Legal implications of flexibility in business contracting from the German perspective: Control of standard terms and conditions and the choice of law[1]

RA DR. HANS-WERNER MORITZ[2] & RA MAXIMILIAN KUHN[3]

This paper is concerned with flexibility in business contracting within the German legal system. After a short introduction about the constitutional background of freedom in contracting in the Federal Republic of Germany it describes in the first part how freedom of business contracting is actually considerably curtailed within the German legal system.

The German Civil Code (BGB) provides for a rigid control of standard terms and conditions through the German courts: While there are detailed provisions regulating the dos and don'ts in commercial B2C contracts, the law allows the users of standard terms and conditions more flexibility in B2B contracts. However, German courts very often do not sufficiently distinguish between B2B and B2C contracts and apply the stringent B2C rules to B2B contracts without taking account of the requirements and established business practices in a given industry. The authors introduce several suggestions how to solve this issue.

The second part of the paper deals with the possibility of choice of law under the prerequisite not to completely leave the German legal system. Discussed are the regimes of CISG and PECL as alternatives to the current German regime.

1. Preamble

This survey describes legal implications of flexibility in business contracting from the German perspective. European aspects will be included in so far as they have a bearing on the German perspective.

---

[1] Last update: August 2013.

[2] Moritz & Moritz, Rechtsanwälte in Bürogemeinschaft, D -82544 Egling, hw.moritz@web.de.
[3] Meister Rechtsanwälte Partnerschaftsgesellschaft, D-80331 München, m.kuhn@meisterlaw.de.

The flexibility issue addressed in this project directly relates to the freedom of individuals and corporations to form contracts without government restrictions. The freedom to contract is the underpinning of laissez-faire economics and is the cornerstone of free market libertarianism.

2. Definitions

In Germany freedom of contract is protected by Article 2 subsection 1 of the Constitution which provides that everyone may contract with which every party and for whatever subject matter one chooses, insofar as the content is not contrary to current law or public policy, or expressly statutorily forbidden.

Freedom of contract can be distinguished as follows:[4]

2.1. Freedom to enter into contracts

Freedom to enter into contracts is the freedom of a person, to decide on his or her own terms whether, where, when and with whom he or she wishes to enter into a contractually binding relation with another person. This freedom may be limited by mandatory obligations to conclude a contract. An example of such obligation is the supply of electricity, where the electricity provider must supply the customer.

2.2. Freedom of the contractual form

Freedom of the contractual form means that one does not have to use a set form for the contract or choose a form defined by statute. There are some exceptions, e.g. for contracts

---

[4] The following definitions are suggested by Notariat Michael Becker, Königstraße 17, D-01097 Dresden, avail-able at http://www.koenigstrasse17.de/lang-de/notars/278-vertragsfreiheit.html.

including estate transfer, which are only valid by notarization according to section 311b subsection 1 German civil code (BGB)[5].

2.3. Freedom of content

Freedom of content means that one can determine the content of the contract as one wishes, including allowing for the creation of new types of contract.

The following survey will address all aspects of the above definitions.

3. General rules of contract law in Germany

The BGB generally provides for freedom of the content of a contract (section 311 BGB). However, a contract is null and void if its content is contrary to mandatory law (section 134 BGB) or contrary to good faith and fair dealing (section 138 BGB).

3.1. Standard terms and conditions in the BGB

Furthermore standard terms and conditions used by a contract party are null and void if they inadequately disadvantage the other contract party contrary to the requirements of good faith and fair dealing (section 307 BGB). Section 307 BGB also applies to B2B-contracts however courts must adequately consider commercial usages and commercial practices.

[5] German Civil Code (Bürgerliches Gesetzbuch, BGB) in the version promulgated on January 2, 2002 (Federal Law Gazette (Bundesgesetzblatt) I p. 42, 2909; 2003 I, p. 738), last amended by statute of September 28, 2009 I 3161, online available at http://www.gesetze-im-internet.de/bgb/BJNR001950896.html and translated into English at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

3.2. Control of standard terms and conditions by the courts

3.2.1. De lege lata

Actually industry associations and legal experts are vividly discussing in Germany whether the control of standard terms and conditions in B2B-contracts is too rigid and should be reformed. De facto the jurisdiction does in the majority of cases not distinguish between consumer contracts and those without consumers as one of the contracting parties, although such distinction is expressly made in the BGB (Vogenauer, 2013, pp. 264 et seq.). Basically three proposals are under discussion.

3.2.2. De lege ferenda

3.2.2.1. Discussed is the relaxation of the strict requirements, which are currently demanded by the jurisdiction for the existence of an uncontrolled individual agreement. According to section 305 subsection 1 sentence 3 BGB, clauses have to be checked as standard terms and conditions when they are supposed to be used more than only once by one of the contracting parties and have not been topic in negotiations in a certain way. Actually, the German Federal Supreme Court accepts only as an "Aushandeln im Einzelnen" (lit.: negotiation with full details) in the sense of section 305 subsection 1 sentence 3 BGB, if the content of the standard terms and conditions, which is deviating from law, is seriously put to the decision by the using party, and the negotiating partner is given freedom of scope to represent his interests; according to that, the client has to get in real terms the possibility to influence the content of the contractual obligations.[6]

Reformers argue against this judicative principle, which says that "Aushandeln" means more than simply "Verhandeln" (lit. also negotiate). According to them, it should be easier to exclude single clauses from the control according to section 305 et seq. BGB by making them a topic in contract negotiations.[7] Some even don't want to wait for a change in jurisdiction,

---

[6] BGH (Bundesgerichtshof - German Federal Supreme Court) in: Neue Juristische Wochenschrift - NJW (1998) p. 3488, on p. 3489; BGHZ (civil law decisions by the German Federal Supreme Court) 150, p. 299, on p. 302 et seq. = Neue Juristische Wochenschrift - NJW (2002) p. 2388, on p. 2389.

[7] Fornasier, „Die Klauselkontrolle im unternehmerischen Geschäftsverkehr - für eine Neubestimmung der zivil- und kartellrechtlichen Grenzen der Vertragsfreiheit", published in: Forschungsinstitut für

which would be possible under current law but would probably take its time due to the German legal system, but call for a revision of section 305 BGB by the legislator.[8]

3.2.2.2. Others propose that judicial control of standard terms and conditions should only happen depending on the value of the deal. A judicial control of the standard terms and conditions should not happen, if the value of the contract is above a certain limit, usually determined at a scale between 500.000,- € and 1 Mio. €.[9] This approach is based on a new theory, according to which the true reason for the protection against standard terms and conditions by law is not the need for compensation because of the difference in economic power between the contracting parties, but to override information- and motivation asymmetries between them, because for the contracting party being confronted with the standard terms and conditions it's often not worth the trouble to read all the fine print as regularly only a single contract of often small value is at stake.[10]

The Problem with this is how to set the value of a contract. Furthermore it makes a difference, if a contract is part of the core business or not or if it's only about a single contract between the contracting parties or several contracts within running business relations.

3.2.2.3. There's also a discussion about changing the case law regarding section 307 BGB, using the words „unangemessene Benachteiligung“ (lit.: inadequate disadvantage) for more leeway in B2B-cases. Particularly, it is suggested that courts no longer use the interdictions of certain clauses for B2C-contracts in section 308 BGB and section 309 BGB as an indication for qualifying a clause as an „unangemessenen Benachteiligung“ in the sense of the blanket clause in section 307 subsection 1 sentence 1 BGB.

As mentioned above under a), because of the peculiarities of the German legal system such a change will take time, because rulings of the German Federal Supreme Court will be needed.

Wirtschaftsverfas-sung und Wettbewerb e.V., Köln (FIW), Schwerpunkte des Kartellrechts 2011, Carl Heymanns Verlag, Cologne Munich (2012), p. 16, on p. 21 et seq.

[8] Berger, „Für eine Reform des AGB-Rechts im Unternehmerverkehr“, published in Neue Juristische Wochenschrift - NJW (2010) p. 465, on p. 467.

[9] Leuschner**, „**AGB-Kontrolle im unternehmerischen Verkehr - Zu den Grundlagen einer Reformdebatte“, published in: Juristenzeitung - JZ (2010), p. 875, on p. 883 et seq.; Fornasier, please see fn. 4, on p. 22.

[10] Fornasier, please see fn. 4, on p. 19 et seq.

And therefor cases are necessary which find their way to the German Federal Supreme Court, which is even more difficult as by now there exists abundant case law ("ständige Rechtsprechung") of the lower courts concerning section 305 et seq. BGB, and therefore, there is - according to section 543 subsection 2 German civil procedure code (ZPO)[11] - hardly a reason for lower courts to allow appeal to the German Federal Supreme Court.[12]

4. Control of standard terms and conditions through the act against restrictions of competition

Although the control of standard terms and conditions in the BGB aims to protect the individual contractual counterpart and the German Act against Restrictions of Competition (GWB)[13] aims to protect competition in principle, both laws can generally be applied side by side, especially due to their different aims and intervention limits.[14] From the perspective of the above mentioned new theory, that control of standard terms and conditions as laid down in the BGB in section 305 et seq. BGB is not intended to compensate differences in economic power between the contractual parties but to override asymmetries in information and motivation between them (cp. above), a protection gap is opened, that possibly could be closed by certain reforms of the GWB.[15]

[11] German civil procedure code (Zivilprozessordnung, ZPO) in the version promulgated on 5 December 2005 (Federal Law Gazette (Bundesgesetzblatt) I p. 3202 ;2006 I p. 431) (2007 I p. 1781) last amended by statute of 22 December 2011 I 3044, online available at http://www.gesetze-im-internet.de/zpo/BJNR005330950.html.
[12] Berger, „Für eine Reform des AGB-Rechts im Unternehmerverkehr", published in Neue Juristische Wochenschrift - NJW (2010) p. 465, on p. 466; Fornasier, please see fn. 4, on p. 2 et seq.
[13] German Act against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) in the version promulgated on 15 July 2005 (Federal Law Gazette (Bundesgesetzblatt) I p. 2114; 2009 I p. 3850), last amended by statute of 22 December 2011 I 3044, online available at http://www.gesetze-im-internet.de/gwb/ BJNR252110998.html and translated to English at http://www.cgerli.org/index.php?id=50& tx_vmdocument search_pi2[docID]=72.
[14] Ulmer/Brandner/Hensen, AGB-Recht, 11th edition (2011), Verlag Dr. Otto Schmidt KG, Cologne, Vorb. v. § 307 BGB, marginal numbers 76, 86.
[15] Fornasier, please see fn. 4, on p. 28.

4.1. No practical significance de lege lata (Section 19 Subsection 4 no. 2 GWB)

The GWB already today forbids market dominating enterprises to demand terms and conditions that deviate with high probability from those that would be established by effective competition (Section 19 Subsection 4 no. 2 GWB). In practice, the impact of this provision is quite small up to now. Reasons for this are first the high intervention limit of section 19 GWB, as only behavior of market dominating enterprises can be sanctioned, and secondly that the standard of scrutiny is difficult to handle: To declare the use of a term or condition as an abuse, a comparison with the situation under effective competition is required. This is quite complicated, especially as the German Federal Supreme Court asks for an overall view of the complete bundle of services ("Gesamtbetrachtung des Leistungsbündels").[16] So it is not only to answer the question, if certain singular clauses would also be used in a market with effective competition, but also what their effect in the whole contractual exchange relationship ("Äquivalenzverhältnis") is and if this is comparable to one concluded in a (hypothetical) market with effective competition.[17]

4.2. Potential practical significance de lege ferenda

A big advantage of the control of standard terms and conditions by the GWB in comparison to the control by section 305 et seq. BGB is, that a single clause must not be checked in isolation but also its interaction with other clauses and the whole contractual exchange relationship has to be taken into account.[18] The main problem with the GBW-approach is the limitation of section 19 GWB to market dominating companies. This limitation could be lowered according to the example of section 20 subsection 2 GWB by including also companies with a relatively strong position in the market, compared to depending small and medium-sized enterprises. Also the standard of scrutiny could be simplified, e.g. by also applying common legal measures of justice as stated in section 242 BGB ("good faith") or

[16] BGH (Bundesgerichtshof - German Federal Supreme Court), decision from 6.11.1984, Ref. No. KVR 13/83, in: Neue Juristische Wochenschrift - NJW (1986) p. 846, on p. 846.
[17] Fornasier, please see fn. 4, on p. 26.
[18] Fornasier, please see fn. 4, on p. 27.

section 138 subsection 1 BGB ("fair dealing") as the standard of comparison.[19] However, currently no efforts of the legislator are known to move in this direction.

5. The possibility of choice of law

5.1. Eligibility of the law of contract

There are two further law regimes under which a contract could be concluded (without leaving the German legal system at all): the United Nations Convention on Contracts for the International Sale of Goods (CISG)[20] and the Principles of European Contract Law (PECL)[21]. The CISG is part of the German legal system since 1. January 1991 and meshes particularly well with German law as it is strongly influenced by continental European legal principles.[22] The PECL are merely a set of model rules or restatement of principles of contract law, initiated by the European Commission and drawn up by leading contract law academics in Europe. However, the practical effects of CISG and PECL will probably be low:

5.2. Freedom of contract under the provisions of the CISG (Article 6) and under the counterpart provisions in the PECL

Both, the CISG and the PECL, address the principle of freedom of contract (Article 6 CISG and Article 1:102, 1:103 PECL).[23] But while the CISG is applicable by law whenever the requirements of Article 1 subsection 1 lit. a) or lit. b) CISG and none of the exceptions in Article 2 - 5 CISG are fulfilled and the CISG is not excluded by the contracting parties (so

---

[19] Fornasier, please see fn. 4, on p. 29.
[20] Full text online available at: http://cisgw3.law.pace.edu/cisg/text/treaty.html.
[21] Online available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.
[22] „Law - Made in Germany", published by Bundesnotarkammer (BNotK), Bundesrechtsanwaltskammer (BRAK), Deutscher Anwaltsverein (DAV), Deutscher Industrie- und Handelskammertag e.V. (DIHK), Deutscher Notarverein (DNotV) and Deutscher Richterbund (DRB) in cooperation, 2nd edition (2012), p. 9; also online available at http://www.lawmadeingermany.de/index.htm.
[23] Schroeter, "Freedom of Contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the PECL" in: The Vidobona Journal of International Commercial Law and Arbitration, Vol. 6 (2002), p. 257, on p. 259.

called "opt-out", Article 6 CISG, only for the law of contracting states of the Convention), the PECL is only applicable when the parties have chosen it and otherwise applicable national law allows for this choice (so called "opt-in").[24]
But more important are the differences between the two laws concerning freedom of contract within their respective system, if they are eventually applicable to a contract:

According to the principal norm in this question, Article 1:102 subsection 1 PECL, the parties may determine the content of the contract "subject to the requirements of good faith and fair dealing".[25] Article 6 CISG does not contain a similar limitation to the freedom of contract. Further Article 1:102 subsection 1 and 2 PECL subjects the freedom of contract to the mandatory rules established in Article 4:118 PECL (limitation of the exclusion or restriction of remedies for fraud, threats, excessive benefit etc.), Article 6:105 (grossly unreasonable exercise of a unilateral right by one party to decide) and Article 8:109 (exclusion or restriction of remedies for non-performance if contrary to good faith and fair dealing). Article 6 CISG names only Article 12 CISG as the single injunction the parties may not derogate from.

Finally, according to Article 1:103 subsection 1 PECL national mandatory rules are applicable if the law otherwise applicable does not allow their exclusion by the way of choice by the parties, and according to Article 1:103 subsection 2 PECL mandatory rules of national, supranational and international law which are applicable irrespective of the law governing the contract must be given effect. Under the CISG, as far as matters governed by the convention are concerned, no mandatory rule of any national, supranational or international law may be applied - cp. Article 7 subsection 2 CISG. As not all matters are governed by the Convention, mandatory rules are to be given effect whenever a matter is outside the CISG's scope. According to Article 4 lit. a) CISG the Convention "is not concerned with […] the validity of the contract or of any of its provisions or of any usage". So mandatory rules concerning the question of validity can also be applicated under CISG. But national mandatory rules remain only applicable by Article 4 lit. a) CISG under the condition that the CISG's provisions and fundamental principles are taken into account when they are applied to a CISG contract. So,

---

[24] Schroeter, please see fn. 20, on p. 258.
[25] Roth/Schubert, in: Münchener Kommentar zum BGB, 6th edition (2012), Verlag C. H. Beck, Munich, § 242, marginal no. 159.

if national law declares clauses as standard terms and conditions invalid because they are incompatible with the essential principles of law from which the contract parties derogate, the relevant essential principles are those of the CISG.[26]

As shown above, the legal nature of the CISG as a contract under international law has allowed its drafters to go beyond the limits laid down in Article 1:102 and Article 1:103 PECL.

6. Outlook: Common European sales law

6.1. The European Commission's proposal

October 2011 the European Commission presented a proposal of a Common European Sales Law (CESL).[27] Its concept is that of an optional, collective material law for cross-border sale contracts. That means it can be chosen by the contract parties in addition to national law.[28] The question is, if this could be an option to avoid the control of clauses as standard terms and conditions according to section 305 et seq. BGB (within the German legal system and without complete "escape" to another legal system like e.g. the Swiss one).

6.2. Practical significance doubtful

De facto the possibility of choosing the CESL is not as attractive as it looks at first sight: For contracts between enterprises, it can - according to Article 7 of the regulation proposal - regularly only be chosen if one of the contract parties is a so called "small or medium-sized enterprise" (SME). This depends according to Article 7 subsection 2 CESL on how many employees are employed and that the annual turnover or balance sheet total is lower than a certain sum, but there are no standards mentioned how to determine this sum. This uncertainty even can rise, because Article 13 of the regulation proposal allows the individual

[26] Schroeter, please see fn. 20, on p. 260 et seq.
[27] COM(2011) 635 final, available at
http://ec.europa.eu/justice/contract/files/common_sales_law/regulation _sales_law_en.pdf.
[28] In place of many Martinek, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch, Ergänzungsband: Eckpfeiler des Zivilrechts, Neubearbeitung 2012, Verlag De Gruyter; Sellier & Co, Berlin, A. BGB aktuell 2012 / 2013, marginal no. 120.

countries to decide, that within their sphere the CESL can also be used for contracts between two enterprises regardless of their size. In addition, also the CESL contains in its Article 79 in conjunction with Article 86 prescriptions that are similar to those concerning standard terms and conditions in section 305 et seq. BGB,[29] so that it is not sure that German courts really will decide differently but will apply their usual interpretation as under German law.

References:

Becker, M. (2012), Notariat Michael Becker [Online], available at http://www.koenigstrasse17.de/lang-de/notars/278-vertragsfreiheit.html [Accessed: 16th January 2013].

Berger, K. P. (2010), „Für eine Reform des AGB-Rechts im Unternehmerverkehr", Neue Juristische Wochenschrift - NJW, Vol. 63 (2010), pp. 465-470.

BGH (1984), Bundesgerichtshof - German Federal Supreme Court, Neue Juristische Wochenschrift – NJW, Vol. 39 (1986), pp. 846-848.

BGH (1998), Bundesgerichtshof - German Federal Supreme Court, Neue Juristische Wochenschrift - NJW, Vol. 51 (1998), pp. 3488-3489.

BGH (2002), Bundesgerichtshof - German Federal Supreme Court, Neue Juristische Wochenschrift - NJW, Vol. 55 (2002), pp. 2388-2389.

Bundesnotarkammer (BNotK), Bundesrechtsanwaltskammer (BRAK), Deutscher Anwaltsverein (DAV), Deutscher Industrie- und Handelskammertag e.V. (DIHK), Deutscher Notarverein (DNotV) and Deutscher Richterbund (DRB) in cooperation 2012, Law - Made in Germany, 2nd edition, available at http://www.lawmadeingermany.de/index.htm [Accessed: 16th January 2013].

Fornasier, M. (2012), „Die Klauselkontrolle im unternehmerischen Geschäftsverkehr - für eine Neubestimmung der zivil- und kartellrechtlichen Grenzen der Vertragsfreiheit", in Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb e.V., Köln (FIW) (Ed.), Schwerpunkte des Kartellrechts 2011, Carl Heymanns Verlag, Cologne Munich, Germany, pp. 17-30.

Fuchs, A. (2011), „Vorb. v. § 307 BGB", in Ulmer, P., Brandner, H. E. and Hensen, H.-D. (Ed.), AGB-Recht – Kommentar zu den §§ 305-310 BGB und zum UKlaG, 11th edition, Verlag Dr. Otto Schmidt KG, Cologne, Germany, pp. 501-564.

Leuschner, L. (2010), „AGB-Kontrolle im unternehmerischen Verkehr - Zu den Grundlagen einer Reformdebatte", Juristenzeitung - JZ, Vol. 59 (2010), pp. 875-884.

[29] Fornasier, please see fn. 4, on p. 29.

Martinek, M. (2012), “BGB aktuell 2012 / 2013“, in: Martinek, M. (Ed.), J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Ergänzungsband: Eckpfeiler des Zivilrechts, Neubearbeitung 2012, Verlag De Gruyter, Sellier & Co, Berlin, Germany, pp. 1-74.

Roth, G. H. and Schubert, C. (2012), „BGB § 242 Leistung nach Treu und Glauben“, in: Säcker, F. J. and Rixecker, R. (Ed.), Münchener Kommentar zum BGB, 6th edition, Verlag C. H. Beck, Munich, Germany, pp. 95-277.

Schroeter, U. G. (2002), “Freedom of Contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the PECL”, The Vidobona Journal of International Commercial Law and Arbitration, Vol. 6, pp. 257-266.

Vogenauer, S. (2013), „Regulatory Competition Trough Choice of Contract Law and Forum“, in Eidenmüller, H. (Ed.), Regulatory Competition in Contract Law and Dispute Resolution, Verlag C.H. Beck · Hart · Nomos, Munich, Germany, pp. 227-284.