of the jury trial is pretty common nowadays. Only a few trials in the States are supported by jury, mere bench trials are normality. Thus, between businessmen the exclusion of the jury trial is not a problem as regards unconscionability (see 4.2.1.3).⁸⁰ The language of a possible clause for the exclusion of the jury trial can be as follows:

“IN THE EVENT OF ANY DISPUTE BETWEEN THE PARTIES, HEREBY KNOWINGLY AND VOLUNTARILY, AND HAVING HAD AN OPPORTUNITY TO CONSULT WITH COUNSEL, WAIVE ALL RIGHTS TO TRIAL BY JURY, AND AGREE THAT ANY AND ALL MATTERS SHALL BE DECIDED BY A JUDGE OR ARBITRATOR WITHOUT A JURY TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW. To the extent applicable, in the event of any lawsuit between the parties arising out of or related to this

⁷⁵ See also *Kondring*, RIW 2010, p. 189, especially if the risk allocation is reflected in the pricing.

⁷⁶ See very critical regarding the development of arbitration in Germany *Schäfer*, p. 869-877.

⁷⁷ Up to three times higher than the amounts normally estimated.

⁷⁸ *Elsing/Van Alstine*, p. 45, side no. 73.

⁷⁹ *Hay*, side no. 199, *Elsing/Van Alstine*, side no. 72, important in particular regarding punitive damages.

⁸⁰ U.L.A., § 2-302, Note 33 p. 379.

agreement, the parties agree to prepare and to timely file the applicable court a mutual consent to waive any statutory or other requirements for a trial by jury.”⁸¹

3.3.2 Class Action

Regarding probable mass disaster, the American specialty of class action has to be considered by German business. Class actions are not permissible in Germany and therefore an unknown judicial terrain for German participants. Class action means, that “*where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.*”⁸² In the scenario (see 4), product liability resulting from the faulty analysis of the body liquids could lead to class actions, depending on the circumstances, especially depending on the number of injured persons.⁸³ Details on class actions are regulated in Rule 23 Federal Rules of Civil Procedure (23.F.R.Civ.P.). *Numerosity, commonalty* and *typicality* (see 23.F.R.Civ.P. a) decide whether a class action is permissible or not. Because of the special nature and high procedural requirements, this work cannot cover this issue completely. Nevertheless a reminder for the sake of completeness is necessary.⁸⁴

3.3.3 Fees

Unconscionable or overreaching fees for attorneys are not permitted,⁸⁵ but still there is no regulation like the *Bundesrechtsanwaltsgebührenordnung (federal attorney’s fees act)*. Furthermore, the prevailing party is not entitled to claim its attorney’s fees from the opposing party. Only the law charges have to be borne by the losing party. But these law charges are only minor compared to the attorney’s fees. These circumstances should surely influence the strategic steps of the parties.

⁸¹ See <http://agreements.realdealdocs.com/merger-agreement-clauses/section-119-waiver-of-jury-trial-29690508/>, last request June 20th, 2012.

⁸² Black’s Law Dictionary, p. 249.

⁸³ See *Beuchler*, p. 41, also recommendable for a deeper investigation of class actions.

⁸⁴ See fn 83.

⁸⁵ see Code of Professional Responsibility of the American Bar Association.

4 Limitation of Liability

The following scenario shall serve as a reference for the following considerations regarding limitation of liability and related issues:

Scenario

A medium sized business (B) in South Germany produces automated analyzer systems for clinical diagnostics and biotechnology. Partner (P), a reseller in Delaware (USA) sent B a purchase order of 10 individualized analyzer systems. B sent an acknowledgement form that excluded the liability regarding consequential damages and gross negligence for auxiliary persons. Furthermore the limitation period was three months. P sold one of the systems to L, a laboratory in Brazil.

a) Three weeks after the delivery to L the analyzers stop functioning due to a deficient unit provided by B. Because of the malfunction the systems are not working for five days. Therefore, L cannot provide the analyzed body liquids to requestors and suffers consequential damages amounting to 175.000 Real.

b) L has used the provided systems for three months. Suddenly five patients infected with HIV from donated contaminated blood analyzed by one of the malfunctioning systems of B. The systems did not detect the virus. The malfunction happened because of incorrect software provided and programmed by B. B claims that the software was incorrectly administered by L.

4.1 German Civil Law Status Quo

4.1.1 German Civil Law and Terms and Conditions (AGB)

A starting point regarding an assessment of the validity of the standard business terms used in combination with or in form of a contract are §§ 305 ff BGB.⁸⁶ For a quick review and a

⁸⁶ A basis for the interpretation of a contract under German law in general is §§ 133, 157 BGB. But they are not applicable regarding terms and conditions because the reduction of an unfair term to the possible extent (*geltungserhaltende Reduktion*) is denied by German adjudication and also by the prevailing opinion in the literature, see also 4.1.2.

better understanding the sections are enclosed in **Annex A**.⁸⁷ The Unfair Terms in Consumer Contracts Directive (93/13/EEC [1993] OJ L95/29) reaches quite far as regards German law. It is worth to take a closer look at the specific German approach, since the result of an application of the provisions, though not intended, can have unfortunate effects.

§ 310 I 2 BGB states that “*Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur.*” Nevertheless, German courts apparently do control the terms and conditions used in b2b-cases frequently.⁸⁸ § 310 I 1 BGB tells the courts to refer to § 307 BGB, if the standard terms are used towards entrepreneurs. In other words, the courts are practicing a judicial review (*Inhaltskontrolle*). Hence, the courts rely on § 307 I 1 BGB, whereafter terms in standard contracts are “*...ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract...*”. As an indicator of what does “*unreasonably disadvantage the other party*” the current jurisdiction refers to §§ 308, 309 BGB,⁸⁹ which were originally implemented to address consumer only. Regarding liability § 309 7b BGB strictly denies a limitation of liability for gross negligence in standard terms. Thus, it is very difficult to limit the liability, for example, for vicarious agents. On the one hand § 278 s. 2 BGB allows an exclusion of liability in advance, i.e. in standard terms, but this option is rigorously constricted in 309 7b BGB. If the contract in the scenario above was concluded under German Law, the exclusion of the liability for gross negligence of auxiliary persons was in all probability not valid. The same problem is just around the corner if the limitation period shall be shorter than one year. § 309 8 b) ee) BGB does indicate the unfairness, so the German court assumes. Thus, B is left in nebulosity if his limitation of the period is effective at all. In case of doubt the full two years resulting from § 438 I No. 3 BGB are applicable.⁹⁰ The court practices the *blue-pencil-test*, whereas invalid terms are being deleted completely and the rest of the clauses survive. Dispositive law applies instead of the invalid terms. If the remaining clauses do make sense without the deleted clauses they remain effective.

Generally, the underlying philosophy is that in a lot of the cases before the courts the parties in b2b cases factually have the same relationship as in b2c cases – the user of the standard

⁸⁷ For the translation see http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf, last request 2012-04-30.

⁸⁸ See precedent BGH, NJW 1984, p. 1751; thereafter BGH NJW 1988, p. 1788; BGH, NJW 2007, p. 3775. Further analyses see also in *Markesinis et. al.*, p. 175-179.

⁸⁹ The so called „*Indizwirkung*“, see *Dauner-Lieb et al. (ZIP)*, p. 311.

⁹⁰ The language see Annex A Quoted provisions – German Civil Code.

terms can exploit the other party which is in a socially weaker position or which is to a certain degree economically dependent on the other party.⁹¹ The so called *principle of differentiation* [Differenzierungsgebot]⁹² is stated in § 310 I 2 BGB, whereafter “...reasonable account must be taken of the practices and customs that apply in business dealings.” But since practices and customs in Germany need a long term to be perceived like practices and customs in terms of legal definitions, the usage of limitation of liability could never really unfold as helpful in a b2b context.⁹³

One last option for the German entrepreneur is to use § 305 b BGB which states that individually agreed terms have priority over standard terms. In this manner German business nowadays tries to get around the current strongly controlling jurisdiction. The individually agreed terms can be assumed as such, if the parties discuss the critical contents and the other party truly has an option to influence the standard terms.⁹⁴ In each case the parties have to sign a separate sheet with the critical terms, for instance the shorter warranty, excluded liabilities, cappings or lump sums etc. But at the end it is not clear, if that could prove a factual discussion about the matter and a possibility to influence the contents. What if there were no discussions? Also in deals with a higher contract volume it is possible that the forms are only exchanged between the parties by reason of signature, not by reason of discussion. Hence, the user of standard terms also has to archive the versions of the documents (if available) and/or the minutes of the negotiations to prove the individually agreed terms. This takes a lot of time and is not easy to organize in the usual course of business.

If one thinks about the fact that the shift of risk sometimes results in a different, i.e. cheaper pricing, one will see that this restrictive term control of the German courts is hindering German business from being competitive.⁹⁵ To a large part business nowadays has a risk management. The longer the seller of a product has to grand warranties, the more expensive it gets. Nowadays the tendency is that judges could and should not assess the prices of the goods in relation to the limitation-clauses, since they are not qualified to do that in a specific branch.⁹⁶ A few exemptions are made, especially if an insurance of the damages is possible.⁹⁷

⁹¹ MüKo/Basedow BGB, § 310, side no. 7-8.

⁹² Dauner-Lieb (ZIP), p. 310.

⁹³ BGH, NJW 1966 p. 504.

⁹⁴ For the latest jurisdiction see BGH, NJW 2010, p. 1131; this judgment is said to bring clarity into the problems that individually agreed terms bear, see *von Westphalen*, p. 1110 – 1115, but in this case two consumer were involved, it is not a b2b case.

⁹⁵ The result is a “Competition of Legal Systems”, see *Kondring* (RIW) p. 184; or Berger, NJW 2010 p. 466.

⁹⁶ MüKo BGB/Krüger, § 307 RN 44.

Nevertheless, regarding consequential damages it is hardly possible to insure them.⁹⁸ Thus, the discussion does not lose its weight. Other legal systems do permit the limitation of liability for gross negligence of vicarious agents etc. in standard terms, for example the Swiss Legal System.⁹⁹ For this reason, it is an easy step to select the other legal system, the more so as the language is the nearly the same.

4.1.2 Judicial Discretion (*geltungserhaltende Reduktion*)

In Germany the law on standardized agreements is characterized by the prohibition of judicial discretion.¹⁰⁰ Different from judicial control,¹⁰¹ judicial discretion means the judge corrects the overreaching clauses to the possible extent, to avoid that the clauses are declared as completely null and void. One reason against judicial discretion is the unwillingness to let the courts act as counsel of the party using the standard terms. Another, is that courts are not able and nor do they desire to alter the clauses; courts simply do not have the professional skills to determine the risk and turn it into amounts. Furthermore the transparency, i.e. the concrete content of a clause was endangered because parties that should learn from the terms and conditions in which framework they are acting, cannot do so.¹⁰² This was already recognized as a huge problem because still, the consequences of void clauses are not clear at all.¹⁰³ The fact that judicial discretion is not permissible in the German private law puts the user of German law in an insecure position, because the slightest exaggeration of a clause leads to striking of the whole clause. In b2b spheres, there will always be grey areas. These grey areas nonetheless, demand more flexibility from the courts than practiced in Germany those days.

⁹⁷ MüKo BGB/*Krüger*, § 307 RN 46

⁹⁸ MüKo BGB/*Krüger*, § 307 RN 46.

⁹⁹ See Art. 101 II OR (Swiss Law of Obligations), for the discussion of the relationship of 101 II OR and 199 OR see *Honsell*, *Obligationenrecht Besonderer Teil*, p. 88.

¹⁰⁰ See a deeper and critical investigation, *Uffmann*, p. 286.

¹⁰¹ Which means that judges control the complete terms upon § 307 BGB.

¹⁰² *Uffmann*, p. 286.

¹⁰³ *Uffmann*, p. 286.

4.2 US-Law Status Quo

4.2.1 US Law and Terms and Conditions

4.2.1.1 „Knockout“ Rule

There are different alternatives for handling deviating terms and conditions. In Germany the status quo is that deviating provisions are superseded by the provisions of the law (“knockout” rule). After getting over the “battle of forms” problem and the “last shot rule”, in § 2-207 UCC the similar approach as practiced in Germany found favor, the “knockout rule”.¹⁰⁴ A necessary provision of the effectiveness of the knockout rule is an expressed deviating term of the counterpart.¹⁰⁵ If the terms are silent, like in the scenario above the terms of P, the knockout rule does not apply.¹⁰⁶ Thus, in subsection (2) the word “materially” raises some questions. In the scenario (4) the seller B excluded the liability for consequential damages in his acknowledgement. Does that materially alter the contract? If the answer is yes, the exclusion would not become part of the contract. A first categorization of materiality is made in the comment 4 to § 2-207 UCC. If “surprise or hardship” result from the alteration, the alteration is material. Having some routine with contracts in b2b spheres, participants in the market will know that it is quite ordinary to exclude the liability for consequential damages. Sometimes this shift of the risk is even reflected in a cheaper price for the good and clearly desired by both parties. The approach of the courts to classify a disclaimer of consequential damages as materially is not in a straight line. Some courts consider negations of implied warranties as “material” changes, whereas others do not.¹⁰⁷ Towards b2b-cases, however, a party may not be “surprised” by a clause that negates consequential damages because it is common in business dealings and hence, the alteration should not be material.

¹⁰⁴ *Gildeggen*, p. 123; the language see Annex C Quoted provisions – Uniform Commercial Code.

¹⁰⁵ *Murray*, p. 175.

¹⁰⁶ *Murray*, p. 175.

¹⁰⁷ *All-Iowa Constr. Co. v. Linear Dynamics, Inc.* 296 F. Supp.2d 969 (N. D. Iowa 2003); *Murray*, p. 172.

4.2.1.2 Standardized Agreements

Regarding the US Law of standardized contracts there are various decisions. One of the most important may be *Max True Plastering Co. v. United States Fidelity and Guaranty Co.*¹⁰⁸ The facts of the case are quite close to the insurance business, but the message can be conceived more general. The decision refers to the Restatement (Second) of Contracts § 211,¹⁰⁹ which is pretty crucial regarding the use of standardized contracts in US law. One could assume that this standardized agreements provision of the Restatement addresses similar problems as covered with §§ 305 ff BGB as regards b2b. But this assumption is wrong. US-law does not offer special provisions regarding terms and conditions in the sphere of b2b. In the assessment of unconscionability, the differentiation between individually negotiated agreements on the one hand and conditions completely drafted to which the counterpart submitted to on the other hand plays an important role.¹¹⁰ An important criterion is the possibility of a contract party to influence the content of the contract de facto.

4.2.1.3 Unconscionability

4.2.1.3.1 Application

The main source regarding the unconscionability-test is § 2 – 302 UCC.¹¹¹ If “(...) *in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.*”, the court is able to refuse the enforceability of the complete agreement.¹¹² Also, the court can strike single terms or groups of terms in agreements. It is even permissible for the court to reduce unconscionable clauses to the possible extent (*geltungserhaltende Reduktion*, more see 4.1.2).¹¹³ The Official Comment emphasizes that “*The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.*”¹¹⁴ California leaves out this regulation from its Commercial Code and states it in West’s Annotations to the Californian Civil Code § 1670.5.

¹⁰⁸ Oklahoma Supreme Court, 912 P.2d 861 (1996).

¹⁰⁹ The language see Annex B Quoted provisions – Restatement (Second) of Contracts.

¹¹⁰ *Raphael*, p. 47.

¹¹¹ The language see Annex C Quoted provisions – Uniform Commercial Code.

¹¹² U.L.A., Volume 1A, Prior Art. 2, §§ 2-201 to 2-314, p. 345.

¹¹³ U.L.A., § 2-302 UCC, p. 345.

¹¹⁴ U.L.A., § 2-302 UCC, p. 344-345.

Precedents for the principle of unconscionability are inter alia *Williams v. Walker-Thomas Furniture & Co*¹¹⁵, a case in which a seller of furniture claimed the retention of title of all goods the buyer (a consumer) bought until the full payment of every single good. The court remanded for the trial court for further proceedings because it was not evident in the protocols that the buyer had the chance to read the conditions in the printed form contract or to discuss them. There are far more cases regarding the unconscionability clause – in the b2c context.¹¹⁶ As regards merchants the courts are pretty reluctant to apply the principle of unconscionability, though § 2-302 UCC covers merchants as well.¹¹⁷ Furthermore, it makes no difference if the terms are negotiated or stated in a standardized agreement, § 2-302 UCC applies to both.¹¹⁸ Circuit Judge McMillian gave the following important statement in *Transport Corp. of America, Inc. v. International Business Machines Corp.*:

“The UCC encourages negotiated agreements in commercial transactions, including warranties and limitations. It is at the time of contract formation that experienced parties define the product, identify the risks, and negotiate a price of the goods that reflects the relative benefits and risks to each. An exclusion of consequential damages as set forth in advance in a commercial agreement between experienced business parties represents a bargained-for allocation of risk that is conscionable as a matter of law.

...

We agree with the district court that the disclaimer of consequential damages was not unconscionable and that the damages claimed by TCA, for business interruption losses and replacement media, were consequential damages. Furthermore, TCA and ICC were sophisticated business entities of relatively equal bargaining power. ICC’s disclaimer was not unconscionable and TCA is therefore precluded from recovering consequential damages.”

A few exemptions were made as, for instance a party (operator of a filling station) was barely able to read the conditions of a contract with a major oil company.¹¹⁹ But generally, as stated

¹¹⁵ United States Court of Appeals, District of Columbia Circuit 350 F.2d 445 (1965).

¹¹⁶ See also *Ingle v. Circuit City Stores, Inc.*, United States Court of Appeals, Ninth Circuit 328 F.3d 1165 (2003).

¹¹⁷ *Murray*, p. 471; *Zweigert/Kötz*, p. 343.

¹¹⁸ *Zweigert/Kötz*, p. 343, here they compare it with the German § 242 BGB.

¹¹⁹ *Johnson v. Mobil Oil Corp.*, 418 F. Supp. 264 (E.D. Mich. 1976).

in *Moscatiello v. Pittsburgh Contractors Equip. Co.*¹²⁰ “Courts have upheld limitation of damages provisions in sales contracts between merchants or experienced business concerns because there is no disparity between such entities in either bargaining power or sophistication”. In the commentary literature one can read that the doctrine of unconscionability in general shall not be misused in case of unequal bargaining power.¹²¹ But statements that reverse this attitude are contained as well.¹²²

In the example mentioned above (4), B, the medium sized business in Germany sells 50 analyzer systems for clinical diagnostics to P in Delaware. West’s Business Law says, “*In summary, a person is a merchant, when she or he, acting in a mercantile capacity, possesses or uses an expertise especially related to the goods being sold.*”¹²³ A statutory definition of merchant is fixed in § 2-104 UCC.¹²⁴ Apparently, at both sides of the contract merchants are acting. Thus, one could think unconscionability may not be a problem here.

4.2.1.3.2 Specific Approaches of Particular States

To demonstrate the diversity and also tendency regarding the jurisdiction on unconscionability, here are a few examples from different states of the U.S.: The Official Comment to § 2-302 UCC says that generally findings of unconscionability are rare in commercial settings.¹²⁵ This is especially true in Michigan.¹²⁶ Under Californian law it was possible to shift the risk of non-acceptance of software by the customers from the seller to the buyer, i.e. the buyer took the risk that the customer would not accept the software produced by the seller.¹²⁷ The Law of New York even provides “...*a presumption of conscionability...*” in case of a commercial setting.¹²⁸ Also in New York unconscionability is seldom established in agreements among merchants.¹²⁹ Nonetheless, in *Construction Associates Inc. v. Fargo*

¹²⁰ 407 Pa. Super.363, 374, 595 A.2d 1190, 1196 (1991).

¹²¹ See U.L.A., § 2-302 p. 354, “*The principle of unconscionability under the Uniform Commercial Code (UCC) is one of prevention of oppression and unfair surprise, and not of disturbance of allocation of risks because of superior bargaining power.*”

¹²² “*Concept of unconscionability was developed so as to prevent unjust enforcement of owner’s contractual terms which one party is able to impose upon others because of significant disparity in bargaining power.*” in *Leonidas Realty Corp. v. Brodowsky*, N.Y.City Civ. Ct. 1982, 454 N.Y.S.2d 183, 115 Misc.2d 88.

¹²³ More to the definition of merchants see West’s Business Law, p. 361.

¹²⁴ The language see Annex C Quoted provisions – Uniform Commercial Code

¹²⁵ U.L.A., § 2-302 UCC, Note 21 p. 370.

¹²⁶ U.L.A., § 2-302 UCC, Note 21 p. 370.

¹²⁷ *Peoplesoft U.S.A, Inc. v. Softeck, Inc.*, N.D. Cal. 2002, 227 F.Supp.2d 1116.

¹²⁸ U.L.A., § 2-302 UCC, note 21 p. 369.

¹²⁹ U.L.A., § 2-302 UCC, note 23 p. 371., see also “*When a contract does not violate public policy and its effect is not so onerous as to shock the conscience, a party will not be relieved of the duty to abide by the contract merely because it is a burdensome bargain.*”, p. 353.

Water Equipment Co.¹³⁰ the court held that “*under appropriate circumstances contractual provision may be found unconscionable even in commercial setting*”.¹³¹ This case does truly reflect reality and thousands of purchase agreements concluded daily. The Supreme Court of North Dakota elaborates unconscionability in a thorough manner. It separates the provisions regarding unconscionability into two categories, the *procedural* unconscionability and the *substantive* unconscionability. The former addresses the possibility to influence and negotiate the terms of the contract, the latter addresses the “one-sidedness” or “harshness” of the contractual terms under discussion.¹³² As regards the possibility to influence and negotiate the terms of the contract, the decision of the Appellate Court of Kansas held that “*Where a party uses a printed form or boilerplate contract which is skillfully drawn by the party in the strongest economic position, which establishes industry-wide standards offered on a take it or leave it basis to the party in a weaker economic position, the contract is unconscionable.*”¹³³ Both parties in this case were merchants, Hartford is a financial services group and Tanner is an importer of cars for resale.

4.2.1.3.3 Conclusion on Unconscionability, Curative Clauses

Regarding unconscionability one can see that there is not a red line that the courts all over the US do follow. Some act more liberal, for instance the courts of New York, others utilize the doctrine of unconscionability more vivid, like the courts of North Dakota. Therefore, it is important to analyze the law of the state in question instead of asking for a general attitude in the US. What they do have in common is the difference to the German jurisdiction: They are free to limit the clause in question to the possible extent instead of striking the clause as a hole. Judicial discretion (*geltungserhaltende Reduktion*) is not permissible in German private law.¹³⁴ This approach is criticized in other legal systems as well. Arguments are that entrepreneurs would start to use overreaching limitation clauses with the excuse the courts would limit them to the extent possible (see 4.1.2). And if the party did not even claim unconscionability – the better it was. This would lead to principally overreaching terms and conditions. The American approach in § 2-302 UCC to leave it to the court grants three options. First “...*the court may refuse to enforce the contract*”, second “*it may enforce the remainder of the contract without the unconscionable clauses*” and third “*it may so limit the*

¹³⁰ N.D. 1989, 446 N.W.2d 237.

¹³¹ U.L.A., § 2-302 UCC, note 21 p. 370.

¹³² see also U.L.A., § 2-302 UCC, note 34, p. 381.

¹³³ Hartford v. Tanner, Kan.App.1996, 910 P.2d 872, 22 Kan. App.2d 64.

¹³⁴ See 4.1.2.

application of any unconscionable clause...”. This approach is quite practical and liberal and gives much discretion to the judges and eventually the jury to decide.¹³⁵ Therefore, the exclusion of the trial court (see 3.3.1) is much more important in this context.

In many contracts designed with a Common Law background one can find “*boiler plate clauses*”. Boiler plate clauses are passages that are used in all kinds of contracts regardless of their contents; inter alia they shall help to safeguard the implementation of the terms of the contract itself.¹³⁶ Nowadays the parties are stating regularly that they both are advised by a legal counsel, hence the possibility of a contract to be void caused by unconscionability shall be diminished.¹³⁷ An example is *Colonial Life ins. Co. of America v. Electronic Data Systems Corp.*¹³⁸ Here the Californian Court developed several criteria as an unconscionability-test, i.e. the sophistication of the parties, the degree of negotiations and the presentation of legal counsel during negotiations. It is recommendable to clarify the representation of the parties by legal counsels already in the contract. The following clause may be useful to indicate the professional context the parties are acting in:

“Each party is a sophisticated and professional business corporation which has engaged legal advice of its own choice in the phase of drafting, negotiation and conclusion of this Agreement. Any assumption in statutory or Common Law against the drafter or any specific provision herein, or against the drafter of this Agreement as one, shall be ineffective whatever. Both parties covenant to, and shall, renounce from affirming or have confidence in any such assumption.”

¹³⁵ This may be the reason for a broad application of judicial discretion in other private law as well, for example in the Swiss Law of Obligations.

¹³⁶ The best example is the severability clause (*salvatorische Klausel*).

¹³⁷ To the English context see Lord Denning's formulated general principle: „*Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on inequality of bargaining power. By virtue of it, the English law gives relief to one who, **without independent advice** [emphasis added], enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.*” in Zweigert/Kötz, p. 331.

¹³⁸ D.N.H.1993, 817 F.Supp.235; U.L.A., § 2-302 UCC, note 34, p. 381.

4.2.2 Classification, General Provisions

The Common Law does have various definitions or examples of non-performance.¹³⁹ All circumstances that lead to a non-performance are categorized as “breach of contract”.¹⁴⁰ The principle of strict liability (different from the German Principle of Fault, see 2.2.3The Principle of Fault) has only little exemptions, like illegality or supervening impossibility.¹⁴¹ The UCC provides provisions on excuses and the possibility to enhance the excuses by means of additional contract terms. § 2-613¹⁴² (Casualty to Identified Goods) helps in case of deteriorated good without fault by either party; § 2-614 UCC (Substituted Performance) helps the parties to render substituted performance in case of difficulties in delivery without fault. § 2-615 UCC (Excuse by Failure of Presupposed Conditions), like later mentioned in force majeure more detailed (4.2.2.2) contents the approach to codify the excuse of the seller in case “...*performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basis assumption on which the contract was made...*”. This provision was necessary, because the allocation of risk and the impediments and obstacles in our environment will never be clear and foreseeable at all; contract parties need to have a limitation regarding possible risk allocations.¹⁴³ § 2-615 UCC also covers “*Frustration of Contracts*”, though the language does not mention the wording.¹⁴⁴

But these excuses provided by the UCC do not always reach as far as the parties want to allocate or shift the risk. For a more liberal allocation of the risk the UCC provides § 2-719¹⁴⁵ (Contractual Modification or Limitation of Remedy). Attention is to be turned at subsection three, whereas regarding consequential damages “...*limitation of damages where the loss is commercial is not [unconscionable]*.” This enhances § 2-302 UCC and is an important difference from the German jurisdiction (see 4.1.1). Thus, in our scenario, B would have no problem to exclude liability for the consequential damages resulting from the standstill of the systems under the UCC.¹⁴⁶ Regarding the font in the contracts the tendency is veering towards keeping the clauses in conspicuous type, as developed by case law in *Stauffer*

¹³⁹ Compared to German law, here we speak about *Falschlieferung*, *Verzug*, *Nichtlieferung* etc., see *Zweigert/Kötz*, p. 510.

¹⁴⁰ *Keil*, p. 8; *Zweigert/Kötz*, p. 510.

¹⁴¹ Restatement of Contracts (1932), sec. 228; Chapter 14 secs. 454-469.

¹⁴² The language see Annex C Quoted provisions – Uniform Commercial Code.

¹⁴³ *Keil*, p. 56; also for a detailed analysis of the particular provisions of § 2-615 UCC see pp. 65 ff.

¹⁴⁴ Frustration of Contracts is an old legal device developed in the English Common Law; it is effective in case the parties fail to contract on the right purpose; this doctrine was almost not important in US-Law, for more details see *Keil*, p. 12.

¹⁴⁵ The language see Annex C Quoted provisions – Uniform Commercial Code.

¹⁴⁶ Nevertheless depending on the individual case law of a particular state.

Chemical Co. v. Curry.¹⁴⁷ Especially the courts of New York see conspicuousness as a relevant factor for the determination of a clause as unconscionable or not.¹⁴⁸ A limitation of liability provision to the contract price in conspicuous type can be designed as follows:

*“IT IS UNDERSTOOD AND AGREED THAT SELLER’S LIABILITY WHETHER IN CONTRACT, IN TORT, UNDER ANY WARRANTY, IN NEGLIGENCE OR OTHERWISE SHALL NOT EXCEED THE RETURN OF THE AMOUNT OF THE PURCHASE PRICE PAID BY PURCHASER AND UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE FOR SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES. THE PRICE STATED FOR THE EQUIPMENT IS A CONSIDERATION IN LIMITING SELLER’S LIABILITY. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE TRANSACTIONS UNDER THIS AGREEMENT MAY BE BROUGHT BY PURCHASER MORE THAN ONE YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED.”*¹⁴⁹

In this context, it is important to highlight the dimension which § 2-719 UCC can have by means of case law: Under Pennsylvania Uniform Commercial Code, it was possible to exclude the liability for damages for breach of implied warranties.¹⁵⁰ In Germany this would hardly be possible, because the origin purpose of the contract must not be endangered by the use of limitation clauses.

4.2.2.1 Tortious Liability

As regards the applicable law, *Rome II* allows the selection of the applicable law in Art. 14 I b in commercial settings before the event giving rise to the damage occurred. The agreement must be freely negotiated, i.e. the mere attachment of terms and condition containing the choice of law as regards product liability is not sufficient. The parties should sign the document that integrates the clause with the selection.

The *Restatement (Second) of Torts* and the *Restatement (Third) of Torts: Products Liability* try to summarize what so long is regulated by case law. Unlike the contract law the *law of*

¹⁴⁷ 778 P. 2d 1083, 10 U.C.C. Rep. Serv. 2d 342 (Wyo. 1989.)

¹⁴⁸ Further factors are clarity, experience of the parties in the field, presence of a meaningful choice of the parties and an eventual unreasonableness of the enforcement of the clause, see *Pacs Industries, Inc. v. CutlerHammer, Inc.*, E.D.N.Y.2000, 103 F.Supp.2d 570, U.L.A. , § 2-302 UCC, Note 24, p. 371.

¹⁴⁹ U.L.A., § 2-719 UCC Form 3, p. 234; this is also established in practice, even small and medium sized business uses these kind of clauses, if properly advised.

¹⁵⁰ U.L.A., § 2-719 UCC note 2 p. 463.

torts basically is developed by the case law of the states; a codification comparable to the UCC, which served as a common basis for the particular states, is not existent.¹⁵¹

4.2.2.1.1 Product Liability, Punitive Damages

There are three legal theories, on which actions regarding product liability can be based on in the US.¹⁵² First, liability can result from a breach of warranty in the classical sense of the UCC. Here, a limitation of liability is possible under the scope § 2-316. But manufacturers are not allowed to limit or exclude consequential damages for injury of persons from consumer goods.¹⁵³ Hence, the importance of the UCC as a basis for claims decreased practically, since the possibility of exclusion in § 2-316 UCC does not reach personal harm. A second basis is negligence liability. If the manufacturer (1) has the obligation to meet a definite standard of care in order to shield the plaintiff from an unreasonable risk of harm, (2) he does not meet this standard of care and (3) causality of the harm is at hand, he will be liable. Regarding our example mentioned in 4, B would be liable, if the application of the software by the user in the laboratory would have been wrong due to improper manuals delivered by B. Moreover, if B pays no attention to laws and regulations (labeling, warnings, etc.) the mere noncompliance leads to liability in negligence. The third and most important source for tortious liability is strict liability in tort (*Gefährdungshaftung*). Strict liability in tort is the standard legal remedy regarding product liability. He who introduces jeopardizing products (dynamite etc.) has to be liable for possible damages, no matter if he was compliant with a duty of care or not.¹⁵⁴ Basically, if the buyer can prove (1) flaws of the product (2) that the flaw rendered the product unreasonably dangerous and (3) causality is existent, the end-user has a legal basis for its claim.¹⁵⁵ Since the reaction of the courts regarding the Restatement (Third) of Torts yet has not clarified, the differentiated handling of the federal states is to be considered.¹⁵⁶ Nevertheless, the suggested provision section 402 A 2d Restatement (Third) of Torts may serve as a landmark.¹⁵⁷

¹⁵¹ *Raphael*, p. 70.

¹⁵² *Schwarz, Sabagh*, p. 2.

¹⁵³ *Elsing/Van Alstine*, side no. 294.

¹⁵⁴ *Elsing/Van Alstine*, side no. 281.

¹⁵⁵ *Elsing/Van Alstine*, side no. 281.

¹⁵⁶ *Elsing/Van Alstine*, side no. 283.

¹⁵⁷ Sec. 402A. Special Liability of Seller of Product For Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

A major difference to the German law of product liability is the policy of punitive damages as a consequence of product liability stemming from British Common Law and still applied by American Courts. Punitive damages can be granted, if the court is of the view that the party which was accused of gross negligence or willful intent while introducing a good that caused personal harm needs to be penalized to prevent recurrence.¹⁵⁸ There was a heavy debate on the policy of punitive damages in- and outside the US because of the criminal law characterization of a civil law process on the one hand and the insufficiency of awards of damages as a pressuring medium on the other hand.¹⁵⁹ These discussions were not of much effect, only little states have limited the application of punitive damages.¹⁶⁰ Since the Rome II regulation left the enforceability of punitive damages to the member states German legislation and adjudication¹⁶¹ prevented major risks. But still, assets owned by German business situated at American terrain linger in jeopardy.¹⁶² Having a look at the scenario 4 b) punitive damages may surely be an issue and pose a risk to German business also holding assets in the US.

4.2.2.1.2 Vicarious Agents

In 4.1.1 an example is explained regarding vicarious agents. Concerning this matter the Common Law has a different approach from German Law. Agency is summarized separately in the Restatement (Third) of agency, i.e. the liability does not arise contractual, but in tort. US Common Law regarding liability for vicarious agents or auxiliary employees (*respondeat superior*) does not grant the master the possibility to absolve himself from liability, i.e. to exculpate for tortuous acts of the servant.¹⁶³ The German equivalent is § 831 BGB¹⁶⁴, which provides the possibility of exculpation. The entrepreneur can solve this problem with a clause in the standard contracts that says that in case of tortuous acts of vicarious agents, the master

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

¹⁵⁸ Hay, side no. 421.

¹⁵⁹ Hay, side no. 422, see there also a deeper argumentation from both opponents and supporters of punitive damages.

¹⁶⁰ Hay, side no. 424.

¹⁶¹ Judgement of the German Supreme Court of June 4, 1992, BGHZ 118, 312, 1992, *Wertpapiermitteilungen* 1451.

¹⁶² Hay, side no. 424.

¹⁶³ *Elsing/Van Alstine*, side no. 177; Hay says it is allocated between fault-based liability and strict liability, side no. 408.

¹⁶⁴ The language see Annex A Quoted provisions – German Civil Code.

shall only be liable if the master acted in fault.¹⁶⁵ The master acted in fault, for instance, when the master chose the auxiliary employee recklessly (*Auswahlverschulden*), i.e., if the master did not pay enough attention to necessary qualifications.¹⁶⁶ Thus, the principle of fault (see 2.2.3) is introduced into the contract. The limit again is unconscionability; the courts seem to be more flexible in b2b cases with sophisticated parties.¹⁶⁷ Because a major part of the work in the normal course of business will mostly be done by agents, a contractual modification in conspicuous font can prove to be helpful.

4.2.2.2 *Force Majeure and Gross Inequity*

Every contract should clarify the risk allocation in case of *force majeure*, also known as *acts of god*.¹⁶⁸ Sales contracts or supply agreements that consist of master agreements as a framework for successive and frequent delivery may contain such clauses because of the long term perspective. Different reasons for possible obstacles or impediments in the performance of contracts exist, for instance fires, earthquakes or floods from the natural perspective, or also war, civil strife, strikes and shortages of raw materials from the economic perspective.¹⁶⁹ The *Restatements (Second) of Contracts* offer a solution in § 261, the UCC in § 2-615.¹⁷⁰ Nevertheless, these reasons can be amended with circumstances that may be helpful in the individual case. This is the more recommendable since the US-approach does not provide an excuse (*Verschuldenshaftung*) also in this context,¹⁷¹ i.e. the seller is strictly liable in case of force majeure. Therefore, a clause in a contract governed by US law is indispensable. Sometimes the wording in the contract is different from the event that happens and a subsumption is a question of interpretation, though the parties want the clause to cover the

¹⁶⁵ Another merger clause was accepted by the courts: “ANY REPRESENTATIONS, PROMISES; WARRANTIES OR STATEMENTS BY SELLER’S AGENT THAT DIFFER IN ANY WAY FROM THE TERMS OF THIS WRITTEN AGREEMENT SHALL BE GIVEN NO FORCE OR EFFECT” see Raphael, *Limits of Liability*, p. 238.

¹⁶⁶ *Elsing/Van Alstine*, side no. 177.

¹⁶⁷ *Raphael*, p. 238.

¹⁶⁸ Which is a subcategory of *force majeure*.

¹⁶⁹ *Murray*, p. 621; for the wording see also *Plate*, p. 44.

¹⁷⁰ A typical force majeure clause is: “Neither party shall be liable for any failure to make or accept any one or more deliveries (or portions thereof) arising out of acts of God, fire, flood, war, sabotage, accidents, labor disputes, shortage or failure of supply of materials or equipment, interruption of or delay in transportation, or any other circumstance of like nature beyond the control of the party so failing; and, at the option of either party, the total quantity to be delivered shall be reduced by the quantity not delivered by reason of any such cause. In the event of the occurrence of any of such contingencies and its consequent inability to supply the total demands for the goods specified herein, Seller may allocate its available supply among any or all purchasers, as well as departments and divisions of Seller, upon such basis as Seller may deem fair and practical without liability for any failure of performance which may result therefrom.” see *Murray et al. U.L.A., Volume 4, Forms and Materials*, p. 218.

¹⁷¹ *Murray*, p. 621.

event. The additional words “*including but not limited to*” can save the user of such a clause from the possibility of events that deviate from the origin wording and different interpretations.¹⁷² To the contrary, if events shall be excluded from force majeure, the scenarios shall be mentioned concrete or abstract as well.¹⁷³

“Gross Inequity”¹⁷⁴ clauses are clauses mainly used in the context of long-term contracts. Since they are quite abstract and nebulous, they did not gain much effect and therefore significance.¹⁷⁵ They are comparable to § 313 BGB, which is also of minor importance in German jurisdiction as regards sales contracts.

4.2.2.3 Scope of Damages

Besides the possibility of an exclusion of liability, it is important to be aware of the scope of damages that could be awarded respective the German or the US Law. In addition, the following aspects analyze, if there is a difference in the German and US Law regarding the scope of damages and what the consequence for the entrepreneur considering a selection of law would be. Section 1-106 UCC¹⁷⁶ states that “*The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.*” The general damage is prescribed in § 2-712¹⁷⁷ (2), whereafter “*the difference between the cost of cover and the contract price...*” shall be decisive. Regarding the costs of cover, the measure to get a substitute and the costs therefore must be reasonable.¹⁷⁸ The courts are not too strict regarding the degree of reasonability. UCC § 2 712, Official Comment 2 says that “*The test of proper cover is whether at the time and place the buyer acted in good faith and in reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most*

¹⁷² Murray, p. 621.

¹⁷³ Plate, p. 44.

¹⁷⁴ For an example of the clause see *Union Electric Co. v. Consolidation Coal Co.* 188 F.3d 998 (8th Cir. 1999): “*Any gross inequity that may result from unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may and should be corrected by mutual agreement; provided however, that nothing contained herein shall be construed as relieving any party from continued performance of its obligations hereunder, notwithstanding the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto. Each party hereto shall, in case of a claim of gross inequity, furnish the other party with whatever documentary evidence may be requested in effecting a settlement of such claim.*”

¹⁷⁵ Murray, p. 621.

¹⁷⁶ The language see Annex C Quoted provisions – Uniform Commercial Code.

¹⁷⁷ The language see Annex C Quoted provisions – Uniform Commercial Code.

¹⁷⁸ see *Huntington Beach School District v. Continental Information Systems Corp.*, United States Court of Appeals, Ninth Circuit, 621 F.2d 353 (1980); here, a buyer in a tender process decided to wait for the performance of the seller who was in delay. Other offers in the first contest were cheaper. Finally, the buyer bought in a second contest. The price in the second contest was much higher than the alternatives in the first contest.

*effective.*¹⁷⁹ Hence, the party that claims remedy is not obliged to keep the damages as low as possible.

§ 2-715 (2) UCC¹⁸⁰ refines the foreseeability limitation.¹⁸¹ Here the consequential damage is limited to the damage arising from “*any loss resulting from general or particular requirements which the seller at the time of contract had reason to know.*” As regards *Huntington Beach School District v. Continental Informations Systems Corp*, for example, the seller had reason to know that the buyer would go and request alternative offers, which could be both, either more expensive or cheaper. The precedent case from which the “had reason to know-rule” derived, is *Hadley v. Baxendale*.¹⁸² Since that precedent is quite decisive, here is a short summary of the facts:

Hadley, a miller from Gloucester, had a mill with a defect crankshaft. As he wanted to send it to W. Joyce & Co. in Greenwich as a sample to get a new crankshaft, he tasked Baxendale and Ors to deliver the crankshaft by a fixed date to W. Joyce & Co.. Baxendale and Ors did not deliver in time. Therefore, Hadley could not proceed with his business and lost profits. Hadley claims these lost profits as consequential damage from Baxendale and Ors.

The US jurisdiction refers to the relevant knowledge of the parties at the time of contract. Relevant knowledge in this context is the information about possible damages that could arise “*...fairly and reasonably considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been the contemplation of both parties (...) as the probable result of the breach of it.*”¹⁸³ Nowadays, business got quite specialized and one cannot always assume that a contract party has an idea of the amounts or extents of damages of the other party that could result from a breach of contract.

Furthermore, this knowledge has to be communicated clearly between the parties.¹⁸⁴ Due to the *parol evidence rule*¹⁸⁵ it is important to include the possible risks and consequences of any

¹⁷⁹ See more *Murray*, p. 13.

¹⁸⁰ The language see Annex C Quoted provisions – Uniform Commercial Code; The foreseeable limitation is also reflected in § 351 (1) of the Restatement (Second) of Contracts with the words “*Damages are not recoverable for loss that a party in breach did not have reason to foresee as a probable result of the breach when the contract was made.*”

¹⁸¹ See more *Murray*, p. 15.

¹⁸² Court of the Exchequer (later: Kings Bench Division), 156 Eng. Rep. 145 (1854).

¹⁸³ *Murray*, p. 633.

¹⁸⁴ *Murray*, p. 634.

possible breach of contract into the written document. Very often, companies include damage categories into the contracts regarding warranties as an attempt to clearly communicate the full particulars. Time-sensitive deliveries have to be contracted and determined as such; special circumstances or special regulations regarding a party should be fixed in the contract. The same is advisable regarding categories of delay. The criteria “*at the time of contract*” indicate that a later definition in, for instance, as terms on the backside of bills or other side agreements, can be critical and should be avoided.

The German standpoint regarding the scope of damages resulting from § 249 BGB¹⁸⁶ is called *Differenzhypothese*. Though heavily criticized in the literature, this principle is still being applied by German courts.¹⁸⁷ The creditor has to be compensated by the debtor and the creditors’ final monetary standing shall be as if the damaging event never happened. The *condition-sine-qua-non* formula serves as an assessment for causality,¹⁸⁸ while the *Adäquanztheorie* sets limits in negating causality in case of excess.¹⁸⁹ Also here, the *Adäquanztheorie* refers to the normal course of business and possible risks arising therefrom. Thus, theoretically the two schemes lead to the same result; the difference is mere formal, i.e. the prior communication of the foreseeability is more important in the Common Law sphere.

4.2.2.4 Liquidated Damages, Nominal Damages

For a proper risk management many companies try to involve liquidated damages into their contracts to safeguard that a risk higher than the capping can be excluded and therefore the maximum risk can be determined. But the drafter of such a clause must be aware of the limitation of § 2-718 UCC. If the liquidated damage is unreasonably higher than the loss actually sustained, the liquidated damage is tainted by the character of punitive damages, which are only permissible in the Common Law tradition regarding tort. This is the result of the economic approach of American jurisdiction, which aspires the breach of a contract, if it is more advantageous for a party (and/or therefore to the economy) to do so.¹⁹⁰ Another explanation is, a breach of a contract be “*not unlawful in a criminal or societal sense*”¹⁹¹. The decisive words are in the last sentence of subsection 1 § 2-718 UCC, whereas “*A term fixing*

¹⁸⁵ A rule which forces the parties to put all the points of discussion into the contract, otherwise they will not be considered as evidence, § 2-202 UCC, see also *Murray*, p. 348.

¹⁸⁶ The Language see Annex A Quoted provisions – German Civil Code.

¹⁸⁷ *Schubert*, Beck OK BGB § 249 side no. 12.

¹⁸⁸ *Schubert*, Beck OK BGB § 249 side no. 50.

¹⁸⁹ *Schubert*, Beck OK BGB § 249 side no. 51.

¹⁹⁰ See the cost-benefit analysis, *West’s Business Law*, p. 742.

¹⁹¹ *West’s Business Law*, p. 310.

unreasonably large liquidated damages is void as a penalty.”. The question is how to draft a clause that handles this problem adequately. Here, the doctrine of foreseeability, determined in § 2-712 UCC (see 4.2.2.3) serves as an indicator for the reasonableness of the amount of liquidated damages. The Restatement (Second) of Contracts provides a test in Section 356 (1).¹⁹² The following wording suggests a balanced clause for the determination of liquidated damages in case of breach by the seller:

*“Seller’s repudiation or wrongful failure or refusal to perform its part of the agreement shall authorize Buyer to purchase within 30 days goods of the same quality as herein contracted for, in the open market at manufacturers prices, in quantity equal to that which Seller fails or refuses to ship, and recover, as liquidated damages, the excess of the price so paid over the purchase price herein.”*¹⁹³

Fixing the measure instead of the price is an accepted method to determine liquidated damages.¹⁹⁴ The recitals in the contracts usually express the wishes of the parties; a recital in the liquidated damage clause is recommendable.¹⁹⁵ Thereby, the reasonableness of the liquidated damages clause can be assessed more thoroughly. Particular clauses were declared unconscionable by different state courts in the past. The reason for an application of § 2-302 UCC mostly was the fairness of the amount of the liquidated damages.¹⁹⁶ Since § 341 BGB allows punitive damages, there is no discussion in the German context as regards the permissibility of liquidated damages. The limits of the liquidated damages in case of delay crystallized as 0.3 % of the contract volume per working day (0.25 % per calendar day)¹⁹⁷ of delay and altogether no more than 5 %¹⁹⁸ of the contract volume.

¹⁹² See Official Comment b) *“Test of penalty.....A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation.”*

¹⁹³ U.L.A., § 2-718 Form 1, p. 230.

¹⁹⁴ U.L.A., § 2-718 Form 1, p. 231.

¹⁹⁵ Example of recital: *“In fixing damages as set out herein, the desire is for a certain mode of calculation, since seller’s actual loss cannot be predetermined, would be difficult of ascertainment, and a matter of argument and unprofitable litigation, it being agreed that said mode is an equitable rule for measurement of seller’s prospective actual loss; the sum allowed seller, (...) being for decline in (...) price, if any, and such inconveniences, damage (general and special, speculative and certain), expenses and loss as may result from Buyer’s default or breach, or may have been incurred. Seller shall not be required to prove any actual loss in order to recover damages (...), and no provision shall be construed as a penalty, as such is not the intention.”* U.L.A., § 2-718 Form 1, p. 232.

¹⁹⁶ U.L.A., § 2-302 note 35 p. 385 *“...far in excess of fair value...”* in *Hertz Commercial Leasing Corp. v. Dynatron, Inc.*, Conn. Supp. 1980, 427 A.2d 872, 37 Conn. Supp. 7; the obligation of specific performance is not an “unconscionable and oppressive” liquidated damages clause, see U.L.A., § 2-302 UCC note 35, p. 385.

¹⁹⁷ BGH NJW-RR 2008, 615.

¹⁹⁸ BGH NJW 2003, 1805; NJW-RR 2004, 1463.

The concept of nominal damages is unknown in the German private law. Nominal damages are awarded, if a party is in breach of a contract, but there is no damage. If a seller does not deliver and the buyer renders a covering purchase with a cheaper price because of decrease of price in the meantime, no damage occurred to the buyer. Nevertheless, the buyer will be granted nominal damages, usually one dollar.¹⁹⁹

4.2.2.5 Indemnification

Indemnification plays an important role in almost every sales contract; the parties should implement clauses as regards indemnifications either one-sided or two-sided. A broad indemnification clause under the UCC was held unconscionable by the Indiana Court of Appeals,

- Without the express assent of the proposed indemnitor and
- When that clause is placed in relative obscurity on back of invoice.²⁰⁰

Therefore, also a clause regarding indemnification shall be drafted in conspicuous font. Furthermore, the parties should request the recipient of documents containing an indemnification clause for signature to evidence the express assent.

¹⁹⁹ West's Business Law, p. 310-311.

²⁰⁰ U.L.A. § 2-302, note 31 p. 379.

4.2.3 UCC –Warranty Provisions and Limitation

The area under discussion regarding warranties in the sales of goods is covered with §§ 2-312 through 2-318 UCC. Here a short overview:

§ 2-312 UCC	Warranties of Title and Against Infringement
§ 2-313 UCC	Express Warranties
§ 2-314 UCC	Implied Warranty of Merchantability
§ 2-315 UCC	Implied Warranty of Fitness for a Particular Purpose
§ 2-316 UCC	Exclusion or Modification of Warranties
§ 2-317 UCC	Rules of Construction in Case of a Conflict of Warranties
§ 2-318 UCC	Third Party Beneficiaries of Warranties

figure 1

Subject to a closer investigation is § 2-316 UCC.²⁰¹ Also here, the wording claims that the font in the contract is conspicuous; otherwise the limitations of implied warranties are not effective. The following stated clause regarding the negation of further express or implied warranties serves as an example for an appropriately drafted clause, whereas the allocation of costs is a question of negotiation:

“Disclaimer of Unstated Warranties. THE WARRANTY PRINTED ABOVE ^[202] IS THE ONLY WARRANTY APPLICABLE TO THIS PURCHASE. ALL OTHER WARRANTIES,

²⁰¹ The language see Annex C Quoted provisions – Uniform Commercial Code.

²⁰² ***“Warranty. The warranty period is ninety (90) days and commences on the date of installation, except that the warranty period for expendable parts [...] is limited to thirty (30) days. Seller’s warranty obligation is limited to providing remedial service during Seller’s normal Business hours during the warranty period and repairing or replacing at its option equipment which has been, during the warranty period, promptly reported by Purchaser as defective in material or workmanship and is so found by Seller upon inspection. Examination and repair or replacement of such Equipment will be effected on location or at Seller’s facilities, at Seller’s option, with no charge to Purchaser for service time expended. Equipment to be examined, replaced or repaired at Seller’s facilities must be returned to Seller by Purchaser within the warranty period, transportation charges prepaid. If examined***

EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE DISCLAIMED.

Limitation of Liability. *IT IS UNDERSTOOD AND AGREED THAT SELLER'S LIABILITY WHETHER IN CONTRACT, IN TORT, UNDER ANY WARRANTY, IN NEGLIGENCE OR OTHERWISE SHALL NOT EXCEED THE RETURN OF THE AMOUNT OF THE PURCHASE PRICE PAID BY PURCHASER AND UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE FOR SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES. THE PRICE STATED FOR THE EQUIPMENT IS A CONSIDERATION IN LIMITING SELLER'S LIABILITY. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE TRANSACTIONS UNDER THIS AGREEMENT MAY BE BROUGHT BY PURCHASER MORE THAN ONE YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED.*"²⁰³

The problem here is that each state, as mentioned above, is free to modify its private law. In *L.L. Teel Co., Inc. v. Houston United Sales, Inc.*,²⁰⁴ the state Mississippi created its own statute on disclaimers.²⁰⁵ Thus, the situation of the particular state must be checked before the application of the state law and the final wording of a disclaimer. Many states have specified § 2-316 UCC regarding exclusions in sale contracts of livestock, human components (blood, tissues etc.) and exclusions towards consumer.²⁰⁶ Additionally, the principle of unconscionability is applicable in this context. To have an idea of how much it takes to get a clause declared unenforceable due to unconscionability, here are the criteria developed in *Martin v. Joseph Harris Co., Inc.* under the Michigan UCC:²⁰⁷

1. Extremely unequal bargaining power (large seed company vs. small farmer);
2. Failing precaution measures regarding the good (missing past seed treatment), knowledge by seller about possible impediments in merchantability arising there from;
3. Unawareness of defect by purchaser, failure to disclose defect by seller.

Equipment is found not to be defective or is not for some other reason within the warranty coverage, Seller's service time expended on and off location will be charged to Purchaser. Purchaser shall be responsible for all maintenance service consisting of lubricating and cleaning the Equipment, replacing expendable parts, making minor adjustments and performing operating checks, all in accordance with procedures outlined in Seller's maintenance literature.

Warranty Limitation and Exclusion. *Seller will have no further warranty obligation under this agreement if the Equipment is subjected to abuse, misuse, negligence or accident or if Purchaser fails to perform any of the duties set forth in ... through... hereof."* U.L.A., § 2-312-2-316 FORM 2, p. 176-177.

²⁰³ U.L.A., § 2-312-2-316 FORM 2, p. 176-177.

²⁰⁴ 491 So. 2d 851, 1 UCC Rep. Serv. 2d 337 (Miss 1986).

²⁰⁵ see in case quoted supra 204 "... When we import these implied warranties, we confront immediately the language of the contract which provides that there are no such implied warranties in this case. That effort at private law-making in turn is met by Miss. Code Ann. 11-7-18 (Supp. 1985) which holds inoperative any such disclaimer of warranties. Sections 75-2-314 and -315, then, do apply by analogy."

²⁰⁶ U.L.A., § 2-316 UCC, p. 148.

²⁰⁷ U.L.A., § 2-312-2-316 FORM 1, p. 169.

The Official Comment to § 2-302 UCC says that a limitation of the warranties “...to repair and replacement of defective parts is not, on its face, unconscionable.”²⁰⁸ The cases stated in the official comment to 2-316 UCC which are in a commercial setting, rarely declared an exclusion of implied and express warranties as unconscionable.²⁰⁹

The clause above mentions the limitation of liability as regards special, indirect and consequential damages, but does not classify the cause of the damages, *i.e.* if the remedy is of contractual nature or in tort. The tendency of the jurisdictions is that warranty provisions are a basis for the recovery of economic loss and not the theories of negligence or strict liability in tort.²¹⁰ Therefore it is important to pay attention to the wording and to combine the exclusion or limitation of liability as regards economic loss with the warranty clause of the contract.

4.2.4 Statute on Limitations

The UCC regulates the Statute on Limitations in § 2-725 UCC²¹¹. The maximum period is four years as a rule, unless contractually modified, but minimum one year and maximum four years. Compared to the German statute on limitations in § 438 I No. 3 BGB²¹² regarding sales (two years), this is twice as long and should be changed contractually, if appropriate. Here, a contractual modification can influence the liability to the advantage of the seller, since he can reduce the period whilst the seller has to take the risk in case of a defective product. The Uniform Laws Annotated suggest the following short form for a constraint of the limitation period:²¹³

***“LIMITATION OF PERIOD FOR ACTION ON CONTRACT.
NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE TRANSACTIONS UNDER
THIS AGREEMENT MAY BE BROUGHT BY PURCHASER MORE THAN ONE YEAR
AFTER THE CAUSE OF ACTION HAS ACCRUED.”***

Other methods of limitation of periods are common in business dealings of, for example engine constructions, plant constructions or other industrial facilities. Limitations with

²⁰⁸ U.L.A., § 2-302 UCC, note 24, p. 373.

²⁰⁹ U.L.A. § 2-316 UCC note 81, p. 237-241.

²¹⁰ U.L.A. § 2-312-2-316 FORM 2, p. 174.

²¹¹ The language see Annex C Quoted provisions – Uniform Commercial Code.

²¹² The language see Annex A Quoted provisions – German Civil Code.

²¹³ U.L.A., § 2-725 UCC, Form 2. Conspicuous type is also recommendable in this context, since an indirect influence to liability in general (see § 2-719 UCC) is evident; U.L.A. § 2-316 UCC note 65, p. 224.

reference to operating hours or mile limits are typical means to restrain liability. § 2-316 UCC allows such limitations, if the limits are reasonable in relation to the period.²¹⁴

²¹⁴ 12,000 miles as regards twelve months (vehicles) see *Taterka v. Ford Motor Co.*, Wis. 1978, 271 N.W.2d 140, 1000 operating hours of a helicopter, see *Boston Helicopter Charter, Inc. v. Agusta Aviation Corp.*, D.Mass.1991, 767 F.Supp.363.; U.L.A., § 2-316 UCC note 65.

5 Brief Summary, Résumé

So, the devil can be in the details, if they are not thoroughly considered. Here is a brief summary of the issues discussed above, which are important for the applicant of US sales law from the perspective of the seller:

- Procedural specialties of the US law, i.e. the jury trial, must be prevented in the contract (see 3.3.1).
- The fault based liability must be introduced into the contract as regards vicarious agents (see 4.2.2.1.2).
- The force majeure clauses are more flexible in the Anglo-American context; the wording should be adjusted contingent on the individual case (see 4.2.2.2).
- A thorough attempt to appoint and allocate the possible risks at the time of conclusion of contract is more important under the UCC in connection with the Common Law (see 4.2.2.3).
- As regards liquidated damages a proper drafting of recitals is important; the parties should include the method of determination of the liquidated damages into the contract (see 4.2.2.4).
- The exclusion of economic loss should be integrated in the wording of the warranty clause (see 4.2.3).
- Indemnification needs to be asserted by indemnitor (see 4.2.2.5).
- The statute on limitations should be contractually modified (see 4.2.4).

The “*praesumptio similitudinis*” is somehow true, to a certain extent. Both legal systems, the German and the US have an instrument to control the contractual contents regarding liability for the sake of conscionability. But the good news is that this *praesumptio similitudinis* has its limits. In the context of unconscionability and terms control, this limit is reached by judicial discretion exercised by American courts. Here both legal systems have entirely controversial approaches. For the drafter of a clause regarding liability limitation the American approach grants more legal certainty. The bad news is that the applicant thoroughly has to consider the situation of the particular state statute that is or shall be chosen, essentially as regards § 2-302 UCC and § 2-719 UCC. A basic rule clearly crystallized: Conspicuous font should be used in all clauses that have the character of limitation of liability.

Concerning the protective character of the German policy on terms and conditions it is recommendable to apply the German Law strategically and if the protection is needed. If the party is in a weaker position and jeopardized of oppression, the party could try to negotiate

the German law as governing law through making concessions in other parts of the contracts. The other way round: If the German entrepreneur has more room to decide and to lead the framework, a higher degree of party autonomy and possibilities to limit liability is granted by the law of the US, which is recommendable under these circumstances.

6 Forecast

The German situation as regards the restrictive term control has been remaining unchanged although the literature is full of suggestions and representations. Some recommend to use §§ 305 ff BGB depending on the total contract value, others say that the courts should not distinguish boilerplate contracts from individually agreed contracts if concluded in a commercial setting, and finally the third opinion demands to loosen the examination criteria in § 307 BGB.²¹⁵ *Basedow* holds that legislative action is not necessary to change the status quo, moreover the expression in § 310 I BGB that “...*reasonable account must be taken of the practices and customs that apply in business dealings...*” should be considered more effectively.²¹⁶ Hence, a glance into the BGB to check whether a change in form of legislative action was rendered or not, may not be sufficient to know the German status quo. In fact, the developing case law has to be retraced.

In 2003, the NCCUSL published the last revision of the UCC after a long discussion of business and scholarship.²¹⁷ The Revised UCC provides changes of, for instance, § 2-718 UCC that do not bring up clear differences but only small hints as to a different interpretation.²¹⁸ Other modifications are related to the sale of consumer goods, e-commerce and the protection of third parties as regards liability.²¹⁹ The version of § 2-318 UCC (Rev.) shall make it easier for remote purchasers to claim damages based on express warranties.²²⁰ The federal state legislation has been reluctant to implement the revised version because of the renunciatory attitude of the industry in the US.²²¹ Still, the UCC reform movement is not clear. Furthermore the application of the young Restatement (Third) of Torts – Product Liability by the courts will bring up new approaches and tendencies.

²¹⁵ MüKo/*Basedow*, § 310 side no. 15.

²¹⁶ MüKo/*Basedow*, § 310 side no. 18.

²¹⁷ *Raphael*, p. 45.

²¹⁸ „...[the revised version] deletes the provision of the current section that voided as a penalty liquidated damages that were unreasonably large. Instead, liquidated damages will be enforced so long as they are reasonable in light of the actual or anticipated harm.” see U.L.A. § 2-718 Form 1 p. 231, this might be understood as a reversal of evidence.

²¹⁹ *Raphael*, p. 45.

²²⁰ *Raphael*, p. 46.

²²¹ *Raphael*, p. 45.

Annex A Quoted provisions – German Civil Code

Sec. 138 Legal transaction contrary to public policy; usury

- (1) A legal transaction which is contrary to public policy is void.
- (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

Sec. 157 Interpretation of contracts

Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

Sec. 206 Suspension of limitation in case of force majeure

Limitation is suspended for as long as, within the last six months of the limitation period, the obligee is prevented by force majeure from prosecuting his rights.

Sec. 242 Performance in good faith

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

Sec. 249 Nature and extent of damages

- (1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.
- (2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.

Sec. 276 Responsibility of the obligor

- (1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of sections 827 and 828 apply with the necessary modifications.
- (2) A person acts negligently if he fails to exercise reasonable care.
- (3) The obligor may not be released in advance from liability for intention.

Sec. 305 Incorporation of standard business terms into the contract

- (1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what

typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.

(2) Standard business terms only become a part of a contract if the user, when entering into the contract,

1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and
2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents, and if the other party to the contract agrees to their applying.

(3) The parties to the contract may, while complying with the requirements set out in subsection (2) above, agree in advance that specific standard business terms are to govern a specific type of legal transaction.

Sec. 305a Incorporation in special cases

Even without compliance with the requirements cited in section 305 (2) nos. 1 and 2, if the other party to the contract agrees to their applying the following are incorporated,

1. the tariffs and regulations of the railways issued with the approval of the competent transport authority or on the basis of international conventions, and the terms of transport approved under the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services,
2. the standard business terms published in the gazette of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen] and kept available on the business premises of the user,
 - a) into transport contracts entered into off business premises by the posting of items in postboxes,
 - b) into contracts on telecommunications, information services and other services that are provided direct by the use of distance communication and at one time and without interruption during the supply of a telecommunications service, if it is disproportionately difficult to make the standard business terms available to the other party before the contract is entered into.

Sec. 305b Priority of individually agreed terms

Individually agreed terms take priority over standard business terms.

Sec. 305c Surprising and ambiguous clauses

(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.

(2) Any doubts in the interpretation of standard business terms are resolved against the user.

Sec. 306 Legal consequences of non-incorporation and ineffectiveness

- (1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.
- (2) To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions.
- (3) The contract is ineffective if upholding it, even taking into account the alteration provided in subsection (2) above, would be an unreasonable hardship for one party.

Sec. 306a Prohibition of circumvention

The rules in this division apply even if they are circumvented by other constructions.

Sec. 307 Test of reasonableness of contents

- (1) Provisions in standard business terms are **ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract** with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.
- (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision
 1. is not compatible with essential principles of the statutory provision from which it deviates, or
 2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is ~~iii~~authorized~~iii~~.
- (3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.

Sec. 308 Prohibited clauses with the possibility of evaluation

In standard business terms the following are in particular ineffective

1. (Period of time for acceptance and performance) a provision by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rendering performance; this does not include the reservation of the right not to perform until after the end of the period of time for revocation or return under sections 355 (1) to (3) and 356;
2. (Additional period of time) a provision by which the user, contrary to legal provisions, reserves to himself the right to an unreasonably long or insufficiently specific additional period of time for the performance he is to render;
3. (Reservation of the right to revoke) the agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract; this does not apply to continuing obligations;
4. (Reservation of the right to modify) the agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or

deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account;

5. (Fictitious declarations) a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless

a) the other party to the contract is granted a reasonable period of time to make an express declaration, and

b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his authorization at the beginning of the period of time;

6. (Fictitious receipt) a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract;

7. (Reversal of contracts) a provision by which the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract, may demand

a) unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered, or

b) unreasonably high reimbursement of expenses;

8. (Unavailability of performance) the agreement, admissible under no. 3, of the reservation by the user of a right to free himself from the duty to perform the contract in the absence of availability of performance, if the user does not agree to

a) inform the other party to the contract without undue delay, of the unavailability, and

b) reimburse the other party to the contract for consideration, without undue delay.

Section 309 Prohibited clauses without the possibility of evaluation

Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:

1. (Price increases at short notice) a provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract; this does not apply to goods or services delivered or rendered in connection with continuing obligations;

2. (Right to refuse performance) a provision by which

a) the right to refuse performance to which the other party to the contract with the user is entitled under section 320, is excluded or restricted, or

b) a right of retention to which the other party to the contract with the user is entitled to the extent that it is based on the same contractual relationship, is excluded or restricted, in particular made dependent upon acknowledgement of defects by the user;

3. (Prohibition of set-off) a provision by which the other party to the contract with the user is deprived of the right to set off a claim that is uncontested or has been finally and non-appealably established;

4. (Warning notice, setting of a period of time) a provision by which the user is exempted from the statutory requirement of giving the other party to the contract a warning notice or setting a period of time for the latter to perform or cure;

5. (Lump-sum claims for damages) the agreement of a lump-sum claim by the user for damages or for compensation of a decrease in value if

a) the lump sum, in the cases covered, exceeds the damage expected under normal circumstances or the customarily occurring decrease in value, or

b) the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum;

6. (Contractual penalty) a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract;

7. (Exclusion of liability for injury to life, body or health and in case of gross fault)

a) (Injury to life, body or health) any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user;

b) (Gross fault) any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user; (emphasize added)

letters (a) and (b) do not apply to limitations of liability in terms of transport and tariff rules, vuthorized in accordance with the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services, to the extent that they do not deviate to the disadvantage of the passenger from the Order on Standard Transport Terms for Tram and Trolley Bus Transport and Regular Public Transport Services with Motor Vehicles [Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen] of 27 February 1970; letter (b) does not apply to limitations on liability for state-approved lotteries and gaming contracts;

8. (Other exclusions of liability for breaches of duty)

a) (Exclusion of the right to free oneself from the contract) a provision which, where there is a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the right of the other party to free himself from the contract; this does not apply to the terms of transport and tariff rules referred to in no. 7 under the conditions set out there;

b) (Defects) a provision by which in contracts relating to the supply of newly produced things and relating to the performance of work

aa) (Exclusion and referral to third parties) the claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties;

bb) (Limitation to cure) the claims against the user are limited in whole or in regard to individual parts to a right to cure, to the extent that the right is not expressly reserved for the other party to the contract to reduce the purchase price, if the cure should fail or, except where building work is the object of liability for defects, at its option to revoke the contract;

cc) (Expenses for cure) the duty of the user to bear the expenses necessary for the purpose of cure, in particular to bear transport, workmen's travel, work and materials costs, is excluded or limited;

dd) (Withholding cure) the user makes cure dependent upon prior payment of the entire fee or a portion of the fee that is disproportionate taking the defect into account;

ee) (Cut-off period for notice of defects) the user sets a cut-off period for the other party to the contract to give notice of non-obvious defects which is shorter than the permissible period of time under double letter (ff) below; (emphasize added)

ff) (Making limitation easier) the limitation of claims against the user due to defects in the cases cited in section 438 (1) no. 2 and section 634a (1) no. 2 is made easier, or in

other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained [emphasize added];

9. (Duration of continuing obligations) in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user,

- a) a duration of the contract binding the other party to the contract for more than two years,
 - b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract, or
 - c) a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract;
- this does not apply to contracts relating to the supply of things sold as belonging together, to insurance contracts or to contracts between the holders of copyright rights and claims and copyright collecting societies within the meaning of the Act on the Administration of Copyright and Neighbouring Rights [Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten];

10. (Change of other party to contract) a provision according to which in the case of purchase, loan or service agreements or agreements to produce a result a third party enters into, or may enter into, the rights and duties under the contract in place of the user, unless, in that provision,

- a) the third party is identified by name, or
- b) the other party to the contract is granted the right to free himself from the contract;

11. (Liability of an agent with power to enter into a contract) a provision by which the user imposes on an agent who enters into a contract for the other party to the contract

- a) a liability or duty of responsibility for the principal on the part of the agent himself, without any explicit and separate declaration to this effect, or
- b) in the case of agency without authority, liability going beyond section 179;

12. (Burden of proof) a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by

- a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or
 - b) having the other party to the contract confirm certain facts;
- letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature;

13. (Form of notices and declarations) a provision by which notices or declarations that are to be made to the user or a third party are tied to a more stringent form than written form or tied to special receipt requirements.

Sec. 310 Scope of application

(1) Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Section 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings. [Emphazise by the author] In cases coming under sentence 1, section 307 (1) and (2) do not apply to contracts in which the

entire Award Rules for Building Works, Part B [Vergabe- und Vertragsordnung für Bauleistungen Teil B – VOB/B] in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provisions.

(2) Sections 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers for the supply of electricity, gas, district heating or water from the supply grid to special customers to the extent that the conditions of supply do not derogate, to the disadvantage of the customer, from orders on general conditions for the supply of standard-rate customers with electricity, gas, district heating and water. Sentence 1 applies with the necessary modifications to contracts for the disposal of sewage.

(3) In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos:

1. Standard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer;
2. Section 305c (2) and sections 306 and 307 to 309 of this Code and Article 46b of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch] apply to preformulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the preformulation, had no influence on their contents;
3. in judging an unreasonable disadvantage under section 307 (1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.

(4) This division does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements. When it is applied to employment contracts, reasonable account must be taken of the special features that apply in labour law; section 305 (2) and (3) must not be applied. Collective agreements and private-sector works agreements or public-sector establishment agreements are equivalent to legal provisions within the meaning of section 307 (3).

Sec. 313 Interference with the basis of the transaction

(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

Sec. 317 Specification of performance by a third party

(1) Where specification of performance is left to a third party, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the third party.

(2) If the specification is made by more than one third party, then in case of doubt, the agreement of all parties is necessary; where an amount is to be specified and several amounts are specified, then in case of doubt, the average amount applies.

Sec. 336 Interpretation of earnest

- (1) Where something is given as an earnest when a contract is entered into, this is deemed to be a sign that the contract has been entered into.
(2) The earnest is not deemed, in case of doubt, to be forfeit money.

Sec. 438 Limitation of claims for defects

- (1) The claims cited in section 437 nos. 1 and 3 become statute-barred
1. in thirty years, if the defect consists
 - a) a real right of a third party on the basis of which return of the purchased thing may be demanded, or
 - b) some other right registered in the Land Register,
 2. in five years
 - a) in relation to a building, and
 - b) in relation to a thing that has been used for a building in accordance with the normal way it is used and has resulted in the defectiveness of the building, and
 3. otherwise in two years.
- (2) In the case of a plot of land the limitation period commences upon the delivery of possession, in other cases upon delivery of the thing.
- (3) Notwithstanding subsection (1) nos. 2 and 3 and subsection (2), claims become statute-barred in the standard limitation period if the seller fraudulently concealed the defect. In the case of subsection (1) no. 2, however, claims are not statute-barred before the end of the period there specified.
- (4) The right of revocation referred to in section 437 is subject to section 218. Notwithstanding the fact that a revocation is ineffective under section 218 (1), the buyer may refuse to pay the purchase price to the extent he would be so entitled on the basis of revocation. If he makes use of this right, the seller may revoke the agreement.
- (5) Section 218 and subsection (4) sentence 2 above apply with the necessary modifications to the right to reduce the price set out in section 437.

Sec. 439 Cure

- (1) As cure the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied.
- (2) The seller must bear all expenses required for the purpose of cure, in particular transport, workmen's travel, work and materials costs.
- (3) Without prejudice to section 275 (2) and (3), the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects, the importance of the defect and the question as to whether recourse could be had to the alternative kind of cure without substantial detriment to the buyer. The claim of the buyer is restricted in this case to the alternative kind of cure; the right of the seller to refuse the alternative kind of cure too, subject to the requirements of sentence 1 above, is unaffected.
- (4) If the seller supplies a thing free of defects for the purpose of cure, he may demand the return of the defective thing in accordance with sections 346 to 348.

Sec. 626 Termination without notice for a compelling reason

(1) The service relationship may be terminated by either party to the contract for a compelling reason without complying with a notice period if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the interests of both parties to the contract.

(2) Notice of termination may only be given within two weeks. The notice period commences with the date on which the person entitled to give notice obtains knowledge of facts

Sec. 831 Liability for vicarious agents

(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.

(2) The same responsibility is borne by a person who assumes the performance of one of the transactions specified in subsection (1) sentence 2 for the principal by contract.

Annex B Quoted provisions – Restatement (Second) of Contracts

§ 71 Requirement of Exchange; Types of Exchange

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or some other person.

§ 188 Law Governing in Absence of Effective Choice by the Parties

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6.
- (2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:
 - (a) the place of contracting,
 - (b) the place of negotiation of the contract,
 - (c) the place of performance,
 - (d) the location of the subject matter of the contract, and
 - (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.These contacts are to be evaluated according to their relative importance with respect to the particular issue.
- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189-199 and 203.

§ 211 Standardized Agreements

- (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

§ 351 Unforeseeability and Related Limitation on Damages

- (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

§356. Liquidated Damages and Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof or loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

Annex C Quoted provisions – Uniform Commercial Code

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Leases. Sections 2A-105 and 2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Governing law in the Article on Funds Transfers. Section 4A-507.

Bulk sales subject to the Article on Bulk Sales. Section 6-103.

§ 2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

(1) "**Merchant**" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "**Financing agency**" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).

(3) "**Between Merchants**" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

§ 2-105 Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit."

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section [2-107](#)).

- (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
- (3) There may be a sale of a part interest in existing identified goods.
- (4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.
- (5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.
- (6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross or carload) or any other unit treated in use or in the relevant market as a single whole.

§ 1-106. Remedies to Be Liberally Administered.

- (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor **penal damages** [emphasize added] may be had except as specifically provided in this Act or by other rule of law.
- (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

§ 2-207 Additional Terms in Acceptance or Confirmation.

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) they **materially** [emphasis by the author] alter it; or© notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2-209. Modification, Rescission and Waiver.

- (1) An agreement modifying a contract within this Article needs no consideration to be binding.
- (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
- (3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
- (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
- (5) A party who has made a waiver affecting an executor portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 2-302. Unconscionable Contract or Clause.

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2-316 Exclusion or Modification of Warranties.

- (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
 - (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
 - (3) Notwithstanding subsection (2)
 - (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
 - (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- © an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

§ 2-613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty **without fault of either party** [emphasize added] before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2-324) then

- (a) if the loss is total the contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

§ 2-614. Substituted Performance.

(1) Where **without fault of either party** [emphasize added] the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made **impracticable** [emphasize added] by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

- © The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

§ 2-712. “Cover”; Buyer’s Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may “**cover**” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§ 2-715. Buyer’s Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach. (2) Consequential damages resulting from the seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

§ 2-716 Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

§ 2-718. Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. **A term fixing unreasonably large liquidated damages is void as a penalty [emphasize added].**

(2) Where the seller justifiably withholds delivery of goods because of the buyer’s breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

- (a) the amount to which the seller is entitled by virtue of terms liquidating the seller’s damages in accordance with subsection (1), or

- (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.
- (3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes
- (a) a right to recover damages under the provisions of this Article other than subsection (1), and
 - (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.
- (4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

§ 2-719 UCC Contractual Modification or Limitation of Remedy

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages, (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

§ 2-725. Statute of Limitations in Contracts for Sale.

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
- (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

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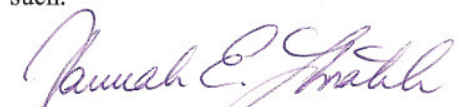
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Herewith I affirm that I have written this Master Dissertation single handed and free from any illegitimate sources. I only used the resources and devices, which are named in the text and the footnotes. All contents that are literally transferred or correspondingly taken are marked as such.



Hannah Elisabeth Strähle
July 3rd 2012, Utting am Ammersee