New Law of Obligations in Germany

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Preliminary Remarks

A new law of obligations applies in Germany since January 1st, 2002. The statutory limitation rules, the law of non-performance, the law of sales contracts and the law of contracts for work have been remodeled. The statutes and regulations with the purpose of consumer protection have been integrated into the German Civil Code (BGB) and a statute on injunction suits protecting the consumers' collective interests has been created. Altogether, far over 300 sections of acts have been changed, replaced or newly introduced.

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External cause for the modernization was the **implemention of the European Community Directive on the Sale of Consumer Goods** dating from 1999 which had to take place until the end of 2001. The compliance with the directive itself would not have required such drastic measures. It therefore was and still is highly controversial in scholarship and practice whether it was the right choice to alter the German law of obligations so radically at this point. On the one hand, another opportunity to modernize the Civil Code and to eliminate overcome mistakes did not seem to arise again soon. On the other hand, one has to be aware of the fact that sooner or later, there will be a **unification of private law in Europe**. The preparatory work is already in the making in the European Union. If this work is successful, there will again be a need for an extensive modification.

Introductory Literature : *Heß,* Das neue Schuldrecht — In-Kraft-Treten und Übergangsregelungen, Neue Juristische Wochenschrift 2002, 253 et seq.

I. Modification of the Statutory Limitation Rules

1. Reduction and Harmonization of the Limitation Periods

The former system consisting of different limitation periods was perceived as being confused and contradictory. The legislator decided on its complete abandonment and particularly on a significant reduction of the general limitation period which **now only** amounts to **three years** and not to 30 years anymore (§ 195 BGB — German Civil Code).

However, the new standard limitation period of three years does not always result in a reduction of limitation. The previous short limitation period of two years (§ 196 BGB) relevant for **purchase price claims and other claims for remuneration** ceased to exist as well. The limitation period for **wage claims by employees** has thus also been extended.

The limitation period for warranty claims in the **law of sales contracts and the law of contracts for work** is still regulated separately. The warranty claims in the case of a contract of sales are generally time-barred in two years (§ 438 (1) No. 3 BGB) and not in only six months anymore. In the law of contracts for work warranty claims in the case of a work, the result of which consists in the production, maintenance or alteration of a thing or in the provision of planning and supervisory services therefor, will be subject to a period of limitation of two years. A limitation period of five years is in effect for buildings (§ 634a (1) No. 1 and 2 BGB). Due to these special provisions, the goal of standardizing limitation periods is missed substantially. The controversy on the demarcation between those claims which are subject to the period of limitation of two years according to the law of warranty and those to which the general limitation period of three years applies has already started.

2. Criteria for the Beginning of a Limitation Period

Whereas the former standard limitation period of 30 years began with the claim's arisal, the beginning of the new standard limitation period of three years depends on two further preconditions: according to § 199 (1) No. 2 BGB, the limitation period begins to run only when the creditor has **become aware** of the circumstances giving rise to the claim and of the identity of the debtor **or ought to have become aware** of them **but for his gross negligence**. Irrespective of knowledge or grossly negligent lack of knowledge, a claim is finally time-barred ten years after the date upon which the claim arose (§ 199 (4) BGB). The new subjective requirement for limitation will cause disputes. To take an example from labor law: if an employee asserts after several years that he has not known he actually is entitled to the higher wage of a salary bracket higher than the one stated in his employment contract, the decisive factor is whether he can be charged with gross negligence. Due to the subjective element pertaining to gross negligence, this question can be difficult to decide on and may require to take extensive evidence in lawsuits.

According to the opening words of § 199 (1) BGB, furthermore, the standard limitation period does not begin until the **expiry of the year** in which the claim has arisen and the mentioned subjective precondition has been fulfilled. This provision was inserted in a late stage of the legislative procedure. It adopts a rule which earlier only applied to the shorter limitation periods of two and four years. According to the experiences then made, it will substantially contribute to the simplification of the problem of limitation.

The limitation period for **warranty claims** in the law of sales contracts and the law of contracts for work begins, independently of the existence of subjective preconditions and the reaching of the end of the calendar year, when the thing is delivered or the work is accepted (§ 438 (2), § 634a (2) BGB).

3. Reorganization of Interruption and Suspension of Limitation

The previous **interruption** of limitation with the effect that the period of limitation begins anew has now been termed "recommencement". According to § 212 (1) BGB, recommencement now only applies in the event that the debtor **acknowledges** the claim to the creditor by part payment, payment of interest, the granting of security or in some other way and in the event that a judicial or official act of **execution** is performed or applied for.

Otherwise, now only the institution of **suspension** of limitation applies. According to § 209 BGB, its effect is that the period during which limitation is suspended is not included when calculating the limitation period. Accordingly, limitation is now suspended also by measures of legal action such as the bringing of an action, service of a demand for payment or of a third-party notice as well as an attachment order and an interim injunction (§ 204 (1) BGB).

Introductory Literature: *Mansell*, Die Neuregelung des Verjährungsrechts, Neue Juristische Wochenschrift 2002, 89 et seq.

II. Modernization of the Law of Non-Performance

1. Uniform Concept of the Breach of Duty

The previously differing forms of non-performance (impossibility, delay and so-called "positive Forderungsverletzung" meaning a breach of an obligation other than by delay or impossibility) with their different preconditions and legal consequences have been standardized according to the model of the "positive Forderungsverletzung". They are now combined in the **central term "breach of duty"** in the general law of non-performance in §§ 275 et seq. BGB : by virtue of the new central rule of § 280 (1) Sentence 1, the obligee of a (contractual or statutory) obligation may claim compensation if the obligor fails to comply with a duty arising under the obligation.

The **principle of liability for fault** has thereby been upheld : according to § 280 (1) Sentence 2, the claim for compensation does not arise if the debtor is not liable for the failure to comply with his duty, that is if he has acted neither deliberately nor negligently. However, a stricter liability may result from the subject matter of the obligation, especially an assumption of a guarantee, as the new version of § 276 (1) 1 BGB now explicitly points out.

In regard to **delay**, § 280 (1) BGB is supplemented by its paragraph 2. Accordingly, compensation for delay may only be claimed if the further preconditions of delay stipulated in § 286 BGB (previously §§ 284, 285 BGB) are satisfied. In regard to the "positive Forderungsverletzung", the new § 241 (2) BGB additionally applies. It now expressly states that the obligation may require each party to have regard to the other party's rights, legally protected interests and other interests depending on its subject matter.

By virtue of § 280 (1) BGB, compensation for the loss **resulting from the breach of duty** may be claimed. The claim for performance itself is not affected by this claim for compensation (compensation in addition to performance). **Additional requirements** must be fulfilled for a claim for **compensation in lieu of performance :** according to § 281 BGB, it is generally necessary that a reasonable period of time fixed by the obligee within which the obligor is to perform or to effect supplementary performance has elapsed to no avail or that the fixing of a period for performance is made dispensable by special circumstances. If the debtor infringes a duty under § 241 (2) BGB, compensation in lieu of performance may also be demanded if the creditor can no longer be reasonably expected to accept performance by the debtor (§ 282 BGB). The obligee may claim compensation in lieu of performance from the outset if by virtue of § 275 (1 to 3) BGB the obligor does not have to perform due to the impossibility of the performance or because performance cannot reasonably be required (§ 283 BGB).

2. Extension of Compensation onto Wasted Expenditure

German compensation law is ruled by the "hypothesis of difference": Whether and to what extent damage has been caused is determined by comparing the actual financial situation of the creditor with the financial situation as it would be if the event which caused the damage would not have happened. According to this principle, wasted expenditure can only justify a claim for compensation if it would have been reflected in an expected but now not occurring growth of wealth. This is generally the case so that the courts act on the assumption of profitability as a rule in the law of evidence. However, the case may also appear differently. Thus the Federal Supreme Court ruled that a political association which had hired a function room from a city and for which the city then failed to open the room could not claim compensation for the advertising costs for the event because there were no proceeds to be expected from the event (BGHZ 99, 182, 196 et seq.).

Henceforth, § 284 BGB stipulates that instead of demanding compensation in lieu of performance the creditor may demand reimbursement of the expenditure which he has incurred in resasonable reliance on the receipt of the performance, save where the purpose of that expenditure would not have been achieved even if the debtor had not breached his duty. This means that today in the mentioned case ruled on by the Federal Supreme Court the expenditure would have had to be reimbursed, because without the breach of duty by the city (the function room not being placed at the disposal), the purpose of the expenditure, namely the realization of the event, would have been accomplished.

The practical significance of the new rule of § 284 BGB extends far beyond the mentioned case. For example, it has to be assumed that the **breach of the obligation to render services in an employment relationship** which results in an interruption of the activity of the business entails the compensation of the expenditure which the employer usually incurs for operating his business. Whether the entrepreneur would have realized a profit out of the business activity does not matter anymore.

3. Uniform Rule on the Burden of Proof

So far, there was a sophisticated rule on the burden of proof for the fault of the debtor in a non-performance. § 282 and § 285 BGB provided that the burden of proof in case of impossibility and delay was up to the debtor. However, in respect to the so-called "positive Forderungsverletzung", it was distinguished whether the breach of the obligation pertained to the obligor's or the obligee's sphere of risk and responsibility. Henceforth, the uniform statutory definition of breach of duty results in a consistent rule on the burden of proof: as it arises from § 280 (1) Sentence 2, the burden of proof to show that the debtor is not liable for the failure to comply with a duty always rests with him.

Whether this standardization will always lead to appropriate results can be doubted. Thus it barely does justice to the special problems of the physician's liability towards the patient. In another case, namely the employee's liability towards the employer, the

legislator created a last-minute exception : according to § 619a BGB and differing from § 280 (1) BGB, the employee only has to reimburse the employer for damage occasioned by a breach of duty stemming from the employment relationship if he is liable for the breach of duty. This means that the employer not only has to prove the breach of duty itself but also the employee's fault.

4. Adjustment of the Law on the Consequences of a Rescission of Contract

§§ 346 et seq. BGB now **uniformly** provide for the **contractual and statutory right of withdrawal**. The principle that if termination occurs any performance received is to be returned is now included in § 346 (1) BGB which likewise is applicable to the contractual and the statutory right of withdrawal.

Whereas hitherto a destruction or an essential deterioration for which the party entitled to withdraw was responsible barred the termination of the contract, henceforth, the creditor must pay compensation for value insofar in accordance with § 346 (2) Sentence 1 No. 2 and 3 BGB. In the case of a statutory right of withdrawal, there is no such duty to pay compensation for value if the party entitled to withdraw has taken the care which he usually takes in his own affairs.

The processing and transformation of the object to be returned do not — unlike before — result in the exclusion of the right of withdrawal either but, pursuant to § 346 (2) Sentence 1 No. 2 BGB, in the payment of compensation for value of the object received. The same is true for the transfer or encumbrance of the object to be returned (§ 346 (2) Sentence 1 No. 2 BGB).

5. Compensation in the Case a Synallagmatic Contract Despite Termination of Contract

So far, § 326 BGB ruled that the creditor in a synallagmatic contract in the case of delay of the debtor had to decide twice between legal remedies : if he wanted to demand compensation for non-performance or terminate the contract, he had to fix an appropriate period of time after the occurrence of the default and to include a declaration that he would refuse acceptance of the performance after expiration of that period. The claim for performance was excluded after expiration of the period. Afterwards, he had to choose between compensation for non-performance or termination of the contract. If he terminated the contract, according to the courts he could not demand compensation because the contract had been transformed by the withdrawal.

By virtue of § 323 BGB now in force, there is **no** need for a **threat of refusal** anymore. Rather, the creditor must have fixed, to no avail, an appropriate period of time for performance. When the fixed period has expired, the creditor may withdraw from the contract, but does not have to do that. He may also still insist on its fulfilment. The claim for performance is only excluded when the creditor has terminated the contract.

The claim for compensation is not affected at all by the steps taken by the obligee

anymore. Rather, according to § 325 BGB, the right to **claim compensation** in the case of a synallagmatic contract is **not precluded by termination**.

6. Express Regulation of Fault at the Time of the Conclusion of Contract.

For a long time, it had been acknowledged by courts and literature in Germany that an obligation with mutual duties, whose breach can result in a claim for compensation, arises as a result of the entry into business contacts so that it virtually could be termed as customary law. This institution of fault at the time of the conclusion of the contract, called "culpa in contrahendo" in Latin, is expressly regulated in the new law of obligations: According to § 311 (2), an obligation with duties in accordance with § 241 (2) BGB also arises as a result of.

1. entry into contractual negotiations,
2. preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interests or other interests or entrusts them to that party, or
3. similar business contacts.

Furthermore, § 311 (3) BGB stipulates that an obligation with duties in accordance with § 241 (2) BGB may also arise towards persons who are not intended to be parties to the contract. This shall apply in particular if the third party by enlisting a particularly high degree of reliance materially influences the contractual obligations or the conclusion of the contract.

These provisions have not de facto changed anything. They only codify the principles developed by courts and literature, namely in § 311 (2) BGB the principle of the liability for fault at the time of the conclusion of the contract in general and in § 311 (3) BGB the personal liability of the person employed to perform an obligation who has a position of trust and thus offers additional warranty for the fulfilment or trustworthiness of the transaction.

7. Express Regulation of Frustration of Contract

The institution of frustration of contract has now also found an express regulation. According to § 313 (1) BGB, the adaptation of a contract may be demanded if circumstances upon which the contract was based have materially changed after the conclusion of the contract and if with regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form (objective basis of the contract). The same is true under § 313 (2) BGB if material assumptions that have become the basis of the contract subsequently turn out to be incorrect (subjective basis of the contract). If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party under § 313 (3) BGB may terminate the

contract.

The provison includes a change of the previous legal position in so far as the adaptation to the changed circumstances does not automatically take place but only if it is **demanded** by one of the parties.

8. Pecuniary Compensation for Immaterial Loss in Obligations Also

The reform of the law of obligations has meanwhile been supplemented by a statute on the reform of compensation law. This reform act has limited the liability of children (which now only begins at the age of 10) and extended product liability, in particular for pharmaceutical products. However, it also includes a readjustment of § 253 BGB which previously only provided for pecuniary compensation in case of immaterial loss if this had been explicitly stipulated. It is now standard that in the events of injury to body, health and liberty, pecuniary compensation of the immaterial loss may be demanded, too. Henceforth, there will be no need to fall back on tortious liability anymore. This also applies to activities by auxiliary persons. Breaches of duty by persons employed to perform an obligation can result in the pecuniary compensation for the immaterial loss if the legally protected interests mentioned in § 253 BGB are concerned. This is practically important in particular because, by virtue of § 278 BGB, there is a strict liability for the fault of the person employed to perform an obligation, meaning that other than in the case of liability in tort according to § 831 BGB, exculpatory evidence cannot be submitted.

However, for labor law it is of interest that nothing has changed in the **law of accident insurance**. There, the principle still applies that in the event of an accident at work the employee does not have a compensation claim under private law against the employer or against the colleague. The employee is rather referred to statutory accident insurance claims that do not include compensation for pain and suffering.

Introductory Literature : *Zimmer,* Das neue Recht der Leistungsstörungen, Neue Juristische Wochenschrift 2002, 1 et seq.

III. Reorganization of Warranty in the Case of a Sales Contract

1. Revision of the Term *Defect*

In regard to **defects as to quality**, what matters in the first place is still the deviation of the sold object from the **agreed quality**. If the quality has not been agreed, the deciding factor is whether the thing is fit for the use specified in the contract or alternatively for the normal use (§ 434 (1) sentences 1 and 2 BGB).

According to § 434 (2) BGB, there is also a defect as to quality if the agreed **assembly** of the thing **has not been properly performed** by the seller or persons employed by him for that purpose or if in case of a thing intended to be assembled the **instruction manual is defective**. That latter provision is called “Ikea-clause”, referring to the Swedish furniture store Ikea which is widespread in Europe and sells in a big scale ready-made furniture that

has to be assembled by the consumer. The furniture has often been damaged because the buyers did not understand the instruction sheet and therefore did not carry through properly the setup.

According to § 434 (3) BGB, delivery by the seller of a different thing or of a lesser amount of the goods is equivalent to a defect as to quality. Such a **delivery of goods of the wrong kind** ("aliud" in Latin) was understood as a defect as to quality under former law, too. Following § 378 Commercial Code a restriction applied, though : if the delivered good diverged from the order so substantially that the seller must have considered the acceptance by the buyer impossible, the law of warranty for defects as to quality did not apply. It is doubtful whether the relinquishment of this restriction can really be upheld. For example, if a lawn mower is delivered instead of a car, it does not seem appropriate to refer the buyer to his rights in the event of defects.

The law also redefines **defects of title :** according to § 435 BGB, a thing is free from defects of title if third parties cannot assert against the buyer, in relation to the thing, any rights or can assert only such rights as are assumed in the sales contract. Entry in the land register of a right that does not exist is equivalent to a defect of title. No factual changes result thereof.

The particular regulation concerning the absence of a promised characteristic in the thing sold (formerly § 463 BGB) does not exist anymore. The absence of a promised characteristic is generally treated as a defect as to quality which activates warranty rights (§ 434 (1) sentence 3) BGB. However, special rules apply when the seller has assumed a guarantee:

— According to § 280 (1) in connection with the revised § 276 (1) BGB, in this case an obligation for compensation due to a defect as to quality may also occur if the seller is not at fault.

— By virtue of § 443 BGB, in the event of a claim under the guarantee, the buyer has the **rights under the guarantee** in addition to his statutory warranty rights. The terms set out in the declaration of guarantee and in the relevant advertising are decisive therein.

— According to § 444 BGB, the **exclusion of liability is not possible** in the event of the acceptance of a guarantee for the condition of the thing. Difficulties arise if, as is often the case in the event of the purchase of enterprises, the parties do agree on a guarantee, e.g. for the turnover, but want to limit this guarantee to a certain amount, for example to the amount of the purchase price. The legitimacy of such a limitation is doubtful given the wording of § 444 BGB. It requires some courage to rely on a restrictive interpretation by the courts.

2. Buyer's Rights in the Event of Defects

By virtue of § 437 BGB the buyer fundamentally has **three rights** in the event of

defects as to quality and of defects of title : he may demand supplementary performance. He may terminate the contract or reduce the purchase price. He may claim compensation or reimbursement for wasted expenditure.

The claim for supplementary performance takes priority. According to § 439 BGB, the buyer may, at his option, demand the removal of the defect or the supply of a thing free from defects. The seller may only refuse supplementary performance if it involves unreasonable expense.

The buyer may regularly only **terminate** or **reduce** the purchase price if he has fixed, to no avail, an appropriate period of time for supplementary performance. This results from § 437 (1) No. 2 in connection with § 323 (1) BGB. However, under § 440 BGB this is not the case, if supplementary performance is refused by the seller or is unreasonable for the buyer. For example, supplementary performance may be considered unreasonable if the intended use of the thing, such as the resale at an event, will not be possible anymore at a later date.

Compensation additionally requires that the buyer is **liable** for the defect. This is a result of § 437 No. 3 BGB which, regarding compensation, refers to § 280 BGB which states the requirement of a fault. If it is already certain at the time of the conclusion of the contract that the defect cannot be removed, under § 311a BGB the claim for compensation depends on whether the seller knew or ought to have known about it upon conclusion of the contract.

The warranty rights are **excluded** according to § 442 BGB if the buyer is aware of the defect upon conclusion of the contract. If, owing to gross negligence on his part, the buyer is unaware of a defect, he may assert rights in respect of that defect only if the seller fraudulently concealed the defect or guaranteed the quality of the thing.

3. Sale of Consumer Goods and Right of Recourse of the Ultimate Seller Against his Supplier

As mentioned in the preliminary remarks, the implementation of the European Community's Directive on the Sale of Consumer Goods was the external cause for reforming the law of obligations. The directive's demands have been met by the provisions on the sale of consumer goods in §§ 474 et seq. BGB. The provisions are applicable where a **consumer buys a moveable thing from a businessperson** (§ 474 (1) Sentence 1 BGB). According to § 13 which was recently incorporated into the German Civil Code, a consumer is any natural person who concludes a legal transaction with a purpose that can neither be assigned to his commercial nor to his self-employed professional activity and therefore belongs to his **private affairs**.

The law on the sale of consumer goods basically contains three particularities :

— Firstly, § 475 (1) BGB provides that the businessperson may **not rely on agreements** which derogate, to the detriment of the consumer, from his warranty rights. For

instance, it is not possible to restrict the buyer's rights to the claim for supplementary performance or, contrariwise, to deny him this claim and only allow him the right of price reduction. However, the buyer may also content himself with the right allowed to him by the contract. For example, if only the right to reduce the price is granted to him, he may assert this right at once without having to fix a period of time for supplementary performance first. § 475 (2) BGB also limits the possibility of a contractual reduction of limitation periods. However, agreements on compensation claims resulting from a defect remain possible according to § 475 (3) BGB.

— Secondly, § 476 BGB provides for a reversal of the burden of proof: if a defect appears within six months of the date on which risk passed, that is in the case of moveable things already the delivery of the purchased thing, it is presumed that the thing was already defective when risk passed. If the seller wants to avoid warranty, he has to prove that the defect has not yet existed upon delivery.

— Thirdly, as a result of the stricter liability of the selling entrepreneur in the sale of consumer goods, his position towards his own supplier is strengthened: if he had to take back a newly manufactured thing from the consumer because of a defect in it or if the consumer reduced the price, the businessperson may assert his rights against his supplier at once according to § 478 (1) BGB. There is no need to fix a period of time. But most notably, by virtue of § 478 (4) BGB the supplier may not invoke an agreement which derogates, to the detriment of the entrepreneur, his rights in the case of defects. Only the claim for compensation may be excluded or limited. The law also permits that instead of the warranty rights the entrepreneur is granted an equivalent remedy which for instance can consist of a lump sum of indemnification.

Introductory Literature: *Westermann,* Das neue Kaufrecht, Neue Juristische Wochenschrift 2002, 241 et seq.

IV. Modifications in the Law of Contracts for Work

The reform of the law of obligations has also modified the law of contracts for work. The modifications essentially consist of an alignment of warranty rights in case of defects with the law of sales contracts which for its part adopted the priority of supplementary performance from the law of contracts for work. Several rules of law developed by the courts have now explicitly been incorporated into the Civil Code.

Like the buyer, the customer primarily has the **right to demand supplementary performance**. Differing from the law of sales contracts (§ 439 (1) BGB), it is not the customer's, but the **contractor's** option to choose between the removal of the defect and the production of a new work under § 635 (1) BGB. If the period fixed for supplementary performance expires to no avail, the customer may either remove the defect himself and demand advance payment for that purpose from the contractor (§ 637 BGB) or, as in a

sales contract, terminate the contract or reduce the remuneration (§ 634 No. 3 BGB). If the contractor is liable for the defect, there is also a right of compensation (§ 634 No. 4 BGB).

Introductory Literature : *Schudnagies,* Das Werkvertragsrecht nach der Schuldrechtsreform, Neue Juristische Wochenschrift 2002, 96 et seq.

V. Incorporation of Consumer Protection Acts into the German Civil Code

1. Law of Standard Business Terms

The reform of the law of obligations has incorporated the law of standard business terms, previously included in the Standard Business Terms Act, into the Civil Code. The regulations can now be found in §§ 305 et seq. BGB.

The new provisions essentially correspond in their contents with the former provisions in the Standard Business Terms Act. In particular, the previous rules on the requirements for standard business terms to become a component part of the contract continue to apply (now §§ 305 - 306 BGB). The standard business terms are also still subject to a **review of subject-matter** in three ways, namely of general unreasonable disadvantage contrary to the requirement of good faith (§ 307 BGB), of disadvantage through clauses which are inappropriate in their appraisal (§ 308 BGB) and of clauses which are generally prohibited (§ 309 BGB). However, two innovations have to be emphasized :

§ 307 (3) Sentence 2 BGB also facilitates the review of provisions other than standard business terms in so far as an unreasonable disadvantage results from the fact that the **provision is not clear and comprehensible**. This is especially of significance for an agreement on the price of a performance. If the price remains unclear because it results only from different convoluted agreements and subagreements, the courts will check its adequacy.

The other very crucial innovation is the partial extension of the law of standard business terms **onto the employment contract :** unlike § 23 (1) Standard Business Terms Act, the substituting § 310 (4) BGB does not exclude contracts in the field of labor law from the scope of application of the law of standard business terms anymore. The standard employment contract terms are thus subject to the comprehensive clause of § 307 as well as to the bans of clauses in §§ 308 and 309 BGB.

It does modify the application that according to § 310 (4) Sentence 2 BGB, appropriate regard must be had to the **special features of labor law**. Therefore, in view of the great practical need to quickly wind up terminated employment relationships, it will be possible to hold on to the customary preclusive time limits even if they supersede the longer statutory limitation periods.

But there still remain plenty of points where standard employment contract terms differing from statutory provisions will not be possible anymore. To name just one

example : if by virtue of § 309 No. 12 BGB a provision by which the user alters the burden of proof to the detriment of the other party is invalid, consequently the employer may not shift the full burden of proof regarding the employee's liability (§ 619 a BGB) which rests on him onto the employee and may not even limit it.

According to § 310 (4) Sentence 1 BGB, provisions included in **collective agreements on the contents, conclusion and termination of the employment relationship** are excluded from the review of the standard business terms. Neither are the bans of clauses of §§ 308 and 309 BGB applied nor is there a review of subject-matter in accordance with § 307 BGB. For instance, on the grounds of § 622 (4) Sentence 1 BGB, a notice period of only one day may be laid down for employment relationships in collective agreements without that it may be regarded as an unreasonable disadvantage according to § 307 (2) No. 1 BGB.

2. Doorstep Transactions

The **consumer's right of revocation** previously included in the Act on the Cancellation of Doorstep Transactions and Analogous Transactions now results from § 312 BGB. According to this provision, a consumer may revoke a contract concerning performance for remuneration which the consumer has been induced to conclude as a result of oral negotiations at his place of work or in a private residence, on the occasion of a leisure event or subsequent to a surprise approach in a means of transport or in an open public space.

The further details of the right of revocation are found in §§ 355 to 357 BGB which have substituted §§ 361a and 361b BGB incorporated into the Civil Code in the year 2000. Accordingly, a consumer may revoke his declaration of intention to conclude a contract **within two weeks**. The period only begins at the time when the consumer has been informed in textual form by a clearly formulated notice of his right of revocation which also states the name and address of the person to whom revocation is to be declared.

According to § 312 (1) Sentence 2 in connection with § 356 BGB, the right of revocation may be replaced by an unrestricted right of return.

Meanwhile, there is a controversy in Germany on the question whether also the **employee** who has concluded an employment contract or a agreement to terminate his employment relationship in his private residence or at his place of work may be entitled to the right of revocation under § 312 BGB. The cause for this dispute is that § 13 BGB which was newly incorporated into the Civil Code in the year 2000 describes every natural person who concludes a legal transaction with a purpose that can neither be assigned to his commercial nor his self-employed professional activity as a consumer. For looking at it from a formal point of view, the employment contract and the agreement to terminate the contract do not serve a self-employed but a dependent professional activity.

In my opinion, the right of revocation cannot be applied to employment contracts and

agreements to terminate a contract. Firstly, it does not make any sense in practice to subordinate these contracts to the right of revocation if the particular requirements of § 312 (1) No. 1 to 3 BGB for a doorstep transaction are met and not to do so otherwise. Secondly, such an application misses the purpose of consumer protection provisions to protect the one who purchases goods and services in the market and has to pay a remuneration for that. Conversely, in labor law, the employee is to be protected as the one who renders a service to a business and claims payment for that. Accordingly, consumer protection law and labor law have developed their own mechanisms of protection which may not be qualified by the other mechanism respectively and thus be depreciated.

3. Distance Contracts

On June 30th, 2000, a Distance Contracts Act entered into force in Germany which implemented the European Community Directive on Consumer Protection in Distance Contracts dating from May 20th, 1997. The provisions of the Distance Contracts Act have now been incorporated into §§ 312b to 312d BGB.

According to § 312b BGB, distance contracts are contracts for the delivery of goods or the supply of services which are concluded between a businessperson and a consumer **exclusively by means of distance communication**. Such means of communication are characterized by the fact that the simultaneous physical presence of the contracting parties is not necessary. They extend from letters, catalogues, telephone calls, telefax, emails to radio, television and media services. Contracts concerning the supply of goods intended for everyday consumption and contracts for the provision of accommodation, transport, catering or leisure services as well as contracts concluded by means of vending machines are excluded from the application.

The core of the provisions is an obligation of the businessperson to provide information and, if it is not fulfilled, a right of the consumer to revoke and return : according to § 312c BGB, prior to the conclusion of the contract the businessperson has to provide the consumer with clear and comprehensible information of the details of the contract and its commercial purpose. In telephone conversations, the businessperson has to explicitly make clear his identity and the commercial purpose of the contract already at the beginning of the conversation. According to § 312d BGB, the consumer has a right of revocation which in turn is regulated by § 355 BGB and may be substituted by a right of return under § 356 BGB. The right of revocation has to be exercised within a period of two weeks in this case, too. According to § 312d (2) BGB, this period does not begin until the duties to provide information have been fulfilled and, in the case of deliveries of goods, not until the day on which they reach the recipient.

Implementing another European Community directive, namely Article 10 and 11 of the E-Commerce Directive dating from June 8th, 2000, § 312e BGB now includes additional provisions on contracts concluded in a **electronic business transaction**. The

businessperson thereby has to provide the customer with appropriate, effective and accessible technical means allowing the customer to identify and correct input errors prior to sending his order. Furthermore, the businessperson must give the customer certain information and acknowledge the receipt of the order without undue delay and by electronic means. Finally, he must enable the customer to retrieve and save in reproducible form the conditions of the contract including standard business terms upon the conclusion of the contract. The period for the exercise of the right of revocation under § 355 BGB does not begin before fulfilment of these duties.

4. Consumer Loan Contracts

Since the Consumer Credit Act came into force on December 17th, 1990, credit contracts with consumers are separately regulated in Germany. The European Community Directive on Consumer Credits dating from December 22nd, 1986, has thus been implemented. The reform of the law of obligations has incorporated these regulations into the Civil Code. They are now included in §§ 488 to 507 BGB. The law distinguishes between actual loan contracts (§§ 488 to 498 BGB), financial accommodations, especially instalment payment transactions (§§ 499 to 504) and instalment supply contracts (§ 505 BGB). Concerning the loan contract, §§ 488 to 490 include general provisions for any type of money loan and §§ 491 to 498 include provisions on consumer loan contracts. The former law of loans in §§ 607 to 610 BGB now only refers to the loan of a thing.

§ 492 BGB prescribes the **written form** for **consumer loans** and stipulates that the declaration signed by the borrower must indicate the net loan amount, the instalments to be made, the interest rate and all other charges applicable to the loan, the annual percentage rate of charge and the costs of an eventual insurance covering the outstanding balance of the loan. If this information is not provided, the contract is void under § 494 (1) BGB. However, by virtue of § 494 (2) BGB, it becomes valid if the borrower receives the loan or has recourse to it. In that case, the rate of interest is reduced to the statutory interest rate which in accordance with § 247 BGB is determined depending on the interest rate fixed by the European Central Bank for its most recent main refinancing operation. Regardless of that, the borrower in a consumer loan has a right of revocation under § 355 BGB (§ 495 BGB).

The lender may give notice to terminate a **loan repayable in instalments** on account of default in payment of the borrower only if the borrower is in default in paying at least two successive instalments in whole or in part and at least 10% or, in the case of a loan contract period exceeding three years, 5% of the nominal amount of the loan or of the instalment purchase price, and a period of two weeks fixed to the borrower has expired to no avail (§ 498 BGB).

According to §§ 499 to 504, the essential provisions on consumer loans also apply to **instalment payment transactions**. A special regulation of the **right of termination** is added

in § 503 (2) BGB. Accordingly, the businessperson may terminate an instalment payment transaction on account of a default in payment by the consumer only subject to the requirements set out in § 498 (1) BGB. The consumer must compensate the businessperson also for the expenditure incurred under the contract and must reimburse him for the benefits. Also, it is **deemed to be the exercise of the right of termination** if the entrepreneur takes back the thing delivered under the instalment payment transaction in exercise of his retention of title.

The provisions on the right of revocation and return in so-called **linked contracts** previously included in §§ 9 and 10 Consumer Credit Act are now regulated in §§ 358 and 359 BGB. Linked contracts are such in which a contract concluded by a consumer on the delivery of a good or the supply of another performance has been linked to a consumer loan contract with a third party, especially a credit institution. In such cases, § 358 BGB gives the consumer the right of revocation also for the other contract respectively: if the consumer has validly revoked a contract for the delivery of a good, for instance because it was a doorstep transaction, he may also cancel the loan contract (§ 358 (1) BGB). If he has revoked the consumer loan contract under § 495 BGB, he also ceases to be bound to the delivery contract (§ 358 (2) BGB).

In such linked contracts, the consumer additionally has the right to raise **objections stemming from the delivery contract** also against the loan contract. For instance, he may refer to defects of the sold thing also in regard to the loan claims. However, this applies only if supplementary performance has failed (§ 359 BGB). According to an originally planned modification of the law, this extension of objections in linked contracts should apply to loans secured by encumbrances on real property as well. In practice, the building owner could have assert defects of the building against a claim arising from a mortgage. This would possibly have hampered the granting of bank credits considerably. Finally the modification has been limited to cases, in which the bank has an own interest in the selling of the real property (§ 358 (3) sentence 3 BGB).

Introductory Literature: *von Westphalen,* AGB-Recht ins BGB—eine erste Bestandsaufnahme. Neue Juristische Wochenschrift 2002, 12 et seq.; *E. Schmidt,* Verbraucherschützende Verbandsklagen, Neue Juristische Wochenschrift 2002, 25 et seq.; *Grigoleit,* Besondere Vertriebsformen im BGB, Neue Juristische Wochenschrift 2002, 1151 et seq.; *Bülow,* Verbraucherkreditrecht im BGB, Neue Juristische Wochenschrift 2002, 1145 et seq.; *Löwisch,* Auswirkungen der Schuldrechtsreform auf das Recht des Arbeitsverhältnisses, see II. 2 (Festschrift for Wiedemann, 2002, 311ff.).