REPORT

German Contract Law Five Years After the Fundamental Contract Law Reform in the Schuldrechtsmodernisierung

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Abstract: After five years, core questions regarding the large contract law reform in Germany of 2002, the Schuldrechtsmodernisierung, have been answered in the case law, mostly by the German Supreme Court. The article discusses clarifications with respect to: the extent to which consumer law protection applies; the concept of non-conformity with the contract and the remedies based on such non-conformity under the EC Sales Directive (and its German transposition); the different kinds of damages which can be distinguished and questions of their computation; and finally the role which the new legal model plays when standard contract terms in pure business transactions are controlled. The German case law is astonishingly dense in all these respects already.

I. Introduction

Since 1 January 2002, Germany has had a largely new law of obligations, namely a new sales and more generally a new (general) contract law.[1] This is now to be found in books 1 and 2 of the German Civil Code (*Bürgerliches Gesetzbuch [BGB]*). The structure of this reform has already been described earlier in this journal.[2] Increasingly though, this structure has been filled out by case law which is interesting in different respects. In many cases, the German Supreme Court – the *Bundesgerichtshof (BGH)* – has formed its

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1 *Bundesgesetzblatt* (German Official Journal) 2001 I, 3138. For the host of literature on the reform, see references next footnotes. The rules referred to in the following can be found in English in: http://www.iuscomp.org/gla/index.html (Book 1 and 2, §§ 1–852 *BGB*) and http://www.gesetze-im-internet.de/english_bgb/ (official translation for the ministry of justice).

2 Sectoral and National Developments: S. Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002', (2005) 1 *European Review of Contract Law* 128–147. The whole of the German contract law is well accessible also in English, see B. Markesinis / H. Unberath / A. Johnston, *The German Law of Contract – A Comparative Treatise* (2nd ed, Oxford: Hart, 2006).

opinion. Indeed, the fundamental issues raised by the new regime seem to have been answered in some detail already.[3] These issues cover, first, core material with respect to (the transposition of) the *acquis comunautaire*, namely: questions related to the concept of consumers and the extent of protection (see below section II); and questions related to the concept of non-conformity and the remedies for non-conformity under the Sales Directive, namely its sections 2, 3 and 5 (see below section III).[4] The issues include also, second, many questions in which solutions in German Law, without serving as a transposition of EC Law strictly speaking, may well be seen as paradigmatic for the emergence of a European Contract Law, ie a set of modern solutions which might arouse interest, but also criticism well beyond its frontiers. Among the many issues which could be addressed, two have been chosen: some important questions concerning the distinction between and the computation of different kinds of damages (see below section IV); and finally the role which the new legal model plays in the control of standard contract terms in pure business transactions (see below section V).

Not all of the case law of the last five years can be dealt with here – not even that of the Supreme Court, which stems mainly from the last two years. There is as well highly interesting case law – in particular – on the notion of

3 See the recent survey: S. Lorenz, 'Fünf Jahre "neues" Schuldrecht im Spiegel der Rechtsprechung', *Neue Juristische Wochenschrift* 2007, 1–8, 8: '… dürften alle grundsätzlichen strukturellen Fragen geklärt sein …'; a fairly complete picture if supplemented by S. Lorenz, 'Schuldrechtsmodernisierung – Erfahrungen seit dem 1. Januar 2002', in E. Lorenz (ed), *Karlsruher Forum 2005* (Karlsruhe: Versicherungswirtschaft, 2006) 5–138; some other surveys in J. Glöckner, 'Die Umsetzung der Verbrauchsgüterkaufrichtlinie in Deutschland', *Juristenzeitung* 2007, 652–665; B. Dauner-Lieb, 'Drei Jahre Schuldrechtsmodernisierungsgesetz', *Anwaltsblatt* 2004, 597–601; I. Saenger / U. Klockenbrink, 'Das "neue" Kaufrecht in der Rechtsprechung 2002–2005', *Zeitschrift für das Gesamte Schuldrecht* 2006, 61–65.

4 For the Sales Directive, see, among others: M. Bianca / S. Grundmann (eds), *EU Sales Directive – Commentary* (Cologne: Schmidt, 2002); G. de Cristofaro, *Difetto di conformità al contratto e diritti del consumatore – l'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie dei beni di consumo*, (Padova: Cedam, 2000); S. Pellet, *La garantie légale des biens de consommation – étude comparée des droits français, anglais et communautaire* (Villeneuve d'Ascg: Presses universitaires du Septentrion, 2003); A. Orti Vallejo, *Los defectos de la cosa en la compraventa civil e mercantil. El nuevo régimen jurídico de las faltas de conformidad según la Directiva 1999/44/CE* (Granada: Ed Comares, 2002); T. Repgen, *Kein Abschied von der Privatautonomie – die Funktion zwingenden Rechts in der Verbrauchsgüterkaufrichtlinie* (Lübeck: Schöning, 2001).

entrepreneur,[5] on acceptance of warranties,[6] and revocation[7] relating to online auctions and on when an animal can be put in a par with other used goods.[8]

II. Further Developments with Respect to the Notion of Consumer

Under the new contract law, a certain set of rules applies only to consumer contracts even though the German legislator has implemented the EC Sales Directive for all sales contracts.[9] Such rules which apply only to consumers are, for instance, those on the right to revoke one's own declaration of will[10] or to exclude the warranty of quality.[11]

In 2000,[12] the German legislator introduced a legal definition of the notion of consumer into the German Civil Code *(BGB).* § 13 *BGB* says that a consumer is a natural person who enters into a legal transaction for a purpose which is not related to his trade, business or profession. This definition is nearly identical to the one used by the ECJ and EC directives.[13] On the other hand, for a long period of time the German overall concept differed from the European one. In Germany, the concept of the *'poorly informed'* or *'inadvertent' consumer*[14] had dominated the discussion, that is, a consumer who is uncritical of advertisements and of moderate intelligence. The European concept on the other hand is that of the reasonably well informed consumer.[15]

5 Bundesgerichtshof (BGH) *Official Reports (BGHZ)* (2006) 167, 40–57 = *Neue Juristische Wochenschrift* 2006, 2250–2254, professional character also without intention to make gains.

6 BGH *Official Reports (BGHZ)* (2006) 170, 86–99 = *Neue Juristische Wochenschrift* 2007, 1346–1350.

7 BGH *Neue Juristische Wochenschrift* 2005, 53–56.

8 BGH *Official Reports (BGHZ)* (2006) 170, 31–47 = *Neue Juristische Woche* 2007, 674–678.

9 See below section III sub 1.

10 § 355 para 1(1) *BGB.*

11 § 475 para 1(1) *BGB.*

12 *Bundesgesetzblatt,* I 2000, 897. The rule has been reconfirmed by the *Schuldrechtsmodernisierungsgesetz* in 2002.

13 A. von Vogel, *Verbrauchervertragsrecht und allgemeines Vertragsrecht* (Berlin: de Gruyter, 2005) 19. There are only little discrepancies: § 13 *BGB* does not refer to a certain type of legal transaction but to legal transactions in general while the directives apply only on doorstep transactions, consumer credit etc.

14 The so-called 'flüchtiger Verbraucher', see BGH *Neue Juristische Wochenschrift* 1957, 182 and still BGH *Wettbewerb in Recht und Praxis* 2000, 517–520.

15 See case 238/89 *Pal* v *Dalhausen* [1990] ECR I-4827, 4849 (ECJ); case 470/93 *Mars* [1995] ECR I-1923, 1944 (ECJ); case 210/96 *Gut Springerheide* [1998] ECR I-4657, 4694 (ECJ). Now this concept is also used in secondary legislation: see Directive 2005/29/EC 11 June 2005 concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7 EC and 98/27/EC, *OJEC* 2005 L 149/22–39.

The German concept led to a very high standard of protection with respect to interpretation and review of unfair contract terms and standard contract terms. However, the *BGH* nowadays also tends to adopt the European concept of consumer, so that both consumer concepts are very similar if not identical.[16]

1. Agency Agreements

The decision by the *Bundesgerichtshof* on the admissibility and legal consequences of agency agreements shows that the changed concept of consumer has repercussions well beyond the mere question of definition.[17] Because any restriction of liability concerning defects is largely excluded between consumers and business people, agency agreements are increasingly used, mainly in the dealing of used cars: the car dealer does not buy and resell the car but sells the car on behalf of the owner. If the owner himself is a consumer, liability for defects can be considerably restricted. The *Bundesgerichtshof* decided that this construction is not *per se* a circumvention of consumer protection rules because – among other aspects – the consumer himself decided to renounce the higher standard of protection. In order to state whether there is abuse of agency agreements, it is not the position of the buyer that is taken into consideration, but it is asked which party bears the economic risk. If the seller bears it, no circumvention can be stated. It is only in cases where the car dealer warrants a minimum price to the seller or alternatively takes on the economic risk in other ways that the agency agreement is regarded as a circumvention of the consumer protection regime.[18] This decision is consistent with the concept of the reasonably well informed consumer, but not at all with that of the *'inadvertent' consumer* and shows the change in the general approach under German law.

2. Leasing

Another decision of the *Bundesgerichtshof* had to deal with a financial leasing arrangement.[19] The lessee, a consumer, was interested in a used car offered for

16 The BGH has now abandoned this concept even in the law of unfair competition where it had originally been applied: BGH *Neue Juristische Wochenschrift – Rechtsprechungsreport* 2000, 1490–1492.

17 BGH *Neue Juristische Wochenschrift* 2005, 1039; and in view of leasing BGH *Neue Juristische Wochenschrift* 2006, 1066, 1067 et seq.

18 BGH *Neue Juristische Wochenschrift* 2005, 1039, 1040 et seq.

19 BGH *Neue Juristische Wochenschrift* 2006, 1066, 1067 et seq.

sale by a car dealer. The parties agreed on financing the purchase price by a leasing agreement. Therefore, the lessor bought the car from the car dealer. The lessor and the car dealer agreed to exclude the warranty in the sales contract. The leasing contract between the lessor and the lessee contained a parallel clause excluding the warranty in the standard contract terms, and conferred, instead, all the rights under the sales contract to have defects repaired to the lessee. When the lessee requested the car dealer to have certain defects of the car repaired, the seller invoked the clause excluding the warranty in the sales contract. The court held that the car dealer was not liable and could invoke the clause in the sales contract and that – as in the case on agency agreements – no circumvention of consumer protection rules could be found. A circumvention would require that the construction deprived the consumer of all legal warranties. According to the court, the lessee/consumer had, however, a legal warranty against the lessor since the standard term excluding the warranty contained in the leasing contract was void because of infringement of § 307(1) *BGB* (unreasonable disadvantage). Therefore, the lessor is liable for defects of goods subject to finance lease.

3. Dual Use

The application of consumer protection rules is problematic as well where the legal transaction relates partly to business interests *and* – at the same time – partly to the private sphere (so-called 'dual use'). The *Bundesgerichtshof* has not yet dealt with this question explicitly. However, the *European Court of Justice* has ruled already that under the Brussell's Convention[20] a person who enters into an agreement for dual use can only be regarded as consumer if the business aspect is totally marginal.[21] Referring to this decision, the Appellate Court in *Celle* recently went even further.[22] In this decision, the court held that even if the purpose of a sales contract is mainly private and the relation to business is, if it exists at all, marginal, it is not necessarily to be regarded as a consumer contract. The will of the parties, which is to be determined objectively, should be decisive. As a consequence, a lawyer who buys a car has to tell the seller that the car is meant for private purposes. Otherwise he risks losing the benefits of consumer protection.

The *Bundesgerichtshof* argued in relation to different circumstances in the same way.[23] In a case where a consumer pretended to act in the course of his

20 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, *OJEC* 1978 L 304/36.

21 Case 464/01 *Gruber* v *BayWa AG* [2005] ECR I-439 (ECJ).

22 OLG Celle, 4 April 2007, 7 U 193/06.

23 BGH *Neue Juristische Wochenschrift* 2005, 1045.

business in order to get a sales discount which is usually available only for business people, the court decided that only the point of view of the other party, determined in an objective way, is relevant to the question whether a consumer sales contract has been concluded.[24]

4. Setting up of New Business Enterprises

Both the *Bundesgerichtshof* and the *European Court of Justice* have ruled that a person who is setting up a business cannot be treated like a consumer even though the business has not yet been started at the moment when the contract was formed.[25] The German Supreme Court decided this for the following case: a doctor acquired a unit of a medical group and the contract contained an arbitration clause whose validity was challenged. Under the German Code of Civil Procedure (*Zivilprozeßordnung – ZPO*) arbitration agreements which involve consumers have to comply with additional formal requirements (§ 1031(5) *ZPO* in conjunction with § 13 *BGB*). Therefore, the validity of the arbitration clause depended on whether the doctor acted still as a consumer when setting up her medical practice. It was held that those who are setting up a business do not need consumer protection, because they do not act in their role as consumers any longer.[26] The court referred to the *ECJ*'s decision because – following the intention of the German legislature – the concept of consumer in § 1031(5) *ZPO* in conjunction with § 13 *BGB* is related to the notion used in the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[27] and has therefore a European background.

5. Narrow Interpretation of the Notion of Consumer

The *ECJ*[28] explicitly prefers a narrow interpretation. The German jurisprudence is interpreting the notion of consumer very narrowly, too, even though the courts do not state this explicitly. This shows that the notion of the consumer under the new contract law is very much the same as the European one. When it comes to the question whether the party to a contract is or is not a consumer, the German courts in the above mentioned cases refer always to

24 BGH *Neue Juristische Wochenschrift* 2005, 1045, 1046.
25 BGH *Neue Juristische Wochenschrift* 2005, 1273 and Case 269/95 *Benincasa* [1997] ECR I-3767 (ECJ).
26 BGH *Neue Juristische Wochenschrift* 2005, 1273, 1274.
27 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEC 1993 L 95/29–34.
28 Case 269/95 *Benincasa* [1997] ECR I-3767 (ECJ).

the case law of the *ECJ* and have until now always followed its reasoning. It is very likely that the *Bundesgerichtshof* will do so as well in dual use cases. On the other hand, the concept of the *'inadvertent' consumer* has been abandoned in German contract law. This makes sense since the standard of consumer protection in Germany and Europe is relatively high and there are practical needs to restrict its scope of application. Today, it can be stated that the notion of consumer under the new German contract law is highly influenced by European law!

III. Sales Law

1. State of Transposition

The German legislature has transposed the EC Sales Directive for all sales contracts. Thus, except for cases where the UN Convention on the International Sale of Goods applies, just one set of rules is applicable – irrespective of the role in which the parties acted (C2C, B2B or B2C) and also irrespective of the kind of goods sold (immovables or movables, used goods or new goods). There are only very few exceptions, namely that the following rules apply only if the retail sale was a consumer sale: the presumption that a good was defective also at the moment of its transfer if the defect appears in the six months after its transfer (Article 5(3) EC Sales Directive, § 476 *BGB*); the rule on transparency of a producer's warranty (Article 6 EC Sales Directive, § 477 *BGB*); and the rules on recourse of the retail seller against the members of the distribution chain (Article 4 EC Sales Directive, §§ 478 *et seq BGB*). The German legislature has transposed the directive so faithfully that indirect effect (interpretation in conformity with the directive) always seems possible. One exception seems possible for the duty to pay compensation for the use already made in cases where the good is replaced (see below section c)) and perhaps for the prerequisite that also consumers must set an additional period of time before they can ask the secondary remedies.[29]

2. Non-Conformity with the Contract

In substance, § 434 *BGB* transposes exhaustively Article 2 of the EC Sales Directive. It does stress, however, more clearly party autonomy with respect to fixing a standard of conformity.

There is no substantial case law discussion yet for such core questions as: whether there is indeed party autonomy for parties who fix a standard of

29 Not in line with the directive according to most authors, see S. Lorenz, in *Münchener Kommentar Bürgerliches Gesetzbuch – vol 4: Schuldrecht – Besonderer Teil I* (4th ed, Munich: C.H.Beck, 2004) Introduction to § 474 *BGB* para 20 (pleading, however, for indirect effect also in this respect).

conformity below market average, observing the requirement of transparency;[30] in which cases advertising is concrete enough – ie in which cases it states 'hard facts' – to be binding on the seller and how the excuses have to be construed which the Directive states in his favour.[31]

There is, however, some case law on the presumption that a good was defective also at the moment of its transfer if the defect appears in the six months after its transfer (Article 5(3) EC Sales Directive and § 476 *BGB*). In three cases, the *BGH* held that the presumption also applies if the defect is such that it can well have been caused only after delivery;[32] this is indeed the scope of a presumption which has the effect of reversing the burden of proof and this is also in line with the scope of the directive to protect consumers with respect to questions of proof. Only in case of defects which even a non-professional could easily see or detect at the time of delivery would the court say that the presumption is not justified given the 'kind of defect'. In the first case referred to, the court held, however, that the purchaser has to specify how the defect occurred and the court has to investigate into all alternatives which the seller then invokes (in that case, it seemed possible that the purchaser had always made the same mistake when driving and that this caused the defect of the motor). Altogether, the court is rather restrictive when interpreting the exceptions and thus protects consumers also in this respect. In another case, much in line with this trend, the court held that a seller may not state certain facts ('the car did not have any accident so far') and then restrict it by specifying in a form attached that this is so (only) 'according to the last owner'.[33] Finally, in an astonishing decision,[34] the court decided that commercial actors

30 See, on this question, H.P. Westermann, 'Das neue Kaufrecht', *Neue Juristische Wochenschrift* 2002, 241, 243.

31 See, on this question, OLG München *Neue Juristische Wochenschrift – Rechtsprechungsreport* 2005, 494; F. Bernreuther, 'Sachmangelhaftung und Werbung', *Monatsschrift für Deutsches Recht* 2003, 63–68 (with further references); most recently: T. Kasper, 'Die Sachmangelhaftung des Verkäufers für Werbeaussagen', *Zeitschrift für das gesamte Schuldrecht* 2007, 172–181; see also (with Austrian background) S. Augenhofer, *Gewährleistung und Werbung. Das neue Gewährleistungsrecht für Werbeaussagen* (Wien: Linde, 2002).

32 BGH *Official Reports (BGHZ)* (2004) 159, 215–220 = *Neue Juristische Wochenschrift* 2004, 2299; 2005, 3490; and 2006, 434 (the latter dealing with the reversal of the presumption in cases where repair by the purchaser has destroyed the pieces of evidence).

33 BGH *Official Reports (BGHZ)* (2006) 168, 64–79 = *Neue Juristische Wochenschrift* 2006, 2839, 2839 et seq (in this case, the car had passed the inspection of a provider with whom this seller intimately collaborated [his car 'bank'] and it was evident that in this inspection the remains of the accident must have become apparent).

34 BGH *Official Reports (BGHZ)* (2006) 164, 196–220 = *Neue Juristische Wochenschrift* 2006, 47, 49.

in a B2B relationship may not write the same presumption into a standard contract term. It would deviate too much from what is the legal paradigm in commercial law. Is there really such a deep divide necessary between consumer law and general contract law? Mandatory imposition of a model on the one hand and mandatory prohibition of the same model on the other – verité en deça des Pyrenées, mensonge au delà[35] (see also below section V)!

3. Replacement and Repair

In a first important set of decisions on replacement and repair as the prime remedies, the *Bundesgerichtshof* had to decide on the question *whether these remedies were available at all*. In a first decision, the court states that the remedy of replacement is not only available in the case of generic goods which, of course, can be replaced because they are available identically in many copies.[36] The court had to deal with a used car, which is probably the most common case of a non-generic good. The court asked the question whether in such cases, a dealer can replace the car sold by another similar used car. Indeed, the used car market is probably the one best functioning for used goods and used cars are often traded in a way as if they were standardised (generic) goods. Even in this (used goods) market, however, the German Supreme Court does not want to state a general rule that replacement is always possible. The court argues that often purchasers inspect the car and get a general impression of it, that this impression is an overall impression consisting of many aspects (motor, general state of conservation, aesthetics etc) and that this cannot easily be compared from one car to another. There is, therefore, even in the case of motor-vehicles, no presumption that replacement is possible in the case of used goods. This protects, of course, clients quite considerably in that they may insist on their preferences. Conversely, the court has been astonishingly restrictive with respect to repair. In one case,[37] a dog had been sold by the breeder. The client became fond of the dog before it became evident that there was a genetic deficiency, which by relatively (but not abnormously) expensive surgery could be cured only in part. The court found that replacement was no alternative because of the client's affection for the dog; this decision again protects the client in that his individual preferences are safeguarded and this trend may be important also in other cases. On the other hand, the court construes the concept of repair narrowly. Because it

35 B. Pascal, *Œuvres complètes* (Paris: Gallimard, 2000, original of 1623–1662) Chapitre XXV – Faiblesse de l'homme.

36 BGH *Neue Juristische Wochenschrift* 2006, 2839, esp 2041.

37 BGH *Monatsschrift für Deutsches Recht* 2006, 141–142.

was impossible to cure the dog completely, the court did not give the remedy of repair … but only the secondary remedies, among which, of course, rescission of the contract was of no use to the new owner either. The court held, that the costs of the surgery were owed as damages, i.e. only in a case of negligence of the seller. The case shows the shortcomings of making parts of the full guarantee of quality of a good depend on fault. The seller could have insured the risk. He can calculate typical risks such as a certain percentage of genetic aberrations into the price. Fault and sometimes even the causal link are infinitely difficult to asses. Moreover, the decision is rather formal in that it says that only a successful repair is repair within the meaning of the provision. This is a very formal reasoning and probably not in line with the spirit of other parts of the Code. Even a relatively high price for the surgery (twice the value of the dog in this particular case) should be acceptable as is shown by various rules under German Law which take into consideration that an animal is different from goods in this respect (see §§ 90a and 251(2) [2] *BGB*).

A second question when dealing with repair and replacement is whether the client has to pay for the use already made when indeed he receives a new good in replacement. Cars, for instance, typically loose about 15–25 % of their value in the first year; replacement at the end of the first six months and under the shadow of the presumption (!) would thus give the consumer a 'surplus' of 8–12 % if no compensation at all was owed for the use. The *Bundesgerichtshof* was of the opinion that German Law asked for such a compensation, but was not sure whether the directive excluded it. The court therefore referred the case to the ECJ[38] – rightly so. Even though the EC Sales Directive should be interpreted the same way as German Law, this is by no means clear (enough under the C.I.L.F.I.T. standards). The case is important in two respects. In substance, it raises one fundamental question: this is whether consumers are only weaker in bargaining power (more precisely: information) or whether consumer law should be aimed at awarding windfall profits to consumers wherever possible. In the particular case, the consumer would not only get a new good, but also half a year of use of a car for free. He would get it for free although such a 'lunch' is costly and not for 'free' on the market. The scope of the directive would seem to be to establish a regime which is fair to the consumer, but, if this condition is met, opts for the least cost intensive remedy.[39] This would speak quite clearly in favour of

38 BGH *Neue Juristische Wochenschrift* 2006, 3200, 3201 et seq.

39 See, for instance, S. Grundmann, 'Regulating Breach of Contract – The Right to Reject Performance by the Party in Breach', (2007) 3 *European Review of Contract Law* 121–149, 129–137 (with further references).

an interpretation which does not give the consumer an additional wind-fall profit. The second question arises if the ECJ decides differently. Then the ECJ would have to consider a case where the national court (the *Bundesgerichtshof*) does not see any lee-way for an interpretation in conformity with the directive but the national legislature did not want to violate the directive.[40] The ECJ would have to decide whether even in such cases it wants to impose indirect effect.[41]

4. Rescission and Reduction of Price

Another line of cases deals with the transition from replacement and repair to rescission and reduction of price. These cases deal with the 'second chance' which the purchaser must give to the seller.[42] In essence, they say that the purchaser who sought repair somewhere else and did not grant an additional period of time after the defect became apparent, does not only loose the right to rescind the contract, but does not even have the right to claim the amount of money which the seller saved by not having to repair the goods (and which the purchaser spent instead). This type of 'enrichment' was not seen as 'unjust' – no analogy was accepted although there are some rules in German law which at least give a right to what the other party saved. The cases turned around analogy, somehow as well around the interest of the seller (or producer) to have the defective parts back in order to inspect them. The argument that the seller's position with respect to proof of the non-conformity is affected is irrelevant, as long as the purchaser has positively proven that, in this particular case, the good was defective at the time it was delivered. If all these interests are safeguarded, however, the negation of a claim in this type of case seems rather formal. Both parties are to blame, but one party suffers all the loss, including the part of it which would have been the minimum which the other would have had to carry. In fact, the second chance is about giving the seller the right to choose the least costly remedy (footnote 17), not about

40 In this sense quite explicitly *Bundestags-Drucksache (BT-Drucks)* 14/6040, 79–83 (core goal, intensive summary and interpretation of the directives), *et passim* (for many single provisions).

41 In favour of indirect effect even in such cases S. Grundmann, 'Richtlinienkonforme Auslegung im Bereich des Privatrechts – insbesondere: der Kanon der nationalen Auslegungsmethoden als Grenze?', *Zeitschrift für europäisches Privatrecht* 1996, 399–424, at 408–424; and – in our view – also case 144/04 *Mangold* [2006] ECR I-9981 (ECJ). Most authors think differently though.

42 BGH *Neue Juristische Wochenschrift* 2005, 1348; Bundesverfassungsgericht (BVerfG) *Zeitschrift für das Gesamte Schuldrecht* 2006, 470; BGH *Neue Juristische Wochenschrift* 2006, 1195 (even if the purchaser is not sure whether the good was defectuous at the time of delivery, he must turn to the seller first to have his rights safeguarded).

freeing him from his responsibility completely. The solution adopted by the Supreme Court sounds very much like a wind-fall profit.

In another case, the *Bundesgerichtshof* had to decide whether a client who still asks for repair or replacement after the additional period of time has lapsed thereby foregoes the remedies of rescission and reduction of price. The court answers this question to the negative,[43] and this, in principle, is laudable. The seller had his second chance, the potential of putting pressure on him must now increase; the strategic advantage of having all remedies available adds to the purchaser's potential of putting such pressure on the seller. This reasoning speaks, however, also in favour of an exception whenever the seller has now visibly started replacement and has incurred expenditure. The good faith principle in the performance of contracts could be a basis for such an exception.

In one case, the *Bundesgerichtshof* had to decide on the exception that – even after the additional time limit has lapsed – rescission may not be demanded if the non-conformity is 'minor'. Many commentators on the directive interpreted this as encompassing only minimal defects.[44] In line with this trend, the court decided that at least intentional fraud so grossly endangers the other party's autonomous formation of will that, in principle, it can not constitute only a 'minor' violation.[45] This is convincing because the exception is aimed primarily at excluding clients' opportunistic behaviour (taking a minimal defect as a pretext for using the potential of pressure inherent in the remedy of rescission). In scenarios where the other side knows that the particular question is important for this client (though 'minimal' for the rest of the world), the logic of the exception no longer applies. Interpretation in conformity with individual preferences (normative individualism) is paramount – at least if known to both parties.

5. Damages

The EC Sales Directive does not deal with damages. In fact, consumers typically do not have damages which can not be cured by replacement, repair, money-back and reduction of price unless they are hurt in their (physical) integrity; and the latter is already covered by the EC Product Liability Direc-

43 BGH *Neue Juristische Wochenschrift* 2006, 1198: This choice is not a unilateral declaration of will changing the contract structure.

44 M. Bianca, in Bianca / Grundmann, n 4 above, Art 3 para 41–45; S. Jorden / M. Lehmann 'Verbrauchsgüterkauf und Schuldrechtsmodernisierung', *Juristenzeitung* 2001, 951, 961.

45 BGH *Neue Juristische Wochenschrift* 2006, 1960.

tive. Consumers typically do not have consequential damages in the form of pure economic loss. As has been said, however, German Law transposes the Directive also for B2B transactions where such consequential damages are much more of an issue. Therefore, damages had to be part of the overall sales regime – applicable to all sales contracts. With respect to damages, however, the sales law refers to general contract law virtually in total (§ 437 Nr 3 *BGB*).[46] For this reason and because there is considerable case law on damages, including outside sales law, this remedy shall be discussed in the next section, devoted to general contract law.

IV. General Contract Law – namely Damages

1. Types of Damages and Their Distinction

The new law distinguishes between damages which supplement performance and those that provide a substitute for it (§ 280 *BGB* and §§ 281–283 *BGB* respectively). Damages which substitute performance are only granted if additional conditions are complied with. In principle, the debtor has to be given a second chance to perform and has to have failed to profit from it, § 281(1) [1] *BGB*. An exception applies only when the debtor definitely refuses to perform or when special circumstances make the creditor's interest in rejecting performance from this debtor prevail over the interests of the debtor to receive a second chance to perform, § 281(2) *BGB*. In the case of impossibility, § 283 *BGB* is the relevant provision. Again, no second chance needs to be given to the creditor.[47] Giving a second chance by setting an additional period of time is justified by higher costs on behalf of the debtor as compared to damages which supplement performance. The debtor gets the performance (as a 'used' good) which is a fact that can cause significant economic loss.[48] This is what damages substituting performance have in common with rescission because the debtor in both cases gets back what he had delivered as a new product. Therefore, parallel treatment (apart from fault) of both cases makes sense. All this corresponds quite well to the EC Sales Di-

46 With some modification in § 440 *BGB* which, however, is more of a clarification (no deviation or exception) and which refers to the prerequisite that also in some cases of damages an additional period of time has to be set.

47 In practice, the same result would be reached by applying the general rule on damages for substituting performance contained in § 281 *BGB*, because, in cases where the debtor can no longer perform, there is no point in giving him a second chance, see Grundmann, n 2 above, 137 and S. Grundmann, 'Der Schadensersatz aus Vertrag – System und Perspektiven', (2004) 204 *Archiv für die civilistische Praxis* 569, 579 et seq.

48 See also above section III sub 3.

rective so that it can be stated that the German legislator acted in the 'spirit' of the Directive.

Damages which supplement performance (§ 280(1) BGB) only require breach and fault. There is, however, an exception for the case of late performance. In that case, damages which supplement performance cannot be recovered without sending a reminder (§ 286(1) [1] *BGB*) unless the time of performance has been fixed very precisely (see § 286(2 and 3) *BGB*).

It can be difficult to distinguish between those cases where damages can be recovered only under the additional conditions of § 286(1) *BGB* and those where this is not the case, ie which fall under § 280(1) *BGB.* Such differentiation is, however, important when the question arises whether a reminder had to be sent out or not. The most important dispute arose about the classification of damages which occur between the delivery of a defective good and its repair (or the delivery of a new non-defective good).[49] The Appellate Court in *Hamm* recently stated in an *obiter dictum* that § 280(1) *BGB* is the relevant provision in those cases, so no reminder needs to be sent; any other interpretation would violate the will of the legislator.[50] Therefore, the recovery of those damages does not depend on the sending of a reminder and can be claimed whenever the debtor is responsible for the defect. The decided case, though, was about damages which occurred because the seller repaired a car too late but was not responsible for the original defect. The classification of these damages is another question: they surely fall under § 286(1) *BGB*. Therefore, the court was not able to decide about the classification of damages which occur between the delivery of a defective good and its repair. Anyhow, we agree with the court's statement, the core argument should be that the sending of a reminder does not make sense. It would make sense if the performance by the debtor within the additional period of time avoided the occurrence of the loss. Then, indeed, the recovery should be handled under § 286(1) *BGB*. If, on the other side, losses occur irrespective of the reminder, such a reminder would be useless.[51] Damages which occur between the delivery of a defective good and the second performance cannot be avoid-

49 Mangelbedingter Verzögerungsschaden; see C.-W. Canaris, 'Begriff und Tatbestand des Verzögerungsschadens im neuen Leistungsstörungsrecht', *Zeitschrift für Wirtschaftsrecht* 2003, 321–327; H. Heinrichs, in O. Palandt, *Bürgerliches Gesetzbuch – Kommentar* (66th ed, Munich: C.H.Beck, 2006) § 280 para 13.

50 OLG Hamm, Urteil vom 23 February 2006, 28 U 164/05, available at beck-online: BeckRS 2006 07007.

51 D. Medicus, 'Die Leistungsstörungen im neuen Schuldrecht', *Juristische Schulung* 2003, 521–529 at 528.

ed by giving the creditor a second chance. Therefore the statement of the Appellate Court in *Hamm* is laudable.[52]

2. Extent of Damages

Since 2002, a new § 284 *BGB* has been in force. § 284 *BGB* allows the creditor to demand reimbursement of the expenditure which he has incurred because he relied on performance, and to do so instead of demanding compensation, save where the purpose of that expenditure would not have been achieved even if the debtor had not breached his duty. It is important to note that reimbursement under this provision can only be claimed *instead* of damages which substitute performance and that the provision was introduced into the *BGB* in reaction to the extensive case law under the old law. The problem was whether the expenditure could be seen as a loss. The jurisprudence had, indeed, stated that the expenditure made would typically have been regained in case of performance conforming to the contract ('presumption of profitability'). There was one large exception though: expenditure for non-profit purposes were not eligible for compensation under the old law, the presumption of profitability was not applied to them. The leading decision was the *Bremer Stadthallenfall*. A political party rented the town hall of Bremen in order to hold its annual meeting. The town did not comply with the rental agreement because of political reasons (it was a right wing extremist party). In that case, it was held that not any compensation for expenditure that served non-profit purposes could be granted. However, the German law is not that strict any longer. According to § 284 *BGB* the expenditures of the party are now, under the new law, compensable. Furthermore, also strengthening the eligibility for compensation of immaterial losses, § 253(2) *BGB* was placed in the general part of the law of obligations, whereas formerly it had been a rule of tort law only (then § 847 *BGB*). This rule provides for compensation for immaterial losses in cases of personal injury. Thus, there is also a tendency to grant compensation more easily for immaterial loss.

Even though § 284 *BGB* was primarily aimed at helping the debtor to recover expenditures incurred for immaterial purposes, the *Bundesgerichtshof* reconfirmed its old case law that also material losses fall under the scope of application of this provision.[53] This makes much sense given that § 284 *BGB* is

52 Opposite H. Grigoleit / T. Riehm, 'Der mangelbedingte Betriebsausfallschaden im System des Leistungsstörungsrechts', *Juristische Schulung* 2004, 745–749 at 747 et seq.

53 BGH *Official Reports (BGHZ)* (2005) 163, 381, 386 = *Neue Juristische Wochenschrift* 2005, 1198, 1199.

only applicable *instead* of the provisions granting damages substituting performance. The recovery of expenditure can therefore be claimed without having to prove the suffering of material losses. The case decided was about a car sales contract. The buyer had already made significant expenditures on extra equipment when it became apparent that the car had defects. The court allowed the buyer to reject the car and granted recovery under § 284 *BGB* for the expenditures made, even though they did not add to the value of the car.

3. Relation between Contract and Tort Law

Rules on contract law remedies do not exclude the application of tort law.[54] It is therefore possible that damages which are granted under contract law can be recovered under tort law (§§ 823 et seq *BGB*) as well. This problem arises typically when the non-conformity with the contract causes further losses (*Mangelfolgeschaden*). This may cause clashes, namely when prescription of claims under contract and tort law differs. There is a separate regime in sales law, largely based on the minimum standard contained in the EC Sales Directive, with a prescription of two years beginning after the day of delivery (§ 438(2) *BGB*). Conversely, a right of action under tort law expires only three years after the end of the year in which the action arose and the creditor got knowledge of this (§§ 195, 199(1) *BGB*). This is why some authors want to bring into line the prescription of actions under sales law with the regime for torts when injuries are caused because of the non-conformity with a sales contract.[55] Following this view it should not matter whether claims are founded on tort or on sales law. On the other hand, the functions of contract and of tort law are different[56] and so it will be interesting to see if the *Bundesgerichtshof* will have the opportunity to rule on this question.

54 Opposite to what is the case in France, eg, where claims based on contract law cannot be combined with claims based on torts law, 'principe du non-cumul'.

55 C.-W. Canaris, 'Die Neuregelung des Leistungsstörungs- und des Kaufrechts', in E. Lorenz (ed), *Karlsruher Forum 2002: Schuldrechtsmodernisierung* (Karlsruhe: Verlag Versicherungswirtschaft, 2003) 5, 98 et seq; G. Wagner, 'Mangel- und Mangelfolgeschaden im neuen Schuldrecht', *Juristenzeitung* 2002, 475, 479.

56 See S. Lorenz, 'Schuldrechtsreform 2002: Problemschwerpunkte drei Jahre danach', *Neue Juristische Wochenschrift* 2005, 1889, 1889 et seq.

V. The New Legal Model and Its Role in the Control of Standard Contract Terms

Where German Law transposes the EC Sales Directive (and as well the EC E-Commerce Directive), it confers mandatory rights on consumers. In these cases, control of standard contract terms is redundant. German Law, however, controls (standard) contract terms also in pure commercial transactions (B2B).[57] The first judgments have been made under the new regime. Some trends emerge although the case law is not yet very dense. Usually the underlying rationale of a rule of the German Civil Code is considered to be one of ensuring 'fairness' to the partners. Astonishingly, though, a rule in B2B relationships which, very generally, subjects the distribution chain to the same solution as the one provided for in § 479 *BGB* (in case of consumer sales), was held to be void in standard contract terms. The court held that it deviated too much from the model in the law![58] According to § 479(1) *BGB*, there is no prescription in the distribution chain before prescription of the claims arising from the (final) retail sale. §§ 478 and 479 BGB may, however, be interpreted also more positively, i.e. in the sense that recourse in distribution chains (in consumer sales) is part of the legal model not only of the BGB but also of the EC Sales Directive and therefore is accepted throughout Europe. The solution helps making the party who is really responsible for the defect liable so that the anxiety of the *Bundesgerichtshof* to restrict the scope of application of these provisions is hard to understand. The decision restricts entrepreneurial activity in a questionable way.[59]

Another recent decision on control of standard contract terms concerns the possibility of restricting liability in sales contracts. The *Bundesgerichtshof* had to rule on the question under which circumstances the period of prescription may be shortened.[60] The case decided was about a six months old foal that was sold at an auction so that the rules on consumer sales did not apply.[61] Under the (standard) term considered, warranty claims were prescribed within 12 months. The question was whether prescription was to be

57 See namely §§ 307, 310 German Civil Code (BGB).

58 BGH *Official Reports (BGHZ)* (2006) 164, 196–220 = *Neue Juristische Wochenschrift* 2006, 47–51.

59 See on this aspect and for the future interpretation of §§ 478, 479 BGB more generally S. Lepsius, 'Obliegenheiten versus unternehmerische Dispositionsfreiheit als taugliche Prinzipien bei der gegenwärtigen und künftigen Interpretation der §§ 478, 479 BGB?', *Archiv für die civilistische Praxis* (2007) 207, 340–370.

60 BGH *Official Reports (BGHZ)* (2007) 170, 31–47 = *Neue Juristische Wochenschrift* 2007, 674–678 = *Juristenzeitung* 2007, 789–796 (commented by S. Augenhofer).

61 § 474(1) [2] BGB.

regarded as a restriction of liability which would be void under § 309 n° 7 lit a and b BGB. Under this provision, a clause is invalid which excludes or limits liability for losses arising out of death or, injury to body in case of (any) negligence (lit a) and as well a clause which excludes or limits liability for other losses in case of gross negligence (lit b). Particularly in practice, attention has to be paid to the avoidance of the use of standard terms that disregard these conditions and are invalid. The Supreme Court held that clauses shortening the period of prescription fall under this provision.

The jurisprudence on standard contract terms cannot be discussed here in detail.[62] There are also highly important decisions dealing, for instance, with the incorporation of standard terms in case of online-business,[63] and with the (in)validity of clauses which oblige the lessee of an apartment to take care for aesthetic repairs[64] etc.

VI. Conclusion

This report shows that the new contract law has not caused serious disruptions. The case law on the new rules is rather dense already, so that legal certainty seems largely to be achieved. The new German contract law is inspiring again and the national jurisprudence and academia have accepted it to a large extent. This might as well (and should) inspire international discussion on its models as compared with others. Some decisions show, however, that even the *Bundesgerichtshof* has its problems in accepting the new legal concepts (see above section V).

62 See notably the discussion on the occasion of the 30th birthday of German standard contract terms legislation: K. Berger, 'Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?', *Zeitschrift für Wirtschaftsrecht* 2006, 2149–2156; F. Graf von Westphalenm, '30 Jahre AGB-Recht – Eine Erfolgsbilanz', *Zeitschrift für Wirtschaftsrecht* 2007, 149–158.

63 BGH *Neue Juristische Wochenschrift* 2006, 2976, 2978.

64 So-called '(starre) Schönheitsreparaturklauseln': see BGH *Neue Juristische Wochenschrift* 2004, 2586–2587; 2006, 1728–1729.