Chapter 2. Five-and-a-half year German Standard Terms Act : an interim survey from the point of view of consumer protection, *by Hans-Wolfgang MICKLITZ (Zentrum für Europäische Rechtspolitik, Bremen) and Wolfgang BOHLE (Verbraucherschutzverein, Berlin).*

List of Abbreviations used

ADAC	Allgemeiner Deutscher Automobilclub (General German Automobile Club)
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Standard Terms Act)
AGV	Arbeitsgemeinschaft der Verbraucher (Association of Consumers)
BGH	Bundesgerichtshof (Federal High Court)
DRV	Deutscher Reisebüroverband (Association of Travel Agencies)
DTV	Deutscher Textilreinigungsverband (Association of Dry-cleaners)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act prohibiting Restraint of Competition)
LG	Landesgericht (Regional Court)
OLG	Oberlandesgericht (Higher Regional Court)
UWG	Gesetz gegen den unlauteren Wettbewerb (Act prohibiting Unfair Competition)
VSV	Verbraucherschutzverein (Consumer Protection Association)
VZ	Verbraucherzentrale (Consumer Advice Centres)
ZdK	Zentralverband des Kraftfahrzeuggewerbes (Association of Motor Vehicle Dealers)
ZVEH	Zentralverband des Elektrohandwerks (Radio and Television Trade Association)

Section 1 - Introductory features.

The Act to Regulate the Law of Standard Terms (Standard Terms Act, AGBG) of Dec. 9, 1976 came into force on Apr. 1, 1977. In contrast to the initially different goals aimed at during the preparatory work on the Act, the AGBG is not merely a consumer protection law. According to its preamble its task is "to establish a fair and proper balance between the superior position of the user of standard terms and the weaker position of the party subject to such terms by means of an appropriate protective clause in favour of the latter" (1).

In spite of its overlapping protective purpose, the AGBG differentiates between professionals and consumers. The Act provides for a number of means, which will be briefly explained to render them more understandable (§ 1). The legislator has entrusted a great number of agents with the implementation of the Act (§ 2), and over the past five and a half years they have become very active both judicially and extra-judicially (§ 3).

§. 1. Supporting legal bases.

A. The term "Standard Terms" - the problems of individual agreements.

§ 1 of the AGBG contains the legal definition of "standard terms" and thus defines the scope of the Act.

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(1) Amtliche Begründung des Regierungsentwurfs, Bundestags-Drucksache 7/3919, p. 13.

Standard terms are those terms which are preformulated for a multitude of contracts and which one contracting party (user) imposes on the other contracting party upon conclusion of a contract (§ 1, para 1, sent.1 AGBG).

The structure, scope and form of the contract are as unimportant in regard to the nature of standard terms as is the requirement of official approval (conditions of transport of the Deutsche Lufthansa AG (German Airlines); insurance conditions; building society conditions).

If the individual contract terms have been negotiated by both parties to the contract, then the standard terms do not dictate the application of the AGBG (§ 1, para 2 AGBG).

So far neither legal writers nor the courts have taken a uniform view of the test for "negotiation". Does the user's mere willingness to negotiate suffice to give standard terms the appearance of individual agreements ? Could the mere discussion of contract terms be considered equivalent to their having been negotiated ?

Whereas the BGH (1) (Federal Supreme Court of Justice) took a pro-user view in the decision of december 15, 1976 (mere willingness to negotiate is sufficient), the OLG Celle (2) (higher regional court of Celle) took the line in the decision of october 28, 1977, that standard terms may be considered as negotiated only if their contents have in actual fact been influenced.

The conflict seems to lose importance since the BGH applies the definition of standard terms in an broad manner. Thus even individual contracts may fall under under the regulation of contents. In its decision of May 6, 1982 (3), the BGH has undertaken the regulation of an exemption clause in a contract concluded before a notary public. The contract party profitting from an exemption clause formulated by the notary's office will be regarded

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(1) NJW 1977, p. 624 ff.

(2) NJW 1978, p. 326 ff.

(3) NJW 1982, p. 2243 ff.

as the user. The BGH had declared void the entire exemption clause in the purchase of new houses or freehold flats in a decision of April 5, 1979 (1); the seller was said to be user, but in those cases the BGH had to deal with standard form contracts of sale of real-estate presented to the notary's office by the development company itself. The decision of May 6, 1982 concerns an individual contract only. Nevertheless, the BGH pointed out that the buyer has to be protected from legal disadvantages in both cases because from his point of view, there is no difference between an exemption clause prepared by the notary's office and one formulated by the development company for use in a contract. This rule is only applicable, following the interpretation of the BGH, if two conditions are fulfilled : the commonly-used exemption clause must be the subject of both special instruction by the notary's office, and special agreement between the contracting parties.

B. The way to regulation of the contents.

Concerning the contract terms as defined within § 1, these terms can constitute the contract proper only if they are incorporated into the contractual relationship, i.e. become part of the contract. The requirements of incorporation are stipulated in § 2. According thereto, standard terms become part of the contract only if the user, upon conclusion of the contract, expressly draws the customer's attention to these contract terms, if he gives the customer the opportunity of reasonably reviewing these terms, and if, eventually the customer has agreed to the standard terms, in which case conduct implying agreement is considered sufficient.

While the provision contained in § 2 is not applied in commercial transactions, it is essential in dealings with consumers and thus constitutes an improvement on the legal situation existing prior to the AGBG. Previously, such contract terms became part of the contract even if the non-professional party to the contract was not aware of the existence of such terms in the

(1) *NJW 1979, p. 1406 ff.*

trade concerned.

The improvement introduced by § 2 has been diluted by the BGH in its decision of March 1, 1982 (1). The BGH has accepted a clause whereby the consumer affirms his knowledge and consent of the standard terms printed on the back of the contract text. The reasoning is rather simple : the clause only repeats the wording of § 2, AGBG. As a result of the decision, standard terms can become part of a contract if they are merely readable. They do not have to be understandable, as the consumer in fact would not have read them. To some extent the consent of the consumer remains hypothetical.

Even if the requirements of § 2 are satisfied, standard terms do not become part of the contract if they are a surprise to the other contracting party. The following factors enter into the determination of "surprising" : (a) the degree by which the contents of the clause deviate from a non-mandatory model contract or, in the absence of such a model contract, from the model customary among the business people concerned; (b) circumstances relating to the conclusion of the actual contract (drafting, arrangement of clauses in the text). Instances typical of a surprise clause are : wage and salary assignment clauses in contracts arranging credit facilities; special clauses linking the contract of sale to a long term maintenance agreement (tie-in clauses).

Contract terms are applicable only unless otherwise agreed to by all parties to the contract (§ 4). The Act refers to priority of individual agreements and recommends a certain procedure. If the contracting parties' special agreements in relation to the actual contract contradicts the preformulated model regulation of the standard terms, then only such special agreements will apply and not the possibly differently-worded contract terms.

Quite often contract terms allow several constructions in regards to their

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(1) NJW 1982, p. 1388 ff.

contents. To provide for such cases the legislator has in § 5 codified a rule of construction whose function is to offer guidance in the case of objectively ambiguous clauses. In the formulation of standard terms, doubts are resolved to the detriment of the user, i.e. among several possible constructions the contents of the clause most favourable to the customer is considered as the one agreed upon. This rule of construction applies, however, only to legal action in which both parties are individuals. By contrast, if clauses are challenged under the general procedure of § 13 by means of the collective action, the contents of the clause most prejudicial to the customer must be taken as the basis. This reversal of the collective action is explained by its preventive function.

The previsions that form the core of the Act (§§ 9 - 11) regulate the contract. They aim at eliminating unfair contract terms. There are various answers to the problem of the unfair drafting of contracts. § 11, item 16, contains a list-type emuneration of clauses which are regarded by the legislator as being absolutely inadmissible (absolutely prohibited clauses).

§ 10, item 8, contains a list of the prohibited clauses that include indefinite legal terms, which are to be clearly defined by means of a weighing of the interests involved. A clause of this type is considered void if its formulation results in prejudice against the user. Such indefinite legal terms, include those that are unreasonable in length or nature, justified on the merits, etc.

Whereas the provisions contained in §§ 10 and 11 specify the instance of terms, the general clause, § 9, states that all such contract terms shall be considered void as unreasonably prejudicial against the other contracting party and lacking in good faith. According to paragraph 2 prejudice must be assumed, as a rule, if the contract term deviates from the current ideas of non-mandatory law or else restricts vital rights and responsibilities under the contract so as to jeopardize the purpose of the contract.

The legal consequences of non-inclusion or invalidity of contract terms are set forth in § 6 : The contract remains valid minus the respective contract

terms and is subject to the statutory provisions concerning the gaps created through non-inclusion or invalidity.

C. Collective action (§ 13)

By introducing the collective action, the legislator has decided on a solution which, disregarding minor deviations, is in agreement with that of § 13, Gesetz gegen den unlauteren Wettbewerb (UWG; Unfair Competition Act). The individual consumer is not entitled to introduce the claims for injunction and retraction mentioned in § 13; instead, the recourse available to him is to bring an action as an individual, where by the control of standard terms would only be exercised in that particular case.

§ 13, paragraph 2, entitles consumer associations and industrial associations such as chambers of industry, commerce, and handicrafts, to sue users of and parties recommending void standard terms for injunction and retraction.

Consumer associations must have legal authority. The association's purpose of providing information must not only be laid down in its statutes, but must also be provided for in practice. Their members may be either 75 private individuals or other associations which are active in the same general area.

The object of protection under the claim for injunction as laid down in § 13 is the interest of the general public in keeping legal transactions free from unfair contract terms. While the claim for injunction is directed at future interference, the claim for retraction aims not only at guarding against future interference but also at eliminating an unlawful situation which has arisen as a result of the *recommendation* of void contract terms. In the procedure under § 13, the review is of a general nature and not linked to specific cases.

Although the procedure outlined in § 13 requires that the court take a general view of the clause in question, the legislator has confined the claim to injunction and retraction to the standard terms considered void under § 9 - 11.

Difficulties arise when, within the framework of standard terms, reference is made to contract terms other than those included under § 2. On this issue several courts other than the BGH have commented as follows : Whithin the scope of a collective action those contract terms coming primarily under § 2 - 5 in terms of substance may also be reviewed, when the respective clauses may be construed as constituting an unfair prejudice under § 9. The court of first instance which as jurisdiction over the subject matter in the case of a collective action is the District Court (§ 14). Concerning territorial jurisdiction, § 14, paragraph 2, allows the governments of the German Länder to establish specialised courts authorized to exercise control. Bavaria, Hesse and North Rhine-Westphalia have made use of this opportunity. In addition one should note the special binding force of final judgments under § 13 (at § 21). This binding force is effective subject to three conditions : (a) a final judgment has been passed, obligating the user to discontinue the use of the clause; (b) the user continues to use the clause in violation of the judgment; (c) an individual action, in which the validity of the included clause is questioned is pending between the adjudicated user and a customer. The customer may plead as a defense the final judgment granted in the procedure under § 13, with the result that the court deciding the individual action is obligated to base its decision on the results of the final injunction.

So far there has been no evidence to show that the binding force of § 21 has had any practical effects and it may be assumed that the provision contained in § 21 lacks the desired effectiveness in an action involving individuals. The reason for this may well lie in the nature of this defense, which presupposes that the party employing it is aware of the possibility of doing so. It would be better to find a way to make it mandatory to consider final injunctions granted in the general procedure. On the other hand, the weakness of § 21 results from the incomplete register kept by the Federal Cartel Office under § 20.

In contrast to the regulation in the UWG concerning the value of the matter in dispute, the legislator has decided on a maximum value : under § 22 it is fixed at DM 500.000. In view of this maximum value the risk of being burdened with the costs of an action is extremely high, taking into consideration

the financial means of the consumer protection associations entitled to sue. The litigation of a case up to the BGH costs about DM 80,000, not including court fees, based on the maximum requested compensation allowed. Although the courts have had reason to decide otherwise on several occasions, they have generally been understanding, no doubt with regard to the empty tills of consumer protection associations, and following the suggestions of the Verbraucherschutzverein (VSV), have left the values in dispute at DM 3,000 per litigated clause. The only court to have taken the maximum value in dispute as a basis in its decision, was the OLG Koblenz (1) on Jan. 10, 1980 - 9 U 1060/78 -. This decision concerned an action brought by the Verbraucherzentrale (VZ) (consumer advice centre) of the Rhineland-Palatinate against the Johannes-Gutenberg-Universität, in connection with terms in contracts governing admission to the hospital. It was held that the value in dispute was to be fixed regardless of the suing association's ability to pay.

§. 2 . The agents.

The right to bring a collective action is exercised primarily by consumer associations. In contrast, the activities of the chambers of industry, commerce, and handicrafts, which are also entitled to sue, have been negligible. From the spectrum of consumer association emerge : the Verbraucherschutzverein (VSV) (A), the Verbraucherzentrale (VZ) Baden-Württemberg and recently Nordrhein-Westfalen (B). Standard terms which are drafted for the various trades by industrial associations in the form of term recommendations (C) are subject to administrative control by the Federal Cartel Office.

A. The Verbraucherschutzverein.

The Verbraucherschutzverein e.V. (VSV) was founded in 1966 by the Arbeitsgemeinschaft der Verbraucher (AgV) e.V. (Association of Consumers) and the consumer advice centres of the German Länder. Since 1974 the VSV has been promoted as an institution by the Federal Minister of Economics. § 3 of its

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(1) Has not yet been published.

by-laws establishes the purpose of the VSV as the safeguarding and promotion of consumer interests through information and guidance, excluding commercial businesses. Specifically, the VSV aims at eliminating unfair competition adversely affecting the consumer and at taking action against inadmissible standard terms that are being used and recommended in dealings with non-professionals. If necessary, this aim is achieved by taking legal measures. The VSV has a staff of 12, including 2 jurists who each work in the divisions in charge of unfair competition and standard terms matters. In the fiscal year 1981/82 the budget for litigation involving standard terms was DM 80,000.

B. The Verbraucherzentrale Baden-Württemberg and Nordrhein-Westfalen.

Although all of the 11 consumer advice centres in the German Länder are at liberty to institute a collective action, only Baden Wuerttemberg and North Rhine-Westphalia have exercised this right. The other 9 consumer advice centres confine themselves to passing on the complaints received to the VSV. This lack of activity is partly explained by the fact that consumer advice centres employ very few jurists. In fact, only 4 consumer advice centres employ any at all : in Hamburg there are 2 (3, if one includes the manager) while the consumer advice centre of Hesse does not furnish any legal advice whatsoever (although after the amendment of the Rechtsberatungsgesetz (Legal Advice Act) effective Jan. 1, 1981, persons not trained in law may also give legal advice within the framework of consumer advice centres). The 11 consumer advice centres take widely differing views of their scope of activity. Bavaria and Rhineland-Palatinate, which are rather on the traditional side, consider it their task to give product guidance. Nor is collective action a focus of activity in Nordrhein-Westfalen and Baden-Wuerttemberg : their main activity consists og giving legal advice to individual consumers. But the Verbraucherzentrale Nordrhein-Westfalen has changed its activities since July 1, 1982. On the basis of an evaluation of its files, responsibilities have been distributed in a different way between the Verbraucherzentrale and the 36 local advice centers. The legal staff of the Zentrale in Düsseldorf concentrates in their day-to-day work on three main subjects : consumer credit, furniture and intermediary activities in different branches such as credit, housing and marriage. The employees in the local centers who give legal

advice without being lawyers may help the consumer in contracts of sale, contracts of manufacture, and in problems caused by subscriptions. To eliminate unfair contract clauses, the Verbraucherzentrale itself uses collective action in the three main sectors.

C. The Federal Cartel Office.

Under the GWB, industrial associations have had since 1973, the possibility of drafting general terms of business, delivery and payment for their members and of recommending the use of such terms. The members are at liberty to adopt the recommendations verbatim or to deviate from them in their standard terms. Despite their non-binding nature, term recommendations must be reported to the Federal Cartel Office and they take effect upon registration (§ 38, paragraph 2, item 2 GWB). Under § 10, paragraph 1, sent. 1, item 3 GWB, the Federal Cartel Office must publish each registration in the Federal Gazette. The application for registration must be accompanied by opinions of the trade and the professional associations concerned (§ 38, paragraph 2, item 3 GWB) - among which consumer organisations are included as far as term recommendations relate to business dealings with the consumer. In the registration procedure, term recommendations are subject to the control of abusive practices (§ 12 GWB). The control of standard terms, specifically under cartel law, is exercised to eliminate the aspect of collusive agreements which constitute a threat to competition. The aim is to eliminate clauses inadmissibly relating to prices and price elements. At the same time the control of unfair practices enables the Federal Cartel Office to check recommended standard terms for their compatibility with the mandatory provisions of civil law, particularly with the AGBG. The civil-law control activities of the Federal Cartel Office are the centre of our detailed analysis in section 3.

§. 3 . Quantitative aspects of the implementation of the Act.

A. Legal writers.

Legal writers immediately descended upon the AGBG, so that shortly after the Act came into force 10 books were published, and all wellknown legal journals

gave their readers an introduction to the new Act. At the same time established sets of clauses were examined for their compatibility with the AGBG : terms under the law of tenancy, standard terms of banks and insurance companies, standard building contract terms, and general German forwarding agents' conditions. Without exception the authors tried to show that the AGBG did not affect sets of clauses that had been left untouched for years. Since then the discussion among legal writers has moved along much more discriminating lines. The extensive discussion of detailed juristic problems has increasingly been joined by a thorough analysis of the consumer's legal position in particular branches of trade and industry : in the law of real-estate brokers, concerning credit, and in repair trades concurrently the differentiation of contract clauses within the scope of § 9 AGBG has become more and more important. The commentators on the AGBG alphabetically list the different types of contracts and clauses and comment on the case law related to each one.

B. The register of standard terms at the Federal Cartel Office.

Details of the implementation of the AGBG may be gathered from the register kept by the Federal Cartel Office, in which all collective action proceedings, final judgments and other arrangements must be recorded (§ 20 AGBG). On Nov. 12, 1982, the register showed 927 entries. However, this figure is only meaningful to a limited extent, since several files may be started for each collective action, e.g. : one file for the petition, which is passed on to the Federal Cartel Office after receipt by the district court having jurisdiction, and one further entry for each judgment pronounced by one of the following courts : district court, higher regional court and the supreme court of justice. Since there were only 311 judgments from the 927 entries, it is evident that the position of the case and the stage of the proceedings cannot be deduced from the register.

C. Warnings and judgments in relation to the VSV and the VZ.

Figures more detailed than those shown in the register of the Federal Cartel Office are to be found in the annual reports of the VSV and the VZ of Baden-Wuerttemberg. By October 1982 the VSV had mailed 767 warnings, 754 concerning

users of standard terms, and 13 concerning parties having recommended standard terms. A "strafbewährte Unterlassungserklärung" (statement that a person will refrain from doing something and will incur a penalty for non-compliance) was made by 469 users, and 237 proceedings were decided by court rulings. By October 1982, approximately 20 proceedings had been decided or were pending in the BGH. From Baden-Wuerttemberg figures are available covering the period up Dec. 31, 1982. From the time that actions were brought shortly after the enactment of the AGBG, 365 enterprises made a statement of submission in compliance with a warning they received from the contract lawyer, and 126 collective actions resulted in a judgment. As the Verbraucherzentrale Nordrhein-Westfalen has taken up its activities in the middle of 1982, the quantity of proceedings is yet comparatively small. Only 14 enterprises received warning notes and court proceedings were initiated against only 4 of them. To facilitate the evaluation of court decisions, about 350 judgments may be taken as a basis.

D. Warnings and judgments concerning industrial associations.

The legislator's idea was that industrial associations would make use of collective action. The slogan of "self-regulation of the economy" was coined. In actual fact almost all collective actions recorded by the Federal Cartel Office were brought by consumer protection associations. Past experience suggests the conclusion that the AGBG - at least as far as its translation into practice by the courts is concerned - is de facto a consumer protection law. However, practical experience with term recommendations suggests that the AGBG has gained considerable importance in the commercial field.

E. Frequency of term recommendations.

In late 1977, the number of term recommendations reported to the Federal Cartel Office was 37, in late 1978, 77, in late 1979, 101, in late 1980, 128, in late 1981, 145, and on Nov. 12, 1982, 151 (1). The AGBG has apparently

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(1) As to the references, see the annual report of the Federal Cartel Office.

precipitated the creation of term recommendations. However, it would be jumping to conclusions to infer from the greatly increased number of term recommendations that the number of branches of trade and industry regulated by standard terms has increased proportionately. In many cases there already were, prior to 1977, standard terms in various trades which had been drafted in the 1930s and 1940s, when the formation of term cartels and term recommendations were the official goal of economic policy. With the coming into force of the GWB in 1957, it would theoretically have been necessary to adapt the existing sets of clauses to the much narrower scope of the GWB. Term cartels were only admissible subject to restrictive conditions, and term recommendations were even prohibited until amendment of the GWB in 1973. The Federal Cartel Office did protect legal positions already held if the industrial associations concerned refrained from drawing their members' attention to the previous sets of clauses in public. Of the 151 currently reported conditions, about 25 or approximately 1/6th, relate to business dealings with consumers. Among the term recommendations relevant to consumers, three main categories may be distinguished :

(a) The main area under consumer-policy aspects : sale of furniture, electrical engineering and electrical trade, travel and dry-cleaning. The number of enterprises in these trades which do in fact base their legal transactions on the recommended standard terms is not known to us. At present there are only estimates available, which are usually overrated and in that respect the study commissioned by the Federal Minister of Justice in 1980 may well afford an insight. At any rate, a sweeping statement cannot be made, because the practical importance of a term recommendation in a given trade is contingent upon its market structure. Essential criteria in this connection are the heterogeneity or homogeneity of the market, the degree of organization of the trade within the industrial association, and the number and power of the suppliers in a given trade;

(b) The area of cars : conditions of sale concerning new cars, conditions of sale concerning second-hand cars, conditions of car repair, sale of bicycles, car washes, towing services;

(c) House construction : recommendations were drafted by the

various trade associations involved for the following occupational groups : architects, locksmiths, roofers, plumbers, sanitary engineers, floor installers, window and facade installers.

A striking feature of all the reported term recommendations is the extent to which particularly the small- and medium-sized businesses avail themselves of the opportunity of applying uniform business conditions. A decisive factor favouring such uniformity in small- and medium-sized businesses is the comparatively clearly-identifiable scope of the AGBG. It is this clearly-defined scope that the legislator uses in exerting pressure on small- and medium-sized businesses to force them to organize on a broader scale than in the past. As the forms and possibilities of cooperation are improved, small- and medium-sized businesses benefit from the AGBG in combination with the term recommendation. Monopolized trades such as banks or insurance companies do not use term recommendations. These trades have for many decades been using largely uniform standard terms, even before the AGBG came into force and term recommendations existed.

Section 2 - Evaluation of court practice.

A complete compilation of all judgments initiated by consumer organisations does not exist. Theoretically the register of standard terms at the Cartel Office should allow a comprehensive analysis, since the courts charged with collective proceedings send 90 % of their opinions to the Cartel Office even though they are only obliged to make court orders known. Practically, though, the register is not available to the public, nor is a publication of the judgments provided for by the AGBG. Aside from the publication in the well-known main law journals, a systematic but incomplete compilation of judgments can be found in **BUNTE**, *Entscheidungssammlung zum AGB-Gesetz* (1).

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(1) BUNTE, Entscheidungssammlung zum AGB-Gesetz, Band 1 1977-1980, Band 2, 1981.

As both individual and collective proceedings are published without a clear division being made between these types of procedure, it seems necessary to concentrate on the annual reports of the Verbraucherschutzverein and the Verbraucherzentrale Baden-Württemberg. The statistics issued by the Verbraucherschutzverein are helpful in answering their policy, in attaching certain clauses and investigating different branches :

(a) In the *building and civil engineering sector*, 50 judgments were obtained. The challenged clauses mainly concerned firms engaged in façade installation, as well as window manufacturers who had caused the consumer advice centres of the German Länder a great deal of trouble in their day-to-day advisory work. On-the-spot cash transactions involving up to DM 10,000 are entered into on extremely unfavorable terms.

(b) In the *services sector*, the 33 judgments that were rendered affect totally different trades : maintenance agreements, dry-cleaning agreements, contracts of transport, tuition agreements, and contracts for repairs.

(c) In 26 cases the courts decided against parties in the *electrical trade*. The range of challenged clauses was wide : assignment of salary/wage claims as security, limitation contrary to the AGBG of statutory warranties for repair of defects, substitute delivery or credit notes exclusion of warranty after third-party action, exclusion of liability for loss by fire, house-breaking and theft, and exclusion of liability for return transport of equipment, whose delivery was not taken.

(d) The VSV has become very active concerning *dealings in furniture* : the courts had to hand down decisions in 35 cases. In all of which several clauses were challenged at the same time; some cases may be said to relate to subjects specific to this trade. In four cases the review concerned clauses which deprive the consumer of nearly all his rights, namely in the event of delivery of furniture when he is

not at home. (Taking delivery of goods clause). In 13 cases it was a matter of the admissibility of notification periods for defects, which the user of standard terms is only allowed to stipulate with respect to patent defects in accordance with § 11, item 10 e. In 18 cases, the list of clauses under review was headed by those concerning settlement of claims in a lump sum.

The great bulk of all judgments was rendered against individual enterprises. Only in three cases has the VSV brought an action against the party recommending standard terms : namely against the German Radio and Television Trade Association, the Association of German Dry-Cleaners, and against the conditions of sale of new cars jointly recommended by the Central Association of Motor Vehicle Dealers, the Association of the Automobile Industry, and the Association of Motor Vehicle Importers.

Unfortunately the Verbraucherzentrale Baden-Württemberg does not keep detailed statistics. Nevertheless it may be pointed out that the annual reports stress the same relevant categories as the Verbraucherschutzverein.

The wealth of decisions forces us to select certain subjects and approaches in analysing the pertinent judgments. In our selection we were guided by the method of worked used by the VSV, which on one hand, has to follow up complaints passed on to it by the consumer advice centres, and, on the other hand, systematically works through the sets of clauses in the various trades on its own. To exemplify a method which is more subject-related, we have chosen the sectors of price clauses and of warranty/guarantee, which, by virtue of their many facets, affect wide areas of cases important to the consumer. An example of a systematic procedure, which is not trade-overlapping but is problem-related, is the discussion of repair conditions in the car repair, electrical engineering and dry-cleaning trades. As a result of mechanization, the dry-cleaning trade has almost ceased to be a craft, but in terms of substance it is similar to the car repair and electrical engineering trades. On the basis of clause-overlapping theses we have attempted to systematize the court decisions passed so far and to evaluate them from the point of view of consumer protection. We will conclude our analysis of court practice

with the presentation of the main procedural problems caused by collective action.

§. 1 . Price clauses.

A. Thesis One : The prohibition of price increases on standard terms for a period of four months from the date of conclusion of the contract to the stipulated date of delivery constitutes an absolute minimum protection which, irrespective of economic decisions, is not subject to alterations by the party using/party recommending standard terms.

BGH, decision of Apr. 23, 1980 - VIII ZR 80/79 (1) (so-called value-added tax clause).

§ 11, item 1, regulates the prohibition of price increases on short notice. Pursuant thereto, those clauses are automatically void which allow the user to pass on to his contracting party price increases concerning goods or services for a period of four months from the date of conclusion of the contract to the stipulated date of delivery.

The subject of the above-quoted BGH decision was a clause recommended by the Verband der Deutschen Automibilindustrie e.V. (VDA) and the Verband der Importeure von Kraftfahrzeugen e.V. (VdIK), in cooperation with the Zentralverband des Kfz-Handels e.V. (ZDK), within the framework of a term recommendation concerning "General business conditions for the sale of brand-new motor vehicles and trailers". The clause was published in the Federal Gazette of Jun. 14, 1977, and read as follows :

> "In the case of deliveries within 4 months, the price prevailing on the day of the conclusion of the contract shall be applicable in all events.
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> Changes in the rate of turnover tax shall entitle each party to adjust

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(1) NJW 1980, p. 2133 ff.

the price accordingly".

While the first part of the clause corresponds to the prohibition provided for in § 11, item 1, it is obvious from the so-called *VAT clause* that changes in the turnover tax rate shall enable price increase to be made even within the 4 months period. Consequently, this part of the clause was the subject of the BGH decision.

The immediate occasion for the VSV to object to the clause in question was the turnover tax rate from 11 to 12 % at the start of the year 1977. A representative of the Federal Cartel Office was present at the various hearings before the courts in Frankfurt. Apparently this lawsuit was conducted on the suggestion of the Federal Cartel Office.

The BGH upheld on appeal the decisions passed by the lower courts, namely, that the clause was void. In interpreting § 11, item 1, the BGH used classical criteria of interpretation :

(a) Based on the wording of this provision, the BGH found that § 11, item 1, linked that prohibition of a price increase to the price payable by the customer for the object of sale. This price also includes the turnover tax portion.

(b) To the minds of the BGH judges, this result, arrived at from the wording of the provision, was confirmed by the description of how § 11, item 1, originated. In terms of substance, this provision is based on § 1, paragraph 1 and 5, of the Verordnung über Preisangaben (Price Marking Order) of May 10, 1973. Any violation thereof does not affect the validity of the contract under substantive law, the result being that the purpose of this Order, namely to protect the buyer against price increases in the case of short terms of delivery, is only inadequately achieved. The resultant gap in consumer protection is filled by § 11, item 1, which forms a supplement under substantive law to § 1, paragraph 5 Preisangabenverordnung, so that both are to be construed in the same way.

(c) Lastly, the position § 11, item 1, as given in the overall system of the Act, results in a restrictive interpretation of admissible price increases. Some legal writers have held the view that § 11, item 1, is not applicable if and as far as price increases are directly due to legislative measures and are typically designed to affect the final consumer. The BGH, however, comes to the conclusion that in the case of a short term of delivery, any provisions in the standard terms to increase the price is generally void, irrespective of the underlying reasons. This follows from the clearly defined exceptions (continuous obligations; transport charges listed in § 99, paragraph 2, item 1 GWB). When the legislator drafted these provisions he was aware of the fact that price increases considered necessary by the seller may also be based on legislative measures. Since the legislator, in spite of that, has failed to include such cases in the list of exceptions, and since in view of its wording the list must be regarded as conclusive, those price increases that do not stem from the seller's side come particularly under the prohibition.

Although the reasons supporting the BGH's decision are founded on a clearly legal interpretation of § 11, item 1, the BGH certainly realizes that in aspects of consumer protection too much is expected of the consumer's understanding and judgement of the importance of comprehensive, abstractly-worded business conditions(such as a set of clauses totalling more than 200 printed lines). These findings may well have influenced the BGH in arriving at the said decision.

B. Thesis Two : Price increases occurring after the minimum period of four months are linked by the courts to cost increases affecting the user. Hence price changes are not made subject to market price formation.

BGH, decision of Jun. 11, 1980-VIII ZR 174/79 (1) (Price increase clause in a continuous obligation).

(1) NJW, 1980, p. 2518 ff.

BGH, decision of Oct. 7, 1981-VIII ZR 229/80 (1) (so-called day-to-day clause).

In the above decisions the BGH was concerned with price increase clauses which are definitely not subject to or do not fall within the scope of § 11, item 1, (continuous obligation), since possible price increase relate exclusively to periods exceeding 4 months (so-called day-to-day clause).

The clauses were worded as follows :

(a) Price increase clause in a continuous obligation : "Price increases or changes in delivery charges customary in the locality concerned do not release the customer from the contract, even if these changes occurred between the conclusion of the contract and the start of delivery".

(b) Day-to-day clause : "Price changes are admissible only if the period between the conclusion of the contract and the stipulated date of delivery exceeds 4 months; in that case the seller's price current on the day of delivery shall apply".

Both clauses gave the VSV reason to test the control of the contents of price change clauses on the basis of § 9. For tactical reasons concerning the value in dispute, the VSV has sued a car dealer on the challenged current price clause which is identical to that contained in the term recommendation for new cars. It had been clear right from the start, however, that the outcome of this decision would affect primarily the Daimler-Benz company, which uses extremely long terms of delivery.

In either case the BGH makes it clear that neither of those price increase clauses not subject to § 11, item 1, can exist in an area which is not controlled by standard terms. Such clauses are not automatically void. Conversely it cannot be said that those clauses not subject to § 11, item 1, are

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(1) NJW 1982, p. 331 ff.

generally effective. Rather, their admissibility must be judged in relation to the general clause of § 9.

In the first decision the BGH is supporting the principle laid down in § 433 BGB (Civil Code), according to which the delivered price agreed on must be adhered to during the duration of the contract, and the customer cannot terminate the contract. This rule is also applicable to contracts of continuous obligations. The BGH does recognize, though, the right to increase prices in the sale of periodicals and magazines, but considers that a fair balance between the interests of the two contracting parties can only be achieved if the price increase clause does not permit any increase in the price of delivery. Instead the clause should be drafted right from the start in a way that reveals to the customer, upon conclusion of the contract, the extent of possible future price increases, and allows the buyer to judge the justification of such a price increase. This clause must contain judgement criteria as cost increasing factors.

Hence the BGH views the change in prices of delivery as a matter of cost development, although price formation in a market economy is primarily determined not by cost factors but by supply and demand, at least in the theoretically assumed case.

In view of the long terms of delivery quite customary in the automobile trade, the BGH also underlines in the second decision the dealer's legitimate interest in passing on to the buyer price increases that may have in the meantime become necessary. This would avoid his being forced right from the start to include a safety factor in his price calculation, which would affect buyers who might otherwise, for reasons of time, not be affected by the cost increase. Here it is also a matter of terms of the clause. Irrespective of the actual practice followed in applying the clause, the price provision under standard terms ceases to be reasonable if the clause, by its wording and terms, gives the user an opportunity - in addition to passing on the cost increases - to abuse the clause with a view to generating additional profits. If the unqualified wording of a price increase clause enables a price increase to be made which is not based on an increase in costs in the meantime, the BGH considers the balance between increase in price and increase in costs to be

disturbed to such an extent that the clause must be regarded as void.

The BGH prefers an approach based on costs in considering whether or not a clause is reasonable. Upon consideration of the difficulties encountered in arriving at a both comprehensive and understandable wording, the BGH discards the thesis advanced in its first decision - namely, that the wording of the clause must reveal to the customer the extent of possible future price increases to enable him to judge the justification of such price increases.

A provision concerning alterations, worded in general terms to the effect that price increases are only admissible to the extent of cost increases that have occurred in the meantime, would not eliminate the unreasonableness of a clause any more than a provision with complicated wording that makes allowances for all cost increasing factors, but is unintelligible to the non-commercial customer.

At any rate we may note that the BGH in both decisions refused to accept competition as a sufficient corrective factor.

C. Thesis Three : The right - to be granted by the user - to withdraw from the contract if a certain percentage rate of the stipulated purchase price is exceeded aims at eliminating the difficulties created by an admissible price increase based on cost factors.

In order to avoid making price increase clauses based on cost development totally impossible, the BGH feels compelled to try an approach which is hardly convincing. As the BGH is of the opinion that a provision of price changes can hardly be worded so as to be clear and intelligible, it resorts to the device of eliminating unreasonableness by granting the buyer the right to withdraw from the contract under certain conditions. This solution is to be limited to those cases where the price increase exceeds a given percentage rate of the purchase price to guard against abuses on the part of the buyer. By solving the problem in this way the BGH does, however misjudge the intention of the legal transaction which aims not at cancellation but at performance. An additional factor is that once the problem is shifted to

the sphere of legal consequences, it may cause a development whose course cannot yet be predicted. In terms of the legal dogma it is untenable to sanction clauses granting the user certain rights or allowing him to contract himself out of certain duties in such a way that the admissibility of the preconditions of the clause may be inferred from the fact that certain legal consequences are allowed to happen in favour of the other contracting party. Provisions allowing changes, for instance, whose preconditions are worded in an inadmissible way and are thus unacceptable to the consumer cannot, on the other hand, be made valid merely by granting the customer the right to withdraw from the contract.

In the meantime Daimler-Benz AG has changed the respective clause and has chosen the following wording :

> "The buyer may withdraw from the contract if the price prevailing on the day the contract is made, not including turnover tax, increases by more than 6 %.

In connection with the collective action, we shall deal separately with the question of whether the percentage rate chosen properly reflects the cost development, and to which cost increasing factors it is geared, particularly since VW-Audi has fixed its percentage rate inclusive of turnover tax at 4 %.

D. Thesis Four : The right of cancellation is granted in return for the relative fixing of the contract price.

In relation to the Deutscher Reisebüro-Verband e.V., which on Oct. 3, 1980, reported "Standard Terms for Travel Contracts" as a non-binding term recommendation, the VSV has taken objection to the following price change clause :

> "The tour operator is entitled to reserve for himself the right, under certain conditions to be specified in his travel terms, to change the price of the journey, provided that the period from receipt of the travel confirmation to the stipulated start of the journey is longer than 4 months. In the event of a subsequent change in the price of the

journey, the tour operator must inform the customer accordingly. The customer is entitled to cancel the travel contract without paying any charge".

The VSV has taken the view that price increases regarding journeys where the period from receipt of the travel confirmation to the stipulated start of the journey is longer than 4 months ought to be admissible only up to a certain time before the start of the journey, in order not to render the traveller's right of cancellation ineffective. It must be assumed that a traveller who is advised of such a price increase only shortly before he is setting out on the journey will in any case have to accept this price increase, especially since during the peak tourist season other destinations would scarcely be available on such short notice. The right of cancellation granted would therefore be ineffective.

The clause was changed through negotiations so that the tour operator is obligated to inform the customer of a subsequent change in the price of the journey no later than 3 weeks prior to the start of the journey. Price increases after such timeare no longer admissible.

Beyond the protection afforded under § 11, item 1, to rights previously acquired, a relative price freeze, and therefore a tangible result, has been achieved in this particular service sector. This effectively narrows the scope of the price increase clauses even more than indicated by the BGH, at least in this sector of the economy.

§. 2 . Warranty/Guarantee clauses.

A. Thesis One : BGH judges do not drive second-hand cars, or the protection of established market practices.

Warranty under the law on sales, as compared to standard terms, has to great extent been definitively laid down, as shown by the prohibitions in §§ 11, items 10 and 11. Yet some questions remain which must be answered in connection with § 9, such as the one concerning the contractual practice that

has been followed for years in the second-hand car trade, namely the exclusion of the statutory warranty under §§ 459 ff. :

"Sold as-is, following inspection".

This clause even eliminates the seller's liability for the car being roadworthy in the first place. Essential rights accorded to the buyer of a second-hand car by the nature of the contract are limited, and thus jeopardize the achievement of the aim of the contract. A person who buys a second-hand car spends more money on it than on a scrap car or on a "car for an amateur constructor", and the very purpose of a contract of sale concerning a second-hand car is to provide the buyer with a second-hand, yet roadworthy vehicle.

The reason the VSV had such a clause reviewed, which had been approved by the BGH and had constituted established practice for many years, was the decision of the *LG Augsburg of May 17, 1977 - 4 S 635/76* (1), in which such a clause was considered to jeopardize the purpose of the contract and hence was considered void.

In contrast to this decision, the BGH was of the opinion in its decision of *Jun. 11, 1977 - VIII ZR 224/78* (2) - the first decision given by the BGH on a case concerning § 13 since the coming into force of the AGBG - that said clause, which is widely used in the second-hand car trade did not even warrant an objection in relation to non-professionals. In this connection the BGH emphasized the second-hand car dealer's limited opportunities to inform himself about the condition of the motor vehicles he sells. This produced the following result : Even after a very short time it can no longer be ascertained whether a defect had been present upon conclusion of the contract of sale or had originated only after the time at which the liability expired, which is decisive for the question of warranty. The BGH fails to see that, according to the legal regulation, the burden of proof that the good was

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(1) NJW 1977, p. 1543 ff.

(2) NJW 1979, p. 1886 ff.

deficient upon delivery rests on the buyer. What the BGH's idea amounts to is not to expose the buyer to such a burden of proof in the first place, but to deny him the right to any claims that he might be granted in this situation.

The criterion that the dealer had great difficulty in ascertaining the actual condition and value of the second-hand car, is of great importance because the BGH denies that the second-hand car dealer has a general duty to examine the car. The reason for this is very simple : the obligation to examine each car would impose too exacting a requirement on the second-hand car dealer.

Realizing quite clearly that the above mentioned result was unsatisfactory for the buyer, the BGH gave the buyer some advice to avoid placing him in a position where he has no rights : The buyer could make a trial run; he could ascertain the condition of the car by a diagnosis, even if he had to pay for it; and lastly, he could ask the dealer to warrant certain qualities of the car that are vital to the buyer. The result of the decision and the method used in arriving at it must be rejected. The priority given to dealers' interests has several reasons : In all probability trial judges themselves lack personal experience with the second-hand car market. Anybody who compares the BGH's well-meant advice with practical experience in the second-hand car trade knows that those recommendations are completely ineffective for reason of unenforceability.

The motive underlying the decision may well be the justified fear that the elimination of the clause in question may mean the end to a protected established practice in the market and may amount an encroachment on a whole sector of the economy, and a threat to the latter's existence. The BGH's argument that non-warranty was dictated by the laws of economic common sense serves this very purpose.

The BGH will probably be unable to uphold this decision in view of the judgments given afterwards in procedures concerning § 13.

It kept emphasizing afterwards that contract terms had to be construed in the

sense most detrimental to the customer and that circumstances relating to the actual handling of a clause had to be left out of account just as did the buyer's theoretical possibilities of mitigating the effects of a disadvantageous clause by his conduct, particular in thr form of individual agreements.

In the meantime the ZdK, in cooperation with the ADAC, has reported to the Federal Cartel Office a term recommendation concerning the trade in second-hand motor vehicles. This recommendation was praised, especially in the field of warranty, as a marked improvement of the buyer's position, brought about by the right to demand the repair of defects, valid for 3 months. On closer examination of the provision containing this right it turned out that there was actually very little enhancement of consumer protection in this field.

The claim for repair of defects granted in standard terms is contingent upon the following :

(a) The dealer must have handed over a report on the car specifying its condition upon delivery on a form containing the following seven items to be ticked yes/no, although he is not obligated to do so.

- Brakes operate properly
- Load-bearing members of body and frame free from holes caused by rust
- Tires on track-wheels in proper condition as regards design and profile
- Electrical equipment operates
- Silencers free from holes caused by rust
- Chassis, shock-absorbers and steering mechanism in operating condition
- Engine, gears, and drive in operating order.

The standard terms expressly say that all product descriptions are automatically considered express warranties (zugesicherte Eigenschaften). The meaning of this statement has not yet been examined by the courts.

(b) A claim for repair of defects is also contingent upon the fact that the actual condition of the car when delivered did not correspond to the

condition stated. The onus of proof is on the buyer.

(c) There is no obligations to repair defects if the buyer fails to bring his claim for repair of defects against the seller immediately upon detection of any incorrect statements in the report on the condition of the car.

(d) The buyer also forfeits his right to claim repair of defects, unless he immediately gives the dealer an opportunity to repair those defects. Since the dealer's business premises are the place of performance, it would, as a matter of principle, be up to the buyer to see that the car is returned to those premises.

We have no practical experience to evaluate the relevance of the standard terms. However, it is a fact that the dealer's lack of obligation to hand over the report weakens the position of the consumer. The ADAC tries to abolish the probability that dealers would attempt to escape the legal consequences by simply refusing to hand over the report.

B. Thesis Two : An analysis of the contrastin treatment between contracts of sale under the AGBG and provisions on warranty in the BGB shows the degree of deviation permissible from non-mandatory law.

In the field of warranty we often find standard term clauses which definitely limit the customer's statutory warranty claims under §§ 459 ff., 633 ff. BGB, to a right to claim repair of defects or to substitute delivery. Since this may, result, however in the customer being placed in a position where he has no rights, the BGH has developed through constant court practice the formula of "revival of statutory warranty claims" if the stipulated repair of defects/ substitute delivery has not been achieved. When drafting the AGBG, the legislator incorporated this principle into § 11, item 10 b. Ever since then, the limitation of the warranty claims for repair of defects/substitute delivery has been admissible only if the right to have recourse to the statutory warranty claims is expressly reserved for the customer in event of failure of the former terms of warranty.

In its decision of *Nov. 28, 1979 -VIII ZR 317/78* (1), the BGH was concerned with a clause contained in retail trade conditions concerning radios, televisions, and photographic equipment, which limited further this right to the repair of defects, which must be asserted before any warranty claims can be brought :

> "(With respect to the repair of defects in the equipment, the full guarantee covers the cost of parts and labour). The guarantee expires immediately after repairs have been made or after a confirmation by the buyer or a third party who is not a member of the seller's business has been received".

The BGH rejected this clause on the ground of inadmissibility. In its view the clause violates the minimum protection afforded to the buyer under the AGBG as regards warranty. The BGH made the various stages of prohibition clear by referring to the statutory provisions : Under § 11, item 10a, the seller of a new good sold to a non-professional may not totally exclude the non-professional's warranty claims in the standard terms. This prohibition, expressed in § 11, item 10b, is modified by the fact that the seller is allowed to inform the buyer - at least for the time being while excluding his warranty claims - of the right to claim repair of defects. If the seller exercises this right, the AGBG does not provide any guidance as to how this right to the repair of defects must be granted. According to the wording of § 11, item 10 b, it is apparently sufficient if the modification of the prohibited non-warranty, as set forth in § 11, item 10 a, is balanced by the buyer being referred in a certain way to the statutory warranty claims.
By the BGH's view a claim for repair of defects which is contrary to the actual regulation on warranty must be comprehensively worded without modifications. Nor can modifications of the statutory warranty claim, which are not provided for in the AGBG, apply to the claim for repair of defects either. Since statutory warranty is not contingent upon fault, the seller's responsibility to repair defects must not be limited to those for which he

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(1) NJW 1980, p. 831 ff.

is to blame, and since under the statutory warranty claim prior acknowledgment of defects by the seller is unknown, the responsibility to repair defects must not be made contingent upon such prior acknowledgment either.
Although the claim for repair of defects is of a contractual nature, the BGH judges the scope for action regarding this claim by the alternatives applicable to the statutory warranty claim. This aims at preventing the buyer from falling victim to a double limitation of the seller's duty of warranty. Also as set forth in the clause in question, the limitation of the claim for repair of defects does not exist with respect to the statutory warranty claim. By virtue of this clause the buyer forfeits his warranty claims if the object of sale is damaged while within his sphere of influence, even though it had actually been deficient at the time the liability expired, and although the confirmation had nothing to do with the defect notified. That is why the clause does not satisfy the minimum requirements of § 11, item 10.

Hence we may note that the BGH has delineated the limits of the drafting of an effective claim for repair of defects. Far- reaching consequences concerning repair of defects clauses arise from the numerous car repair conditions which obligate the buyer in principle to have his car repaired only by an authorized repairshop.

C. Thesis Three : The question of whether warranty claims remain unaffected when standard terms refer only to "guarantee" hinges on the understanding of the average consumer who is not versed in the law.

In its decision of *Dec. 10, 1980 - VIII ZR 295/79* (1), the BGH was concerned with several guarantee terms which were consolidated in what is known as a certificate of guarantee of a large mail-order business. It was undisputed that, taken separately, the guarantee terms deviated from the minimum standard of § 11, item 10, to the detriment of the customer. The decisive question was whether such deviation could be accepted, because no mention had been made of the statutory warranty claims in the certificate of guarantee.

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(1) NJW 1981, p. 867 ff.

Did the statutory warranty claims exist side by side with the given guarantee?

The effectiveness of the guarantee terms are contingent upon how well the consumer understood the guarantee. The BGH based its definition of the consumer's range of comprehension on the purpose of the collective action, namely to counteract the purposes of the seller in his standard terms; customarily, standard terms curtail the consumer's claims under non-mandatory law. The consumer is to be prevented from immediately asserting such claims in order to avoid litigation and thus a review and reformulation by the court of the clause in question. Particularly since consumers are prevented from exercising their rights when confronted with a clause said to be unambiguous, the legislator has made it possible under § 13 for the consumer to have a seemingly effective clause reviewed by a court before a legal dispute arises.

From the point of view of this objective of the § 13 procedure, the BGH arrives at an interpretation of the clause based on the question of how the clause can be pointed out to the consumer, while making allowances for the understanding of an average consumer not versed in law. To such a consumer the term "guarantee" means the extent and the limitation in time of those rights which he has against the seller in the event of deficient delivery. The consumer is apt to regard the rights granted under the guarantee as the only rights available.

By using the formulation most detrimental to the customer, the BGH succeeds in eliminating the means of consumer protection available under the AGBG. As the guarantee terms, despite their designation, are construed by the BGH as a warranty, the BGH has thus allowed itself to judge these terms by § 11, item 10, which relates exclusively to warranty claims.

Since the guarantee terms construed as a warranty did not satisfy the requirements of § 11, item 10, the BGH declared them void and prohibited their use.

§. 3 . Conditions of repair in the car repair, electrical engineering and dry-cleaning trades.

In all the three branches of trade involved here the trade associations have reported term recommendations. The extent to which they are being used varies. In the car repair trade the standard terms recommended by the respective trade association may well be used at the rate of 70 % by those repair-hops which are bound by contract to the manufacturers. Since in the electrical engineering trade two associations are competing for the membership of enterprises and trade solidarity does not seem to be very strong, the rate of application of the term recommendation is probably even less than 50 %. By way of comparison, the market structure in the dry-cleaning trade is homogenuous. The Deutsche Textilreinigungsverband (DTV) is highly inlfuential at least in regard to the northern/northwestern and western areas of Germany, so that recommended standard terms are being used in the great majority of cases. In the area of electrical engineering the VSV has obtained a great number of decisions in legal proceedings against individual enterprises. The experience gained in this connection is being taken into consideration in a systematic review of conditions of repair in the car repair trade currently under way. On Oct. 21, 1982, the VSV issued warnings in respect to a total of 14 clauses, but whether or not litigation will ensue has not yet been decided.

A. Thesis One : The courts are anxious to restore the consumer's freedom to decide.

Over the past three years the BGH has passed decisions concerning the following clauses :

Electrical engineering trade : *BGH, Dec. 3, 1981*(1).

.... For cost estimates which do not result in repairs being performed a handling fee will be charged. In the case of colour television sets and audiovisual equipment this fee may amount to DM 80, in the case of black-and-white television sets to DM 50, in the case of all other equipment

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(1) NJW 1982, p. 765 ff.

to DM 40. We reserve the right to invoice transport charges, if any, separately.

Electrical engineering trade : *BGH, Febr. 25, 1982* (1).

Repair time shall not be binding unless confirmed in writing.

Dry-cleaning trade : *OLG Cologne, Jul. 3, 1981* (2).

We shall be liable to the extent of the current value, but not in excess of 15 times the price charged for dry-cleaning or washing the object delivered to us for treatment. In respect to all other orders (e.g. cleaning of leather, carpets, upholstered furniture, dyeing) the limit of liability shall also be 15 times the processing fee.

Clauses governing determination of extent of performance subject to a charge are to be found in conditions of car repairs just as in conditions of repairs concerning electrical equipment. The craftsman wants to be reimbursed for the expense incurred in preparing a cost estimate even if the order is not placed with him. In practice this clause rules out a price comparison for the consumer who, prior to placing an order for repairs, had decided on getting a cost estimate, as he will now place the order with the craftsman in question regardless, in order to save costs or else will refrain from having the repair performed because it is too expensive for him.

A similar comparison of the interest involved can be made with respect to repair time in the car repair and electrical engineering trades. The consumer would like to know when he may expect to get back his car or electrical appliance that is being repaired in order to organize his schedule accordingly. Although repair shops are quite willing to give out information, they do not whish to commit themselves in writing to a specific repair time at the

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(1) NJW 1982, p. 1389 ff.

(2) BB 1982, p. 638 ff.

consumer's request or insistence. But until the foreman, as the ultimately responsible person, has done just that the consumer cannot hold the repairshop liable for damages for exceeding this deadline. The purpose of the reservation of confirmation is clear : the reporting industrial associations want to prevent repairshops from being tied down to a deadline which mere employee of the enterprise has promised a consumer, not only orally but in writing. Scheduling must remain the responsibility of the management of the repairshop or enterprise.

The limitation of liability to 15 times the processing fee has occupied the German courts for 13 years. Cleaners claim that they are able to adjust 90 % of all complaints by means of the limitation of liability. Beyond that they are afraid that the consumer might abuse this provision by passing off old articles of clothing as new ones, in order to receive increased damages. Conversely, the complaints received by the arbitration boards show that the limitation of liability often does not suffice to finance the necessary replacement.

The BGH has declared all three clauses void. The concern of the party recommending standard terms - which manifests itself in the clauses - is considered not to be totally unjustified. The BGH's wording runs : "There are no legal objections to repairshops asking to be reimbursed for the costly preparation of cost estimates. Repairshops are not obligated to include their expense in their overhead costs and thus ultimately to charge all customers a fee when repairing their equipment". Nor is the trade association of the electrical engineering trade basically forbidden to link the binding nature of written deadlines to the express confirmation given by the person ultimately responsible. "There are no legal objections to the defendant reserving the right vis-à-vis his customers at the defendant's service centres, to plan the work to be done, to have the workshop management confirm in writing binding statements regarding repair time, and to declare as non-binding collection times stated by the defendant's employees in charge of dealing with customers". The limitation of liability clause recommended by the DTV "constitutes a unilateral and unreasonable prejudice *in those cases* where the damage *exceeds* the amount equivalent to 15 times the price charged for cleaning".

After the BGH has basically recognized the legitimacy of the association's interests, it can, as a second step, deal with these clauses from the point of view of the consumer. The BGH based its decision that the clauses were unlawful on the limitation of the consumer's autonomy. These clauses, as they currently exist, do not allow the consumer to identify the intention of the party using standard terms early enough to enable him to react to the legal consequences working to his disadvantage. The BGH demands the consumer's "explicit" consent to the preparation of a cost estimate before the equipment is accepted for the purpose of such an estimate; in other words it demands the conclusion, independent of the contract for repairs, of a contract for work, the cost of which must *expressly* be pointed out to the consumer. *Before* the consuuer places a repair order it should be "pointed out to him that the repair deadline mentioned and even noted down by the receiving office on the collection slip is non-binding pending confirmation by the repairshop management". In the final analysis, the limitation of liability to 15 times the processing fee is considered unlawful for the very reason that the consumer must, upon conclusion of the contract, be given an option to choose between concluding an ordinary contract, under which liability is limited, and concluding a contract which is perhaps more expensive but affords him protection in the event of major damage.
As a consequence of the prohibition, a dispute between the VSV and the dry cleaners has questioned the extent to which the choice of the two possibilities must be indicated in the standard terms.

With all three decisions the BGH is shifting the consumer's problems from the collective level of standard terms to the level of individual decision. The consumer must satisfy himself as to the authority of the employee promising a deadline, and he must ask the cleaner whether he will have the above option upon concluding the contract. The price paid for the unlawfulness of the clause is increased requirements concerning the consumer's duty to gather information. While conversely, the consumer must be informed about the fact that he will have to pay for the cost estimate, the BGH's decision does not help him to get any closer to the goal of obtaining a cost estimate free of charge. In the individual negotiation of cost estimates, of promises of deadlines, and of limitation clauses, the lack of balance of power produced by

the structure of the market makes itself felt again, leaving the consumer but one alternative : namely, not to conclude the contract.

B. Thesis Two : The improvement by the courts of the consumer's freedom to decide precludes a collective solution to the problem underlying the clause in question.

Cost estimates subject to a fee, repair deadlines, and clauses limiting liability, put the consumer in a position where his freedom to decide as an individual consumer has been improved by the BGH's decisions. However, a marked improvement of his legal position as a consumer would be achieved only if such legal position were laid down uniformly in all standard terms. A desirable proposition seems to be standard terms granting the consumer the right to ask any time for a cost estimate free of charge; provisions under which the consumer is entitled to damages in the event of deadlines being exceeded, provided the deadline was confirmed in writing by an employee, or provisions under which the cleaner is fully liable for damages. The AGBG is not tailored to a uniform regulation of the consumer's legal position. The VSV was merely given a "negative" authority : it can only sue for the elimination of unlawful clauses from standard terms. It cannot sue for the inclusion, in standard terms, of clauses favouring the consumer, although so far legal writers have not yet attempted to substantiate de lege lata such an action. For all that, we can imagine cases where only a definite wording of the clause satisfies the requirements of the AGBG.

C. Thesis Three : There is no effective means to counter the suppression of rights granted under the AGBG.

Under § 11, item 10 c AGBG, the repair shop is obligated to bear all expenses incidental to the repair of defects (transport charges, fares, cost of labour and materials). This provision is a thorn in the side of electrical engineers since, according to their professional association, this comprehensive obligation to give compensation results in serious hardship. For years it had been a popular practice in this trade to limit the consumer's claim for repair of defects to the replacement of materials. Since such a regulation was

no longer possible after the coming into force of the AGBG, the association concerned had to find another way out when formulating its term recommendation. The solution is as logical as it is simple : the term recommendation circumvents the regulation laid down in § 11, item 10.

On the other hand, the provision does not obligate the association to include in its standard terms any regulation regarding incidental expenses. Neither the BGB (Civil Code) nor the AGBG basically obligate the party using standard terms to inform the consumer about his rights. The courts decide by taking into consideration the circumstances in each case which, depending on the situation, leads to different results, without a uniform pattern being discernable. Under § 11, item 5 b, AGBG, those clauses are unlawful that obligate the consumer to pay lump-sum damages without allowing him to prove that no or only minor damage occurred. Up to the BGH's decision of *Jun. 16, 1982 - AZ VII ZR 89/81* (1) - it was a highly debatable question whether it was necessary to expressly point out to the consumer his right to furnish proof to the contrary. The BGH denies such a legal obligation and considers it sufficient if the clause "within its perceivable meaning" leaves the consumer the possibility of arguing against the user that the damage sustained in a given case was only minor. A more far-reaching result was arrived at by the LG Berlin in its decision of *May 27, 1982-AZ 26 O 492/81*(2). The clause under consideration had been :

> "Should the seller exceed the agreed time of delivery, the buyer shall be entitled to extend the original term by 14 days and, after this term has expired unused, shall be entitled to withdraw from the contract".

The court declared the clause void, because its wording gave the impression that the buyer was only entitled to the right to cancellation whereas pursuant to the BGH he could also claim damages. "It would be incomprehensible from the point of view of both a customer and the defendant (sellers of

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(1) *NJW 1982, 2316 ff.*

(2) *Unpublished decision.*

furniture), if in standard terms a legal consequence which derives from the BGB itself (i.e. the possibility of withdrawing from the contract upon certain conditions) had been laid down, unless the further legal consequence of damages, possible under the BGB, had simultaneously been excluded".

The consumer is in a relatively better position if the user *distorts* the consumer's rights or else describes them *incompletely*. The conditions of repair of electrical equipment, for instance, mention "warranty" and "correcting defects" without explaining what has to be done in the event of the impossibility of correcting the defect. Under § 11, item 10 b, the user must include in standard terms a passage to the effect that the right of redhibition or the right to abatement is reaffirmed if the party using standard terms makes reference to the possibility of repair of defects. While the conditions of repair of electrical equipment do not expressly mention any limitation of the right to claim repair of defects, in the abstract procedure for a final injunction a clause included in such conditions must be construed in the sense most detrimental to the consumer. That is why the association is obligated to make reference to the revival of warranty claims, which in the BGH's view includes the obligation to make express mention of cancellation of the contract (redhibition) and reduction of the purchase price (abatement).

The BGH's decision of *Dec. 10, 1980-VII ZR 295/79.* (1) is along the same lines. In this case the following clause used by NECKERMANN was challenged by the VSV :

> During the term of guarantee we shall remedy every manufacturing defect in the equipment which can be proved to be attributable to defective materials or defective production or else shall supply a substitute article. The necessary repair parts and the labour time expended will not be offset...

The BGH declared this clause unlawful because, unlike the regulation in § 11,

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(1) NJW 1981, p. 867 ff.

item 10 c, the consumer was given the impression that any transport charges incurred for the return of the defective goods would be charged to the consumer's account.

Subsidiary clauses - that is clauses that are only applicable providing there are no other acts overriding them - do not distort or suppress consumer rights; instead, reference is made within them to a statutory framework, so that without knowledge of the law it is impossible to grasp the contents and extent of exemption. In terms of contents, there is a connection between such clauses and the distortion or suppression of consumer rights. The problematic nature of subsidiary clauses is closely associated with the obligation of the party using standard terms to call the consumer's attention to his rights under those terms. From the wealth of decisions on subsidiary clauses taken by courts other than the BGH, the decision taken by the OLG Stuttgart on *Dec. 19, 1980/2 U 122/1980* (1) stands out :

> Damage claims for default or non-performance shall, as far as permitted by law, be excluded.
>
> "This clause violates the requirement of comprehensibility as laid down in § 2, paragraph 1, item 2, AGBG. Void thereunder are clauses whose implications can only be understood by a lawyer, provided that a clear and unambiguous wording is possible and reasonable".

As far as violation of clauses definitely prohibited under the meaning of § 11 comes within the scope of a subsidiary clause, the OLG seems to assume that such clauses are generally void, for it defines the requirements of admissibility as follows :

> "Only if there are legal doubts as to the extent of limitation of customer rights permitted by the AGBG and <u>therefore</u> a narrowly-worded clause is unreasonable, are clauses worded in broader sense including

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(1) <u>NJW</u> 1981, p. 1105 ff.

subsidiary additions permissible (...)".

The same line of argument has been used by the BGH in its decision of *January 20, 1983 - VII ZR 105/81* (1), in a lawsuit which the VSV had brought against the Deutsche Lufthansa :

> "The air carrier's liability to a passenger in the event of death, bodily injury or impairment of health, is limited to the amount of 250,000 gold francs or its equivalent (about US $ 20,000); if a different limitation of liability has been provided for under the applicable law, such limitation shall apply".

It is merely a question of the admissibility of reference to German law, which under § 11, item 7, forbids a limitation of liability in the event of intent and gross negligence. Contrary to OLG Cologne in its decisions of *February 20, 1981 - 6 U 151/80*, the BGH declared the said clause void, "because the clause limits liability as to damages based on intent or gross negligence by the defendant (Lufthansa) or on intent or gross negligence by the employees of the defendant".

D. Thesis Four : The consumer's legal protection is more effective, the less the clause in question is of importance to him.

This provoking thesis is designed to point out three central gaps in the AGBG where control is excluded : burden of proof, and the price and quality of goods or services. To the consumer, price and quality are the central parameters of decision which determine his behaviour as a consumer. The rules governing the burden of proof determine his chances of affirming his rights.

The entire law of warranty in the repair trade is ineffective, because the consumer is generally unable to prove that the repairshop is responsible for poor workmanship. This consequence can be illustrated by means of third-

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(1) BB 1983, p. 527 ff.

party action clauses, which can be found in the conditions of repair concerning electrical equipment and cars. In their standard terms, repairshops exclude claims for damages or repair of defects if the consumer himself or a third party acting on the consumer's behalf tries to remedy the defect. As is well known, the BGH has put an end to this exemption clause, but in the final analysis has given the consumer "stones to eat instead of bread" (1). By pleading the undermining of its situation regarding the burden of proof as a result of the buyer's action, the defendant (retail firm) fails to see that the buyer (consumer), after accepting the thing as fulfillment (§ 363 BGB), has to prove that a defect was present before the expiration of liability (..) and in so doing also has to disprove an appropriately substantiated assertion by the seller that the buyer's action regarding the equipment resulted in the defect. The buyer accepts this risk as to the burden of proof if he himself examines the equipment or has it examined...".
The applicable rules on the burden of proof in the BGB can be seen as barriers of non-mandatory law, which do not remedy the consumer's inferior position resulting from the structure of the market, but instead, obviate the gap between trade and handicraft. The consumer will generally lack the expert knowledge required to disprove the seller's susbtantiated assertions.

The consumer is similarly lost if a craftsman refuses to repair a defect free of charge, arguing that it was a consequential defect whose repair had to be paid for separately by the consumer. The stereotypical reasons given for this exist in three different versions : (a) The defect was attributable to several causes; in the first repair only one was eliminated; (b) As a result of the initial repair work another part was affected; (c) there was an elusive, undetected defect in the equipment which kept destroying the part just installed. This reasoning can only be disproved with the aid of an expert for whom the consumer has to pay.

Any endeavour to subject the *repair price* itself to a legal and judicial review is thwarted by the principle of free movement of goods in our society, in

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(1) BGH NJW 1980, p. 831 ff; see our Thesis two relating to warranty/guarantee clauses.

which an administered and hence controllable repair price does not exist. § 8, AGBG, adheres to the fantasy of the contractually agreed repair price. At least in the abstract, the market is the only regulating force in regard to the price. Similarly, the *quality* of the repair job escapes legal control. A parallel to the contractually agreed repair price is the idea of viewing the actual performance as the object of a negotiating process between the individual parties. This view point, however, has little to do with the situation currently prevailing in the repair trade concerning cars, electrical equipment and dry-cleaning, for mechanization in these trades results in the unification of working operations through standardization; performance becomes objectively measurable and thus testable. This unification process goes together with the scientific elaboration of calculation methods, which is a precondition for taking a clear view, under the legal perspective of the price formation process. In any case, in the Federal Republic there are substantial, often ideological, difficulties involved in the control of prices and quality, which can only be overcome through political channels.

The limitation of control by the AGBG lies on the periphery of the price/performance relationship, since it is difficult to draw a clear boundary between prohibited and permitted control. The directly relevant questions of determination of performance and placing of orders belong to this very peripheral area. Consumer protection bodies are quite familiar with these problems. Upon conclusion of a contract, the repairer wants to secure for himself as wide a margin as possible for the amount of work to be done and the price to be charged for it. The consumer on the other hand wants to know as precisely as possible - even if he does not say so - how much the repair is going to cost him. The repairer's intentions are reflected in his standard terms in many instances : blanket order clauses, obligations to pay in the event of stopped or impossible repairs; clauses concerning the extension of an order in view of additional repairs which turn out to be "necessary" only when the order is being executed; clauses concerning the exceeding of prices, which completely destroy the binding force of price quotation, if any, on the order form. In the term recommendation for the car repair trade the VSV is making, for the first time, an accurately aimed attempt to narrow the scope allowed to the party using standard terms. It would be too lengthy to

explain all the clauses determining performance and all the clauses providing for an extension of the order, as mentioned above, in the light of the prevailing court practice. The general rule is that any possible interference with the standard terms used in the car repair trade is more difficult the closer it gets to regulating the price and the quality of performance.

E. Thesis Five : The closer the clause in question gets to the prohibited part of the price/performance relationship, the greater the need for legislation that will shift authority from the judiciary to the arbitration bodies.

Standard terms in the dry-cleaning trade obligate the cleaner to perform his work in accordance with the principles laid down in RAL 990 A2. The technical standard thus forms a part of the standard terms, which is rarely the case, and prescribes the quality of the cleaning operation, fixing it at a low level. This latter fact is easy to prove since in 1979 the trade itself drafted the RAL RG 990 system, whose translation into binding standard terms would result in up to a 40 % improvement on current cleaning quality.

The AGBG hinders the VSV from reviewing the standards contained in the clause. Taking as a basis the decisions passed by other courts elsewhere, we may easily predict the outcome of theoretically possible collective action proceedings. The courts will dismiss the action because the AGBG exempts performance as such from judicial control. A predictably unfavourable decision may, however, hinder the development of consumer protection law, since cleaners can thereby oppose efforts by consumer associations which argue that the quality of performance has escaped legal interference. For that reason the VSV is advised to refrain from bringing an action for review of a standard of lower quality.

Therefore, consumer associations must attempt to improve cleaning quality by way of extrajudicial negotiation. The present position seems to be favourable, since consumer associations can make a clear-cut demand as to what cleaners should do.

A good example of the development of law through negotiation beyond the status quo of court practice can be found in tour operators' standard terms,

in which cancellation rights are granted in return for the relative fixing of the contract price (1).

§. 4 . Procedural issues.

A. Thesis One : Necessity for a warning : reduction of the collective action to a quasi-tortious claim for cessation of interference.

When the AGBG came into force on Apr. 1, 1977, the first question to be answered in the enforcement of the collective claim for injunction under § 13 was the following : was the procedural solution of the collective claim for a cease-and-desist order in the area of the UWG to be adopted, or did the peculiarities of the proceedings involving standard terms imply independent rules of procedure ? This applies specifically to the extra-judicial warning procedure.

The wealth of legal literature which had been in existence when the AGBG came into force, or which was written shortly thereafter, assumed as a forgone conclusion that the rules of procedure developed over the years by the courts and legal writers for the collective action proceedings under § 13 UWG were also to be applied without questioning to the collective claim for injunction under § 13 AGBG.

It was not before August 1977, when two permanent positions in the area of standard terms were created that the VSV started to systematically enforce collective claims for injunction under § 13 AGBG. Being aware of the uniform view held by legal writers, it saw no reason why it should come up with ideas of its own. Instead, the rules of procedure applicable in the UWG division were also applied to the area of standard terms, with the result that prior to the filing of an action, an often time-consuming warning procedure was initiated.

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(1) See our Thesis four, relating to price clauses.

It was only as a result of the decision of the LG Berlin of *Jul. 12, 1977 - 26 O 153/79* (1)(a by-product decision), that attention was drawn for the first time to the existing problems. A user, sued for an injunction, had immediately recognized the claim and had moved for a decision awarding the costs of the proceedints against the VSV. The user claimed thatsince he had not received written warning from the VSV, he has thus given no cause for the action. The LG Berlin disallowed this objection and ordered the user to bear the costs, arriving at the following result : The legal writers' opinion that it was in the interest of the association entitled to sue to warn the user before an action was filed, cannot be relevant to actions under the AGBG, as it was based on court decisions on the prohibitory action in the law on competition. The procedure under §§ 13 ff. is of a special legal nature. It serves the purpose of reviewing an abstract general regulation isolated from specific cases to determine whether it is compatible with a higher ranking standard. It is a control procedure which is similar to abstract judicial proceedings on the constitutionality of laws. Owing to the many publications and reports on, and references in public media to, the Act since its coming into force, users of standard terms could reasonably be expected to examine their business conditions with a view to judging whether they were compatible with the AGBG and to adjust them where appropriate. A person who ignores the Act must expect to be held responsible in accordance with the Act, without having an interest warranting protection, i.e., without being given a warning by a consumer association entitled to sue.

Actually, the introduction of registration under § 20 argues against the adoption of the warning procedure followed in the UWG. It is the register, in combination with the effect produced by § 21, which aims to ensure the publicity of the decisions taken in this area. Practical experience shows that collective claims for injunction are settled in most cases by a "strafbewährte Unterlassungserklärung" (statement that a person will refrain from doing something and will incur a penalty for non-compliance) as a consequence to a previous warning. This Unterlassungserklärung cannot be entered

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(1) Published by BUNTE, Entscheidungssammlung, Band 1 § 13, 38.

into the register, and therefore avoids publicity. The legislator's decision to have only actions registered favours suing the user directly and discourages the use of the warning procedure in the area of standard terms. Despite these reasons, the decisions of the LG Berlin is quite exceptional in nature. Both the Kammergericht (1) and the OLG Frankfurt (2) have affirmed the necessity for a warning, arguing that the situation concerning the law on standard terms and where the interests lie within the law is similar to that concerning the law governing competition.

Practically speaking, this reduces the abstract collective action under § 13 to a quasi-tortious claim for cessation of interference. Although the claim for injunction is of a collective nature, it is treated like an individual claim under § 1004 BGB, where elements of fault and moral aspects are involved.

B. Thesis Two : Contractual penalty - The lack of a basis of assessment for the purpose of contractual penalty often hinders the exercise of the claim for injunction.

To ensure compliance with Unterlassungserklärungen, contractual penalty is used as a sanction, so that in the event of non-compliance with his responsibilities, the user is obligated to pay the agreed contractual penalty.

Lacking a clear basis of assessment, it is very difficult to determine the amount of contractual penalty - specifically so in the case where a warning has been issued in respect to a number of clauses. Also legal writers only mentioned lump sums for each clause, without making allowances for the indifiduality of the various clauses. This individuality results from the difference in the assessment of clauses by the user, and by the consumer; it is obvious that ajurisdiction clause calls for different assessment than a price change clause.

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(1) Conclusion of October 6, BUNTE, Band 2 § 13, 17.

(2) Decision of October 8, 1979, BUNTE, Band 1 § 13, 14.

For want of appropriate criteria, the VSV fixes the amount per clause at DM 1,000, and as a total contractual penalty half the sum of the penalties incurred in a given case. The discount thus granted to users of a great number of inadmissible clauses in business dealings is the result of the experience gained by the VSV. Originally, the total contractual penalty was not reduced, so that in given instances sizeable total of contractual penalties also showed in the books of small-and-medium-sized businesses (in the case where a warning was issued, in respect to 28 clauses, the contractual penalty would total DM 28,000 (1). At that time the LG Frankfurt had considered such a contractual penalty to be unacceptable to the user and had declared the VSV liable for the costs of the proceedings. In order to avoid being burdened with costs which could block further activities in the enforcement of a claim for injunction, the VSV departed from previous practice by allowing discounts, although they considered them undesirable.

The only exceptions to this rule can be found in the case of enterprises which are known to have great turnover and a strong market position, and in the case of parties recommending standard terms.

The amount of contractual penalty collected following acts of contravention averages five to eight thousand German marks per calendar year. Since acts of contravention were in some cases committed several months or even years after a Unterlassungerklärung had been made, it can be assumed that compliance with such a Unterlassungserklärung is not ensured. Up until now the detection of any contravention has happened by chance.

C. Thesis Three : Danger of recurrence - The differing practices followed by courts other than the BGH influence the time for filing an action.

Problems in terms of danger of recurrence, which are encountered in the enforcement of the abstract claim for injunction, are mainly due to three causes : (a) the legal institution of a warning used in proceeding concerning

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(1) *Decision of October 18, 1978, BUNTE, Band 1 § 15, 8.*

unfair competition, is applied unquestioningly to proceedings involving standard terms; (b) the courts react differently to the users' defensive strategies, which not only aim at avoiding an action bus also at avoiding an Unterlassungserklärung; thus, in reaction to a warning, users say that they will stop using the excepted provisions, that they will draft new standard terms, or that they are already using other standard terms and have destroyed the excepted forms; (c) the differing reactions by courts other than the BGH are explained by the fact that proceedings involving standard terms are in some cases only decided upon by court divisions for competition matters. Their requirements concerning the danger of recurrence are stricter than those of ordinary civil divisions, which are more inclined to be influenced by a user's assertion in determining whether such a danger exists.

Although the BGH explained in its decision of *Jul. 9, 1981 - VII ZR 123/80* (1) - that there may not be any danger of recurrence even in the absence of a Unterlassungserklärung, this decision is of importance only in a specific case in regard to the enforcement of a claim for injunction. The case in question concerned an owner-operated public-sector enterprise, which had concluded maintenance agreements with local owners of central gas heating units. There was no doubt that this enterprise had pointed out to the comparatively small group of customers the void clauses contained in the VSV's warning notice and had offered to conclude new contracts based on more legally effective clauses. Hence the enterprise had done more than could be expected on the strength of the claim for injunction.

Consequently, the BGH's decision must be regarded as a decision concerning a specific case, since it cannot be assumed that the course of action followed by the above enterprise is practicable in other branches of the economy. The BGH's decision has not, therefore, solved the general problems in this area. The VSV is familiar with the differing views taken by courts other than the BGH with respect to the danger of recurrence and is also aware that the timeframe for filing an action will vary, depending on the court with which such

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(1) NJW 1981, p. 2412 ff.

a prohibitory action must be filed. This is true even if the subject matter of the warning is the same.

D. Thesis Four : A preliminary injunction is not a suitable means of obtaining decisions on questions of principle raised by lawsuits, but is rather a sanction available to enforce established court practices.

When the OLG Düsseldorf denied the admissibility of a preliminary injunction in its decision of *Jul. 10, 1978 - 6 U 61/78*(1), arguing that the required urgency was generally lacking, it looked initially as if the way to speedy legal protection by summary proceedings was blocked. Later on, however, it turned out that other courts did not share this opinion, but instead regarded the preliminary injunction as a possible procedural means of enforcement (LG Hamburg of November 28, 1980 - *74 O 426/80* -; OLG Hamburg of *July 10, 1981 - 5 U 78/81*) (2).

However, the preliminary injunction has so far played only a minor role in the field of standard terms. To ensure uniformity of court practice, issues of principle in this field can only be decided by the BGH. The last stage of appeal in proceedings involving a preliminary injunction is before a superior court. In other respects preliminary injunctions, particularly if they were granted by order and not by judgment, do not offer anything that can be used to develop the law. For that reason the VSV takes the view that proceedings involving a preliminary injunction are primarily suited for a speedy enforcement of decisions handed down by the courts. At present, though, the process of translating the purposes of the AGBG into practice is still at a stage where the aim is to bring about established court practice.

E. Thesis Five : Deadlines for phasing out, or how unlawful standard terms remain in use in business dealings for many years.

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(1) NJW 1979, p. 2512 ff.

(2) LG Hamburg, BUNTE, Band 1 § 15, 11; OLG Hamburg, NJW 1981, p. 2420 ff.

It often happens that enterprises make the strafbewährte Unterlassungserklärung contingent upon a more or less generous fixed deadline for phasing out or at least request the VSV to grant such a deadline.

The problems involved in deadlines for phasing out relate once again to the area of the law on competition. They concern the question of whether violators of the law on competition may continue for a period of time to use costly advertising material, which later turns out to be contrary to fair competition, in order not to have needlessly expended the money. Under the law on competition the courts occasionally allow such a deadline, but the dominant opinion of the law of standard terms is that the object of protection of the abstract prohibitory action under § 13, namely to keep legal transactions free from inadmissible clauses, does not allow the fixing of any deadline whatsoever.

In its decision of *Jun. 11, 1980 - VIII ZR 174/79* (1) (price change in the case of continuing obligations) the BGH endorsed this opinion, stating that the continued use of sample copies containing void standard terms cannot be permitted, even for a transitional period. People involved in legal transactions are to be protected to all intents and purposes against the use of unfair clauses. The BGH officially confirmed and explicated this opinion in its decisions of *Jun. 7, 1982 - VIII ZR 139/81, January 20, 1983 and January, 26, 1983* (2). The principle expressed in the above-mentioned decision in respect to the *proceedings leading to the judgment* also apply in a similar way to the *Unterlassungserklärung*, which aims at rendering superfluous a final injunction at a later date. Hence the VSV is entitled to reject those Unterlassungserklärungen that are subject to the above condition, or to turn down related requests made by enterprises.

In practice the situation is different : warning procedures very often drag along because users who have received such notices keep requesting extensions

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(1) NJW 1980, p. 2518 ff.

(2) BB 1982, p. 1752 ff; BB 1983, p. 527 ff; BB 1983, p. 524 ff.

of the deadline for making an Unterlassungserklärung, for various reasons. Such extensions are generally granted. The result is that deadlines for phasing out are granted indirectly, even if the term "deadline for phasing out " does not appear any place in the extrajudicial procedure. In the area of term recommendations, it often happens that the parties recommending them avail themselves of the unsubstantiated right to provisionally redraft excepted wordings and to report them to the Federal Cartel Office before making a strafbewährte Unterlassungserklärung. Often several months go by before the relevant registration procedure and during that periode the excepted terms appear unaltered in the Federal Gazette.

Our thesis is confirmed by the current negotiations concerning recommended travel terms between the DRV and the VSV : the procedure began in February 1981, and has not yet been completed, although two years will soon have passed.

But even if the BGH expressly refuses to grant deadlines for the termination of contracts containing prohibited clauses, the users still try to obtain permission to do so from the VSV. The proceedings against Lufthansa began in 1980, and when the regional court of Cologne declared the clause void, Lufthansa should have considered changing its standard terms. Nevertheless after losing an appeal in January 1983, Lufthansa asked for an extension until the end of 1983, arguing that it would be extremely difficult to quickly reprint new standard terms. The VSV has refused the demand and has granted only a period of several weeks.

F. Thesis Six : Reduction to effective parts - Protection of the VSV's rights, or how the BGH promotes the development of the law.

In the case of reduction to effective parts, the question is whether inadmissible clauses containing a reasonable and thus effective element may be reduced to that element and upheld within this narrow scope. For example,

3 month extension of the original time period provided for under the standard terms, is unreasonably long (§ 10, item 2) - 4 weeks would be more reasonable. A maintenance agreement providing for a 5-year term, would also be unreasonable since under § 11, item 12, only a term of contract not exceeding 2 years is allowed. Is it necessary to regard the entire clause, including the effective elements as void, or can the effective framework of the clause be upheld ?

In its decisions of *May 17, 1982 - VII ZR 316/81* (1) and *Jun. 7, 1982 - VIII ZR 139/81* (2), the BGH rejected reduction to effective parts, at least related to the cases it dealt with. In its supporting reasons for those decisions, the BGH cites the purpose of the AGBG, according to which a customer should be given the opportunity to obtain appropriate information about the rights and duties arising from a preformulated contract. A reduction to effective parts confronts the consumer with such sophisticated clauses that he can only get a clear picture of the extent of his rights and responsibilities in a lawsuit between individuals. The AGBG, however, as a consequence of its preventive function, aims at preventing just these types of lawsuits.

As a result of the above decisions, the BGH has, whether intentionally or not, strengthened the effectiveness of the collective action under § 13, which proves to be a consumer association's collective action. A reduction to effective parts, even in the case of clear ineffectiveness, is acompanied by the risk of particular dismissal and the related consequences as to cost. The BGH has thus indirectly contributed its share to the protection of the position of those consumer associations entitled to sue, and has at the same time promoted the development of the law, so that clauses characterized by increasingly sophisticated wordings can be submitted to the courts for decision.

On the other hand, in its decisions on price changes in the case of continuing obligations and on the current price clause the BGH undeniably explicated its ideas on the future wording of ineffective clauses which may constitute the

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(1) NJW 1982, p. 2309 ff.

(2) NJW 1982, p. 2311 ff.

subject of litigation. Hence in its decision on the price change clause concerning subscriptions to periodicals, the BGH pointed out the following : The clause may provide for price increases only on condition that the circumstances prevailing at the time of conclusion of the contract have changed; the extent of the price increase must be appropriately proprotional to the change that has occurred. The circumstances responsible for a price increase must be specified in advance; a fair balance to the above would be achieved by the customer being granted the right to withdraw from the contract.

In its decision on guarantee terms, the BGH gave users appropriate tips as to what they should do if they wanted to uphold the customer's statutory warranty claims in addition to his guarantee claims.

The inconsistency of this court practice becomes obvious in that in a given case, reduction to effective parts is rejected, but assistance is rendered as regards the proper wording of clauses.

G. Thesis Seven : Retroactive decisions, or must Daimler-Benz allocate 500 million German marks for reimbursement ?

In what is known as a day-to-day decision (1), the BGH declared a price increase clause void. This clause is of economic importance particularly to the Daimler-Benz company, which uses multi-annual terms of delivery. This decision does not only acquire economic importance because Daimler-Benz is prohibited from basing future contracts on the clause in question. The economic implications also relate to those contracts still pending when the decision was handed down, and, as shown by practical experience, the implications also relate to contracts already completed. The VSV submitted to the BGH the question of whether the duty to desist on the part of the user, against whom a non-appealable judgment had been delivered, extended also to include the following instance : that the user, while fulfilling contracts that had been concluded but not yet completed at the time the decision became final, could

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(1) Of October 7, 1981, NJW 1982, p. 331 ff.

no longer rely on inadmissible clauses in dealings with the customer.

In its decision of *Feb. 11,1981 - VIII ZR 335/79* (1), the BGH stated that the duty to desist also extended to include such contracts as were concluded prior to the granting of a final injunction and which contained the clauses that were later declared void. The BGH substantiates this decisions by simply referring to the purpose of the prohibitory action, that is, to keep legal transactions free from objectively unreasonable clauses. This purpose would only be partially achieved if the user of a clause declared void by the procedure under § 13 were allowed to continue to rely on such a clause, which he knew to be void. This is true even though he would be completing previously concluded contracts and thus technically exercising his rights.

The decision goes to show that the term "use" as employed in § 13 must be interpreted in a much broader sense than that used in § 1, where, according to the wording of the provisions, the time when the contract is concluded is taken as a criterion.

The BGH consistently regards this broader interpretation of the order to desists as not containing the element of retroactivity, since the user is not obligated retroactively to eliminate the consequences of a clause initially agreed on, but later found to be void.

It is just seen from this point of view that the BGH's decision on the day-to-day clause acquires its special economic importance. Since there is no statutory provision filling the gap caused by the ineffectiveness of the day-to-day clause (§ 6, paragraph 2), legal writers have in the meantime considered many different legal schemes. These are ultimately intended to solve the problem of whether Daimler-Benz is entitled to charge the price current at the time of delivery, or whether it is obligated in the case of contracts concluded and completed after Apr. 1, 1977 (the date on which the AGBG came into force), to refund the amount of the price increase paid in accordance

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(1) NJW 1981, p. 1511 ff.

with the principles of undue profit (§ 812 ff. BGB). Meanwhile a claim for repayment under § 812 BGB was granted by the LG Nürnberg/Fürth in its final decision of *Jan. 27, 1982 - 11 S 59/81*(1) - and by the LG Frankfurt in its decision of *Feb. 1982 - 2/16 S 168/81* (2). By contrast, the LG Darmstadt dismissed the claim for repayment for reasons of undue profit under § 812 BGB in its decision of *Mar. 12, 1982 - 17 S 114/81*.

Considering the results of the current price decision, customers driving Mercedes have voiced their alarm through the VSV. As is widely known, the sum of all refund claims against Daimler-Benz is likely to total about 500 million German marks, so that it is easily understandable why they should take such an adamant view against these customer complaints.

To strengthen the effectiveness of subsequent proceedings for recovery in favour of the consumer involved, it would be desirable to aggregate all individual rights into a class action of the VSV against Mercedes-Benz. Under German procedural law, however, it would be rather difficult to argue for such an approach.

If we compare the decision on second-hand cars with that on the current price clause, we can note the following : Whereas the buyer of a second-hand car may have to put up with a car which is not even roadworthy, the buyer of a Mercedes has the chance of claiming repayment of a quite considerable portion of the price.

Hence the question arises as to whether the BGH's decision on the current price clause is perhaps just an expression of the Supreme Court judges' own embarrassment or, in other words : he who drives a Mercedes gets more out of life.

Section 3 - Evaluation of the Federal Cartel Office's regulatory activity.

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(1) BB 1982, p. 456 ff.

(2) Unpublished decision.

The information furnished by the Federal Cartel Office itself provides only a very limited basis on which to judge the order of importance of its regulatory activity. The Federal Cartel Office is obligated by law to compile a report on its past activities every two years (formerly each year), but term recommendations play only secondary part in this report. From the treatises written by two employees, however, further conclusions may be drawn : a main topic is the description of the procedural rules which do not clearly reveal to the public what is actually happening. The Federal Cartel Office has, through its employees, advised those associations interested in a term recommendation against reporting their drafts right away, as called for by the statutory provisions in § 38 GWB. Instead it has suggested that they submit those drafts to the Federal Cartel Office for preliminary review. Within the framework of this informal procedure, which precedes the actual applications for registration, the custodians of cartel law examine the draft from the point of view of the AGBG. To the Cartel Office and to industrial associations alike, this practice offers considerable advantages over the statutory provision. The associations save costs, which would be incurred by a subsequent alteration of the registered recommendation in response to the pressure exerted by the Federal Cartel Office. And what is more, they need not be afraid of negative publicity, for a comparison between the text of the initial application for registration and the text of the revised version would reveal quite clearly where the associations had to concede. The Federal Cartel Office in its turn takes advantage of just this fear of publicity, exerting an influence on the drafting of standard terms at the stage of their application for registration. For purposes of an academic evaluation of the Office's regulatory activity, the lack of clarity of the procedure followed means that the Federal Cartel Office's regulatory activity can only be evaluated following a study of its files. Again, this is only possible if the industrial association filing an application agrees to an inspection of the files.

§. 1 . Thesis One : The Federal Cartel Office only reviews the term recommendations to be registered with a view to obvious violations, and leaves the interpretation of indefinite legal terms to the courts.

The Federal Cartel Office uses the list of definitively prohibited clauses, as far as it contains definite criteria, for its guidance. However, "obviously" the Federal Cartel Office does not cogently apply the standard applicable to clauses prohibited under § 11, AGBG, as it did nothing about the following clause in the term recommendation fo the electrical trade : "overhead costs in respect to portable equipment are charged in the category customary within the business, unless they are disproportionately high compared with the purchase price and the seller can furnish proof to that effect". § 11, item 10 c, obligates the party using standard terms to absorb incidental expenses incurred in the repair of defects in all cases. No doubt, the Federal Cartel Office was aware of the violation, but in the final analysis, it yielded to the association.

The Federal Cartel Office deliberately fails to exhaust the possibilities provided for in the general clause and in § 10 AGBG. It leaves this to the VSV, which may even take action against standard terms reviewed by the Cartel Office by instituting a collective action. By shifting the responsibility for interpretation to the courts and consumer organizations, the Federal Cartel Office tries to present itself as the party which merely applies the law. This impression of the Office is confirmed by its line of action, which consists of merely reacting to a final decision, often with surprising gaps in communication. The competent decision-making department initiates abuse proceedings against the party recommending standard terms only when the decision has been published in the relevant journal, which may mean a delay of up to 6 months from the date of pronouncement of a decision. If the decision passed by the BGH does not exactly fit the wording of a clause, the Federal Cartel Office is hesitant to apply that decision to similar cases. The BGH had declared void the third-party action clause in the conditions of sale concerning the electrical trade. Despite the fact that the conditions of repair in the same trade are printed on the same form as the conditions of sale, and also contain a third-party action clause, the Federal Cartel Office reviewed and took exception only to the conditions of sale. The Office's files do not reveal whether the Federal Cartel office even noticed the parallel in the first place.

§. 2. Thesis Two : The structure of the registration procedure presents an insurmountable obstacle to collective negotiation due to the unequal possibility of participation.

The negotiation procedures initiated by the Cartel Office involve the Cartel Office and all interested trade associations. The Arbeitsgemeinschaft der Verbraucher (AGV) is not directly engaged in negotiations, but draft term recommendations are submitted to them for comment. The GWB does not even explicitly grant consumer organisations this modest opportunity to participate. As late as 1974, the Cartel Office had asked for a legal opinion in order to clarify whether consumer organisations had a right to be heard at all, before establishing the present practice. While the AGV's legal viewpoint is reviewed by the Federal Cartel Office, it rarely happens that any of the AGV's criticisms are taken directly into consideration during the negotiations. The AGV's comment is more in the nature of defense, which is partly the AGV's own fault, since its comments are often quite superficial.

§. 3. Thesis Three : Industrial associations play the AGV against the Cartel Office if the AGV makes "excessive" demands with respect to consumer protection.

This possibility of playing one against the other is explained by the unequal opportunities of participation in the registration procedure. The Zentralverband des Elektrohandwerks (ZVEH) in 1973 got in touch with the AGV in order to discuss drafted conditions of sale and repair. According to the ZVEH's idea, this mutually agreed draft was to be filed with the Federal Cartel Office for the purpose of registration. When the AGV made an attempt during the negotiations to anticipate the developments of the AGBG, the ZVEH broke off relations. The Federal Cartel Office approved the drafted term recommendation and confined itself to drawing the ZVEH's attention to the fact that after the coming into force of the AGBG, the term recommendation would have to be adjusted accordingly.

§. 4. Thesis Four : If industrial associations and consumer organizations have jointly worked out a draft, the Federal Cartel Office restrains itself during the registration procedure.

In cooperation with the Zentralverband des Kraftfahrzeughandels und-gewerbes, the ADAC has worked out a whole range of standard terms : conditions of car repairs, and conditions of sale concerning new and second-hand cars. The associations mentioned have submitted to the Federal Cartel Office for registration a joint draft with respect to each of the three sets of clauses. Upon initial registration in 1974, and again upon adjustment to the AGBG in 1977, the Federal Cartel Office dispensed with a review in view of the ADAC's expert knowledge. The AGV's comment was not taken into account. In 1981 the ZVK and the ADAC completely revised the conditions of repair, and the revised text was published in the Federal Gazette on Jan. 30, 1982. The practice followed by the Cartel Office does not seem to have changed, for the BGH had meanwhile declared void both the third-party action clause - on Nov. 28 1979 (1) - and the consumer's obligation to pay for a cost estimate provided for on standard form - on Dec. 3, 1981 - (2), without these decisions having had any noticeable influence on the review procedure before the Cartel Office. In respect to both clauses, the VSV issued warning notices on Oct. 21, 1982.

The extent to which the Federal Cartel Office has also dispensed with unassisted control in the case of conditions concerning new or second-hand cars, could only be ascertained by a study of the files. There are indications that control by the Cartel Office is hardly ever exercised if the parties submit to the Office a mutually negotiated result.

§. 5. Thesis Five : The lack of organization within consumer associations reduces the chance of their exerting an influence on the proceedings at the Cartel Office.

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(1) NJW 1982, p. 765 ff.

(2) NJW 1980, p. 831 ff.

The AGV has removed itself from the process of opinion-forming in proceedings at the Cartel Office, at least with respect to those proceedings in which the ADAC acts as an agent safeguarding the consumer's interests. During a revision of car repair conditions in 1973, the ADAC had requested an opinion from the AGV in order to satisfy the formal requirements of the hearing procedure provided for in § 38 GWB. At that time the AGV had unceremoniously left the field to the ADAC, not because it trusted the ADAC unconditionally with regard to its course of action, but rather because the AGV itself had no expertise in that field. In the subsequent registration proceedings this withdrawal resulted in the Federal Cartel Office ceasing to pay attention to the AGV's opinion. At the same time the ADAC acts like a consumer organization in its dealings with the Federal Cartel Office. This position of the ADAC seems questionable since the VSV has issued a warning in respect to 14 clauses of the revised text of the car repair conditions which the ADAC had supported. The above statements show the tension existing between the ADAC and the VSV. The VSV plays the part of the troublemaker, criticizing the compromise negotiated on the consumer's behalf by two powerful organizations. The ADAC's annoyance as a result of the warning it received from the VSV may be sufficient proof of this conclusion. The uneven division of responsibilities between the AGV and the VSV results in the loss of many opportunities to exert an influence on the proceedings at the Cartel Office. During the registration proceedings the opinion is delivered by the AGV, which informally asks the VSV for its advice. But only the VSV, which is held in high repute by the Federal Cartel Office, is technically qualified.

§. 6. Thesis Six : The non-binding nature of a term recommendation results in difficulties in its application - a fact disapproved of by both recommending associations and consumer organizations.

Term recommendations are non-binding by nature. The Federal Cartel Office, however, pays meticulous attention to compliance with a wording which begins by expressing that non-binding nature : "The following recommendation is non-binding. Consequently, association members and their business partners are at liberty to use deviating business conditions". Theoretically the Federal Cartel Office would be obligated to take action if a trade

actually applies the term recommendation uniformly, since the questions of an inadmissible cartel agreement would then arise. Actually, with the exception of car repair conditions and conditions of sale concerning new cars, the scope of application is so narrow that the quasi-binding force poses only an academic problem. Consumer and industrial associations deplore this non-binding nature for various reasons. Industrial associations regard a recommendation as a means of promoting solidarity in the trade : members are linked more closely with the association, while non-members are stigmatized as black sheep. From the point of view of the consumer, the standard achieved in term recommendations constitutes a marked improvement over many standard terms used by small-and medium-sized trade and industry, which often contain a great number of unlawful clauses. Conversely, members of trade and industrial organizations reject standard terms which excessively favour consumers even if such terms were drafted by the respective associations. In view of the very limited possibility of control, these small- and medium-sized enterprises stand a good chance of using clearly unlawful standard terms which deviate from the term recommendation, for many years to come.

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