

Introduction to German Law

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Summary of Contents

Editors	v
Contributors	vii
Preface	xi
CHAPTER 1 Characteristic Aspects of German Legal Culture <i>Reinhard Zimmermann</i>	1
CHAPTER 2 Constitutional Law <i>Marcel Kau</i>	57
CHAPTER 3 Administrative Law <i>Johannes Saurer</i>	97
CHAPTER 4 Commercial Law <i>Johannes Köndgen & Georg Borges</i>	131
CHAPTER 5 The Law of Business Associations <i>Rolf Sethe</i>	157
CHAPTER 6 Contract Law <i>Wolfgang Wurmnest</i>	199

Summary of Contents

CHAPTER 7	
The Law of Torts	
<i>Harald Koch</i>	269
CHAPTER 8	
Property Law (<i>Sachenrecht</i>)	
<i>Jürgen Kohler</i>	295
CHAPTER 9	
Family Law	
<i>Dieter Martiny</i>	323
CHAPTER 10	
The Law of Succession	
<i>Dennis Solomon</i>	345
CHAPTER 11	
Labor Law	
<i>Manfred Weiss</i>	375
CHAPTER 12	
Private International Law	
<i>Kurt Siehr</i>	419
CHAPTER 13	
The Law of Civil Procedure	
<i>Wolfgang Hau</i>	479
CHAPTER 14	
Criminal Law	
<i>Tatjana Hörnle & Rita Vavra</i>	503
CHAPTER 15	
The Law of Criminal Procedure	
<i>Gerhard Dannecker & Julian Roberts</i>	537
Index	573

CHAPTER 6

Contract Law

Wolfgang Wurmnest*

TABLE OF CONTENTS

§6.01 Introduction

- [A] General Concept
- [B] Sources
 - [1] BGB
 - [2] *Acquis Communautaire*
 - [3] Additional Sources
- [C] Contract Law and the Structure of the BGB
- [D] How to Find the Law?

§6.02 Basic Features of German Contract Law

- [A] Freedom of Contract
 - [1] Principle
 - [2] Limits to Contractual Freedom
 - [a] Obligation to Contract (*Kontrahierungszwang*)
 - [b] Mandatory Rules
- [B] Specific Performance
- [C] Interpretation of Contracts
- [D] Concurrence of Liability
- [E] The Blurred Line Between Contract and Tort Law
 - [1] Pre-contractual Liability
 - [2] Contracts with Protective Effects Toward Third Parties
 - [3] Combinations: The Lettuce Leaf Case

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§6.03 Contract Formation

- [A] Consensus of the Parties**
- [B] Offer**
 - [1] Essential Content**
 - [2] Distinguishing Invitations to Treat**
 - [3] Mental Reservations and Lack of Seriousness**
 - [4] Communicating the Offer**
 - [5] Irrevocability of an Offer**
 - [6] Expiry of an Offer**
- [C] Acceptance**
 - [1] Express and Implied Acceptance**
 - [2] Contracting by Remaining Silent**
- [D] Battle of Forms**
- [E] Agency**
- [F] No Consideration**

§6.04 Validity and Avoidance of the Contract

- [A] Protection of Minors and Persons with Mental Disturbances**
- [B] Formal Requirements**
- [C] Illegality (§ 134 BGB) and Public Policy (§ 138 BGB)**
- [D] Defects of Intention (Mistake, Deceit, Duress)**
- [E] Scrutiny of Standard Terms**
 - [1] Historical Development and Design of the Law**
 - [2] Incorporation of Standard Terms and Their Interpretation**
 - [3] Fairness Test**

§6.05 Performance and Other Forms of Extinguishing an Obligation

- [A] Performance**
- [B] Set-Off**
 - [1] Concept and Effect**
 - [2] Requirements for Set-Off**
- [C] Release**
- [D] Other Forms**

§6.06 The General System of Contractual Remedies

- [A] Introduction**
- [B] The Right to Specific Performance and Exclusions of This Right**
 - [1] Specific Performance**
 - [2] Impossibility of Performance**
 - [a] General Rule**
 - [b] Practical Impossibility**
 - [c] Moral Impossibility**
 - [d] Rights of the Creditor**
- [C] Termination**
 - [1] Overview**
 - [2] The Requirements for Termination**

- [a] Late Performance and Improper Performance
 - [b] Infringement of Protective Duties
 - [3] Mechanism and Legal Consequences of Termination
 - [4] Special Rules for Continuing Obligations
(*Dauerschuldverhältnisse*)
 - [D] Revocation
 - [E] Contract Adaptation Based on the Doctrine of the 'Foundation of the Transaction'
 - [F] Damages
 - [1] Overview
 - [2] The General Requirements for Damages Claims
 - [a] Obligation
 - [b] Breach of Duty
 - [c] 'Fault Principle'
 - [d] Damage
 - [3] Damages for Delay in Performance (§§ 280, 286 BGB)
 - [4] Damages in Lieu of Performance
 - [a] Late or Defective Performance (§§ 280, 281 BGB)
 - [b] Impossibility (§§ 280, 283 BGB, § 311a II BGB)
 - [c] Breach of Protective Duties (§§ 280, 282 BGB)
 - [5] Damages Alongside Performance (§ 280 BGB)
 - [6] Expenses Made in Reliance of the Debtor's Promise
(§ 284 BGB)
 - [G] Other Remedies
- §6.07 Special Contractual Regimes
- [A] Overview
 - [B] Contract of Sale
 - [1] Structure of the Law
 - [2] General Rules
 - [a] Obligations of the Parties
 - [b] Breach of Contract
 - [3] Consumer Sale Contracts
 - [4] International Sales
 - [C] Donation
 - [D] Contract of Rent
 - [1] Structure of the Law
 - [2] General Rules
 - [a] Obligations of the Parties
 - [b] Breach of Contract
 - [c] Ending the Agreement
 - [3] Special Rules for Housing Premises
 - [E] Contracts for Services
 - [F] Contracts for Work and Related Contracts
 - [1] Structure of the Law
 - [2] General Rules for Contracts for Work

[3] (Consumer) Construction Contracts

[G] Suretyship and Guarantee

Selected Bibliography

§6.01 INTRODUCTION

[A] General Concept

Contract law is the body of rules dealing with obligations deriving from a mutual agreement between the parties. Those obligations need to be distinguished from obligations arising by law (*gesetzliche Schuldverhältnisse*), specifically the law of *negotiorum gestio* (§§ 677–687 German Civil Code, Bürgerliches Gesetzbuch – BGB), the law of tort (§§ 823–853 BGB) and the law of unjust enrichment (§§ 812–822 BGB). A contractual obligation is generally enforceable. One of the rare exceptions applies to obligations from gambling and betting contracts (§ 762 BGB).

In addition, under German law, contractual obligations must be distinguished from issues relating to rights in rem. This entails the peculiarity that from a doctrinal viewpoint a single transaction will usually involve two contracts: one creating an obligation (*schuldrechtlicher Vertrag*) and a second one transferring the right in rem (*dinglicher Vertrag*) which serves to fulfil the obligation. If, e.g., the parties agree on the sale of a movable good, both the buyer's right to claim the good and the seller's obligation to hand it over as well as to procure ownership result from the 'obligation contract'. Thus far, German law largely corresponds to other legal systems. But, in contrast to other legal systems, the parties have to conclude an additional in rem 'transfer contract' to perform the sale contract, as the change of possession of the good does not in itself suffice to transfer the property to the buyer. Oftentimes, both contracts are concluded impliedly in one single transaction. Nonetheless, it is important to stress that the legal consequences of the 'obligation contract' and the 'transfer contract' have to be assessed separately (*Trennungsprinzip*), and just because one of these contracts is void does not necessarily mean that the other one is void, too (*Abstraktionsprinzip*). For details, see the chapter on property law.

[B] Sources

[1] BGB

The main source for German contract law is the *Bürgerliches Gesetzbuch* (BGB). The BGB in its original version came into force on 1 January 1900. Since then, it has undergone several significant reforms, although its general structure has remained stable. A major reform took place in 2001 with the Act to Modernise the Law of Obligations (*Schuldrechtsmodernisierungsgesetz*).¹ In addition, over the last years the

1. *Gesetz zur Modernisierung des Schuldrechts of 26 November 2001*, BGBl. I 2001, 3138. An English translation of the modernised rules is available at the German Law Archive:

legislature has substantially reformed more specific fields of contract law, such as the rules for tenancy contracts² and contracts for work.³

[2] Acquis Communautaire

Germany is member to the European Union (EU), which enacts legislation in the field of private law. The body of law it generates is termed ‘*acquis communautaire*’ or simply ‘*acquis*’. The EU has adopted numerous directives on contract law, mainly to protect consumers against various unfair business practices.⁴

Up to the *Schuldrechtsmodernisierung*, rules from consumer law directives were encased in special statutes (like the Unfair Contract Terms Act⁵ or the Distance Contracts Act⁶). The consequence was a fragmentation of the law. A turning point was reached with Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which touched upon the area of sales law. The German legislature decided to incorporate this directive into the BGB (the so-called ‘*Große Lösung*’)⁷ in order to ensure that this codification would remain the primary source for contract lawyers.⁸ It further used the European stimulus to significantly overhaul the general rules for breach of contract – a project that originated in the late 1970s.⁹ Following the decision to transpose Directive 1999/44/EC into the BGB, all other (then existing) statutes in the field of contract law (although not all consumer protection

<http://germanlawarchive.iuscomp.org/?p=632>. On this reform, see the contributions to Wolfgang Ernst & Reinhard Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001). For a recent assessment of the reform, see the contributions to Markus Artz, Beate Gsell & Stephan Lorenz (eds), *Zehn Jahre Schuldrechtsmodernisierung* (2014).

2. *Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts (Mietrechtsreformgesetz)* of 19 June 2001, BGBl. I 2001, 1149.
3. *Gesetz zur Reform des Bauvertragsrechts, zur Änderung der kaufrechtlichen Mängelhaftung, zur Stärkung des zivilprozessualen Rechtsschutzes und zum maschinellen Siegel im Grundbuch- und Schiffsregisterverfahren* of 28 April 2017, BGBl. I 2017, 969.
4. For an overview see Martin Schmidt-Kessel, ‘Verbraucherschutzrecht in der EU’, in: Martin Gebauer & Christoph Teichmann (eds), *Europäisches Privat- und Unternehmensrecht, Enzyklopädie Europarecht*, vol. VI (2016), § 4 nos. 205 et seq. Important Directives include: Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts, O.J. L 95, 29; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, O.J. L 133, 66.
5. *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)* of 9 December 1976, BGBl. I 1976, 3317 (Directive 93/13/EEC was later transposed into that statute).
6. *Gesetz über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro* of 27 June 2000, BGBl. I 2000, 897. This Act transposed Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. L 144, 19 and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, O.J. L 166, 51.
7. Herta Däubler-Gmelin, ‘Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform: Zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts’, *Neue Juristische Wochenschrift* 2001, 2281 et seq.
8. On the functions of a codification see Jürgen Basedow, ‘Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex’, *Archiv für die civilistische Praxis* 200 (2000), 445, 467 et seq.
9. On the process leading to the reform Reinhard Zimmermann, ‘Consumer Contract Law and General Contract Law: The German Experience’, *Current Legal Problems* 58 (2005), 415 et seq.

rules of the *acquis*) were similarly incorporated¹⁰ to ensure that this codification systematically presents the main rules on all commonly encountered contracts. As a side effect, the BGB turned from a rather static codification into a ‘permanent construction site’ on which ‘two architects [are working]: one in Berlin and one in Brussels/Strasbourg’.¹¹ The German legislature has to amend the BGB at regular intervals to transpose new or revised directives. In addition, judgments rendered by the Court of Justice of the European Union on matters of EU law can make it necessary to align wordings in the BGB with the Court’s rulings.

[3] Additional Sources

Besides the BGB, there are additional sources that might need to be considered when drafting a contract or resolving a contractual dispute under German law. The General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)¹² safeguards the principle of equal treatment regardless of gender, race or ethnic origin, mainly regarding employment, social benefits and access to and supply of goods and services offered to the public (for details, see chapter on employment law).

In the commercial context, the Commercial Code (*Handelsgesetzbuch*) sets forth additional rules supplanting or complementing the rules of the BGB. Both codifications must thus be read together.

Finally, the fundamental rights enshrined in the German Constitution (*Grundgesetz* (GG), literally ‘Basic Law’) may deploy an effect on contractual stipulations via the general clauses of the BGB, such as § 138 BGB (public policy) or § 242 BGB (good faith). For instance, the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that a surety agreement that had been concluded between a bank and the adult daughter of a debtor was void because the bank asked the virtually destitute daughter to sign it ‘for the files’. The Court held that the bank had unlawfully exploited its bargaining position and declared that courts must interpret the general clauses

10. For a detailed analysis see Thomas Pfeiffer, ‘Die Integration von “Nebengesetzen” in das BGB’, in: Wolfgang Ernst & Reinhard Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001), pp. 481 et seq.

11. Wulf-Henning Roth, ‘Europäischer Verbraucherschutz und BGB’, *Juristenzeitung* 2001, 475, 488: ‘Wir werden uns an die Vorstellung gewöhnen müssen, dass das deutsche Privatrecht aufgrund des gemeinschaftsrechtlichen Harmonisierungsprozesses eine permanente Baustelle sein wird, bei der zwei Architekten – einer in Berlin und einer in Brüssel/Straßburg – am Werke sind’.

12. *Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung* of 14 August 2006, BGBl. I 2006, 1897. This Act transposed the following EU directives: Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 22; Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 16; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L 269, 15; Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. L 373, 37.

contained in the BGB in a way as to safeguard the principle of freedom of contract, which is protected by the Constitution as part of the general freedom of action (Article 2 I GG).¹³ Despite this and other important rulings, all things considered, the impact of the case law of the Federal Constitutional Court on contract law is limited.

[C] Contract Law and the Structure of the BGB

The draftsmen of the BGB employed a regulatory technique based on the idea that all rules capable of generalisation should be assembled in parts containing general principles, followed by more specific parts. Although this approach is laudable from a systematic perspective, it has the consequence that foreign contract lawyers (at least from jurisdictions that were not significantly influenced by the German approach) face difficulties in coming to grips with German contract law, given that the relevant provisions are spread among different parts of the BGB.

Book I (§§ 1–240 BGB) contains the General Part of the BGB, i.e., rules that are of relevance for all other books in the Code. It bears the stamp of the Pandectists, who, in the 19th century, systematically developed general rules from the earlier case law.¹⁴ Following this line of ‘abstractivism’, the legislature codified all rules of general application in Book I.¹⁵ In other national codifications, these rules are enshrined in the more specific field of contract law. For example Book I lays down rules on the capacity to contract (§§ 104–113 BGB), mistake and undue influence (§§ 119–123 BGB), nullity of legal transactions for infringements of form requirements, illegality and public policy (§§ 125, 134, 138 BGB), as well as the formation (§§ 145–156 BGB) and interpretation of contracts (§§ 133, 157 BGB). In addition, the rules on agency (§§ 164–181 BGB) are situated in the General Part, as well as the definitions of ‘consumer’ and ‘entrepreneur’ (§§ 13, 14 BGB), which are vital for determining the scope of consumer contract law.

The bulk of contract law rules are assembled in Book II (§§ 241–853 BGB), entitled ‘Law of Obligations’. An obligation is the right of the creditor to claim performance from the debtor as flowing from a contract or a legal relationship (§ 241 I BGB). Book II first supplies the rules pertaining to all forms of obligations (the so-called ‘General Law of Obligations’, *Allgemeines Schuldrecht*), including obligations *ex lege*, e.g., the law of damages (§§ 249–254 BGB). The remainder of Book II contains rules for specific contractual regimes (and for obligations *ex lege*) and is therefore termed ‘Special Law of Obligations’ (*Besonderes Schuldrecht*). The rules on special contractual regimes concern subjects such as contracts for the transfer of property (e.g., sale, barter, donation), contracts for the use of property (e.g., rent, leasehold, loan) and contracts for the provision of certain services (e.g., work, general services, travel).

13. BVerfGE 89, 214.

14. On the development of general rules by legal scholars see Mathias Schmoeckel, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), Vor § 1 BGB part III nos. 14 et seq.

15. On the historical background Reinhard Zimmermann, *The Law of Obligations* (1996), 30–31.

The regulatory technique employed by the German legislature (which of course also has an impact on the structure of university curricula) also explains why ‘contract law’ (*Vertragsrecht*) – unlike in other jurisdictions – is not a common title for legal texts in Germany.¹⁶ Many books dealing (in part) with contract law issues present them along the structure of the BGB. In this vein, textbooks cover the ‘General Part of the BGB’,¹⁷ the ‘General’¹⁸ or ‘Special Part’¹⁹ of the law of obligations or more broadly ‘contractual obligations’.²⁰

[D] How to Find the Law?

The provisions of the BGB and the other main sources of German contract law can be found online in several legal databases. Some of them are freely accessible,²¹ while others have to be paid for.²² There are various translations of the BGB (or parts of it) into English. Given the high frequency of legal reforms over the last years, however, many translations are at least partly outdated. The most frequently updated translation, one following a rather literal translation approach, seems to be the online publication of the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*)²³ – although even this translation is not always fully up to date. Case law on German private law is published in various law

16. A laudable exception is Hein Kötz, *Vertragsrecht* (2nd ed. 2012).

17. Burkhard Boemke & Bernhard Ulrici, *BGB Allgemeiner Teil* (2nd ed. 2014); Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th ed. 2016); Hans Brox & Wolf-Dietrich Walker, *Allgemeiner Teil des BGB* (41st ed. 2017); Florian Faust, *Bürgerliches Gesetzbuch Allgemeiner Teil* (6th ed. 2018); Dieter Medicus & Jens Petersen, *Allgemeiner Teil des BGB* (11th ed. 2016); Haimo Schack, *BGB – Allgemeiner Teil* (15th ed. 2016); Manfred Wolf & Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (11th ed. 2016).

18. Hans Brox & Wolf-Dietrich Walker, *Allgemeines Schuldrecht* (42nd ed. 2018); Christian Förster, *Schuldrecht Allgemeiner Teil* (3rd ed. 2015); Karl Larenz, *Lehrbuch des Schuldrechts, I. Band: Allgemeiner Teil* (14th ed. 1987); Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017); Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015); Peter Schlechtriem & Martin Schmidt-Kessel, *Schuldrecht: Allgemeiner Teil* (6th ed. 2005); Frank Weiler, *Schuldrecht Allgemeiner Teil* (4th ed. 2017).

19. Hans Brox & Wolf-Dietrich Walker, *Besonderes Schuldrecht* (42nd ed. 2018); Christian Förster, *Schuldrecht: Besonderer Teil* (2nd ed. 2016); Karl Larenz, *Lehrbuch des Schuldrechts, II. Band: Besonderer Teil, 1. Halbband* (13th ed. 1986); Karl Larenz & Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts, II. Band: Besonderer Teil, 2. Halbband* (13th ed. 1994); Dieter Medicus & Stephan Lorenz, *Schuldrecht II: Besonderer Teil* (17th ed. 2014); Dirk Looschelders, *Schuldrecht: Besonderer Teil* (13th ed. 2018); Peter Schlechtriem, *Schuldrecht: Besonderer Teil* (6th ed. 2003).

20. Books on *Vertragliche Schuldverhältnisse* usually focus on the special contractual regimes and do not treat the rules contained in the General Part, see Jürgen Oechsler, *Vertragliche Schuldverhältnisse* (2nd ed. 2017); Hartmut Oetker & Felix Maultzsch, *Vertragliche Schuldverhältnisse* (4th ed. 2013); Klaus Tonner, *Schuldrecht: Vertragliche Schuldverhältnisse* (4th ed. 2016).

21. Examples include the webpages <http://www.gesetze-im-internet.de>, <https://openjur.de> and <https://dejure.org>.

22. The most commonly used databases, which also contain court judgments and journal publications, are beck-online (www.beck-online.de) and juris (www.juris.de).

23. http://www.gesetze-im-internet.de/englisch_bgb.

journals and may be accessed via fee-based databases.²⁴ For some years, the judgments of the Federal Supreme Court (*Bundesgerichtshof*, BGH) are published on its website,²⁵ and some German states have developed freely accessible databases for decisions of their local courts.²⁶

In addition, there is a vast body of literature on German contract law in all shape and sizes. As it was already mentioned, many textbooks develop the law of contract based on the different parts of the BGB.²⁷ Other textbooks or handbooks deal with special issues of contract law, for instance general terms and conditions.²⁸ For more specific information on a particular problem, advice should always be taken from a commentary, explaining every single black letter rule. Commentaries take account of both the case law and doctrinal ideas developed by scholars, and they exist in various types: some are written for time-pressed practitioners who quickly need information on basic issues. Others explore the law in great detail by analysing (and referencing) the case law and scholarly opinions. Amongst others, the latter category includes the *Münchener Kommentar zum BGB*, the *Staudinger* and the *Beck-online.GROSSKOMMENTAR* (the latter is accessible only via a fee-based database).

§6.02 BASIC FEATURES OF GERMAN CONTRACT LAW

[A] Freedom of Contract

[1] Principle

Freedom of contract is of paramount importance for German law.²⁹ Not only does this maxim allow for the development of a private order based on the needs of the parties, 'it is also an indispensable feature of a free economy: it makes private enterprise possible and encourages the responsible construction of economic relationships. Freedom of contract is thus of central significance for the whole of the private law'.³⁰

24. The major databases are beck-online (www.beck-online.de) and juris (www.juris.de).

25. http://www.bundesgerichtshof.de/DE/Entscheidungen/EntscheidungenBGH/entscheidungenBGH_node.html.

26. Two examples are <https://www.justiz.nrw.de> and www.justizportal-bw.de.

27. These include the majority of textbooks cited in n. 17–19.

28. Martin Schwab, *AGB-Recht* (2nd ed. 2014); Markus Stoffels, *AGB-Recht* (3rd ed. 2015). There are also larger treatises such as Manfred Wolf, Walter F. Lindacher & Thomas Pfeiffer (eds), *AGB-Recht: Kommentar* (6th ed. 2013); Peter Ulmer, Hans Erich Brandner & Horst-Diether Hensen, *AGB-Recht: Kommentar* (12th ed. 2016).

29. On the justification for this maxim see Claus-Wilhelm Canaris & Hans Christoph Grigoleit, 'Interpretation of Contracts', in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. 2011), pp. 587, 589.

30. Hans G. Leser, 'Contract: Capacity, Formation and Freedom of Contract', in: Norbert Horn, Hans G. Leser & Hein Kötz (eds), *German Private and Commercial Law: An Introduction* (1982), pp. 71, 84.

It therefore does not come as a surprise that this maxim is accepted in all EU Member States³¹ and counts among the foundations of European private law.³²

The maxim has various facets. First, it protects the freedom of each party to choose whether and with whom a contract shall be concluded (*Abschlussfreiheit*). Second, the parties are free to shape the content of the agreement and may thus even create contracts not regulated in the BGB or elsewhere (*Inhaltsfreiheit*). Third, the parties may generally also agree on the form of the contract (*Formfreiheit*).

[2] *Limits to Contractual Freedom*

As with all other jurisdictions, German law does not grant unlimited freedom of contract. Although the BGB was drafted at a time that is often described as a ‘high time of economic liberalism’, its draftsmen set forth various boundaries, which over the years have constantly broadened to protect weaker contracting parties.³³

[a] *Obligation to Contract* (Kontrahierungszwang)

The freedom of each party to decide freely with whom a contract is concluded (*Abschlussfreiheit*) is restricted in various ways. First, the legislature has imposed a legal obligation to contract under certain circumstances so as to ensure access to important goods,³⁴ e.g., in the area of transport law (§ 22 *Personenbeförderungsgesetz*, § 10 *Allgemeines Eisenbahngesetz*) or energy supply (§ 18 *Energiewirtschaftsgesetz*). Protection against firms with a high degree of market power is furthermore ensured by the rules of competition (antitrust) law, which under certain circumstances grant-dependent firms the right to demand delivery of essential commercial goods or services (e.g., under §§ 19 II no. 4, 20 *Gesetz gegen Wettbewerbsbeschränkungen*).

In addition to these special statutory duties, there is a general obligation to contract. The legal foundation and prerequisites of this obligation are subject to debate. Originally, the Imperial Court (*Reichsgericht*), i.e., the Supreme Court for civil and

31. See Notes to Art. 1:102 of the Principles of European Contract Law, *Parts I & II* (2000), pp. 99 et seq.

32. Peter-Christian Müller-Graff, ‘Allgemeines Gemeinschaftsprivatrecht’, in: Martin Gebauer & Christoph Teichmann (eds), *Europäisches Privat- und Unternehmensrecht, Enzyklopädie Europarecht*, vol. VI (2016), § 2 nos. 78 et seq.

33. Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations*, vol. I: *The Law of Contracts and Restitution* (1997), 28. The view that the 19th century was dominated by a very ‘formal’ conception of contract and that the ‘materialisation’ of German contract law is a tendency only of the 20th century has recently been softened in connection with evidence that issues of social justice were of much greater concern at the time the BGB was drafted than commonly assumed, see Tilman Reppen, *Die soziale Aufgabe des Privatrechts: Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts* (2001), 490 et seq.; Phillip Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (2010), 5 et seq.

34. See the overview by Reinhard Bork, in: *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Allgemeiner Teil 4b* (revised ed. 2015), Vor §§ 145–156 BGB no. 17; Jan Busche, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (7th ed. 2015), Vor § 145 BGB nos. 14 et seq.

commercial matters of the German Reich, derived such a rule from § 826 BGB (a general tort law provision);³⁵ yet, its adequacy as a basis to create an obligation to contract is in dispute.³⁶ The prevailing understanding of the rule holds that a party who offers goods or services to the public acts *contra bonos mores* if he – without an objective basis – refuses to conclude a contract with a buyer who cannot otherwise procure the desired goods or services. In such a situation, the buyer is entitled to compensatory relief such that he is put in the position he would have been in but for the wrongful conduct (§ 249 I BGB). Thus, conclusion of the contract is mandatory.³⁷ The Imperial Court, however, imposed this obligation, in principle, only on firms holding a monopoly position.³⁸ This approach was basically adopted by the Federal Court (BGH),³⁹ which also – at least implicitly – limited the scope of application to important goods and services.⁴⁰ Beyond this context, it is disputed under which circumstances an obligation to contract will arise. Some authors argue for a lowering of the (monopoly) threshold so as to reach suppliers holding merely a strong market position,⁴¹ whereas other authors would even go so far as extending the duty to contract to persons supplying everyday goods and services.⁴²

In recent times, there has been a recurrent debate surrounding cases of discrimination where an individual has been denied entrance to an establishment (e.g., a nightclub, a restaurant or a hotel) because of his ethnicity.⁴³ Can the individual being discriminated against sue for admission to the establishment or is he limited to claim for damages? Some authors see a compensatory claim in tort (and potentially the filing of criminal charges) as a reasonable and effective sanction.⁴⁴ Others, however, find

35. RGZ 132, 273, 276; RGZ 133, 388, 392; RGZ 155, 257, 284; concurring Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 29; Peter Schlechtriem & Martin Schmidt-Kessel, *Schuldrecht Allgemeiner Teil* (6th ed. 2005), no. 56.

36. Many scholars argue that the obligation to contract is rather a ‘*quasinegatorischer Unterlassungsanspruch*’ (like § 1004 BGB) since the discriminated person wants to prevent future damages rather than obtain compensation for already existing damage, see Jan Busche, *Privatautonomie und Kontrahierungszwang* (1999), 230 et seq.; Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th ed. 2016), no. 672; see also Tilmann Bezenberger, ‘Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht’, *Archiv für die civilistische Praxis* 196 (1996), 395, 428. Both approaches (§§ 826, 249 BGB and § 1004 BGB) rest on shaky ground, see Jörg Neuner, ‘Diskriminierungsschutz durch Privatrecht’, *Juristenzeitung* 2003, 57, 61.

37. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 29.

38. RGZ 48, 114, 127; RGZ 132, 273, 276; RGZ 155, 257, 284.

39. BGH, *Neue Zeitschrift für Verwaltungsrecht* 1994, 1240, 1241.

40. RGZ 48, 122, 127; RGZ 99, 107, 109; see also Wolfgang Kilian, ‘Kontrahierungszwang und Zivilrechtssystem’, *Archiv für die civilistische Praxis* 180 (1980), 47, 58. The Bundesgerichtshof left this issue open, cf. BGH, *Neue Juristische Wochenschrift* 1990, 761, 763.

41. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 29.

42. Franz Bydlinski, ‘Zu den dogmatischen Grundfragen des Kontrahierungszwangs’, *Archiv für die civilistische Praxis* 180 (1980), 1, 37 (‘*Normalbedarf*’).

43. See Dieter Martiny, ‘Ausländerdiskriminierung und Vertragsschluss’, *Zeitschrift für Europäisches Privatrecht* 2001, 563, 578 et seq.

44. Franz Bydlinski, ‘Zu den dogmatischen Grundfragen des Kontrahierungszwangs’, *Archiv für die civilistische Praxis* 180 (1980) 1, 13, 44 et seq.; Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 80.

that an obligation to contract is justified given the blatant injury to human dignity; while a court ruling on this matter may not – as a practical matter – allow the injured party to secure entry on the desired occasion, the affirmation of such an obligation would at least foreclose future instances of wrongful conduct.⁴⁵ This latter view is persuasive, leading to the conclusion that an obligation to contract may also exist in the context of blatant discriminatory treatment. This would not unduly interfere with contractual freedom,⁴⁶ since protection from discrimination is already embedded in the existing private law regime, namely as an aspect of freedom of action guaranteed to any potential victim of discriminatory treatment. But this is not to say that every act of discrimination based on one's origin must give way to an obligation to contract. If, for instance, a Bavarian is unwilling to sell his car to a man from Berlin because he does not like 'Prussians', the buyer from Berlin will have to turn elsewhere to fill his needs.

In recent times, courts have derived a right against (future) discriminatory treatment from the terms of the Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz* – AGG), where its prerequisites were met.⁴⁷ In a case where a teenager was denied entrance to a club on account of his skin colour, the Stuttgart Court of Appeals not only awarded the claimant damages but also prospectively prohibited the club from denying the teen entry based on his colour.⁴⁸

[b] Mandatory Rules

The principle that the parties may shape the content of the contract (*Inhaltsfreiheit*) finds its limits in mandatory rules. These are provisions from which parties may not deviate by agreement. Since 1900, the German legislature has steadily increased the number of mandatory rules, namely in the areas of consumer law, tenancy law, employment law and insurance contract law so as to protect the weaker party to the contract.

Mandatory rules also limit the parties' freedom to agree on the contract's form. If a certain form is mandatory, the parties must comply with this requirement; otherwise their contract is void (§ 125, 1 BGB) except where the law exceptionally provides for a method to cure an infringement. To ensure that unduly severe form requirements do not hinder consumers from exercising their rights, § 309 no. 13b and c BGB further declares that standard contract clauses in consumer contracts – except contracts that are recorded before a notary – are void, insofar as notices or declarations are conditioned on a stricter form than text form (i.e., handwritten, typed or via email) or if special requirements for receipt apply.

45. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), § 6 nos. 119 et seq.

46. On this debate in relation to the enactment of the AGG Eduard Picker, 'Antidiskriminierung als Zivilrechtsprogramm?', *Juristenzeitung* 2003, 540, 543 et seq.

47. Whether the obligation to contract flows from the AGG or from the general rules (e.g., § 826 BGB) is disputed, see Jan Busche, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (7th ed. 2015), Vor § 145 BGB no. 17 (with further references).

48. OLG Stuttgart, *Neue Juristische Wochenschrift* 2012, 1085.

[B] Specific Performance

It is a general principle of German law that, in cases of non-performance of a contractual obligation, the creditor can seek specific performance from the debtor provided that performance is still possible. If this is the case, it does not matter whether the debtor has to deliver goods, keep his shop open at certain times or personally perform a service.⁴⁹ The creditor can go to court and demand a so-called *Leistungsurteil* requiring the debtor to perform in kind. This stands in sharp contrast to the Anglo-Saxon approach, under which specific performance of a non-monetary obligation is subject to many restrictions and is rather seen as an exception.⁵⁰

The differences between German law and the common law should, however, not be overstated. Even though the right to claim specific performance has been described as the ‘backbone of the obligation’ (*Rückgrat der Obligation*),⁵¹ a glimpse at the law in action reveals that, even in Germany, claims for damages are the rule and claims for specific performance the exception. First, whenever a creditor can be fully compensated by a sum of money (i.e., in cases where he can readily secure the promised good or service elsewhere), he will hardly seek performance from a reluctant debtor and will instead limit his claim to damages.⁵² Second, even if he seeks specific performance, a closer look at the rules on enforcement reveals that it is only in limited circumstances that such a judgment may be executed. Under §§ 887, 888 Code of Civil Procedure (*Zivilprozessordnung* – ZPO), one has to distinguish between acts that can be performed by another person (*vertretbare Handlungen*) and acts that have to be performed by the debtor (*unvertretbare Handlungen*). The former are enforced by substituting another person for the debtor at the cost of the original debtor (§ 887 ZPO). The creditor’s act of securing substitute service effectively releases the original debtor from his obligation to perform the contractual obligation, since he now has to pay a certain sum to the creditor that covers the cost of the substitute. The latter can, in principle, be enforced by certain coercive means such as a fine (*Zwangsgeld*) or even imprisonment (*Zwangshaft*) (§ 888 I ZPO), but to protect the debtor’s personal freedom the legislature has exempted the enforcement of judgments concerning the provision of a service that the debtor has to provide in person (§ 888 III ZPO). In such a case, the creditor is effectively limited to a claim for damages.⁵³ The German procedural enforcement system thus further levels the differences to common law jurisdictions with regard to the outcome of a dispute. However, from a conceptual point of view, significant

49. Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), 469.

50. For details on English law see Edwin Peel, *The Law of Contract* (14th ed. 2015), nos. 21–016 et seq.

51. Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), 469.

52. *Ibid.*, 482.

53. Jens Kleinschmidt, ‘Specific Performance’, in: Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012), vol. II, pp. 1581, 1582 et seq.

differences remain since under German law the creditor can always sue for performance in kind, whereas English law, e.g., leaves it at the discretion of the court to decide whether specific performance is granted or not.⁵⁴

[C] Interpretation of Contracts

At the end of the 19th century, there were competing views on how to interpret declarations of intent. Put simply (the actual lines of arguments were much more nuanced), the proponents of a subjective approach argued that the aim of interpretation must be an inquiry into the true will of the person making the statement (*Willenstheorie*), while adherents of the objective approach argued that, in principle, it is the objective meaning of a declaration that matters (*Erklärungstheorie*).⁵⁵ The BGB did not bring this controversy to an end since two different rules on interpretation were incorporated, both of which can be traced back to the French Civil Code:⁵⁶ While § 133 BGB refers to the true intention as a yardstick for interpreting declarations of intent, § 157 BGB demands that contracts be interpreted objectively, in good faith, and with regard to common usage. Nowadays, however, it is settled case law that these two rules of interpretation need to be combined when assessing whether a contract has been formed and what content it ought to have.⁵⁷ These two general provisions are flanked by the *contra proferentem* rule that applies to standard contract terms, § 305c II BGB.

As a starting point, declarations leading to the contract must – from a doctrinal point of view – be interpreted in a way as to reflect the true will of the declarators. That is why under German law, a stipulation may be given a meaning differing from the common understanding of an expression. As far as the true intentions of the parties do match, but the parties nonetheless use an expression different from common usage, the courts will construe the contract according to the intended meaning (*falsa demonstratio non nocet*).⁵⁸ Thus, if a buyer buys *Haakjöringsköd* (Norwegian for shark meat) from the seller, but both parties understand this expression as meaning whale meat,

54. Jens Kleinschmidt, 'Specific Performance', in: Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012), vol. II, pp. 1581, 1583. For details see Edwin Peel, *The Law of Contract* (14th ed. 2015), nos. 21–029 et seq.

55. For details see Stefan Vogenauer, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), §§ 133, 157 BGB nos. 34 et seq.

56. § 133 BGB was inspired by Art. 1156 CC (now Art. 1188 CC), and a precursor of § 157 BGB was modelled after Art. 1135 CC (now Art. 1194 CC), see Stefan Vogenauer, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), §§ 133, 157 BGB nos. 18, 24, 38.

57. It is important to note that the German rules of interpretation differ in detail with regard to, on the one hand, declarations of will that have to be received by another party (*empfangsbedürftige Willenserklärungen*) and, on the other hand, declarations of will that are valid without receipt by another party (*nicht-empfangsbedürftige Willenserklärungen*). Moreover, peculiarities apply in special situations, e.g., when declarations must comply with certain formal requirements.

58. Claus-Wilhelm Canaris & Hans Christoph Grigoleit, 'Interpretation of Contracts', in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. 2011), pp. 587, 598; Jörg Neuner, 'Vertragsauslegung – Vertragsergänzung – Vertragskorrektur', in: *Festschrift für Claus-Wilhelm Canaris*, vol. I (2007), pp. 901, 908.

they have concluded a contract on the latter.⁵⁹ But in practice, such a subjective approach to interpretation is rather the exception given that the true will is often difficult to ascertain. That is why declarations in the context of contract formation are usually to be interpreted from the position of a neutral bystander taking the perspective of the recipient of the declaration (*objektiver Empfängerhorizont*) to protect legitimate expectations.⁶⁰ Hence, a contractual stipulation can be given a meaning that corresponds to the true intention of only one of the parties. If, e.g., only the seller understood *Haakjöringsköd* as referring to whale meat, whereas the buyer understood it to mean shark meat, and this meaning is the common understanding in the fish trade, a contract on shark meat would have been concluded. A different issue is whether the seller can rescind the contract based on mistake (*infra* §6.04[D]).

In the event the parties have not formed a will on certain issues related to their contractual arrangement, so that the contract contains a ‘gap’, courts will usually fill this gap by applying the code’s default rules (*ius dispositivum*, *dispositives Recht*),⁶¹ as far as these rules are compatible with the interests of the parties in the case at hand. If there are no such rules or if they do not fit because the contract concerns an atypical scenario, courts may resort to completive (constructive) interpretation (*ergänzende Vertragsauslegung*), which – under certain circumstances – enables a court to fill the gap with a hypothetical rule that reasonable parties would have agreed on if they had thought about the issue at the time of contracting. Such a gap-filling procedure is, however, not always possible as there are many instances in which no rule that both parties would have agreed on can be conceived. A completive (constructive) interpretation can thus only be applied in exceptional cases and courts must avoid substituting their own conception of contractual justice for the parties’ will.⁶² A commonly cited example for the application of this interpretational rule is a contract between two physicians from different towns who contractually swap their practices. If, after some months, one of the doctors returns to his home town and opens up a practice in close vicinity to his old place of work (meaning that many of his former patients will likely want to be treated by him and not by the ‘new’ doctor in town – which, of course, runs counter to the economic purpose of the contract), his contractual partner can in principle only stop him from doing business there if the contract contains a non-compete clause. If the contract does not contain such a prohibition, a temporary limitation of two or three years can nevertheless be read into the contract under German law by resorting to completive interpretation, as there is no default rule of law on this issue and the parties would most likely have intended such a provision if they had thought about the problem.⁶³

59. This example is based on RGZ 99, 147, 148.

60. Jörg Neuner, ‘Vertragsauslegung – Vertragsergänzung – Vertragskorrektur’, in: *Festschrift für Claus-Wilhelm Canaris*, vol. I (2007), pp. 901, 908 et seq.

61. BGHZ 158, 201, 206 (with further references).

62. Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th ed. 2016), no. 537; Claus-Wilhelm Canaris & Hans Christoph Grigoleit, ‘Interpretation of Contracts’, in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. 2011), pp. 587, 595 et seq.; Dieter Medicus & Jens Petersen, *Allgemeiner Teil des BGB* (11th ed. 2016), no. 344.

63. BGHZ 16, 71, 76; Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th ed. 2016), no. 538; Karl Larenz, ‘Ergänzende Vertragsauslegung und dispositives Recht’, *Neue Juristische*

When interpreting a contract, German courts are in principle not limited to the ‘four corners of the contract’ and may also take into account prior communication and negotiations between the parties.⁶⁴ Parties to an international commercial transaction, therefore, often include ‘entire agreement clauses’ in their contracts which aim to prevent courts from looking at material other than the written agreement to determine its meaning.⁶⁵

[D] Concurrence of Liability

Unlike in French law, where the principle of *non-cumul des actions* prohibits concurrent claims to a large extent,⁶⁶ German law allows a claimant to base its claim on different grounds. Thus, claims representing concurrent liability, e.g., contractual claims and tort claims, are frequently observed.⁶⁷

[E] The Blurred Line Between Contract and Tort Law

A peculiarity of German law is the rather blurred line between contract and tort law. Over the years, courts have expanded the field of contract law considerably. This development was in part an attempt to counterbalance the narrow scope of German tort law. For instance, the draftsmen of the BGB had designed a rather perfunctory rule on vicarious liability. It differs considerably from similar rules in other jurisdictions as it defines the liability of the principal (or master) very narrowly.⁶⁸ § 831 BGB holds the principal liable for unlawful damage wrongfully caused by his auxiliary (*Verrichtungsgehilfe*) if the principal did not exercise the necessary care in selecting, training or supervising the auxiliary (for details see the chapter on tort law). Thus, if the principal did not act negligently himself, he is not liable and the damaged person can seek damages only from the employee, who often does not have the means to pay for the damage caused. The second facet of tort law leading the courts to a wide interpretation of contract law is the fact that pure economic loss can be recovered only where the tortfeasor caused damage to his victim intentionally and acted against *bonos mores* (§ 826 BGB).⁶⁹

Wochenschrift 1963, 737, 738 et seq.; the complete (constructive) interpretation as applied by the German courts is rejected by Jörg Neuner, ‘Vertragsauslegung – Vertragsergänzung – Vertragskorrektur’, in: *Festschrift für Claus-Wilhelm Canaris*, vol. I (2007), pp. 901, 918 et seq.

64. See, e.g., BGH, *Neue Juristische Wochenschrift* 1999, 3191.

65. Such a clause will however not completely isolate the contract from its legal context, see Giuditta Cordero-Moss, *International Commercial Contracts* (2014), 91 et seq.

66. For details see Konstanze Brieskorn, *Vertragshaftung und responsabilité contractuelle* (2010), 218 et seq.

67. For details see Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations*, vol. I: *The Law of Contracts and Restitution* (1997), 43 et seq.

68. See Gerhard Wagner, ‘Vicarious Liability’, in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. 2011), pp. 903, 907–914; Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), 632–649.

69. Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations*, vol. I: *The Law of Contracts and Restitution* (1997), 276.

[1] Pre-contractual Liability

Facing the shortcomings of German tort law, courts have, *inter alia*,⁷⁰ enlarged the reach of contractual liability. One move in this regard was to expand the doctrine of *culpa in contrahendo*⁷¹ to cover tort-related situations.⁷² Back in 1911, the Imperial Court had to decide on the liability of a warehouse owner for damages caused by his sales person to a potential customer. The customer had entered the warehouse to buy linoleum floor covering. When the sales person showed him the product, he moved some rolls of linoleum without exercising the necessary care. These rolls fell on the customer and injured him. The Court held the shop owner liable under the doctrine of *culpa in contrahendo* (now codified in §§ 311 II, 241 II, 280 I BGB). As the accident prevented the customer from contracting with the shop-owner, contractual liability could not be properly claimed. But as the shop-owner had intentionally opened his premises to customers and thus paved the way for concluding contracts (today: § 311 II BGB), the Imperial Court expanded the rules of contractual liability to such pre-contractual situations. This expansion allowed the Court to apply § 278, 1 BGB, under which the fault of a person who is employed to perform an obligation (*Erfüllungsgehilfe*) can be attributed to the debtor (*respondeat superior*) irrespective of whether the debtor was answerable to the breach of contract himself or not. Expanding contractual liability thus effectively closed the gaps in German tort law left by § 831 BGB. Today, the doctrine of *culpa in contrahendo* has developed into a general doctrine. It has various fields of application. Courts have even turned it into a basis for liability to recover reliance loss (*Vertrauensschaden*) in those cases where a party has signalled to the other side that a contract will certainly be concluded but later breaks off negotiations without a proper reason.⁷³

[2] Contracts with Protective Effects Toward Third Parties

The concept of *culpa in contrahendo* is difficult to apply if the person suffering damage had no intention at all to enter into a contractual relationship with the seller. To overcome the perceived gaps in tort law, scholars and courts have developed the concept of ‘contracts with protective effects toward third parties’ (*Vertrag mit*

70. For other attempts to circumvent the application of § 831 BGB see Gerhard Wagner, ‘Vicarious Liability’, in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. 2011), pp. 903, 911–912.

71. This doctrine was to a large extent shaped by Rudolph von Jhering, ‘*Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen’, *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 4 (1861), 1–112.

72. Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations*, vol. I: *The Law of Contracts and Restitution* (1997), 265.

73. BGH, *Neue Juristische Wochenschrift* 1975, 1774. However, in the majority of cases no compensation was awarded due to the particular underlying circumstances, see BGH, *Neue Juristische Wochenschrift* 1967, 2199; BGH, *Neue Juristische Wochenschrift* 1970, 1840, 1841; BGH, *Neue Juristische Wochenschrift* 1996, 1884, 1885; BGHZ 71, 386, 395. For details see Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations*, vol. I: *The Law of Contracts and Restitution* (1997), 69.

Schutzwirkung zugunsten Dritter).⁷⁴ This concept, which today is based on a complete (constructive) interpretation of the contract under the principle of good faith (§ 242 BGB),⁷⁵ extends duties of protection to a non-party to the contract, conferring contractual protection to this third person. A first line of cases concerned claims against a landlord for personal damages sustained by family members or other persons who were in close relation to the tenant.⁷⁶ Later, courts extended this doctrine to damages caused to property and – more importantly – to pure economic loss.⁷⁷

It is important to note that only duties of protection are extended to a third party, so that the third party cannot claim performance from the debtor. Nonetheless, this concept relaxes the general principle of privity of contract, i.e., that a contract is a bond between the parties. To be able to distinguish contractual liability from tort-based liability, courts have developed four requirements which have to be met for extending the protective scope of a contract to cover a non-contracting party. They take into account the interests of all parties involved (debtor, creditor and third party):

- The third person must have been exposed to the contractual obligation of the debtor in a similar manner as the creditor (*Leistungsnähe*).⁷⁸
- The creditor must have an interest in extending the protective scope of the contract to the third party. This is assumed whenever the creditor is responsible for the wellbeing (*Wohl und Wehe*) of the third party, as is the case in family relationships⁷⁹ or because of duties resulting from work contracts.⁸⁰ Courts have, however, expanded the protective scope of a contract beyond such relationships.⁸¹ Nowadays, it suffices that there is merely an unspecified interest in protecting a third party.⁸²
- The debtor must be able to foresee, at the time of contracting, which persons may in fact qualify as third-party beneficiaries of his duties of protection. Yet, it is not necessary that he knows the identity of these people. It suffices that the group of included third parties can be assessed abstractly.⁸³

74. Wolfgang Fikentscher & Andreas Heinemann, *Schuldrecht Allgemeiner und Besonderer Teil* (11th ed. 2017), no. 305; Holger Sutschet, *Der Schutzanspruch zugunsten Dritter: Unter Berücksichtigung der Pflichtenlehre des Kommissionsentwurfs* (1999), 21 et seq.

75. BGH, *Neue Juristische Wochenschrift* 2004, 3035, 3036; BGH, *Neue Juristische Wochenschrift* 2016, 3432, 3433. The foundation of this principle, originally based on § 328 BGB, is subject to debate, see Andreas Zenner, 'Der Vertrag mit Schutzwirkung zu Gunsten Dritter: Ein Institut im Lichte seiner Rechtsgrundlage', *Neue Juristische Wochenschrift* 2009, 1030 et seq.

76. RGZ 102, 231, 232; RGZ 160, 153, 155.

77. BGHZ 49, 350, 355 (damage to property); BGHZ 69, 82, 89 (non-pecuniary loss). On this development Holger Sutschet, *Der Schutzanspruch zugunsten Dritter: Unter Berücksichtigung der Pflichtenlehre des Kommissionsentwurfs* (1999), 23 et seq.

78. BGHZ 133, 168, 173; BGH, *Neue Juristische Wochenschrift* 2010, 3152, 3153.

79. BGHZ 66, 51, 57 (family relationship).

80. BGH, *Neue Juristische Wochenschrift* 1969, 269, 272; BGH, *Neue Juristische Wochenschrift* 1977, 2208, 2209.

81. BGH, *Neue Juristische Wochenschrift* 1965, 1955, 1956 et seq.; BGH, *Neue Juristische Wochenschrift* 1984, 355, 356.

82. BGH, *Neue Juristische Wochenschrift* 1996, 2927, 2928 et seq.; BGH, *Neue Juristische Wochenschrift* 2001, 3115, 3116.

83. BGH, *Neue Juristische Wochenschrift* 1968, 885, 887; BGH, *Neue Juristische Wochenschrift* 1984, 355.

- Lastly, the third party must be worthy of protection (*schutzwürdig*). This can be assumed if this party has no equivalent claim of its own against the debtor, i.e., a claim that is based on the same prerequisites.⁸⁴

Based on the concept of contracts with protective effect for third parties, it is, e.g., possible to grant employees who have been harmed by a dangerous substance (which was bought by their employer) a direct contractual claim against the seller. Similarly, a landlord whose auxiliary negligently injured the child of his tenant is liable for that damage under the law of contract and does not have the possibility to exculpate himself, as it would be possible under tort law. A borderline case is the following scenario: A doctor implants a contraceptive device that turns out to be ineffective due to the doctor's negligence. Subsequently, the patient engages in a sexual relationship that results in a child. The BGH ruled that the patient's lover had a claim to relief regarding child support payments since the requirements of a contract with protective effects toward third parties were satisfied.⁸⁵

[3] **Combinations: The Lettuce Leaf Case**

The extension of a contract's protective scope may also be combined with the doctrine of *culpa in contrahendo*, as can be demonstrated by the lettuce leaf case:⁸⁶ A potential buyer entered a self-service grocery store accompanied by her 14 year old daughter, who slipped on a leaf of lettuce on the floor and injured herself. The BGH held that the obligation arising from the legal relationship between the parent and store, i.e., the obligation resulting from the *culpa in contrahendo* situation, generates a protective effect for the daughter, so that she could raise a contractual claim for damages against the supermarket. Other jurisdictions would clearly have applied tort law (vicarious liability) to such a scenario.

§6.03 **CONTRACT FORMATION**

[A] **Consensus of the Parties**

The formation of a contract requires a meeting of minds of the (two or more) parties. Such a consensus is usually reached when one party makes an offer (*Angebot*) to the other side, which then accepts it (*Annahme*). The CISG (Articles 14 et seq. CISG) and many other jurisdictions provide similar rules.⁸⁷ The division of the contracting phase into 'offer' and 'acceptance' is a useful theoretical tool for analysing the parties' agreement – even though the contract-making process is often 'more disorderly [than

84. BGH, *Neue Juristische Wochenschrift* 1996, 2927, 2929; BGH, *Neue Juristische Wochenschrift* 2016, 3432, 3433.

85. BGH, *Neue Juristische Wochenschrift* 2007, 989, 991; for details see Juliana Mörsdorf-Schulte, 'Vermögensschutz beim One-Night-Stand?', *Neue Juristische Wochenschrift* 2007, 964 et seq.

86. BGHZ 66, 51, 58.

87. For a comparative overview see Jessica Schmidt, *Der Vertragsschluss* (2013), 130 et seq.

suggested by these categories]’.⁸⁸ The rules for contract formation are laid down in §§ 145 et seq. BGB. As offer and acceptance are declarations of intent, one must read these provisions together with the general rules on such declarations (§§ 104–144 BGB).

[B] Offer

[1] Essential Content

An offer is a promise to contract by which the offeror wants to be bound. As any declaration of intent, it can be declared expressly (*ausdrücklich*) or impliedly (*konklu- dent*). To be valid, the promise must be sufficiently precise and complete regarding the essential components of the contract (*essentialia negotii*). The essential stipulations must at least be ascertainable, so that an acceptance can be declared by just saying ‘yes’ or ‘I agree’⁸⁹ – otherwise a contract cannot be formed.⁹⁰ What kind of stipulations are deemed essential varies according to the contract type proposed. In a sales contract, at least the price and the item that is put up for sale must be ascertainable.⁹¹ That does not mean that the parties have to fix the price themselves immediately. It is also possible to conclude a contract and agree that one of the parties (§ 315 BGB) or a third person (§ 317 BGB), e.g., an expert, will fix the price for them. To avoid over-formalism, the law provides further exceptions to the rule of completeness. If a client hops into a taxi and instructs the driver to drive him to the airport, a contract is formed if the latter does so despite the parties not having addressed the price for this service. Where a person regularly carries out an obligation for remuneration, the parties are deemed to have tacitly agreed on a price. The customer thus has to pay either the regular tariff or – if no such tariff exists – the ‘usual’ remuneration. Such rules exist, e.g., with regard to service contracts (§ 612 BGB) or contracts for work (§ 632 BGB).

[2] Distinguishing Invitations to Treat

An offer must be distinguished from a mere invitation to treat (*invitatio ad offeren- dum*). Simple postings of goods for sale on a website,⁹² advertising in newspapers or on websites⁹³ or the sending of advertising material (catalogues, etc.)⁹⁴ are usually not regarded as offers given that the seller normally still wants to have the last word on

88. Arthur Taylor von Mehren, ‘The Formation of Contracts’, in: idem (ed.), *International Encyclopedia of Comparative Law*, vol. VII/1 (2008), no. 9–112; Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 57.

89. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 59.

90. Arthur Taylor von Mehren, ‘The Formation of Contracts’, in: idem (ed.), *International Encyclopedia of Comparative Law*, vol. VII/1 (2008), no. 9–60.

91. Helmut Köhler, *BGB: Allgemeiner Teil* (40th ed. 2016), § 8 no. 8; Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 210.

92. BGH, *Neue Juristische Wochenschrift* 2005, 976; BGH, *Neue Juristische Wochenschrift* 2005, 3567, 3568; Heinrich Dörner, ‘Rechtsgeschäfte im Internet’, *Archiv für die civilistische Praxis* 202 (2002), 363, 377 et seq.

93. BGH, *Neue Juristische Wochenschrift* 2012, 2268, 2269.

conclusion of a contract. He might not want to contract with certain potential customers (e.g., with persons that had not made timely payments on previous purchases) and might have to check whether he is actually still able to sell the product (since it may already be sold out at the time the request of a potential buyer reaches him). Whether placing goods on shelves in a supermarket constitutes a binding offer or a mere invitation to contract is still subject to debate. It is argued that such displays should be treated as mere invitations given that the seller would want to reserve the right to contract; among other reasons the seller may wish to retain the possibility of avoiding sales *en gros* to single customers. Thus, in a supermarket a contract should be deemed to be concluded only when the customer puts the chosen goods on the counter and the cashier accepts this offer on behalf of the market.⁹⁵ Things are different with regard to the purchase of fuel at a self-service station. Here, the contract is concluded already when the customer puts the fuel into his tank, since in this case both parties have an interest in concluding the agreement at this early point (the seller having already handed over the product and the buyer – as he cannot return it – wanting to keep the fuel irrespective of whether the seller would eventually want to contract with him or not).⁹⁶

[3] *Mental Reservations and Lack of Seriousness*

A mental reservation that is not communicated to the other party does not render an offer void, unless the other side was aware of this (hidden) reservation (§ 116 BGB). A declaration that is obviously unserious is void, even if the other side understood it as serious offer and accepts it (§ 118 BGB). In the latter case, the offeror may, however, be liable for any damage resulting from reliance on the validity of the unserious declaration (§ 122 I BGB).

[4] *Communicating the Offer*

An offer becomes effective when it reaches (*zugehen*) its addressee (§ 130 I 1 BGB). From this moment on, the declaration becomes binding (§ 145 BGB) and thus can be accepted to form a contract. § 130 I 1 BGB states a general principle, although, from its

94. BGH, *Neue Juristische Wochenschrift* 2009, 1337, 1338 (catalogue of a telecommunication provider); Jessica Schmidt, *Der Vertragsschluss* (2013), 204.

95. Concurring Gerhard Dietrich, 'Der Kauf im Selbstbedienungsladen', *Der Betrieb* 1972, 957, 958; Jan Busche, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (7th ed. 2015), § 145 BGB no. 12; Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 63; Manfred Wolf & Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (11th ed. 2016), § 37 no. 7; Jessica Schmidt, *Der Vertragsschluss* (2013), 219; contra Reinhard Bork, in: *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Allgemeiner Teil 4b* (revised ed. 2015), § 145 BGB no. 7; Götz Schulze, 'Rechtsfragen des Selbstbedienungskaus – zur Abgrenzung von Qualifikations- und Identitätsaliud beim Stückkauf über vertauschte Ware', *Archiv für die civilistische Praxis* 201 (2001), 232, 235 (display of goods is an offer by the seller that is accepted by the customer at the cashier's desk).

96. BGH, *Neue Juristische Wochenschrift* 2011, 2871.

wording, it deals with declarations addressed to absent persons.⁹⁷ At the latest, an offer reaches the addressee when he takes notice of it. But even prior to that point in time, an offer can be legally deemed to have reached its recipient and therefore become effective. This is the case when it has been conveyed to the addressee's sphere of influence (letter box, email inbox, voicemail, etc) and a sufficient amount of time has elapsed such that it would have been possible under usual circumstances to take notice of the offer.⁹⁸

[5] *Irrevocability of an Offer*

German law does not in principle allow the offeror to revoke an offer after it has become binding. This approach stands in sharp contrast to common law, which generally allows the withdrawal of the offer at any time prior to acceptance by the addressee.⁹⁹ The drafters of the BGB justified this binding effect with the needs of commerce and the necessity of legal certainty,¹⁰⁰ but they carved out important exceptions: First, it is possible to revoke the offer before it has become binding, i.e., before it has reached its addressee. Hence, if the revocation reaches the addressee prior to or at the same time as the offer (§ 130 I 2 BGB), the latter does not become binding as it was validly revoked. Second, the offeror is free to exclude the irrevocability of his offer (§ 145 BGB). In the commercial world, such a revocable offer can be expressed through wordings such as '*Angebot freibleibend*' (offer may change) or '*Angebot ohne Obligo*' (offer without commitment). Depending on the circumstances of the particular case,¹⁰¹ these declarations may also be qualified as mere invitations to treat.¹⁰²

[6] *Expiry of an Offer*

If the offer was not revoked on time, it expires if it is explicitly rejected by the addressee or at least not accepted in due time (§ 146 BGB). In principle, the offeror is free to fix the timeframe in which his offer must be accepted (§ 148 BGB). If he has not done so, two scenarios are to be distinguished: First, offers made to a person present in the same physical setting or via direct means of communication, such as the telephone, must be accepted immediately (§ 147 I BGB). Second, offers made to a person not present in the same place, e.g., via letters, fax or email, are binding up to the time at which the offeror may usually expect to receive an answer (§ 147 II BGB).

97. Manfred Wolf & Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (11th ed. 2016), § 33 no. 10.

98. BGH, *Neue Juristische Wochenschrift* 2004, 1320; BGHZ 137, 205, 208; Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 94.

99. Edwin Peel, *The Law of Contract* (14th ed. 2015), no. 2–058.

100. Benno Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. I (1899), 443.

101. See BGH, *Neue Juristische Wochenschrift* 1984, 1885 et seq. ('*freibleibend entsprechend unserer Verfügbarkeit*' in a charter contract for an airplane was qualified as an offer).

102. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 64 et seq. The Imperial Court has regarded such declarations as mere invitations to treat, see RGZ 105, 8, 12.

In the event the offeror dies after voicing his offer (or loses his capacity to contract), the offer does not become void *ipso iure* (§ 130 II BGB). Yet whether a contract can still be concluded through a declaration of acceptance conveyed to the heirs (or the legal representative) of the offeror is a different issue. § 153 BGB states that the contract can be concluded unless a ‘different intention’ of the offeror can be inferred. The latter can be assumed, e.g., if the offer related to a service that only the offeror could provide or the purchase of a good that only the deceased needed.¹⁰³ For instance, if a craftsman had offered to repair the roof of a house and his heirs do not want (or are not qualified) to carry on his business, no contract can be concluded. By contrast, if a shopkeeper has offered goods to a customer before dying, the latter can usually accept the offer with the shopkeeper’s heirs if there is no ascertainable intention to the contrary on the part of the offeror.

[C] Acceptance

[1] Express and Implied Acceptance

A contract is concluded if the addressee accepts the offer expressly or impliedly. The declaration of acceptance must match the offer and has to be declared before the offer expires. Any late acceptance or an acceptance modifying the offer is a counteroffer (§ 150 BGB) which must in turn be accepted by the original offeror to produce a contract.

Like an offer, a declaration of acceptance must in principle reach the addressee (§ 130 I 1 BGB) to form a contract, although there are exceptions. § 151, 1 BGB relieves the acceptor from transmitting the acceptance to the offeror if this is commonly not expected or the offeror has explicitly waived the requirement. This provision does not, however, relieve the addressee from accepting the offer at least impliedly.¹⁰⁴

[2] Contracting by Remaining Silent

If the addressee remains silent and also does not accept the offer impliedly (e.g., by carrying out the works the offeror asked him to do), no contract is concluded as mere silence does not carry any declaration of intent – neither of acceptance nor of refusal.¹⁰⁵ There are, however, some exceptions to this general rule.

The parties may agree that silence is to have a certain meaning.¹⁰⁶ If, e.g., the addressee conveys to the offeror that he wants to sleep on the offer for a night and that the contract should be deemed concluded in the event he does not contact him before noon the next day – and the offeror agrees with this understanding – then a contract is

103. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 109.

104. Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th ed. 2016), no. 749; Florian Faust, *Bürgerliches Gesetzbuch Allgemeiner Teil* (6th ed. 2018), § 3 no. 18.

105. Ernst A. Kramer, ‘Schweigen als Annahme eines Antrags’, *Jura* 1984, 235, 238; Jens Petersen, ‘Schweigen im Rechtsverkehr’, *Jura* 2003, 687.

106. Manfred Wolf & Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (11th ed. 2016), § 31 no. 14.

concluded after the deadline has passed if the addressee has remained silent. However, if the offeror asks a client whether he wants to buy an object and adds that he will deem silence as acceptance, a contract will not be concluded even if the addressee does not reject the offer as there was no agreement between the parties on the meaning of silence.

In exceptional cases, the default rules of the BGB attribute a specific meaning to the addressee's silence. Sometimes, silence is defined as rejection. If, e.g., the contractual partner of a child older than seven but younger than eighteen asks the child's parents to approve the contract, § 108 II 2 BGB stipulates that silence of the legal representatives for more than two weeks is tantamount to rejecting the request. A similar rule can be found in § 415 II 2 BGB on the assumption of a debt. But silence may also be deemed an acceptance. If a person hands over a good to another person and asks the recipient if he wants to accept it as a donation, silence is deemed as acceptance (§ 516 II 2 BGB) since it is presumed that an addressee who does not want to conclude a donation contract will expressly indicate so.

In the commercial world, a failure to object can more easily result in a contract. First, § 362 I HGB states that a merchant whose profession is to provide services (i.e., a carrier or a freight forwarder) must reply immediately to an offer reaching him for the provision of his usual services. Otherwise, his silence is considered an acceptance by law, thus creating a contractual relationship.¹⁰⁷ This rule is, however, limited to cases in which the addressee already has a business relationship with the offeror or cases where the addressee proposed carrying out business with the offeror.

Second, silence following the receipt of a commercial confirmation letter (*kaufmännisches Bestätigungsschreiben*) in the aftermath of contractual negotiations may serve to modify the contract already concluded. If parties to a B2B transaction have negotiated and agreed on a contract, one party often summarises the results of the oral negotiations and might even add some minor points or its standard terms to complete the agreement. If such a confirmation is sent to the other side in a timely manner following the negotiations, the addressee must immediately (i.e., without undue delay) object to it if he believes the letter does not state what was agreed upon.¹⁰⁸ If he remains silent, a contract is concluded on the terms of the confirmation letter.¹⁰⁹ This rule protects legal communication in B2B-settings given that in the commercial world contracts are often concluded after very brief negotiations. The sender and recipient must therefore be merchants or persons participating in business in a similar manner.¹¹⁰ Courts will also apply this rule in instances where negotiators agree in principle on the content of a contract without themselves concluding an

107. For more details see Claus-Wilhelm Canaris, *Handelsrecht* (24th ed. 2006), § 23 nos. 1 et seq.

108. Claus-Wilhelm Canaris, *Handelsrecht* (24th ed. 2006), § 23 nos. 1 et seq.; Tobias Lettl, 'Das kaufmännische Bestätigungsschreiben', *Juristische Schulung* 2008, 849, 850 et seq.

109. BGHZ 7, 187, 189; BGHZ 11, 1, 3; Ludwig Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen* (1935), 193.

110. BGHZ 40, 42, 44; Jan Busche, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (7th ed. 2015), § 147 BGB no. 16; Tobias Lettl, 'Das kaufmännische Bestätigungsschreiben', *Juristische Schulung* 2008, 849, 850 et seq.

agreement;¹¹¹ in such situations it may be the case that one party was represented by a negotiator that had no signature power, and the other side consequently sends a letter to the principal summarising the arrangement.¹¹² In this case, too, silence will amount to the conclusion of a contract even though strictly speaking the letter referring to the negotiations is merely an offer.¹¹³

It is important to note, however, that a confirmation letter may result in a contract or alter the content agreed upon only if the sender could reasonably assume that the recipient would silently approve the letter's content. This is clearly not the case if the sender intentionally misstates the results of the negotiations, e.g., by making up an order.¹¹⁴ As it is often difficult to establish whether the sender wilfully misstated the results of the negotiation or whether he simply misunderstood or merely completed what was negotiated, courts have developed a second limitation:¹¹⁵ no contract is concluded if the confirmation deviates significantly from what was originally agreed upon, because in that case the sender cannot reasonably expect that the silent recipient agrees with the significant alteration.¹¹⁶ This is often the case when the sender adds his standard terms.¹¹⁷ A third limitation concerns the scenario that both parties have sent confirmation letters to each other containing different terms. Although the views are divided on this matter, it is submitted that no objection is necessary in this constellation as it is obvious to each sender that the other side does not approve of the diverging terms.¹¹⁸ That does, however, not necessarily mean that no contract was produced. It only means that it was not concluded based on one of the confirmation letters.¹¹⁹

[D] Battle of Forms

In the commercial world, it is commonplace that both parties contract on the basis of their respective standard terms. In many transactions, these terms are, however, not expressly discussed in the course of the negotiations. That often leads to a scenario in which the buyer makes an offer using a form containing his terms and conditions and the seller accepts it through a letter or similar communication including his own standard terms. Standard terms usually differ, e.g., with regard to limitations of liability or prescription periods, because each side acts in a self-favouring manner. In practice, given that there is an agreement on the contract's essential points, none of the

111. BGHZ 7, 187, 189; BGH, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 2001, 680.

112. BGH, *Neue Juristische Wochenschrift* 1964, 1951, 1952; Jens Petersen, 'Schweigen im Rechtsverkehr', *Jura* 2003, 687, 691 et seq.

113. Karsten Schmidt, *Handelsrecht: Unternehmensrecht I* (6th ed. 2014), § 19 no. 94.

114. RGZ 95, 48, 51.

115. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 120.

116. BGHZ 40, 42, 44; BGHZ 61, 282, 286; BGHZ 93, 338, 343; BGH, *Neue Juristische Wochenschrift* 1994, 1288; BGH, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 2001, 680, 681.

117. BGHZ 61, 282, 286 et seq.; Karsten Schmidt, *Handelsrecht: Unternehmensrecht I* (6th ed. 2014), § 19 no. 111.

118. The BGH makes an exception when the discrepancy is not significant, see BGH, *Neue Juristische Wochenschrift* 1966, 1070, 1071.

119. Karsten Schmidt, *Handelsrecht: Unternehmensrecht I* (6th ed. 2014), § 19 no. 117.

contracting parties will pay much attention to the standard terms of the other side while executing the contract. It is, thus, accepted that a contract was concluded under these circumstances, but the question nevertheless arises: What are the terms of this agreement? The traditional view argues that the terms of the party ‘firing the last shot’ must apply (*Theorie des letzten Worts*). Following this reasoning, since a contract may only be formed if offer and acceptance match, an acceptance joined by the introduction of different standard terms constitutes a counteroffer (§ 150 II BGB) which needs to be accepted by the original offeror at least implicitly by shipping or accepting the shipped goods. Whereas German courts first followed this traditional approach,¹²⁰ they later slowly backed away from its application.¹²¹ In 1985 the BGH finally shifted to the knock-out rule in cases where the parties insisted on contracting solely on the basis of their own standard terms.¹²² Under this rule, which is since long supported by scholars,¹²³ opposing standard terms are considered not included in the contract given that there is no agreement of the parties on these stipulations – unlike on the contract as such. Gaps left by the rules ‘knocked-out’ under this reasoning must be filled by applying default rules. This approach relies on a holistic view of the contract and finds some support in the codified law on standard terms, namely in § 306 II BGB. Although the BGH never explicitly discarded the last-shot rule, it no longer plays a role in practice given that most parties’ standard terms will now include defence clauses (*Abwehrklauseln*) specifying the non-acceptance of a contractual partner’s general terms.¹²⁴

[E] Agency

The German law of agency (*Stellvertretung*) and authority (*Vollmacht*) is laid down in §§ 164–181 BGB. These provisions distinguish between two legal relationships, the first being a grant of authority enabling an agent to bind his principal in relation to a third party (external relation) and the second being a legal relationship between agent and principal, e.g., resulting from an employment or mandate contract, that itself forms the basis of authority (internal relation).¹²⁵ Both relationships are in principle independent, with the result that the end of the underlying (internal) legal relationship may not

120. BGHZ 18, 212, 216; BGH, *Neue Juristische Wochenschrift* 1963, 1248.

121. Before embracing the knockout-rule explicitly, the BGH argued that the standard terms of the counteroffer were not accepted implicitly by the other side through the execution of the contract and that the principle of good faith (§ 242 BGB) barred the parties from claiming that no contract had been concluded at all, see BGHZ 61, 282, 286–289. On this argument Oleg de Lousanoff, ‘Neues zur Wirksamkeit des Eigentumsvorbehaltes bei kollidierenden Allgemeinen Geschäftsbedingungen’, *Neue Juristische Wochenschrift* 1985, 2921, 2924.

122. BGH, *Neue Juristische Wochenschrift* 1985, 1838, 1839.

123. Peter Ulmer & Harry Schmidt, ‘Nachträglicher „einseitiger“ Eigentumsvorbehalt’, *Juristische Schulung* 1984, 18, 20 (with further references).

124. Giesela Rühl, ‘The Battle of the Forms: Comparative and Economic Observations’, *University of Pennsylvania Journal of International Law* 24 (2003), 189, 203 et seq.

125. This approach can be traced back to Paul Laband, ‘Die Stellvertretung bei dem Abschluß von Rechtsgeschäften nach dem allgem. Deutsch. Handelsgesetzbuch’, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 10 (1866), 183–241, see Wolfram Müller-Freienfels, *Stellvertretungsregelungen in Einheit und Vielfalt* (1982), 94 et seq.

trigger the end of the agent's (external) authority to bind the principal and vice versa.

To bind the principal, the agent himself must form and declare the intent to conclude the contract. If he simply delivers the declaration of his principal, e.g., a written offer, he is not an agent but a mere messenger (*Bote*).¹²⁶

Moreover, the agent must clearly state that he acts on behalf of the principal, unless it is apparent from the circumstances that he wants to contract for another person (*Offenkundigkeitsprinzip*, § 164 I 2 BGB).¹²⁷ This is, e.g., the case when the cashier in a supermarket accepts the offer of a customer. If it is not apparent that the agent intended to act for the principal and he has not explicitly stated so, he is himself bound by the contract (§ 164 II BGB). Thus, the BGB provides for direct representation (*unmittelbare Stellvertretung*) only and does not recognise indirect representation in the sense that the agent could bind a 'hidden principal'.¹²⁸

Finally, the agent must have acted within the scope of his powers (*Vertretungsmacht*) to bind the principal (§ 164 I 1 BGB). The power to bind another person contractually may flow from three sources: (i) It can be granted through statutory provisions (*gesetzliche Vertretungsmacht*). For example parents are the legal representatives of their minor children (§§ 1626 I, 1629 BGB) and can conclude contracts on their behalf. Likewise, corporations act through their legal representatives, such as the managing director (*Geschäftsführer*) of a limited company (*Gesellschaft mit beschränkter Haftung*, § 35 I 1 GmbHG), and in bankruptcy cases the trustee can conclude contracts for the estate. (ii) Power can also flow from a *Vollmacht*, i.e., an act by which the principal confers authority to his agent (§ 166 II BGB) (*rechtsgeschäftliche Vertretungsmacht*). This form of authority to the agent is granted by virtue of a declaration of the principal vis-à-vis the agent or to the contracting partner or by public announcement (§ 167 I BGB). The distinction between statutory and contractual authority is not as sharp as it may seem at first sight. This is best illustrated by the granting of a *Prokura* (a very powerful form of authority for commercial transactions): although this is a unilateral act of the owner of a commercial establishment, its limits are prescribed by statute to protect commercial transactions in general (§§ 48–50 HGB). (iii) Finally, the power to bind another person may flow from situations of good faith reliance (*Rechtsscheinsprinzip*). If, e.g., a person pretends to be an agent and through the

126. For details see Manfred Wolf & Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (11th ed. 2016), § 49 nos. 13 et seq. On the foundations of this approach Volker Beuthien, 'Zur Theorie der Stellvertretung im Bürgerlichen Recht', in: *Festschrift für Dieter Medicus* (1999), pp. 1 et seq.

127. On the function of this principle Dorothee Einsele, 'Inhalt, Schranken und Bedeutung des Offenkundigkeitsprinzips – unter besonderer Berücksichtigung des Geschäfts für den, den es angeht, der fiduziarischen Treuhand sowie der dinglichen Surrogation', *Juristenzeitung* 1990, 1005, 1006.

128. An exception applies to everyday cash transactions as in these cases the contracting party generally does not need nor want to know whether the agent himself or the principal is to be bound by the contract ('*Geschäft für den, den es angeht*'), see Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 111.

negligence of the principal it seems that he indeed acts under his authority, the agent can bind the principal (*Anscheinsvollmacht*).¹²⁹

If the agent had no power to conclude the contract on behalf of the principal or acted outside of his powers, he must pursuant to § 179 I BGB at the choice of the contracting partner either fulfil the contract or compensate him for any damage caused.

[F] No Consideration

German law does not require consideration for an offer to become binding. There is no real equivalent to the Anglo-American doctrine of consideration. That does not mean, however, that German law leaves the offeror unprotected. For instance, the drafters of the BGB have laid down certain formal requirements for important transactions that are intended to protect one or even both parties against overly hasty decisions. Moreover, it always ought to be carefully evaluated whether a declaration really amounts to a binding offer or simply to a promise on a goodwill basis (*Gefälligkeitsverhältnis*), the latter of which may not produce any legal obligations.

§6.04 VALIDITY AND AVOIDANCE OF THE CONTRACT

[A] Protection of Minors and Persons with Mental Disturbances

Contracts can only be concluded by persons with the legal capacity to do so. As a general rule, anyone can enter into a contract. Exceptions protect persons whose judgment might be impaired such that it would not appear reasonable to bind them to their declarations.

Minors under the age of seven thus cannot conclude contracts at all. As they cannot voice a valid declaration of intent (§§ 104 no. 1, 105 I BGB), they must be represented by their legal representative(s), usually their parents (§§ 1626 I, 1629 BGB). Children older than seven but younger than eighteen have a limited capacity to contract (§§ 2, 106 BGB). They cannot conclude contracts without the consent of their legal representative(s), unless a transaction does not cause any legal disadvantage to them (§ 107 BGB) or the contract was effected by the minor with means knowingly ceded to him by his representative(s) or (with approval of the representative(s)) by a third party with the purpose of concluding the type of transaction at stake (§ 110 BGB).

Persons older than eighteen years (§ 2 BGB) generally have unlimited legal capacity. However, they may lack capacity, when a permanent mental condition impairs them in the exercise of their free will (§§ 104 No. 2, 105 I BGB) (e.g., because of an advanced state of Alzheimer's disease) or they voice declarations of intent in a state of unconsciousness or temporary mental disturbance (e.g., in a state of drug inebriation) (§ 105 II BGB). Given that persons with lasting impairments would not be able to participate in social life at all under such a strict rule as they would need the

129. BGHZ 102, 60, 64; Florian Faust, *Bürgerliches Gesetzbuch Allgemeiner Teil* (6th ed. 2018), § 26 no. 38.

consent of their legal representative for every single legal transaction, the legislature has introduced an exception for low-value contracts pertaining to everyday transactions (§ 105a BGB). Such contracts (e.g., on the acquisition of tickets for local public transport or for a cinema visit) are valid as soon as performance has been effected.¹³⁰

[B] Formal Requirements

There is no general rule requiring that contracts assume a certain form. Thus, they can be validly concluded even without uttering a single word, i.e., by declaring offer and acceptance impliedly (*supra* §6.03[C][1]). It is a different matter when the parties have agreed that certain declarations must adhere to a particular form (written form, electronic form, text format and so on). A declaration not adhering to this form is void (§ 125, 2 BGB), unless the parties have agreed otherwise.

To protect the parties from hasty decisions and to secure evidence that a contract was concluded, the legislature has further provided statutory exceptions to the principle that contracts can be formed without abiding by a certain form. For example contracts on the purchase of real estate (§ 311b I 1 BGB) or the donor's promise to enter into a donation agreement that shall not be effected immediately (§ 518 I 1 BGB) must be recorded by a notary public. A surety contract must be in writing (§ 766, 1 BGB) unless it is a commercial transaction (*Handelsgeschäft*) for the surety (*Bürge*) (§ 350 HGB). Over the last decades, new formal requirements have been introduced. In this respect, the so-called text format (§ 126b BGB), requiring a declaration on a reproducible medium (fax, email, etc.), has become more important, e.g., in the field of consumer law. If statutory form requirements are not met, the declaration and thus the overall contract are void (§ 125, 1 BGB). Sometimes, however, the law provides remedies to mitigate this result. An oral or written contract involving real estate becomes valid when conveyance (*Auflassung*) has been declared and the buyer has been recorded in the land register (§ 311b I 2 BGB). The same holds true if a donation promise is not registered by a notary but later nevertheless effected (§ 518 II BGB) or if a surety has fulfilled a surety contract that was not concluded in writing (§ 766, 3 BGB).

[C] Illegality (§ 134 BGB) and Public Policy (§ 138 BGB)

Contracts that violate a statutory prohibition (e.g., a rule of criminal or regulatory law) are void, unless the violated provision does not imply this legal consequence (§ 134 BGB). This rule aims to ensure that essential standards of justice laid down in other fields of law cannot be circumvented by contractual stipulations. Where the statutory prohibition in question is directed against the content or the purpose of the contract

130. For details see Bernhard Ulrici, 'Alltagsgeschäfte volljähriger Geschäftsunfähiger', *Jura* 2003, 520, 521.

(sale of drugs, violation of competition rules etc.), the contract is null and void.¹³¹ But not all infringements of statutory rules lead to this result. If the parties, for instance, merely violate rules regulating the modalities of a contract, such as the opening hours for a shop, the contract is not void as these rules do not imply this harsh consequence.¹³²

Further, contracts that contravene *bonos mores* are void (§ 138 BGB). Whereas § 138 I BGB lays down the general clause stipulating this rule, § 138 II BGB names usury (*Wucher*) as one example of a contract violating public policy. Under German law, a finding of usury demands more than a grossly disproportionate price for a good or service and must thus be distinguished from the concept of *laesio enormis* as known as in other jurisdictions.¹³³ In essence, to qualify for usury one party needs to exploit a predicament, the inexperience, the lack of judgment or a considerable weakness of the other side, this being in addition to a disproportionate price.

[D] Defects of Intention (Mistake, Deceit, Duress)

A defect of intention (*Willensmangel*) occurs if the objective meaning of a declaration and the true intention of the declarant do not match. Subject to narrow exceptions (§§ 117 I, 118 BGB), such a declaration is not void *ipso iure*. To set it aside, the person that has made the declaration has to avoid it through rescission (*Anfechtung*). For this purpose, he must declare within certain time limits (§§ 121, 124 BGB) that he does not want to be bound by his declaration (§ 143 I BGB). In addition, there must be a ground for avoidance (*Anfechtungsgrund*). To protect the reasonable expectations of the addressee of the declaration, the drafters of the BGB have limited these grounds to certain forms of mistake, deceit and duress (§§ 119, 120, 123 BGB). A successfully rescinded declaration is deemed to be void *ex tunc* (§ 142 I BGB), so that no contract was formed from the outset. Consequently, contracts already performed need to be rewound according to the rules of unjust enrichment (§§ 812–822 BGB): delivered goods have to be returned and a remuneration paid has to be refunded.

The grounds for avoidance for mistake are laid down in §§ 119, 120 BGB. § 119 I BGB allows avoidance in cases of an *Erklärungsirrtum* ('error of expression') or an *Inhaltsirrtum* ('error of meaning'). The former concerns scenarios in which the declarant erroneously used an incorrect word or signal and did not realise his mistake (slip of tongue, crossing the wrong box on a form, typing errors, etc.). The latter covers

131. A detailed overview is given by Christian Armbrüster, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (7th ed. 2015), § 134 BGB nos. 50 et seq.; Rolf Sack & Maximilian Seibel, in: *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Gesetzliches Verbot, Verfügungsverbot, Sittenwidrigkeit* (revised ed. 2017), § 134 BGB nos. 195 et seq.

132. Burkhard Boemke & Bernhard Ulrici, *BGB Allgemeiner Teil* (2nd ed. 2014), § 11 no. 18; Florian Faust, *Bürgerliches Gesetzbuch Allgemeiner Teil* (6th ed. 2018), § 9 no. 2.

133. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 249. On the concept of *laesio enormis* see Christoph Becker, *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik* (1993); Thomas Finkenauer, 'Laesio Enormis', in: Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012), vol. II, pp. 1029 et seq.

scenarios in which a word or sign was correctly used as intended, but the declarant erred with regard to its true meaning. § 120 BGB extends the right to rescind to cases in which a declaration was wrongfully communicated by a third party acting as messenger. Finally, § 119 II BGB allows avoidance in exceptional cases in which erroneous assumptions have been made in respect of certain characteristics of the goods or persons that are regarded as important in the context of the contract. For instance, if the buyer of a piece of land erroneously thinks that construction is permitted on the land, he can in principle rescind the contract if it turns out that the property is located in an area reserved for agriculture. § 119 II BGB thus concerns errors relating to the decision-making process preceding the declaration. This rule is an exception to the general principle that simple motivational mistakes leading to the conclusion of a contract (*Motivirrtümer*), e.g., mere errors on the profitability of a deal, do not allow for avoidance. Avoidance based on §§ 119, 120 BGB must be declared immediately – i.e., without undue delay – after the error has been detected (§ 121 I 1 BGB). In any case, the right to rescind the contract expires ten years after the declaration was made (§ 121 II BGB). Where a contract has been successfully avoided, the contesting party must compensate the other side for the damage resulting from his reliance on the validity of the contract (§ 122 I BGB).

§ 123 I BGB allows a person to avoid a declaration of intention induced by deceit or unlawful duress. In the case of deceit, avoidance has to be declared within one year of its discovery by the person entitled to avoid; as to duress, avoidance must be effected within one year from the time the unlawful duress ends (§ 124 I, II BGB). If more than ten years have passed since the declaration was made, avoidance is excluded (§ 124 III BGB) in any event.

[E] Scrutiny of Standard Terms

[1] Historical Development and Design of the Law

Standard contract terms have found wide use since the industrial revolution even though their origins can be traced back much further in time. As a consequence, the courts have recurrently confronted such terms. Relying on the general rules on contract formation, courts assessed the circumstances under which standard terms were incorporated into the contract. Moreover, special rules of construction emerged, and over time German courts developed more sophisticated tools to police the content of standard terms.¹³⁴ The latter development was hailed by *Ludwig Raiser* as a ‘page of glory in German jurisprudence’ (*Ruhmesblatt der deutschen Rechtsprechung*).¹³⁵ Whereas the beginning of the 20th century saw the Imperial Court strike out an unjust clause on application of § 138 BGB – in a case where a monopolist exploited a predicament faced by his contractual partner – the Federal Supreme Court later widened court control by making the principle of good faith (§ 242 BGB) the yardstick

134. See the examples cited by Phillip Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (2010), 2 et seq.

135. Ludwig Raiser, ‘Vertragsfreiheit heute’, *Juristenzeitung* 1958, 1, 7.

for review. In 1976, the German legislature enacted the Standard Contract Terms Act (AGBG),¹³⁶ which adopted many of the prohibitions shaped to that point by case law. The transposition of the Unfair Contracts Terms Directive 93/13/EEC¹³⁷ brought only few changes. Since the *Schuldrechtsmodernisierung*, which again only slightly modified the law, the rules for policing standard terms have been embodied in §§ 305–310 BGB. § 310 BGB defines the scope of application of the different rules (not all rules apply to all types of contracts and contractual parties) and exempts certain fields of law from scrutiny.

The history of the law of standard terms explains why Germany – unlike other jurisdictions and unlike Directive 93/13/EEC – does not limit court control over standard terms to B2C contracts. The principle of good faith and other rules German courts had relied on to police standard terms were of a general nature, and many of the cases in which courts disallowed unfair terms concerned commercial transactions. Indeed, the very first case in which the Imperial Court rejected an unfair term concerned a contract between a ship owner and the operator of the Kiel Canal (*Nord-Ostsee-Kanal*).¹³⁸ When enacting the AGBG, the German legislature cast this case law into statutory form but made clear that B2B-contracts ought to be subject to more lenient oversight than clauses in B2C contracts. In recent times, numerous voices have criticised the courts' alleged tendency to scrutinise standard terms in B2B contracts too strictly.¹³⁹ They fear that Germany will fall back in the competition of jurisdictions¹⁴⁰ and that parties are being forced to evade German courts by relying on arbitration¹⁴¹ and (where possible) choice-of-law clauses pointing to a jurisdiction with a more lenient system, such as Switzerland.¹⁴²

[2] *Incorporation of Standard Terms and Their Interpretation*

§ 305 I BGB defines standard terms as contractual stipulations that (i) have been pre-formulated for use in a multitude of contracts, (ii) are introduced by one party

136. *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)* of 9 December 1976, BGBl. I 1976, 3317.

137. *Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts*, O.J. L 95, 29.

138. RGZ 62, 264, 266.

139. Klaus-Peter Berger, 'Für eine Reform des AGB-Rechts im Unternehmerverkehr', *Neue Juristische Wochenschrift* 2010, 465 et seq.; Lars Leuschner, 'Reformvorschläge für die AGB-Kontrolle im unternehmerischen Rechtsverkehr', *ZIP – Zeitschrift für Wirtschaftsrecht* 2015, 1045 et seq. For an overview see Hartmut Oetker, 'AGB-Kontrolle im Zivil- und Arbeitsrecht', *Archiv für die civilistische Praxis* 212 (2012), 202, 229 et seq.; Wolfgang Wurmnest, 'Kautelarpraxis und AGB-Recht', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 82 (2018), 346, 378 et seq.

140. Jörg Kondring, 'Flucht vor dem deutschen AGB-Recht in Inlandsverträgen', *Recht der Internationalen Wirtschaft* 2010, 184 et seq.; contra Friedrich Graf v. Westphalen, 'Wider einen Reformbedarf beim AGB-Recht im Unternehmerverkehr', *Neue Juristische Wochenschrift* 2009, 2977 et seq.; idem, 'AGB-Kontrolle – kein Standortnachteil', *Betriebs-Berater* 2013, 1357 et seq.

141. Thomas Pfeiffer, 'Die Abwahl des deutschen AGB-Rechts in Inlandsfällen bei Vereinbarung eines Schiedsverfahrens', *Neue Juristische Wochenschrift* 2012, 1169 et seq.

142. Thomas Pfeiffer, 'Flucht ins schweizerische Recht? – Zu den AGB-rechtlichen Folgen der Wahl schweizerischen Rechts', in: *Festschrift für Friedrich Graf v. Westphalen* (2010), pp. 555 et seq.

unilaterally and (iii) have not been negotiated individually between the parties. § 310 III BGB widens these requirements with regard to consumer contacts, as e.g., also clauses that are pre-formulated for single use only can be scrutinised (§ 310 III no. 2 BGB).

§ 305 II BGB sets forth a special incorporation regime for standard terms that takes precedence over the general rules on contract formation. This regime does not apply if standard terms are used against an entrepreneur or a public entity (§ 310 I 1 BGB). Pursuant to § 305 II no. 1 BGB, the user of standard terms must expressly draw the contractual partner's attention to the standard terms or, where this is too onerous, must put up a clearly visible notice at the place of contracting. § 305 II no. 2 BGB further specifies that the other side must have an opportunity to take notice of the standard terms. In the field of transport law and in the utility sector a relaxed incorporation test applies (§ 305a BGB), reflecting that these terms are often approved by an authority and announced to the public in advance. Even if the user of the standard terms has complied with these requirements (or with those laid down in §§ 145 ff. BGB outside the field of consumer contracts), clauses that are 'surprising' from the standpoint of a contracting partner's legitimate expectations are not incorporated into the contract (§ 305c I BGB). A term can be deemed surprising not only when it significantly alters the content of the contract (e.g., by setting forth a payment obligation in the event of a consensual termination of a rental contract)¹⁴³ but also when it is placed in an unusual position within the body of standard terms.¹⁴⁴

When interpreting standard terms, the *contra proferentem* rule applies: Any doubt as to the interpretation of standard terms must be decided against their author (§ 305c II BGB). This rule also applies if terms were used against an entrepreneur or a public entity, as can be inferred from § 310 I BGB.¹⁴⁵ Historically, in many jurisdictions this rule was one of the first to limit the substantive scope of unfair clauses as courts construed the clauses in favour of the contractual partner when possible.¹⁴⁶

[3] Fairness Test

Standard terms incorporated into a contract can be reviewed on the basis of §§ 307–309 BGB. In accordance with Directive 93/13/EEC, German law sets forth a general provision (§ 307 BGB) flanked by non-exhaustive lists of contractual clauses that are regularly (§ 309 BGB) or at least usually null and void (§ 308 BGB). These lists are intended to guide the courts and enhance legal certainty. Whereas the general clause applies to all contracts covered by the law of standard terms, most of the prohibitions in the non-exhaustive lists (except § 308 no. 1a, 1b BGB) are limited to B2C contracts (§ 310 I BGB) even so there is a certain spill over effect on B2B contracts. In practice,

143. OLG Karlsruhe, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 2000, 1538, 1539.

144. BGHZ 84, 109, 113.

145. BGH, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 2012, 1261.

146. Kevin Kosche, *Contra proferentem und das Transparenzgebot im Common Law und Civil Law* (2011), 68 et seq.

the fairness test under the general provision of § 307 BGB is of much greater importance than the non-exhaustive lists given that their prohibitions are well known and predominantly avoided by lawyers drafting standard contracts.

The fairness test is subject to a number of qualifications. First, only terms that deviate from (or supplement) statutory provisions are subject to full scrutiny (§ 307 III 1 BGB). If a term simply reproduces the law in plain and comprehensible language, it is not open to a fairness test since ‘ordinary’ courts should not have the power to indirectly review statutory provisions. Second, German law does not allow courts to review actual contractual stipulations which, by their very nature, cannot be regulated by default rules but must be determined by the parties in exercise of their party autonomy.¹⁴⁷ Therefore, the terms that describe the essential performance (*Leistungsbeschreibungen*) cannot be reviewed on the basis of §§ 307–309 BGB. The same applies to the price because courts cannot and must not evaluate ‘whether the deal is a good or a bad one’.¹⁴⁸ Clauses altering the price or performance are, however, not exempt from scrutiny.¹⁴⁹

§ 307 I 1 BGB stipulates that terms unreasonably disadvantaging the other party contrary to the requirement of good faith are void. Such an unreasonable disadvantage can be assumed if the term deviates from essential principles of the default rules in the BGB or other statutes (§ 307 II no. 1 BGB) or if it limits the essential rights or duties of the parties under the contract so as to jeopardise its purpose (§ 307 II no. 2 BGB). In addition, § 307 I 2 BGB specifies that courts can strike out clauses on the basis that they are non-transparent, i.e., not worded in plain and comprehensible language.

The ‘black list’ (§ 309 BGB) prohibits, for instance, price increases on short notice in contracts for the delivery of goods or for the provision of services where performance has to be rendered up to four months after the contract was concluded, though this is limited to contracts that cannot be classified as contracts of continuing obligation (*Dauerschuldverhältnisse*) (no. 1). Other prohibitions limit the possibility of the user including in his standard terms certain unfair penalties (no. 6) or liability limitation clauses (no. 7). The ‘grey list’ (§ 308 BGB) concerns, *inter alia*, terms granting their user an additional and unreasonably long timeframe to perform (no. 1), the right to terminate the contract without any reason (no. 3), or the right to modify performance in an unreasonable manner (no. 4).

Unfair standard terms are void and the gap has to be filled by applying default rules found in the law (§ 306 II BGB). The remainder of the contract continues to be valid unless it creates an unreasonable hardship for one party (§ 306 I, III BGB).

147. Thomas Pfeiffer, in: Manfred Wolf, Walter F. Lindacher & Thomas Pfeiffer (eds), *AGB-Recht – Kommentar* (6th ed. 2013), § 307 BGB no. 288.

148. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 175.

149. For details see Michael Coester, in: J. v. Staudingers *Kommentar zum Bürgerlichen Gesetzbuch, Recht der Allgemeinen Geschäftsbedingungen* (revised ed. 2013), § 307 BGB nos. 275 et seq.; Andreas Fuchs, in: Peter Ulmer, Hans Erich Brandner & Horst-Diether Hensen (eds), *AGB-Recht: Kommentar* (12th ed. 2016), § 307 BGB nos. 18 et seq.; Wolfgang Wurmnest, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (7th ed. 2016), § 307 BGB nos. 12 et seq.

§6.05 PERFORMANCE AND OTHER FORMS OF EXTINGUISHING AN OBLIGATION

[A] Performance

A contractual obligation expires if the performance is rendered by the debtor to the creditor as promised (§ 362 I BGB) or (with the creditor's approval) to a third party for the purpose of performing the contract (§ 362 II BGB) (*Erfüllung*). The parties may stipulate the modalities of performance in their agreement. In case they have not done so, the BGB provides default rules, e.g., regarding the place and time of performance (§§ 269, 271 BGB) or partial performance (§ 266 BGB).

In the event that a personal performance was agreed upon, the debtor is the only person that can perform the contract (§ 267 I 1 BGB). In other cases, a third party may step in to perform the obligation even without the debtor's consent (§ 267 I 2 BGB). However, where the debtor objects to performance by a third party, the creditor may choose to (but is not required to) reject the performance (§ 267 II BGB). The person to whom the obligation must be effected is the creditor if not agreed otherwise. An exception applies if the creditor is no longer entitled to receive the performance, e.g., because he is insolvent (§ 80 I InsO). Likewise, performance made towards persons lacking capacity or towards minors does not extinguish the obligation unless the legal representative has given his consent.¹⁵⁰

Even though the extinction of an obligation usually requires that the promised obligation has been effected, performance can also be assumed if the creditor accepts another type of performance in lieu of the agreed performance (*Leistung an Erfüllungs statt*, § 364 I BGB). This can, e.g., be assumed if the seller of a new car accepts the buyer's old car in lieu of a part of the agreed purchase price.¹⁵¹ It is a different situation when a new obligation towards the creditor is assumed, as it often occurs in the commercial world in order to facilitate or to secure payment. Handing over a cheque or a promissory note does not (unless otherwise agreed upon) lead to the extinction of the creditor's claim. Performance of this claim can be assumed only if the creditor receives the promised obligation by cashing the cheque or promissory note.¹⁵²

[B] Set-Off

[1] Concept and Effect

Two parties owing each other obligations of the same kind, such as money, can be discharged of their obligations by an off-setting of one party's claim to performance against that of the other party (§§ 387, 389 BGB). A set-off has to be declared by one

150. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 346.

151. BGHZ 46, 338, 342.

152. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 855; Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 368; Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 276.

party to the other party as it does not arise *ex lege* (§ 388, 1 BGB). The notice is not subject to special formal requirements and can also be declared outside judicial proceedings, as, under German law, set off is a matter of substantive law. It leads to an extinguishing of the mutual obligations to the extent that they correspond to each other (§ 389 BGB). This applies retroactively so that discharge operates as of the moment when the two obligations could have been set-off for the first time.¹⁵³ Consequently, a contractual penalty clause that seemed to have been triggered already might fall away upon set-off of the underlying claim.¹⁵⁴

The function of set-off is twofold: On the one hand, the party declaring set-off can discharge himself from an existing contractual obligation. On the other hand, the party declaring set-off can enforce the claim he has against the other party (cross-claim), e.g., in cases where the contractual partner does not currently have the means to pay the debt.¹⁵⁵

[2] Requirements for Set-Off

As far as not agreed otherwise by the parties, set-off requires that the claim and the cross-claim are mutual and of the same kind (§ 387 BGB), e.g., monetary claims. Mutual claims for money in different currencies are, however, not considered to be of the same kind, such that a claim in Euros may not be set-off against a claim in USD (unless agreed otherwise).¹⁵⁶ Due to the enforcement effect of set-off, the cross-claim that the person declaring set-off has against the other party must be enforceable (§ 387 BGB), i.e., the claim must exist and be due. Moreover, the other side must not have a defence against the cross-claim (§ 390), such as the defence of the other side's non-performance (§ 320 I BGB). An exception applies to claims that are time-barred. § 215 BGB provides that a set-off is not excluded when the cross-claim was not time-barred at the time when the set-off could first have been declared. Whether the person declaring set-off has a defence against the claim of the other party is of no relevance as a debtor is always free to perform even though he could refuse to do so.¹⁵⁷

In certain situations, set-off is excluded by law. In order to avoid self-administered justice, a set-off may not be effected for a tort that was deliberately committed (§ 393 BGB) (otherwise a creditor may be encouraged to beat up a recalcitrant debtor and then off-set the debtor's claim for damages with the claim he

153. For a critical view see Peter Bydliński, 'Die Aufrechnung mit verjährten Forderungen: Wirklich kein Änderungsbedarf?', *Archiv für die civilistische Praxis* 196 (1996), 276, 281 et seq.; Reinhard Zimmermann, 'Die Aufrechnung: Eine rechtsvergleichende Skizze zum Europäischen Vertragsrecht', in: *Festschrift für Dieter Medicus* (1999), pp. 707, 723 et seq.

154. Ingeborg Schwenzer, 'The Law of Contracts' in: Werner F. Ebke & Mathew W. Finkin (eds), *Introduction to German Law* (1996), pp. 173, 187.

155. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 373; Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 293.

156. Martin Schlüter, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (7th ed. 2016), § 387 BGB no. 32.

157. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 378.

has against the debtor).¹⁵⁸ Moreover, restrictions apply to claims that are seized (§ 392 BGB) or that are not subject to attachment (§ 394, 1 BGB), such as minimum wages.

In addition, the parties can agree by contract to exclude the right to set-off, although standard terms to this effect are subject to restrictions. § 309 no. 3 BGB prohibits clauses that deprive a consumer of the right to set off a claim that is uncontested or that has been ascertained by a court whose decision has become final. The BGH has held that this prohibition applies *cum grano salis* also to B2B contracts.¹⁵⁹

[C] Release

An obligation is extinguished in full or in part through a valid release (*Verzicht*). Whereas in some jurisdictions, a release is conceptualised as being of a unilateral nature (such that the creditor may extinguish the debtor's obligation without the consent of the latter), the drafters of the BGB codified a contractual concept (§ 397 BGB) as the release was seen as *actus contrarius* to the creation of the obligation.¹⁶⁰ A valid release thus requires offer and acceptance, as does an agreement by which creditor and debtor concur that there is no obligation (§ 397 II BGB). The contractual foundation of the concept of release has been severely criticised by scholars, who point out that a defence or a property right can be relinquished either contractually or unilaterally. Given that the relinquishment of a defence or a property right is a mechanism comparable to a release concerning an obligation, the inconsistency resulting therefrom should be brought to an end by granting a right to unilateral release.¹⁶¹

[D] Other Forms

An obligation can be extinguished if the debtor deposits the owed sum, valuables, securities or other documents for the benefit of the creditor with a public authority (§ 372 BGB), such as a court, provided that the debtor gives up his right to reclaim the deposited things (§ 378 BGB). Deposits of this nature are open to the debtor if the creditor cannot be identified with certainty or if the creditor is in default of acceptance (§ 372 BGB). In the latter case, the debtor may also auction or sell the objects not capable of being deposited pursuant to the rules set forth in §§ 383–386 BGB (*Selbsthilfeverkauf*).

158. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 875.

159. BGHZ 92, 312, 316.

160. On the historical origins see Jens Kleinschmidt, 'Release', in: Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012), vol. II, pp. 1446, 1447.

161. Jens Kleinschmidt, *Der Verzicht im Schuldrecht: Vertragsprinzip und einseitiges Rechtsgeschäft im deutschen und US-amerikanischen Recht* (2004), 262 et seq.; Reinhard Zimmermann, 'Vertrag und Versprechen: Deutsches Recht und Principles of European Contract Law im Vergleich', in: *Festschrift für Andreas Heldrich* (2005), pp. 467, 483 et seq.

§6.06 THE GENERAL SYSTEM OF CONTRACTUAL REMEDIES

[A] Introduction

As a general term for all sorts of scenarios concerning the non-performance of a contractual obligation, German lawyers coined the expression *Leistungsstörungen* (irregularities in the performance of a contract). Since the *Schuldrechtsmodernisierung* there are three general remedies: Performance *in specie* of the primary duty (*supra* §6.02[B]), damages (§§ 280–283 BGB and other rules) and termination of the contract (§§ 314, 323–325, 326 V, 346–348).¹⁶² Recovering expenses occurred in reliance on the debtor's promise to perform (§ 284 BGB) may be grouped into the category of 'damages'. Regarding the remedy of termination, it is important to understand that German law distinguishes between *Kündigung* for what are termed contracts of continuing obligations (*Dauerschuldverhältnisse*), e.g., contracts for rent or work and *Rücktritt* for all other contracts, e.g., sales contracts. In addition, consumers may revoke certain contracts (§§ 355–361 BGB and other rules). In exceptional cases, a party may demand adaption or termination of a contract based on the doctrine of the 'foundation of the transaction', i.e., a variant of frustration (§ 313 BGB). These general rules are complemented (and sometimes supplanted) by the rules laid down in the specific part of the law of obligations dealing with specific contractual regimes (*see infra* §6.07), such that both sets of rules still have to be read together when assessing claims for breach of contract.

From an Anglo-American perspective, the German breach of contract rules contain some particularities. The first stems from the fact that under German law – unlike under common law – performance *in specie* (of non-monetary obligations) can be enforced if the creditor so demands. This difference also affects remedies for breach of contract. *Markesinis, Unberath & Johnson* remark in this respect that under German law the parties 'should at least make one attempt to keep the contract alive [before they are entitled to seek satisfaction elsewhere]. Hence, granting the debtor a period of grace (*Nachfrist*) becomes a *Leitmotiv* of the German approach to "breach". This also ties in well with the German (indeed continental European) predilection to protect the debtor'.¹⁶³ The second major difference is that, under German law, a debtor is only liable for damages if he is responsible for the breach of contract, which is to say that he has acted with fault, as far as it is not provided otherwise (§ 276 I 1 BGB). This general principle differs from the Anglo-American system that regards contractual promises as guarantees such that any failure to perform triggers damages claims to the extent that the breach cannot be excused.¹⁶⁴

162. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 386.

163. *Ibid.*, 381.

164. *Ibid.*, 380 et seq.; Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), 501 et seq.

[B] The Right to Specific Performance and Exclusions of This Right**[1] Specific Performance**

The right to specific performance may concern the contract's main obligation, such as the delivery of the purchased good or the payment of the remuneration for a service rendered. It may also relate to auxiliary obligations, i.e., obligations that complement or secure the performance of the main obligation, such as packaging the sold good.¹⁶⁵ A special form of performance *in specie* is the right to claim *Nacherfüllung*, i.e., the cure of defective performance rendered earlier. If the contractual partner has tried and failed to perform his obligation because this first attempt did not comport with the standards agreed to, the creditor may demand that the debtor cure the defect. This right exists in sale contracts (§§ 437 No. 1, 439 BGB) and in contracts for work (§§ 634 no. 1, 635 BGB). It protects the debtors by granting them a second chance to perform the contract and thus a chance to secure full payment.¹⁶⁶

[2] Impossibility of Performance**[a] General Rule**

The creditor's claim for performance *in specie* is excluded if performance is impossible for the debtor or any other person (§ 275 I BGB). This rule applies to all types of impossibility regardless of timing and modality.¹⁶⁷ It does not matter whether performance was impossible at the time the contract was concluded ('initial impossibility') or whether impossibility arose after that time ('subsequent impossibility'). It is also irrelevant whether the impossibility to perform is confined to the person of the debtor ('subjective impossibility') or whether performance is impossible for all individuals ('objective impossibility').¹⁶⁸ In all of these cases, the debtor is released from his obligation to perform the contract, irrespective of whether or not he is answerable for the circumstances leading to impossibility.

§ 275 I BGB also applies to claims for cure of defective performance (*Nacherfüllung*). For example, if it turns out that a sold second-hand car had been involved in an accident, it is impossible for the seller to cure this defect, provided that the car was sold as accident-free. It is a different situation if interpretation of the contract reveals that the seller is allowed to deliver another car similar to the car initially sold. In such a scenario, the seller would be able to perform his obligation. This example plainly shows that impossibility always has to be measured against the precise content of the contract.

165. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 12.

166. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 762.

167. Claus-Wilhelm Canaris, 'Die Reform des Rechts der Leistungsstörungen', *Juristenzeitung* 2001, 499.

168. Reinhard Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law', *Edinburgh Law Review* 6 (2002), 271, 280 et seq.

[b] *Practical Impossibility*

Sometimes, performing the obligation may not be impossible but come at the price of unreasonable efforts or expenses. § 275 II BGB allows the debtor to refuse performance whenever performing would require an effort grossly disproportionate to the creditor's interest in obtaining the performance. Scholars speak of 'practical impossibility' (*praktische Unmöglichkeit*) when referring to such a situation. In assessing proportionality, the principle of good faith and the content of the obligation must be taken into account. It also matters whether the debtor is responsible for the impediment or not. The classic textbook example of 'practical impossibility' hypothesises a previously sold ring of little value that – prior to be received by the buyer – has fallen into a deep lake at no fault of the seller.¹⁶⁹ As the seller could drain the lake and recover the ring, § 275 I BGB does not apply. Under the assumption that the ring is of little value to the creditor (buyer) in comparison to the costly efforts the debtor (seller) would incur in order to deliver the ring, the law allows the seller to refuse performance in this case. Given that § 275 II BGB is a defence of the seller, it is up to him to invoke the unreasonableness of performance or to overcome the impediment and perform the contract.

To understand the scope of § 275 II BGB, it is important to note that this rule does not protect the debtor from economic risks associated with commercial transactions inherent to the contract concluded. A builder having promised to construct a house for a fixed price, for instance, cannot rely on § 275 II BGB if it turns out that building the house is much more onerous and costly because the ground is swampy.¹⁷⁰ Also, cases of 'economic impossibility' (*wirtschaftliche Unmöglichkeit*) in which a change of circumstances causes a strong imbalance between performance and counter-performance causing economic hardship to the debtor, do not qualify as cases of 'practical impossibility'. In those cases, the interest of the creditor to obtain performance is usually very strong and outweighs the costs to be incurred by the debtor when performing the contract. Cases of such economic hardship due to a change of circumstances following the conclusion of a contract might in exceptional cases be remedied under the doctrine of the 'foundation of the transaction', i.e., the German equivalent of frustration (*infra* §6.06[E]).¹⁷¹

[c] *Moral Impossibility*

Finally, § 275 III BGB gives the debtor a defence when he has to render a service in person and it would be unreasonable to expect him to perform. The textbook case of

169. This example was already cited close to a century ago by Philipp Heck, *Grundriß des Schuldrechts* (1929), 89.

170. A similar example is given by Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 811.

171. Claus-Wilhelm Canaris, 'Die Reform des Rechts der Leistungsstörungen', *Juristenzeitung* 2001, 499, 501; Reinhard Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law', *Edinburgh Law Review* 6 (2002), 271, 282.

such a ‘moral’ or ‘personal impossibility’ (*persönliche Unmöglichkeit*) is a singer who refuses to perform a concert after having learned that a close family member has died or become severely ill.¹⁷²

[d] *Rights of the Creditor*

In the event the debtor is released from performing the obligation, § 275 IV BGB specifies the rights of the creditor. He can claim damages if the debtor is answerable for the subsequent impediment leading to the impossibility (§§ 280 I, III, 283 BGB) or (in a case of initial impossibility) if he knew or ought to have known that it would be impossible to fulfil the obligation he has entered into (§ 311a II BGB). Alternatively, he can claim reimbursement of frustrated expenses that were made (in vain) in reliance on the debtor’s promise to perform (§ 284 BGB) (*infra* §6.06[F][6]).

In addition, under § 285 I BGB, the creditor may claim the substitute (*commodum*) the debtor received in lieu of what he was supposed to deliver to the creditor. If, e.g., the object to be delivered under the contract was destroyed, the debtor might have acquired a claim against an insurer. The debtor has to cede this claim to the creditor.

With regard to reciprocal contracts, § 326 I 1 BGB stipulates that a debtor who is released from fulfilling his contractual duties in accordance with § 275 I-III BGB cannot claim counter-performance (i.e., payment) from the creditor. Hence, the creditor is also relieved of his payment obligations and need not pay. If the creditor has already paid the debtor, he may reclaim the money pursuant to §§ 326 IV, 346 et seq. BGB. Matters are different if the creditor of the performance is solely or predominately responsible for the impossibility (§ 326 II 1 BGB). In this case, he is deemed unworthy of protection and must pay the price without receiving performance. If, e.g., a tenant has negligently burned down the house, § 275 I BGB releases the landlord from the obligation to grant the tenant use of the house. He is, however, still entitled to claim the rent pursuant to § 326 II 1 BGB because the tenant is responsible for causing impossibility.¹⁷³ Similarly, the creditor is not released from paying the price if he was in delay of accepting the performance when the harm occurred (§ 326 II 1 BGB). Breach of his own obligations thus justifies that the creditor bears the risk of having to pay the price without receiving the promised good or service.¹⁷⁴ Further, the creditor has to pay the price if he claims the substitute item under § 285 BGB (§ 326 III 1 BGB). There are further exceptions, e.g., in sales law, when the risk has passed onto the buyer.

172. Dirk Looschelders, *Schuldrecht: Allgemeiner Teil* (15th ed. 2017), no. 441; Reinhard Zimmermann, ‘Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law’, *Edinburgh Law Review* 6 (2002), 271, 285.

173. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 828.

174. Hartmut Oetker & Felix Maultzsch, *Vertragliche Schuldverhältnisse* (4th ed. 2013), § 2 no. 376.

[C] Termination

[1] Overview

A contract can be terminated (the German lawyer speaks of *Rücktritt*) if a right to termination has been contractually agreed upon or if the statutory rules laid down in §§ 323–326 BGB apply. Termination allows one contractual partner to be discharged from his own obligations towards the other side, with the consequence that both parties are released from their duties to perform and have to return whatever they have received in performance of the contract so far (§§ 346–348 BGB). That is why the statutory rules on termination concern merely mutual contracts, i.e., contracts in which one party promises performance in exchange for receiving a performance from the other party in return. For gratuitous (non-reciprocal) contracts, the BGB provides special rules that may release a person from his duty to perform. A donor, e.g., is entitled to revoke the donation under specific circumstances (*infra* §6.07[C]).

The law of termination has to strike a balance between the interests of the debtor and those of the creditor. The debtor, on the one hand, will generally want to fulfil the contract and earn the remuneration (if the deal is beneficial to him), whereas the creditor, on the other hand, may want to pull out immediately in order to obtain the promised good or service elsewhere.¹⁷⁵ The CISG limits the right to terminate a contract to cases of fundamental breach (Article 49 I a, 64 I a, 25 CISG), whilst English law limits termination to breaches of obligations forming the basis of the contract.¹⁷⁶ Unless the parties have agreed otherwise, German law allows termination for all forms of breaches provided that the other side has been granted a second chance to perform (§ 323 I BGB). Nevertheless, there are exceptions to the ‘second chance rule’ whenever the interest of the creditor in immediate termination outweighs the interest of the debtor in fulfilling the contract (§§ 323 II, 324 BGB). Exceptions apply to trivial breaches of contract (§ 323 V 2 BGB) and where the creditor’s interest in terminating the contract is unworthy of protection (§ 323 VI BGB). The right to terminate a contract does not depend on any fault of the debtor nor does it preclude the creditor from claiming damages (§ 325 BGB). A special termination regime exists for continuing obligations, which can only be terminated by a *Kündigung* (not: *Rücktritt*).

[2] The Requirements for Termination

The general requirements for terminating a mutual contract are laid down in §§ 323, 324 BGB. These rules were modelled on the rules for damages (§§ 281, 282 BGB) to

175. For a comparative analysis see Axel Flessner, ‘Befreiung vom Vertrag wegen Nichterfüllung’, *Zeitschrift für Europäisches Privatrecht* 1997, 255 et seq.; Hein Kötz, *Europäisches Vertragsrecht* (2nd ed. 2015), 320 et seq.

176. Jan M. Smits, *Contract Law: A Comparative Introduction* (2nd ed. 2017), 231.

avoid circumvention of the prerequisites for termination by claiming damages in lieu of performance.¹⁷⁷

[a] *Late Performance and Improper Performance*

§ 323 I BGB treats two different forms of breaches. The first is what is termed late performance (the sold good was not delivered or the promised work was not finished on time). The second form is a performance of the debtor that does not comply with the contractual obligation (the delivered good or the promised work is non-conforming). The latter category is often referred to as an improper performance (*Schlechtleistung*).

If the debtor did not perform at all or improperly, the creditor may terminate the contract if performance was due (§ 323 I BGB) and the debtor could not raise any defences against it (e.g., flowing from § 275 BGB or § 320 I 1 BGB). Exceptionally, the creditor may terminate the contract before performance is due should it be obvious that the requirements for termination will be met (§ 323 IV BGB). Termination further requires the – ‘unsuccessful’ – expiration of a reasonable period of time to perform the contractual obligation or cure the improper performance which the creditor must have set the debtor (§ 323 I BGB). What length of time is to be considered reasonable depends on the circumstances of each case. If the deadline set is too short, the creditor may nonetheless terminate the contract after a reasonable period has lapsed.¹⁷⁸ Fixing such a period does not require that the creditor informs the debtor of his intention to terminate the contract should performance not be forthcoming, as long as it is clear from the wording that such a consequence is not excluded. In addition, setting a precise date for effecting performance is not necessary. Demanding performance ‘within a reasonable time’ or ‘promptly’ is enough to set the grace period.¹⁷⁹ A warning (*Abmahnung*) must be given in lieu of setting a grace period for effecting performance when the latter is not feasible (§ 323 III BGB).

Setting a grace period is dispensable when the debtor has unequivocally and definitively refused to perform (§ 323 II no. 1 BGB). In this case, it would be a pure formality to grant the debtor a second chance.¹⁸⁰ Moreover, the creditor may terminate a contract without prior warning where a specified date or a certain time frame was fixed in the contract and the debtor was aware that timely performance was essential to the creditor (§ 323 II no. 2 BGB). Finally § 323 II no. 3 BGB provides a clause covering situations in which special circumstances justify terminating the contract without providing for an additional period to cure performance. Further exemptions apply to specific contracts (§§ 440, 636 BGB).

177. Reinhard Zimmermann, ‘Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law’, *Edinburgh Law Review* 6 (2002), 271, 304 et seq.

178. BGH, *Neue Juristische Wochenschrift* 1982, 1279, 1280; BGH, *Neue Juristische Wochenschrift* 1985, 2640.

179. BGH, *Neue Juristische Wochenschrift* 2015, 2564, 2565; BGH, *Neue Juristische Wochenschrift* 2016, 3654 et seq.

180. BGH, *Neue Juristische Wochenschrift* 2012, 3714, 3716.

In cases of improper performance, § 323 V 2 BGB excludes termination for trivial breaches, e.g., the delivery of a good with a very minor defect. Termination is also excluded if the creditor was responsible for the circumstance that would otherwise entitle him to terminate the contract or if such a circumstance for which the debtor is not responsible occurs at a time when the creditor is in default of acceptance (§ 323 VI BGB).

[b] *Infringement of Protective Duties*

§ 324 BGB covers infringements of ancillary duties as defined by § 241 II BGB. Such duties relate to a creditor's general rights and interests and do not affect the performance as such.¹⁸¹ A debtor breaching such duties enables the creditor to terminate the contract (without setting a reasonable period to perform) if the breach was so severe that one could not reasonably expect the creditor to accept performance. A seller's driver insulting the buyer severely or handing out drugs to the buyer's children are examples of cases in which the creditor may terminate the contract based on § 324 BGB.¹⁸²

[3] *Mechanism and Legal Consequences of Termination*

To terminate a contract, one party must expressly or impliedly communicate to the other side that the contract is to be terminated and that restitution is to be made for performances to the extent they have been effected (e.g., 'I terminate the agreement' or 'I want my money back')¹⁸³ (§ 349 BGB). Consequently, both parties are relieved from their initial duties. However, unlike other legal systems, German law does not eradicate the entire contract in cases of termination.¹⁸⁴ Instead, a *Rücktritt* transforms the contract into a winding-up relationship (*Rückgewährschuldverhältnis*)¹⁸⁵ governed by §§ 346–348 BGB.

§ 346 I BGB provides that the parties have to return what they have received from the other side, including benefits from use and enjoyment (§§ 99, 100 BGB). Thus, the buyer of a defective car has to return it to the seller and restore title to him (as far as the parties did not agree on a retention of title, meaning that the property did not pass to the buyer before termination was declared); in return, the seller has to refund the purchase price, from which he may deduct a certain sum depending on the kilometres

181. Reinhard Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law', *Edinburgh Law Review* 6 (2002), 271, 305.

182. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 972.

183. Wolfgang Fikentscher & Andreas Heinemann, *Schuldrecht Allgemeiner und Besonderer Teil* (11th ed. 2017), no. 535.

184. For a comparative assessment see Michael Sonnentag, *Das Rückgewährschuldverhältnis* (2016), 65 et seq.

185. BGH, *Neue Juristische Wochenschrift* 2008, 911; BGH, *Neue Juristische Wochenschrift* 2010, 2426, 2427; Reinhard Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law', *Edinburgh Law Review* 6 (2002), 271, 306.

driven by the buyer.¹⁸⁶ Restitution has to be effected concurrently ('*Zug um Zug*', § 348 BGB).

Where restitution in kind is impossible, § 346 II BGB allows the debtor to claim compensation equal to the value of performance instead of the performance itself (*Wertersatz*). This is the case, for instance, whenever a service was rendered, the sold good was consumed or processed, or the good has deteriorated or was destroyed. However, § 346 III BGB excludes compensation for the value where the defect permitting termination was discovered only in the course of processing the good (§ 346 III no. 1) or where the creditor was responsible for the destruction or loss of the good (§ 346 III no. 2). The same applies if the good was destroyed or has deteriorated in the sphere of the person terminating the contract, provided that this person exercised the level of care that he usually employs in his own affairs (*diligentia quam in suis*) (§ 346 III no. 3 BGB). Effectively, this means that a purchaser of a used car that was destroyed in a serious accident may reclaim the full purchase price after terminating the contract if he discovers that the car had been involved in previous accidents despite having been sold as 'accident-free'. If the buyer did not cause the accident intentionally or by grossly negligent conduct, he only has to return the car 'as it is' and does not have to compensate the seller for the value of his performance (*mortuus redhibetur*¹⁸⁷). This rule, which reallocates the risk of accidental deterioration back to the seller, is based on the idea that the party in breach of contract has to bear the risk of accidental loss or deterioration in cases where neither party is responsible for the loss or deterioration.¹⁸⁸

[4] Special Rules for Continuing Obligations (*Dauerschuldverhältnisse*)

A special form of termination applies to continuing obligations (*Dauerschuldverhältnisse*), i.e., contracts requiring more than one act of performance over a certain period of time. Such a continuing performance is typical for partnership, rental, employment or service contracts. These contracts can be terminated *pro futuro* only, which makes it unnecessary to codify a special restitution regime (i.e., as laid down in §§ 346–348 BGB). The German lawyer uses a different legal term for this form of termination (*Kündigung* instead of *Rücktritt*). Put simply, there are two types of *Kündigungen*: For some contracts, such as rental contracts for housing premises, the law provides for the possibility of terminating the contract by giving notice within a certain period of time, and the tenant (unlike the landlord) does not even need to state any grounds for termination (*ordentliche Kündigung*). In addition, the law grants the parties an extraordinary right to terminate the contract if certain events occur that justify a unilateral withdrawal from the contract (*außerordentliche Kündigung*). In some cases

186. On the calculation of use benefits (*Gebrauchsvorteile*) for cars see Reinhard Gaier, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (7th ed. 2016), § 346 BGB no. 27.

187. On this aspect see Gerhard Wagner, 'Mortuus Redhibetur im neuen Schuldrecht?', in: *Festschrift für Ulrich Huber* (2006), pp. 591, 592 et seq.

188. Reinhard Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law', *Edinburgh Law Review* 6 (2002), 271, 308.

this type of *Kündigung* becomes effective after a certain time has lapsed (*außerordentliche fristgebundene Kündigung*), whereas in other cases it can be excised with immediate effect (*fristlose außerordentliche Kündigung*). An example for a termination with immediate effect is the right to terminate a continuing obligation for a compelling reason (*Kündigung aus wichtigem Grund*), e.g. because the other side manifestly breached the contract even after a warning had been given (§ 314 BGB). For details on the termination of rental contracts for housing premises *see infra* §6.07[D][3].

[D] Revocation

German consumer law allows consumers (§ 13 BGB) to revoke certain contracts concluded with an entrepreneur (§ 14 BGB).¹⁸⁹ This right is essentially based on rules of European origin (*see* §6.01[B][2]). Revocation must be communicated to the entrepreneur (§ 355 I 2 BGB) within certain deadlines. The right is not bound to any reasons (unlike termination or rescission). Thus, even where an entrepreneur has rendered performance in full conformity with the terms agreed upon, the contract may be revoked by the consumer solely based on a determination that he does not want to keep the goods or use the service. Under German law, revoking a contract is generally permissible in situations in which the legislature considered the consumer typically unable of assessing the full risks of the contract when concluding it.¹⁹⁰ Such a right exists for off-premise contracts (§ 312b BGB), distance contracts (§ 312c BGB), time-share contracts (§ 481 BGB), contracts on long-term holiday products (§ 481a BGB), consumer loan contracts (§ 491 BGB), financial assistance contracts (§ 506 BGB), instalment supply contracts (§ 510 BGB) and also for distance teaching contracts (§ 4 Distance Teaching Act). The general rules concerning revocation and the legal consequences (restitution of what was received, costs of sending back goods etc.) are set out in §§ 355–361 BGB. It is important to note that revoking a consumer contract extends to certain contracts closely tied to it, such as consumer loan contracts brokered by the contractual partner (§ 358 BGB).

[E] Contract Adaptation Based on the Doctrine of the ‘Foundation of the Transaction’

The German version of the doctrine of frustration, which has a much broader scope and different legal consequences than its common law counterpart, was essentially developed by the courts in the aftermath of World War I in order to cope with the fundamental economic changes being witnessed at that time, particularly rampant inflation. Although first seen as a variant of impossibility,¹⁹¹ courts later embraced the

189. On the historical development of consumer contract law *see* Reinhard Zimmermann, ‘Consumer Contract Law and General Contract Law: The German Experience’, *Current Legal Problems* 58 (2005), 415, 417 et seq.

190. On the *raison d’être* of the right to revoke a contract Horst Eidenmüller, ‘Die Rechtfertigung von Widerrufsrechten’, *Archiv für die civilistische Praxis* 201 (2010), 67 et seq.

191. RGZ 88, 71, 75 et seq.; RGZ 94, 46, 47.

doctrine of ‘disturbances relating to the foundations of the transaction’ (*Störung der Geschäftsgrundlage*)¹⁹² shaped by Paul Oertmann,¹⁹³ based on the principle of good faith (§ 242 BGB). The *Schuldrechtsmodernisierung* has cast these principles in statutory form (§ 313 BGB) without intending major changes, meaning that the bulk of the old case law still stands.

The requirements and legal consequences of this doctrine can be summarised as follows: If the circumstances forming the foundation of the transaction change significantly after the contract was entered into and the parties – assuming they had foreseen these changes – would not have concluded the contract at all or only under different terms, the aggrieved party may demand adaptation of the contract, provided that it cannot reasonably be expected that it continue to be bound by the unmodified agreement (§ 313 I BGB). Such a judge-made adaptation of the contract is also permissible if assumptions shared by both parties forming the basis of the transaction turn out to be false (§ 313 II BGB). Should adaptation of the contract be impossible or unreasonable, the disadvantaged party may terminate the agreement (§ 313 III BGB). When assessing whether adapting the obligation (or even terminating the contract) is justified, the allocation of contractual risks must be taken into account. Changes relating to a risk assumed by one party in the contract do not entitle this party to rely on the doctrine of the foundation of the transaction.¹⁹⁴

The German variant of the doctrine of frustration essentially covers two narrow groups of cases: The first one concerns a serious alteration of the balance between performance and counter-performance, such as caused by a drastic rise in prices due to economic shocks or hyperinflation, given that one cannot expect the disadvantaged party to perform or accept performance at such economically unreasonable terms.¹⁹⁵ The second one concerns situations in which the common purpose of the contract is frustrated. The classic example is modelled on *Krell v. Henry*:¹⁹⁶ If a party leases a balcony or room at a very high price for a very short period (a day, an afternoon or the like) to see a coronation-event that ultimately does not take place because the (future) king is taken ill that day, a German lawyer would seek to remedy the situation by applying § 313 BGB.¹⁹⁷ However, this scenario is exceptional. Usually, the risk of reselling a good or making use of a rented item of property is allocated to the buyer or lessee through the agreement entered into by the parties.¹⁹⁸

192. The landmark ruling was RGZ 103, 328, 332 et seq.

193. Paul Oertmann, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (1921). As to this doctrine, its precursors, and its development, see Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 320 et seq.; Rudolf Meyer-Pritzel, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. II/2 (2007), §§ 313–314 BGB nos. 4 et seq.

194. BGH, *Neue Juristische Wochenschrift* 1978, 2390, 2391; BGH, *Neue Juristische Wochenschrift* 2000, 1714, 1716.

195. BGH, *Wertpapiermitteilungen* 1978, 322, 323.

196. [1903] 2 KB 740.

197. Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 565.

198. BGH, *Neue Juristische Wochenschrift* 1984, 1746, 1747 (regarding the risk that the buyer will be able to resell the purchased object); BGH, *Neue Juristische Wochenschrift* 2000, 1714, 1716 (regarding the risk that the lessee will be able to make profitable use of the rented shop space).

[F] Damages**[1] Overview**

The *Grundnorm* (basic standard) for damages for breach of contract is laid down in § 280 I BGB. It enshrines the core requirements applicable to all claims for damages for any breach of contract, including the ‘fault principle’ (some modifications apply to claims under § 311a II BGB). This general rule is complemented by §§ 281–283, 286 BGB, (mostly) setting forth additional requirements for particular types of breaches, particularly to preserve the debtor’s right to cure. In cases of late or improper performance, §§ 280 I, III, 281 BGB make claims for damages in lieu of performance contingent upon fixing a period for performance for the debtor (so he gets a second chance to perform) unless the interest of the creditor in claiming damages without prior warning prevails (similar to § 323 BGB). Admittedly, making the right to claim damages contingent on a prior warning does not make sense in all cases. It would be a purely formalistic exercise to demand that the creditor set a period for performance where performance is impossible. For this reason, damages may be claimed immediately in such a situation (§§ 280 I, III, 283 BGB, § 311a II BGB). Claiming damages for delay in performance requires that the debtor be in default (§§ 280 II, 286 BGB). A further qualification added to § 280 I BGB is supplied by § 284 BGB, which allows the creditor to claim (instead of damages) reimbursement of expenses made in reliance on the debtor’s promise to perform the contract.

From the foregoing, it becomes clear that three main types of damages claims have to be distinguished:¹⁹⁹

- First, damages in lieu of performance (*Schadensersatz statt der Leistung*), i.e., claims that either replace or supplement the performance of the debtor. This category covers damages in cases of late or improper performance (§§ 280, 281), damages for breach of a protective duty (§§ 280, 282), and damages occurring from an initial (§ 311a II BGB) or subsequent (§§ 280, 283 BGB) impossibility.
- Secondly, damages for delayed performance (*Schadensersatz wegen Verzögerung der Leistung*) (§§ 280, 286 BGB).
- Thirdly, (simple) damages alongside performance (*Schadensersatz wegen Pflichtverletzung neben der Leistung*) (§ 280 BGB).

The aforementioned rules only stipulate the prerequisites for claims for damages. The law of damages (*quantum*) itself, which is explained in more detail in the chapter on tort law, is contained in §§ 249–254 BGB.

199. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 441; Reinhard Zimmermann, ‘Remedies for Non-Performance: The Revised German Law of Obligations, Viewed Against the Background of the Principles of European Contract Law’, *Edinburgh Law Review* 6 (2002), 271, 288.

[2] *The General Requirements for Damages Claims*

§ 280 I BGB states the basic requirements for damages claims. Put simply, this rule sets forth four basic requirements.

[a] *Obligation*

Every contractual claim for damages requires the existence of an obligation between the debtor and the creditor. Such an obligation need not necessarily be a contract between the parties but may also come into existence if the parties have such a close relationship to each other that duties of protection (§ 241 II BGB) arise. Examples of such a close relationship without a prior contract include the commencement of negotiations or the opening of business premises to customers (§ 311 II BGB).²⁰⁰ Therefore, § 280 I BGB is also relevant for claims under the doctrine of *culpa in contrahendo* (*supra* §6.02[E][1]). It also applies to contracts having a protective effect towards a third party (*supra* §6.02[E][2]).

[b] *Breach of Duty*

A claim for damages further requires the breach of a duty (*Pflichtverletzung*). Although the German term carries a connotation of blameworthy behaviour, this is actually not implied. A breach of duty simply means that the debtor has not done what he was supposed to do (or not do) under the contract (§ 241 I BGB) or that he breached a duty of care (§ 241 II BGB). The reasons behind the breach are of no relevance.²⁰¹

[c] *‘Fault Principle’*

A person is liable for damages only if he is answerable for the breach of duty (*Vertretenmüssen*). The negative formulation of § 280 I 2 BGB (“This is not the case if the debtor is not answerable for the breach of duty”) indicates that the existence of this requirement is presumed, and it is up to the debtor to prove he is not answerable for the breach.²⁰² Even though *Vertretenmüssen* is not identical with fault (*Verschulden*), the latter is the starting point, as § 276 I BGB specifies that the debtor is liable for all forms of fault, i.e., intentional acts and negligence, unless provided otherwise. It is important to note that § 276 II BGB defines negligence objectively: A person acts negligently if he infringes the standard of care that applies to members of his trade and profession. Thus, it does not matter whether an individual debtor is subjectively capable of doing

200. In addition, § 280 I BGB applies to a breach of obligation arising by law.

201. Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), no. 327.

202. Peter Schlechtriem & Martin Schmidt-Kessel, *Schuldrecht Allgemeiner Teil* (6th ed. 2005), nos. 589 et seq.; Oliver Brand, *Schadensersatzrecht* (2nd ed. 2015), § 11 no. 13.

what he promised. All that matters is what a member of his business community could and would have done.²⁰³

If the debtor makes use of another person (*Erfüllungsgehilfe*) to perform his duties under the contract, the fault of this auxiliary is imputed to the debtor without granting him a chance of exculpation (§ 278 BGB) (*supra* §6.02[E][1]).

The yardstick for measuring whether the debtor is answerable for the breach can be altered by agreement. The parties are free (within the boundary set forth in § 276 III BGB) to contract for a stricter or more lenient liability regime (when this is done by general contract terms, further limitations apply). Exceptionally, the law may vary the standard of liability. A stricter standard may, for instance, be inferred from the content of the contract when the debtor gives a guarantee with regard to the quality of a good or service or assumes the risk of procuring a certain good (§ 276 I BGB). In addition, should the debtor have to pay a sum of money, financial impediments will not excuse non-performance. In this regard, the debtor is strictly liable to have the funds necessary to effectuate performance at his disposal.²⁰⁴ In turn, the law occasionally relaxes the standard of liability; this is the case regarding donors, e.g., as they do not receive (material) remuneration for their donation (*see infra* §6.07[C]).

[d] *Damage*

The law of damages is laid down in §§ 249–254 BGB.²⁰⁵ The provisions rest upon the general principle that the victim of a wrong is to be compensated to the full extent for the loss incurred (*Totalreparation*). § 249 I BGB requires the wrongdoer to restore the victim to the situation he hypothetically would have been in but for the breach. This means that the debtor owes restitution in kind (*Naturalrestitution*). But restitution in kind is not the only form of compensation provided for by law. As far as damage claims concern personal injuries or damaged property, the creditor can claim either compensation in kind or a sum of money (§ 249 II BGB). In addition, monetary compensation has to be paid whenever restitution in kind is not effected within a certain period (§ 250 BGB) or when it would be either impossible or an insufficient means of compensating the debtor (§ 251 BGB). Reading the German rules on the law of damages, one could get the impression that money claims are the exception and restitution in kind is the general rule. However, as for breaches of contract, this is not the case. Damages in lieu of performance and damages for delay in performance are necessarily monetary claims given that they replace or complement the primary remedy (performance *in specie*). Also, in cases of simple damages, the creditor will regularly seek monetary relief.²⁰⁶

203. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 448.

204. Dieter Medicus, “Geld muß man haben’: Unvermögen und Schuldnerverzug bei Geldmangel’, *Archiv für die civilistische Praxis* 188 (1988), 489 et seq.; Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 1095.

205. On the law of damages, *see* Oliver Brand, *Schadensersatzrecht* (2nd ed. 2015).

206. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 442.

Under German law, lost profits also have to be compensated (§ 252 BGB). This rule is complemented by § 376 II HGB. It states that the creditor of a commercial sales transaction can claim compensation for the difference in the price agreed upon and the (achievable) market price at the time and place delivery was due (*abstrakte Schadensberechnung*) if the parties agreed upon a fixed delivery date (*Fixhandelskauf*). Contributory negligence on the part of the creditor can mitigate his claim for damages (§ 254 BGB).

While punitive damages U.S. style are alien to German law, contractual penalty clauses are permissible (§§ 336–345 BGB). Nevertheless, a judge has the power to reduce the sum agreed upon to a reasonable amount in the event the penalty is disproportionately high (§ 343 BGB). Moreover, penalty clauses in standard terms are subject to certain restrictions (*supra* §6.04[E][3]).

[3] Damages for Delay in Performance (§§ 280, 286 BGB)

Damages for a delay in performance (*Schadensersatz wegen Verzögerung der Leistung*) concern cases in which the creditor wants to hold on to the performance *in specie* but seeks compensation for lost profits or expenses suffered due to late performance. If, e.g., the contractor of a turnkey contract regarding an office building were to hand over the keys to the premises some weeks later than agreed upon, the employer would be entitled to claim compensation for expenses incurred in leasing a different office space for the time he was unable to use the contracted premises. Damages for delay are recoverable if the requirements of § 280 I BGB and § 286 BGB are met (§ 280 II BGB).²⁰⁷ Besides the general requirements discussed above, most notably that the debtor is answerable for the breach (§§ 280 I 2, 286 IV BGB), the debtor must be in a state of *mora debitoris* (*Schuldnerverzug*). The creditor's claim for performance must have been due and free of defences. In addition, the creditor must have sent a *Mahnung* (a special notice) to the debtor (§ 286 I BGB) and the debtor must still not have performed.²⁰⁸

In certain cases, a notice is not necessary to put the debtor in default. Requiring such a warning would be a pure formality whenever the debtor unequivocally and definitely refuses performance (§ 286 II no. 3 BGB). More importantly, the debtor needs no 'reminder' when the performance date can be determined merely based on the calendar (1 February 2017, calendar week no. 5) or by reference to the calendar in conjunction with a certain event (fourteen days after delivery) (§ 286 II nos. 1, 2 BGB). Regarding obligations to pay money, the debtor is, at the latest, in default when he fails to cover the debt within thirty days of receiving an invoice or an equivalent demand for payment. A debtor who is a consumer can only be deemed in default after this period has lapsed if he was informed about this consequence in the invoice or demand for payment (§ 286 III BGB). These exceptions to the requirement of a *Mahnung* allow

207. For a critical assessment of these rules in a comparative and European perspective Eva Lein, *Die Verzögerung der Leistung im europäischen Vertragsrecht* (2015), 484 et seq.

208. Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil* (21st ed. 2015), nos. 463 et seq.

skilled contract drafters to ensure damage claims for late performance without prior warning.²⁰⁹

The creditor of a monetary claim for which the debtor is in default may claim additional interest. Notwithstanding a creditor's right to seek a higher rate of interest (§ 288 III BGB), the rate of interest is statutorily fixed at 9 percentage points above the current 'base rate'²¹⁰ for transactions not involving consumers and at 5 percentage points above this rate for all other transactions (§ 288 I, II BGB). A creditor may also claim a lump sum of €40 compensating expenses that typically accrue in cases of late payment. However, this sum is set off against a subsequent claim for damages (§ 288 V BGB).²¹¹

In addition to the consequences just mentioned, *mora debitoris* also alters the general liability standard of the debtor (§ 287 BGB). Most importantly, the debtor can no longer invoke certain limitations of liability as he is liable for all forms of negligence. Moreover, he is also answerable for his performance becoming impossible regardless of fault, unless the damage would have occurred even if the debtor had performed in a timely manner.

[4] Damages in Lieu of Performance

Damages in lieu of performance grant the creditor an equivalent in money which substitutes for the debtor's promise to perform.²¹² Thus, his interest in receiving performance (*Erfüllungsinteresse*) must be satisfied. That is to say, the debtor must place the creditor in a position similar to the one he would hypothetically have been in, had the debtor performed properly.²¹³ The prerequisites to be met for this claim vary according to the breach at stake.

[a] Late or Defective Performance (§§ 280, 281 BGB)

If the debtor does not perform timely (the good was not delivered) or performs in a manner incompatible with the contract (the goods delivered had defects as to quality necessitating repair), the creditor may claim damages provided that the requirements of § 280 I BGB and § 281 BGB are met (§ 280 III BGB). This claim's main aim is to

209. Stefan Grundmann, 'Der Schadensersatzanspruch aus Vertrag', *Archiv für die civilistische Praxis* 204 (2004), 569, 603.

210. The 'base rate' as defined by § 247 I BGB is 3,62% but is adapted twice a year by the German *Bundesbank* based on European parameters set forth by the European Central Bank. The current rate is published in the *Bundesanzeiger* and on the website of the German *Bundesbank* (<https://www.bundesbank.de>). As of 1 January 2018 the base rate is fixed at -0.88%.

211. For details see Tim W. Dornis, 'Die Entschädigungspauschale für Beitreibungsaufwand – Neujustierung von Kompensation und Prävention im europäischen und deutschen Verzugsrecht?', *Wertpapiermitteilungen* 2014, 677 et seq.

212. Claus-Wilhelm Canaris, 'Die Reform des Rechts der Leistungsstörungen', *Juristenzeitung* 2001, 499, 512.

213. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 451.

recover expenses incurred in procuring a substitute performance at a higher price.²¹⁴ In addition to performance having been due, the creditor must have set the debtor a reasonable period to perform or cure any defects. The creditor may only claim damages if this period has lapsed without cure coming forward. When claiming damages in lieu of performance, the creditor loses his right to claim specific performance (§ 281 IV BGB) so as to avoid double recovery.

The law states two exceptions to the general rule of giving the debtor a second chance to perform: Setting a period is dispensable whenever the debtor unequivocally and definitely refuses to perform or special circumstances justify a claim for damages without prior warning (§ 281 II BGB). Further exemptions are laid down in §§ 440, 636 BGB for sale and work contracts. Given that the rule of setting a reasonable period as well as the exceptions to this rule, the latter being laid down in § 281 II BGB, correspond with § 323 II BGB (which sets forth an additional exception for *Fixgeschäfte*), the principles discussed above apply (*supra* §6.06[C][2][a]).

[b] *Impossibility (§§ 280, 283 BGB, § 311a II BGB)*

In the event of impossibility (§ 275 I-III BGB) it makes no sense to provide the debtor with a second chance to perform. Therefore, the creditor is entitled to claim damages without fixing a period of grace. This rule applies regardless of whether the impossibility arises prior or subsequent to having entered into the contract. In addition, the drafters of the *Schuldrechtsmodernisierung* based both types of liability on the ‘fault principle’, thus avoiding arbitrary results as it is often only a matter of seconds whether the facts making performance impossible arise before or after the contract’s formation.²¹⁵

However, the liability standards set out in §§ 280, 283 BGB (subsequent impossibility) and § 311a II BGB (initial impossibility) are not entirely congruent. The point of reference for the ‘fault principle’ differs in the two scenarios: In cases of subsequent impossibility, the ‘fault’ of the debtor relates to the impediment to performance, i.e., usually a lack of diligence in procuring or safeguarding an object. This does not work for cases of initial impediments to performance as a prospective debtor is under no duty towards a prospective creditor to anticipate impediments or to apply care in guarding an object before the conclusion of a contract.²¹⁶ Against this backdrop, the draftsmen of the *Schuldrechtsmodernisierung* decided that claims for damages in lieu of performance are permissible if the requirements set forth in § 280 I

214. Reinhard Zimmermann, ‘Remedies for Non-Performance: The Revised German Law of Obligations, Viewed Against the Background of the Principles of European Contract Law’, *Edinburgh Law Review* 6 (2002), 271, 290.

215. Claus-Wilhelm Canaris, ‘Die Reform des Rechts der Leistungsstörungen’, *Juristenzeitung* 2001, 499, 506; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 64.

216. Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed. 2006), 458; Reinhard Zimmermann, ‘Remedies for Non-Performance: The Revised German Law of Obligations, Viewed Against the Background of the Principles of European Contract Law’, *Edinburgh Law Review* 6 (2002), 271, 299.

BGB are met, as § 283 BGB refers back to the *Grundnorm* without introducing additional requirements. Thus, a person is answerable for the breach if responsible for the impediment leading to impossibility. In turn, damages for initial impossibility require that the debtor knew or should have known that performance was impossible (but not that he was responsible for causing impossibility). Analogous to the interpretation of § 280 I 2 BGB, the prerequisite that the debtor is answerable can be presumed (but the presumption can be rebutted) given the negative formulation found in § 311a II 2 BGB ('This is not the case...').²¹⁷

§ 311a II BGB also covers damages in lieu of performance when the defect of a delivered good cannot be remedied. A person selling a second-hand car as being accident-free even though it was not, for instance, is liable for damages only if he knew or should have known of the defect (however, his knowledge is presumed pursuant to § 311a II 2 BGB).²¹⁸

[c] *Breach of Protective Duties (§§ 280, 282 BGB)*

A claim for damages under §§ 280, 282 BGB in lieu of performance covers breaches of ancillary duties (§ 241 II BGB) relating to the creditor's general rights and interests. The requirements set forth in § 282 BGB correspond with those in § 324 BGB (apart from the 'fault' criterion). This claim for damages concerns scenarios in which the main performance itself was proper, though made under circumstances detrimental to the creditor. In such a case, the creditor may claim damages in lieu of performance if one cannot reasonably expect him to accept performance. Such cases are rare.²¹⁹ The textbook example is a painter who, though painting in an orderly manner, regularly damages household furniture severely with his ladder over the course of his long-lasting assignment.²²⁰ Here, the creditor may terminate the contract (§ 324 BGB), engage another painter to finish the job and claim damages from the original painter for any additional costs incurred.²²¹

[5] *Damages Alongside Performance (§ 280 BGB)*

Claims for damages alongside performance under § 280 BGB, also called 'simple damages' (*einfacher Schadensersatz*)²²² cover the infringement of ancillary duties as defined in § 241 II BGB, i.e., duties not relating to the main performance. Such claims relate to situations where the harmed party seeks damages alongside (and not instead

217. Hans Brox & Wolf-Dietrich Walker, *Allgemeines Schuldrecht* (42nd ed. 2018), § 22 no. 69.

218. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), nos. 1184 et seq.

219. Wolfgang Ernst, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (7th ed. 2016), § 282 BGB no. 2.

220. Regierungsbegründung, BT-Drs. 14/6040, 141 (regarding § 282 BGB).

221. Claus-Wilhelm Canaris, *Schuldrechtsmodernisierung 2002* (2002), 682.

222. Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 111.

of) performance.²²³ Thus, a supermarket customer slipping on a leaf of lettuce can claim damages for breach of contract (besides claims under the law of tort). Should he slip prior to the conclusion of a contract, the doctrine of *culpa in contrahendo* (§§ 280 I, 311 II, 241 II BGB, *supra* §6.02[E][1]) enables him to claim damages. Should the accident occur after the conclusion of a contract, §§ 280 I, 241 II BGB apply. In addition, § 280 I BGB may cover cases in which the debtor has breached a duty of performance, such as a bank giving incorrect advice to a client where financial losses result.²²⁴

[6] *Expenses Made in Reliance of the Debtor's Promise (§ 284 BGB)*

Proof of damages can be difficult sometimes, especially with regard to lost profits. For this reason, § 284 BGB allows the creditor – instead of claiming damages – to recover expenses incurred in vain in reliance on the debtor's promise to perform.

[G] **Other Remedies**

In addition to the principal remedies highlighted so far, the BGB provides additional ones that cannot comprehensively be treated in this context. For example, in some situations a buyer may have the right to reduce the price in sale and work contracts (§ 441 BGB and § 638 BGB, respectively). There are also rules on *mora creditoris* (§§ 293–304 BGB) which, however, do not entitle the debtor to sue the creditor for breach of contract.

§6.07 SPECIAL CONTRACTUAL REGIMES

[A] **Overview**

Already upon its initial creation, the draftsmen of the BGB included various sets of rules in the law of obligations concerning specific contracts that were commonly encountered at the time. This set of rules was constantly supplemented, as new types of contracts developed by practising lawyers had to be codified, European directives had to be transposed, and the protection of weaker parties had to be enhanced. Today, the most important rules in the BGB concern the following contracts:²²⁵

- Sale (including consumer sale) and barter contracts (*Kauf* and *Tausch*), §§ 433–480 BGB.
- Timeshare contracts, contracts on long-term holiday products, brokerage contracts, exchange system contracts (*Teilzeit-Wohnrechte-Verträge*, *Verträge*

223. Hans Brox & Wolf-Dietrich Walker, *Allgemeines Schuldrecht* (41st ed. 2017), § 2 nos. 11 et seq.; Hein Kötz, *Vertragsrecht* (2nd ed. 2012), nos. 1026 et seq.

224. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 1028.

225. A similar list was provided by Ingeborg Schwenzer, 'The Law of Contracts', in: Werner F. Ebke & Mathew W. Finkin (eds), *Introduction to German Law* (1996), pp. 173, 191.

über langfristige Urlaubsprodukte, Vermittlungsverträge, Tauschsystemverträge), §§ 481–487 BGB.

- Consumer loan contracts, finance assistance contracts, and instalment supply contracts (*Darlehen, Finanzierungshilfen* and *Ratenlieferung für Verbraucherverträge*), §§ 488–515 BGB.
- Donation (*Schenkung*), §§ 516–534 BGB.
- Rent and usufructuary lease (*Miete* and *Pacht*), §§ 535–597 BGB.
- Gratuitous loan for use (*Leihe*), §§ 598–606 BGB.
- Service and treatment contracts (*Dienstvertrag* and *Behandlungsvertrag*), §§ 611–630h BGB.
- Contracts for work and similar contracts, especially package travel contracts (*Werkvertrag, Reisevertrag*), §§ 631–651y BGB.
- Brokerage contracts (*Mäklervertrag*), §§ 652–655e BGB.
- Promises of a reward (*Auslobung*), §§ 657–661a BGB.
- Mandate, management of the affairs of another, payment services (*Auftrag, Geschäftsbesorgung, Zahlungsdienste*), §§ 662–676c BGB.
- Deposit (*Verwahrung*), §§ 688–700 BGB.
- Partnership (*Gesellschaft*), §§ 705–740 BGB.
- Suretyship (*Bürgschaft*), §§ 765–778 BGB.
- Settlement (*Vergleich*), § 779 BGB.
- Acknowledgment of debt (*Schuldanerkenntnis, Schuldversprechen*), §§ 780–782 BGB.
- Orders (*Anweisung*), §§ 783–792 BGB.
- Bearer bonds (*Schuldverschreibung auf den Inhaber*), §§ 793–808 BGB.

[B] Contract of Sale

[1] Structure of the Law

Under a contract of sale, the seller has to deliver a thing to the buyer and transfer the title to him in exchange for payment of the purchase price (§ 433 BGB). Since the *Schuldrechtsmodernisierung* implemented Directive 1999/44/EC, the rules on sales law distinguishes between sales transactions in general (§§ 433–453 BGB) and consumer sales (§§ 474–479 BGB). The rules on consumer sales have to be read together with the general rules on consumer protection applicable to specific types of sales (§§ 312–312k BGB). The law of sales is also important for barter contracts (§ 480 BGB).

[2] General Rules

[a] Obligations of the Parties

The general rules apply to all types of sales contracts, including contracts for the purchase of real estate, goods, aggregate of goods (e.g., a collection of paintings), rights (e.g., claims, shares, rights to a name or patents), as well as aggregates of all these

categories (e.g., a business), irrespective of the parties to the contract. The seller has to hand over the thing – that must be free from defects as to quality and title – to the buyer and procure ownership to him (§ 433 I BGB). The seller may have additional obligations, such as packing fragile goods in a secure fashion or providing directions for use when selling a machine.²²⁶ The buyer has to pay the purchase price and accept the thing (§ 433 II BGB). Unless agreed otherwise, the buyer has to bear the cost of shipping the purchased things to a place other than the place of performance (§ 448 I BGB) and – in the case of a sale of land – the cost of recording the contract with a notary public (§ 448 II BGB).

The ownership of the sold thing does not pass to the buyer *ipso iure* when the sale contract is concluded or performed. Rather, the parties have to agree on transferring property to the buyer (which is in principle a separate contract, *supra* §6.01[A]) and the buyer must receive some form of possession over the good. Movables, e.g., must usually be handed over to the buyer (§ 929, 1 BGB). In sales of real estate, the buyer has to be recorded in the land register (§§ 873, 925 BGB) and similar rules apply with regard to registered ships and ships under construction. Even though the ‘obligation contract’ and the ‘transfer contract’ are independent from each other, § 449 I BGB allows the linking of both transactions by an agreement so as to ensure that the seller retains the title to goods handed over to the buyer up until the full purchase price has been paid (*Eigentumsvorbehalt*).

The parties may agree on the place where the seller must deliver the goods. This place of performance is of importance because the risk of the good being lost or destroyed passes to the buyer when it is handed over to him (§ 446, 1 BGB). Usually, the seller has to provide the goods at his place of business unless the parties have stipulated otherwise or it can be inferred from the nature of the obligation that the place of performance is elsewhere (§ 269 I BGB). In cases where the good is to be shipped elsewhere, e.g., to the place of business of the buyer, the fact that the seller has borne the cost of shipment alone does not suffice to alter the place of performance (§ 269 III BGB). Thus, if a good is shipped, the risk usually passes when the good is handed over to the first carrier (§ 447 I BGB) unless it is agreed upon otherwise. The situation is different in consumer sales contracts (*see infra* §6.07[B][3]).

[b] Breach of Contract

Upon the execution of a contract, all forms of impairments discussed in the section on breach of contract may occur, and the buyer and the seller will have the general remedies discussed above. The law of sales, however, provides some additional rules for breaches relating to defects as to quality and title (*Sachmängel, Rechtsmängel*, §§ 434–445b, 453 BGB). These rules must be read together with the general rules in order to assess remedies available for a breach of contract.

226. Wolfgang Fikentscher & Andreas Heinemann, *Schuldrecht Allgemeiner und Besonderer Teil* (11th ed. 2017), no. 811.

As a general principle, the purchased object must be free from defects as to quality and title at the time the risk passes to the buyer. Defects as to title concern the existence of any third-party rights in relation to the purchased object that have not been specified in the contract (§ 435 BGB). What is to be considered as a defect in quality can be inferred from § 434 BGB. The parties may choose to define the quality standards that the purchased object must conform to (*Beschaffensvereinbarung*), § 434 I 1 BGB. This can be done explicitly (by specifying the standards in the contract) or impliedly (e.g., when the seller puts a sign on the car for sale stating certain technical information regarding the car, such as the mileage).²²⁷ If the parties have failed to agree on a standard, the good is free of defects if suitable for the contractually intended use (§ 434 I 2 no. 1 BGB) or for the customary use the buyer can reasonably expect (§ 434 I 2 no. 2 BGB). A defect may also be assumed when the good does not demonstrate the special characteristics claimed in public statements made by the seller or the producer (which can also be the importer, see § 4 II ProdHaftG) or an auxiliary unless the seller was not aware of the statement (§ 434 I 3 BGB). Thus, if a watch producer advertises his products as being ‘absolutely waterproof’, a watch taking on water is defective even if the seller has not mentioned this characteristic when concluding the contract (as far as the seller could be aware of the advertising campaign). If a purchased good needs to be assembled, a defect can be assumed if the assembly instructions are defective (§ 434 II 2 BGB) or if the seller or his auxiliaries have assembled it improperly (§ 434 II 1 BGB). Finally, a defect is assumed even when the seller delivers an object different from that agreed on (or a lesser amount) (§ 434 III BGB).

In cases of defects, the buyer’s remedies are listed in § 437 BGB, a rule referring partly to the general system of remedies but also to other rules of the sales law complementing the general rules. First, the buyer must in principle ask for cure of the defect either by remedying the defect (*Nacherfüllung*), e.g., by repairing the object (*Nachbesserung*) or by delivering another object free of defects (*Nachlieferung*) (§§ 437 no. 1, 439 BGB). This remedy – which is based on the idea that the seller should get a second chance to perform as agreed upon – does not require fault on the side of the seller. If performance is impossible or not rendered in time, the buyer is also entitled to reduce the price (§§ 437 No. 2, 441 BGB) or to terminate the contract (§§ 437 no. 2, 440, 323, 326 V BGB). Finally, the buyer may claim damages according to the general rules (§§ 437 no. 3, 440, 280, 281, 283, 311a BGB) or, alternatively, reimbursement of expenses that he reasonably incurred in expectation of performance (§§ 437 no. 3, 284 BGB).

A buyer knowing of the defect – mere doubts are insufficient – at the time of contract formation has no remedy against the seller (§ 442 I 1 BGB).²²⁸ If the buyer was grossly negligent in overlooking the defect when the contract was formed, his rights are abrogated unless the seller acted fraudulently (§ 442 I 2 BGB). In addition, a seller

227. BGH, *Neue Juristische Wochenschrift* 1975, 1693, 1695; Kurt Reinking & Christoph Eggert, *Der Autokauf: Rechtsfragen beim Kauf neuer und gebrauchter Kraftfahrzeuge sowie beim Leasing* (13th ed. 2017), no. 2782.

228. Annemarie Matusche-Beckmann, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Kaufrecht* (revised ed. 2014), § 442 BGB no. 12.

having guaranteed that the object comports with certain standards is liable for any deviances from that standard as in such cases even a limitation of liability would be void (§ 444 BGB).²²⁹ The formation of the contract being the relevant point in time, the buyer does not forfeit his remedial rights should he gain knowledge of the defect in the timeframe between signing the contract and accepting delivery. This is true even if he accepts the object without notifying the seller of the defect – unless one can construe the delivery of the defective good and the unconditional acceptance as an alteration of the original contract.²³⁰

It is important to note that buyers in general do not have to inspect the goods and to give timely notice of defects to maintain their claims regarding defects as to quality, unlike merchants who are under such an obligation (§ 377 HGB).

[3] *Consumer Sale Contracts*

Special mandatory rules, which alter the general rules, govern contracts concluded between a ‘consumer’ (§ 13 BGB) and an ‘entrepreneur’ (§ 14 BGB) on the sale of movables (§ 474 BGB).²³¹ These rules, which transpose the European Directive 1999/44/EC (*supra* §6.01[B][2]), also apply when the consumer sale is accompanied by a service to be effected by the seller (§ 474 I 2 BGB), e.g., assembling the purchased item. Due to space limitations, only two important rules can be outlined here.

First, § 475 II BGB alters the general rule enshrined in § 447 I BGB that the risk of accidental loss or deterioration passes to the buyer when the good is handed over to the first carrier. In consumer sales, the risk passes only at that time if the buyer instructed the carrier to ship the good to him and the seller had not named this carrier previously. In commonly encountered consumer sales, these conditions are rarely met. If, e.g., the consumer shops online and agrees with the seller on delivery to his place of residence, the seller usually chooses the carrier himself or has specified certain potential carriers on his website from which the buyer can select one. In both cases, the risk does not shift to the buyer until receipt. Thus, if the good does not arrive, the seller has no claim for the purchase price against the consumer (§ 326 I 1 BGB).

Second, § 477 BGB contains an important rule on the burden of proof. Remedies for defective goods apply only if the product was defective at the time the risk passed to the buyer (§ 434 I 1 BGB), i.e., usually when it was delivered to him (§ 446, 1 BGB). Generally, the buyer has to prove that the object was defective upon delivery and must refute that his improper handling of the object caused the defect, should the other side plead this.²³² § 477 BGB, however, shifts the burden of proof: Where an object’s defect manifests itself within six months after the date of the risk passed to the buyer, the defect is presumed to have existed at the time the risk passed (allowing the buyer to exercise his remedies), unless such a presumption is incompatible with the nature of

229. Ingo Saenger, in: *Bürgerliches Gesetzbuch: Handkommentar* (9th ed. 2017), § 442 BGB no. 6.

230. *Ibid.*, § 442 BGB no. 4.

231. These rules do not cover public auctions of used goods which the consumer may attend in person, § 474 II BGB.

232. Ingo Saenger, in: *Bürgerliches Gesetzbuch: Handkommentar* (9th ed. 2017), § 476 BGB no. 1.

the object or the defect. The ECJ has clarified that the consumer is required neither to prove which circumstances produced the defective state nor that the defect can be attributed to the seller.²³³ Thus, if the consumer bought a second-hand car whose automatic transmission no longer works properly after five months, it is presumed that the car was defective at the time of delivery (unless the seller can prove that the defect resulted from the buyer's driving habits).²³⁴

[4] *International Sales*

Germany is party to the CISG. Within its scope, the provisions of the BGB and HGB are applicable only as far as the Convention leaves a gap to be filled by national law, provided that German law applies at all. Parties also often refer to the INCOTERMS of the ICC to allocate the duties, costs and risks associated with an international sales contract, including shipment and insurance.

[C] *Donation*

Under a donation contract, a donor uses his own assets to enrich a contractual partner without receiving money or any other kind of payment in exchange (§ 516 I BGB). Donations immediately executed (even without a proper prior agreement, § 516 II BGB) do not have to be recorded (*Handschenkungen*). Things are different if the donation shall be executed after the donation contract was formed. In this case, the donor's promise (*Schenkungsversprechen*) has to be recorded by a notary public to form a valid donation contract (§ 518 I 1 BGB). Consideration is not necessary to bind the promisor because under German law the form requirement protects the promisor sufficiently. If the donor, however, executes the donation contract even though it was concluded in a non-appropriate form, he knowingly and wilfully diminishes his assets and thus needs no additional warning. Therefore, the defect as to form is remedied (§ 518 II BGB).²³⁵

Given that the donor does not receive a (material) remuneration in exchange for the gift, the law provides many rules in his favour. The donor can choose not to fulfil his promise as far as performing would render him in a position in which he could not care for himself reasonably or could not fulfil statutory maintenance obligations towards other persons, e.g., his family (§ 519 I BGB). Subject to certain restrictions, impoverishment also entitles the donor to reclaim the gift from the donee in accord with the rules of unjust enrichment (§§ 528, 529 BGB). Moreover, his liability towards the donee is relaxed: Generally, a donor is liable only for intentional acts or those done with gross negligence (§ 521 BGB). Regarding defects as to quality or title, the donor's liability is even limited to situations in which he fraudulently conceals the defect (§§

233. Case C-497/13, *Faber v. Autobedrijf Hazet Ochten BV*, ECLI:EU:C:2015:357, para. 75.

234. BGH, *Neue Juristische Wochenschrift* 2017, 1093, 1099. In this case, the BGH relaxed its older case law (see BGH, *Neue Juristische Wochenschrift* 2004, 2299, 2300) to implement the ECJ's *Faber* ruling.

235. Dirk Looschelders, *Schuldrecht: Besonderer Teil* (13th ed. 2018), no. 312.

523 I, 524 I BGB). The donor may also be entitled to revoke his donation for gross ingratitude on the part of the donee (§§ 530–534 BGB).

[D] Contract of Rent

[1] Structure of the Law

Under a contract of rent, use of an item of property, be it a car, a flat, a collection of things, or a piece of land, is granted to another person for a specified period of time in return for a remuneration (§ 535 BGB). Within the relevant part of the BGB, the first section lists general rules on all forms of lease agreements (§§ 535–548 BGB), the second part lays down special rules on residential property (§§ 549–577a BGB) and the last part supplies rules on renting of other property, such as office space or ships (§§ 578–580a BGB). If the use of the rented property includes a right to exploit its yields, German law classifies the contract as a *Pachtvertrag* (usufructory lease). As this type of contract is a variant of the rental contract, the section dealing with usufructory leases is attached to the sections on contracts of rent (§§ 581–584b BGB). As far as these rules do not provide otherwise, the rules of rental contracts also apply to usufructory leases (§ 581 II BGB). Additional rules for usufructory leases of real property are laid down in §§ 585–597 BGB.

With regard to the lease of residential property, additional statutes are of practical importance, such as the regulation on the calculation of heating costs (*Verordnung über Heizkostenabrechnung*)²³⁶ and the regulation on operating costs (*Betriebskostenverordnung*).²³⁷ These regulations contain rules on the distribution of costs for warm water, heating, the calculation of overhead, and charges associated with a building. In addition, there are public law rules allowing authorities to take measures against the alienation of residential property so as to avoid or overcome housing shortages occurring in larger cities.

[2] General Rules

[a] Obligations of the Parties

Under the general rules on rental contracts, the lessor has to grant the lessee possession over the property (§ 535 I 1 BGB). In addition, the property must be in a condition suitable for the contractually agreed upon use, and the lessor has to bear the cost of maintaining the property during the rental period (§ 535 I 2, 3 BGB). The latter obligation is – as most rules in the first part of the law of contracts of rent – not mandatory, which means parties may deviate from it. This is frequently done in

236. *Verordnung über die verbrauchsabhängige Abrechnung der Heiz- und Warmwasserkosten (Verordnung über Heizkostenabrechnung – HeizkostenV)* of 5 October 2009 (*Neubekanntmachung*), BGBl. I 2009, 3250.

237. *Verordnung über die Aufstellung von Betriebskosten (Betriebskostenverordnung – BetrKV)* of 25 November 2003, BGBl. I 2003, 2346 (as amended).

contracts for the lease of real estate. The parties often agree that the lessee shall bear the obligation of repairing normal wear and tear (*Schönheitsreparaturen*). Such an agreement contained in a standard term is valid as far as the lessee only has to undertake repairs or painting the rooms when the necessity to do so actually arises.²³⁸ Finally, the lessor may have additional duties, such as ensuring that the premises are supplied with water and electricity. He also has to respect duties of protection (§ 241 II BGB), e.g., warning the lessee about dangers, such as the risk of break-ins.²³⁹

The lessee is obliged to pay the rent agreed upon (§ 535 II BGB). Even though this usually means money, this is not mandatorily so as services such as upkeep of the house or garden can be owed to the lessor as well.²⁴⁰ At the end of the rental period, the lessee has to return the property (§ 546 I BGB). Whether or not he can actually use the leased object does not affect the right of the lessor to claim the rent. Thus, a lessee must pay the rent even if he has taken ill and is unable to drive a leased car.

The lessee is limited to using the rented property as agreed upon in the contract and is not liable for any deterioration of it brought about by use in conformity with the contract (§ 538 BGB). Without prior permission of the lessor, the lessee is not entitled to sublet the property to a third party (§ 540 I 1 BGB). If the lessor denies the request for permission, the lessee may terminate (*kündigen*) the contract within the statutory notice period unless there is something significant about the third party that entitles the lessor to deny the request. The latter is the case if, e.g., a landlord running a business in his building has rented out some space to another business. The landlord is entitled to withhold his permission for a sublease if the tenant intends to sublet the office space to a business that is a competitor of the landlord.²⁴¹ If the lessee sublets the property without the permission of the lessor, the latter can terminate the contract immediately (§ 543 II 1 no. 2 BGB). In the event the lessee gained profits from subletting the property, the lessor may not skim off these profits despite the unlawful behaviour of his contractual partner (unless agreed otherwise).²⁴²

[b] Breach of Contract

Thus far, the system of remedies for breaches of contracts of rent has not been fully aligned with the general rules on remedies as was done in sales law.²⁴³ The general

238. For details see: Wolfgang Wurmnest, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (7th ed. 2016), § 307 BGB nos. 114 et seq.

239. OLG Hamburg, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 1988, 1481; Dirk Looschelders, *Schuldrecht: Besonderer Teil* (13th ed. 2018), no. 406.

240. Wolfgang Fikentscher & Andreas Heinemann, *Schuldrecht Allgemeiner und Besonderer Teil* (11th ed. 2017), no. 1012.

241. OLG Nürnberg, *Neue Zeitschrift für Miet- und Wohnungsrecht* 2007, 567; Hans-Jürgen Bieber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. IV (7th ed. 2016), § 540 BGB no. 20.

242. BGH, *Neue Juristische Wochenschrift* 1996, 838 et seq.

243. For a detailed proposal on the synchronisation of the rules on rental contracts with the general rules on *Leistungsstörungen* see Karl Riesenhuber, 'Mietrechtsgewährleistung im System des Allgemeinen Leistungsstörungenrechts: Ansätze zu einer Integration', *Zeitschrift für die gesamte Privatrechtswissenschaft* 2016, 448 et seq.

system has been altered to some extent by special rules on rental contracts. Distinguishing between the applicability of these special rules and the general rules on remedies for breach of contract may sometimes turn out to be a difficult task. Moreover, it has to be noted that a contract of rent is a continuing obligation (*Dauerschuldverhältnis*). Consequently, termination is effected by a *Kündigung* and not by a *Rücktritt* (*supra* §6.06[C][4]). Although not comprehensive, the following overview focuses on some important remedies of the lessee.²⁴⁴

Where a defect regarding the quality or title of the property is identified upon its handover to the lessee or during its period of rent, and where this defect precludes or significantly limits the item's use as envisioned in the contract, the lessee is exempted from paying rent or has to pay only a reduced rent to the extent the defect is not negligible (§ 536 I BGB). This remedy does not require fault on the side of the lessor and must not even be declared by the lessee (unlike in the law of sales). Of course, the lessee has to notify the lessor about defects arising during the rental period to enable him to cure them (§ 536c I 1 BGB).

With regard to claims for damages, the lessor is subject to a type of guaranteed liability with regard to defects that existed at the time of the conclusion of the contract (§ 536a I BGB). He is liable for any damages caused by such defects irrespective of fault (unlike under the general rules). This strict liability aims to protect the lessee.²⁴⁵ Damages can also be claimed for defects arising during the rental period due to a circumstance for which the lessor is responsible or if the lessor is in default (§ 286 BGB) of curing a defect (§ 536a I BGB). § 536b, 1 BGB excludes claims under §§ 536, 536a BGB where the lessee knows of the defect at the time the contract was concluded (unless he informs the lessor when accepting the leased object that he wants to maintain these rights); the lessee does, however, in any case retain the right to demand from the lessor to cure the defect.²⁴⁶

Each party may terminate the contract extraordinarily (with immediate notice) (*außerordentliche Kündigung*) for a compelling reason (§ 543 I 1 BGB). A serious breach of a contractual obligation by one of the parties entitles the other party to exercise this right under certain conditions. Besides the already mentioned sublease without permission (§ 543 II 1 no. 2 BGB), the lessor may terminate the contract if the lessee is in default on two successive dates with the payment of the rent or parts thereof, provided that the amount is significant (§ 543 II 1 no. 3 BGB). The lessee may terminate the contract if the lessor does not grant him the use of the leased item of property or in the event he is deprived of it (§ 543 II 1 no. 1 BGB).

244. For a detailed analysis see Peter Derleder, 'Mängelrechte des Wohnraummieters nach Miet- und Schuldrechtsreform', *Neue Zeitschrift für Miet- und Wohnungsrecht* 2002, 676 et seq.; Volker Emmerich, 'Neues Mietrecht und Schuldrechtsmodernisierung', *Neue Zeitschrift für Miet- und Wohnungsrecht* 2002, 362 et seq.; Barbara Dauner-Lieb & Wolfgang Dötsch, 'Aufwendungssatz für eine Mängelbeseitigung durch den Mieter: Alte Fragen in neuem Gewand?', *Neue Zeitschrift für Miet- und Wohnungsrecht* 2004, 641 et seq.

245. Dirk Looschelders, *Schuldrecht: Besonderer Teil* (13th ed. 2018), no. 421.

246. Marcus Bieder, in: *beck-online.GROSSKOMMENTAR BGB* (1 April 2018), § 536b BGB no. 36.

[c] *Ending the Agreement*

If the parties have agreed on an indefinite lease period, the lease ends when one party lawfully terminates the contract (§ 542 I BGB). Leases for a definite period end at the point of time agreed upon unless the contract is terminated earlier or the parties agree on a renewal (§ 542 II BGB).

[3] *Special Rules for Housing Premises*

For lease contracts concerning residential property, the general rules apply only as far as §§ 549–577a BGB do not provide otherwise (§ 549 I BGB). The framework for the lease of housing premises has been changed significantly since 1900.²⁴⁷ Over the years, the legislature limited the circumstances under which a landlord may terminate the contract and evict the tenant so as to grant the lessee a greater degree of housing security. The legislature has also introduced various rules protecting tenants from rents considered ‘too high’. In more recent times, the tenant’s power to terminate a rental contract within a reasonable time has been strengthened to respond to increased mobility needs. Tenants may have to move for job purposes or – in the case of an elderly person – to a retirement home. In addition, rules on the modernisation of dwellings were incorporated in the BGB, *inter alia*, as an attempt to lower heating emissions. As far as these rules protect the tenant, they are mandatory. The most important rules will be sketched in the following discussion.

Lease agreements for residential property for a period longer than one year must be entered into in writing (§ 550, 1 BGB). This rule aims to ensure that buyers of land learn about such agreements given that § 566 BGB enshrines the rule whereby ‘sale does not break lease’ (*Kauf bricht nicht Miete*). Under this maxim, the buyer of residential property steps into the shoes of the seller and becomes party to all the rental contracts in place at the time of sale.

Landlords often demand a security deposit in case the tenant damages the premises. Pursuant to § 551 I BGB, the maximum amount of the deposit is limited to three times the monthly rent. The provision also supplies rules on the administration of the money.

To facilitate the subletting of rooms by tenants to third parties, § 553 BGB allows the tenant to demand from the landlord approval to sublet a part of the rented space to a third party if the tenant has a legitimate interest in doing so. Examples of such an interest are a tenant who, because of a decrease in income, wishes to sublease a room to cover part of the rent, or a tenant who wants to bring a person in need of care into the apartment.²⁴⁸ The landlord can deny approval only if the sublease would

247. Volker Emmerich, in: *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Mietrecht 1: Allgemeine Vorschriften; Wohnraummiete* (revised ed. 2018), Vor § 535 BGB nos. 1 et seq.

248. Hans-Jürgen Bieber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. IV (7th ed. 2016), § 553 BGB no. 7.

overcrowd the premises or if there is something significant about the person to be taken in that would make it unreasonable for him to accept the sublease.²⁴⁹

Another subchapter deals with the payment of rent and specifies to what extent the operating costs associated with a building can be passed onto the tenant (§§ 556–556c BGB). In addition, the BGB contains various rules on rent control. In areas with tight housing markets, which are defined by ordinance, rules limit the amount of rent demandable by the landlord at the initiation of a lease agreement (§§ 556d–556g BGB) to avoid sharp rises in the general level of rent in these areas. Outside these areas, the amount of rent can be freely negotiated when concluding the contract. The BGB, however, contains various rules limiting the grounds for rent increases during the lease period (§§ 557–561 BGB).

For contracts concluded for an indefinite period of time, the legislature introduced an ‘ordinary’ right to terminate the contract (*ordentliche Kündigung*), this sitting alongside with the ‘extraordinary’ termination right which can be exercised in case certain events occur (*see* §6.07[D][2][b]). To protect the tenant, the termination rights are asymmetric: This means that the tenant can terminate the contract within a certain notice period (usually three months, but longer periods may apply) without stating a reason (§ 573c I 1 BGB), with immediate effect for certain breaches of contract by the landlord (§§ 543, 569 BGB) or within the statutory notice period in certain cases in which the landlord denies the tenant to sublet the premises (§ 540 I BGB). The landlord’s right to terminate the contract, by contrast, is much more restricted. He can, for instance, terminate the contract if the tenant has given him a reason to do so (e.g., by significantly disturbing the neighbours) or if the landlord needs the premises for himself or a family member or if the tenant has breached the contract significantly (§§ 569, 573 BGB).

[E] Contracts for Services

A service contract obliges the service provider to perform a service in exchange for remuneration (§ 611 I BGB). The BGB distinguishes this type of contract from a contract for work by looking at the obligation to be performed: A service provider has to provide the service and is remunerated regardless of whether the service achieves the intended results, whereas a contract for work obliges the contractor to produce a certain work, i.e., a certain result. Whether a contract has to be interpreted as a contract for a service or a contract for work depends to a large extent on the content of the contract (what the parties have agreed upon) and which party is to bear the risk of the activity agreed upon not producing the intended outcome.²⁵⁰

The provisions of the BGB on the law of service contracts address a wide range of services, which were deeply reformed and supplemented over the years. § 611 BGB and related rules cover service contracts concluded by certain freelance professionals

249. Volker Emmerich, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Mietrecht 1: Allgemeine Vorschriften; Wohnraummiete* (revised ed. 2018), § 553 BGB nos. 13–14.

250. Dirk Looschelders, *Schuldrecht: Besonderer Teil* (13th ed. 2018), nos. 541 et seq.; Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 647.

(lawyers, accountants, tax advisors, commercial agents, etc.) with their customers. Employment contracts are dealt with in § 611a BGB, but this field of law is dominated by many rules outside the BGB protecting employees (see chapter on employment law). A special form of service contract is the ‘treatment contract’ (*Behandlungsvertrag*) entered into by a doctor and a patient, which was incorporated into the BGB in 2013 (§§ 630a–h BGB).²⁵¹ Essentially, these provisions codify the rules on medical malpractice that have been developed by the courts over the years.²⁵²

[F] Contracts for Work and Related Contracts

[1] Structure of the Law

Under a contract for work, the contractor (*Werkunternehmer*) promises to produce a certain result (the work) in exchange for a remuneration, paid by the employer (*Besteller*). In April 2017, the German legislature enacted a major reform of the rules on these contracts, which entered into force on 1 January 2018.²⁵³ The revision overhauled the existing structure of the law significantly, as rules on consumer protection were implemented and different variants of contracts for work were codified. The section on contracts for work is divided into three parts: The first part deals with contracts for work, including construction contracts, in general (§§ 631–650o BGB); the second part sets forth special rules for contracts with architects and engineers (§§ 650p–650t BGB); and the third part lays down rules for real estate development contracts (*Bau trägervertrag*, § 650u–650v BGB). For reasons of space, the following overview focuses on selected general rules for contracts for work and on construction contracts.

[2] General Rules for Contracts for Work

§§ 631–650 BGB are applicable to contracts for work of any kind. These rules specify the mutual obligations of the parties. The contractor has to produce the promised work and the employer has to pay the remuneration agreed upon (§ 631 I BGB).²⁵⁴ The object of the contract may concern the production or modification of an object or any other

251. *Gesetz zur Verbesserung der Rechte von Patientinnen und Patienten* of 20 February 2013, BGBl. I 2013, 277.

252. Gerhard Wagner, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. IV (7th ed. 2016), Vor § 630a BGB no. 8.

253. *Gesetz zur Reform des Bauvertragsrechts, zur Änderung der kaufrechtlichen Mängelhaftung, zur Stärkung des zivilprozessualen Rechtsschutzes und zum maschinellen Siegel im Grundbuch- und Schiffsregisterverfahren* of 28 April 2017, BGBl. I 2017, 969. For details, see Jochen Glöckner, ‘BGB-Novelle zur Reform des Bauvertragsrechts als Grundlage effektiven Verbraucherschutzes’, *Verbraucher und Recht* 2016, 123 et seq. (part 1), 163 et seq. (part 2) (on the proposed bill); Gerd Motzke, ‘Der Reformgesetzgeber am Webstuhl des Architekten- und Ingenieurrechts’, *Neue Zeitschrift für Baurecht und Vergaberecht* 2017, 251 et seq. The reform’s scope is criticised by Martin Illmer, ‘Warum nur Bauverträge?’, *Zeitschrift für Rechtspolitik* 2017, 122 et seq.

254. For an implied setting of remuneration, see *supra* §6.03[B][1].

result that may be achieved by a service (§ 631 II BGB). Contracts for work concern, e.g., the construction of a building, the cutting of hair, performance of a concert or the transportation of a person. However, if the promisor undertakes to produce a movable object and deliver the same to the employer, this so-called *Werklieferungsvertrag* is governed by sales law (§ 650 BGB).

If the work conforms to the standards agreed upon by the parties, the employer has to approve the work (*Abnahme*, § 640 I 1 BGB). Approval can be declared expressly or impliedly, e.g., by paying for the service rendered despite obvious defects. To ensure a timely approval, it is assumed as a matter of law after the lapse of a reasonable period set by the contractor in the event the employer is unable to point to any defect in the work to justify withholding approval (§ 640 II BGB). The same should apply if the employer names only a very minor defect.²⁵⁵ Upon *Abnahme*, the remuneration becomes due (§ 641 BGB), unless the parties have agreed otherwise. The contractor may, however, demand partial payment (*Abschlagszahlung*) beforehand pursuant to § 632a BGB. If the nature of the work excludes an *Abnahme*, as in the case of a concert or transportation service, completing the work triggers the legal consequences associated with an approval by the employer (§ 646 BGB).²⁵⁶

The structure of the remedial system for contracts for work is similar to that of sales law. §§ 633–639 BGB supplement the general rules discussed above (*supra* §6.06) with regard to defective performance, i.e., defects as to quality and title (*Sachmängel, Rechtsmängel*).

Under the law of work contracts, the contractor has to produce the work free of defects (§ 633 I BGB). The parties may define the standards the work has to comply with (§ 633 II 1 BGB), which is regularly done in larger transactions such as construction contracts. In the absence of such an agreement, the work is free of any defects if suitable for the contractually intended use (§ 633 II 2 no. 1 BGB) or for the customary use that the employer may expect (§ 633 II 2 no. 2 BGB). Finally, a contractor producing a different work or a lesser amount than agreed upon also presents a defect as to quality (§ 633 II 3 BGB).

Where the work is defective under § 633 BGB, the remedies of the employer are listed in § 634 BGB. This provision is structured similarly to § 437. It links the special rules in the law of contracts for work with the general rules for breach of contract described above. As in sales law, the employer can ask the contractor to cure the defect by repairing it or producing a new work (§§ 634 no. 1, 635 BGB) irrespective of the issue whether the contractor acted with ‘fault’ or not. If the contractor fails to cure the defect within a reasonable grace period, set by the employer, the latter may cure the defect himself (or ask a third person to do so) and charge the contractor for expenses incurred in doing so (§§ 634 no. 2, 637 BGB). The employer may – if the general conditions are met (§§ 634 no. 3, 636, 323, 326 V BGB) – also terminate the contract, which usually requires the setting and lapse of a grace period. In addition, the employer

255. Ralf Leinemann, ‘Das neue Bauvertragsrecht und seine praktischen Folgen’, *Neue Juristische Wochenschrift* 2017, 3113, 3114; Tobias Breitling, ‘Abnahme und Zustandsfeststellung nach neuem Recht’, *Neue Zeitschrift für Baurecht und Vergaberecht*, 2017, 393 et seq.

256. Hein Kötz, *Vertragsrecht* (2nd ed. 2012), no. 683.

may demand a price reduction should he want to keep the work as it is (§§ 634 no. 3, 638 BGB). Finally, the employer is entitled to claim damages in accord with the general rules (§§ 634 no. 4, 636, 280, 281, 283, 311a BGB) or, alternatively, reimbursement of expenses incurred in the expectation of performance (§§ 634 no. 4, 284 BGB).

Irrespective of an existing defect, the employer may terminate (*kündigen*) the contract at any time before the contractor finishes the work without reason (§ 648, 1 BGB). In this case, the employer has to pay the agreed-upon remuneration but may deduct the contractor's saved expenses or the sum of money the contractor acquired or could have acquired from making use of his labour resources in another way (§ 648, 2 BGB). In addition, either party has the right to terminate the contract for a compelling reason (§ 648a BGB). This usually requires a prior warning and the setting of a reasonable period of time to allow the contractual partner to cure the breach, unless such a warning can be dispensed with pursuant to §§ 648a III, 314 II, 323 II nos. 1, 2 BGB.²⁵⁷

[3] (Consumer) Construction Contracts

Construction contracts concern the construction, restoration, demolition or reconstruction of a building (§ 650a I BGB). As these contracts often involve high stakes and pose special problems, e.g., concerning changes to the work the constructor is to carry out, the German legislature decided to codify special rules for this important type of contract, namely §§ 650a–650h BGB. They contain, e.g., a mechanism which enables the parties to modify the remuneration after the conclusion of the contract in cases (i) where the employer demands changes to the work to be carried out or (ii) if such changes are necessary to reach the purpose of the contract (§ 650b BGB). If the parties do not reach an agreement on the modification of the price within thirty days, the employer can order the contractor to effect the changes necessary to reach the purpose of the contract, provided that he communicates these changes in text form. Consequently, he has to bear the additional costs (§ 650b II 1, 650c BGB). In the event that the employer merely wants to modify the work even though changes are not necessary to reach the purpose of the building contract, the contractor is obliged to effect these changes only if doing so is reasonable for him (§ 650b II 2 BGB).²⁵⁸

The parties to construction contracts often incorporate (at least parts of) the General Conditions for Construction Works (*Vergabe und Vertragsordnung für Bauleistungen, Teil B: Allgemeine Vertragsbedingungen für die Ausführung von Bauleistungen* = VOB/B) into their contract. This set of boilerplate provisions was drafted by an institution composed of representatives of public bodies that often commission building works, representatives of the construction business, and technical experts. These

257. Ralf Leinemann, 'Das neue Bauvertragsrecht und seine praktischen Folgen', *Neue Juristische Wochenschrift* 2017, 3113, 3114.

258. For details, see Klaus Englert & Florian Englert, 'Die 'Zumutbarkeit' der Befolgung von Anordnungen nach dem neuen Bauvertragsrecht', *Neue Zeitschrift für Baurecht und Vergaberecht* 2017, 579 et seq.

General Conditions build upon the general rules of the BGB and adapt them to the needs of construction contracts.

§§ 650i–650n BGB provide special rules for consumer construction contracts. For the most part, these rules are mandatory (§ 650o BGB). It is important to note that, by definition, not all contracts concluded between a consumer and an entrepreneur on construction works qualify as consumer contracts. § 650i I BGB defines these contracts as agreements on the construction of a new building or the reconstruction of an existing one. Under a consumer construction contract, the contractor (entrepreneur) has, *inter alia*, to provide detailed information about the work to be carried out (§ 650j BGB), and the law restricts his ability to demand partial payments (§ 650m BGB). The consumer is entitled to revoke the contract within fourteen days after its conclusion unless the contract was recorded by a notary public (§§ 650l, 355 BGB).

[G] Suretyship and Guarantee

Rules on securities are regulated primarily in the BGB's part on property law (see chapter on property law). A security interest of practical importance that is dealt with in the law of obligations is the suretyship contract (*Bürgschaft*). A suretyship is concluded between the surety (*Bürge*) and a creditor to secure a debt of the principal debtor (*Hauptschuldner*), § 765 I BGB. To be valid, the contract must be concluded in writing (§ 766, 1 BGB) – unless the surety is a merchant who concludes the suretyship for commercial purposes (§ 350 HGB). Irrespective of this, fulfilment of the contractual obligation by the surety remedies any defect in form and validates the surety contract (§ 766, 3 BGB). Suretyship is premised on the main debt, even though it is a distinct contract. The term of art used in German legal doctrine is that of *Akzessorietät* (accessory relationship) between the suretyship and the main debt. The principal debt determines the liability of the surety (§ 767 I 1 BGB). If the main debt does not exist, either because the main debtor rescinded the main contract or the contract is void for other reasons, the creditor cannot demand payment under the suretyship. Similarly, where the principal debtor paid up part of his debt, the liability of the surety diminishes accordingly. The principle of *Akzessorietät* also explains why the surety can raise certain defences against the creditor even if the main debtor has waived them (§ 768 BGB).

As the surety is only a substitute and not a joint debtor, the drafters of the BGB gave him special defences of his own, which he can raise against the creditor as long as he has not waived them by agreement. If the main debtor would be entitled to rescind the contract (but does not do so), the guarantor can refuse to satisfy the creditor (§ 770 I BGB). The same holds true when the creditor could obtain satisfaction by off-setting his claim with a claim he has against the main debtor (§ 770 II BGB) or – within certain limitations – where the creditor has not tried to seek satisfaction from the main debtor (§§ 771, 773 BGB).

Given that the accessory principle can make it difficult for the creditor to receive prompt payment from the surety, parties may therefore have resort to another type of security interest, the guarantee (*Garantievertrag*), which is not expressly regulated in

the BGB. This security interest is independent from the main debt. Where a bank provides such a guarantee for a commercial transaction, it is often a ‘guarantee on first demand’ (*Garantie auf erstes Anfordern*), which is not only independent of the secured debt but must also be honoured immediately upon the creditor’s request. Objections of the guarantor with regard to the main debt are usually excluded, apart from claims of an abuse of law.

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