

Prof. Dr. Thomas Hoeren
Institute for Information, Telecommunication and Media Law
University of Münster
Leonardo-Campus 9
D-48149 Münster
hoeren@uni-muenster.de

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List of abbreviations

A

a.A.	dissenting view
ABl. EU	Gazette of the European Union
Abs.	Paragraph
ADR	Alternative Dispute Resolution
a.E.	down the road
AEUV	Treaty on the Functioning of the European Union
AG	Local court
AGB	General terms and conditions of business
AJP	Aktuelle Juristische Praxis (magazine)
ArchPT	Archiv für Post und Telekommunikation (magazine)
ARPA	Advanced Research Projects Agency
ASP	Application Service Providing/Provider
AuA	Arbeit und Arbeitsrecht (magazine)

B

BAG	Federal Labour Court
BB	Betriebs-Berater (magazine)
BDSG	Federal Data Protection Act
BFH	Federal Fiscal Court
BGB	German Civil Code
BGBI.	Federal Law Gazette
BGH	Federal Court of Justice
BMJ	Federal Ministry of Justice
BNetzA	Federal Network Agency
BRAO	Federal Lawyers' Act
BR-Drs.	Bundesrat printed matter
BT-Drs.	Bundestag printed matter
BVerfG	Federal Constitutional Court
BVerwG	Federal Administrative Court
B2B	Business to Business
B2C	Business to Consumer

C

CD-ROM	Compact Disc Read-Only Memory
c.i.c.	culpa in contrahendo
CISG	Convention on the International Sale of Goods
CPU	Central Processing Unit
CR	Computer und Recht (magazine)
CRi	Computer Law Review International

D

DAB	Digital audio broadcasting
DANA	Privacy notices
DB	Der Betrieb (magazine)
DFÜ	Remote data transmission
Digma	Journal for data law and data security
DRiZ	German magazine for judges
DRM	Digital rights management
DSGVO	Basic data protection regulation
DuD	Datenschutz und Datensicherheit (magazine)
DV	Data processing
DVD	Digital Versatile Disc
DVBl.	Deutsches Verwaltungsblatt (magazine)

E

ECLIP	Electronic commerce legal issues platform
ECLR	European comparative law review
EDI	Electronic data interchange
EDV	electronic Data processing
EGBGB	Introductory Act to the German Civil Code
EGG	Electronic Commerce Act
EIPR	European Intellectual Property Review
E-Mail	Electronic Mail
EU	European Union
EULA	End User License Agreement

EuGH	European Court of Justice
EuGVVO	European Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters
EuZW	European Journal of Business Law
evtl.	possibly
EWR	European Economic Area

F

FG	Finance Court
FTC	Federal Trade Commission
FTP	File Transfer Protocol
Fed. R. Civ. P.	Federal Rules of Civil Procedure

G

gem.	according to
GEMA	Society for Musical Performing Rights
GewO	Industrial Code
GMVO	Regulation on the Community trade mark
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (magazine)
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht International (magazine)
GVBl.	Law and Ordinance Gazette

H

HGB	German Commercial Code
h.M.	prevailing view
Hrsg.	Publisher

I

ICC	International Chamber of Commerce
IHK	Chamber of Industry and Commerce
IPR	International Private law
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (magazine)
i.S.d.	according to the
i.S.v.	according to

i.V.m.	in conjunction with
ITM	Institute for Information, Telecommunications and Media Law
ITRB	Der IT-Rechts-Berater (magazine)
IZVR	International Civil Procedure Law
K	
K&R	Kommunikation und Recht (magazine)
KUG	Art Copyright Act
KWG	German Banking Act
L	
LAG	State Labour Court
LG	District court
LS.	Guiding principle
M	
MA	Markenartikel (magazine)
MarkenG	Law on the protection of Trademarks and other signs
MDR	Monatsschrift für deutsches Recht (magazine)
m.E.	in my point of view
MMR	Multimedia und Recht (magazine)
m.w.N.	with additional evidence
N	
NJW	Neue Juristische Wochenschrift (magazine)
NJW-CoR	Neue Juristische Wochenschrift – Computerreport (magazine)
NJW-RR	New legal weekly publication/report on court cases
NW	North Rhine-Westphalia
NZA	New journal for labour law
O	
OECD	Organisation for Economic Co-Operation and Development
OEM	Original Equipment Manufacturer
OLG	Higher Regional Court

ONP	Open Network Provision
OVG	Higher Administrative Court
P	
PatG	patent law
PC	Personal Computer
PersR	Der Personalrat (magazine)
POP	Point of Presence
pVV	positive infringement
R	
R + S	Recht und Schaden (magazine)
RabelsZ	Rebel's journal for foreign and international private law
RAM	Random Access Memory
RBÜ	Revised Berne Convention
RdA	Recht der Arbeit (magazine)
RDV	Recht der Datenverarbeitung (magazine)
RdW	Recht der Wirtschaft (magazine)
RefE	Draft Speaker
RegE	Government Draft
RegTP	Regulatory Authority for Telecommunications and Posts
RIW	Recht der internationalen Wirtschaft (magazine)
RL	Directive
S	
SaaS	Software as a Service
SigG	Signature Act
SigV	Signature Ordinance
SLA	Service Level Agreement
U	
UCITA	Uniform Computer Information Transaction Act
UFITA	Archiv für Urheber-, Film- und Theaterrecht (magazine)

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UPR	moral right
UrhG	copyright law
URL	Uniform Resource Locator
US	United States
UWG	law against unfair competition
V	
VAG	insurance supervision law
VAR	Value Added Reseller
VersR	Versicherungsrecht (magazine)
VG	Collecting society
VO	Regulation
VuR	Verbraucher und Recht (magazine)
VPRT	Association for Private Broadcasting and Telecommunications
VVG	Insurance Contract Act
W	
WCT	World Copyright Treaty
WIPO	World Intellectual Property Organization
WM	Wertpapier-Mitteilungen (magazine)
WRP	Wettbewerb in Recht und Praxis (magazine)
WTO	World Trade Organisation
WuW	Wirtschaft und Wettbewerb (magazine)
WWW	World Wide Web
Z	
z.B.	e. g.
ZIP	Journal for business law
ZUM	journal for copyright and media law
ZUM-RD	Journal for copyright and media law/legal service
ZPO	Code of Civil Procedure
ZZP	Journal of Civil Procedure

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- Computer und Recht (CR): Zeitschrift für die Praxis des Rechts der Informationstechnologien
- Multimedia und Recht: Zeitschrift für Informations-, Telekommunikations- und Medienrecht (MMR)
- Kommunikation und Recht (KR) Der IT-Rechts-Berater (ITRB)
- Computerrecht (Niederländisch)

Chapter One: Legal protection for computer products

I. Premeditation: The protection of ideas

literature:

Marly, Der Schutzgegenstand des urheberrechtlichen Softwareschutzes, GRUR 2012, 773; *Kilian*, GRUR Int. 2011, 895; *Seffer/Hortler*, IT-Vertragsklauseln über Nutzungsrechte an Residual Information, ITRB 2005, 61.

Every IT project, every new business model starts with an idea. Therefore, it is necessary to ask the question about the protectability of ideas in advance.

Ideas cannot be protected. Copyright law, for example, does not protect all results of individual intellectual activity, but only works within the meaning of § 2 UrhG. In terms of their character and use, computer programs are less aesthetic than technical-functional in nature; their economic value generally lies in their functionality. The law only protects the form of a work, i.e. the way it is compiled, structured and presented. The idea underlying a work is not protected. The more concrete individual design elements have been adopted, the more likely it is that a copyright infringement has occurred. However, it seems difficult, even almost impossible, to draw the line between idea and form. Here, it will have to be made clear that the distinction does not have to be made ontologically, but is based on a social decision in favour of the need to preserve freedom of use

Free ideas include, for example, advertising methods, scientific teachings and other information that is considered to be common property. Even the transformation of an idea into a concept does not change the principle of freedom of ideas. In the software sector, Section 69a (2) sentence 2 UrhG expressly stipulates that ideas and principles on which an element of the computer program is based and the principles underlying the interfaces are not protected. This means that the procedures for solving a problem and the mathematical principles in a computer program are in principle not covered by copyright protection, although it is extremely difficult to distinguish them from the protected concrete formulation of these principles. Accordingly, the good will of an IT company should not have an objective sales value.

For the person concerned, the free usability of ideas is an unsolvable problem. There are numerous industries whose creativity and success is based solely on ideas. In the advertising industry, for example, it often takes some effort to develop the idea for an advertising strategy. In these industries the idea giver stands there without protection. He cannot defend himself against the exploitation of his ideas. Even a deposit or registration does not help here, as it

does not change the inability to protect ideas. Industrial property rights (in particular the Patent Act and the Utility Model Act) offer protection for technical inventions only under very high conditions. Also the competition law (UWG) does not protect in principle against the adoption of ideas

There are also problems with freedom of ideas in IT projects because of the residual information. Residual information refers to the residual information that remains in the memory of the project staff after completion of a job. Typically, an attempt is made here to agree a right in favour of the contractor to use corresponding ideas or knowledge available in the memory of the employees. However, there is a risk that the intellectual property rights of the client will be damaged, which is why in practice attempts are being made to restrict the area of free knowledge by prohibiting written fixation and to exclude the use of affected industrial or intellectual property rights. Also here the term of the Residual information is included then on the pure memory achievement of the coworker, as far as this corresponds to an average coworker.

The protection of ideas in the employment relationship poses particular problems. Even without a special agreement, a former employee is obliged under employment law to maintain confidentiality about business and company secrets due to a continuing duty of loyalty. He is only permitted to use the acquired professional experience. A more extensive duty of confidentiality can only be imposed on him if special protection considerations are taken into account. For example, case law has expressed reservations about an unlimited duration of the duty of confidentiality, the combination with a duty to pay damages in the case of direct or indirect communication of relevant knowledge to competitors or the establishment of a competing company, as well as the absence of compensation for damages.

An employee is, however, free under competition law, after leaving an employment relationship, to pass on and exploit the trade secrets obtained there in good faith. Such disclosure or exploitation only violates § 3 UWG under special circumstances. They are supported in particular by the consideration that, according to the version of Section 17 of the Act against Unfair Competition, employees may in principle use their - honestly acquired - professional knowledge, and also by the fact that it is difficult to draw a clear distinction between secret and experiential knowledge. However, it should be noted that the implementation of the Directive of the European Parliament and of the Council on the protection of confidential know-how and business information (business secrets) against unlawful acquisition, use and disclosure will lead to some changes in the legal situation.

Difficulties are also caused by non-solicitation bans. In principle, the programmer is not prevented from accepting a job from a third party; he may also inquire about a job there. In principle, job offers are permissible, whereas it is forbidden to persuade the programmer to change jobs "immediately" without giving the lender notice, because this would incite the employee to breach the contract. Such behaviour violates the loyalty obligations from the hiring relationship and § 4 No. 4 UWG. A company can be effectively obliged in general terms and conditions to pay a contractual penalty of DM 10,000 for each case of unlawful enticement of external employees. Suction. assistance in dismissal constitutes unlawful enticement. Under Paragraph 75 et seq. HGB, agreements between employers which block the employment of employees of one employer for other employers (blocking agreements) are inadmissible. This prohibition does not include agreements in which the employers merely undertake to refrain from poaching.

On 30.4.2014, the Federal Court of Justice (BGH) ruled that non-solicitation bans within the scope of Section 75f of the German Commercial Code (HGB) can only be regarded as permissible in the form of ancillary provisions, only if there is a special relationship of trust and only for a maximum period of two years after the termination of the cooperation, whereby the court expressly attached little importance to the exact wording of the non-solicitation ban in question.

A **choice of law clause** in the employment contract, such as the employer-friendly law of Switzerland, does not help. According to Art. 8 para. 1 sentence 1 Rome I-VO, the employment contract is subject to the principle of private autonomy which applies to all contracts under the law of obligations pursuant to Art. 3 para. 1 Rome I-VO. However, mandatory protective provisions that would apply on the basis of an objective choice of law within the meaning of Article 8 (2) sentence 1 Rome I Regulation cannot be waived by this, if the parties had not made a choice of law. The prerequisite is that the legal system chosen by the parties does not offer appropriate protection. Art. 8 (2) Rome I Regulation contains the rule that the law of the state in which the place of work is located. If the applicable law cannot be determined pursuant to para. 2, the law of the country of the employing branch office applies pursuant to para. 3. However, the law thus determined is not decisive under Art. 8 para. 4 Rome I Regulation if it is clear from the circumstances as a whole that the employment contract has closer links to a more closely connected country; in this case, the law of this other country is applicable. The primary connecting factors are the place of work, the registered office of the employer, the nationality of both contracting parties and the residence of the employee, i.e. the geographical dimension of the employment relationship. In addition, the contractual di-

mension, i.e. the contractual language and currency in which the remuneration is paid, must be taken into account and, if necessary, further aspects essential to the contract which, taken as a whole, have sufficient weight to overcome the significance of the rule linking.

There are many ways in which valuable knowledge can escape from a group like Volkswagen. Employees with specialist knowledge leave Volkswagen, cyber attacks can also occur, as can photography, storage or other forms of disclosure by employees. E-mails can also be intercepted and read. The estimated damage caused by industrial espionage in Germany is around €50 billion a year. Internationally, the industrialised countries have taken precautions through Art. 39 para. 2 of the TRIPS Agreement. As a minimum standard, the member states of TRIPS have committed themselves to protect information against unauthorised disclosure as long as this information is secret, i.e.

- in the compilation are not generally known or accessible in normal business circles,
- have an economic value because they are secret, and
- be subject to appropriate confidentiality measures.
- In Germany, special protection for trade secrets is provided by the traditional criminal law provisions in Sections 17 to 19 of the German Unfair Competition Act (UWG). The criminal offences are also sanctioned under civil law via transfer norms (§ 3 UWG, § 823 para. 2 BGB). These were already in existence when the TRIPS Agreement did not yet exist. Accordingly, the regulatory objectives of TRIPS and Sections 17 to 19 UWG are not identical. New are, above all, special problems of proof for the confidential character of the information and the duties of proof for appropriate non-disclosure agreements.

In the European overview, Germany is in the middle range of the protection level of secrets. While Great Britain has a well thought-out system of secrecy obligations, secrecy agreements are virtually unknown in countries such as France or Malta. This has already prompted the Commission to commission two studies on the protection of trade secrets in a European comparison in November 2011 and April 2013. The studies naturally came to the conclusion that secrecy protection in Europe resembles a patchwork quilt. The Commission subsequently adopted a first draft of a harmonisation directive in November 2013. This was followed in May 2014 by the joint text adopted by the Council of Ministers. One year later - in June 2015 - the Parliament presented its report on the draft directive, on the basis of which the European Commission, the Council and the Parliament, in the framework of an (unofficial) tripartite negotiations resulted in a compromise proposal which was published in December 2016. In June 2016, the directive was finally adopted, which is now to be transposed into national law by June 2018. Now there is a dispute at national level as to whether the protection of trade

secrets should be included in a comprehensive set of separate rules for intellectual property rights or whether at least a special law should regulate the issue. In Germany, the interruption caused by the federal elections has led to the discontinuity of any preliminary drafts of the old coalition: In any case, the Federal Ministry of Justice (BMJV) will have to introduce a new draft into the parliamentary discussion. It is already certain that the implementation deadline of June 2018 cannot be met. As we have heard, the ministry is planning to transpose it into a special law of its own, but without touching § 17 UWG. An internal draft, in which the BMJV as well as the Ministry of Labour and the Ministry of Economics have been involved, has already been available for a year. It provides for a direct implementation of the Directive into national law; however, further elements can be added if required.

The Directive intends to harmonise the existing different national rules. It is intended to be a complementary or alternative measure to intellectual property rights (recital 2). The relationship to the Unfair Competition Act is generally left open and left to a later examination by the Commission (Recital 10). Moreover, the Directive should now only contain minimum harmonisation (Art. 1(1)). It must also be taken into account that the EU has no competence for criminal law and, moreover, does not claim to legislate on works constitution law or press law (Art. 1 para. 2).

It is astonishing that the Directive does not contain any rules on private international law (IPR). It could be linked to criminal law, intellectual property law or the UWG. Ultimately, the fact that the legal nature of the newly created system is unclear is a revenge here. If one classifies the system in terms of intellectual property law, the directive already applies to every act of use relating to the EU. According to the UWG, the final market intervention or the intended use would have to be asked instead.

The cornerstone of the Directive is the concept of business secrecy. It is broadly defined, wider than under Section 17 of the German Unfair Competition Act. A trade secret is deemed to exist if the information is generally unknown or not known to the targeted public. It is unclear which circles are considered the targeted public. Also the existence of an outsider or a hacker makes the information accessible in a purely factual way. However, the problem is not new, but was already known in § 17 UWG. Case law has taken into account the fact that the development of information requires a great deal of time and expense and has also based this on the viewpoint of the specialist circles. In addition, VW's trade secret must embody a commercial value because it is secret (Art. 2 Para. 1 lit. b). The value of VW's trade secret

must therefore be precisely that which is kept secret. This is unknown to Volkswagen, as under § 17 UWG neither the value of the information nor the existence of a secret is asked. Instead, German law has always been based on the requirement of an objectively existing, economic interest in secrecy, and in this respect has also protected secrets of no value, the disclosure of which could cause damage. The definition comes from Art. 39 TRIPS. It will now be necessary to be able to document the value of information in a way that will stand up in court. On the one hand, this requires an accounting of business secrets. On the other hand, proof of confidentiality must be provided as the status quo. This element alone will therefore require proof of comprehensive secrecy management, which extends to the encryption of e-mails and IT security.

As if that were not enough, proof must also be provided that the secret is the subject of appropriate steps to maintain secrecy (Art. 2(1)(c)). Proactive and continuous measures of confidentiality are therefore already required in order to preserve the confidential nature of information. This requires extensive and above all long-term measures which correspond to the state of the art. It is new for Volkswagen that appropriate secrecy measures are a prerequisite for protection. Up to now, they have only played a role in the law of evidence. Up to now, the Federal Court of Justice had allowed it to suffice that a willingness to maintain secrecy resulted from the nature of the matter, and had considered even the absence of explicit secrecy agreements to be unproblematic. Now, however, many people are thinking about what is meant by the appropriateness of confidentiality measures. The directive does not explain the term in any more detail. It does not presuppose the best possible or most effective safeguards, but only an adequate standard of protection. Concrete steps must therefore be determined for the internal implementation within the company. First, clear responsibilities for the protection of trade secrets within the company must be defined. Then the potentially relevant know-how must be identified, evaluated and categorized. Finally, concrete protective measures must be defined, including special contractual agreements, IT security measures and the organization of work processes. In the automotive industry, for example, care is taken to ensure that building services, information security and organisational measures are implemented and checked by means of audits. Certification is carried out for the area of IT security according to ISO 27001.

According to Art. 2 item 2, the owner of a trade secret is the natural or legal person who exercises legitimate control over a trade secret. Thus, the decisive factor is not the creator, but the person who exercises lawful control. It is not clear what is meant by control. If the actual pos-

sibility of access is taken into account here, the employee would be the original owner as long as Volkswagen, as the employer, did not receive the information. However, the directive focuses on the protection of companies, which is why there are no rules on derivative acquisition in the directive. The characteristic of appropriate protective measures justifies an original acquisition by the entrepreneur. This gives rise to the obligation to create secrecy structures by means of instructions in employment contracts and operational instructions, and thus to establish original acquisition.

Art. 3 lit. b) regulates the particularly sensitive general freedom of testing. The regulation allows the analysis and testing of a product that has been made known to the public or is lawfully in the possession of the acquirer of the information. The Directive is thus breaking new ground. It is a European regulation on reverse engineering from US law. In Germany, reverse engineering has traditionally been considered prohibited. Traces of reverse engineering can be found in copyright law (§§ 69d (3), 69e) and in patent law (§ 11 No. 1 and 2), which are regulated in detail. The Semiconductor Protection Law contains a detailed permission for reverse engineering (Sec. 6 (2) No. 2 and 3). It regulates the reproduction of topographies for the purpose of analysis, evaluation or training, as well as the commercial exploitation of a topography which is the result of an analysis or evaluation. The freedom of testing refers to a product which has been made available to the public or is lawfully in the possession of the acquirer of the information. The principle goes far beyond the principle of exhaustion in copyright and patent law and also applies to rented products. It is therefore not to be denied to the competitors to achieve test results by a precise analysis of a software product and to use them profitably in a competing product

Amazingly, there is a small addition, according to which the acquirer of the information must be free of legal obligations in order to use the secret. It is therefore contractually permissible within the Volkswagen Group to restrict the freedom of testing. Supply contracts and cooperation agreements should therefore contain a reference to reverse engineering and such conduct should be excluded. In addition, in recital 17, the Commission has given consideration to the fact that in cases of parasitic copying, a provision on the Unfair Competition Act (product piracy or slavish imitation) should also be considered. However, contractual restrictions are usually useless if there are no contracts at all. Nobody can prevent a car-mobile manufacturer from buying a competing product on the free market and copying it by way of testing

II. Software protection - an overview

literature:

Brüggemann, Urheberrechtlicher Schutz von Computer- und Videospielen, CR 2015, 697; *Ganzhorn*, Rechtliche Betrachtung des Vertriebs und der Weitergabe digitaler Güter, 2015; *Kilian*: Entwicklungsgeschichte und Perspektiven des Rechtsschutzes von Computersoftware in Europa, GRUR Int. 2011, 895.

Once an IT project has passed the phase of pure idea into a form, the question of the most adequate and efficient protection of the IT product must be clarified. This can be done by protecting the software via copyright - protection that costs nothing and is informal. Actually, the integration of a technical product such as software into the catalogue of protection under the German Copyright Act, which is mainly characterised by the protection of works of fine art, is questionable. Accordingly, the categories of copyright do not fit for computer programs, if one thinks of the moral rights of the author or the bizarre protection periods of 70 years post mortem auctoris for software. The introduction of copyright software protection was also superfluous because under German law there were sufficient protection mechanisms against software piracy (see below). In the meantime, however, the adoption of copyright protection for software has become common worldwide. Art. 10 TRIPs provides that computer programs in source and machine code are to be protected as literary works. A similar provision is enshrined in Art. 4 WCT. In this respect, copyright protection for computer programs can be assumed to exist worldwide. However, there are other protection possibilities besides copyright law.

1. Patent protection

literature:

Brandi-Dohrn, in: Schneider/von Westphalen, Software-Erstellungsverträge, 2. Aufl., Köln 2014, Kap. A Rz. 202 ff.; *Ensthaler*, Der patentrechtliche Schutz von Computerprogrammen nach der BGH-Entscheidung „Steuerungseinrichtung für Untersuchungsmodalitäten“, GRUR 2010,1; *Haedicke*: Patentrecht, 3. Aufl. 2015; *Haedicke/Zech*, Das Internet als Herausforderung für das Patentrecht, GRUR Beilage 2014, 52; *Kraßer*, Patentrecht, 6. Aufl., München 2009, 150 ff.; *Lejeune/Sieckmann*, Softwarepatente in den USA und die aktuelle Entwicklung in Deutschland und der EU - Analyse der Entscheidung des U.S. Supreme Court i.S. *Bilski v. Kappos*, MMR 2010, 741; *Pfeiffer*, Zur Diskussion der Software-Regelungen im Patentrecht. Zum Ausschluss von Programmen für Datenverarbeitungsanlagen „als solche“ von der Patentfähigkeit, GRUR 2003, 581; *Schwarz*, Rechtfertigen rechtsdogmatisch schwierige Fragen die Abschaffung von „Software-Patenten?, GRUR 2014, 224; *Taeger*, Internet der Dinge – Digitalisierung von Wirtschaft und Gesellschaft, Tagungsband DSRI-Herbstakademie 2015, 2015, 519; *Tauchert*, Nochmals: Anforderungen an einen Patentschutz für Computerprogramme, GRUR 2004, 922; *Zoebisch*, Technische Schutzrechte bei der Digitalisierung der Wirtschaft – Softwarepatente in Europa und den USA, DSRITB 2015, 695.

According to Sec. 1 (2) Patent Law, programs for data processing equipment are not considered to be protectable inventions. However, this exclusion from patentability applies only to the extent that protection is sought for software "as such" (Sec. 1 (3) Patent Law). This provision has the effect that software is generally not patentable. Historically, the regulation is based on the fact that the US Patent Office was overloaded with numerous, labour-intensive software applications in the early seventies. Therefore, the exclusion of patentability was incorporated into the US Patent Act, from where it also reached the European patent laws. Even before the new regulation was passed, the Federal Court of Justice in Germany assumed that computer programs regularly lacked technical character and were therefore not patentable.

The current legal situation is essentially reflected in the old DPA Test Guidelines of 24.6.1981, which entered into force on 1.1.1987. According to these guidelines, inventions are also eligible for patent protection if they contain a computer program, a calculation or organisation rule, other software features or a program-like process (program-related inventions). However, the decisive factor for such inventions is that they have a technical character (No. 1). This is the case if natural forces, technical measures or means (e.g. hydraulic, electronic flows in switching elements and control devices or signals in data processing systems) must be used to solve the underlying task (No. 3). In contrast to the BGH, the DPA does not focus on the core of the teaching claimed to be new and inventive when assessing the technical character. Rather, the technical character of the object applied for must be examined in its entirety, beyond the new and inventive elements (no. 3). A program-related invention is technical if switching elements are used to solve the problem, even if the elements themselves work in a known manner (no. 5a). The technical character could also lie in the fact that the invention required a new and inventive construction of the system (no. 5b). For example, a method for sentence analysis according to grammatical aspects should not be in the technical field, even if it is computer-implemented.

A non-technical process does not acquire a technical character even if a device characteristic is mentioned in passing. The trend, however, is to open the gates of patent law to software more and more extensively by interpreting the term technical nature extensively. For example, medical software which directly controls examination equipment should also be patentable. The subject matter for which patent protection is sought must go beyond the pure program. It must be made clear that the core of the patent solution contains instructions which contain an enrichment of the technology worthy of protection. For the grant of a patent for a process which serves to carry out a business activity by means of a computer, it is not sufficient to

propose that a computer be used as a means of processing data relevant to the process. Rather, it must contain further instructions which are based on a concrete technical problem. For only then, when examining an inventive step, is it possible to make a statement as to whether there is an enrichment of the technology which justifies patent protection. At the end of 2008, the President of the EPO submitted detailed legal questions for clarification by the Enlarged Board of Appeal under Article 112 EPC, on which numerous third party comments were also received. The Federal Court of Justice (BGH) in turn opened the door to patent protection for software in two cases. Thus, even purely conceptual considerations should be able to solve a technical problem under certain circumstances and thus be worthy of protection in principle. In this context, the BGH states that a process which concerns the direct interaction of the elements of a data processing system (here: a server with a client for the dynamic generation of structured documents) is always of a technical nature, without it being of importance whether it is characterised by technical instructions in the form in which it is applied for a patent. A solution by technical means is not only present if system components are modified or addressed in a new way. Rather, it is sufficient if the running of a computer program used to solve the problem is determined by technical circumstances outside the computer system or if the solution consists precisely in designing a computer program so that it takes account of the technical circumstances of the computer system. According to the Federal Court of Justice in the second case, this also protects a method which serves to process procedural steps in computer networks in a data-processing manner. However, this opening for the patent protection of software does not yet mean that all software is patentable. Rather, the inventive step and the novelty of the software must also be examined in each individual case. Furthermore, protection is excluded if a software merely solves a pure problem of data processing, which for example lies in the provision of information, its preparation, retrieval and evaluation. In the absence of a reference to the world of technology, protection under the Patent Act is then excluded.

With a motion in 2013, the Bundestag has called for a limitation of the patentability of computer programs, thus fuelling the legal policy debate on software patents.

In the United States, the patentability of software has been recognized at the latest since the *State Street Bank v. Signature* decision of 1998, and the European Patent Office (EPO) has also granted about 20 000 to 30 000 software patents since 1978. The problem is that patent protection for computer programs is explicitly excluded by Art. 52(c)(3) EPC and § 1(2)(3) PatG, both at the European and the German level. The Commission's attempt to harmonise

this area by means of a directive on software-based inventions failed in July 2005 due to opposition from the European Parliament.

According to a US Federal Law of 1952 and an early decision of the US Supreme Court of 1851, an invention in the USA is actually considered trivial and therefore not worthy of protection if an expert in the field concerned describes it as obvious. However, the Federal Circuit Court of Appeals, which is also responsible for appeals in patent disputes, has greatly restricted this exclusion criterion for industrial property rights in recent decades. Accordingly, even a simple new combination of already known techniques or processes was sufficient to obtain a state monopoly claim. However, this narrow interpretation of the rule of obviousness was largely reversed by the Supreme Court in the highly regarded case of the US company Teleflex against the Canadian automotive supplier KSR International. According to the court, an invention must be considered obvious and not patentable if an ordinary skilled person could "teach many patents" for it "like pieces in a puzzle". "Granting patent protection for progress that occurs in the normal course of development without real innovation prevents progress and, in the case of patents that combine previously known elements, may deprive earlier inventions of their value and usefulness," the Supreme Court has now ruled in its majority opinion.

2. Title and trademark protection

literature:

Betten, Titelschutz von Computerprogrammen, GRUR 1995, 5; *Betten*, Erwiderung – Titelschutz von Computerprogrammen, CR 1995, 383; *Deutsch*, Neues zum Titelschutz, GRUR 2013, 113; *Huppertz/Fritzsche*, Titelschutz für Software: Überblick, wettbewerbsrechtliche Aspekte, Vergleich zur Marke, ITBR 2011, 86; *Lehmann*, Titelschutz für Software, CT 1998, 2; *Lehmann*, Neuer Titelschutz von Software im Markengesetz, CR 1995, 129; *Poll/Brauneck*, Rechtliche Aspekte des Gaming-Markts, GRUR 2001, 389; *Schneider*, Titelschutz für Software. Rechtsschutz, CI 1998, 37; *Stratmann*, Titelschutz für Software nach dem neuen deutschen Markengesetz, Mitt. 1995, 366; *Zahrnt*, Titelschutz für Software-Products - a mistake?, BB 1996, 1570; *Zöllner/Lehmann*, trademark and unfair competition law protection for apps, GRUR 2014, 431.

Software is title protected. The protection also extends to computer games. The LG Hamburg has also affirmed that apps can be protected as work titles. Most recently, the Higher Regional Court of Cologne affirmed the protection of the title of a computer simulation game. As the BGH emphasises, title protection requires that the software has a realisable intellectual content which, in the eyes of the public, constitutes the essence of the program and allows the commodity character of the concrete embodiment of the software idea to take a back seat. The protection extends to all designations under which a software product is brought to market. The protection arises from the use of the designation, for example in the context of adverti-

sing or distribution. In-house testing of the software is not sufficient. A registration at the German Patent and Trademark Office is not required. The protection can be postponed by publishing the intention to use the software in suitable publications (e.g. in the "Börsenblatt des Deutschen Buchhandels" or the "Titelschutzanzeiger"). With the announcement, the protection is brought forward by six months. During this period, the party entitled to protection must then initiate marketing. If he does not do so or does not do so in time, the effect of the notice of title protection lapses. The scope of protection is limited by the requirement of proximity to the industry. In the case of the computer game "emergency", for example, the Hamburg Regional Court rejected the enforceability of the title protection on the grounds that the parties to the dispute lacked the industry proximity required for the claiming of title protection. The manufacturer of the computer game was not in direct competition with its opponent, who offered an online service for information on emergencies under the Internet address "emergency.de".

In the meantime, the Federal Court of Justice has relativized its liberal position on title protection for software. It is true that software is eligible for title protection. However, the question of the likelihood of confusion must be reduced. Computer software can be designed very differently in terms of type and intended use. The average consumer who is well informed and reasonably well-informed is aware of this. According to his understanding, software products which differ from one another in their design and are intended in particular for different purposes may therefore be presented as different works which may even bear the same title without being confused with one another.

The creation of title protection for a computer program requires the commencement of distribution of the finished product or an advertising announcement immediately preceding the delivery of the finished product. According to a decision of the LG Düsseldorf, it is not sufficient to refer to a "rough concept" in a letter to a single interested party. Rather, a finished computer program must be available at the time of the application and actual distribution must be possible. Two letters to possible interested parties would not be sufficient for such an announcement. Rather, it was necessary to ensure that the announcement would enable interested competitors to gain broad knowledge. It was also not sufficient for the programme to have been presented at a small trade fair, if at that time the acceptance test and market launch of this programme had only just begun.

The designation of an app is in principle capable of work title protection within the meaning of § 5 (3) MarkenG. The compilation and processing of the data as well as their presentation and arrangement with regard to clarity and user guidance creates an independent and charac-

teristic service, i.e. a product within the meaning of § 5 para. 3 MarkenG, which is identified by the symbol or icon in relation to content. In order to determine the original distinctiveness of the work title protection for apps, the general standard must be applied. In contrast, the significantly simplified requirements as for newspaper or magazine titles do not apply to app titles. In contrast to the newspaper and magazine market, where newspapers and magazines have always been offered under more or less colourless generic names, there is no evidence of a corresponding habituation of the market with regard to apps. Here, purely imaginative names ("skype", "WhatsApp") stand alongside descriptive signs ("traffic4all") and titles ("weather").

In addition to title protection, trademark protection for software can be considered. In this case, protection can be claimed within the scope of § 14 MarkenG by registration or on the basis of a corresponding reputation. If a designation is used as the name of a computer game, trademark-related use is rather doubtful and use not as a trademark but as a work title within the meaning of § 5 para. 3 MarkenG is possible. For the assumption that the designation is also an indication of origin, concrete evidence is required in individual cases.

However, the protection relates to the relevant market. There is no likelihood of confusion between trademarks for software and electronically supported services for the financial sector. The fact that a service is provided electronically does not mean that the software is advertised and the software used is named together with the service. Trademark protection also helps against the circumvention of technical barriers such as DRM systems. If a trademark owner incorporates a technical barrier (of any kind) into his products against certain types of use, it constitutes an infringement within the meaning of Sec. 24 (2) Trademark Act if a third party overcomes this barrier without the trademark owner's consent and thus enables a use not desired by the trademark owner.

3. Motion picture protection

An easy to obtain protection is guaranteed by the running screen protection according to § 95 UrhG, especially for computer games. Here, running images are often strung together in a film-like sequence so that the impression of movement is created. Thus, computer games - regardless of their originality - fall under the ancillary copyright protection of § 95 UrhG. The owner of such an ancillary copyright has the exclusive right to reproduce and distribute the image carrier (§ 94 UrhG). In the event of infringement of this right, the owner is entitled, among other things, to injunctive relief and/or damages (§§ 97 ff. UrhG). All moving images enjoy moving image protection regardless of whether they are based on a creative achievement and are therefore protectable within the meaning of § 2 (2) UrhG..

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4. Secrecy protection

literature:

Gorbatyuk/Overwalle/van Zimmeren, Intellectual Property Ownership in Coupled Open Innovation Processes, IIC 2016, 262; *Ernst*, Die Verfügbarkeit des Source Codes – Rechtlicher Know-How-Schutz bei Software und Webdesign, MMR 2001, 208; *Falce*, Trade Secrets – Looking for (Full) Harmonization in the Innovative Union, IIC 2015, 940; *Gärtner*, Zum Richtlinienentwurf über den Schutz von Geschäftsgeheimnissen, NZG 2014, 650; *Kieth/Hohmann*, Der strafrechtliche Schutz von Geschäfts- und Betriebsgeheimnissen, NSTZ 2006, 185; *Koós*, Die europäische Geschäftsgeheimnis-Richtlinie – ein gelungener Wurf? Schutz von Know-how und Geschäftsinformationen – Änderungen im deutschen Wettbewerbsrecht, MMR 2016, 224; *McGuire/Joachim/Künzel/Weber*, Der Schutz von Geschäftsgeheimnissen durch Rechte des Geistigen Eigentums und durch das Recht des unlauteren Wettbewerbs, GRUR Int 2010, 829; *Mehrbrey/Schreibauer*, Haftungsverhältnisse bei Cyber-Angriffen – Ansprüche und Haftungsrisiken von Unternehmen und Organen, MMR 2016, 75; *Ohly*, Der Geheimnisschutz im deutschen Recht: heutiger Stand und Perspektiven, GRUR 2014, 1; *Rauer/Lovells*, Richtlinienentwurf: Europaweit einheitlicher Schutz von Geschäftsgeheimnissen, GRUR-Prax 2014, 2; *Schweyer*, Die rechtliche Bewertung des Reverse-Engineering in Deutschland und den USA, Bayreuth 2012; *Weiden, Wiebe*, Know-How-Schutz von Computersoftware, München 1993; *Wiebe*, Reverse Engineering und Geheimnisschutz von Computerprogrammen, CR 1992, 134, *Witt/Freudenberg*, Der Entwurf der Richtlinie über den Schutz von Geschäftsgeheimnissen im Spiegel zentraler deutscher Verbotstatbestände, WRP 2014, 374.

The protection of business and trade secrets has so far been given priority in German law in Sections 17 to 19 of the German Unfair Competition Act (UWG) as provisions of secondary criminal law. Further regulations can be found in private and labour law.

At European level, the Directive of the European Parliament and the Council on the protection of confidential know-how and confidential business information (trade secrets) against un-

lawful acquisition, use and disclosure is intended to harmonise for the first time the rules on the protection of secrets in commercial transactions. The Directive was adopted by the European Parliament and the Council of the European Union on June 8, 2016. Under previous German law, business or trade secrets are information that is related to the business and is not in the public domain. They are only known to a limited circle of people and are to be kept secret according to the expressed will of the owner of the business, based on a sufficient economic interest. In general terms, the majority of the bans are in line with the requirements of the Directive. It defines business and trade secrets as information which is secret and therefore of commercial value and which is protected by the lawful owner of the trade secret by means of confidentiality measures. In future, the concrete technical and legal protective measures will therefore have to be set out in the infringement proceedings; the decisive factor here is sufficient confidentiality agreements (Art. 2 of the draft directive). The Directive also lays down conditions for the unlawful acquisition, use and disclosure of secrets. It should be noted here that the prohibitions of the Directive already apply in cases of gross negligence and possibly even simple negligence and are thus broader than German law. § Section 17 of the German Unfair Competition Act (UWG) considers a secret to be illegal only if it is disclosed intentionally for the purposes of competition, for personal gain, for the benefit of a third party or with the intention of causing damage to the owner of the company. There is also a need for clarification with regard to other individual questions of interpretation, as the Directive applies the bans in a general and broad sense. As legal consequences, the directive provides for preventive and final measures which are very similar to those resulting from the infringement of an industrial property right. For example, the possibility of prohibiting the use and disclosure of the secret or the prohibition of production and marketing.

With regard to IT law, protected know-how includes the source format of the software (source code), which the software producer, as the core of the programming, typically does not want to give to third parties. Furthermore, trade secrets include interface information and the underlying algorithm. The object code, or the machine-readable code itself, is not protected because it is made generally accessible to the users of the program. It follows from this constellation that decompiling the program is to be regarded as a violation of the protection of know-how by technical means pursuant to § 17 (2) no. 1a UWG. However, this only applies if decompilation does not take place within the scope of the permissible exercise of the right of self-help pursuant to § 69e UrhG.

5. Criminal law protection

In the opinion of the OLG Stuttgart, the unauthorized procurement and exploitation of software violates § 202a (1) StGB. This would make software piracy punishable; claims for damages and injunctive relief would arise from §§ 823 para. 2, 1004 BGB.

However, the application of § 202a StGB to software piracy is not unproblematic: § 202a para. 1 StGB requires that the perpetrator spies out "data" as defined in § 202a para. 2 StGB. However, it is questionable whether software can be equated with data. However, § 263a StGB explicitly distinguishes between data and programs. Furthermore, § 202a StGB is not a copyright provision. An extension of this provision to software would largely render the meaning of copyright criminal law absurd.

According to § 202a para. 2 StGB (German Criminal Code), only data that is not directly perceptible is protected under criminal law. It is extremely questionable why the legislator has based itself on the characteristic of perceptibility, especially in the case of data. In any case, this characteristic leads to inconsistent results: A storage on punch card or the provision of software in the form of a detailed program description does not fall under § 202a StGB, since in these cases the data is directly perceptible. According to the legal definition in § 202a para. 2 StGB, data is only data that is specially protected against unauthorized access. The protection of § 202a para. 1 StGB therefore only applies if the software has been provided with a copy protection.

However, the introduction of copy protection can also have negative consequences for the manufacturer of the software: The user may have the right to make backup copies of the program he has purchased (§ 69d Abs. 2 UrhG). If the user cannot make a backup copy, he is entitled to warranty and liability claims against the manufacturer/dealer if the program cannot be used due to a defect. So far, however, there is no case law on this matter; a final clarification is still pending.

6. Supplementary performance protection

In contrast, the sale of a computer with pre-installed software is permitted under competition law. This decision essentially dealt with the question of whether the sale of a computer with pre-installed software constitutes an unfair commercial practice within the meaning of the Directive concerning unfair business-to-consumer commercial practices in the internal market (Directive 2005/29). The ECJ decided that a commercial practice consisting of the sale of a computer with pre-installed software, where the consumer has no possibility to purchase the same computer model without the pre-installed software, does not in itself constitute an unfair

commercial practice within the meaning of Article 5(2) of the Directive. The prerequisite for this is that the offer does not fall within the characteristics of unfairness in Articles 5 to 9 of the Directive. In this context, the ECJ also decided that the absence of a price indication for the individual pre-installed programmes in the context of the tying offer cannot be classified as a misleading commercial practice within the meaning of Art. 5 (4 a), Art. 7 of the Directive.

Protection through the prohibition of disabilities may arise in particular for computer games. Simply ignoring the rules of a game, such as World of Warcraft, is generally not sufficient for the assessment of a business activity as anti-competitive. Rather, there must be special circumstances which make the competitive behaviour appear unfair. Such special circumstances may exist if the non-compliant conduct of one party to the contract impairs the business model of the other party to the contract, as defined by the General Terms and Conditions, and thus has an unfair effect on the product offered by the other party to the contract. In this context, even the indirect effect on the product of a competitor can be seen as an unfair product-related impediment under competition law. An influence on the product of a competitor, e.g. by cheat bots, is usually considered unfair if a protective measure is undermined which is intended to prevent such an influence.

7. Database protection

literature:

Benecke, Was ist „wesentlich“ beim Schutz von Datenbanken?, CR 2004, 608; *Calame*, Der rechtliche Schutz von Datenbanken unter besonderer Berücksichtigung des Rechts der Europäischen Gemeinschaft, Bamberg 2002; *Ehmann*, Big Data auf unsicherer Grundlage - was ist "wesentlich" beim Investitionsschutz für Datenbanken?, K&R 2014, 394; *Fusbahn*, Der Schutz des Datenbankherstellers, IPRB 2012, 114; *Ganea u.a. (Hrsg.)*, Urheberrecht. Gestern – Heute – Morgen. Festschrift für Adolf Dietz zum 65. Geburtstag, München 2001, 493; *Hoebbel*, European Sui Generis Right for Databases, CR Int. 2001, 74; *Knöbl*, Der Schutz von Datenbanken nach der Feist-Entscheidung des amerikanischen Supreme Court, UFITA 2002/II, 355; *Leistner*, Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht, München 2000; *Leistner*, Verwandte Schutzrechte im europäischen Urheberrecht: Eine Untersuchung am Beispiel des Datenbankherstellerschutzes; *Lopez*, El derecho sui generis del fabricante de bases de datos, Madrid 2001; *Nippe*, Urheber und Datenbank, München 2000; *Sendrowski*, Zum Schutzrecht sui generis an Datenbanken, GRUR 2005, 369; *Westkamp*, Der Schutz von Datenbanken und Informationssammlungen im britischen und deutschen Recht, München 2003; *Westermeier*, New Strategies for Strengthening the Protection for Databases - A Focus on Collective Works, Cri 2014, 7; *Wiebe*, Der Schutz von Datenbanken – ungeliebtes Stiefkind des Immaterialgüterrechts, CR 2014, 1.

Components of a software package can be protected as database works (§ 4 paragraph 2 UrhG). According to § 4 Abs. 1 UrhG, collections of works or contributions which are a personal-intellectual creation by selection or arrangement are protected as independent works, without prejudice to the copyright of the recorded works. A digital database can be protected in this way, provided that contributions (even of different types of works) are collected in it and the selection or arrangement of the contributions represents a personal-intellectual creation (if this level of creation is missing, however, protection as a scientific edition under Section 70 UrhG is still possible).

The first characteristic causes little difficulty: Within a website, a number of different excerpts from music and film works and texts can be linked together. The feature of a personal-spiritual creation causes most difficulties in subsumption. In this respect, case law is based on the fact that the existing material is selected according to independent criteria or compiled under individual aspects of order. A purely schematic or routine selection or arrangement cannot be protected.

Moreover, the ECJ rejected the reference to the intellectual effort and expertise invested in the production of the data as an argument for protection as a database work. It is also irrelevant in this respect whether the selection or arrangement of the data involves "adding an essential meaning" to them. Nor can protection be justified by the significant amount of work and expertise required to create the database if it does not reflect any originality in the selection or arrangement of the data contained in the database.

Of central importance are also §§ 87a-87e UrhG with the sui generis right anchored there, which has been incorporated into the copyright law as a result of the EU Database Directive. The database producers are protected. The producer is not only the natural person who procured or verified the elements of the database, but also the person who made the investment in the database. For this reason, according to the legal definition of Section 87a (1) sentence 1 UrhG, this protection covers any collection of works, data or other independent elements which are arranged systematically or methodically and are individually accessible by electronic means or otherwise, provided that their acquisition, verification or presentation requires an investment which is substantial in nature or scope. Expenses for the acquisition of a finished database or a "license" to such a database do not justify database rights.

As the ECJ has determined in its decision on database protection for betting and football data, this requires a not inconsiderable investment in the identification and compilation of elements in the database. The means used to create the elements that make up the contents of the data-

base are irrelevant. On this ground, the ECJ has refused to protect a compilation of results of individual football matches or dog races. The decisive factor in this respect is the amount of work and money involved in preparing the database, but not in generating the data. The delimitation is difficult and will lead to fierce controversies for future cases. The BGH has twisted the specifications of the ECJ in two decisions. According to these rulings, an intervention in database law should already be given if data is extracted and combined in another way. The assumption of the arrangement of the data in the database of the producer should not be relevant for the protection under Section 87b (1) sentence 1 UrhG. Consequently, the right of the database producer is not infringed by the distribution of a CD-ROM containing data from a collection protected by copyright; only the author of the compilation is entitled to protection under Section 4 (2) UrhG.

The protection may include an extensive collection of hyperlinks, online collections of classified ads, and most collections of information on a website. The protection of databases is also applicable to printed media, such as "Lists of Presses" or a government tender journal. Train schedules also fall under § 87b UrhG. Extracts from such databases using a meta search engine infringe the reproduction right to which the author of the database is entitled. § 87a UrhG protects eBay against the duplication of its evaluation database. Rating databases that are fed with content by users of the platform also fall under § 87a UrhG, so that the publication of rating data records on a competing website violates § 87b. It is disputed whether class libraries enjoy database protection in the context of object-oriented programming. Spelling programs, for example, do not fall under the protection because they contain an integrated database, but their elements are not individually accessible to the user. For the localizability of individual elements, case law refers to technical or other means, such as an index, a table of contents or an outline. Operating systems as such are mere compilations without systematic arrangement, so that they cannot be granted protection according to § 87a UrhG.

Due to its high practical relevance, sui generis protection plays a special role in the piracy of telephone directories. Case law has rejected copyright protection for such data collections - particularly in the disputes over D-Info 2.0 - and instead has predominantly affirmed supplementary ancillary copyright protection via § 3 UWG. The BGH stated this, among other things, in its "Tele-Info-CD" decision and further stated that protection as a database under Section 87a UrhG could also be considered. However, it is not sufficient for someone to collect data for an Internet business directory merely from publicly accessible sources and have them recorded by computer. In the opinion of the Cologne Regional Court, calling up the

search mask of the online railway information system, starting the search query and subsequently communicating the search result verbally or by telephone is intended to be seen as a repeated and systematic dissemination or public reproduction of parts of the railway's online information database.

On the order for reference of the Federal Court of Justice whether Art. 1 (2) of Directive 96/9/EC of 11.3.1996 on the legal protection of databases is to be interpreted as meaning that topographic maps are a collection of independent elements, which is decisive for the protection of the database producer), the ECJ decided that geographical data extracted from a topographic map by third parties in order to produce and market another map has sufficient information value after extraction to be regarded as an independent element of a database within the meaning of this provision.

With regard to collections of laws, the Munich Higher Regional Court (OLG) expressly rejected copyright protection in its decision of 26.9.1996: such a collection would at best represent a series of texts which could not enjoy copyright protection even with regard to the editorially designed headings for individual paragraphs. Protection under competition law was also ruled out in view of the lack of individual character. However, protection via § 87a UrhG could be considered, since the creation of extensive collections of texts (as in the case of "Schönfelder") is generally associated with a substantial investment by the publisher.

An exception that leaves official databases unprotected is not found in Section 87a UrhG; however, the Federal Court of Justice seems to want to apply Section 5 UrhG (area exception from copyright protection for official works) analogously to performance results protected by the UrhG - and thus also to databases. This does not affect the possibility of claiming sui generis protection for the database created from an investment-intensive compilation of official works, documents or other material (e.g. collections of laws).

In the case of investment protection under Sections 87a et seq. of the German Copyright Act, the criterion of substantial investment is the counterpart to the level of creation in the protection of authors. When asserting claims under Section 87a UrhG, it must be explained and proved, inter alia, whether and to what extent the applicant has incurred expenses for the preparation and indexing of the database content by compiling tables, abstracts, thesauri, indices, query systems, etc., which only enable the individual accessibility of its elements characteristic of a database, costs of acquiring the computer programs required for database use and costs of producing a database carrier. Then there are the costs of data preparation, including the optimization of the query systems, which are essentially reflected in wage costs for their systematic or other methodological arrangement, as well as costs of provision. These costs are

to be distinguished from insignificant investments in data generation. The Higher Regional Court of Cologne affirms a "substantial investment" in the establishment of a database accessible via the Internet for registered members with more than 25,000 data records for those who have invested 20-30 working hours per week for seven years. This is because, according to an objective view, this is an investment which is not unreasonable, i.e. not something which can be achieved by everyone, and which is therefore essential within the meaning of § 87a.1 sentence 1 UrhG.

The protection regime comprises a 15-year right of the database producer to reproduce, distribute or publicly reproduce the database in whole or in substantial parts (Section 87b (1) sentence 1 UrhG). The sui generis right can be invoked in particular against the commercial use of external network content, e.g. by means of virtual search robots (intelligent or electronic agents) which take over the content of external websites. This raises the question for search engine providers, for example, to what extent the search methods used by them might not be problematic with regard to a possible sui generis protection for the searched websites. The fact that a competitor provides its product with an import/export function for entered user data is not a violation of database law. In the opinion of the BGH, even the one-time extraction of all changed data from a certain version of the CD-ROM - by creating a (possibly only temporarily stored) list of changes or by direct transfer - refers to a qualitatively essential part of the database. Therefore, the claim of the plaintiff is not contradicted by the fact that the legitimate user can extract qualitatively or quantitatively insignificant parts of a publicly accessible database for any purpose. The assumption of 10 % of an internet rating database is not yet "essential". According to the ECJ, a relevant reproduction also exists if a part of the copy, consisting of text extracts of eleven words, is printed out. The Cologne Higher Regional Court assumes the extraction of substantial parts of a database if 1/5 of the records of a module database are taken over. Finally, the LG Hamburg decided that a database containing a regularly updated compilation of all basic services and additional services offered by the statutory health insurance funds, which are systematised in a total of 456 service details, 10 service areas and various areas of care, is protectable under database law. The almost identical adoption of service details, including their classification into specific service and care areas, therefore constitutes an inadmissible reproduction of an essential database part within the meaning of § 87b.1 sentence 1 UrhG.

§ Moreover, Section 87b (1) sentence 2 UrhG also sanctions the use of insignificant parts of a database if this is associated with an unreasonable impairment of the interests of the database producer. This should be the case, for example, when reading train connection data from a

public database and verbally communicating this data to third parties. The database producer's right under Section 87b (1) sentence 2 UrhG is not infringed if individual smaller components of newspaper and journal articles stored in a database are transmitted to users by an internet search service on keyword request in order to give them an indication as to whether retrieving the full text would be useful for them. This also applies if the search service repeatedly and systematically accesses the database within the meaning of Section 87b (1) sentence 2 UrhG. A company which sells software for the automated readout of online automobile stock exchanges only infringes the database manufacturer's right of an automobile stock exchange operator if the individual users themselves infringe the database manufacturer's right. Otherwise, the main act necessary for liability as an assistant or disruptive party, i.e. for liability based on any deliberate and causal involvement in an unlawful impairment, the removal of which would have been reasonable for the disruptive party or assistant, is missing. For this reason, the assessment of whether a substantial part of the database is taken does not depend on the usage behaviour of the sum of all users, but on whether at least individual users reproduce or take quantitatively substantial parts of the database when using the software. The repeated and systematic duplication and extraction of parts of the database which are insignificant in terms of type and scope can only constitute an infringement of the database producer's right if the cumulative effect of the extraction operations is such that a substantial part of the database is duplicated or extracted.

Database law also proves to be a problem for so-called screen scraping. The term screen scraping generally covers all methods of reading text from computer screens. Currently, however, the term is only used in relation to web pages (hence web scraping). In this case, screen scraping refers specifically to the technologies used to obtain information by specifically extracting the required data. In the opinion of the OLG Frankfurt a.M., the mediation of flight tickets by another company by means of screen scraping is not legally objectionable even if the airline company does not wish to use this distribution channel; in particular, this can be seen as neither a violation of the "virtual domiciliary right" of the airline company on its website nor a violation of the database rights (§ 87b UrhG) of the airline company. Nor can screen scraping in connection with flight brokerage on the Internet be objected to under competition law. According to this, the operator of an Internet portal does not violate § 4 No. 4 UWG if the freely accessible flight connection data on which a flight brokerage is based is determined by means of an automated query from the Internet site of the airline. The website operator cannot prevent the use of the data by third parties by an exclusion in the GTC alone. He must create technical devices to stop a loss of control. On the other hand, databases which are not

protected by copyright or by the sui generis right of the Directive may, without prejudice to the applicable national law, impose contractual restrictions on their use by third parties. That leads, however, to the paradoxical result that producers of databases which are subject to the database right enjoy less protection than those producers to whom the database right does not apply.

In a similar case, the ECJ ruled that specialised meta-search engines violate the database directive if substantial parts of a database are re-used by making results publicly available, thereby depriving the database producer of the possibility of generating income and covering production costs. The ECJ thus regards the provision of the meta search engine as a violation of Section 87b (1) UrhG, while the Federal Court of Justice evaluates user queries according to whether they would read out essential parts of the database.

The difficult questions of interpretation arising in the sui generis right and the legal uncertainty it creates can only be resolved with the help of the courts. This applies in particular to the interpretation of the concept of materiality, which determines both the object of protection (Section 87a (1) GCA) and the scope of protection (Section 87b (1) GCA) and thus decisively determines the admissibility of database use. This applies all the more since § 87b.1 sentence 2 UrhG is also intended to be the gateway for constitutional considerations, for example with regard to freedom of the press and information.

The Federal Court of Justice (BGH) referred the question to the European Court of Justice as to whether an unlawful transfer of data is also present if the corresponding extraction is carried out on the basis of queries of the databases after weighing up the details. The case in question was that of a professor of German studies at the University of Freiburg who, after extensive research, had compiled a list of poetry titles which was published on the Internet under the heading "Die tausendeinhundert wichtigsten Gedichte der deutschen Literatur zwischen 1730 und 1900". The defendant distributed a CD-Rom "1000 Gichte, die jeder muss haben". When compiling the poems on the CD-Rom, the defendant had based itself on the list of poems of the Freiburg professor. Some of the poems listed there had been omitted, others added. The selection made by the plaintiff was also critically examined in each case. The ECJ decided on the question whether the term "extraction" within the meaning of Article 7(2)(a) of Directive 96/9 covers the process whereby elements of a protected database are extracted on the basis of queries to the database following a balancing exercise, or whether an extraction within the meaning of this provision presupposes a process of physical copying of a set of data. According to this provision, an unlawful extraction may be connected with a screen consultation of a protected database if the transfer of elements from it is carried out by means

of a further detailed consideration. The decisive factor is that the screen query leads to the transfer of a substantial part of the contents of the protected database. The maker of a database may not prevent third parties from consulting the database for information purposes if he makes its contents accessible to third parties. It is only when the presentation of the contents of the database on screen requires the permanent or temporary transfer of all or a substantial part of those contents to another medium that the consultation in question may be made subject to the authorisation of the maker. As regards the question whether there has been an extraction, it is irrelevant whether the transfer is based on a technical process of copying the contents of a protected database. Nor does the fact that elements contained in a database are taken over only after critical examination preclude the finding that there is a transfer of elements of the first database to the second.

In this context, the decision of the Cologne Higher Regional Court must also be taken into account. According to this decision, the ratings submitted by users on a rating portal are also to be qualified as a database within the meaning of Section 87a (1) UrhG. When assessing the necessary investment amount, the costs for the creation, maintenance and continuous development of the database software must also be taken into account. However, a repeated and systematic extraction of individual evaluations from such a database does not necessarily lead to the assumption of a violation of the law. Even in the case of a systematic extraction, the sum of the extracted data would have to exceed the materiality limit. The purely quantitatively significant extraction of individual data is only sufficient if the acquisition, verification or presentation of this part of the data requires a very substantial human, technical or financial investment. In addition to Section 87a UrhG, the application of Sections 3, 4 no. 10 UWG was out of the question; a certain impediment to competition was also immanent to competition when individual data records were extracted. This is not the case if the acquiring party is only interested in participating in the data, but not in preventing the exploitation of the database.

It is precisely because of an alleged excessive use of such vague legal terms that the Database Directive has been particularly heavily criticised in the USA. However, the reason for such a detailed examination of the European regulation of database protection is probably the fact that Article 11 (3) in conjunction with Article 11 (4) of the Data Protection Directive is the only one that has been adopted. Recital 56 of the Database Directive may be the requirement of material reciprocity for the granting of sui generis protection against manufacturers from third countries. Accordingly, American database manufacturers will only enjoy the new legal protection for their products in the EU if there is comparable protection for European data-

bases in the USA. Although there are many fears that the European regulation will threaten freedom of information, science and research, hinder competition in the market for secondary products and restrict global trade in information products and services, the concern about a competitive disadvantage for American companies in the European market seems to be a (hidden) motive for the harsh criticism. Finally, it remains to be mentioned that since the introduction of the Database Directive there have also been efforts in the USA to introduce special legal protection for "non-creative" databases.

Section 87e of the German Copyright Act (UrhG) must be observed under contract law. According to this, agreements on the exclusion of the use of parts of a database which are insignificant in terms of type or scope are invalid, provided that the restricted actions neither run counter to a normal evaluation of the database nor unreasonably affect the legitimate interests of the database producer. Similarly, § 87b UrhG permits the free use of insignificant parts of a database, provided that the use neither unreasonably impairs the legitimate interests of the database producer nor unreasonably interferes with the normal evaluation of the database. Contractual restrictions of §§ 87b and e UrhG are ineffective; AGB regulations violate § 307 BGB.

III. The copyright protection

literature:

Boecker, Computerprogramme zwischen Werk und Erfindung, 2008; *Kreutzer*, Computerspiele im System des deutschen Urheberrechts – Eine Untersuchung des geltenden Rechts für Sicherungskopien und Schutz technischer Maßnahmen bei Computerspielen, CR 2007, 1; *Bechtold*, Vom Urheber- zum Informationsrecht, München 2002; *Bullinger/Czychowski*, Digitale Inhalte: Werk und/oder Software? – Ein Gedankenspiel am Beispiel von Computerspielen, GRUR 2011, 19; *Ernst*, Die Verfügbarkeit des Source Codes, Rechtlicher Know-how-Schutz bei Software und Webdesign, MMR 2001, 208; *Gennen*, Die Software-Entwicklergemeinschaft, Voraussetzungen und Rechtsfolgen, ITRB 2006, 161; *Gennen*, „Auseinandersetzungen“ von Miturhebergemeinschaften – Möglichkeiten zur Minimierung der Auswirkungen einer Miturhebergemeinschaft bei gemeinschaftlicher Softwareentwicklung, ITRB 2008, 13; *Grützmaker*, Gebrauchtssoftware und Übertragbarkeit von Lizenzen – Zu den Rechtsfragen auch jenseits der Erschöpfungslehre, CR 2007, 549; *Heutz*, Freiwild Internetdesign? – Urheber- und geschmacksmusterrechtlicher Schutz der Gestaltung von Internetseiten, MMR 2005, 567; *Hoeren*, Die Pflicht zur Überlassung des Quellcodes – Eine liberale Lösung des BGH und ihre Folgen, CR 2004, 721; *Hoeren*, Die Kündigung von Softwareerstellungsverträgen und deren urheberrechtliche Auswirkungen, CR 2005, 773; *Hoeren*, Urheberrecht und Vertragsfreiheit: Kritische Überlegungen am Beispiel der Verwendungsbeschränkungen, in: Klumpp/Kubicek/Roßnagel/Schulz (Hrsg.), Medien, Ordnung und Innovation, Heidelberg 2006 (zit. *Hoeren* in Klumpp/Kubicek/Roßnagel/Schulz); *Kreutzer*, Computerspiele im System des deutschen Urheberrechts – Eine Untersuchung des geltenden Rechts für Sicherungskopien und Schutz technischer Maßnahmen bei Computerspielen, CR 2007, 1; *Link*, Die Auswirkungen des Urheberrechts auf die vertraglichen Be-

ziehungen bei der Erstellung von Computerprogrammen, GRUR 1986, 141; *Marly*, Der Urheberrechtsschutz grafischer Benutzeroberflächen von Computerprogrammen – Zugleich Besprechung der EuGH-Entscheidung „BSA/Kulturministerium“, GRUR 2011, 204; *Marly*, der Schutzgegenstand des urheberrechtlichen Softwareschutzes, GRUR 2012, 773; *Ohst*, Computerprogramm und Datenbank, Definition und Abgrenzung – Eine Untersuchung beider Begriffe und ihrer Wechselbeziehungen im Urheberrechtssystem der Informationsgesellschaft, Frankfurt a.M. 2004; *Partsch/Reich*, Die Change-of-Control-Klausel im neuen Urhebervertragsrecht – Zum Wegfall des § 28 VerlG, AfP 2002, 298; *Paulus*, Software in der Vollstreckung, in: Lehmann (Hrsg.), Rechtsschutz und Verwertung von Computerprogrammen, 2. Aufl., Köln 1993, 831 (zitiert: *Paulus* in Lehmann); *Peukert*, Technische Schutzmaßnahmen, in: *Loewenheim* (Hrsg.), Handbuch des Urheberrechts, München 2003 (zit. *Loewenheim/Peukert*); *Platz*, Hyperlinks im Spannungsfeld von Urheber-, Wettbewerbs- und Haftungsrecht, WRP 2000, 599; *Redeker*, IT-Recht, 5. Aufl., München 2012; *Redeker*, Eigentumsvorbehalte und Sicherungsklauseln in Softwareverträgen, ITRB 2005, 70; *Royla/Gramer*, Urheberrecht und Unternehmenskauf – Reichweite von Zustimmungserfordernis und Rückrufrecht des Urhebers von Computerprogrammen, CR 2004, 154; *Schack*, Urheberrechtliche Gestaltung von Webseiten unter Einsatz von Links und Frames, MMR 2001, 9; *Schneider*, Handbuch des EDV-Rechts, 4. Aufl., Köln 2009; *Schneider*, Neues zu Vorlage und Herausgabe des Quellcodes? – Kritische Überlegungen zur Dissonanz zwischen vertraglicher und prozessualer Beurteilung des Quellcodes durch den BGH, CR 2003, 1; *Schneider*, Urheberrechtliche Probleme bei objektorientierten Programmen, in: Büllersbach/Heymann (Hrsg.), Informationsrecht 2000, Perspektiven für das nächste Jahrzehnt, Köln 2000, 143 (zit. *Schneider* in Büllersbach/Heymann); *Schulz*, Dezentrale Softwareentwicklungs- und Softwarevermarktungskonzepte, Köln u.a. 2005; *Schumacher*, Schutz von Algorithmen für Computerprogramme, Münster 2004; *Seffer*, Softwareschutz beim Asset-Deal – Übertragung der gewerblichen Schutzrechte bei Individualsoftware mit Tücken, ITRB 2006, 146; *Spindler/Weber*, Die Umsetzung der Enforcement-Richtlinie nach dem Regierungsentwurf für ein Gesetz zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums, ZUM 2007, 257; *Spindler*, Softwareschutz; Grenzen, CR 2012, 417; *Thormann*, Links und Frames und ihr Rechtsschutz im Internet, Mitt. 2002, 311; *Wiebe*, Rechtsschutz für Software in den neunziger Jahren, BB 1993, 1094; *Wimmers*, Urheberrechtliche Probleme beim IT-Outsourcing, in: Büchner/Dreier, Von der Lochkarte zum globalen Netzwerk – 30 Jahre DGRI, Köln 2007, 169 (zit. *Wimmers* in Büchner/Dreier); *Witte*, Zur Schadensberechnung bei der Verletzung von Urheberrechten an Software – Die drei Berechnungsarten, der Bereicherungsausgleich und der Ausgleich für die Verletzung von Urheberpersönlichkeitsrechten, ITRB 2006, 136; *Zecher*, Zur Umgehung des Erschöpfungsgrundsatzes bei Computerprogrammen, Baden-Baden 2004.

The copyright protection for software is regulated in §§ 69a-g UrhG, but the regulations refer to the general provisions of the UrhG in case of gaps (§ 69a Abs. 4).

1. Object of protection (§ 69a UrhG)

§ Section 69a UrhG regulates the object of protection and the level of protection for software. The regulation is to be seen in the context of § 2 para. 1 no. 1 UrhG. There it is already referred to that computer programs as linguistic works come into consideration for copyright protection. The further particularities of the level of protection are regulated in § 69a UrhG.

§ Section 69a (1) UrhG expressly describes the term software as "computer programs in any form and including their design material". It is noticeable here that § 69a (1) UrhG is not a definition of the term. The Federal Government did not consider such a definition to be "advisable, as it would be feared that it would soon be overtaken by development". In most commentary literature, reference is made to the definition in § 1 (i) of the WIPO Model Rules. According to this definition, the term "computer program" includes a sequence of instructions which, when recorded in a machine-readable medium, are capable of causing a machine with information processing capabilities to display, perform or achieve a particular function or task or a particular result.

This waiver of regulation leads to the fact that the differentiation of the actual program from other parts of a software package remains in the dark. It is indisputable that files with the identification "exe" or "com" in the Windows area fall under the software area. However, it is questionable whether other files in a software package can be subsumed as "computer program" within the meaning of § 69a UrhG. This question arises, for example, for pure graphics or help files. In this context, Art. 1 (3) of the EU Database Directive, which distinguishes between the rights to a database and the rights to the computer programs used to create or access it, must also be considered. The protection under Section 69a UrhG does not cover purely conceptual specifications, for example in commercial or business management terms.

In accordance with the EC Directive, the protection extends to any form of computer program (Section 69a (2) UrhG). Consequently, the protection extends to object and source code in the same way. Some authors have previously emphasised that copyright protection can only extend to the source code, but not to the object code, as the latter is a purely technical transformation of the source code. This opinion can no longer be upheld after § 69a UrhG has come into force. Interfaces are also protected; Section 69a (2) sentence 2 UrhG only declares the ideas underlying the interfaces to be in the public domain.

The protection also extends to the design material. Accordingly, the preliminary stages of the source code are also protected, in particular the problem analysis, the data flow plan and the program flow chart. However, the design material does not include the documents that the user receives. Rights according to § 69a UrhG can only be held by the user who implements certain tasks developed by himself or specified by a third party into a computer program. The purely conceptual specifications - for example in commercial and business management terms - are not "design material" protected under this provision, even if they are indispensable for the creation of a functional program. They can, at best, claim protection under §§ 2 (1) nos. 1 and 7 UrhG and then lead to co-authorship of the complete work. The general provisions of

§§ 2 ff. of the German Copyright Act apply to manuals, operating instructions or specifications. UrhG, which is of practical relevance in particular with regard to the question of copyrightability. These texts are protectable as linguistic works within the meaning of Section 2 (1) No. 1 UrhG or as scientific and technical representations within the meaning of Section 2 (1) No. 7 UrhG only if they are regarded as personal and intellectual creations within the meaning of Section 2 (2) UrhG. . . data or data stocks stored in files are not in themselves computer programs or written works protected by copyright according to § 69a UrhG in the sense of § 2 para. 2 UrhG. § 2 UrhG No. 1 UrhG.

It is disputed whether the protection for software extends to screen masks. However, it must be taken into account whether and to what extent the program authors had a not inconsiderable amount of leeway in the design of the masks. Only if other forms of design are possible, even if the factual specifications are identical, does copyright protection come into consideration. This interpretation - borrowed from American case law - excludes the possibility that, for example, the structure of a balance sheet on Section 69a UrhG enjoys copyright protection.

The extension of Section 69a UrhG also to screen surfaces is rejected in principle by the judiciary and large parts of the literature. These authors plead for a protection for screen surfaces independent of software protection. However, this view is doubtful. This is because the structure of the masks is programmatically predetermined in the source code; the development of the user interface is part of the programmer's development work. Protection under competition law pursuant to Sections 3, 4 No. 9 of the German Unfair Competition Act (UWG) could also be considered as an effective solution to the "look and feel" problem. In this context, the screen mask has to be checked for its competitive character; the greater this character, the greater the presumption of the existence of unfair competition. In any case, the software producer suing plagiarists must prove that the development of the program design was costly and laborious and how much it cost him. If this design is already prescribed by the market, he cannot invoke § 3 UWG. Furthermore, however, it must be checked in his favour how well-known and marketable his software product is: Especially with well-known computer programs, the user's habituation to a certain screen design plays a major role. Once he has become accustomed to the design, he will also very often be inclined to purchase a plagiarism with the same design for cheaper purposes. In this respect, the plagiarist exploits the pull of market leaders for his own purposes; this must be punished as unfair under competition law. Recently, protection of web design and user interfaces via the unregistered design/design is also being considered.

The assignment is unclear with modern programming techniques, such as HTML or JAVA programming. Some argue in the discussion that the protection of multimedia products is ultimately a question of software protection, especially if they are based on HTML or similar tools. In fact, with an HTML-based homepage, it is no longer possible to distinguish between the user interface and the underlying program code. However, this interpretation ignores the separation of programming services and the creativity of other creators, which is the basis of § 69a UrhG. The fact that certain information is put into an HTML code does not yet make it a programming service.

The protection also covers computer games. In addition, however, protection as moving images within the meaning of §§ 94, 95 UrhG continues to be possible. The reference in Section 69a (4) UrhG to the provisions applicable to language works does not mean that other provisions outside the protection of language works cannot also apply. It is precisely because computer games often contain sequences of images which correspond to cinematic works that running screen protection can be considered for these components. In addition, ancillary copyrights exist under § 72 UrhG if individual images are merely strung together. For example, it should be possible to assign such a screen protection to the slideshow of a computer program. However, stored game scores, i.e. the "current status" of the computer player's game progress, are not protected. In the opinion of the OLG Hamburg, protection can only be considered if the stored scores contain program instructions, i.e. elements of the program code which the computer game uses for its program flow. The storage of scores alone is not sufficient for the acceptance of a program or a sequence of program commands. Protection under Paragraph 3 of the UWG - for example, from the point of view of insertion in a series of other games - should also be regularly ruled out.

Web graphics regularly lack the necessary level of creation. They do not enjoy copyright protection, because they are photographs that have been manipulated on the computer to achieve certain light-dark effects. It is not evident to what extent this alienation effect is based on special achievements which lift the graphics above the normal craftsmanship. Web graphics also do not enjoy photo protection according to § 72 UrhG (German Copyright Act), as these are not photos that have been created using radiant energy. This kind of production is missing in computer images, because the computer program produces the graphic independently; the creative act lies in the programming and not in the image production, so that the object of protection in such computer graphics can therefore only be the program itself, which produces the corresponding computer image. Moreover, digitalised writings enjoy copyright protection

under Sections 69a et seq. of the German Copyright Act at any rate with regard to the underlying computer program.

The case law is, moreover, reticent about the protection of websites. Graphics integrated in advertising banners are typically not considered protectable, even taking into account the special colour design. At best, it is supposed to be a work of applied art, but then such banner graphics do not achieve the required quality of work. In the field of applied art, strict requirements are set for the level of creation. With regard to the parallel possible protection of design, it must be a creation of individual character whose aesthetic content reaches such a degree that, according to the prevailing views in life, one can still speak of art. The website should also not enjoy protection either as a linguistic work or as a work of fine art because of the high protection requirements. A uniform design and an everyday graphic design of the user interface alone is not sufficient to achieve the required level of creativity. In such cases, protection of the design and layout could not be achieved almost "automatically" as a "small coin" via Section 2 (1) no. 4 UrhG. In the meantime, however, it has been clarified in court that the design of an internet page (and thus also the design of a user interface) can also be protected as an unregistered design. According to § 2 Abs.1 DesignG, it is only necessary that the website contains a design which is new and has individual character. It is not necessary that the website shows a special design achievement.

The protectability of a linguistic work should depend both on its nature and its scope. If the subject matter of the linguistic work is freely invented, then in the opinion of the LG Köln it is more likely to obtain copyright protection than texts in which the subject matter is predetermined by organisational purposes or scientific and other topics. This is because in such texts, the customary mode of expression in the scientific or other subject area in question often lacks the characteristic of an original work which is eligible for copyright protection. Instead, the courts refer to the German Unfair Competition Act (UWG) as a possibility of protection under the aspect of supplementary ancillary copyright protection (§ 8 (1) in conjunction with §§ 3, 4 (1) no. 9 UWG).

The OLG Rostock argues differently for a search engine optimized website. Such a website exists, for example, if the search engines on the Internet sort their results on the basis of the meta tags contained in the source texts as well as the occurrence of the search terms in the document title or in headings. In order to achieve the listing of the web pages at the top of the search results for a certain period of time, special knowledge and skills are required for the design of the Internet presence. Therein lies the personal intellectual creation. The selection, classification and arrangement of the search terms from everyday language on the web pages

and in the source text form the individual, creative peculiarity here. The use of language as a means of design achieves a level of design that is sufficient for copyright protection, because it clearly exceeds the work of an average web designer, which is based on a routine, manual and mechanical-technical combination of the material.

Also multimedia works are not per se to be regarded as software in the sense of § 69a UrhG. Admittedly, it is argued for so-called multimedia works that they are to be protected uniformly as computer programs. However, the isolated view is rightly rejected by the overwhelming view. Like other software-supported user interfaces, multimedia applications are generated technically, namely only by a program or its commands and graphic data, and accordingly are only made visible by the program flow. However, this is the result of a program operation and not the program itself. A computer program within the meaning of Section 69a of the German Copyright Act (UrhG) can understandably only be the program which enables the control and the sequence of the individual components of the multimedia work.

Ideas and principles underlying a computer program, including those underlying the interfaces, are not protectable (Section 69a (2) UrhG). At this point the law refers to the general principle of freedom of ideas. The technical and scientific teaching which has been incorporated into a computer program shall be in the public domain. Drawing the line between idea and form is not easy, especially in the case of software. In the USA, the focus is on whether there is a sufficient number of alternatives to the chosen solution ("dictated by necessities"). If a problem can only be solved in a single way, protection is not possible. It is questionable whether this test is transferable to German conditions. It will first have to be made clear that the distinction between idea and form, at least in the case of software, must be clarified as a question of a need to preserve availability. On this basis, it must be clarified to what extent the individual structural features of a program are dictated by external factors (standards, etc.) or merely contain general knowledge. If there is only one way to transform an idea into a certain program form, copyright protection is also ruled out. With the freedom of ideas, abstract problems and guiding ideas of an IT project also fall outside the scope of protection of intellectual property rights. In the opinion of the European Court of Justice, neither the functionality of a computer program nor the programming language or file format used in the context of a computer program are protected. Otherwise - according to the ECJ - the possibility of monopolising ideas would be opened up to the detriment of technical progress and industrial development. Accordingly, the rights holder cannot prohibit a user from exploring the ideas and principles of a program, i.e. its functionality, provided that the measures taken by the user are within the scope of the actions permitted under the licence.

The Law does not contain a definition of the term "interface". The Federal Government only refers to the preamble of the EC Directive, which defines the term interface as "the parts of the program which provide for (...) interconnection and interaction between elements of software and hardware". This refers to the information whose knowledge is necessary for the creation of interoperable programs (see also § 69e UrhG). The "pure" facts as such are to be kept free and therefore free. Only their concrete implementation in a computer program can be protected. Just like the EU Directive, Section 69a UrhG does not contain any references to programming languages and algorithms. It is unclear why these topics have been omitted in the Directive. Only the preamble to the directive gives some hints by emphasizing that the ideas and principles underlying "logic algorithms and programming languages" cannot be copyrightable. This (non-binding) reference can only be understood to mean that algorithms and programming languages themselves are copyrightable.

2. Standard of originality

Under Section 69a (3) UrhG, computer programs are protectable if they represent individual works in the sense that they can be regarded as the result of the author's own personal creation. All other criteria for determining protectability, in particular qualitative or aesthetic criteria, are inadmissible. With this regulation, software protection breaks with classical categories of copyright protection. Software is an object which, due to its rather technical nature, could actually be protected by patent law, had it not been for the legislative rejection of the patentability of computer programs in § 1 (3) PatG. With the renunciation of any qualitative-aesthetic criterion, copyright protection for software is opened, whereby according to the wording of the regulation, any program, no matter how banal, should be protectable.

The characteristic of "personal" creation is intended to indicate that the activity of a human being as the creator of the software must form the basis of it. This is regularly the case. However, problems arise with computer-generated software. This in turn does not correspond to the creator principle. In Great Britain, a separate copyright regulation has been created for this area. According to this regulation, the creator of such programs is the person who created the development tool.

The BGH has already pointed out in the Buchhaltungsprogramm decision that Section 69a (3) UrhG must in any case lead to a reduction of the protection requirements for software. Consequently, the "aesthetic content" of a program or the requirement of a clearly above-average design no longer plays a role. Software is protectable even if the (low) level of design in another type of work would not justify the assumption of a personal intellectual creation. If the development of a program requires skills and knowledge which exceed the skills of an

average programmer, this is sufficient for Section 69a (3) sentence 2 GCA. The Düsseldorf Higher Regional Court has set the bar even lower. It should be sufficient that the programmer has sufficient scope for individual design in solving the task assigned to him and that the concept has peculiarities which do not appear trivial, banal and compelling from the point of view of factual logic. The Higher Regional Court of Karlsruhe will determine whether the programmer has a not inconsiderable amount of freedom in the design of the software or to what extent other forms of design would have been possible if the factual requirements had been the same. This criterion is particularly important for the design of screen interfaces. Here the programmer is often faced with a number of constraints, so that the scope for individual creation is limited.

As a result, at least the so-called small coin is also covered by the protection. Simple computer programs enjoy copyright protection, provided they are not completely banal. Even the exclusion of banal creations is in conflict with the prohibition of the use of qualitative examination criteria. With software protection, the German Copyright Act for the first time provides for an ancillary copyright protection. However, a certain minimum level of intellectual creation remains necessary because individuality or "one's own intellectual creation" is ultimately nothing more than a personal intellectual creation within the meaning of Section 2 (2) UrhG. For this reason, it is not sufficient to understand individuality as "statistical uniqueness" or not to demand any level of creation at all. However, it should be sufficient to state that the computer system is marketable and/or has been developed by a majority of programmers in the course of years of work and further development. Similarly, the Austrian Supreme Court will focus on whether the task set allowed for several solutions and whether the programmer had sufficient freedom of thought for the development of individual features. This is to be assumed either in the case of complex programs or if an unusual degree of experience, skill and expertise manifests itself in the work. It is also decisive whether a new program is created or whether the programmer can essentially fall back on already existing program modules. The High Court of the Canton of Switzerland also stated that the copyright protection of software is the rule and only in exceptional cases can a lack of individuality be assumed. The presumption of protectability could only be refuted by substantiated evidence of banality or machine production. However, the attitude of the OLG Hamm is unconventional, which assumes that the originality of a source code can be judged without technical assistance from its own expertise.

The courts also draw procedural consequences from the lowering of the level of design, for example for the burden of proof in copyright infringement proceedings. In the opinion of the

Federal Court of Justice, it can be assumed that there is an actual presumption of copyright protectability. Smaller works or parts of works are also protected. In the case of complex software, the complexity alone speaks for a sufficient individual creation of the author. However, it is not sufficient to indicate the possible uses of the program. Rather, it is necessary that the plaintiff explains to what extent the individual features chosen by him are not already technically predetermined by the problem. However, the author must point out the specifics of his software. What is necessary is a global description which shows that the program in question is not a completely banal program design or an imitation of a foreign program. Without such a description, it would be impossible for the Court of First Instance to understand how the opponent has adopted the characteristic features of the program.

The OLG Celle sees the requirements regarding the burden of proof more restrictively. It should not be possible in the disposal proceedings to make the copyrightability credible - for example by presenting the source format to an expert. The law does not offer any solutions which, with the means of the preliminary injunction proceedings, would allow such a reliable basis for a decision to be reached that it would be justified to order such far-reaching consequences as would be associated with a prohibition of distribution.

3. Copyright and employment relationship

literature:

Bayreuther, Nach §§ 69a ff. UrhG geschützte Computerprogramme, Münchener Handbuch zum Arbeitsrecht, 3. Aufl. 2009, § 91; *Buchner*, Der Schutz von Computerprogrammen und Know-How im Arbeitsverhältnis; *Brandner*, Zur Rechtsstellung eines angestellten Programmierers, GRUR, 2001, 883; *Lehmann* (Hrsg.), Rechtsschutz und Verwertung von Computerprogrammen, 2. Aufl. 1993; *Däubler*, Arbeitsrecht und Informationstechnologien, CR 2005, 767; *Gennen*, Die Software-Entwicklergemeinschaft, ITRB 2006, 161; *Gennen*, in: Schneider/von Westphalen (Hrsg.), Software-Erstellungsverträge, 2. Aufl., Köln 2014, Kap. E I.; *Sack*, Arbeitnehmer-Urheberrechte an Computerprogrammen nach der Urheberrechtsnovelle, UFITA 121 (1993), 15;; *Sujecki*, Vertrags- und urheberrechtliche Aspekte von Open Source Software im deutschen Recht, Jur PC 2005, Web-Dok. 145/2005; *von der Hoff*, Die Vergütung angestellter Software-Entwickler, 2008.

The continental European copyright tradition has many problems with the development of works in employment. Since the French Revolution, it has been considered an inalienable human right to express one's creativity in original works. Therefore, the creator of a work is considered to be the owner of all rights, even if he has been commissioned by an employer to develop this work (cf.) Furthermore, German copyright law does not allow legal persons to be considered as copyright holders. Consequently, the employee is generally qualified as the author; contractual restrictions of this principle are invalid. The employer does not acquire any copyright to the software, even if he employs his employee to develop new software.

However, the employer can contractually condition exclusive or simple rights of use of the software.

a) Scope of Section 69b UrhG

If the employer does not do so in the employment contract, he shall be granted those rights according to the so-called purpose transfer rule which are necessary according to the purpose of the employment contract (Section 31 (5) in conjunction with Section 43 UrhG). According to this, the employer also receives the rights for software which was developed before the entry into force of Sections 69a et seqq. of the Copyright Act on 24 June 1993, provided that the software development was carried out in fulfilment of the duty to work.

This principle has been codified for software in Section 69b (1) UrhG. If a computer program has been developed by an employee in the performance of his or her duties under the employment contract or in accordance with the instructions of his or her employer, only the employer shall be entitled to all economically relevant rights, unless the contract provides otherwise. This provision should also apply to public sector employment contracts (Section 69b (2) UrhG). However, the provision does not apply to contractual relationships; in this respect, the (difficult) demarcation between contract and employment contract is of decisive importance. However, the programmer may also have impliedly granted comprehensive rights of use in the case of freelance work under Section 31 (5) UrhG. This assumption is supported, for example, by the fact that the developer of a program intended for marketing received a monthly remuneration for his work under a contract of employment.

The regulation of § 69b UrhG leads to an important change in German copyright law: The employer gets all economic rights, even if his employee is not employed as a full-time software developer. In addition, he no longer needs to sue for his rights if the employee refuses to do so; instead, he becomes the owner of the rights, even if the employee refuses. By law, the employer - as stated in the explanatory memorandum to § 69b UrhG - "has to be fully assigned the property rights (...)". This provision continues the legal conviction already existing before its entry into force that the creator of copyrightable works who is active as an employee is regularly compensated for his work with his salary if the creation of such works is part of his obligations under labour law according to the agreements made with the employer or can otherwise be demanded of him under the employment contract. This right of use and exploitation, which is predominantly understood as a statutory licence, is the responsibility of the employer within the scope of application of § 69b UrhG at every stage of its creation. This transfer of economic exploitation rights, which is standardized by law, is not made dependent on any consideration by the employer. This only allows the conclusion that the

employee affected by the regulation cannot claim such remuneration in any case. Consequently, the employee - unlike in patent law - is not entitled to further remuneration for the use and exploitation of his software by the employer, since he has already been paid by his salary for the development of the program. However, the employee shall be entitled to a special reward if his salary was extraordinarily disproportionate to the economic success of his software. Previously, § 36 UrhG (old version) was invoked as a justification. Since 28.3.2002, Section 32a UrhG has applied in this respect.

The scheme applies to employment contracts of all types, regardless of the scope of employment or the size of the employing company. The term "employment contract" thus also includes part-time contracts, contracts with trainees and temporary employment contracts in the field of temporary employment. The regulation does not apply to the relationships of an exploiter with freelancers or software houses. Such contractual relationships, which are typically handled via the law on contracts for work and services, are regulated by § 31 (5) UrhG in conjunction with § 31 (2) UrhG. § Section 69a (4) UrhG. Thus, unless the development contract contains a special provision on the transfer of rights, the principle applies: in dubio pro auctore. However, this does not lead to any serious differences. Consequently, the client of a freelancer is entitled to the exclusive right of use of the program, unless other regulations exist. This includes the right to receive and use the source code.

By virtue of Section 69b (2) UrhG, the provision also applies in the public sector, in particular to the employment relationships of civil servants. The latter provision is not found in the EU Directive (91/250/EEC), but was only included in the provision in the implementation procedure due to critical voices in the literature.

The provision must be interpreted narrowly outside the area of employment contracts and service relationships. This results from the basic idea of § 29 sentence 2 UrhG, according to which the copyright including the rights of exploitation basically remain with the employed programmer. The provision therefore does not apply to contractual relationships, such as software development agreements with a software company. The first draft of the Software Protection Directive still provided for a corresponding application to contracts. However, this proposal has not been included in the final text of the directive. The provision is also unlikely to apply to persons similar to employees. The only purpose of the construction is to put certain groups of self-employed persons on a par with employees for their protection. Application to the detriment of the persons concerned is therefore excluded.

The employee or the person liable for payment must have acted in the performance of his duties or according to the employer's instructions. "Performing duties" refers to the general

description of the work tasks as set out either in the collective agreement or in the employment contract. Thus, if an employee has been entrusted with the development of computer programs within the scope of his or her duties under the employment contract, the employer has, in case of doubt, the exclusive right of use to commercially exploit the created software. The concept of work tasks is widely interpreted by the prevailing view. The improvement of the workplace and its environment is also part of the general tasks of an employee. It is sufficient that the computer programs have been created during working hours with the approval and at the expense of the employer. The fact that the employee performs his work at home does not change the applicability of Section 69b UrhG. This applies even if he still performs work tasks in his free time. An employer who has temporarily released his employee from other activities and from the obligation to be present at work in order to create a computer program is also the holder of the rights to the program described in Section 69b GCA if the development of the program has been pursued predominantly outside normal working hours. Instructions of the employer describe his individual instructions. However, it must be noted in employment law that individual instructions must be within the scope of the obligations under the employment contract. The internal connection to the employee's fields of activity is important.

However, unclear constellations still remain. The legal situation is unclear if an employee develops software outside of his work tasks and individual instructions alongside his employment. In such a case, earlier case law already assumed that the employer must be entitled to a simple right to use the software so that he can use the software in his business operations. However, it remains doubtful whether the employer should also be granted an exclusive right of use in this constellation. In the case of a civil servant who had not been expressly commissioned to develop the software, the Munich District Court revoked all rights of use from the employer. However, by analogous application of the principles of the employee invention law, the court then granted the employer the possibility to take possession of the rights of use, provided that the software is based to a large extent on the experience or work of the company. In its "Poldok" decision, the Court of Appeal assumes that the employer is entitled to all rights of use of a program if the author makes use of the employer's personnel and material resources and performs the activities necessary to create his work during his working hours. In the literature it is argued with a "correctly understood revised scope of duties". If the employee, with the employer's approval, had intended to use the software for business purposes, the software had been created voluntarily in extension of the scope of duties and the employer had impliedly been granted an exclusive right of use.

An employee may freely use and exploit software developed outside working hours. However, it has been discussed so far whether certain provisions of patent law could not be applied analogously in such a case. In particular, it is disputed whether the employee must inform the employer about his invention under certain conditions and offer the invention to him. It is irrelevant for the scope of Section 69b UrhG whether the employee created the computer program in his spare time or during regular working hours, provided that it is established that he acts only in the performance of his official duties and instructions. In such a case, it is not appropriate to divide a creation process into a phase within or outside of leisure time. Thus, if a programmer is temporarily released from his other activities and a company presence to work on the program at home, the rights to the developed program belong to the employer.

The employer has no rights to software that was developed before the start of the employment relationship or after the termination of the employment relationship. The only exception is if an employee provides his employer with a program free of charge and the employer recognizably adapts the program for his purposes; in this case, the employer should retain at least a simple right of use. A software developer may not, however, stop the development of a program in order to terminate his employment and then use the program for himself later; if he does so, the employer is granted an exclusive license, even though the program has been developed to the end regardless of the employment relationship.

§ Section 69b UrhG assures the employer or employer of all "economic rights" to the computer program. This term is foreign to classical copyright law. What is meant here are the exclusive rights of use, unlimited in time and space, as defined in § 31 (3) UrhG. The term "economic rights" does not include moral rights. Neither the EC Directive (91/250/EEC) nor the Copyright Act is intended to regulate these ideal rights; in this respect, the old law remains in force. The moral rights therefore always remain with the employee. These rights include above all the right to be named as author and the right to edit the software (§ 39 UrhG); other ancillary rights are also included. This legal situation is very disadvantageous for the employer - especially in comparison to the Anglo-American copyright system, according to which the employer is considered the author of the developed program. However, in literature, a contractual waiver of the exercise of these personal rights is considered possible.

The usage rights do not only extend to the program in the object code. Rather, the source code in particular is covered by this regulation. The same applies to the design material, especially the technical documentation. For further documents, reference is made to § 31 (5) in conjunction with § 43 UrhG is to be taken into account. If an employee deletes a program on the company notebook so that the employer can no longer use the notebook and data on it, this is

a reason for extraordinary termination. This is because the installation of a program constitutes a processing operation within the meaning of § 950 BGB, which has led to the legal acquisition of ownership by the employer as manufacturer within the meaning of § 950 BGB. The employee must therefore surrender the notebook together with the program loaded by him in accordance with § 985 BGB, regardless of the copyright legal situation.

For disputes between employee and employer concerning the use of computer programs created or contributed by the employee, legal recourse to the ordinary courts is possible (cf. Section 104 UrhG, Section 2 (2b) ArbGG).

b) Distribution of rights within the team

In programming, there is often the situation that this is not done by a single programmer but by a whole team. This is where § 8 UrhG comes into play, which in principle provides for co-authorship, which leads to the necessary exercise of rights in joint ownership. § Section 8 UrhG presupposes the existence of a uniform creation in which the participating authors are subordinate to an overall idea. Thus, for example, software updates should regularly not be subject to § 8 UrhG, as they are detached, subsequently created products. The scope and size of the individual programming services are irrelevant, as long as the individual programming service is protectable in itself. If someone only creates the general programming task without being involved in the programming himself, he shall not be granted any copyright and shall therefore not belong to the Miturhebergruppe. In particular, the client himself cannot claim copyright just because he has contributed his ideas to an IT project. The originator in the university sector is not the university lecturer who only contributes the ideas for an IT project without being involved in programming himself. Conceptual requirements of a business management nature that are incorporated into software development do not justify authorship of the software. Co-authorship exists if the author of an incomplete work cooperates with another person in the completion of the work and the contributions of the persons later entering the process of creating the work are not exhausted in a mere assistant activity. In the case of co-authorship, the co-authors are entitled to the copyrights pursuant to Section 8 (2) UrhG on a collective basis. Each co-author is entitled to assert claims arising from infringements of the joint copyright pursuant to Section 8 (3) sentence 3 UrhG. However, the co-author may only demand performance to all co-authors pursuant to § 8 subsec. 3 old UrhG.

The programmers participating in the co-originator group form a community of joint owners (Section 8 (2) UrhG). On the basis of this, the individual programmer can sue for injunction in the event of copyright infringement; however, claims for damages must be asserted by Gesamthand. It is also impossible to use individual services in such a construction; the clarifica-

tion of the economic use requires the consent of all parties involved. This causes many difficulties, especially in the case of open-source products, since a large number of mostly unknown programmers are involved in the development of such an open-source product.

The developer community is therefore designed as a whole hand. Irrespective of the quantitative extent of the shares of individual co-authors, there is a permanent legal obligation which cannot be terminated by way of notice. Only the waiver of the share is conceivable (Section 8 (4) sentence 1 UrhG). The management and representation therefore depends on the will of all co-authors involved. However, a co-author may not refuse his or her consent contrary to good faith (Section 8 (2) sentence 2 GCA). In this respect, the other co-authors may sue him or her for giving a corresponding consent within the framework of § 894 ZPO. However, the provisions of Section 8 (2-4) UrhG are optional. In this respect, it is appropriate to make a different regulation, especially with regard to software teams.

4. Rights of the software author

literature:

Dreier, Verletzung urheberrechtlich geschützter *Software* nach der Umsetzung der EG-Richtlinie, GRUR 1993, 781; *Günther*, Änderungsrechte des Softwarenutzers, CR 1994, 321; *Lehmann*, Das neue Software-Vertragsrecht – Verkauf und Lizenzierung von Computerprogrammen, NJW 1993, 1822; *Lehmann*, Vermieten und Verleihen von Computerprogrammen. Internationales, Europäisches und deutsches Recht, CR 1994, 271; *Sujecki*, Vertrags- und urheberrechtliche Aspekte von Open Source Software im deutschen Recht, Jur PC 2005, eb-Dok 145/2005; *Zahrnt*, Überlassung von Softwareprodukten nach neuem Urheberrecht, CR 1994, 455.

The programmer has the exclusive right of physical and non-physical exploitation of the work, the latter however only with regard to communication to the public.

a) Reproduction

literature:

Gutman, Abruf im Internet von unbekanntem und offensichtlich urheberrechtlich unrechtmäßigen Werken, MMR 2003, 706; *Nordemann*, CPU-Klauseln in Softwareüberlassungsvereinbarungen, CR 1996, 5; *Salje*, Wirksamkeitsprobleme der Lizenzvereinbarung bei Standard-Anwendersoftware, Festschrift für Rudolf Lukes, Hrsg. Leßmann, Großfeld, Vollmer, Köln 1992, S. 182 ff.; *Wand*, So the Knot Be Unknotted – Germany and the Legal Protection of Technological Measures, IIC 2002, 305.

§ Section 69c No. 1 UrhG grants the rightholder the right to make permanent or temporary copies, in whole or in part, of the computer program by any means and in any form. This includes in any case the making of copies on a floppy disk, CD-ROM or hard disk. The future reproduction by installing the program on the hard disk of the end user's PC is usually implicitly consensual and therefore does not constitute a copyright infringement. The performance

of the software manufacturer due in the case of a so-called web service contract usually only refers to the transfer of the application to a user; only if a corresponding warranty has been contractually agreed upon, the software manufacturer's performance obligation also extends to the liability for an infringement of the rights of third parties through the use of this application.

It is questionable, however, whether temporary intermediate storage also falls under the concept of reproduction. Such caches are hardware-related. The copies may be present in these caches for microseconds; however, depending on the technical specifications, the storage may be longer. Typical examples are loading the program into the main memory or using proxy servers on the Internet. The UrhG does not contain a definition of the term reproduction. Therefore, before the adoption of § 69c No. 1 UrhG in 2003, there were doubts as to whether the loading process was to be regarded as copyright-relevant copying. The German courts had not ruled on this controversial question until the 2nd Amendment Act came into force; the BGH refused to decide the question in the Nixdorf case.

Nor does Section 69c No. 1 UrhG contain a conclusive solution to this problem. In particular, § 69c No. 1 sentence 2 UrhG does not help here, since this provision does not say anything about whether the loading, saving or running of a program is to be regarded as reproduction. The provision obviously assumes that the loading or running of a computer program does not, in principle, involve copying. The consent of the author should only be required for this act if it requires reproduction in a particular case. In the Holzhandelsprogramm judgment, the Federal Court of Justice (BGH) pointed out as obiter dictum *da-rauf* that there are concerns about the copyright relevance of loading to the extent that pure use is not covered by copyright. Differently, however, increased statements are to be weighted, which want to qualify the shop as a copyright relevant reproduction process. This is advocated by some German courts, for example. The European Commission, too, has advocated such an interpretation and has subsumed temporary storage under the term reproduction in the EU Database Directive. Conciliatory statements point out that technical processes cannot be regarded as copying if they are necessary for the use of the program. According to this perspective, which was already taken as a basis in the Timber Trade Programme Judgment, loading would not become relevant under copyright law, whereas browsing and downloading on the Internet would have to be qualified as an independent act of exploitation.

M. E. the evaluation of § 44a UrhG is to be consulted here. According to this provision, temporary acts of reproduction which are transient or incidental and constitute an integral and essential part of a technical process and which have no independent economic significance are

not subject to consent. According to this evaluation, RAM copies have no independent economic value, so that the creation of such copies is also permitted without the consent of the author. In a decision, the Federal Court of Australia has decided to reject the existence of duplication in RAM copies for lack of material fixation. The attitude of the Federal Court of Justice (BGH) in its order for reference to the European Court of Justice on online exhaustion is erroneous. Here, the BGH doubts the applicability of § 44a UrhG and also wants to include volatile copies under § 69c No. 1 UrhG subsume. § 44a UrhG cannot be applied because loading the software into the main memory of further workstations has an independent economic significance. That is already apparent from the fact that the defendant requires remuneration for the grant of a licence for that use. The ECJ has put an end to this argument. In the Sky Decoder decision, the ECJ emphasised that transient acts of reproduction, for example in the memory of a satellite decoder and on a television screen, are not subject to the requirements of Art. 5 paragraphs. 1 of Directive 2001/29 (= Section 44a UrhG) and therefore may be carried out without the permission of the copyright holder.

For a reproduction to be credible, it is sufficient if it is highly probable that a program has been completely reprogrammed. If the screen masks match, this is an indication of the identity of the external appearance and internal structure of the programs. However, minor similarities in the user interface of computer programs do not allow the assumption of program parts eligible for copyright protection to be inferred, just as little as the similarity of computer programs in individual program blocks, if those program blocks, with a total size of the program file of more than 700,000 bytes, are only about 100 bytes in size. If, after an expert opinion, it is established that the programs in question are identical in the implicates and in the data collections and that coincidence of these coincidences is virtually impossible, this constitutes an infringement of the reproduction right.

b) dissemination

literature:

Bröckers, Software-Gebrauchthandel: Der Teufel steckt im Detail – Technische Besonderheiten und gesetzlicher Änderungsbedarf, MMR 2011, 18; *Grützmacher*, „Gebrauchtsoftware“ und Erschöpfungslehre: Zu den Rahmenbedingungen eines Second-Hand-Marktes für Software, ZUM 2006, 302; *Haberstumpf*, Der Handel mit gebrauchter Software und die Grundlagen des Urheberrechts, CR 2009, 345; ders., Der Handel mit gebrauchter Software im harmonisierten Urheberrecht, CR 2012, 651; *Haines/Scholz*, Zur Frage der Erschöpfung bei Software-Onlineverbreitung, CR 2006, 161; *Heydn/Schmidt*, Der Handel mit gebrandter Software und der Erschöpfungsgrundsatz, K&R 2006, 74; *Hoeren*, Der urheberrechtliche Erschöpfungsgrundsatz bei der Online-Übertragung von Computerprogrammen, CR 2006, 573; *Hoeren*, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, 665; *Hoeren*, Die Online-Erschöpfung im Softwarebereich – Fallgruppen und Beweislast, MMR 2010, 447; *Huppertz*, Handel mit Second-Hand-Software, CR 2006,

145; *Intveen*, Möglichkeiten der Hersteller und Lieferanten von Software zur Nutzungsrechtseinschränkung und Weitergabebeschränkungen bei dauerhafter Software-Überlassung, ITRB 2005, 234; *Leistner*: Gebrauchtssoftware auf dem Weg nach Luxemburg, CR 2011, 209; *Malevanny*, Die UsedSoft-Kontroverse: Auslegung und Auswirkungen des EuGH-Urteils, CR 2013, 422; *Marly*, Der Handel mit sogenannter „Gebrauchtssoftware“, EuZW 2012, 654; *Rath/Maiworm*, Weg frei für Second-Hand-Software?, WRP 2012, 1051;; *Schneider/Spindler*, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, in: CR 2012, 489; *Schuppert/Greissinger*, Gebrauchthandel mit Softwarelizenzen, CR 2005, 81; *Spindler*: Der Handel mit Gebrauchtssoftware – Erschöpfungsgrundsatz quo vadis?, CR 2008, 69; *Vianello*, Handel mit gebrauchter Software für Schüler, Studenten und Lehrkräfte, MMR 2012, 139; *Witte*, Online-Vertrieb von Software, ITRB 2005, 86.

With regard to the distribution of software, the copyright holder has the exclusive right to offer the program to the public and to put it on the market (Section 69c No. 3 sentence 1 UrhG). This regulation is the counterpart to the general distribution right (§ 17 UrhG). The distribution right is the right to offer the original or copies of the work to the public or to put it on the market. Placing on the market is the exit of the offering party from the internal sphere into the public sphere. Publicity is the provision for a plurality of persons, unless the circle is clearly defined and personally linked to each other by mutual relations or relations with the organiser (§ 15 par. 3 UrhG). A public appearance is not ruled out by the fact that sales are made to legally independent sister companies or cooperation partners. According to the case law of the ECJ it is irrelevant for the question of placing on the market whether the holder of the right and the licensee belong to the same group. However, the distribution right for software has some specificities. The act of distribution includes both the right of commercialisation and marketing. Dissemination in the form of “offering to the public”; can also be made by an individual offer to a third party with whom no personal relationship exists. The search for an exchange partner via newspaper advertisements is sufficient. The same applies to offers to dealers. An actual downstream sales transaction is not necessary in this respect.

Anyone who places a third-party, copyright-protected computer program on the Internet for downloading must not rely on the fact that, in the absence of any evidence to the contrary, it is a program that the entitled party agrees to make publicly accessible. Rather, he must first carefully check whether the rightholder has released the program for public access. The OLG Frankfurt a. M. interpreted the notion of distribution as meaning that the mere fact of acquiring a copyright protected work without any subsequent sales process constitutes distribution. S. d. § 69c No. 3, sentence 2 UrhG, if the advertisement is an incentive to acquire it. The granting of test access constitutes a public access to the computer program.

The right of distribution is, however, limited by the principle of exhaustion, which is contained in § 69c No. 3 sentence 2 of the Copyright Act. After that the further distribution (not the

duplication or other rights!) of workpieces within the territory of the EEA without restriction if they have been put on the market by way of sale with the prior consent of the person entitled.

For a long time it was unclear whether this principle of exhaustion also applied to software contracts. This uncertainty related primarily to the question of whether a software contract constituted a "sale"; i. S. v. § 69c No. 3 sentence 2 UrhG. In contrast to some of the literature, case law takes the view that this is the case with normal software contracts: the acquisition of (tailor-made) individual software is then carried out within the framework of a contract for work and services. (Ready-made) standard software, on the other hand, is put on the market by way of a purchase in kind or a contract similar to a purchase. In both cases, the user/customer acquires ownership of a specific copy of the program including the program documents belonging to it. Individual and standard software will therefore regularly be put on the market by way of purchase and work contracts, even if such contracts are referred to as "licences". However, the principle of exhaustion does not apply to the first rental of the software.

Therefore, the courts have held that the principle of exhaustion is directly applicable to software contracts. The manufacturer or distributor cannot therefore claim that the resale of software infringes his rights by reference to copyright. The only option left to him is to conclude rental agreements with the users for the transfer of the programs, as this would not result in a sale i. S. d. § seventeen paragraphs. 2 UrhG exists; this alternative is, however, ruled out for practical reasons in view of the very extensive warranty rules of tenancy law. This also applies to bundling agreements under which the resale of pre-installed software is not permitted without the corresponding hardware. In contrast, there is no risk that the end customer distributes the software several times in violation of the distribution right, provided that the dealer has declarations that the customers have deleted the software on their hard disk. In this respect, the case is no different from those in which a reseller resells a delivery copy of the software handed over to him on diskette, with regard to which he was granted the right to install and use on the computer. Also in these cases, it is considered necessary and sufficient that the seller deletes the copy installed by him on the hard disk with the transfer.

However, it is questionable to what extent the distribution right can be limited by contract with real effect. § Section 137 sentence 1 of the German Civil Code fundamentally excludes this; however, the provision permits a binding obligation under the law of obligations (Section 137 sentence 2 of the German Civil Code). The KG Berlin has z. B. Allows Microsoft to split the sale of Microsoft products into OEM and (free) non-OEM versions and, by doing so, pro-

hibits the sale of OEM versions on the open market. European law has not changed the admissibility of granting different rights of use for separate types of use; different rights of use could continue to be granted for hardback and paperback editions. This view is not shared by other Higher Regional Courts and is criticised in the literature. In the meantime, the Federal Court of Justice has deemed an in rem restriction of OEM sales to be ineffective. The distribution of OEM software cannot be restricted from the outset; the principle of exhaustion applies irrespective of any limitation of the content of the right of use. The BFH also specified that the concept of distribution also included resale to legally independent group companies and cooperation partners. This also applies to the use within an intranet or via file sharing.

According to § 69c No. 3 UrhG, the distribution right also includes the exclusive right to rent out the software and to control the subletting. Rental right is therefore a form of distribution; the author is able to prohibit any unauthorised rental of his software. However, this legislative decision is not of great relevance for the German software industry, since subleasing does not play a major role in Germany (in contrast to the rental of CDs and DVDs).

The term "rent" is not defined in the government bill. The German Government refers to the preamble to the EC Directive (91/250/EEC), which defines the term rent as "the making available for use, for limited period of time and for profit-making purposes". Rental, on the other hand, does not refer to the public lending practice which is the subject of another EC Directive. This prompted the Federal Council, in its opinion on the proposal, to add the words "for profit-making purposes" to § 69c no. 3 UrhG to clarify the reference of the law to letting. However, this proposal was rejected by the Federal Government with reference to the fact that the more detailed definition of rent should be left to the implementation of the Rental Directive. However, this possibility of restriction is problematic for data processing leasing. Here, leasing of hardware and software is a regular occurrence, the latter especially in the case of operating system software. However, IT leasing is not permitted under Section 69c No. 3 sentence 1 UrhG only permissible with the consent of the owner of the software rights.

The OLG Karlsruhe has now allowed the contractual restriction of the transfer of software rights. In a contract which regulates the provision of client-server-based business software, a clause according to which it is not permissible to split up a volume of use acquired as a whole (prohibition of splitting), the content control according to §§ 305 ff. BGB. Nor does such a prohibition of splitting infringe antitrust law. However, the ruling is explicitly based on the submission of the BGH to the ECJ on online exhaustion (see below) and therefore has no further significance until the legal issues have been finally clarified by the ECJ.

Die Frage, ob auch im **im Online-Bereich** eine Erschöpfung angenommen werden kann, ist auch in der Rechtsprechung lange Zeit kontrovers diskutiert worden. Einige Gerichte haben die Frage verneint. So hat insbesondere die Münchener Justiz ihr Problem mit der Online-Erschöpfung. Das *OLG München* will diesen Grundsatz nicht anerkennen; die Weitergabe von Nutzungsrechten verstoße gegen das Vervielfältigungsrecht des Urhebers, weil sich der

The question of whether exhaustion can also be assumed in the online sector has also been the subject of controversial discussion in case law for a long time. Some courts have denied the question. The Munich judiciary in particular has its problems with online exhaustion. The Higher Regional Court of Munich does not want to acknowledge this principle; the passing on of rights of use would violate the author's right of reproduction because the principle of exhaustion under German as well as European law only refers to works embodied in an object and in this case the "used"; software was not handed over to the purchaser embodied on a data carrier but only the software licence was sold. Neither directly nor by analogy can the principle of exhaustion be applied. Furthermore, in the opinion of the Regional Court of Munich, the blanket advertising statement that the sale of "used"; software licences for standard software is permitted is misleading in the light of Sections 3 and 5 of the German Unfair Competition Act (UWG) and thus inadmissible. It is also taken into account that the use of software implies the encroachment on other rights, such as the right to load into the working memory. Other courts rightly argue that it makes no difference whether software is distributed via DVD or over the net; in both cases, the economic and legal arguments regarding exhaustion must be the same. The Regional Court of Munich has granted the claim for the purchase price of the plaintiff, who is dealing with used software licenses; the court did not agree with the software buyer's argument that the sale of a single license from a volume license agreement is based on a defect of title. An embodied copy was given to the purchaser, which was created by duplicating the master copy of the original licence holder. Thus, exhaustion according to § 1 of the German Copyright Act is not possible with regard to both the distribution right and the reproduction right. 69c No. 3 sentence 2 UrhG. By granting rights of use to software in fulfilment of the respective volume licence agreement, the licence holder's right of distribution had been exhausted with regard to each individual right of use granted, which was to be treated as an independent reproduction of the software. As a result, even in the case of split volume licenses, individual software licenses could be sold without the consent of the license holder.

Exhaustion was ruled by the OLG Frankfurt a. M. in a decision concerning the resale on eBay of surplus usage rights to Windows XP Professional acquired under a volume license. An ana-

logous application was denied on the grounds that the right of distribution can only be exhausted in respect of physical works, but not in respect of incorporeal rights, and that a purchase via download does not constitute putting into circulation. This situation has to be distinguished from the trade with used software in case of OEM versions which are put into circulation in physical form but are exclusively sold in connection with a computer. Here, the OLG Düsseldorf set aside a judgment of the LG Düsseldorf on the grounds that the principle of exhaustion did not apply to the sale of OEM software, since the software was never put into circulation for isolated distribution. Rather, it is up to the rightholder to decide whether he or she facilitates or hampers further distribution by distributing individual works, by choosing an embodiment which is difficult to handle. In the case of pre-installed software, the distribution right could only have been exhausted with regard to the workpiece in which the computer program was embodied, i. e. the computer on which the program had been pre-installed.. Without passing on the computer or at least the hard disk, a further distribution of the pre-installed software is therefore inadmissible. Against the background that the Federal Court of Justice already declared the permissibility of reselling OEM software, which is, however, still delivered on CD, years ago, it has become apparent, however, that fixed pre-installation is merely a way of circumventing the principle of exhaustion and therefore cannot simply be placed at the discretion of the rights holder. Thus the indispensable § 69c No. 3 sentence 2 UrhG at the technical level. Regardless of whether the software is distributed as an OEM version or as a download, as long as it is ensured that there is no reproduction of the licensed software, the principle of exhaustion must be acknowledged. Otherwise, a similarly absurd situation would arise as the annulment of § 53 UrhG by the technical protective measures protected by § 95a UrhG.

In February 2011, the BGH referred the question to the ECJ for a decision. According to the BGH, by downloading the computer programs, the customers of the defendant are interfering with the protection of their rights under Section 69c no. 1 UrhG exclusively entitles the holder of the right to reproduce the computer programs. Since the defendant induces its customers to do so by offering "used" licences, it can be sued for injunctive relief if its customers are not entitled to reproduce the programmes. In the opinion of the BGH, however, the defendant's customers may possibly rely on the provision of Section 69d (1) of the German Commercial Code. 1 UrhG, the Art. 5 paragraphs. 1 of Directive 2009/24/EC into German law and must therefore be interpreted in conformity with that directive. According to Art. 5 para. 1 of Directive 2009/24/EC, unless otherwise agreed, the reproduction of a computer

program shall not require the consent of the rightholder where it is necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose. The question therefore arises whether and, if so, under what conditions the person who has acquired a "used"; software licence is to be regarded as the "lawful acquirer"; of the computer program in question. In this context, the further question may also arise as to whether the rightholder's distribution right is exhausted when a computer program has been put on the market with his consent by means of online transmission. In *UsedSoft vs. Oracle*, the ECJ applied the principle of exhaustion of the Computer Programs Directive also to download software. If the copyright holder makes a copy - physical or non-physical - available to his customer and at the same time concludes a "licence agreement"; against payment of a fee, by which the customer receives the unlimited right of use of this copy, he sells this copy to the customer and thus exhausts his exclusive right of distribution. Such a transaction transfers the ownership of the copy. Thus, even if the licence agreement prohibits a subsequent sale, the rightholder can no longer oppose the resale of that copy. It is questionable whether new sales models will replace purchase/license in the future (rent, cloud computing; SaaS). Furthermore, the reproductions which are made in accordance with Art. 5 of the directive is required for the use of the software and the second purchaser is therefore permitted to use it, not the splitting of volume licenses. In a further decision, the *UsedSoft III* decision, the Federal Court of Justice has now decided that the principle of creation applies not only to the copy of the first acquirer but also to the reproduction by the first acquirer for the purpose of producing the copies to be split off, which go to the second acquirer. Accordingly, it no longer makes any difference whether the copy was downloaded or produced. It is exciting to see how the decisions affect other types of work. The LG Berlin has clarified that the *UsedSoft* Decision cannot be applied to online computer games and the transferability of accounts in such games. Clauses that undermine the online exhaustion are invalid under the law of general terms and conditions. Thus the OLG Hamburg has the use of the clause.

„You may also transfer the Software (together with the license) to a computer owned by someone else if a) you are the first licensee of the Software and b) the new user agrees to the terms of this Agreement.“

prohibited. It infringes the principle of copyright exhaustion. The restriction of the transferability of the software to a single transfer process - from the first licensee to a third party - deviates from the legal regulation of § 69c No. 3 p. 2 UrhG and therefore infringes § 307, Subsection 3. 1 p. 1, paragraph. 2 No. 1BGB. Also prohibited were clauses in the general terms and conditions of a software manufacturer, according to which the transfer of software requi-

res the written consent of the software manufacturer and the latter may refuse consent if the use of the software by the new user is contrary to his legitimate interests. Also inadmissible is a clause according to which any use of the manufacturer's software that goes beyond the contractual agreements must be reported to the software manufacturer in writing and requires a separate agreement with the software manufacturer on the additional scope of use (additional purchase).

The rejection or non-processing of so-called Transfer applications for the transfer of used software by Microsoft exclusively for the reason that outdated forms were used or a passage was struck by the used software dealer which contained the insurance for the non-transfer to non-affiliated third parties is not permitted according to § 4 No. 4 UWG anticompetitive.

Cases in which a right to use software was transferred only in relation to a group of companies also cause problems; if the software is then used in spun-off parts of the company, this is in breach of copyright law in the opinion of the Düsseldorf Higher Regional Court. It is also difficult to distribute the burden of proof and demonstration in cases of exhaustion. Anyone who, on the basis of the exhaustion of the distribution right, claims to be entitled to make use of the reproduction right as a person entitled to use a reproduction copy must state in detail that

- the rightholder has given his consent to download the relevant software licenses against payment of a fee,,
- the rightholder has granted his purchasers a right to use the temporary copy of the program for an unlimited period of time,,
- the use of updates of the software is covered in the respective concrete individual case by a maintenance contract concluded between the legal owner and the original purchaser,

the copy at the time of resale, only the acquirer of his own program unusable, on his Server, therefore, no duplication longer remains, so that an impermissible splitting of the licenses is excluded and in each case it is ensured that the subsequent purchasers, the program copy only the first purchaser allowed ten intended scope of uses.

c) Edit

According to § 69c no. 2 UrhG, the author of a computer program has the exclusive right to Translation, alteration, or editing of his work in any Form. In Deviation from § 23 of the copyright act, the principle of editing freedom is for Software on-lifted.

§ 69c no. 2 UrhG prohibits the removal of a Dongle query without the consent of the right holder. The Dongle is a copy protection plug, which is plugged to an interface of the compu-

ter and the presence of which is queried by the protected Software on a regular basis. The Dongle is removed, the Software your service. A processing lies not in changes to the packaging, because the program itself, to which § 69c UrhG refers to is this has not been changed

In connection with the handling of the moral is the legal question of the naming right of a programmer (§ 13 UrhG). The OLG Hamm has adopted, as a first court of such a right. The comprehensive and exclusive Granting of rights of use and exploitation authority does not allow the moral law meant, and the clues to the authorship of a programmer, way-leave, to change, in particular, the copyright notice, or distribute the Software. In principle, each of the authors of the gem. § 13 UrhG, the right to recognition of his authorship of the works – supplemented by the Entstellungs and change to prohibitions of §§ 14 and 39 of the copyright act and the mandatory source disclosure ACC. to Section 63 of the copyright act. He can fight back, if someone, for example, the plant is referred to as a private, according to against. The higher regional court of Hamm clarifies the requirements for a waiver of the attribution: An agreement on the designation of authorship in the context of a Usage is permitted. However, be to provide for the protection of the author's strict requirements. This applies on the one hand, for the determination of a – if necessary, also tacitly – made contractual restriction on the name usage to the right. On the other hand, it is needed to Assess the for the copyright reasonable results for a concrete balancing of interests, for instance, the intensity of the intervention, its necessity are to be considered in terms of the in the framework of the contractual exercise of the exploitation, the Industry conditions and the contract and recovery purpose.

d) Keep available for retrieval

literature:

Dietrich, ASP – öffentliche Zugänglichmachung oder unbenannte Nutzungsart?, ZUM 2010, 567; *Hoeren*, LAN-Software. Urheber- und AGB-rechtliche Probleme des Einsatzes von Software in lokalen Netzen, UFITA 111 (1989), 5; *Kotthoff*, Zum Schutz von Datenbanken beim Einsatz von CD-ROMs in Netzwerken, GRUR 1997, 597.

§ 69c no. 4 UrhG guaranteed for Software, the new right of the author to control those processes that run on a provision of the protected content for the public recall also (§ 15 Abs. 2 UrhG). This plays an important role in the Download of computer programs over File Transfer Protocol (FTP) or similar services on the Internet. Here it is important to note that the single Download of a copyrighted work from an FTP Server is a gem. Section 106 of the copyright act punishable reproduction is. To make the third in the way of Application Service Providing (ASP) is a computer program available on the Internet, also violated the rights of the author pursuant to § 69c no. 4 UrhG, when in ASP mode, no program data.

The availability in the non-public area, however, is copyright free. The concept of the Public sphere is determined in accordance with § 15 Abs. 3 UrhG. To the Public it is missing, if only the purpose is to use the programs in the manageable and through contractual relations with affiliated companies the circle for their own data processing purposes. In this respect, the use of Software in the context of local networks, used by small User groups, not the consent of the right holder's needs. Because here it is missing because of the size of the company regularly on a personal bond in the case of employees of a company. According to the BGH, the participant must be connected to the circuit via its membership of the operations, through closer personal relations with each other, in order to be considered as non-public.

Concern to flat-rate limitations of the Network, LAN-prohibitions and network licenses are displayed, however, since such arrangements without the author's intervention, the legal justification in the Self-tümerfreiheit of the user and, therefore, regularly gem. § 307 Abs. 2 no. 1 and 2 of the civil code are null and void. In addition, the licensee is not entitled to recognized the exclusive license to distribute the work in physical Form in boxes ("physical product in a boxed version") him against making available to the public on the Internet in digital Form to proceed..

5. Barriers

literature:

Grützmacher, Lizenzgestaltung für neue Nutzungsformen im Lichte von § 69d UrhG, CR 2011, 458; *Moritz*, Vervielfältigungsstück eines Programms und seine berechtigte Verwendung – § 69d UrhG und die neueste BGH-Rechtsprechung, MMR 2001, 94; *Smith*, EC Software Protection Directive – an attempt to understand Article 5 (1), Computer Law and Security Report 7 (1990/91), 149; *Sucker*, Lizenzierung von Computer-Software, CR 1989, 353 und 468; *Vinje*, Die EG-Richtlinie zum Schutz von Computerprogrammen und die Frage der Interoperabilität, GRUR Int. 1992, 250; *Weber/Hötzel*, Das Schicksal der Softwarelizenz in der Lizenzkette bei Insolvenz des Lizenznehmers, NZI 2011, 432; *Zahrnt*, Umfang des Einsatzrechts des Anwenders und Programmschutz, IuR 1986, 199.

§ 69d UrhG is in correlation to § 69c UrhG. If the rights of the author in the section be expanded 69c of the UrhG, about the usual level, this must have an impact on the barriers for the benefit of the user. Accordingly, § 69d UrhG contains a number of provisions for the protection of the interests of the software user, which is of a mandatory nature (see § 69g Abs. 2 UrhG).

The legal nature of § 69d Abs. 1 copyright act is, however, unclear. In part, it is seen as a legal barrier. Others see this because of the reference to the other regulations, a rule of Interpretation in accordance with § 31 Para. 5 of the UrhG, according to which the license-holder to use the law to the extent that it requires the purpose of the contract without prejudice to other

contractual provisions. The ambiguity is due to the fact that the reference to the MRP gas sensitivity is based on an internal contradiction of the EU software protection Directive. At the core of the scheme is to be regarded as a mandatory legal barrier.

In §§ 69d and 69e of the German copyright act-anchored barriers are to be interpreted – as with everything else in copyright law – because, in principle, the use of third-party ideas is free, and the copyright protection itself is an exception to this principle. A certain school in copyright law assumes that regulations are always to be interpreted narrowly. However, this is incorrect. Barriers to return to the user only the freedom that is rightfully his anyway. In principle, any use of third-party ideas is free. The protection of works on copyright, in turn, is an exception that must be narrowly construed. In contrast, the barriers refer to the General concept of the freedom of information and are therefore to be understood also in accordance with constitutional principles – extensive. §§ 69d and 69e of the German copyright act are therefore to be considered in the way of the interpretation of the law compliant as a guarantee of a mandatory core of copyright-relevant uses for the contractual use of the program are essential.

a) Intended use (§ 69d Abs. 1 UrhG)

Die erste Schranke enthält § 69d Abs. 1 UrhG. Kernbegriff ist der Terminus „**bestimmungsgemäßer Gebrauch**“. Die EU-Softwareschutzrichtlinie spricht in Art. 5 Abs. 1 von „in accordance with its intended purpose“.

The "determination" of a program is determined subjectively-objectively. Primary is the intention of the parties, as the software agreement or other agreements. Such a common intention should not be to determine, is to consider the opinion of to. This applies in particular for standard software, for a certain typology of functionalities can be provided by experts found. In the case of individual software, an objective opinion is likely to be more difficult. The intended use of the computer program, for example, can also include Training by a third party, unless this results from the software contract.

Difficulties are likely to arise, if the contract defines the functionality to run counter-spell to the objective of traffic use. If the parties to negotiate individually the contract, exceeds the party will traffic use. In the case of terms and conditions § 305c BGB, however, is to note. As a surprising and, to the extent not included in the contract, those parts of a pre-formulated contract are to be considered, which limit the lenses use much. So it may be a User is not allowed to be programmed in accordance with the acquisition of a word processing program, a print function, which is not provided in the package and in the terms and conditions is excluded.

The intended use includes the wording of § 69d Abs. 1 UrhG, the elimination of errors. The User can not be banned, to eliminate interference due to its own Programming effort. It is important to note, however, that he may be detained in the framework of the contractual agreements, from unauthorized Changes. This does not apply in the context of the purchase of standard software applicable to the sale of goods. The User can eliminate the error of the Software by virtue of his position as the owner. Its terms and conditions is not consistent-it is legally permissible that such a Troubleshooting leads to automatic exclusion of the warranty. Something else applies if the dealer agreed with the customer, a Phase of repair. In this case, the customer must tolerate the elimination of the error by the seller and may not act arbitrarily. The same applies to the agreement for the creation of custom software, because of their contractual nature, a Troubleshooting right of the software Creator includes (§ 633 Para. 3 BGB). The Bug-the handle of the § 69d Abs. 1 UrhG is expected to be with the Lack of definition of the German civil code are identical. As an Error, in particular, the unusual response time is, therefore, behavior, lack of error routines or HELP to view functions. § 69d Abs. 1 UrhG is not legitimate, however, to Create copies of the user documentation or the Supplement this documentation with additional Features. Even if a user documentation of the contract is legally owed, not include the user documentation of the provisions of §§ 69a–69h of the copyright act. § 69a Abs. 1 UrhG refers only to the technical documentation, but includes regularly from the obligation to deliver.

§ 69d Abs. 1 UrhG allows the elimination of errors, in addition to the development of new functionalities. The extent of the additional Features resulting from the intended use of the program. In this respect, the copyright act is the equivalent of the civil-legal idea of (partial) fulfilment. If the supplier he is not filling his main obligations, to the User a self-help right.

The problem is, however, whether the User is allowed to sell the modified software version. This could be in relation to the trademark rights of the manufacturer is problematic. In this respect, the the Medicines known case-law, uses cases to the Packaging.

Not of § 69d Abs. 1, the removal or circumvention of the Dongle is comprised of a query with copy protection. Such a transformation is contrary to the apparent will of the programmer, for the Dongle query to error-free operation of the program. In the context of the "intended" use is noted, therefore, that the user is eligible for an interest in a function, and thus also of Dongle-queries free program. The best immune for the intended use, however, is not determined only from the point of view of the user. Rather, it must also acknowledge the protection and for the user, catering for the interests of the programmer into account. This has to

protect his program against the hard to control unlawful copying. If the user, therefore, the connection of the program with a Dongle recognizable, he has to respect this technical device during the use of the program. The not should in the direction of function properly, leaves a self-help legal.

The question is, what other agreement within the meaning of § 69d Abs then. 1 UrhG is to be considered. A part of the literature § 69d Abs looks. 1 of the copyright act in General as a device to. Any contractual limitation of the self-help right should be allowed. This view is reflected-however, the wording of the EU software protection Directive, which is to be used in the context of the European law compliant interpretation to Interpretation. Art. 5, Para. 1 of the EU software protection Directive allows for other contractual provisions that restrict the rights of the user. This possibility in the preamble to the Directive, which expressly States that "acts of loading and running for the use of a copy of a program which has been lawfully obtained and the act of correction of its errors may not be prohibit-ed by contract", however, is contradictory. This has the consequence that contractual restrictions in accordance with article 5, Para. 1 of the EU software protection Directive would be permitted, which are forbidden by the preamble. Part of the acceptance has not been represented, that preamble, connective, so that article 5 Para. 1 of the EU software protection Directive was a priority. The German legislator has, however, adopted a different view. He assumes that the in § 69d Abs. 1 UrhG-mentioned Hand-lungs of the user cannot be contractually prohibited. It's just the way it could, rather, can be, as these actions are executed through the contract are specified. This distinction, however, leads to some uncertainties in the Law.

You should, to the extent to try to bring the two statements into a meaningful context. This will be based on the notion of "special agreements". Is not allowed according to this, the blanket exclusion of the self-help law, would in any case with the idea of a mandatory core of the provision to be incompatible. The reference to "special agreements" indicates, rather, that more detailed Ersatzbe-moods can take the place of the barrier. If the purpose of the barrier can also be through contractual arrangements implemented, the right to manufacture to the intended use. This refers to the purchase of contract law in business – at least in the individual contract – definable and factory law of contract law option of the distributor to the self-performance of the rectification of the defect (delay in Change?). If and to the extent that the supplier is offering, in turn, an adequate Update and maintenance service, is denied the customer self-help. To the extent that the reference to the special agreements in terms of the civil code is to read, that Non-performance and warranty provisions grants to the supplier a Remedy in accordance with the contract.

b) Backup copy

§ 69d Abs. 2 UrhG contains the right of the User to create a backup copy. The wording is in terms of the number of the backup copies clearly: it is only Allowed a single copy. If the user installed a software package on his computer, is realized, this right already by the fact that he keeps next to the copy on the computer still in the original package in the hands. Additional copies may no longer be created. Unlike the legal position in the case of preinstalled Software or Software for Download. Here the customer could not meet any additional copy, the Backup purposes. It must therefore be ensured that the customer can get relatively easy an extra copy.

The right is not contractually beschränkbar, § 69g Abs. 2 UrhG. If in the contract expressly Creating additional copies is prohibited, must expressis verbis a Predetermined holding with regard to § 69d Abs. 2 copyright act are formulated. The supplier wants the right cabinets, can he Abs only to in § 69b. 2 copyright act is called the characteristic of Necessity is based. The right to create backup copies will only be guaranteed "as required". Backup copies are not required if the supplier does not offer a Backup Service. This can be done by the supplier undertakes the delivery of the replacement copies.

However, the German government has found another regulatory gap in the EC Directive. In kind. 5 paragraphs. 2 the Directive grants a right of the lawful user to make a backup copy; under Art. 7 para. 1c it prohibits the commercial use of anti-copy protection programs. If such programs have legal backup copies made, they would actually have to be protected under Art. 5 paragraphs. 2 may be marketed. The federal government itself is not discussing a possible solution to this problem, but instead refers to a later clarification by the courts.

If the creation of a required backup copy is prevented by technical blocks, this shall constitute a defect in the software, the warranty rights of the customer, if applicable also triggers claims for damages. However, such conduct on the part of the supplier does not justify that the customer, for its part, overrides or circumvents copy protection by means of circumvention mechanisms. As the case law on dongle cases expressly emphasises, the use of such circumvention mechanisms is itself contrary to copyright law. The distribution of such mechanisms is considered unfair i. S. v. § 3 UWG.

c) Test runs

§ Section 69d, paragraph. 3 UrhG allows the observation, examination and testing of the functionality of a computer program without the consent of the copyright holder. In contrast to Section 69e UrhG, program analysis is not restricted to specific purposes. Rather, the analysis

can serve to ensure the maintainability of the software, to extend the program with new functionalities or to generate technical evidence for the infringement proceedings. It is crucial that the analysis is aimed at identifying the ideas and principles underlying a programme element. However, in the final analysis, the regulation is therefore superfluous. § 69a para. 2 UrhG already provides that ideas and principles underlying a program are not protected by copyright; as a consequence, the lawful user of a computer program may in any case observe the functioning of the software in order to find out the underlying principles. In this respect, this part of the German law only repeats an obvious rule of traditional copyright law. Only the person entitled to use a copy of the program is entitled to this right. Allowed are actions for loading, displaying, running, transferring or saving the program. § 69d par. 3 UrhG therefore only regulates the internal use by the authorised user. However, the regulation does not legitimise the use of the test results for the development of almost identical competing products. The free analysis of programs must not be confused with decompiling. The new provisions only allow the program to be examined and tested in the form of the object code; they do not allow the object code to be copied and translated into the source code, as is the case with decompilation. § Section 69g para. 2 UrhG provides that any contractual restriction of this right is null and void. Herein lies the actual meaning of the provision. Contracts must contain a reference to freedom of analysis; otherwise the agreement may be partially null and void.

Pursuant to Section 69d (1). 3 UrhG, the person entitled to use a copy of a computer program may also perform the acts of loading, displaying, running, transmitting or storing the program to which he is entitled under the licence agreement without the consent of the rightholder, in order to observe, examine or test the functioning of this program and to determine the ideas and principles underlying a program element, if he pursues commercial or professional purposes in doing so and the "licence agreement"; only permits use of the program for private purposes. In the case of computer games, however, the use of bot programs which violate the rules of the game laid down in the General Terms and Conditions can lead to consequences under competition law in addition to a breach of contract. The provision of § 69d par. 3 UrhG is only applicable to computer programs and not to other works or services protected by copyright. The reproduction of a computer game which not only consists of a computer program but also contains other works or performances protected by copyright is therefore not permitted under Section 69d (1) of the German Copyright Act with regard to the reproduction of the other works or performances. 3 UrhG is permissible.

Beyond § 69d UrhG and § 69e UrhG the law does not allow any further barriers in favour of the user. In particular, he is to be granted recourse to the freedom of private copying (§ 53 (53) 1 UrhG) be denied.

However, a program can be used freely if it has been brought to market as public domain software. In this case, it is to be assumed that the use of the term "public domain"; waives from the outset the assertion of any claims against a person who reproduces and redistributes the program. The shareware market, in which the distribution of trial versions of computer programs is in the foreground, must be distinguished from this. In this area, the copying and distribution of shareware products without the consent of the entitled party is at least to be regarded as a direct assumption of services according to § 3 UWG a. F. forbidden.

d) Decompilation

literature:

Bauer, Reverse Engineering und Urheberrecht, CR 1990, 89; *Burkill*, Reverse Compilation of Computer Programs and its Permissibility under the Berne Convention, Computer Law & Practice, March-April 1990, 114; *Ernst*, Die Verfügbarkeit des Source Codes – Rechtlicher Know-how-Schutz bei Software und Webdesign, MMR 2001, 208; *Haberstumpf*, Die Zulässigkeit des Reverse Engineering, CR 1991, 129; *Harte-Bavendamm*, Wettbewerbsrechtliche Aspekte des Reverse Engineering von Computerprogrammen, GRUR 1990, 657; *Olzhöfer*, Reverse Engineering von Software und Urheberrecht – eine Betrachtung aus technischer Sicht, CR 1990, 578; *Kindermann*, Reverse Engineering von Computerprogrammen, CR 1990, 638; *Kindermann*, Urheberrechtliche Voraussetzungen und Grenzen des Reverse Engineering und Schutz von Schnittstellen, Wirtschaftsinformatik 34 (1992), 175 ff.; *Lietz*, Technische Aspekte des Reverse Engineering, CR 1991, 564; *Vinje*, The development of Interoperable Products Under the EC Directive, The Computer Lawyer 8 (1991), Nummer 11, 13 ff.

§ Section 69e UrhG is based on Art. 6 of the EU software protection directive, one of the most controversial regulations of the entire directive. The main question is how to ensure free access to interfaces if this information is protected by copyright. § 69a para. 2 sentence 2 UrhG provides that the ideas underlying the interfaces are in the public domain. However, it is very difficult to distinguish between public domain ideas and copyright-protected concretization of interface information. For this reason, access to protectable interfaces had to be regulated if one did not want to cement the market power of powerful data processing manufacturers by copyright - as in the famous disputes between IBM and the European Commission. In this situation it would have been appropriate to solve the problem under antitrust law - via Art. 102 TFEU - to be solved.

However, the legislator has chosen to take a copyright probe into the introduction of a new barrier. The user should be allowed, under certain conditions, to retranslate the object code of a program into its source code and thus filter out the necessary information. However, the

European Commission met with fierce resistance from the software manufacturers in the early stages of the discussion. They feared that the approval of the reassemblings would lead to an unrestrained use of the source code, which is one of the manufacturer's trade secrets. However, the compromise reached after hard wrestling is useless. The fear of manufacturers of uncontrolled access to the source code is pathological, since technically the original source code can never be generated by reassembling. During this very complex process, program lines are created in a kind of Assembler language, which can be used for example for the following B. do not contain the comment lines of the original code. All in all, the decompilation regulation is characterised by a high degree of technical uncertainty. Even for experts, decompiling as well as "reading"; the final product is only possible with a lot of effort. The decompilation also does not generate the original source code, but only a C- or assembler-like reconstruction of an intermediate version without the internal comment lines of the programmer. The compilation of the original source code can also be done by an optimization option. Furthermore, the source code can be obfuscated with an obfuscator. In such cases the decompiled code is almost unusable. The question is therefore what significance decompilation actually has in the software industry. There may have been some controversy on the issue of decompilation over a topic that will not play a major role in the future.

§ Section 69e para. 1 UrhG conclusively regulates the admissibility requirements for decompilation. In view of the clear wording, an extended interpretation - for example with regard to the maintenance of software - is not possible. § 69e UrhG uses the term decompilation only in the title. Instead, the text of the provision speaks of "duplication of the code"; or "translation of the code form";. It should be noted technically that each software is normally available in two versions. The programmer uses a special programming language that is as close as possible to the colloquial language. However, the "source code"; created in this way is not "readable"; by the computer. It must be translated into a machine language that generates bits and bytes via binary signals. The "text"; created in this way is the object code. For the translation one uses special programs, the so-called Compilers

Now, the Object Code can, in turn, not for the analysis of the program. This requires the "Original Source Code", or at least a Version of the Program comes this Format close. For the reconstruction of the Source code, you can use, in turn, special programs, the so-called Decompilers This generate, however, is never the Original Source Code, but only a combination of Object and Source Code.

§ 69e UrhG allows decompiling the object code only to achieve interoperability, not for other purposes. In the first drafts of the EU software protection directive, the area of third-party

maintenance was still listed; this proposal has not been incorporated into the final text of the directive. This will make it almost impossible for third parties to maintain software; the only solution to this difficult problem will be to introduce maintenance rights in the software contract. Decompilation for the purpose of error correction is also not legitimate. This also applies to the circumvention or removal of a dongle query; a permission for this cannot be derived from § 69e UrhG. Also excluded is decompilation for scientific and research purposes. Decompilation cannot be used to obtain evidence in infringement proceedings; however, refusal to obtain the consent of the rightholder is likely to be thwarting evidence. For the admissibility of decompilation it is not sufficient to state that software is inserted into another program.

As already explained in the explanatory memorandum to the draft law, this regulation leaves open whether decompilation should also be permitted for the production of compatible hardware. The EC directive and the German legislator explicitly only focus on the production of interoperable software. Nevertheless, the question of the permissibility of compatible hardware could prove to be technically superfluous. Hardware per se has never been subject of decompilation. Even when it comes to hardware compatibility, it is a problem of software-defined interfaces. As far as I know, the compatibility of "pure" hardware has never been the reason for decompiling, regardless of the software.

the term "other programs"; refers to the decompiled program itself. So if someone wants to create a program compatible with Windows, he can decompile the central interface information and use it within the scope of § 69e UrhG. On the other hand, interoperability with other third-party programs legitimizes the application of Section 69e UrhG. In contrast to early drafts of the EU software protection directive, which had closely related the decompilation freedom to the original program, the formulation of § 69e UrhG is now open for the identification of interface specifications which serve to establish interoperability with competing products. In this respect, the production of competing products does not lead to the exclusion of the barrier.

§ Section 69e of the German Copyright Act declares decompilation to be lawful only to the extent that the information received is necessary to achieve the interoperability of independently created programs. In this respect the law follows the idea of strict purpose limitation. Data may only be generated in the context of the interoperability purpose. As soon as the data is no longer needed, it must be deleted. Here it becomes clear once again that § 69e UrhG is not a copyright provision, but rather that cartel law has been wrapped in an (inappropriate) copyright dress.

Decompilation must also be limited to the necessary program parts; otherwise it goes beyond the narrow scope of indispensability. The strict purpose limitation also applies here. However, the user will have to be granted a certain grey area within which he can freely orientate himself in the program during decompilation in order to filter out the program parts with the interface information. Furthermore, decompilation is not indispensable if another source of information is available in time. § 69e UrhG is therefore not applicable if the rightholder makes the interface information easily accessible. This can be done by publication on the Internet or in the manual. It should also be sufficient that the data are available free of charge on request from the manufacturer. An obligation to pay costs that exceeds the obligation to reimburse necessary expenses leads to the user's right to self-help according to § 69e UrhG.

§ Section 69e para. 2 UrhG regulates the further fate of interface information generated by decompilation. However, this regulation is not a concrete definition of a copyright barrier. This is because the interface information as such is rarely capable of being protected. As already § 69a para. 2 sentence 2 UrhG, the ideas underlying the interfaces are in the public domain. Consequently, these ideas cannot be referred to in Section 69e (e). 2 UrhG. Rather, this provision can only cover the (rare and elusive) case of the concrete design of an interface. In this respect, Paragraph 69e(e) of the Law contains 2 UrhG sets a legal limit on the use of such concrete forms. However, the barrier is not clearly defined. First of all, Paragraph 69e(e) of that law refers 2 No. 1 UrhG that the information may only be used to establish the interoperability of the independently created program. Other purposes are not applicable, which is, however, also the case under § 69e para. 1 UrhG. Furthermore, information may not be used for the development, production or distribution of software that is in breach of copyright (§ 69e para. 2 No. 3 UrhG); this should be self-evident and would have required no special mention. The most important is still § 69e paragraph. 2 No. 2 UrhG, which only permits the passing on of information if this is necessary to achieve interoperability.

6. Bypass protection

literature:

Ernst, Kopierschutz nach neuem UrhG. Bedeutung und Tragweite des Verbots von Umgehungsmaßnahmen und Hacking-Werkzeugen für die Praxis, CR 2004, 39; *Raubenheimer*, Beseitigung/Umgehung eines technischen Programmschutzes nach UrhG und UWG, CR 1996, 69; *Schweikart*, Zum Verbraucherschutz im Urheberrecht, UFITA 2005, 7; *Schweikart*, Die jüngste Rechtsprechung zur Beseitigung/Umgehung eines Dongles, NJW-CoR 1996, 174; *Schweikart*, Vernichtungsanspruch gem. § 69f UrhG, CR 1994, 129.

§ Section 69f UrhG has two components. On the one hand, the injured party is granted a right to destruction with regard to pirated copies (Section 69f para. 1 UrhG). On the other hand, this

claim is also extended to tools for circumventing copy protection mechanisms (§ 69f para. 2 UrhG). The central issue is the claim for destruction; claims for damages and injunctive relief must be derived from the general provisions.

The provision goes far beyond Section 98 (1). 1 UrhG. The destruction of pirated copies (§ 69f para. 1 UrhG) does not - unlike § 98 UrhG - depend on the fact that it is a copy in the possession or property of the infringer. Rather, the claim for destruction comes into play wherever there are pirate copies.

Also new is the claim regarding the anti-copying protection mechanisms (Section 69f para. 2 UrhG). § 98 UrhG provides for a claim to the destruction or transfer of copying devices, but this is not directed to the opposite case of the use of circumvention mechanisms. The claim can only be derived in part from Section 3 of the UWG, insofar as these mechanisms are used in a competitive relationship. The private creation and passing on of such tools can only be done via § 69f Abs. 2 UrhG be punished. Apart from that, the new provisions on copy protection (§§ 95a, 95b UrhG) do not apply to computer programs; § 69f paragraph. 2 UrhG is to be regarded as a more specific and conclusive regulation. Under the protection of § 69f para. 2 UrhG, DRM systems, Expiration Dates or even Nintendo DS cards are covered. On the other hand, software which enables videos to be downloaded from an Internet portal even though its operator has secured the video stream with the aforementioned protective measures is to be subject to § 95a para. 1 UrhG are subject . In addition, § 4 No. 4 UWG under consideration.

However, the distinction between Section 95a UrhG and Section 69f UrhG is unclear. For example, the Federal Court of Justice has referred the question to the ECJ as to which rules are applicable to the protection of technical measures for the protection of video games protected by copyright. The question arises whether the protection of measures protecting "hybrid products";, such as video games in particular, is governed by the provisions specific to computer programs or those generally applicable to works, or whether both of these provisions apply.

After the ECJ stated in another preliminary ruling procedure that in the case of a video game, which not only consists of a computer program but also includes - for example graphic or sound - components with their own creative value, the parts of the video game which participate in the originality of the work, together with the complete work, are protected by copyright i. R. d. introduced by Directive 2001/29/EC, the Senate withdrew its question. The BGH adopted the case law of the European Court of Justice and ruled for the underlying legal dispute that although §§ 95a et seq. UrhG and therein also an 'effective'; measure i. S. of

these regulations. However, a violation does not violate copyright i. S. v. § 97 UrhG, so that Paragraph 98 UrhG is not applicable.

In addition to the right to destruction, the other rights to which a person affected is entitled in the event of a copyright infringement are applicable (§ 69a (1) 4 i. B. M. §§ 96-111 UrhG).

The regulation applies to all illegally produced, distributed or intended for illegal distribution. In this respect, the destruction is primarily directed against illegally produced copies; due to their illegal production, their distribution is also prohibited (§ 96 Par. 1 UrhG). In addition, the claim comes into effect if someone passes on a legally acquired software product to a third party without permission. This is the case if the transfer is made within the scope of subletting (§ 69c No. 3 sentence 2 UrhG). It is difficult to actually determine whether a copy is "intended"; for illegal distribution. Here it will objectively-final depend on an evaluation of the circumstances of the crime.

The copyright infringement must be factual and unlawful. Contrary to the Software Protection Directive, the claim is conceived as a general claim for fault elimination; fault is therefore not relevant. Furthermore, the claim does not presuppose that the owner or owner has committed the copyright infringement. The only decisive factor is that the copy is based on an infringement of copyright.

§ Section 69f UrhG speaks of destruction without further explaining this term. This is unfortunate in that the concept of destruction in the DP context is unclear.

Just like simply moving the program to the recycle bin, simply deleting the program copy from the respective data medium (e. g. by emptying the recycle bin) is not sufficient. This is because the deletion only removes the entry of the software copy in the register of the file system. Although the program is then no longer visible and cannot be retrieved easily, it actually remains on the disk and can be made visible again using appropriate tools. The same applies to "fast formatted"; storage media only. A final deletion requires a complete overwriting of the file on the storage medium, which can be carried out by means of specific tools or by completely reformatting the entire medium (which, however, affects all data on the storage medium or the respective partition of the medium). The possibility of recovering data from formatted storage media with a large amount of effort should be negligible. In view of the low material value of many storage media, the destruction of the data carrier is also conceivable, whereby the infringer has the choice between both measures. In this respect, the injured party only has the right to the final result, the destruction of the program files. With

read-only formats - such as B. CD-ROM - deletion is not possible, so that only the destruction of the data medium remains as a possibility for destruction.

Moreover, Paragraph 69f of the UrhG does not speak of the injured party carrying out the destruction. Instead, the wording "to be destroyed"; suggests that the infringer is responsible for the destruction. Accordingly, the injured party may not demand the surrender of the copies to himself or a third party. However, § 98 para. 2 UrhG, which according to § 69f Abs. 1 sentence 2 UrhG also applies in software law. Accordingly, the injured party may also demand the surrender of the copies in return for appropriate compensation instead of their destruction; the compensation may not exceed the production costs.

IV. The software infringement case

literature:

Frank/Wiegand, Der Besichtigungsanspruch im Urheberrecht de lege ferenda, CR 2007, 481; *Gedert*, Bemessung des Schadensersatzes nach der „Enforcement-Directive“, in: *Taeger/Wiebe*, Aktuelle Rechtsfragen zu IT und Internet, Oldenburg 2006, 76; *Hoppen*, Software-Besichtigungsansprüche und ihre Durchsetzung, CR 2009, 407; *Karger*, Beweisermittlung im deutschen und US-amerikanischen Softwareverletzungsprozess 1996, 3; *Kühnen*, Die Besichtigung im Patentrecht, GRUR 2005, 185; *Mellulis*, Zum Besichtigungsanspruch im Vorfeld von Schutzrechtsverletzungen, in: Festschrift Tilmann 2003, 843; *Tilmann/Schreibauer*, Die neueste BGH-Rechtsprechung zum Besichtigungsanspruch nach § 809 BGB – Anmerkungen zum Urteil des BGH „Faxkarte“, GRUR 2002, 1015.

1. Claims of the injured party

First of all, the claims of injured parties are to be discussed, first of all the main claims for injunctive relief, destruction and compensation.

a) Claims for injunctive relief

In the case of copyright infringements in the software sector, there are first of all claims for injunctive relief according to § 97 UrhG. In the case of infringements of trademark law, the claims for injunctive relief arise from §§ 14 para. 5, 15 paragraphs. 4 MarkenG and Art. 102 GMO. If the software is patentable, § 139 paragraph 1 PatG relevant. The right to injunctive relief presupposes a risk of recurrence of a previous infringement. In certain cases, however, an imminent danger of committing an offence is sufficient. In litigation, all injunctive relief claims must take into account that the respective concrete form of infringement is specified. It is necessary to file a specific action in which the individual acts of infringement are described in separate applications as a specific form of infringement. It is particularly difficult to prove an infringement of rights in the case of software. In a copyright software protection case, the

submission of the source code of the original program and the source or binary code of the program derived according to the applicant's arguments is necessary in order to demonstrate and prove sufficiently which parts of the original program can claim copyright protection as an original creative work and under what circumstances, i. e. are not mere adoptions or routines. This already affects the presentation level. If, instead of the source code, the binary codes are compared on both sides, not only the demonstration of the copyright protection of the partial components fails, but also the demonstration that and how precisely these copyright-protected parts have been taken over.

b) Destruction claims

In addition to the claims for injunctive relief, there are also claims for destruction (regulated in § 18 Marks Act, § 98 Copyright Act, § 140a Patent Act). The claim for destruction presupposes illegality. Furthermore, there must be no other more gentle means and proportionality must be assessed. In the case of proportionality, it must be examined in particular how the interest in destruction of the infringer stands in relation to the interest in preservation of the infringer. In this case law takes into account in particular the innocence or the degree of guilt of the infringer. In addition, there are questions regarding the severity of the intervention, in particular the type and extent to which programming documents are taken over. Finally, the extent of the damage incurred must also be placed in a relationship to the loss of assets on the side of the infringer. Destruction can primarily only take the form of destruction by the infringer. In the field of software, destruction cannot be carried out by simply pressing the delete function, but - if the software is stored on a data carrier - must be carried out fundamentally, e. g. by reformatting the data carrier (see above). p. 87 f.). If the software has already been confiscated by the state authorities, case law has affirmed that the injured party has a claim for restitution as part of the destruction. In particular in copyright law, it should also be possible to demand destruction in the form of illegally produced copies being handed over to a bailiff who is prepared to destroy them.

c) repayment for damages

In addition to the claims for injunctive relief and destruction, there are also claims for damages (regulated in §§ 14 para. 6, 15 paragraphs. 5 MarkenG, § 97 UrhG and § 139 (1) 2 PatG). The possibility of triple damage calculation should be noted here. The damage can be calculated by means of a license analogy at the injured party's choice, by determining the lost profit (§ 252 BGB) or by surrendering the lost profit. The injured party can switch between the different calculation methods until the legal capacity is granted. According to Art. 13, the injured

party should be required to receive compensation for the actual damage in an appropriate form for the infringement of rights. In this respect, the calculation of damages should allow for a comprehensive consideration of all relevant aspects, including loss of profits. Instead, however, a lump sum in the amount of the license analogy can be demanded. According to the current draft of the German transposition law, the old right to choose between the three damage calculation methods is to remain.

The calculation of damages is typically determined by a claim for information according to § 101 UrhG prepared. The infringed party first of all requests information about the various infringement processes and their scope and, in addition, requests an assessment of damages in accordance with § 256 ZPO. Due to the complexity of the damage calculations, it is assumed that there is an interest in making a determination in the entire field of industrial property protection.

By way of a license analogy, the software house concerned receives compensation in the form that it is placed in a position as if the infringer had concluded a license agreement. There are no infringement surcharges on the resulting appropriate "license". Surcharges will only be granted if the infringing goods have promoted the sale of a main product. In addition, there is a licence surcharge of currently 5% above the base interest rate (§ 288 BGB). The criterion for determining the amount of damages to be paid following a copyright infringement due to the sale of unauthorized software copies is not the price of the retail version, but the comparison price of a legal OEM version.

In addition to the license analogy, there is also the possibility of claiming one's own lost profit (§ 252 BGB). However, the problem here is that the injured person must give detailed information about his internal profit structure. Moreover, he would have to prove that he had actually received all the infringer's orders and that the latter could not have obtained the rights from a third party. Therefore, this form of damage calculation is rarely chosen. The most popular form of damages is that of compensation for damages, which is aimed at the surrender of the infringer's profit (derived from §§ 687 (1), (2), (3), (4) and (5)). 2, 666 BGB). In copyright law, profit distribution is expressly provided for as another way of calculating damages instead of compensation (§ 97 Par. 1 UrhG). It is still disputed to what extent the overhead costs are deductible when calculating the infringer's profit. The Federal Court of Justice has cut off the infringer's objection that his infringer's profit is also based on his own special distribution services. Furthermore, overheads should only be deductible if and to the extent that they can be directly attributed to the infringing goods. However, this attitude of the 1. Civil Senate of the BGH not common sense with all other BGH Senates; the judges of the 10th Ci-

vil Senate of the BGH responsible for patent law are not common sense with all other BGH Senates. Civil Senate considers such a sharp stance on overhead costs to be problematic.

It is also questionable how the infringer's profit in the distribution chain should be calculated. In the opinion of the BGH, the latter is to be held liable after an infringement of copyrighted rights of use pursuant to § 97 (1). 1 UrhG only insofar as it is based on the infringement of rights. In the case of the sale of an unfree adaptation in violation of copyright law, the extent to which the decision of the buyer to purchase the attacked adaptation is due to the fact that it shows the features on which the copyright protection of the work used is based is decisive. If several suppliers within a supply chain have successively infringed copyrighted rights of use, the infringed party is fundamentally entitled to demand from each infringer within the infringing chain the surrender of the profit made by the infringer as compensation. However, the profit to be surrendered by the Supplier to the injured party shall be reduced by compensation payments which the Supplier makes to its customers for their claims by the injured party.

d) Information and accounting

In addition to the main claims for omission, destruction and damages, there are also claims for information and invoicing. These result on the one hand from § 242 BGB and the Product Piracy Act. A so-called independent right to information can be derived from § 242 BGB to the effect that the infringer must provide the information necessary for the calculation of the claim. As an auxiliary claim to the claim for damages, it must first of all be established on the merits that the injured party can claim damages. In addition, the probability of damage occurring must be made plausible. Finally, the corresponding fault of the infringer must also be proven. In addition, there are the independent claims for damages under the Product Piracy Act, which are regulated in this respect by special laws in the individual protection laws (Section 101a Copyright Act, Section 19 Trademark Act; Section 140b Patent Act). With these claims, the question of liability for damages is irrelevant, as is the question of the probability of the occurrence of damage and the fault of the infringer. In addition to the classic information, the question of the so-called auditor's reservation still arises. In the event of such a reservation, the party required to provide information may disclose the names and addresses of its customers and the relevant deliveries to a third party who is bound to secrecy, usually an auditor. This presupposes, however, that the auditor is also authorised to inform the injured party as to whether the documents contain certain specifically designated customers or deliveries. Such a reservation for auditors is no longer possible under the Product Piracy Act; however, it still plays a role for the dependent right to information.

e) Applications

Difficulties arise from the determination of the claim. This is an area where one will regularly have to proceed very carefully, as the Federal Court of Justice (BGH) emphasised in its decision "Planfreigabesystem": If it is not clear which computer program is meant by a particular designation, the claims for information and invoicing and for a declaration of liability for damages relating to such a computer program - as well as the corresponding applications for injunctive relief - are in principle only adequately determined if they describe the content of that computer program in another way in such a way that confusion with other computer programs is ruled out as far as possible. The necessary individualisation of the computer program may be achieved by reference to printed programs or program carriers.

However, z. For example, even if only parts of a program have allegedly been copied, the mere market name of a program is sufficient. The decisive factor is the concretization by means of submitted documents or data carriers, provided that these do not only contain general performance requirements of the program to be developed. The mere reference to attachments is not sufficient if they consist only of lists in which the names of the files, their size in bytes, the data of the last modification, the last access, the creation and an allocation criterion are given. The mere reference to the program name is also not sufficient. If the application for prohibition is about imitations or partial takeovers, the specifics of the application must be aligned with the infringing programme. Flat-rate injunctions to the effect that the program code may not be "modified"; or "interfered with"; are inadmissible for lack of specificity. For the mere reproduction of the wording of Paragraph 69c(c)(a) 2 UrhG does not suffice to describe the specific act of infringement. If an applied for prohibition of reproduction and processing does not exclude the area of permissible decompilation (Section 96e UrhG), such an application is unfounded in this respect.

The following proposal for the wording of the applications results from the above mentioned claims:

In the name of and on behalf of the applicant, I hereby bring an action and will apply,

- I. order the defendant to pay damages,
to refrain from producing and marketing the software specified below, if a fine of up to EUR 250,000. 00 is avoided for each case of infringement, or alternatively up to six months'; imprisonment, or up to two years'; imprisonment if repeated,
- II. to provide the plaintiff with information about the origin and the distribution channel of the software, in particular with the names and addresses of the manufacturers, the

- suppliers and their previous owners, the commercial customers or contractors, as well as the quantity of copies produced, delivered, received or ordered,
- III. to invoice the applicant for the extent of the acts described above, by submitting a list indicating the quantities and times of manufacture and the individual deliveries, with reference to each of them
 - a) the delivery times, quantities, prices and the names and addresses of the purchasers,
 - b) the cost of production, indicating the individual cost factors,
 - c) the profit made, specifying the individual offers and the advertising and mentioning them,
 - d) the dates and prices of tenders and the names and addresses of the persons to whom they are addressed,
 - e) the individual advertising media, their circulation, distribution period and distribution area,
 - IV. to destroy the copies of the Software in the direct or indirect possession or ownership of the Defendant,
 - V. declare that the defendant is under an obligation to compensate the applicant for all damage which he has suffered and will suffer in the future as a result of the defendant's acts referred to above.

2. Procedure

The software infringement process typically starts with a warning according to § 97a UrhG. This is a warning letter with a serious request to cease and desist under threat of legal action. The warning is important because of the costs that would otherwise arise, since an infringement action brought without a warning may under certain circumstances result in the infringed party bearing the entire costs of the action (Section 93 ZPO). It should be borne in mind when issuing a warning that the infringed party may also be threatened with recourse claims in the event of an unjustified property right warning (§ 823 BGB). The warning must be formulated sufficiently clearly, a mere authorisation request is not a warning. Accordingly, a mere authorization request is not sufficient to avoid the cost consequences of § 93 ZPO. Therefore, the software user can express a contrary legal opinion to the authorization request without losing the possibility to assert the claim free of charge in accordance with § § 2 in the event of an immediately following legal claim. 93 ZPO to be recognized. Because the exchange of different legal views does not make a prior warning dispensable because of probable unsuccessfulness. Unjustified warnings trigger counterclaims for injunctive relief and damages, whereby the company issuing the warning bears the burden of proof for all circum-

stances of the underlying claim. A warning is also unjustified if it is too general. The proprietor of the property right is required to carry out the necessary, expected and reasonable checks on the justification of his request before a cease-and-desist letter is issued.

Similarly, a mere request for authorisation does not trigger the right of the infringer to bring an action for a negative finding. If the infringer receives a warning, he should carefully prepare his own defence. The possibilities of attacking the attacker himself as an infringer must be examined. It should also be remembered to avoid litigation in state courts by means of a settlement or a delimitation agreement, as these courts are very often overburdened with software infringement proceedings.

If an action is nevertheless to be brought, the question of jurisdiction must be examined. In this respect, special responsibilities exist in the area of copyright law at some regional courts within the country. Trademark and patent matters belong to the jurisdiction of the regional courts anyway, regardless of the amount in dispute (Sec. 140 Trademark Law, Sec. 143 Patent Law). The local jurisdiction is based on the defendant's domicile (Section 12 ZPO) or the place of the tort (Section 32 ZPO). The place of the unauthorized action is wherever the infringing software is offered or distributed. This can be nationwide in the case of distribution on the Internet, so that the plaintiff is free to choose the place of jurisdiction (so-called flying - the place of jurisdiction).

For international jurisdiction, the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EuGVVO) must be observed. This Regulation shall apply only to disputes with parties domiciled within the EU. According to this provision, international jurisdiction exists first of all at the domicile of the defendant (Art. 2 EuGVVO) as well as at the place of the unauthorised action (Art. 5 No. 3 of the EC Treaty). In the case of damages litigation with a cross-border element, only the damages incurred in the relevant contractual dispute at the respective place of success can be decided by the locally competent court. Only the court at the place of action can decide on the entire damage. In this context, it is also important to point out the dangers that may arise from the so-called Brussels Torpedo exist. In this case, the infringer brings an action for a negative declaratory judgment based on an appropriate warning and submits it to the Brussels Regional Court. Because of this action, it is impossible to bring an action for an injunction elsewhere because of the objection of pre-existing *lis pendens* (Art. 27 of the EC Treaty). Since decisions in Belgium (similar to those in Italy) take a long time, the infringer has an enormous gain in time, combined with special economic distribution possibilities. The only way to counteract this is a

quick action for an injunction without warning. Moreover, the Belgian courts are moving towards dismissing such actions on the grounds that they may be abusive.

It is important to remember that in addition to the dealer, the manufacturer can also be involved in the court proceedings. This is typically done by way of a joint action against both. However, the distributor may also have an interest in involving the manufacturer in the procedure. This happens in particular against the background that the dealer has a claim for damages against the manufacturer due to defects of title (§§ 433 para. 1 sentence 2, 435 BGB). Therefore, as a dealer, he is obliged to pay the supplier according to §§ 72 ff. ZPO announce the dispute. To this end, he sends a written statement to the manufacturer specifying the reason and the location of the dispute. If the third party notice is effective, the manufacturer must accept the court decisions against him, regardless of whether he joins the legal dispute or not (§ 68 ZPO). It also makes sense to agree to join the dispute by means of an agreement between the distributor and the software producer. Moreover, the third party notice also plays a role when it concerns the participation of former employees in a copyright infringement. Enforcement by way of interim relief is also conceivable. In the past, such a fast-track procedure was unthinkable, as the examination of copyright eligibility had high requirements. Today, the courts are more generous with the interim legal protection in the event of a software infringement. But here too, only clear infringements can be punished in the preliminary proceedings, but not imitations that are complicated to prove.

The burden of proof in software infringement proceedings is naturally borne by the plaintiff. The defendant must, for its part, put forward appropriate defence arguments, such as the plea of exhaustion. Of the evidence, witness evidence plays a rather minor role. More important is the expert opinion. The appointment of an expert is made by the court by means of an order of evidence either after the oral hearing (§ 358 ZPO) or already before the oral hearing (§ 358a ZPO). The parties have the opportunity to make proposals for an expert. The court or tribunal shall forward the written expert report to the parties and give them the opportunity to put supplementary questions (section 411(1) 4 ZPO). An expert can only be refused on the grounds of concern for partiality, not for professional incompetence (§ 406 ZPO). Concern of bias exists. B. where the valuer carries out an inspection without respecting the principle of the right to be heard. It is important to discuss the questions of evidence in advance with the expert in a briefing session. Also, in view of the complexity of most software infringement cases, an oral explanation of the expert opinion should be given once more if possible (§ 411, Subsection 3 ZPO).

In addition to the expert opinion, the visual inspection of copyright infringements can also be considered. According to § 144 ZPO, the inspection can be ordered at the premises of a party or third party. At present, an extension of the visual inspection is being considered, especially as a result of the implementation of the EC Enforcement Directive. The additions refer primarily to the right to inspection in accordance with § 101a UrhG. According to this provision, the infringed party may require the person who is reasonably likely to be infringing the copyright to produce documents or to inspect an object in his possession if this is necessary to substantiate his claims. A claim to inspection of a data carrier on which the source code of the competing program is stored could be derived from § 101a UrhG. Up to now, this had been structured according to the rules of the Federal Court of Justice (BGH) from its decision "Druckbalken"; and derived from § 809 BGB. Afterwards, visual inspection was possible if there was a very high probability of injury. The claim for inspection can therefore in principle only be asserted to enforce claims which are otherwise promising. In the "Fax Card"; decision, the BGH then reduced the probability criterion for the IT sector to the existence of a "certain"; probability of infringement.. The Düsseldorf Regional Court then extended the right of inspection once again on a procedural basis. The instrument of the independent procedure of taking evidence (§§ 485 ff. ZPO) is used. The regional court also wants to allow seizure and inspection in the interim legal protection if, in addition to the independent procedure of taking evidence, the requirements for an interim injunction are also met. The reason for the injunction here lies in the imminent loss of evidence. The protection of trade secrets is taken into account by the fact that the applicant's lawyers can participate in such a procedure of taking evidence and at the same time have a duty of confidentiality towards the applicant. The company has a stake in this so-called "patent law firm";, which has already been established in patent disputes in Germany. Düsseldorf practice is also clearly oriented towards Art. 8 of the draft directive on the protection of confidential know-how and confidential business information. It is also conceivable to have the inspection carried out only by an independent expert who is sworn to secrecy. The latter is only obliged to the court; its findings are only released by the court to the alleged infringer after a positive decision on all other issues of the main case. It is not sufficient to present only the conformity of small parts of the programming documents without their suitability for protection being established. The situation is different in the case of pirated products, where less strict standards have to be applied. But even in such a case, it is not enough just to pretend that the programs were copied from a home-burned CD to the computer.

3. costs

The question of the reimbursement of costs under Section 91 of the Code of Civil Procedure is also important in procedural terms. Eligible costs are the costs for the involvement of a foreign traffic lawyer, but limited to a domestic traffic fee. Search costs, in particular in the field of industrial property rights, are also reimbursable on the basis of proven expenditure. Expert costs are typically not reimbursed if the expert opinion is purely private. The possibility of a settlement is also conceivable, in particular by granting a licence for the past and granting a limited licence for the future.

4. execution

Claims for information are typically unjustifiable actions within the scope of § 888 ZPO. Enforcement is therefore only possible by imposing an administrative fine or detention order. Enforcement under § 888 ZPO is possible irrespective of fault, as the fines are only a means of correction. The verification of the information is to be carried out by means of an affidavit in accordance with § 259 para. 2 and section 260 subsection 2 BGB possible. However, this is subject to the condition that there may be reason to believe that the information provided has not been compiled with the necessary care. The affidavit must be made by the respective company body, i. e. typically by the board of directors or the managing director. Verification by inspection of the books is not possible unless it has been contractually agreed. In this respect, it is worthwhile to contractually provide for the possibility of having accounts audited by an auditor. Border seizures are also important, particularly in the software sector, and are mainly carried out on the basis of uniform EU regulations.

The customs authority can confiscate goods which obviously infringe industrial property rights when crossing the border in accordance with § 111b UrhG. The customs authority therefore does not check whether there is actually an infringement of property rights. The confiscation shall be made in accordance with § 111 paragraphs. 1 p. 1 UrhG on the basis of a corresponding decision and a previously received application for border seizure. Such a request will only be granted if the injured party provides security in the form of a bank guarantee (Section 111(111)(c)). 1 p. 1 UrhG). Furthermore, the customs authorities need clear samples of infringing goods as well as the name of a corresponding contact person at the infringed party. In the event of an objection by the infringer to the border seizure, the right holder must, in accordance with § 111 paragraphs. 4 UrhG, within two weeks of notification of the objection, submit an enforceable court decision on the basis of which the confiscated product is to be held in safekeeping. Typically, this requires an injunction from a court. Responsible for the

whole of Germany are the specialists from the Nuremberg Regional Tax Office - Munich Branch Office.

In addition to these national regulations, there are also regulations under Community law, in particular Regulation 1383/2003. At EU level, it is no longer a question of border seizure, but of suspending the release or a withholding of goods. The customs authorities may act upon request or ex officio, the latter when there are reasonable grounds for suspecting an infringement (Art. 4 and Art. 5). No further guarantee is required from the rights holder, nor is there any obligation to pay fees. Nor does the rightholder have to submit judicial decisions within the short period of time mentioned above. On the contrary, in response to a corresponding opposition, he only has to prove that he has initiated proceedings to establish an infringement (Art. 13). One main proceedings are sufficient.

Chapter Two: Computer Contract Law

literature:

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I. Introduction: Preliminary economic considerations

Software is the foundation of every information society. Wherever you look, you will find computer programs. The Internet is based on HTML coding and JAVA script programs. The classic software market is becoming increasingly important alongside the Internet. Its speed of innovation and the variety of software contracts lead to an increased complexity of contract law. There are different types of contracts. If you arrange them historically, the hardware market, especially the sale and rental of hardware, is the starting point. Only gradually does a company develop software to solve individual customer problems within the framework of so-called software development contracts. The individual software was very quickly standardized and brought to the mass market. Such standard solutions were regularly passed on within the framework of so-called software transfer agreements. Individual solutions are nowadays mainly offered within the framework of large IT project contracts. Increasingly, software is being detached from the data carrier, initially within the framework of network agreements, then also from downloading agreements, which regulate, for example, the loading of software via the Internet. Special markets are the distribution via open source, the marketing of PC software and CD-ROM products via protective cover contracts as well as the economically very important IT care market.

Changes in the area of IT contract law could be brought about by the directives on consumer protection law for digital content and the online distance selling of goods, which the Commission will present at the end of 2015. A previously submitted proposal for a Common European Sales Law (CESL), with which the EU Commission also pursued the goal of optionally regulating contracts for digital contents uniformly, failed due to resistance from the member states. The Commission therefore withdrew its proposal at the end of 2014 and announced its intention to replace it with an alternative proposal (CESL II) in the framework of the Digital Agenda, on the grounds that the potential of e-commerce in the Digital Single Market should be fully exploited. In addition to digital content, the scope of the Directive includes services that enable the creation, processing or storage of data in digital form, where such data is provided by the consumer. This means that not only all software, but in principle also all licence agreements fall within the scope of the proposed Directive. However, the proposal still raises many questions, so it remains to be seen what the implications are for national law..

II. Classification of the contract types

1. standard software

The classification of software licensing agreements has been controversial from the beginning. In industry, such agreements are still often referred to as "licence agreements"; and are qualified as sui generis contracts. Case law put a stop to this at an early stage by classifying contracts for the transfer of "naked"; software in the long term for a one-off fee as a purchase in kind, or at least as a contract similar to a purchase in kind. This classification has been confirmed by several decisions of the BGH - in particular by its compiler decision. The reform of the law of obligations does not change the classification of software licensing agreements under sales law. Rather, the qualification under purchase law is made even easier by the fact that it refers to the earlier disputed question of the qualification of objects in view of the provision in § 453, Subsection 3, Subsection 3, of the German Commercial Code. 1 BGB no longer arrives. This is because according to this, the same rules apply to the purchase of goods and rights as to the sale of other goods.

In contrast, the higher regional court jurisdiction for a long time wanted to classify all software contracts as contracts for work. It interpreted the compiler decision of the BGH restrictively in this respect: This decision concerned the acquisition of a single compiler program by a dealer. Only in the case of such an acquisition of the "naked"; software could one speak of a sales contract. However, if an ancillary obligation of some kind is added to the purchase of the software, the entire transfer agreement is to be classified as a contract for

work and services. So they say. B. in the judgment of the Higher Regional Court of Cologne of 11. 10. 1991: "The rules of the contract for work and services apply to a contract which has as its object the acquisition of standard software if, in addition to delivery, the software is to be adapted to the needs of the user and the staff is to be trained. (1. guiding principle).

Similarly, in its judgment of 22 August 1991, the Higher Regional Court (OLG) of Hamm referred to the law governing contracts for work and services: "However, if the customer is an unqualified end customer who wishes to acquire a complete system to perform certain tasks, the experience of the Senate shows that it is more in line with the ideas of supplier and customer that a contractual service is owed at all events if the supplier assumes the obligation to instruct the customer in the use of the system and to train him accordingly.

Even after the reform of the law of obligations, the Cologne Higher Regional Court (OLG) will continue to insist on the qualification of software contracts as far as possible on the basis of a contract for work and services. In case of written confirmation that the ordered EDP system contains all the user software necessary for the industry and the needs of the customer, not only the associated standard hardware and standard software is owed, but a complete solution that meets the needs of the customer..

Then, however, the problem of the qualification of contracts between software licensing and software development remained. This refers to the sale of standard software, which is adapted to the customer's needs by means of additional services. If the focus is on the adaptation of the standard software to the individual needs of the user, the contract must be qualified by a contract for work and services. This is the case if the base program has been changed in such a way that it can no longer be used for other purposes. In addition, many higher regional courts insist that all software contracts should be qualified as far as possible by a contract for work and services. Thus, a contract which has as its object the production of an EDP program which meets the individual requirements of the user shall normally also be qualified as a contract for work and services if a standard program is used for this purpose with adaptation to the special operational requirements and if, in addition, the delivery of hardware as well as the training of the personnel and the recording of operational data is undertaken. In the literature, a qualification based on an employment contract is suggested.

2. Individual software

The creation of individual software is carried out within the framework of work contracts. Similarly, the IT project contract, which involves the creation of special IT solutions tailored to the customer's needs, is regarded as a contract for work and services. The law on contracts

for work and services also includes a contract in which the programmer agrees to convert the software to other operating systems (so-called porting).

If hardware and software services are regulated in different contracts, this does not exclude the assumption of a legally uniform transaction. Rather, it must be determined by interpretation whether the parties' intention to link the contracts objectively can be assumed. It is sufficient if the service is indivisible for one contractual partner and this is recognisable to the other.

It is questionable whether this differentiation can remain after the reform of the law of obligations. As a result, a problem has arisen in that § 651 BGB in its new version shifts the boundaries between the law of sale and the law of contracts for work and services. The basis was Art. 1 para. 4 of the EU Directive on the warranty of consumer goods. According to Art. 1 para. 4, contracts for the supply of consumer goods to be manufactured or produced are also considered sales contracts within the meaning of the Directive. Irrespective of whether the parties are consumers or not, § 651 sentence 1 BGB now stipulates that the law on sales also applies to contracts for the delivery of movable goods to be manufactured or produced.

Parts of the literature draw the conclusion from this that, in principle, the law governing contracts for work and services should no longer apply to software development contracts, but rather the law governing contracts of sale. The negative consequences of such a qualification are mitigated by § 651 sentence 3 BGB, which declares important provisions of the law on contracts for work and services to be applicable. In my opinion, this view is not correct. § 651 BGB focuses centrally on what is the "object", i.e. the main purpose of the contract. If the main purpose of the contract consists in the (mere) delivery of goods, one will certainly have to apply sales contract law. The situation is different, however, if an individual success is owed and the delivery of the object is not made the object of the contract. Such a situation is the case with the delivery of individual software, where it is not a matter of merely handing over a computer program to the user on a specific storage medium. Rather, in the case of individual software the interest of both parties is directed towards implementing an individual solution tailored to the user's needs. The computer program with the data carrier is then only a partial component which does not constitute the essence of the software creation agreement. This applies even more clearly in the case of the delivery of standard software, if a considerable additional service is added. Here, as in the past, a distinction will have to be made between the weight of the individual services and the obligation to perform which characterises the contract. If mixed forms are used (e.g. in the case of a purchase with an installation

obligation), a distinction is made according to whether in the individual case elements of a contract for work and services or a purchase contract predominate.

Some argue that the acceptance of a contract for work and services for software purchases is problematic because the correct statute of limitations is missing. If one considers § 634a I No.1 BGB to be applicable, one affirms the quality of the software. If one assumes that software is not an object, one would have to fall back on § 634a I No. 3 BGB, whereby the warranty claims for defects would become statute-barred within the regular period of time - three years according to § 195 BGB. This does not seem appropriate in the end. The problem of the correct statute of limitations when accepting a contract for work and services for individual software does not arise if one assumes that software has material quality (which is now uniformly assumed by case law in copyright matters - see the "UsedSoft" judgment of the ECJ). Therefore, § 634a I No.1 BGB would have to be applied to the limitation of warranty claims in the law of contracts for work and services for individual software.

In 2009, the BGH provided further fuel. In its ruling of 23.7.2009, the court decided that purchase law is to be applied to all contracts with an obligation to supply movable goods to be manufactured or produced. The purpose of the parts, to be installed in buildings, does not justify a different assessment. Such an assessment is also not justified if the subject matter of the contract also includes planning services that must precede the manufacture of the construction and plant components and do not form the main focus of the contract. An exception should at most apply if a planning service is so dominant that it forms the main focus of the contract and therefore requires the application of the law on contracts for work and services, e.g. if the assignment essentially involves the general planning solution of a constructive problem.

Surprisingly, in the Internet-Systemvertrag decision, the Federal Court of Justice pointed out that a contract for the creation or processing of a special software tailored to the needs of the customer is regularly to be regarded as a contract for work and services. Even if the adaptation of the software to the needs of the client was agreed upon, the BGH confirmed its view that it was a contract for work and services. Finally, the BGH repeated this classification of the Internet system contract as a contract for work and services: The decision was based on a claim for repayment of advance payments and payments on account by the client, whose termination of the contract by the client was considered permissible despite the agreement of a fixed term. In the opinion of the court, the claim for repayment does not result from § 812 BGB, but from the contract. Its amount is calculated from the surplus determined at the time of the decision.

3. The EVB-IT

literature:

Bischof, Der EVB-IT Erstellungsvertrag – Der „kleine“ EVB-IT Systemvertrag - Überblick und erste kritische Würdigung, CR 2013, 553; *Feil/Leitzen*, EVB-IT Kommentar, Köln 2003; *Kahler*, Der neue EVB-IT Erstellungsvertrag, K&R 2013, 765; *Kirn/Müller-Hengstenberg*, Die EVB-IT Systeme – ein Mustervertrag mit hohen Risiken?, CR 2009, 69; *Kilian/Heussen*, Computerrechts-Handbuch, 32. Ergänzungslieferung 2013; *Leitzen/Intveen*, IT-Beschaffungsverträge der öffentlichen Hand, CR 2001, 493; *Müller-Hengstenberg*, BVB/EVB-IT-Computersoftware – Besondere Vertragsbedingungen für die Überlassung, Erstellung, Planung und Pflege sowie ergänzende Vertragsbedingungen für IT-Dienstleistungen, 6. Aufl. 2003; *Müller*, Quo Vadis EVB-IT-Verträge? Über Sinn und Nutzen der geplanten Musterverträge EVB-IT-Systeme und EVB-IT-Planung und Realisierung für die Branche, CR 2006, 426; *Müglic*, AGB-rechtliche Überlegungen zur Auftragsvergabe nach BVB. Führt das reformierte Schuldrecht zur AGB-rechtlichen Unwirksamkeit?, CR 2004, 166; *Bischof*, Öffentliche Vergabe von IT-Leistungen, in: Schneider/von Westphalen (Hrsg.), Software-Erstellungsverträge, 2. Aufl., Köln 2014, Kap. N.; *Zahrnt*, Wie die EVB-IT handhaben?, CR 2004, 716.

Of particular importance in the procurement of IT services by the public sector are the EVB-IT, the Uniform Terms of Contract . Already in the seventies, the state began to work out standardized contract conditions for IT procurement together with industry. The background was the idea that such a set of rules - similar to the German Construction Contract Procedures (VOB) - would then be exempt from content control of the kind required by general terms and conditions law. This led to the adoption of the so-called Special Contract Terms (BVB). However, these were subsequently deemed invalid by the Federal Court of Justice in several parts with regard to general terms and conditions, so that a revision became necessary. The BGH expressly pointed out that the BVB cannot be compared with the VOB/B, as there can be no question of a recognition by all the circles involved that would last for decades. In particular, the default regulation and the legal consequences of default (lump sum damages) are still controversial. For example, the provision in BVB-Überlassung § 9 No. 4, according to which the client has the right to withdraw from the contract within two weeks of the functional test in the event of a lack of suitability, is invalid due to a violation of § 307 (2) BGB. Also § 9 No. 4 para. 2 BVB transfer, according to which the client is entitled to a right of withdrawal if deviations from the performance specification are found during the function test and if the client exercises the right of withdrawal - irrespective of the time of withdrawal - he is entitled to a flat-rate amount of damages for 100 calendar days if the function test has shown that the program cannot be used in an economically sensible manner, violates § 307 para. 2 BGB.

Under the leadership of the Federal Ministry of the Interior, a public sector working group on behalf of KoopA-ADV (Cooperation Committee Automated Data Processing Feder-

al/Länder/Municipal Sector) drew up the so-called Supplementary Contract Terms for the Procurement of IT Services (EVB-IT) with the aim of replacing the BVB contract types. Almost the entire application spectrum of IT procurement is covered by the ten EVB IT contract types available to date (system delivery, system, creation, service, purchase, service, provision of standard software for a one-off fee (type A provision), temporary provision of standard software (type B provision), maintenance, maintenance of standard software). There are only two BVB model contracts (BVB rental and BVB planning) for which there are no alternative EVB IT contract categories. For this reason, you must decide for each IT procurement whether the contract is to be concluded on the basis of EVB-IT or BVB, until all planned EVB-IT contract categories are published and introduced and the BVB is completely replaced by EVB-IT. For this purpose, the Federal Ministry of the Interior provides a decision guidance for the right choice of EVB-IT or BVB on the website. Currently there is a conflict between BVB and EVB-IT. This has led to the fact that the public client has made some independent adjustments to the BVB in the contract cover sheets. The coexistence of BVB, EVB-IT and hand-made adjustments has led to the question whether EVB-IT is not null and void due to violation of the transparency requirement (§ 307 para. 1 sentence 2 BGB). However, due to the special expertise of the parties involved, especially the IT companies, sufficient transparency should regularly be assumed.

Nevertheless, new EVB-IT is mandatory under budgetary law (§ 55 BHO).

According to the circular of the Ministry of Finance of 19.4.2001, the types of contract are as follows:

The EVB-IT Purchase shall be applied to contracts for the purchase of "finished" hardware, if necessary including the provision of standard software for unlimited use against a one-time fee. In contrast to the BVB purchase, the EVB-IT purchase does not provide for contractual services such as adaptation services or the achievement of functionality. The EVB-IT purchase therefore does not include any contractual agreements such as the declaration of functional readiness, performance tests and acceptance. In contrast to this, the version of the EVB-IT purchase of 17.3.2016 published by the IT Planning Council is new, including a so-called "no-spy clause", which was certainly introduced in response to the future prevention of state Trojans. According to clause 2.4, the customer undertakes to deliver the hardware free of damaging software, e.g. in drivers or firmware supplied. With the introduction of the EVB-IT system contract, work-contractual services beyond the mere delivery of the standard software are to be agreed upon for this type of contract. Contracts for services were not covered by the previous BVB. The present EVB-IT service shall be applied if the focus of the service owed

by the contractor is the provision of services, such as training, consulting or other support services.

The contract types transfer of use are applicable for the transfer of standard software against a one-time fee for unlimited use (EVB-IT transfer type A) as well as the transfer of use for a limited period of time (EVB-IT transfer type B). As with the EVB-IT purchase, the EVB-IT provision contracts are not applicable if additional contractual services of the contractor such as installation, integration, parameterization or adaptation of the standard software to the needs of the customer are required. If the procurer expects a contractual service beyond the mere delivery of the standard software, the EVB-IT system contract shall apply.

The EVB-IT transfer type A therefore regulates the transfer and use of standard software against a one-time fee for the contractually agreed use. These regulations do not apply to other services such as installation, integration, parameterization and adaptation of the standard software to the needs of the customer. The content of the transfer agreement was essentially shaped by the German Software Industry Association (VSI). In particular, the VSI was able to ensure that the interests of the wholesalers represented by the VSI were also taken into account. Thus the virus theft could be defused decisively. The client has a legitimate interest in receiving virus-free software. Therefore, paragraph 2.3 of the EVB-IT transfer type A obliges the contractor to only transfer such software that has been checked with an up-to-date virus search program at an appropriate time before delivery. However, despite all due care, the examination with a virus search program can probably never completely exclude the presence of viruses. The examination does not necessarily have to be carried out by the contractor himself..

According to the old version of 1.4.2002, valid until 15.7.2015, of the EVB-IT Assignment Type A, the customer basically had a non-terminable right of use for a limited period of time according to clause 3.2. Under clause 4 of the EVB-IT Assignment Type A, the contractor was granted an extraordinary right of termination in two cases: In case of a serious violation of the agreed rights of use or property rights (clause 4.1) and in case of a violation of US-American export control regulations (clause 4.2). This provision may seem surprising at first sight, but it can be explained by the fact that the contractor for his part is often subject to such a right of termination through contracts of use with his upstream supplier and is obliged to agree on this right of termination in the contracts concluded by him. He can neither pass on rights which he himself does not have, nor waive the passing on of restrictions to which he has committed himself towards his pre-supplier. The US Bureau of Administration, US Department of Commerce, requires all US software manufacturers to agree to corresponding

export restriction clauses in their contracts. This is intended to prevent undesired exports to certain countries. Accordingly, all US American license terms and conditions contain corresponding termination rights and are already regularly and effectively agreed in contracts between public-sector customers and suppliers of US software. Section 4 EVB-IT Transfer Type A takes these constraints into account.

With the new version of the EVB-IT Überlassung-AGB (Type A) of 16.07.2015, such an extraordinary right of termination no longer applies. According to section 3.1 the client is granted a non-exclusive, with the restriction of section 3.3 transferable, permanent, irrevocable and irrevocable right of use.

The EVB-IT transfer type B regulates the transfer and use of standard software for a limited period of time against periodic payment for the contractually agreed use. As with Type A, these regulations do not apply to other services such as installation, integration, parameterization and adaptation of the standard software to the needs of the customer. The content of the license agreement essentially corresponds to the type A license agreement, so that reference can be made to the explanations there.

The EVB-IT maintenance is applied to contracts for repair, inspection and maintenance of hardware. They replace the BVB maintenance. Maintenance services can be agreed for a flat-rate fee or for remuneration according to time and effort.

In the old version of EVB-IT Maintenance, the type of service provision was differentiated between flat-rate remuneration and remuneration according to time and effort. Thus, in the case of flat-rate remuneration, the contractor was obliged to maintain and restore the operational readiness of the hardware specified in the contract. In addition, in the case of agreed remuneration on a time and material basis, the Contractor was obliged to provide information on the performance of repair, inspection and maintenance work for the hardware specified in the maintenance contract and to restore its operational readiness. According to the new version of the EVB-IT maintenance terms and conditions of 17.03.2016, the type of service provision is no longer differentiated according to the type of remuneration. Although both flat-rate and expense compensation can be agreed (Section 10), according to Section 2.1 a fault clearance must be agreed upon so that the contractor can take the necessary measures.

In the case of agreed lump-sum remuneration, the Contractor shall be responsible for maintaining and restoring the operational readiness of the hardware specified in the contract. In addition, in the case of agreed remuneration on a time and material basis, instructions for the performance of repair, inspection and maintenance work for the hardware specified in the Maintenance Agreement and the restoration of its operational readiness shall be provided.

The EVB-IT system delivery serves to regulate the purchase of IT systems consisting of one or more system components (standard software and hardware), whereby further services to bring about operational readiness according to the contract agreed upon (under 2.3 and 2.4) are added. The additional services may include training and system service, although it should be noted that these services must not be the main focus. The EVB-IT service is to be used for this purpose. According to clause 1.3, the creation of the overall functionality of the system is of essential importance for the customer. The contract as a whole is to be regarded as a purchase contract and replaces the BVB Purchase and BVB Transfer Type II.

The creation of IT systems from standard software and/or hardware and, if necessary, individual software is covered by the EVB IT system. In addition, further services to bring about operational readiness are provided, whereby these or the creation of individual software are the main focus of the service. The assessment of the main focus can in no case be lumped together, but is to be assumed if the creation of the individual software or the services to bring about operational readiness account for more than 15% 20% of the order value. Legally, the contract is to be classified as a contract for work and services. In addition to the EVB-IT creation, the BVB creation is also replaced by the EVB-IT system.

The EVB-IT creation deals with the adaptation of software on the basis of a contract for work and services. Furthermore a maintenance after acceptance and the further development and adaptation is possible. It is a reduced and shortened EVB-IT system contract, which basically covers four fields. These are the creation of an individual software, the adaptation of a software on source code level, the extensive customizing of standard software or the purchase of standard software for adaptation by order. The differentiation between EVB-IT system delivery and EVB-IT system is problematic. As a differentiation criterion the decision guidance for the EVB-IT system contract can be used. The EVB-IT creation does not contain any regulations for personnel or project management. There are also no regulations about possible securities or rental services to be provided. These have to be added in agreements if necessary.

In addition, if the contract for work and services has a significant impact on the contract, the EVB-IT creation shall apply. If the focus is not on these contractual services of the contract, but on the mere delivery of software, the EVB-IT system delivery applies.

Services, usually work services, around an IT system, which exceed the scope of services in the other EVB-IT are taken up by the EVB-IT Service. These services may consist of fault clearance, preventive measures, the provision of new program versions and the modification or extension of the IT system. Thus, services can be subsequently extended and adapted or

introduced for the first time. Service subjects such as on-call duty, on-site services, license management, file backup services, relocation (removal) and installation of system components are included in a sample for the first time. There is also the possibility to carry out an initial inventory of systems that are foreign to the contractor. The EVB-IT service also includes regulations for dealing with defects in the event of a takeover. The maintenance of only standard software and the maintenance of only hardware are not handled by EVB-IT, but by EVBI-IT-Pflege S and EVB-IT-Maintenance. The BVB maintenance is replaced by.

The EVB-IT maintenance S serve the regulation for the maintenance of standard software. The scope of services is basically based on the maintenance services for the agreed standard software according to section 1.1 of the contract, whereas according to section 1.2 the maintenance services "Troubleshooting and installation of new program versions" are factory services. The EVB-IT and in particular the EVB-IT system are characterised by a special liability clause (EVB-IT system clause 15). The EVB system does not provide for a lump-sum compensation after a waiting period. If the agreed deadline for the performance of the contractually owed service is exceeded by more than seven calendar days, the customer can demand a contractual penalty of 0.2% of the order value for each day the contractor is in default (Section 9.3). However, the contractual penalty may not exceed 5% of the contract value. In the event of default, the Customer may demand liquidated damages. If the Contractor does not deliver within the reasonable grace period set by the Customer in case of default, the Customer may subsequently withdraw from the contract and claim damages for non-performance, EVB-IT-System Section 9.2. Any lump-sum damages already paid shall be set off against the damages for non-performance. In case of slight negligence, an upper limit of 5% of the order value is set for both compensation possibilities. There are no upper limits for intent and gross negligence according to section 15.4 EVB-IT system.

The rules for warranty are different (Clause 13 EVB-IT system). If the rectification is not successful, the client has the choice between withdrawal, reduction and, if necessary, compensation. The regulations cover material defects and defects of title and are essentially based on the legal regulations of the law on contracts for work and services. With the publication of the new version of 2012, the regulation on third party industrial property rights known from EVB IT system delivery was also included under item 14. Compensation for damages shall not exceed 8 % of the total price of the contract. This limitation does not apply in the cases of section 7.10 EVB-IT transfer, i.e. not in the absence of a specially agreed quality in the case of fraudulent concealment of a defect and in the case of personal injury. The limitation also does not apply in cases of intent or gross negligence, but only in cases of slight negligence.

Claims for compensation for lost profit are excluded. The liability of the contractor for the absence of specially agreed product qualities can be limited in number 4 of the EVB-IT license agreement.

In other cases of liability apart from warranty, default and infringements of property rights, the liability clause in section 15 EVB-IT-System provides for limitations of liability in terms of amount for damages caused by slight negligence of a contractual partner. For such damages, the same maximum amounts of liability apply for both contractual partners. The maximum liability sums are differentiated according to the legal assets to be protected according to property damage and financial losses. The liability for negligent breach of duty in the contract is limited to the contract value. If the contract value is less than € 25,000, liability is limited to € 50,000. If the contract value is between €25,000 and €100,000, liability is limited to €100,000 (Section 15.1). The Contractor's liability for damages due to loss of data is limited to the amount of work required to retrieve or restore backed-up data (Section 15.3). If the Customer has not backed up the data properly and regularly, the compensation for damages shall be limited to the amount that would have been incurred in the event of loss despite the proper backup of the data. This limitation of liability applies irrespective of the degree of fault, i.e. also in the case of intent and gross negligence.

III. General rules for the structure of an IT contract

Every contract should have the same structure. There are clear dogmatic guidelines which must be observed when drafting contracts (also outside of IT law). The preamble specifies the purpose of the contract and the legal nature of the contract. The correct classification of a contract in terms of its legal nature is important above all because of § 307 Paragraph 2 Nos. 1 and 2 BGB, i.e. for the precise determination of the rights and obligations essential to the contract in terms of GTC law. The purpose of the contract in turn determines the interpretation of the contract, in particular with regard to the scope of copyright exploitation rights transferred or to be transferred (see § 31 (5) UrhG). For reasons of warranty law, caution should be exercised in the case of excessive "adulation" of the performance of the software.

suppliers.

Then follows the main part with the main obligations. The freedom of control under GTC law requires that these be precisely defined; the scope of the main obligations - apart from the transparency requirement - is not subject to control under GTC law.

This is followed by the next section on ancillary obligations, i.e. in particular on the liability consequences of a pre-contractual or contractual breach of information obligations. This is followed by the chapter on breaches of performance (impossibility - delay - warranty), before

the rules for terminating the contract, in particular for cancellation, are then formulated. The contract ends with the final provisions, preceded by the rules on choice of law and jurisdiction. In this order, the various types of IT contracts are also presented below.

Chapter Three: Software license agreements

literature:

Koch, Urheberrechtliche Zulässigkeit technischer Beschränkungen und Kontrolle der Benutzung, CR 2002, 629; *Marly*, Softwareüberlassungsverträge, 4. Aufl., Bonn 2005; *Naus*, Softwareerstellung als Projekt, Hamburg 2006; *Metzger*, Die Zulässigkeit von CPU-Klauseln in Softwarelizenzverträgen, NJW 2003, 1994; *Peintinger*, Widerrufsrechte beim Erwerb digitaler Inhalte - Praxisvorschläge am Beispiel des Softwarekaufs unter Berücksichtigung von SaaS-Verträgen, MMR 2016, 3; *Petersen*, Quellensteuer bei Überlassung von Software, IStR 2013, 896; *Scholz/Haines*, Hardwarebezogene Verwendungsbeschränkungen in Standardverträgen zur Überlassung von Software – Eine Betrachtung von CPU- und Upgradeklauseln, CR 2003, 393; *Scholz/Wagener*, Kartellrechtliche Bewertung hardwarebezogener Verwendungsbeschränkungen in Software-Überlassungsverträgen – Eine Betrachtung von CPU- und Upgrade-Klauseln, CR 2003, 880.

I. Preamble

The preamble is of central importance for the drafting of contracts. It must clarify the legal nature of the contract and its purpose. The legal nature is particularly important for the control of content according to § 307 para. 2 BGB; the purpose of the contract decides on the rights of use transferred in case of doubt.

If the purchaser of a computer program, irrespective of the name of the contract in the individual case, is granted the right to dispose of the "workpiece" (the computer program copy or the data carrier) for an unlimited period of time, such a transfer of software must be regarded as a "purchase in kind" or as a transfer of ownership of workpieces. In the case of a permanent transfer of software, purchase law applies, so that the user (the buyer) is the owner of the software after the purchase in accordance with § 433 Para. 1 S. 1 BGB (German Civil Code) and restrictions on use are fundamentally contrary to the model of § 903 BGB.

If, however, the rights of use are only granted temporarily, a rent-like constellation exists which allows extensive restrictions on use but at the same time leads to an extended warranty obligation on the part of the software supplier. The obligation of the customer to apply new versions and delete copies of old versions, the ordinary possibility of termination and the de-

defendant's obligation to provide maintenance services are also arguments in favour of a simple, non-transferable right of use that is only granted for a limited period of time..¹

The term "licence agreement" chosen by the parties does not contradict the legal classification of the legal relationship in question under the rules of the law on sales. The decisive factor is always the primary obligations of the contracting parties.²

Of no relevance for the legal qualification of the contract is the statement by the plaintiff that the program is protected by copyright. The purpose pursued by a software licensing agreement is to enable the user to use the program, irrespective of whether it is a copyrighted program or not. The existence of the copyright therefore does not affect the contractual classification, but only has the meaning that it establishes the contractual accessory obligation of the software supplier to grant rights of use to reproduce the program for program input and to make the necessary backup copies in accordance with § 31 UrhG.³

II. Main performance obligations and rights of use

literature:

Osterloh, Inhaltliche Beschränkungen des Nutzungsrechts an Software, GRUR 2009, 311;
Witte, Änderungsvorbehalte in IZ-Verträgen, ITRB 2005, 237.

In software licensing agreements, the main performance obligations can be determined relatively clearly due to their character as a sales contract: It is about the procurement of the ownership of a program copy for the purpose of transfer of use against payment of the agreed purchase price.

However, in addition to the agreement on the procurement of ownership of software, the sale of hardware with pre-installed software is also frequently concluded. It often happens that hardware together with its pre-installed software is transferred for use or its ownership is procured for the buyer. As a rule, this is not an unfair commercial practice within the meaning of Art. 5 II UCP-Directive 2005/29, unless such a practice is contrary to the seller's professional duty of care and significantly influences the economic behaviour of the average consumer because the consumer was not sufficiently informed about the tying of software and hardware. The seller is not obliged to inform a purchasing consumer, when selling used software, about the structure of the rights to use the program as intended.⁴

¹ So *OLG Frankfurt*, Urt. v. 14.12.1999 – 11 U 7/99, CR 2000, 146; *LG Köln*, Urt. v. 25.10.1995 – 20 S 9/95, CR 1996, 154 = BB Beilage 1996, Nr. 9, 9–10.

² *Hoeren*, Softwareüberlassung als Sachkauf, 1989, Rn. 66 ff.

³ *OLG Nürnberg*, Urt. v. 20.10.1992 – 3 U 2087/92, CR 1993, 359 = BB-Beilage 1993, Nr. 13, 14–15.

⁴ *LG Hamburg*, Urt. v. 9.11.2017 – 327 O 301/17.

However, it is not uncommon for reservations of change to be agreed, on the basis of which the IT supplier is entitled to make technical changes or change models. Such clauses are ineffective in terms of the General Terms and Conditions of Business according to § 308 No. 4 and § 307 Para. 2 BGB (German Civil Code) if they are not reasonable for the other party to the contract. They are subject to full content control, since they are not regulations on the main performance obligations, but rather a subsidiary authority to change performances. Update clauses are similarly ineffective, according to which the user must accept updates even if the overall performance deteriorates.⁵

Software suppliers sometimes take the view that, although the purchaser may become the owner of the software, he will still need rights of use of a copyright nature for its contractual use. However, this is not true. The user is always entitled to use the program within the scope of normal use, even without the consent of the copyright holder. § Section 69d (1) UrhG thus guarantees the user a mandatory core of copyright-relevant uses which are indispensable for the contractual use of the program.⁶

The limitations of copyright law ordered in § 69d UrhG are to be interpreted broadly, because in principle the use of other people's ideas is free and copyright protection itself is an exception to this principle.⁷

Furthermore, in contrast to technical property rights, pure use is not covered by copyright; i.e. use as such is not relevant to copyright.

1. CPU clauses

Software suppliers often tend to limit the use of the software to a specific central processing unit (so-called CPU clause). A typical example of such a usage restriction is: "X grants to LICENSEE a personal, non-transferable and non-exclusive right to use ... each SOFTWARE PRODUCT ... solely on or in conjunction with DESIGNATED CPU's for such SOFTWARE PRODUCT". In most cases, a list is attached to the contract, from which the manufacturer, type or model number and serial number of the hardware configuration used by the user can be derived.

The purpose of CPU clauses in copyright usage contracts is to guarantee the manufacturer reasonable additional remuneration in the event that the customer wishes to use the program

⁵ Witte, ITRB 2005, 237, 239 f.

⁶ Vgl. BGH, Urt. v. 24.2.2000 – I ZR 141/97, NJW 2000, 3212, 3214 – Programmfehlerbeseitigung.

⁷ OLG Düsseldorf, Urt. v. 29.5.2001 – 20 U 166/00, ZUM 2001, 795 = CR 2002, 95.

made available to him on a different, more powerful machine than the one for which he acquired it and thus obtains a higher than expected benefit from it.

It is disputed in the literature whether and to what extent system restrictions of the kind customary in such contracts still follow directly from copyright law (Section 31 UrhG) or can only be agreed with effect under the law of obligations. In some cases, system agreements are considered possible at the level of the law of obligations, because a corresponding, concrete splitting of the right of use is not possible.⁸

The case law sees things differently. Almost without exception, CPU clauses according to § 307 para. 2 nos. 1 and 2 BGB are regarded as invalid if purchase law is applicable to the program transfer. Only in exceptional cases can CPU clauses be justified by a legitimate interest of the software producer, if the program is dependent in its runnability, performance or other special features on being used only on a certain type of computer and if every use on another computer entails the risk that runnability problems may occur which endanger the reputation of the software producer.⁹

If the Supplier only agrees to remove a program block activated by him, which makes it impossible to use the software on more powerful new hardware, if the Purchaser agrees to a modification of the computer systems agreed as permissible, incurring a new "license fee", this constitutes an unlawful threat within the meaning of Section 123 (1) of the German Civil Code, which entitles the Purchaser to contest the modification agreement.¹⁰

CPU clauses do indeed violate § 307 para. 2 nos. 1 and 2 BGB. They restrict the possibility guaranteed to the user in § 69c no. 3 sentence 2 UrhG to be able to use the acquired program freely. In addition, they undermine the user's essential contractual rights. Since software contracts are to be classified as purchase contracts or contracts for work and services, the software supplier is obliged to transfer the ownership of the program copy to the user and thus not to make a sensible use of the ownership impossible: A transfer contract in which the user is formally granted the position of an owner, but de facto deprived of it by countless and serious restrictions on use, no longer corresponds to the model of a sales contract and therefore violates § 307 para. 2 no. 2 BGB.

In the absence of copyright restrictions, the user is basically entitled to use the program copy acquired by him on any computer system in accordance with § 903 BGB. This right is also of

⁸ *Marly*, Urheberrechtsschutz für Computer-Software in der EU, München 1991, 193 f.

⁹ *OLG Frankfurt a.M.*, Urt. v. 10.3.1994 – 6 U 18/93, CR 1994, 398 = NJW-RR 1995, 182 = OLGR Frankfurt, 1994, 121; *OLG Frankfurt a.M.*, Urt. v. 14.12.1999 – 11 U 7/99, CR 2000, 146 f.

¹⁰ *LG Frankfurt a.M.*, Urt. v. 17.12.1998 – 2/3 O 266/97, CR 1999, 147 und *OLG Frankfurt a.M.*, Urt. v. 14.12.1999 – 11 U 7/99, CR 2000, 146 f.

particular importance to the user: In view of the rapid technical development on the hardware market, he very often feels compelled to replace his computer system with a new hardware configuration. If the software supplier were entitled to prevent the program from being used on the new CPU, the user would be considerably restricted in his possibilities of use despite his ownership. This restriction of ownership rights is therefore in principle contrary to the software supplier's obligation to procure ownership as set forth in §§ 433 para. 1 sentence 1, 631 para. 1 BGB.

The case is different in the case of temporary software licensing. For such a case, the BGH has considered CPU clauses to be effective which allow the use of the software on a more powerful computer in return for further license payments. The BGH assumes that it is not possible to split copyright usage rights relating to different hardware. However, agreements of this kind can be made outside the granting of copyright licenses. They are subject to the law on general terms and conditions. The Federal Court of Justice states that the appropriateness of CPU clauses depends to a large extent on whether the contracts are for the permanent provision of software against a one-off payment or whether they are for a limited period of time as part of a continuing obligation.¹¹

2. Forwarding clauses

Software suppliers often try to contractually prohibit the passing on of software by the customer. This is particularly intended to prevent the resale of used software, upgrades and original equipment manufacturer (OEM) versions. However, these clauses are invalid. If software is acquired on a permanent basis, the corresponding copies of the computer programs have been put into circulation by sale within the territory of the European Communities. Thus, pursuant to Section 69c No. 3 sentence 2 GCA, the distribution right (Sections 2 (1) No. 1, 15 (1) No. 2 GCA) has been exhausted. The rights of use of these copies cannot be retained by the rightholder. If a prohibition of sale to this effect is contained in the General Terms and Conditions, the clause in question shall be invalid pursuant to Section 307 (2) Nos. 1 and 2 of the German Civil Code (BGB) due to a violation of the essential basic idea of Sections 17 (2), 69c No. 3 of the German Copyright Act. The copyright consumption of the distribution right, which occurs with the principle of exhaustion, depends solely on whether the holder of the

¹¹ *BGH*, Urt. v. 24.10.2002 – I ZR 3/00, NJW 2003, 2014 = GRUR 2003, 416 = MMR 2003, 393.

rights has authorised the first placing on the market by sale. This consent is to be affirmed if software and hardware have been distributed together by contract at the time of the first sale.¹² The freedom of resale includes OEM versions, as the BGH has made clear contrary to a decision practice of the Higher Regional Court. A software producer cannot enforce his interest in the fact that a program version offered at a favourable price is only sold together with a new PC in such a way that he only grants a right of use limited to this distribution channel from the outset. If the program version has been put into circulation by the manufacturer or with his consent, the further distribution is free on account of the exhaustion of the copyright distribution right which has occurred, irrespective of a restriction of the granted right of use in terms of content..¹³

Surprisingly, however, the European Court of Justice clarified in its ruling of 12.10.2016 that although the first purchaser of a license for unlimited use is entitled to sell the copy used and his license to a second purchaser, entirely in accordance with the copyright exhaustion principle and Art.4 c RL 91/250, the resale of a backup copy, on the other hand, requires the consent of the right holder if the software was originally delivered on an original physical data carrier which was damaged, lost or destroyed before resale. The creation of backup copies of a computer program by the person entitled to use it cannot be prohibited under Art. 5 para. 2 of the Directive 91/250 if the creation is necessary for use. However, the back-up copy may not be used for the purpose of resale if the original has been lost and the holder of the rights does not agree to this..

Nor can the right of the purchaser of a copy of a computer program to redistribute the copy be limited by contract to the right to sell the copy only to purchasers of an earlier version of the same program as an update. The right of use of a computer program cannot be limited in such a way that the sale of the (update) program is only permissible to those users who have already acquired an original full version of the program; this is not a permissible restriction of the right of use in terms of content within the meaning of Section 32 UrhG old version (= Section 31 (1) sentence 2 UrhG new version)..¹⁴

Nor does it violate Section 3 UWG if unrecognisable school versions or updates of a computer program are (re)sold as full versions, because the author's distribution right under Section 69c sentence 1 no. 3 sentence 2 UrhG is exhausted when the reproduction piece is sold for the

¹² *LG Düsseldorf*, Urt. v. 26.11.2008 – 12 O 431/08, MMR 2009, 216 = CR 2009, 221.

¹³ *BGH*, Urt. v. 6.7.2000 – I ZR 244/97, CR 2000, 651 = NJW 2000, 3571 = MMR 2000, 749; gegen *KG Berlin*, Urt. v. 17.6.1997 – 5 U 7145/96, CR 1998, 137 = MMR 1998, 315 = ZUM-RD 1999, 20.

¹⁴ *OLG Frankfurt a.M.*, Urt. v. 12.8.2003 – 11 U 15/03, NJOZ 2004, 874 = GRUR-RR 2004, 198.

first time. Nor is it objectionable under competition law if, for competition purposes, a sign or other business designation (e.g. a company name or a type designation) firmly attached to the product itself is removed and the product thus altered is resold.¹⁵

The purchaser of a computer program protected by copyright who has undertaken by contract not to make the program available to third parties cannot generally be prohibited from employing a third party to remedy the defects. A corresponding clause would not be compatible with Section 69d (1) UrhG. If a prohibition to make the program accessible to third parties would also concern the correction of errors, the purpose of the contract would be affected. § Section 69d (1) UrhG has a compelling core in that copyright-relevant uses, which are indispensable for the contractual use of the program, cannot be excluded without further ado.¹⁶

For a long time, the online exhaustion of software was also problematic in the sense of a passing on clause. This is about the resale of software that is downloaded from the manufacturer's server and for which the right of use exists, e.g. on the basis of a product key. In the past, the OLG Munich wanted to limit the principle of creation to software that is distributed by physical data carriers. A prohibition of clauses according to § 307 II No. 1 BGB in connection with § 69c No.3 S.2 UrhG would therefore not be considered, which is why prohibitions of passing on for the online acquisition of software could be effectively included in the contract. The ECJ has refuted this argumentation in the "Used-Soft" decision. When purchasing software and the principle of exhaustion which arises with the purchase of software, the form of distribution cannot be decisive, since the will of the European legislator of the Computer Programs Directive does not differentiate between physical and non-physical program copies. Accordingly, the resale of a product key cannot be restricted by prohibitions of clauses if the product key has not yet been activated and the rights holder enables the download¹⁷.

Beyond the principle of exhaustion, however, the transferability of rights of use to third parties is a problem. Pursuant to Section 34 (3) sentence 1 UrhG, a right of use may also be transferred without the consent of the author if the transfer is part of the overall sale of a company or the sale of parts of a company. The regulation is based on the consideration that in this situation it would not be reasonable to expect the selling entity - for example a publishing house - to obtain the consent of all authors who have granted him rights of use. In this respect, there are no problems with company sales. Within the scope of M&A, rights of use for software can be transferred without having to ask the author for permission again.

¹⁵ *LG München*, Urt. v. 3.11.1994 – 4 HKO 18823/94, CR 1996, 542.

¹⁶ *BGH*, Urt. v. 24.2.2000 – I ZR 141/97, NJW 2000, 3212.

¹⁷ *OLG Frankfurt a.M.*, Beschl. v. 27.5.2016 – 6 W 42/16, ITRB 11/2016.

The situation is different for the individual transfer of rights of use. If rights to software are to be assigned to third parties outside of a company sale, this requires the consent of the author (§ 34 (1) UrhG). It should therefore be expressly stipulated in the contract with the programmer that the rights covered by the contract are transferable. However, the consent does not have to be given explicitly, it can rather result from the overall circumstances. The requirements for an implied consent are not to be set high in a case in which the further transfer of the rights of use takes place in the course of the realisation of the insolvency assets by the insolvency administrator. As a rule, there are no reasonable grounds for the author in such a situation to insist that only the original contractual partner uses the work. He is also obliged not to refuse his consent to retransmission in bad faith (Section 34 (1) sentence 2 UrhG).

Moreover, the principle of exhaustion should not include any statement on the admissibility of technical barriers. In the legendary misjudgement *Half Life 2*, the Federal Court of Justice considered the business model of a computer games provider to be lawful, according to which a computer game distributed on DVD is programmed in such a way that it can only be used after an individual identifier has been assigned online and that this identifier may not be passed on to third parties. This also applies if the DVD with the computer game can practically no longer be resold by the first purchaser because of the limited playing possibilities without an identifier.

Often the right of the buyer to resell his software copy is restricted to the extent that technical protection measures are built into the software to make it impossible to make copies of the program. According to the case law of the European Court of Justice, however, technical protection measures which prevent the copying of software are only worthy of protection if they are in accordance with the principle of proportionality. Accordingly, there must be no other protective measures of equivalent effect which intervene less intensively in the actions of third parties. The case law seems to follow this principle very favourably for the software industry.

For example, the Munich Higher Regional Court recently decided that even technical protection measures for video games in the form of a combination of software program blocking and the proprietary (owned) format of the video game cards of a "Nintendo DS console" respect the principle of proportionality¹⁸.

¹⁸ *OLG München*, Urt. v. 22.9.2016 – 6 U 5037/09.

Another "solution" of circumventing the purchaser's right of resale is partly applied by the software producers by renting software. This would, however, have negative consequences in terms of the warranty right that would affect them for the entire period of the lease.

Nor does the question of the principle of exhaustion arise, in the opinion of the Higher Regional Court Frankfurt am Main, if the purchaser is given a so-called product key with which he can download the program from the internet site of the rights owner to his server and the product key sold has not yet been activated at that time. In this case, the product key does not serve for the incorporeal transfer of an already existing duplication piece in the sense of the "UsedSoft" case law of the European Court of Justice and the Federal Court of Justice, but for the first-time production of a duplication piece. Whether the acquirer is entitled to use this reproduction piece depends solely on whether the holder of the rights consents to this reproduction. Under these circumstances, the offer and sale of a product key is only misleading if - for which the suing competitor is obliged to demonstrate - the rights holder will refuse this consent.¹⁹

The application of the principle of exhaustion to e-books and audio files is particularly controversial. For example, the OLG Hamburg wants to apply the exhaustion of the right of distribution according to § 17 II UrhG only to physical objects and not to transfer the already mentioned "UsedSoft" case law of the ECJ to digital goods. A provision in the general terms and conditions of a provider of e-books and audio files, according to which the customers do not acquire ownership of the files and the customers are merely granted a non-transferable right of use, does not deviate from the basic evaluation of a legal regulation according to § 307 II No.1 BGB. The ECJ did not extend the concept of ownership to digital goods. Although computer programs should fall under the concept of ownership, digital content should not.

This seems paradoxical, as the ECJ in its decision makes economic considerations the basis of the decision. It cannot make a difference whether it is software or e-books or music files, as these do not differ economically. In view of this, there are many arguments in favour of including digital content under the principle of exhaustion²⁰.

¹⁹ *OLG Frankfurt a.M.*, Beschl. v. 27.5.2016 – 6 W 42/16, GRUR-RS 2016, 11719.

²⁰ *Hoeren/Försterling*, MMR 2012, 642 (647); *Hilty*, CR 2012, 625 (635); *Redeker*, CR 2014, 73.

3. LAN bans

Typical software contracts are LAN prohibitions, i.e. contractual restrictions on the use of software in local networks. There are many shades of such network contracts..²¹

It is doubtful under copyright law whether the use of software in local networks actually encroaches on the software producer's exploitation rights. If the software is permanently stored on different terminals, the respective permanent storage contains a duplication relevant to copyright law.²² The situation is different with terminal software and the mere use of software via the respective main memories of the connected workstations. The BFH has also affirmed a "license obligation" for such network processes without further explanation.²³ However, the mere running of a computer program does not constitute a reproduction act within the meaning of Section 69c UrhG. However, the Senate has so far left open the question of whether the program input and the running of the program within the scope of program use is -processing makes duplication necessary. This question is also not conclusively answered by the Second Act amending the Copyright Act of 9 June 1993, which serves to implement Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (Section 69c No. 1 sentence 2 UrhG: "Insofar as loading ... requires reproduction"). However, the reorganisation of the Copyright Act as of 13.9.2003 has clarified that volatile copies do not constitute reproductions relevant to copyright law. According to § 44a UrhG, temporary acts of reproduction are irrelevant under copyright law if they have no independent economic value. The RAM copy, which inevitably arises when a computer program is run, has no independent economic value and therefore does not constitute an encroachment on the right of reproduction.

The BGH takes a different view in its ECJ submission on the admissibility of the sale of "used" software licenses. In the first place, the barrier regulation of § 44a UrhG does not benefit the user at all. Sections 69d and 69e UrhG, which serve to implement Articles 5 and 6 of Directive 2009/24/EC, conclusively regulate the provisions for computer programs. The requirements of Section 44a UrhG are therefore not fulfilled if the software producer demands remuneration for the use of the program. In this case, "reproduction" has its own economic significance pursuant to Section 44a UrhG..

²¹ *Schumacher*, CR 2000, 641, 649; vgl. *Polley*, CR 1999, 345, 347; *Lehmann*, in: FS für Schrickler, S. 543, 559.

²² *BGH*, Urt. v. 20.1.1994 – I ZR 267/91, NJW 1994, 1216 = CR 1994, 275 = GRUR 1994, 363 = DB 1994, 1180.

²³ *BFH*, Urt. v. 25.11.2004 – V R 25/04, V R 26/04, MMR 2005, 529 = CR 2006, 12 = DSrR 2005, 595.

This argumentation seems questionable when one considers that when purchasing the software, the customer could have installed it on the hardware of his choice anyway. A long-term storage only takes place on the hard disk of the system on which the software was originally installed. An intermediate storage on the working memory of the system on which the software is used can be indifferent to the manufacturer in so far as the customer could have carried out the installation also from the outset there on the fixed memory. Only the system in which the software has been installed on the read-only memory can be of economic importance.

In its decision on the trade with used software *UsedSoft*, the ECJ leaves open the question of the copyright reproduction according to §§ 69c No.1, 44a UrhG, but in another decision *Sky Decoder* emphasizes that transient acts of reproduction meet the requirements of Art. 5 I of the Directive 2001/29, i.e. § 44a UrhG, and are therefore not subject to permission. However, the BGH maintains its previous case law.²⁴

However, mere terminal server use also becomes relevant under copyright law if it takes place in the public domain. The 2003 Copyright Amendment also provided for a right of the author to control the public reproduction and the provision of software to the public (Section 69c No. 4 UrhG). The rights holder is hereby assigned the right to decide whether the software is to be made available to the public. Public access is defined as members of the public having access to the software from places and at times of their choice. Problematic here is the reference to "members of the public". It is unclear who should be covered by this term. According to the legal definition of § 15 (3) sentence 2 UrhG, the public includes everyone who is not connected by personal relationships with the person who exploits the work or with other persons to whom the work is perceived or made accessible in an incorporeal form.

Of course, a purely technical connection does not establish a personal relationship within the meaning of Section 15 (3) sentence 2 UrhG. What is decisive is the personal connection of the persons connected to the network. It is unclear how the area of personal relationships is to be concretised for internal company use. One can take the position that all uses within a company are characterised by personal relations to the employer/company. In this respect, each company is in itself non-public as far as the area of copyright use is concerned. However, it is also possible to differentiate according to the tasks within the company and to af-

²⁴ *BGH*, Urt. v. 17.7.2013 – I ZR 129/08, MMR 2014, 232 Rn. 28.

firm a company-internal publicity if a concrete project and work unit is granted access and use via LAN.

In any case, the user should make sure in contract negotiations with software suppliers that the use of computer programs is regularly only internal to the company and is therefore already non-public. In addition, it should be pointed out in contract negotiations if software is only purchased in a small network for a specific project group. If this software is then made available for retrieval via terminal servers, LAN restrictions are legally ineffective. It is then still questionable to what extent corresponding network fees have to be paid. First of all, it should be noted that the pricing of software used in a LAN is not subject to content control (§ 307 (3) sentence 1 BGB). Prices as such are part of the main service obligations and thus not subject to the control of the GTC. However, this does not exclude a control of the content criteria for a specific price scale, as is apparent from § 307 para. 3 sentence 2 BGB. In this respect, price scales for LAN use are certainly open to attack for lack of transparency, especially if they cannot be justified under copyright law. The owner's freedom of use prevails if copyright law does not permit a specific restriction of use (§ 903 BGB). The "clumsy" prohibition of network use is thus ineffective. Also prohibited are so-called site, installation or building licenses that specify the place of use of the software. So-called service-office restrictions as well as contractual and technical restrictions to a certain number of users are also doubtful. In particular, the contract may not regulate how many users may use the program in the network in parallel (as so-called concurrent users) (so-called floating license).²⁵

In contrast, the attempts to justify network clauses made in the literature to date have not been successful. For example, Grützmacher's statement that network operation is a separate type of use compared to the use of single workstations and can therefore be limited by contract is not very convincing. Not every form of use of a computer program is an independent type of use under copyright law. Copyright law deliberately leaves the area of non-public reproduction unregulated and thus also opens it up to the free disposition of the user. Wanting to restrict this free area subsequently by means of contracts cannot be legitimised by copyright. In terms of contractual law, too, respect for the public freedom of non-public reproduction must be regarded as an essential basic idea within the meaning of § 307 (2) No. 1 BGB, so that corresponding restrictions under general terms and conditions are also invalid. Furthermore, the manufacturer may have an interest worthy of protection in the fact that the user does not use

²⁵ A.A. *Grützmacher*, in: *Wandtke/Bullinger, UrhR*, 4. Aufl. 2014, § 69d Rn. 44; *Bartsch*, CR 1994, 667, 669 f.; vgl. auch *Schmidt*, in: *Lehmann*, Kap. XV Rn. 74.

the software to a greater extent than contractually intended without his economic participation. However, this general interest must be reconciled with the freedom of ownership. The German Civil Code (BGB) is based decisively on the guiding principle that the owner is free to use his object without prejudice to the rights of third parties. The software developer cannot undermine this freedom of use by limiting the freedom of ownership at will with reference to his profit-making intentions. Rather, the restriction must in turn be an expression of the rights developer's own legal position, which is capable of restricting the freedom of ownership within the meaning of § 903 BGB. Since the non-public, incorporeal use is a free area, however, the law on general terms and conditions does not permit the creation of artificial reservations of use.

4. Audit Clauses

Software licensing agreements often include so-called audit clauses. These are intended to enable the software rights holder to verify the actual extent of use of their software products in the course of an audit. In addition, the software producer can, for example, visit the premises of the company or the buyer in general. However, it is questionable whether such tying is permissible and, if so, where its limits are in any case.

The purpose of such clauses shall be to protect the interests of the licensor: the power resulting from the copyright protection of the computer program according to § 69a UrhG (German Copyright Act) to determine and, if necessary, prohibit any use (sublicensing) not authorized by the licensor, § 69c UrhG . On the other hand, there are the interests of the customer, which range from the impairment of business operations to a violation of business and trade secrets. Likewise, the inviolability of the apartment/business premises is contrary to the interests of the software company.

Requests for information under copyright law can be based on §§ 101 I, 101a UrhG, but only in some exceptions, whereas a right to inspect documents on site does not arise from the UrhG. A request for information must therefore comply with the principle of proportionality and there must be a sufficient probability of the customer infringing the law. A claim for information could result from § 242 BGB (German Civil Code) - however, this requires a special connection and a justified suspicion of a breach of duty. A claim for inspection in accordance with § 809 BGB is based equally on the requirements of § 242 BGB. However, there must always be a concrete presumption of sublicensing.

However, a clause that is intended to enable the software company to carry out an audit is subject to the limits of § 307 BGB - even if it was concluded in the B2B area. However, § 307 II No.1 BGB prohibits the specification of clauses that would be incompatible with the basic idea of legal provisions, so that an unreasonable disadvantage would result. According to some of the literature, an audit clause is said to be fundamentally contrary to the basic idea of legal regulations, since in copyright law a right of inspection was not included in the book-keeping. It is not acceptable to undermine the clear protective intentions of the copyright legislator by contractually securing an audit. According to this, an infringement of § 307 II No.1 BGB would in principle exist²⁶.

In another opinion, a violation of § 307 II No.1 BGB could be present if the clause represents an unreasonable disadvantage, unreasonably impairs the business process, violates business and trade secrets as well as personal rights or does not comply with labor law requirements. However, if the audit clause does not unreasonably restrict any of these rights, its admissibility is not excluded from the outset.

5 Exclusion of editing rights
Ebenso often tries to exclude any editing rights of the customer by clauses. An editing right could include, for example, the right of the buyer to make changes to the software or to find out the program code and to check the software for its resistance to hacker attacks. A prohibition of such clauses could result from § 307 II No. 1 in conjunction with § 903 BGB. According to § 69c No. 2 UrhG, the translation, adaptation, arrangement and other modifications of the computer program are generally subject to approval. Thus, it seems that a prohibition of such reworking is out of the question. An exception to this principle of the prohibition of editing and modification of Sections 23 and 39 UrhG seems to result from Section 69d I UrhG, according to which there is no act requiring consent within the meaning of the above-mentioned provisions if it is necessary for the intended use of the computer program. It is therefore questionable what constitutes intended use. In any case, a general prohibition of program modification in general terms and conditions is intended to violate § 307 II No.1 BGB in conjunction with § 69d I UrhG. Thus, for example, prohibitions of error correction are also a violation of the mandatory core of § 69 d I UrhG . Accordingly, prohibitions must be sophisticated so that they are covered by the protective right of Sections 69c No. 2 and 69 d I UrhG . It is disputed whether within the scope of error correction there is

²⁶ *Hoeren* in Graf von Westphalen, siehe eben da, Rn. 156.

also permission for decompilation (Section 69e UrhG) - i.e. from the transformation of the object code into the source code -. ²⁷.

6. Maintenance bans

literature:

Gabriel/Cornels, Kunde oder König – Gibt es ein Recht auf Lizenz und Update?, ITRB 2008, 277, 278; *Grapentin/Ströbl*, Third Party Maintenance: Abschlusszwang und Kopplungsverlangen, CR 2009, 137.

Oftentimes there is also an attempt to link the use of the software to maintenance. In particular, third parties should not be authorized to maintain the software. Case law assumes that a prohibition to use the program for the purposes of third parties or to make it accessible to third parties is effective. However, the prohibition may not extend to the elimination of errors and maintenance by third parties. The acquirer of a computer program protected by copyright, who is contractually prohibited from making the program accessible to third parties, cannot generally be prohibited from engaging a third party to remedy errors, since Section 69d (1) UrhG provides for a right of the user to remedy errors, which also includes maintenance by third parties and in this respect has a mandatory, contractually non-negotiable core as uses relevant to copyright, which are absolutely necessary for the contractual use of the program and cannot be excluded without further ado. While the elimination of errors through the involvement of third parties cannot generally be waived, a contractual provision is permissible which reserves the elimination of errors to the software producer. However, the contractual partner must be granted the right to have the error corrected by a third party if the manufacturer cannot or does not wish to correct the error.²⁸

Another problem is "third party maintenance", i.e. support by a third party, i.e. not identical with the manufacturer. Of course, the manufacturer of a software solution or hardware will try to continue to provide paid patches and other support services through bundling. Maintenance by third parties, especially by competitors, is not right for him, because this way revenues are lost and the competition gets technical insight into the product. It is therefore questionable whether the manufacturer of hardware or software is allowed to link the transfer to the conclusion of a maintenance contract or to refuse the delivery of standard patches outside the

²⁷ Schricker/Loewenheim, UrhG § 69d Rn. 3; Wandtke/Bullinger/Grützmacher, UrhG, 4. Aufl. 2014, § 69e UrhG Rn.7.

²⁸ BGH, Urt. v. 24.2.2000 – I ZR 141/97, NJW 2000, 3212 = GRUR 2000, 866 = CR 2000, 656 = DB 2000, 2063.

warranty if services are purchased from third parties. There is no legal obligation to conclude a contract for the supply of standard patches, either under § 242 BGB or § 20 GWB in conjunction with § 33 GWB or, if at all, only in very narrow exceptional cases. Maintenance by third parties has its limits where the manufacturer's copyright is infringed, e.g. in the case of de-compilation. In addition, efforts are being made to strengthen customer loyalty by concluding framework agreements on future individual projects. These should be so detailed that in later day-to-day business only the service and remuneration side and some details need to be regulated. However, especially in the creation of individual software, the focus is not only on troubleshooting the software in the maintenance contracts, but also on further development and the software as a project²⁹.

5. Summary

It has been shown that CPU restrictions and prohibitions on redistribution are largely ineffective in software licensing agreements. The fate of network theft is still unclear; further clarification by the courts is needed. During contract negotiations, the user should therefore carefully check whether individual restrictions on use are not problematic and inform the supplier accordingly. Often an amicable solution in the interest of both parties can be found in individual discussions, away from the control of the general terms and conditions.

Also, the inclusion of audit clauses will in most cases be ineffective if the rights of the buyer are unjustifiably restricted. Processing rights of the software buyer cannot be excluded from the outset. In this case, it would have to be examined whether the processing of the software would enable the intended use. This shows that in most cases it is necessary to weigh up the individual case.

III. Warranty

1. Warranty in sales law

literature:

Bömer, Die Pflichten im Computersoftwarevertrag, Darstellung der Besonderheiten im Vergleich zu den Vertragstypen des allgemeinen Zivilrechts, München 1988; *Brandi-Dohrn*, Gewährleistung bei Hard- und Softwaremängeln, München 1988; *Heussen*, Unvermeidbare Softwarefehler. Neue Entlastungsmöglichkeiten für Hersteller, CR 2004, 1; *Höpfner/Fallman* die Reform des kauf rechtlichen Gewährleistungsrecht, NJW 2017, 3745; *Kilian*, Haftung für Mängel der Computer-Software, Karlsruhe 1986; *Koch*, Schlechtleistung bei soft-

²⁹ ITRB 11/2016, 256 (257).

warebezogener Nacherfüllung, ITRB 2008, 131; *Pötzsch*, Die rechtliche Einheit von Hard- und Software, Berlin 1991; *Taeger*, Außervertragliche Haftung für fehlerhafte Computerprogramme, Tübingen 1995.

The buyer of a defective program has a number of claims and rights: Above all, he can assert his warranty rights under § 437 BGB, i.e. he can, among other things, demand the delivery of defect-free software, return the purchased software and claim his purchase price back or reduce the purchase price to be paid by the reduced value of the software. However, such rights are only given if a number of different conditions are fulfilled.

a) Deficiency

First, there must be a defect in the software. As already outlined above, the BGB distinguishes between material defects and defects of title (§§ 434, 435 BGB).

Software has a defect of title if the provider is not entitled to (re)distribute it. This is evident in the case of a pirated program copy. Defects of title are treated as material defects, since both types of defects are breaches of duty. In both cases, the buyer is subject to the general rules of the law on breach of contract. Defects of title in software include, for example, the lack of rights of use in a program copy or "unlicensed" system software or word processing software. The installation of an operating system as a pirated copy is also covered by the defect of title, similar to the case of the lack of trademark rights when using an IT product designation. From a current point of view, manipulated exhaust software of a vehicle according to § 434 I 2 No. 2 BGB should also be counted as a defect.³⁰

In particular, the customer may reduce the purchase price (which is subject to copyright restrictions and claims for damages according to §§ 69c ff., 97 ff. UrhG in case of a pirated copy) or withdraw from the contract (§§ 437 No. 2, 323, 346 para. 1 BGB). In addition, in the event of unsuccessful subsequent performance, the customer may - depending on fault - claim damages (§§ 280, 281, if applicable § 283 BGB). Even the delivery of defective software is a breach of contract; the term "breach of duty" within the meaning of § 280 BGB is to be understood purely objectively. If the dealer is not responsible for a defect (e.g. due to a lack of testing possibilities), he can exonerate himself according to § 280 para. 1 sentence 2 BGB; there is still a breach of duty. Since standard software is a generic debt, the dealer bears the

³⁰ Vor allem LG *Münster*, Urt. v. 14.3.2016 – 011 O 341/15, BeckRS 2016, 06090; dem folgend LG *Bochum*, Urt. v. 16.03.2016 – I-2 O 425/15, BeckRS 2016, 05964 Rn. 17; s. hierzu auch NJW-Spezial 2016, 299; LG *München I*, Urt. v. 14.04.2016 – 23 O 23033/15, BeckRS 2016, 10952, geht offensichtlich von einer Beschaffensvereinbarung in Bezug auf den Schadstoffausstoß aus; offengelassen von LG *Düsseldorf*, Urt. v. 23.8.2016 – 6 O 413/15, BeckRS 2016,15047.

procurement risk (§ 276 para. 1 BGB). However, defects do not establish any warranty rights if they were known to the buyer at the time of conclusion of the contract or remained unrecognized due to gross negligence, § 442 BGB. In the latter case, the provider is only liable if the defect is guaranteed to be free of defects or if the defect is fraudulently concealed.³¹

In practice, the regulations on liability for material defects and their contractual limitation are more important. An item is free of material defects if it does not deviate from the nominal quality. Such a deviation of the actual quality from the target quality exists if the value or the suitability of the object for the contractually agreed (§ 434 para. 1 sentence 2 BGB), contractually presupposed (§ 434 para. 1 sentence 2 No. 1 BGB) or usual (§ 434 para. 1 sentence 2 No. 2 BGB) use is cancelled or reduced. A material defect within the meaning of § 434 BGB requires that the respective circumstance is a quality of the object of purchase. The quality is to be equated with the actual condition of the object. The term "condition" includes every characteristic and every factual, economic or legal circumstance adhering to the object. The property/circumstance must be rooted in the condition of the object of purchase and must adhere to it directly (physically) for a certain period of time. Admittedly, the legislator has not defined the concept of quality and has left open whether the much demanded directness relationship must be given. However, since the new regulation of the concept of material defect in the context of the reform of the law of obligations did not want to change the concept of error applicable under the old legal situation and the new regulation follows the subjective-objective concept of error, the concept of quality must still be interpreted restrictively.

aa) Error: Computer Science versus Law

This definition, which will be brought to life below, is fundamentally different from the error concept of computer science. A computer scientist regards every objective technical failure of the software as an error. But since it is well known that a technical failure of computer programs can never be excluded, technicians like to write the notorious sentence in software contracts: "Software can never be error-free". The lawyer sees the concept of error differently. For example, there are technical errors which are legally irrelevant: If a program crashes during a rarely used keyboard combination, from a legal point of view there is only a minor, insignificant failure, which hardly affects the usability of the system. Accordingly, in such a case - despite the existence of a technical failure - there is no right of withdrawal (§ 323, Sub-

³¹ Koch, Handbuch Software- und Datenbankrecht, 2003, § 5, Rn. 25 f., 35.

section 5, Sentence 2 in conjunction with § 437, No. 2, BGB). Conversely, a program can be technically error-free but legally defective. If, according to the contract, a program is to have certain functions, the program is defective if these functions are missing, even if it works technically flawlessly.

bb) Agreed quality

An error already exists if the program does not meet the contractually agreed requirements in its actual condition. These performance requirements may be expressly defined in a performance specification. It is precisely this group of errors that is the most pleasing from the point of view of the courts: there is no need for complicated expert opinions and disputes between the parties. After all, the only issue here is whether or not a certain performance of the program is available according to the agreements.

cc) Assumed contractual use

It is difficult to distinguish between contractually agreed provisions and contractually suspended use. In my opinion, the area of contractual agreement includes the target provisions that are expressly stipulated in the contract. In contrast, the area of contractually stipulated use regulates the area of implied agreed criteria. This would be the case, for example, with a service description. Similarly, if the desired functions have been discussed with the supplier in the course of contract negotiations and have been jointly accepted.³²

dd) Ordinary use

Apart from contractual regulations, the usual use is the most important measure for checking software defects. The suitability for normal use, which is to be determined objectively, is to be based on the quality that the buyer can expect. This is determined according to the expectation horizon of the average buyer. With regard to the condition of the object of purchase, all factual, legal, economic and social circumstances which, according to the current market opinion, directly influence the value and usability of the object are taken into consideration.³³

However, the proof of normal use is not easy. A number of earlier delimitation difficulties no longer exist after the reform of the law of obligations. For example, the distinction between

³² Vgl. *LG Frankfurt a.M.*, Urt. v. 4.11.1986 – 2/8 S 83/86, IuR 1987, 229.

³³ *OLG München*, Urt. v. 15.9.2004 – 18 U 2176/04, NJW-RR 2005, 494 = NZV 2005, 309.

generic and individual debts no longer plays a role, nor does the delimitation to aliud. According to § 434 para. 3 BGB, the delivery of another object is equivalent to a material defect. In this respect, the previously central problem that the delivery of standard software is part of a generic debt and defective software was therefore to be regarded as an aliud no longer applies since the reform of the law of obligations.

b) Error types

It is questionable, however, whether there is a common use for a certain standard product at all. Ultimately, only some typical types of error can be derived from case law.³⁴

aa) Functional deficits

A functional deficit can always be assumed if there is an absence of certain functions that a program should normally offer.

A program must contain certain functions, even if this has not been expressly agreed. For example, a program designated as "UNIX-compatible" must be multi-user capable. If a program is required to run on a specific hardware, manual defects are also software defects. Furthermore, a database program must prevent files from overflowing. In general, all software must contain HELP functions and error routines to prevent operating errors from the outset; an exception should only apply if the user can be considered a computer specialist (whatever that means). On the other hand, there should be no error if the software lacks a printer driver or a banking program is not tamper-proof. A small word processing program should also be sufficient for a compact program for the industry. According to the opinion of the OLG Koblenz, an EDP system is defective even if an error message regularly appears during the daily data backup, according to which the system backup is unusable, although the data backup is actually usable and is carried out completely without data loss. The resulting uncertainty of the user and the subsequent verification of the error message lead to a considerable impairment of the work flow. The defect therein entitles the user to cancel the purchase contract..

If a hardware peripheral device no longer works properly due to outdated operating software, there is no material defect if the manufacturer has delivered the device with operating software corresponding to the state of development and provides so-called "updates" for the soft-

³⁴ Vgl. hierzu auch *Kilian/Heussen*, in: *Computerrechts-Handbuch*, 32. Auflage 2013, Kap. 201 mit weiteren Beispielen und *Schneider*, *Handbuch des EDV-Rechts*, 4. Aufl. 2009, D 522–535.

ware at suitable intervals. If it is contractually agreed that the created software should be able to run unconditionally on its hardware - which is recorded in writing - the user is also entitled to exercise warranty rights in the event of a malfunction if the malfunction is solely due to the nature of the hardware. The programmer is then obliged to compensate for the hardware error by appropriate programming..³⁵

If a retailer sells a digital camera using a manufacturer's brochure which states that the camera can be updated with the help of free firmware and software updates, which means that the camera is always state-of-the-art, the camera does not exhibit a material defect at the time of the transfer of risk solely because the manufacturer provides an update for the camera for the last time shortly after conclusion of the contract.³⁶

bb) Functional deficiencies

Another important group of errors concerns functional deficiencies, i.e. the technical failure of individual program functions.

Software is defective if

- it produces false invoices when used in a business,³⁷
- it is not able to output umlauts, but instead only question marks appear in the printout,³⁸
- it is not 2000-fixed since the time when four-digit year numbers are common programming practice (mid-1990s),³⁹
- it does not allow purchases/sales to be carried out in euro,⁴⁰
- it is not virus-free, i.e. has not been checked for known viruses using standard tools.⁴¹

Manipulated exhaust software in motor vehicles also falls under the concept of software malfunction and thus as a defect of title within the meaning of § 434 I p.2 No. 2, whereby it makes no difference whether the feigned exhaust gas cleaning is carried out by manipulating the exhaust gas recirculation or by switching off the emission control system. In the case of a defect of title, it is therefore irrelevant which technical measures have been chosen with re-

³⁵ *LG Bonn*, Urt. v. 27.2.2004 – 10 O 618/03, ZGS 2004, 199 = BeckRS 2015, 07308.

³⁶ *OLG Koblenz*, Urt. v. 30.4.2009 – 6 U 268/08, OLG Frankfurt 2009, 719.

³⁷ *LG München I*, Urt. v. 23.1.1985 – 8 HKO 11785/83, CR 1987, 364.

³⁸ *OLG München*, Urt. v. 15.2.1989 – 27 U 386/88, CR 1990, 646, 648.

³⁹ Siehe hierzu *Bartsch*, CR 1998, 193 ff.; *Bartsch*, Software und das Jahr 2000 – Haftung und Versicherungsschutz für ein technisches Großproblem, 1998, 58 ff.; *von Westphalen/Langheid/Streitz*, Der Jahr-2000-Fehler – Haftung und Versicherung, 1999; *Hildebrand*, CR 1998, 248 ff.

⁴⁰ *LG Coburg*, Urt. v. 1.2.2002 – 32 S 193/01, CR 2002, 325; *LG Stuttgart*, Urt. v. 26.2.2001 – 14 O 232/00, CR 2002, 255, Leitsatz.

⁴¹ *LG Regensburg*, Urt. v. 17.6.1997 – 2 S 168/96, CR 1997, 686; *LG Kleve*, Urt. v. 29.6.1995 – 7 O 17/95, CR 1996, 292.

gard to the software in order to simulate better values. Although the vehicle is suitable for normal use despite manipulation, it does not have a quality that can be expected according to the nature of the item § 434 I p.2 No. 2. An average buyer may assume that the values specified in the data sheet are not only maintained by manipulation of the software on the test bench, but also in road traffic. The defect of the software installed in the motor vehicle thus affects the entire thing.

On the basis of a ruling of the OLG Hamm, the BGH decided last year that misdirections of a navigation system installed in a new car constitute a material defect within the meaning of § 434 I S.2 No. 2 BGB if they are based on a technical defect in the vehicle or if the software of the navigation system was already outdated when it was sold⁴².

In the opinion of the LG Freiburg, a material defect does not exist if a firmware that is up-to-date at the time of delivery of a printer becomes obsolete after some time and the printer is no longer usable as a result, but the manufacturer provides updates for the software at suitable intervals to correct this error. The court did not comment on the question of whether a claim for damages exists under §§ 311 (2), 241 (2) BGB (formerly c.i.c.) due to a missing reference to the necessity of the free updates, because the legal costs incurred were not caused by the missing reference but by the erroneous assumption of a defect.

cc) Lack of capacity/unusual response time behaviour

A very important case group concerns the unusual response time behaviour in a computer system. If a software is designed in such a way that it leads to an unbearable slowdown of the system, an error has occurred. Such a state should be present, for example, when the response times in a multi-user system drop to 30 seconds or the speed of the printer is reduced to 20%. However, it is not possible to give concrete figures; the assessment of the expert appointed by the Court of First Instance will depend on the individual case.

dd) Program locks

The installation of program blocks is also inadmissible if this is intended to force the settlement of a claim or the conclusion of a maintenance contract. However, such a lock could be permissible if it is required for protection against software piracy. This is not the case, however, if the buyer requires system disks for removal which are only in the possession of the

⁴² OLG Hamm, Urt. V. 22.3.2016 – 28 U 44/15; BGH: Mangelhaftigkeit des eingebauten Navigationssystems, CR 11/ 2016, 708.

seller. Product activation for Windows XP is also considered a defect. For the inclusion of such blocks, the instructions on the packaging or in the terms and conditions are required. Such notices affect the nominal condition and exclude the affirmation of a defect. Also, the clear reference to a lock implies that the user is aware of the technical lock and thus cannot make a notice of defect according to § 442 para. 1 BGB. The purchaser of standard software can also refuse to accept it if the seller demands the signing of a declaration required by the manufacturer of the software, according to which the software may only be used for "research and evaluation proposals". Such contracts are also contestable on the grounds of an unlawful threat; for if the Licensor activates a program block which makes it impossible to use the Software on powerful hardware and declares that the block can only be lifted if the Licensee agrees to the change of the system directory, incurring a new license fee, this constitutes a threat.⁴³

Furthermore, it is misleading within the meaning of § 5 UWG if, prior to the purchase of a computer program, it is not pointed out that, after the software has been called up several times, a registration by transmission of personal data (name, address, telephone number, etc.) is required to remove an otherwise effective program block. At the same time, the predicament resulting from the program block is unfair within the meaning of § 3 UWG.⁴⁴

ee) Lack of or errors in the documentation

Ultimately, the "most popular" error group is the absence or incompleteness of the documentation. As courts struggle with the proof of a program error, they often look for errors in the manuals provided. Before the reform of the law of obligations, it was disputed whether the delivery of a manual constituted a primary obligation or whether the lack of documentation should be regarded as a defect. After the reform of the law of obligations, the legal situation is no different. Especially § 434 para. 3 BGB, which equates the wrong and insufficient delivery with a material defect, does not change the fact that the partial non-delivery is a problem of delay.⁴⁵

For example, some voices assume that documentation and program form a unity; if the documentation is missing, this is considered a lack of this unity. In such a case the purchaser can

⁴³ *OLG Frankfurt a.M.*, Urt. v. 14.12.1999 – 11 U 7/99, CR 2000, 146; ähnlich bereits *LG Frankfurt a.M.*, Urt. v. 17.12.1998 – 2/3 O 266/97, CR 1999, 147.

⁴⁴ *OLG München*, Urt. v. 12.10.2000 – 29 U 3680/00, GRUR 2001, 1184 = MMR 2001, 395; *OLG Köln*, Urt. v. 29.10.1999 – 19 U 94/99, CR 2000, 354 = ZUM-RD 2000, 488; *OLG Bremen*, Urt. v. 13.2.1997 – 2 U 76/96, WRP 1997, 573; *OLG Celle*, Urt. v. 3.3.1992 – 20 U 69/90, NJW-RR 1993, 432.

⁴⁵ In diese Richtung auch *OLG Karlsruhe*, Urt. v. 16.8.2002 – 1 U 250/01, CR 2003, 95.

therefore "only" assert the classic warranty rights of § 437 BGB. In contrast, the Federal Court of Justice (BGH) has ruled on several occasions that the purchase of a computer system consisting of hardware and software lacks delivery as long as the software documentation has not yet been delivered. The absence of the documentation is to be regarded as non-performance and not as a warranty case.

If documentation is available, it must be assessed according to warranty law. It is important that the documentation is available in writing. Therefore, it is not sufficient to train users in advance and not to provide any documentation with reference to this. It is also insufficient to include screen texts in the program or to send text files on diskettes as documentation. However, the obligation to provide a manual is also met if the manual is provided in the form of a CD-ROM and the individual pages of the manual can be printed from this CD-ROM in good quality. In this case it is not necessary to hand over a printed version of the manual. A printed version is also not required if the buyer is a professional software developer and the necessary help instructions appear during the program call.⁴⁶

The documentation must be written in German. Accordingly, the delivery of an English language manual leads to the possibility that the entire purchase contract may be cancelled or the purchase price reduced. An exception to this rule only applies if the parties agree otherwise (a reference to the English manual in the advertisement may be sufficient) or if the user is to be regarded as an IT specialist. A bilingual manual is tacitly owed if the customer has agreed that the entire system should run bilingually.⁴⁷

All program error messages must be listed completely in the documentation. The user must be able to determine from the documentation what certain error messages mean and how to react to an error. A software documentation is defective if a considerable number of screen dialogs are not (no longer) up-to-date, do not correspond to the dialogs in the program or are not documented at all, if a table of contents is missing or if the documentation does not enable the user to install the software again or on another system if necessary. The maintenance creditor is entitled to updated software documentation with every "update" of the software.

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ff) Public statements of the producer/dealer

In addition to the defect, public statements made by the seller, the manufacturer or their assistants may also trigger warranty rights. In contrast to earlier law, no special willingness to

⁴⁶ *OLG Karlsruhe*, Urt. v. 15.7.2003 – 14 U 140/01, CR 2004, 493.

⁴⁷ *OLG Köln*, Urt. v. 3.9.1999 – 19 U 54/99, CR 2000, 585.

⁴⁸ *LG Bonn*, Urt. v. 19.12.2003 – 10 O 387/01, MMR 2004, 356 = CR 2004, 414.

assume liability is required in order to make a sales statement by the seller a binding contractual basis. Rather, advertising statements are now generally binding, regardless of their source.

(1) Comments of the producer/dealer

When a "public statement" in computer sales can be affirmed is difficult to answer in the abstract; ultimately, this depends on the individual case. At best, one can say that such a statement is likely to be contained in binding statements in the specification, clear technical statements by the dealer (especially on compatibility) or in statements by a seller who acts as an expert and thus claims special trust. A statement that the buyer of an EDP system is purchasing a device with the latest technical status is, in contrast to the old case law of the BGH, binding under warranty law.

The attribution is not made for all the statements of the relevant public. The decisive factors are rather statements of the manufacturer and the dealer himself. Statements by other dealers are not attributed to the software vendor. The definition of the term manufacturer is particularly difficult in the software sector. Software is not a product of machine production; it is therefore difficult to name the manufacturer of more complex data processing products. For Windows XP, the manufacturer (Microsoft Inc.) is based in Richmond, USA. However, there are hardly any statements from Microsoft headquarters that are directly intended for the German market. The advertising concept for the German market comes from the German Microsoft branch.

(2) Reasons for exclusion

Advertising statements have no effect under warranty law if the seller did not know the statement and did not have to know it. Finally, they are also irrelevant if they could not influence the purchase decision.

gg) Assembly

A defect shall also be deemed to exist if the agreed installation has been improperly carried out by the seller or his vicarious agents (§ 434 para. 2 BGB). The field of assembly is very relevant in the software sector. This also includes the installation of the software and the setting up of the data processing system. Since the installation service must have been contractually agreed, it is not sufficient that the dealer actually assists with the installation. It is also irrelevant according to the wording of the law whether the installation is part of the purchase agreement or whether it is provided for in a separate (work) agreement..

hh) Assembly instructions

Finally, a defect also exists in the case of defective assembly instructions (§ 434 Para. 2 Sentence 2 BGB). It is questionable whether installation instructions in the DP sector can be subsumed under § 434 (2) sentence 2 BGB. The explanatory memorandum to the government draft of the reform of the law of obligations also mentions defective installation as assembly; in this respect, defective installation instructions should also trigger warranty rights. If the installation is successful despite the incorrect instructions, there is no defect.

2. Obligation to give notice of defects according to §§ 377, 381 paragraph 2 HGB

According to § 377 HGB (German Commercial Code), a merchant must immediately inspect the goods purchased by him for defects and immediately give notice of any visible defects. If defects appear later, notification must be made immediately after discovery. If the buyer does not comply with this obligation, the goods shall be deemed to be approved.

The commercial user must therefore examine ordered software immediately at the place of delivery within the framework of the appropriate course of business and notify the seller immediately of any recognisable defects. In addition, hidden defects must be reported immediately after their discovery. The time frame of the duty to examine and notify depends on the individual case. Non-experts have a longer trial period at their disposal. In the case of open, verifiable defects of a PC (here lacking IBM compatibility), the period may be shorter than eleven days. A description of the program errors is not necessary for the notification of defects; it is sufficient if the defective effect of the program is explained for the individual work processes. However, it should be noted that the period for giving notice of defects shall not commence until the software has been delivered in full, including its installation. If a complete system of hardware and software is to be delivered, the period shall not commence until the complete delivery and installation of the complete system..⁴⁹

In addition to the obligations of merchants to give notice of defects, there are general obligations of everyone to give notice of defects. According to §§ 437 No. 1, 439 BGB, the buyer can demand subsequent performance without further ado in case of defective goods. However, rights to rescission, reduction and compensation shall only arise after the unsuccessful expiry of a grace period. This results for the withdrawal from the reference in § 439 No. 2

⁴⁹ *BGH*, Urt. v. 27.6.1990 – VIII ZR 72/89, WM 1990, 2000.

BGB to § 323 para. 1 BGB, according to which the withdrawal is linked to the unsuccessful expiry of a reasonable period for performance or subsequent performance.

3. Unconditional acceptance with knowledge of the defect

In accordance with § 442 (1) sentence 1 BGB, the buyer loses his warranty rights if he is aware of the defects of the purchased item when the contract is concluded. He also loses his rights if the defect has remained unknown to him due to gross negligence (§ 442 para. 1 sentence 2 BGB). It is precisely this requirement that is of importance in larger EDP projects (unless in such a case the law on contracts for work and services applies anyway): In this case, errors during the installation and training phase often become apparent which should have been clear to the user at the time the contract was concluded. This can result in the purchaser losing his warranty rights in this respect according to § 442 BGB. On the other hand, the burden of proof is linked to the handover of the object of sale, so that the seller bears the burden of proof of freedom from defects up to this point in time, but from this point in time the burden of proof can be transferred to the buyer (§ 363 BGB).

A particular problem lies in the relationship between the warranty rules and pre-contractual information obligations. If pre-contractual obligations to provide information in the law on sales contracts were to be affirmed to an excessive extent, the clear regime of warranty law could be circumvented. This links, for example, the statute of limitations, i.e. the right to damages, to the delivery, regardless of the knowledge of the buyer. § Section 442 (1) BGB excludes warranty claims for grossly negligent ignorance on the part of the purchaser, which would in turn be incompatible with the guiding principle of the law on damages. Moreover, there would be a high risk that the priority of subsequent performance would be circumvented in the case of a pre-contractual duty of disclosure. Here, the principle must apply that claims for damages resulting from the violation of pre-contractual obligations to provide information cannot be considered if the obligations to provide information refer to negligent false statements about such circumstances which are the subject of an agreement substantiating the defect.

4. Limitation period (§ 438 BGB)

According to § 438 para. 1 No. 3 BGB, a limitation period of two years from the date of delivery applies to claims for subsequent delivery and damages in the case of software licensing agreements. For withdrawal and reduction § 438 para. 4 or 5 in connection with § 218 BGB (GERMAN CIVIL CODE) SHALL APPLY. This provision again refers to the limitation of the claim for subsequent performance..

The statute of limitations serves exclusively the interests of the debtor and is intended to protect him from having to defend himself after an unreasonably long period of time with arguments that relieve him of a risk. After the expiry of longer periods of time between delivery or the transfer of risk in the purchase contract and the assertion of the warranty claims by the creditor, the debtor runs the risk of no longer being able to prove the "actual prerequisites of aspects that hinder or destroy the law". Although there is also the risk of the creditor being unable to prove this, he can take legal action against it in good time.⁵⁰

For the production of individual software the statute of limitations of the law on contracts for work and services in the sense of § 634a I No. 1 BGB (German Civil Code) shall apply, unless the law on sales is applicable under § 651 BGB..

a) The concept of "delivery"

The case law before the reform of the law of obligations tried to extend the limitation period as far as possible in favour of the user. This was achieved by extending the time of "delivery" by a long way, so that the limitation period did not begin to run until very late, in some cases never. With the reform of the law of obligations this jurisdiction was to be modified. There is no longer any need to artificially extend the limitation periods by an extensive interpretation of the term "delivery". The limitation periods are now reasonably long. This argues in favour of a parallelism of transfer and delivery. However, it should be noted that § 438 (2) BGB distinguishes between "transfer" (in the case of real estate) and "delivery". Similar to § 377 para. 1 HGB, it will be possible to focus on the point in time from which the buyer has the object in his control so that he can examine it.⁵¹

The term "acceptance" alone occurs in the BGB in at least two variants: The physical acceptance of the object (§ 433 II BGB), which is regularly applied in the delivery of standard software and in § 640 BGB, the regulation of the right to contract for work and services for individual software. According to § 640 BGB, it is equivalent to acceptance if the customer does not accept the work within a reasonable period of time determined by the entrepreneur, although he is obliged to do so.

However, the law does not prescribe whether the acceptance of an IT system must take place before or after the IT system goes live. Therefore, this must be regulated in advance by indi-

⁵⁰ *Regenfus*, in NJW 2016, 2977 (2977, 2978).

⁵¹ So schon *BGH*, Urt. v. 21.12.1960 – V ZR 9/60, NJW 1961, 730.

vidual contract. Acceptance before going live means that the acceptance takes place after inspection and is then put into use. Acceptance after the start of production accordingly means that first the delivered system is put into operation and after a reasonable period of probation the acceptance takes place.⁵²

The decisive factor is therefore the purely actual ability of the buyer to dispose of the goods..⁵³

However, delivery must also include certain documentation (see above). The user manuals mentioned above are as much a part of the software creation as the performance result itself. If these are missing, then there is a lack of readiness for acceptance⁵⁴.

b) Suspension of the statute of limitations

According to § 204 para. 1 no. 7 BGB, the buyer can suspend the limitation period if he requests a judicial hearing of evidence to secure the evidence. In fact, in practice it is usually overlooked that the German Code of Civil Procedure offers a special procedure for securing difficult evidence (§§ 485 ff. ZPO). Such an early procedure for the preservation of evidence is particularly suitable,

- if the user can no longer use defective software and for this reason wants to sell,
- if certain, rarely occurring defects can only be proved by witnesses (personnel) or experts during operation of the plant,
- if the user wants to eliminate the defects himself in order to be able to work quickly with the program,
- when the user wants to have certainty about the fault as quickly as possible in order to purchase a new system and shut down the old one.

The course of the limitation period is also suspended in the event of service of a default summons (§ 204 (1) No. 3 BGB). If the user therefore wishes to have his purchase price partially refunded, he can file an application for a default summons against the seller with the local court responsible for him. However, it is not permissible to file such an application for the repayment of the entire purchase price. This claim is only valid if the buyer also returns the defective software; however, the dunning procedure is not permitted for such so-called con-

⁵² Sarre in Auer-Reinsdorff/Conrad, Handbuch IT- und Datenschutzrecht 2. Aufl. 2016, § 2 Rn.49- 50.

⁵³ BGH, Urt. v. 30.1.1985 – VIII ZR 238/83, NJW 1985, 1333, 1334.

⁵⁴ Schneider, CR 10/2016, 634 (641).

current claims (§ 688 para. 2 no. 2 ZPO). In this respect, legal action must be taken in good time.

In addition, the buyer of a defective item may also bring an action against the seller and thereby suspend the limitation period (§ 204 para. 1 no. 1 BGB). Furthermore, the statute of limitations is suspended as long as the seller is busy with the subsequent delivery of a defect-free program or with the repair of the defective software. The statute of limitations can also be suspended by a request for conciliation in accordance with § 204 I No. 4 BGB, but only if the circumstances justifying the claim and the objective of the conciliation proceedings are sufficiently individualised. This should be assessed from the perspective of both the defendant and the conciliator. If this individualisation is missing or if the facts of the case or the request cannot be inferred, then the admissibility requirements for the conciliation proceedings are not met. However, the BGH approved the opinion of the previous instance that such a request for conciliation does not have an effect that prevents the statute of limitations in the sense of § 204 I No. 4 BGB if the opponent has seriously and finally refused to participate in conciliation proceedings in advance.⁵⁵

An inhibition also occurs as long as negotiations on the warranty are still ongoing (§ 203 BGB). Negotiations are suspended as long as the creditor assumes that the debtor does not finally refuse performance. The suspension also ends if it is to be expected in good faith that the warranty attempts will no longer have any progress. Negotiations on the claim within the meaning of § 203 BGB which suspend the statute of limitations do not require that the negotiations are aimed at realising the claims. Rather, it may be sufficient in individual cases if the claim holder claims to be famous in order to strengthen his negotiating position with regard to another interest, or it may appear legitimate and not abusive if legal prosecution measures are taken only for the purpose of suspending the limitation period.⁵⁶

Whether the Seller's measures or attempts to remedy defects only lead to an inhibition in accordance with §§ 203 ff BGB or to a restart of the limitation period in the sense of § 438 BGB of the Buyer's claims for defects depends on whether the measures concerned are to be regarded as an implied acknowledgement of the Seller's obligation to remedy defects, taking into account all circumstances of the individual case. This is by no means to be assumed regularly, but only if the seller acts from the buyer's point of view not only as a gesture of goodwill or to

⁵⁵ *BGH*, Urt. v. 28.10.2015 – IV ZR 526/14, NJW 2016, 233.

⁵⁶ *BGH*, Urt. v. 28.10.2015 – IV ZR 526/14, NJW 2016, 233 (235); *BGH*, Urt. v. 28.10.2015 – IV ZR 405/14, NJW 2016, 236 (237); *BGH*, Beschl. V. 17.2.2016 – IV ZR 374/14, NJOZ 2016, 645.

settle a dispute amicably, but in the knowledge that he is obliged to remedy the defect. The scope, duration and costs of the work to remedy the defects are of particular importance in this respect. Accordingly, as a rule, only a suspension of the limitation period occurs, whereas according to § 212 BGB only the acknowledgement and enforcement measures lead to a new start of the period. Acknowledgement can refer to the entire claim or only to a part of it. The partial acknowledgement interrupts the limitation period only for the acknowledged part, since in the case of divisible liabilities an acknowledgement does not have the power to interrupt the limitation period beyond this part.⁵⁷

c) Agreement on the statute of limitations

Finally, the problem of limitation can also be regulated by contract (§ 202 BGB). Both a shortening and an extension of the time limit is permitted by individual contract. However, a shortening of the statutory limitation period, which is carried out via general terms and conditions, raises problems.

A distinction must be made here between purchases of consumer goods within the meaning of § 474 (1) sentence 2 BGB and purchases in the B2B sector. A shortening of the limitation period vis-à-vis consumers is only possible under commercial law within the narrow limits of § 475 (2) BGB. It should be noted, however, that the provision - in accordance with the scope of the Consumer Goods Directive - does not apply to claims for damages under § 475 (3) BGB, i.e. these are subject to the parties' further disposition. However, as the provision expressly clarifies, limitations of claims for damages against consumers under the General Terms and Conditions must be measured against §§ 307-309 BGB. For the limitation of claims for defects under sales law, the inadmissibility of limitation periods of less than one year also results from § 309 No. 8 b) ff) BGB a.E..

In the B2B area, § 475 BGB does not apply. The admissibility of a one-year limitation period under GTC law must be measured against § 307 BGB in business dealings, see § 310 para. 1 sentences 1, 2 BGB. The extent to which shortening of the limitation period in general terms and conditions to less than one year is permissible for entrepreneurs is answered inconsistently. At least the reduction to one year is, however, to be recognised as permissible. For this purpose § 309 No. 8 b) ff) BGB a.E. can be used, which allows a limitation period of one year for claims subject to the usual limitation period already in the B2C area. However, for shorte-

⁵⁷ *Grothe*, in MüKo BGB 7. Aufl. 2015, § 212 Rn. 9; BGH v. 12. 7. 1960 - VI ZR 163/59, VersR 1960 831 (832).

ning the limitation period in cases of entrepreneurial recourse, the provision of § 478 para. 4 BGB (also for individual contractual agreements!) must be observed.

M.E. to be qualified as inadmissible within the meaning of § 307 para. 1 BGB are also such clauses in the General Terms and Conditions of Business which determine that the software is deemed delivered within the meaning of § 438 para. 2 BGB as soon as it is available for retrieval via the Internet. A clause formulated in such a blanket manner shall initially also cover cases in which the buyer, although the software is accessible via the Internet, actually does not yet have access to the file (for example, because he has not yet been informed of the accessibility or necessary access data). However, even a clause that includes the actual access of the user as a prerequisite would be doubtful. In fact, the buyer can only check the software for defects if it is already executable. However, this is usually only the case when the software has been downloaded and successfully installed.

5. Legal consequences

a) Individual warranty rights

The buyer of software has several rights, graded among each other (§ 437 BGB). He primarily has a claim for subsequent performance (§§ 437 No. 1, 439 BGB). If the buyer demands supplementary performance, the seller is immediately in default, as the demand for supplementary performance is to be regarded as a reminder. After the unsuccessful expiration of a reasonable grace period, the buyer may declare withdrawal, demand a reduction in price and/or compensation for damages.

aa) supplementary performance

Subsequent performance hardly plays a role in the area of standard software, because in the case of programming errors there is no such thing as a defect-free product. Instead, it must be assumed that the supplier is no longer able to fulfil the contract. In this respect, there is actually a case of subjective inability. The obligation of subsequent performance would then cease to apply without substitution and the buyer would instead only be able to demand withdrawal and reduction. However, an economic consideration would also be conceivable. In such cases, the customer may not claim repair, but the delivery of a new program version. This is based on § 439 para. 3 sentence 2 BGB ("without significant disadvantages"). This should also re-

sult in an obligation of the customer to adopt the new releases, whereby he must pay for additional functionalities according to the model "new for old."⁵⁸

§ Section 439 (4) BGB provides with reference to Section 346 (1) BGB that the buyer who demands subsequent performance by way of a new delivery must pay compensation for the use actually made of the defective item. This provision is particularly important for software, as it often happens there that the software user was able to use the defective software for some time despite its defectiveness. The obligation to compensate for the loss of use was also expressly affirmed by the Bundestag, which dealt in detail with the directive conformity of such a regulation and affirmed it. However, the regulation is also criticised. It is pointed out that, due to the maintenance of the purchase contract, the usage already paid for is settled with the purchase price, which the seller does not have to pay interest on for the period until the subsequent delivery. Moreover, the Consumer Sales Directive emphasises that the subsequent performance must be "free of charge" (Art. 3(2), 3). The Nuremberg Higher Regional Court and the Nuremberg-Fürth Regional Court have taken account of the considerable reservations by a teleological reduction of the norm, by denying a claim to compensation for use with reference to the wording of the provision (in § 439 (4) BGB, only "restitution" is mentioned). However, the Federal Court of Justice denied the possibility of correcting the statutory provision of § 439 (4) BGB in the sense of the Nuremberg Higher Regional Court by way of interpretation. At the same time, the BGH has doubts as to whether the provision with this anti-consumer consequence corresponds to the requirements of the EU Consumer Goods Directive. Art. 3 (2-4) of this directive stipulates that the replacement delivery must be free of charge. The Federal Court of Justice (BGH) therefore suspended the proceedings under Art. 267 TFEU and referred the matter to the ECJ for a preliminary ruling on the legal issue. Finally, the ECJ decided that a provision granting the seller compensation for the use of a non-conforming good is contrary to Art. 3 of the Consumer Sales Directive, whereupon the BGH, in the course of an interpretation in conformity with the Directive, decided that § 439 VI BGB is to be applied restrictively in cases of the sale of consumer goods according to § 474 I 1 BGB. The regulations on withdrawal referred to in § 439 IV BGB (§§ 346 to 348 BGB) apply in these cases only to the return of the defective item itself, but did not lead to a claim by the seller against the buyer for the return of the benefits drawn.⁵⁹

⁵⁸ So *Bartsch*, CR 2001, 649, 654.

⁵⁹ *BGH*, Urt. v. 26.11.2008 – VIII ZR 200/05 (OLG Nürnberg), NJW 2009, 427.

To comply with the case law of the European Court of Justice, paragraph 3 of section 439 of the German Civil Code has now been modified with effect from 1 January 2018. This extends the scope of the claim for subsequent performance compared to the previous legal situation: The draft provides that the seller is obliged to compensate the buyer for the expenses incurred for the removal of the defective item and for the installation or attachment of the repaired or defect-free item within the scope of subsequent performance irrespective of fault. The right of the seller, which is still provided for in the draft law, to choose whether to carry out the installation and removal itself or rather to reimburse expenses, was rejected by the committee, as possible competition should be avoided, which occurs in particular if the buyer has main contractual obligations for work and services on the one hand and contractual warranty obligations on the other hand, e.g. if the entrepreneur had installed the defective object of purchase at a third party before the defect occurred. Whether the obligation resulting from § 439 BGB n.F. to remove the old and to install the defect-free purchase item can also exist independently of the obligation to rectify the defect or to make a subsequent delivery remains unclear, however, due to the wording "within the scope of subsequent performance". This is to be discussed in cases in which both rectification of defects and subsequent delivery are impossible, but the purchaser wishes to have the defective item removed again.⁶⁰

It is noteworthy that the change is not limited to the classic installation cases. Now, by including "mounting", the scope of application is to be extended by those cases in which the object of purchase has not been installed in the literal sense, but has been "mounted" on an object in a similarly appropriate manner (e.g. subsequent installation of a hard disk or connection of a printer). The seller is protected to the greatest possible extent by an extension of the recourse claims against the supplier, so that a self-execution of the seller is not required even for reasons of cost limitation. The recourse claims against the supplier, which were previously regulated in § 478 para. 2 BGB (German Civil Code), are supplemented by an independent claim to reimbursement of the costs in the event of rectification of defects in § 445a para. 1 BGB (new version). In addition, contrary to the previous provision of § 478 para. 2 BGB, which presupposes that the end customer is the consumer, the now provided statutory provision of § 445a para. 1 and 2 BGB as amended provides for the possibility of recourse against

⁶⁰ Ebd.

the supplier, even if the end customer is an entrepreneur. This extends supplier recourse from the purchase of consumer goods to business transactions.⁶¹

The new regulations are of a planning nature - a contractual waiver is therefore possible. It is questionable whether the provisions can be waived in the context of general terms and conditions. In my opinion, a distinction should be made here between the Business to Consumer and Business to Business cases. As far as the relationship with the consumer is concerned, the obligation to pay for removal and installation costs is laid down in European law. The claim is based on the interpretation of the European Court of Justice of what the interpretation of Art. 3 of the Consumer Sales Directive is with regard to the buyer's claim for subsequent performance. With the obligation to reimburse the additional costs, the ECJ wanted to avoid that the consumer has to bear such costs in the case of a replacement delivery for a consumer good that is not in conformity with the contract and could thus de facto shy away from asserting such claims. However, such a claim, which is pre-formed under European law, can then probably not be excluded by general terms and conditions without violating essential basic ideas of the legal regulations (§ 307 para. 2 no. 1 BGB). It is therefore only understandable that the legislator, with the reform of building contract law, has also changed the law on general terms and conditions accordingly. The new regulation of § 309 I No. 8 b) cc) BGB n.F. prohibits a clause which excludes or limits the obligation of the user to bear or reimburse the expenses necessary for the purposes of subsequent performance.

The situation is different in the area between traders. Here, the corresponding regulation with regard to the installation and removal costs is not pre-defined by European law. Rather, the Bundestag has simply applied the consumer protection law concept to the commercial sector as well. In my opinion, tradespeople are less in need of protection here, so that it should be possible to waive the right to general terms and conditions. This is also supported by the fact that the Federal Court of Justice has expressly rejected such a form of subsequent claim in the B2B sector. The Senate pointed out at the time that such a claim was limited only to the sale of consumer goods and could not be extended to sales contracts between entrepreneurs or between consumers. However, according to the grounds of the law, a blanket exclusion of the obligation to pay costs is also inadmissible in B2B.⁶²

⁶¹ *Eckhoff*, Der neue § 439 BGB: Haftung ohne Grenzen?!, online verfügbar unter <http://www.cmshs-bloggt.de/commercial/der-neue-439-bgb-haftung-ohne-grenzen/> (zuletzt abgerufen am 07.10.2019).

⁶² BT-DRS 18/8486, S. 27.

In the context of the legal consequences, the question of the materiality of defects must also be examined. This question plays an important role in the software industry. Many software products have minor bugs, and the various error constellations cannot be tested on any product. In the past, the materiality threshold was a criterion on the facts side; insignificant defects generally excluded warranty rights (see § 459 para. 1 sentence 2 BGB old version). Following the reform of the law of obligations, minor defects are a question on the legal consequences side. The claim for subsequent performance is covered by

§ Section 439 (3) of the German Civil Code (BGB) is limited in that the Seller may refuse subsequent performance if the costs are unreasonable. After the reform of the building contract law as of 1 January 2018, § 475 para. 4 sentence one BGB n.v. provides for an exclusion of the plea of absolute disproportionality. This includes both cases in which only one place of subsequent performance is proportionate and cases in which each place of subsequent performance in itself incurs disproportionately high costs. If the disproportionate costs are based on expenses pursuant to § 439 (2) and (3), the contract seller may limit the reimbursement of expenses to an appropriate amount pursuant to § 475 (4) sentence two BGB. The legislator leaves open how the cost sharing is calculated in concrete terms. The relationship between cost sharing and withdrawal is also unclear. § Section 475 (5) provides that the buyer may withdraw from the contract without notice if the seller limits the reimbursement of expenses to an appropriate amount. It is completely unclear what happens to the already installed object of purchase in the event of withdrawal.

In the supplementary performance phase, the buyer has no claim to reimbursement of the costs of a substitute performance (for example, from § 326 para. 2 sentence 2 BGB analogously). Replacement performance is an instrument of the law governing contracts for work and services which cannot be incorporated into the law governing contracts of sale without inspection. According to the new version of § 439 (1) BGB, the buyer had the right to choose whether to demand that the seller remove and install the goods in their original condition or to demand reimbursement of expenses according to § 439 (3)..⁶³

bb) Withdrawal and reduction

If the supplementary performance fails, the user can withdraw from the contract or demand a reduction. For all these claims, a grace period must be set; the software dealer must be given the opportunity to implement his obligation of supplementary performance by means of a se-

⁶³ Grunewald/Tassius/Langebach, BB 2017, 1673; a.A. Höpfner/Fallman, NJW 2017, 3745, 3748 f.

cond delivery. A period of time sufficient to meet the requirements of § 323 para. 1 BGB is deemed to have been set if the debtor has been requested to render the contractual performance within a period of time reasonable under the circumstances.

According to the wording of the law (as in the case of Section 281 of the German Civil Code), the creditor does not necessarily have to attach a threat of refusal to the demand for performance. However, in view of the possible consequences for the further fate of the contract, the creditor must clearly express to the opposing party that the latter is given a last opportunity to perform the contractual service. The necessity of a clear expression of the buyer's will also follows from the systematics of warranty law. Subsequent performance represents the primary claim and is at the same time the legal remedy preceding the further rights of the buyer. It is not sufficient that the buyer of the software has often called the seller under the hotline number and complained about "the listed defects"..⁶⁴

Under the conditions of §§ 440, 323 para. 2 BGB (German Civil Code), the setting of a time limit is dispensable if the seller seriously and finally refuses its general contractual performance obligations or if the subsequent performance has failed or was unreasonable for the buyer (§ 440 sentence 1 BGB). This includes an appropriate period of time, especially when the dispatch route is taken into account. The fact that the device can only be repaired by the manufacturer does not make subsequent performance unreasonable. A failure of the supplementary performance is, moreover, to be assumed in accordance with the previous case law on the former § 11 No. 10b AGBG in the case of objective or subjective impossibility, inadequacy, unjustified refusal, undue delay and in the case of unsuccessful attempts at repair. Legislation has adopted this introduced term with the interpretation made by case law in this regard. Finally, it is also conceivable to deny the right of subsequent performance to the seller who fraudulently concealed a defect in the purchased item at the time of conclusion of the purchase.⁶⁵

Resignation is now - in contrast to change - a right to shape the future. Consequently, the declaration of resignation cannot be reversed - for example, by way of a change for reduction. However, the rescission only comes into effect if there is a defect; without a defect, the declaration of rescission is meaningless. In the event of withdrawal, the benefits derived by the user must be surrendered. Typically, the value of the uses is estimated according to § 287 ZPO. The estimate is based on the purchase price, the expected useful life and the actual use. There

⁶⁴ *OLG Köln*, Beschl. v. 1.9.2003 – 19 U 80/03, NJOZ 2004, 556.

⁶⁵ Vgl. zu dieser Überlegung: *Schur*, ZGS 2002, 243, 248.

are also problems with incorrectly calculated reductions. The reduction is ineffective as a design right if the user incorrectly calculates the amount of the reduction.

cc) Revocation

In order to implement the Consumer Rights Directive, in 2014 the customer was granted a right of withdrawal and a right of revocation for consumer contracts concluded after 13 June 2014 in accordance with §§ 355 ff. BGB was granted. The prerequisite for exercising this right is, instead of a defect in the purchased item, §434 BGB (see above), the existence of a consumer contract concluded outside of business premises (§ 312b BGB) or in distance selling (§ 312c BGB), which is the only possible option for software licensing contracts. According to § 312g BGB, the consumer has a right of revocation in accordance with § 355 BGB for these contracts. The term consumer contract is legally defined in § 310 III BGB. According to this, the contract must be one between an entrepreneur (§ 14 BGB) and a consumer (§ 13 BGB). Therefore, a contract must be between a natural or legal person or a partnership with legal capacity which, in the exercise of the legal transaction, fulfils its commercial or self-employed activity (entrepreneur) and a natural person who concludes a legal transaction for purposes which can predominantly be attributed neither to its commercial nor its self-employed professional activity (consumer). In mixed cases, however, the person shall be regarded as a consumer if the commercial purpose does not predominate in contracts with a dual purpose. Regularly, however, a company that buys software will not be able to make use of the revocation, but private customers who buy standard software via e.g. the Internet will be able to do so. As it is still located in the Fifth Title of Section III of the Law of Obligations, the provision equates recall with withdrawal in terms of exercise and legal consequences. The reason for exclusion of § 312g II No. 6 BGB is not irrelevant for contracts for software in distance selling. Accordingly, there is no right of withdrawal for contracts for the delivery of audio or video recordings or computer software in a sealed package if the seal is removed after delivery. This provision was introduced in the course of the implementation of the Consumer Rights Directive as a replacement for § 312d IV No. 2 BGB (old version). § 312g II No.6 BGB presupposes that a barrier used to protect copyright is overcome. The right of withdrawal is therefore not excluded from the outset, but expires as soon as the seal on the data carrier is broken by the consumer. The right of revocation does not lapse if the dealer has played software on hardware on behalf of the customer, no seal within the meaning of § 312g II No.6 BGB is a Sellotape which only functions for the safety of the transport. A sealed package is required. It must not be possible to access the data carrier without breaking the

seal. A seal is sufficient as an additional protective measure, e.g. shrink-wrapping in a film. According to § 355 II BGB the revocation period is basically 14 days after receipt of the goods § 356 II No. 1 BGB, but it does not start before the entrepreneur has informed the consumer according to the requirements of article 246a § 1 II S.1 No. 1 BGB or article 246b § 2 I EGBGB in terms of § 356 III S.1 BGB. The revocation instruction serves to ensure that the consumer can also exercise his rights. Therefore, a revocation instruction on the internet presence of the entrepreneur is not sufficient. Rather, the revocation instruction must reach the consumer in a manner suitable for permanent reproduction in written form. This is also not the case if the entrepreneur uses a so-called checkbox, by means of which the consumer declares that he has taken note of the cancellation policy and printed or saved it.

If, instead of withdrawing from the contract, the customer withdraws from the contract in accordance with the law on distance selling (§ 355 BGB), this generally relieves the customer of the burden of paying a usage fee. However, in certain exceptional cases a usage fee is also payable under distance selling law.

The purpose of the right of withdrawal is to give the consumer the possibility to withdraw from the contract after having received the product and examined it. The Austrian Supreme Court has decided that the right of withdrawal under distance selling law should give the consumer the possibility to withdraw from the contract after receiving the product and having checked it. It serves as a corrective for rash orders to which the consumer has been tempted by means of appropriate advertising and marketing measures. The consumer in distance selling is to be equated with a buyer who can inspect and check the goods before conclusion of the contract. Only revocation enables the consumer to take advantage of the benefits of distance selling and yet to see himself in a comparable position to someone who can examine the subject matter of the contract in depth before the conclusion of the contract. However, in the event of excessive use, the obligation to pay compensation for lost value does not lapse. The provisions for compensation for loss of value in the event of revocation are regulated in § 357 VII BGB. For this purpose, the loss of value according to § 357 VII No.1 BGB must first of all be due to handling of the goods that is not necessary for testing the condition, properties and functionality of the goods. However, the consumer is generally entitled to use the goods. However, it is still questionable to what extent wear and tear during the commissioning of software should lead to a loss of value, since software as an incorporeal object is not subject to the modalities of ordinary commissioning. If, in any case, a purchase contract has been concluded by means of distance selling and if the buyer has not only examined the object of purchase subject to wear and tear and depreciation during the withdrawal period before decla-

ring the withdrawal, but has also used it extensively (here 43 hours) to such an extent that the entrepreneur could only resell the object of purchase "used" at a considerably lower purchase price, there is nothing to prevent the imposition of an appropriate user fee including compensation for a reduction of the common value resulting from the use. It is left to the free will of the consumer whether and for what reasons he makes use of a right of withdrawal existing in the case of a distance selling transaction. This norm does not contradict Art. 6 of the "Distance Selling Directive".

dd) Expenses and damages

The buyer is entitled - also in addition to withdrawal and reduction - to a claim for damages and reimbursement of expenses. The calculation of damages becomes difficult in case of useless expenditures. According to §§ 280 para. 1, 281 para. 1 sentence 1, 437 no. 3 BGB (German Civil Code), the buyer is to be placed in the position he would have been in if the seller had properly fulfilled the contract. In this respect, the expenses which have become useless are not counted as part of this compensation, as these would also have been incurred if the object of purchase had been free of defects. The Regional Court of Bonn nevertheless assumed a claim for damages because such useless expenses fell under the presumption of profitability. These were expenses for material purposes which one could assume would have been profitable for the user in the end. The damage would then lie in a loss of the presumed compensation. In this respect, § 284 of the Civil Code did not block recourse to § 281.1 sentence 1 of the Civil Code and the presumption of profitability..

However, it is conceivable, for example, to regard expert costs as compensation "in addition" to the service within the meaning of § 280 para. 1 BGB, which can be claimed in addition to the claim for reimbursement of expenses pursuant to § 284 BGB. It is important to remember that § 284 BGB does not allow the reimbursement of expenses in addition to the compensation for damages instead of the service, but only in place of the compensation for damages instead of the service.

According to § 280 para. 1 sentence 2 BGB, fault is presumed. In any case, in the case of generic debts, fault is to be waived as a prerequisite for examination because of the associated assumption of the risk of defects..⁶⁶

⁶⁶ So *Canaris*, DB 2001, 1815; v. *Westphalen*, ZGS 2002, 154 ff.

b) Uniform unwinding in the event of a malfunction of a partial service

A further problem of computer contract law concerns the question of whether and when the user can also return the hardware to the seller in the case of defective software: Is there an overall processing right with regard to hardware and software, even if the hardware itself is free of defects? Does such a right also exist if hardware and software have been sold under different contracts or by different suppliers? In principle, all partial performances are to be classified as legally independent; in this respect, in principle, only a partial reversal is possible in the absence of a partial performance.

aa) Computer system as a uniform thing (§ 93 BGB)

An overall settlement right would be conceivable if software and hardware were to be regarded as a single thing within the meaning of § 93 BGB. This presupposes that software and hardware cannot be separated from each other without destroying or changing the nature of one of the components. In this context, only the traffic view, but not the will of the parties is to be taken into account.⁶⁷

As a rule, the requirements of § 93 BGB are not met in the software sector: Whereas in the 1960s and 1970s software and hardware were usually sold together (so-called bundling), the software market has now largely decoupled itself from the hardware market (so-called unbundling). Computer programs are therefore no longer bound to a specific type of hardware. Instead, thanks to the Windows and UNIX standards, it is possible to use software on a wide variety of computers. In this respect, computer programs and hardware no longer form an inseparable unit. If someone buys a PC together with software, it is not usually a uniform purchase item. Only in exceptional cases do hardware and software form a complete unit; this includes the use of non-Windows or UNIX-compatible "exotic" hardware or the ROM BIOS as well as operating systems for mainframes..⁶⁸

bb) Total withdrawal and partial benefits

The earlier regulation on the overall change has ceased to apply with the modernisation of the law of obligations. However, it was not replaced by § 323.5 sentence 1 BGB. According to this, the creditor can only withdraw from the entire contract in the case of partial performance if he has no interest in the partial performance already received. This provision only applies if

⁶⁷ Vgl. allgemein *BGH*, Urt. v. 25.10.1961 – V ZR 30/60, BGHZ 36, 50; *Ellenberger*, in: Palandt, 76. Aufl. 2017, § 93 Rn. 3.

⁶⁸ Vgl. *BGH*, Urt. v. 4.11.1987 – VIII ZR 314/86, CR 1988, 129.

the debtor has not rendered partial performance in full; in the constellation to be examined here, however, the seller has supplied hardware and software. In the reform of the law of obligations, the legislator intended instead that the creditor can withdraw from the entire contract in the event of only partial poor performance. Something else should only apply if the breach of duty is insignificant (§ 323, Subsection 5, Sentence 2, BGB).

However, it is precisely from the latter provision that a solution to the problem can be derived, which takes up the basic idea of the old provision of § 469 of the Civil Code. For example, a withdrawal according to § 323 BGB is only possible at all if it is a contract with partial performance. If there are two contracts, each of them must be examined separately and independently of the other with regard to rights of withdrawal. Therefore, the first thing to clarify is whether a contract for partial performance exists. In a second step, the loss of interest according to § 323, Subsection 5, Sentence 1, BGB and the irrelevance according to § 323, Subsection 5, Sentence 2, BGB must be discussed. This question can only be clarified by considering the disadvantages for the creditor. Thus both elements of § 469 BGB old version are integrated into § 323 BGB. Only the basic approach remains different. The old BGB started out from the principle of individual conversion; the overall conversion was the exception. In its current version, however, the BGB is based on the principle of total rescission.⁶⁹

(1) partial performance contract

The regulation requires a single contract for several partial services. Whether such a contract exists can, in my opinion, be clarified taking into account § 469 sentence 2 BGB (old version). For under the old BGB it was already decisive that hardware and software were "sold as belonging together". Such coherence exists "if the parties want to conclude the purchase only in the connection established by the common purpose of the goods, so that the goods appear to be intended to remain together". No problems arise here if both components have been sold by one hand in a contract; as the Federal Court of Justice (BGH) already emphasised in its decision of 4 November 1987, it can be assumed here that they belong together. The fact that there is a uniform contractual deed speaks for the presumption of uniformity.⁷⁰

In the meantime, it is also clear that the user may also change with regard to hardware and software if these have been acquired under different contracts but from one source. Although "the external appearance of the separate documents" is an indication of separate contracts, this indication can be invalidated, for example, by the fact that hardware and software have been

⁶⁹ Koch, CR 2001, 569, 572 f.

⁷⁰ BGH, Urt. v. 25.3.1987 – VIII ZR 43/86, NJW 1987, 2004 ff., vgl. auch OLG Köln, Urt. v. 11.1.2013 – 19 U 81/07, CR 2014, 427, OLG Köln, Beschl. v. 14.2.2013 – 19 U 166/12, CR 2014, 367 m. w. N.

coordinated with each other as an overall system according to the will of the parties and sold as a uniform package. It depends on whether the different agreements are legally "stand and fall" with each other, i.e. whether there is a will to achieve uniformity. Even if only one of the parties to the contract shows such a will for uniformity and the other recognises or at least accepts it, it can be assumed that a uniform contract exists. However, purely economic reasons are not sufficient. The Higher Regional Court of Munich has affirmed this in the case that hardware and software are used to perform certain tasks. The fact that the software may only run on the purchased hardware according to the General Terms and Conditions is also intended to speak in favour of the contractual unit. § Section 469 sentence 2 BGB (old version) was also applied if the supplier was to install the software on the hardware supplied by him. The same applies if the purchased hardware serves to convert an operating process.⁷¹

Difficulties arise, however, when the suppliers of the computer and those of the software are different persons; the case law on this is still in flux. If one refers to the case law on financed hire purchase, the required economic unity can only be affirmed if "beyond an expediency-method relationship, the two transactions are connected with each other in such a way that neither would have been concluded without the other or each of the underlying contracts only acquires its meaning through the other". In this case, it is most sensible to explicitly link the hardware and software contracts, since otherwise it is difficult to prove that they belong together. In some cases, it is also considered sufficient that the parties assumed the purchase of a uniform computer system in their sales negotiations. In this context, the Federal Court of Justice emphasizes that the purchaser must be recognisably interested in the uniform delivery or manufacture of the hardware and software; from his point of view, the hardware and software must appear as a "total solution to his problems". However, the mere fact that the software and hardware contracts were concluded at the same time is not sufficient. By way of recourse to objection, a uniform contractual relationship is to be assumed, even if the contracting parties are different, if the customer does not conclude different contracts on his own initiative, if a complete system is delivered by cooperation, if the software is to be used only on a certain hardware, if the impression is created that the customer is only dealing with one contractual partner, if there is a close temporal and factual connection between the deliveries and if the second conclusion of contract is mediated by the first supplier..⁷²

⁷¹ *OLG Köln*, Urt. v. 26.10.1990 – 19 U 28/90, CR 1991, 154, 156.

⁷² *OLG Köln*, Urt. v. 24.10.2000 – X ZR 72/98, CR 2001, 224 = ITRB 2001, 129.

(2) Loss of interest

Furthermore, § 323, Subsection 5, BGB, requires that the creditor has no interest in the partial performance already received. Here, too, the case law on § 469 sentence 2 BGB old version can be applied, according to which hardware and software cannot be separated from each other without disadvantage. In literature and case law, it is highly debatable when such a disadvantage exists. Partially, § 139 BGB is referred to. In the opinion of the BGH, a disadvantage should be present in particular if the procurement of a suitable replacement part causes considerable difficulties. Such difficulties are said to exist "if equivalent special software could only be obtained from other suppliers at considerably higher prices or only at unreasonable delivery times". The decisive factor is whether the creditor is no longer interested in receiving the partial performance already received for a correspondingly reduced consideration, for example because his specific purposes cannot be partially achieved with the partial performance or the missing parts can only be obtained with considerable effort. The interest of the creditor must be disproportionately impaired by the division beyond the deprivation of the part withheld. A comparable case is given if the installation of the replacement program is costly or the new program has a completely different structure so that the user would have to familiarize himself with the program again. The loss of interest is not to be affirmed in the case of the purchase of a commercially available computer and the provision of standard software. The situation is different if the buyer purchases a PC, monitor and software "from one source". In such a case, the buyer would lose the advantages of buying from a single source if he were to cancel a contract in isolation.⁷³

For the assessment of the irrelevance of a breach of duty pursuant to § 323, Subsection 5, Sentence 2, BGB, literature and case law require a comprehensive weighing of interests, taking into account the circumstances of the individual case. After the modernisation of the law of obligations, it was assumed in parts of the literature that the materiality threshold of § 323.5 of the Civil Code must be significantly higher than that of § 459.1 sentence 2 of the old version of the Civil Code. However, in its ruling of 28 May 2014, the Federal Court of Justice (BGH) decided that in the case of a remediable defect, it can generally no longer be assumed that the defect is irrelevant if the cost of remedying the defect exceeds an amount of five per cent of the purchase price. The dispute between the classification of the threshold according to the aspects of § 459.1 sentence 2 of the old version of the Civil Code (3-4 per cent) and the

⁷³ *OLG Düsseldorf*, Urt. v. 21.1.2000 – 22 U 122/99, CR 2000, 350, 351; *OLG Düsseldorf*, Urt. v. 21.1.2000 – 22 U 122/99, NJW-RR 2000, 1223.

demands of votes from the literature (10 per cent and more) has thus been decided by the highest court. However, this does not change the necessity of the individual case consideration.

IV. Liability

1. Liability for defects in sales law

The old German Civil Code (BGB) only provided for the possibility that the purchaser could claim damages for a defect instead of rescission or reduction in price in two cases, namely in the absence of a warranted characteristic (§ 480, Subsection 2, 1st case, old version of the German Civil Code) and in the case of fraudulent concealment of a defect (§ 480, Subsection 2, 2nd case, old version of the German Civil Code). This has changed fundamentally since the modernization of the law of obligations. Compensation is now available for every software defect for which the customer is responsible, equal in rank to withdrawal and reduction (§ 437 No. 3 BGB). What is required, however, is the unsuccessful expiry of an appropriate grace period (§§ 280, 281 para. 1 sentence 1 BGB). If subsequent performance is impossible, it is not necessary to set a grace period; the claim for damages is then derived directly from § 437 No. 3 in conjunction with §§ 280, 283 or § 311a BGB. Like the right to withdraw from the contract and the right to reduce the purchase price, the claim for damages expires two years after delivery of the software (§ 438 para. 1 no. 3 BGB). If the buyer asserts the right of withdrawal, he cannot invoke a claim for damages; the same applies vice versa.⁷⁴

However, liability is only possible if the buyer can prove intent or negligence on the part of the seller with regard to the defect (§§ 280 para. 1 sentence 2, 276 BGB). A stricter liability can at most result from the content of the obligation, in particular from the assumption of a guarantee. In terms of time, it regularly depends on the recognisability of the defect at the time of transfer.⁷⁵

2. Liability due to the violation of pre-contractual duties of disclosure (§ 280 para. 1 BGB)

a) preliminary considerations

In addition to liability for software defects, liability for breach of duty (§ 280 para. 1 BGB) is of great importance. A contracting party must be liable for damages even if it has delivered a

⁷⁴ Arg. ex §§ 437 Nr. 3 i.V.m. 281 Abs. 1 BGB.

⁷⁵ *BGH*, Beschl. v. 13.4.2005 - IV ZR 62/04, NJW-RR 2005, 1051.

faultless product or if a contract was not concluded at all. Any non-fulfilment of secondary contractual obligations is a breach of duty and leads to liability for damages, unless the supplier can prove that he is not responsible for the breach of duty (§ 280 para. 1 sentence 2 BGB). In addition, the user can demand compensation instead of performance (§ 281 para. 1 BGB) or withdraw from the contract (§ 323 para. 1 BGB) in the case of any not insignificant breach of duty after unsuccessful setting of a deadline.

Case law has always assumed that the seller/entrepreneur has certain duties of care already in the run-up to the contract negotiations and called this legal institution "c.i.c.". Now the obligatory relationship at the time of the initiation of the contract is defined in § 311 para. 2 in connection with § 241 para. 2 BGB. Accordingly, the seller must also take into account the rights, legal interests and interests of the potential buyer before the conclusion of the contract. In particular, he is thus subject to the duty of disclosure with regard to the object of sale. If the seller culpably fails to fulfil these obligations vis-à-vis the buyer, he must be liable for any damage that may occur. This liability circumstance helps in many warranty processes, especially if a defect is not or only with difficulty provable. However, the seller in the specialized trade is only obliged to provide information about the characteristics that he knows or must know. The buyer can therefore not expect any information about remote risks, which may be known to the manufacturer of the goods due to his outstanding expertise. An obligation to inquire with the manufacturer about the characteristics of the object of purchase only applies to the seller if he has or must have doubts about the suitability of the goods for the use intended by the buyer on the basis of concrete evidence. In any case, the IT dealer has a duty to determine the wishes and expectations of the customer; any ambiguity is at the expense of the supplier. The dealer also has the duty to point out restrictions for the application (here: unsuitable hardware of the user). In addition, indications of possible capacity problems are owed. Specifications are also part of the duty to provide information - including the offer to prepare the specifications.⁷⁶

As a rule, the buyer cannot pass on the economic consequences of the realisation of a risk to the seller by asking him for advice on the object of purchase. In this respect, the principle remains that - outside the warranty under purchase law - the risk of use lies with the buyer. If the user succeeds in proving that the supplier negligently failed to inform him correctly about circumstances essential to the contract prior to conclusion of the contract, he has several pos-

⁷⁶ *OLG Stuttgart*, Urt. v. 18.10. 1988 – 6 U 64/88, CR 1989, 600.

sibilities. He can demand cancellation of the contract, claim compensation for his useless expenses or keep the software and demand the (lost) lower price.⁷⁷

This claim is subject to a limitation period of three years from the time of knowledge or grossly negligent lack of knowledge (§ 199 para. 1 BGB). In the absence of knowledge or grossly negligent lack of knowledge, the ten-year limitation period applies, provided the claim has already arisen. If the claim has not arisen, there is a limitation period of 30 years from the date of the breach of duty (§ 199 para. 3 BGB)..

b) Distinction from an independent consultancy contract

The rights of the user are better if he has concluded an additional consultancy contract with the supplier in addition to the purchase/work contract (§ 611 BGB). No special agreement or even a written contract is required for such a contract. Rather, in the opinion of the BGH, such an information contract is tacitly concluded if information provided by the supplier was recognisably of considerable importance and the basis for important decisions of the user. In such a case, the user can claim full compensation for damages under § 280 para. 1 BGB..

3. Liability due to the breach of contractual obligations

In addition to pre-contractual secondary obligations, case law also recognises a number of contractual secondary obligations, the negligent non-compliance of which on the part of the seller/entrepreneur triggers liability under § 280 Para. 1 BGB. These are, for example, obligations to protect the health or property of the customer.⁷⁸

If the supplier or user negligently fails to comply with these obligations and the other party to the contract suffers damage as a result, the other party to the contract may demand compensation for non-performance or withdraw from the contract. For certain types of contract, which also include the contract of sale and contract for work and services, there is a reversal of the burden of proof with regard to fault in accordance with § 280 Para. 1 Sentence 2 BGB. Thus, the debtor must exonerate himself with regard to his fault if it is either certain that he has objectively violated the obligations affecting him and the alleged damage has arisen as a result,

⁷⁷ *BGH*, Urt. v. 8.12.1989 – V ZR 259/87, NJW 1990, 1661; *BGH*, Urt. v. 17.12.1987 – 4 StR 440/87, NJW-RR 1990, 1335.

⁷⁸ *Peters/Jacoby*, in: Staudinger, BGB, 15. Aufl. 2013, § 631 BGB Rn. 59.

or the cause of the damage which has occurred, from which he must protect his contractual partner, falls within his sphere of control and responsibility.⁷⁹

In this case the claims from § 280 para. 1 BGB expire in the general period of time of § 199 BGB. However, a shorter (two-year) limitation period applies in accordance with § 438 BGB ana-log if the damage is directly related to material defects.⁸⁰

4. Liability according to ProdHaftG

Furthermore, liability according to the product liability law (ProdHaftG) shall be considered. The application of the product liability law is usually rejected with reference to the fact that software is not a movable object and thus not a product in the sense of the Product Liability Act. In any case, however, the applicability of the Product Liability Act is to be affirmed for standard software, since this is a movable object within the meaning of § 90 BGB. This viewpoint corresponds both to the national "opinio communis" and the state of the international product liability discussion.⁸¹

With regard to individual software, the previous literature is not entirely in agreement. The fact that the ProdHaftG also covers handicraft products speaks in favour of including individual software. The explanatory statement on protection states: "The method of manufacture is of no importance for the qualification as a product. In addition to the industrially manufactured item, this also includes, for example, items made by hand or by handicraft". However, it must also be taken into account that the German Product Liability Act regulates the problem of liability in the case of multi-stage sales of mass products, whether they are manufactured by machine or by hand. Precisely for this reason, the explanatory memorandum of the law always speaks of "a product being placed on the market and used" and repeatedly refers to "manufacturers of goods" and "consumers". According to the explanatory memorandum, a "placing on the market" only exists if a product "has been placed in the distribution chain".

⁷⁹ Vgl. *BGH*, Urt. v. 11.2.1977 – V ZR 40/75, BGHZ 67, 383, 397; *BGH*, Urt. v. 18.12.1990 – VI ZR 169/90, NJW 1991, 1540, 1541. Vgl. auch *BGH*, Urt. v. 22. 10. 2008 – XII ZR 148/06, NJW 2009, 142 Tz. 15, wonach die Rechtsprechung zum alten Schuldrecht auch nach der Schuldrechtsreform gilt.

⁸⁰ *BGH*, Urt. v. 21.11.1989 – VI ZR 350/88, NJW 1990, 908; *BGH*, Urt. v. 26.4.1989 – VIII ZR 312/87, NJW 1989, 2118, 2119.

⁸¹ So etwa *Stuurman*, Product liability for software in Europe. A discussion of the EC-directive of 25 July 1985, in: Vandenberghe (Hrsg.), *Advanced Topics of Law and Information Technology*, Deventer 1989, 110, 112 ff.; *Whittaker*, European Product Liability and Intellectual Products, in: LQR 105 (1989), 125, 138 ff.; *Bown*, Liability for Defective Software in the United Kingdom, in: *Software Protection* 1/1986, 1, 12; *Reed*, Product Liability for Software, in: *Computer Law & Practice* 4 (1988), 149 ff.; ähnlich für den Bereich des *UCC Aubrey's R.V. Ctr., Inc. v. Tandy Corp.*, 46 Wn. App. 595, 600, 731 P.2d 1124 (1987) (accepting agreement of parties that U.C.C. Article 2 applied to transaction involving defective software); *mAdvent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 675–76 (3d Cir. 1991) (holding that computer software falls within definition of a 'good' under U.C.C. Article 2).

The law therefore obviously assumes a hierarchical and differentiated distribution network from the manufacturer via the importer and dealer to the end consumer. Such a network is completely absent in the creation of individual software; here, manufacturer and user are directly opposed to each other and are directly linked to each other by contract. In this respect, the ProdHaftG is not applicable to such tailor-made individual programs from its basic conception.

A claim according to the product liability law requires first of all that there is a defect in the sense of § 3 paragraph 1 of the law. According to this, a product has a defect if it does not offer the safety that can be reasonably expected under consideration of all circumstances. In this respect it is problematic that security standards are not generally defined in the IT industry. There are hardly any sets of rules that define generally binding rules for the development of secure products. Therefore, the general practice of certain security expectations must be taken into account.

It is particularly problematic that the claim for damages is only granted in the case of damage to health or damage to other objects, provided that these are usually used privately (§ 1 para. 1 sentence 2 ProdHaftG). This regulation leads to the fact that the product liability law is hardly applied in the software sector. With regard to conceivable medical damages, the law only plays a role in the case of navigation software (e.g. flight control) and in the area of medical data processing. Damage to other, privately used objects only comes into consideration if, for example, the user's computer explodes due to software. For damage to commercially used objects the law is not applicable from the outset. In addition, the law assumes an excess of 500 Euro in the case of damage to property according to § 11 ProdHaftG. However, it should be very rare that the damage to a consumer when using software exceeds this amount. The law only plays a (modest) role because liability under the ProdHaftG cannot be excluded by contract (§ 14 ProdHaftG). This means that a reference to unlimited liability under the ProdHaftG must be included in every liability clause. Apart from that, the tortious liability according to § 823 BGB remains in force in addition to the ProdHaftG (§ 15 para. 2 ProdHaftG), which is of central importance for property damage below 500 Euro and damage to commercially used objects.

5. Liability according to § 823 paragraph 1 BGB

With § 823 paragraph 1 BGB it depends crucially on the fact that body, life, health, eggs or another absolute legal interest is injured. Manufacturers and dealers have product monitoring obligations, whose violation triggers claims for damages according to § 823 para. 1 BGB. This applies in particular to medical software, the use of which can under certain circum-

stances lead to damage to health. It is questionable whether the loss of data can also be punished as a violation of proprietary rights under § 823 Para. 1 BGB. In some cases, the law on data stocks and other collections of information is placed directly under the protection of § 823 para. 1 BGB. In contractual relationships, the Federal Court of Justice (BGH) regards the data stock of a computer user as an independent asset that is considerable and worthy of protection under damage law as an object of damage. In the case of a current-related loss of data, the Regional Court of Constance has emphasised that electronic data does not fall under the (property law) concept and thus no legal interest within the meaning of the provision is violated. Furthermore, the German Equipment and Product Safety Act is applicable to software; the law is also a protective law within the meaning of § 823 para. 2 BGB. In this respect, the manufacturers are required to carry out risk management as a preventive measure.⁸²

In case of data loss, § 254 BGB is also important. Data backup is a generally known matter of course. In view of the manifold dangers of a data loss and the regularly resulting serious economic damage for the EDP user, data backup is considered indispensable. Thus, the OLG Hamm had to deal with the liability for loss of data on the occasion of maintenance work by a commissioned computer company. The judges emphasise that the client of maintenance work is to be held responsible for the loss of data if he does not carry out a data backup himself before carrying out the work on the computer system. This may be taken for granted by contractors when carrying out work on such systems. However, there are additional inspection obligations if there are serious doubts that a data backup has not been carried out properly or that the security system is not functioning.⁸³

It is unclear to what extent such a duty of observation on the part of the trader exists. In the case of an imported defective product, the BGH affirmed claims of the customer against a dealer according to § 823 para. 1 BGB: The defendant, as a trader, had violated its obligation to ensure safety on the road. It is true that the manufacturer of the goods is in principle fully responsible for a product defect that has arisen in his area of knowledge and activity. In contrast, the trader was only bound to a limited extent by product-related obligations to avert risk. In particular, he is not affected by the full scope of liability of a manufacturer of goods because he acts "like a manufacturer" by using his own trademarks. However, a trader who alone sells the goods in question in Germany has a special position. In such a constellation, the (sole

⁸² *Littbarski*, VersR 2005, 448, 457; *Zscherpe/Lutz*, K&R 2005, 499.

⁸³ So auch *BGH*, Urt. v. 2.7.1996 – X ZR 64/94 = NJW 1996, 2924; *OLG Hamm*, Urt. v. 10. 5.1999 – 13 U 95/98, CR 2000, 289; *OLG Karlsruhe*, Urt. v. 7.11.1995 – 3 U 15/95, NJW 1996, 200 = CR 1996, 352; *OLG Köln*, Urt. v. 2. 2.1996 – 19 U 223/95, CR 1996, 407 = NJW-RR 1997, 558; *OLG Köln*; Urt. v. 22.4.1994 – 19 U 253/93, CR 1994, 532 = NJW-RR 1994, 1262.

distributor) dealer acts as a link between the German consumer and the foreign manufacturer on account of the domestic monopoly position. In such a case, the Federal Court of Justice leaves it open as to whether the defendant had an obligation to so-called product monitoring on account of its position, i.e. whether it would have been obliged to set up a business organisation for the purpose of obtaining information on the practical probation of the product. Instead, the Senate "at least" affirms the duty of passive product monitoring, i.e. the duty to examine complaints about the product.

Furthermore, it should be noted that the manipulation of exhaust software can not only lead to further obligations of the seller as a defect, but can also establish a liability of the seller via § 826 BGB as intentional immoral damage.⁸⁴

V. Regulation of warranty and liability by AGB

In the following, it will be explained how the question of warranty and liability can be dealt with by contract.⁸⁵

GTCs must first be effectively incorporated into a contract. For this purpose, according to § 305 Abs. 2 BGB, the other party must be expressly informed or, if this would be disproportionate, at least by a clearly visible notice at the place of the conclusion of the contract of the inclusion of GTC in the contract. The other party must be given the opportunity to take note of the content in accordance with § 305 para. 2 no. 2 BGB. The Austrian Federal Supreme Court assumes that the user of the GTC must provide the other party with a possibility of reasonable knowledge. This is the case if the terms are made available via the Internet - especially if the parties communicate with each other via e-mail - but not if they are made available via fax. If an effective inclusion of the GTC has been made, the question must also be clarified as to which provisions actually regulate content control..

When using general terms and conditions of business, the application of §§ 307 and 309 BGB (German Civil Code) comes into consideration for the area between B2C and B2B in addition to §§ 138, 444 BGB. It is noticeable that § 475 BGB acts like a disruptive factor. This is because this excludes regulations for individual contracts at the expense of consumers, which are in turn expressly considered to be effective in the context of content control also for contracts with consumers (§ 309 BGB). However, § 309 BGB is subject to the proviso "even

⁸⁴ *OLG Köln*, Urt. v. 3.1.2019 – 18 U 70/18.

⁸⁵ Dazu auch eingehend *von Westphalen*, in: Schneider/von Westphalen, *Software-Erstellungsverträge*, 2. Aufl. 2014, Kap. K Rn. 13 ff.

if a deviation from the statutory provisions is permissible". This is intended to express that mandatory provisions of the BGB are to be examined with priority. This means above all the provision in § 475 BGB in favour of the purchase of consumer goods. In this respect, the legislator has decided to implement the Consumer Sales Directive in the reform of the law of obligations to a very limited extent, purely according to its wording. This results in contradictions in valuation which can hardly be resolved, as will be shown in the following.

It is above all questionable what scope remains for § 309 BGB. This regulation does not apply to business terms and conditions that are agreed upon vis-à-vis an entrepreneur (§ 310 para. 1 BGB). In this respect, § 309 BGB mainly applies to C2C as well as to those areas of business with consumers that are not covered by the term consumer goods purchase. These are the sale of immovable property (§ 474 para. 1 sentence 1 BGB) and the compulsory auction of used goods (§ 474 para. 1 sentence 2 BGB). In addition, apart from the law on sales, there are in particular the areas of the law on contracts for work and services, above all the law on construction services; in the latter case, however, the provisions of §§ 309 No. 8b lit. bb) and ff) BGB apply only to a limited extent. Furthermore, it should be noted that deviating agreements are also permissible in the area of liability in the case of the purchase of consumer goods (§ 475 para. 2 BGB).

According to § 307 para. 1 BGB (German Civil Code), provisions in GTC are invalid if they unreasonably disadvantage the contractual partner of the user contrary to the requirements of good faith. Accordingly, a provision in the GTC of an Internet platform is invalid if, on objective interpretation, the user reserves the right to remove digital content acquired from the customer against payment. An unreasonable disadvantage can also result from the fact that the provisions are not clear and understandable (§ 307 para. 1 sentence 2 BGB). According to § 310 Paragraph 1 Sentence 2 (old version) of the German Civil Code, however, the interpretation of this provision must take appropriate account of the customs and practices applicable in commercial transactions. The prohibitions of clauses in §§ 307-309 BGB, which largely correspond to the previous provisions in §§ 9-11 AGB, apply to the relationship between entrepreneur and consumer in AGB law.

However, it is questionable whether Section 475 of the German Civil Code has a model function within the framework of Section 307 of the German Civil Code for contracts between undertakings. One could draw the conclusion from § 475 BGB that the regulations of the law of sale mentioned there are fixed to general terms and conditions. However, this is contradicted by the clear division of the different types of contracts with the respective differentiation between B2B and B2C. The *argumentum e contrario* is decisive. If the German Civil Code

now interprets the scope of application of the mandatory provisions in § 475 BGB narrowly as a result of the Consumer Goods Directive, the only conclusion that can be drawn from this is that the principle of contractual autonomy applies in areas outside the sale of consumer goods. Using § 307 BGB to incorporate the basic ideas of § 475 BGB and the provisions referred to therein would counteract this basic model. § Section 475 BGB does not apply if the buyer feigns a commercial purpose to the seller. The seller's statements about the existence of a trade on his side are irrelevant. Section 475 BGB does not apply to C2C transactions.⁸⁶

1. Exclusion of warranty (§ 309 No. 8b lit. aa) BGB)

According to § 309 No. 8b lit. aa) BGB (German Civil Code), a clause is invalid which excludes any warranty for contracts of sale or contracts for work and services for new goods and services or which restricts it to the containment of claims against third parties (in particular the manufacturer). Such a clause violates § 309 No. 8b lit. aa) BGB, insofar as contracts for the delivery of newly manufactured goods are concerned. It should be noted that this provision covers both legal and material defects. However, the scope of application of § 309 No. 8b BGB is considerably restricted compared to the previous § 11 No. 10 AGBG. This is due in particular to the fact that now, when selling software in the B2C relationship (so-called sale of consumer goods), the mandatory regulatory effect of § 475 para. 1 BGB must be observed, regardless of whether the goods are new or used. The same applies according to § 651 BGB for a contract which has as its object the delivery of movable goods to be manufactured or produced. Apart from C2C, which is rather insignificant with regard to the use of general terms and conditions, § 309 No. 8b BGB thus only covers contracts for newly manufactured immovable property and for work and services that are not covered by § 651 BGB.

§ Section 309 No. 8b lit. aa) BGB prohibits in particular the complete exclusion of the rights from §§ 437, 634 BGB. At the same time, this indicates that a limitation to reduction or withdrawal is generally permissible. However, the symmetry with § 309 No. 8b lit. bb) BGB must be maintained here, according to which the customer must expressly reserve the right to withdraw from the contract and reduce the purchase price. Consequently, it can be assumed that the limitation of the customer's right to a reduction in price by means of a clause is permissible before § 309 No. 8b lit. aa) BGB, but cannot be reconciled with § 307 Para. 2 No. 1 BGB. Conversely, the limitation of the liability for material defects to the more extensive right of rescission under exclusion of the right to reduce the purchase price is not objectionable.

⁸⁶ So für den Privatverkauf von „Bastlerautos“ *OLG Oldenburg*, Urt. v. 3.7.2003 – 9 W 30/03, ZGS 2004, 75.

The inadmissible exclusion of the rights from §§ 437, 634 BGB (German Civil Code) is equivalent if the rights left to the customer fully exclude a certain range of defects from liability ("We are not liable for hidden defects") or if the user only wants to be liable for defects for which he is responsible. The latter contradicts, in particular, the obligation to assume liability regardless of fault arising from § 437 No. 1 BGB. Furthermore, the limitation to the defects detected during delivery or acceptance as well as to the defects "acknowledged" by the User shall be ineffective, because the User has released itself from its liability for defects to the extent of the later occurring, unacknowledged defects. The invalidity of the clauses already inadmissible according to - as described above - § 309 No. 8b can also be justified on this basis.

The prohibition to fully exclude liability for defects also applies in the B2B relationship. Between merchants, a clause such as "We assume no liability for special offers and goods to be collected" is also invalid. In this respect, the general content control according to §§ 307 para. 1, 310 para. 1 BGB (German Civil Code) applies. Here it is to be noted that the legal regulations referred to in § 307 para. 2 No. 1 BGB and the essential basic ideas connected with them have sometimes changed considerably due to the reform of the law of obligations. In detail, the extent to which the new regulations have a model function is to be critically examined. In sales law, the special provisions on the sale of consumer goods, which are based on EU Directive 1999/44/EC, do not serve as a model for the B2B and C2C sectors. The guidelines merely aim to strengthen the legal position of the customer as a consumer within the meaning of § 13 BGB. Thus, there is no concern that the buyer's right to choose the type of supplementary performance within the meaning of § 439 (1) BGB in the B2B area may be considered waived. It should also be considered in this area whether the seller's right to make a second tender (§§ 437 no. 1, 439 BGB) can be effectively waived in the terms and conditions of purchase. Such an agreement also seems appropriate in the interest of the speed of trade.

Ineffective are clauses such as:

- „Any warranty is excluded.“⁸⁷
- „The buyer confirms upon delivery that the delivered goods are in a wall-free condition upon delivery.“⁸⁸

⁸⁷ Diese Klausel ist auch gegenüber Kaufleuten unwirksam; vgl. *BGH*, Urt. v. 26.6.1991 – VIII ZR 231/90, ZIP 1991, 1362.

⁸⁸ So auch *KG Berlin*, Urt. v. 26.6.1991 – VIII ZR 231/90, NJW 1991, 2630 = ZIP 1981, 1105; *OLG Hamm*, Urt. v. 12.12.1988 – 31 U 104/87, NJW 1989, 1041.

A provision is permissible according to which the warranty does not extend to defects that are attributable to a failure of the customer to operate the product. It is questionable, however, whether such a clause makes sense, as it ultimately only reflects the statutory regulation.

A disclaimer of warranty for "bargains" is ineffective, for example in the following way: "We do not assume any warranty for special offers and pick-up goods. Equally ineffective is the statement: "Technical products are never free of defects". The buyer must know that the seller is subsidiarily liable. The dealer may also not point out to the customer that the latter asserts his warranty claims directly with the manufacturer or his domestic distribution company ("In the event of defects, the buyer must first contact the manufacturer/supplier").⁸⁹

A difficult question is whether such an exclusion of warranty would also be permissible in the case of individual agreements when purchasing consumer goods at the expense of a consumer. § 475 para. 1 sentence 1 BGB prohibits a deviation from § 437 BGB to the disadvantage of the consumer. According to § 437 BGB the buyer has the right to demand fulfilment, withdrawal, reduction and compensation. This limitation of § 437 No. 1 and 2 BGB justifies the assumption that a corresponding agreement violates § 475 para. 1 BGB.

§ 475 para. 1 sentence 1 BGB thus orders the mandatory applicability of the aforementioned provisions. According to § 475 para. 1 sentence 2 BGB, also such agreements are invalid which aim to modify the rights of the buyer to his disadvantage by other contractual arrangements.

Such a possibility could arise in the law on sales from an agreement on the freedom from defects of the purchased item. Formulations such as the "sold as is" formula mentioned above represent a contractual definition of the "agreed quality" of the goods within the meaning of § 434 para. 1 sentence 1 BGB. Such a clause declares the item to be free of defects as seen by the buyer. The buyer can therefore not assert any deficits that may occur within the scope of the warranty claims to which he is entitled; they do not fall within the definition of a defect by the agreement.

Since this is thus an indirect cancellation of the warranty rights granted to the consumer, it must be assumed that such formulas will also be used in the future pursuant to § 475, Subsection 1, Sentence 2, in conjunction with § 475, Subsection 1, Sentence 2, of the German Civil Code. § 475 para. 1 sentence 1 BGB are invalid.

Furthermore, the clause "sold as is" is also ineffective according to § 138 BGB. Furthermore, the area of fraudulent intent and guarantees (§ 444 BGB) must be considered.

⁸⁹ *BGH*, Urt. v. 10.7.1980 – VII ZR 139/79, NJW 1980, 2800 = MDR 1980, 1014.

2. Restriction of supplementary performance

Within the framework of § 309 No. 8b bb) BGB, a limitation of the rights of withdrawal and reduction by means of an upstream supplementary performance phase is permissible. However, the provision has undergone a considerable change in meaning due to the modernisation of the law of obligations. Whereas previously the restriction by clause to subsequent improvement in the context of § 11 No. 10b AGBG, which is identical in wording, meant a genuine improvement in the position of the user - he was not exposed to the otherwise immediately applicable statutory warranty rights at least until the subsequent improvement failed -, this legal position is now in principle accorded to him even without a corresponding clause provision. This is explained by the fact that the institute of subsequent performance regulated in § 439 BGB has a double legal nature. Although the subsequent performance is on the one hand a consequence of the claim to the procurement of a defect-free item (continuation of the claim to performance), on the other hand it is also the seller's right to the so-called second tender before he is threatened with withdrawal, reduction and compensation. As the primary remedy under the new law on breach of contract is therefore subsequent performance, the significance of § 309 No. 8b bb) BGB is already considerably weakened by this. Furthermore, the delimitation to §§ 474, 475 BGB must be observed. For the purchase of consumer goods it remains mandatory that the buyer can demand subsequent performance and - after unsuccessful setting of a deadline - reduction or withdrawal and also compensation for damages (§§ 280 ff. BGB) or reimbursement of futile expenses (§ 284 BGB). Only in the case of consumer transactions which do not fall under the purchase of consumer goods, § 309 No. 8b bb) BGB shall apply. Clauses which provide for a "right of repair" on the part of the purchaser are likely to be inadmissible. The mere formulation "the buyer can demand rectification of the goods" violates § 309 no. 8b bb) BGB, because the buyer who is not legally competent could have the impression that he cannot assert any other rights apart from rectification. However, § 309 No. 8b bb) BGB provides that the other party to the contract must expressly reserve the right to reduce the purchase price or, at its option, to withdraw from the contract if the subsequent performance fails. The customer must therefore also retain the right to withdraw from the contract or reduce the purchase price in the event of failed subsequent performance.

According to §§ 437, 439 BGB, the concept of supplementary performance goes far beyond that of rectification. It includes both the removal of the defect and the delivery of a defect-free item (§ 439 para. 1 BGB). However, a restriction to one of the two possibilities of subsequent improvement is conceivable, for example by clearly referring to the possibility of remedying the defect, provided that the contractual partner expressly reserves the right to reduce the

purchase price or to withdraw from the contract if the possibility of subsequent performance granted in each case fails.⁹⁰

As with previous case law, the concept of "reduction" could also be problematic. However, the former term "reduction of remuneration" has been replaced by the term "reduction" (§§ 437 no. 2, 441 BGB). This is an indication that it is also permissible to speak of reduction in general terms and conditions. In contrast to the case law on the old AGBG, the reference to "reduction" is ineffective in non-commercial transactions, as the law now uses the term itself as a technical term.

A formulation once approved by the Federal Court of Justice in an earlier decision should be admissible: "As long as we fulfil our obligations for subsequent performance, in particular for the elimination of defects or the delivery of a defect-free item, the customer has no right to demand a reduction of the remuneration or to declare withdrawal from the contract, unless the subsequent performance has failed."

It is also necessary to limit the number of attempts at subsequent performance. In some cases, the case law considered the formal stipulation that the customer must permit three attempts at subsequent improvement to be ineffective, but in others the introduction of an obligation on the part of the customer to tolerate three attempts at subsequent improvement was also considered permissible. As a result, the question of how many attempts at subsequent performance the customer must permit will have to be made dependent on the nature of the defect and a weighing up of the mutual interests. Within the framework of the law on sales, § 440 sentence 2 BGB is now to be applied, which assumes a failure of the subsequent improvement after two attempts.

§ Section 439 (4) of the German Civil Code (BGB) also provides for the possibility that the seller can demand that the buyer return the defective item upon delivery of a defect-free item. Such an obligation to return the goods can also be anchored in the law on general terms and conditions. Furthermore, subsequent performance can be made dependent on the purchase price being paid in an appropriate part, in the determination of which the fact of defectiveness must be taken into account in accordance with § 309 No. 8b dd) BGB. In this respect, the definition of appropriateness is subject to narrow limits. The upper limit for the partial performance is the value of the defective performance. If the service is of no value to the customer, the customer may not be required to pay. This differentiation must be observed when drafting the clause.

⁹⁰ Vgl. auch BR-Drs. 338/01, 363.

In connection with the claims for damages to be taken into account, § 444 BGB also becomes relevant. If the user of the General Terms and Conditions has assumed a procurement risk within the meaning of § 276 BGB or a guarantee within the meaning of § 444 BGB in an individual contract, he has thereby established his unconditional - no-fault - obligation to assume liability. A clause which is contrary to the standard of fault in § 276 BGB and which provides for liability only in the event of fault is then in breach of § 307 para. 2 no. 2 BGB if the achievement of the purpose of the contract is obviously at risk. At the level of purchasing conditions, it also follows that the user as purchaser is not in a position to impose the conditions of a no-fault guarantee liability by means of a form, if and insofar as such a liability obligation is not the result of an individual contract, but only an agreement as to quality in accordance with § 434 BGB or § 634 BGB.⁹¹

Within the framework of § 307 BGB, the basic model of § 308 BGB is also applied. It is permitted to make withdrawal and reduction dependent on the failure of the supplementary performance. However, the two primary rights may then not be restricted. A limitation, e.g. to the right to reduction, is also negligent between companies in terms of general terms and conditions.⁹²

The rights of recourse of the trade against the "backers" are strengthened to the extent that the entrepreneur can make use of his suppliers more easily in the case of the purchase of consumer goods according to § 478 BGB. This is justified by the fact that the defect in the purchased item is not the fault of the dealer himself, but of the manufacturer. In this respect, the end seller can have recourse to his "backers" for up to five years (§ 479 Para. 1 and Para. 2 BGB). Here, too, the law regulates questions of contractual disposability. Pursuant to § 478, Subsection 4, BGB, an agreement to the detriment of the entrepreneur cannot be made if the recourse creditor is not granted an equivalent compensation. However, this provision shall not apply to the exclusion or limitation of the claim for damages (§ 478 para. 4 sentence 2 BGB). Equivalent compensation can be introduced, for example, in the context of flat-rate settlement systems.⁹³

This restriction also renders the clause ineffective for consumer goods purchase agreements with consumers, since in this respect there is a restriction of § 439 BGB, which cannot be agreed to the disadvantage of the consumer according to § 475 BGB. However, as the systema-

⁹¹ v. *Westphalen*, NJW 2002, 12, 18.

⁹² *BGH*, Urt. v. 25.2.1981 – VIII ZR 35/80, NJW 1981, 1501; *BGH*, Urt. v. 3.7.1985 – VIII ZR 152/84, BB 1993, 1755, 1757.

⁹³ BT Drs. 14/6040, S. 249.

tic position of this provision proves, this only applies to the area of consumer goods sales, i.e. sales contracts for movable goods between a consumer and an entrepreneur, § 474 para. 1 BGB. According to § 475 para. 1 sentence 1 BGB, the regulations concerning the claims and rights of the buyer in case of defects have mandatory character, so that neither the right of the buyer to subsequent performance/replacement nor the rights to reduction or withdrawal may be changed or excluded to the disadvantage of the buyer.

§ Section 437 No. 2 BGB refers to sections 323, 326 (5) and 440 BGB for the withdrawal. The same applies to reduction of the purchase price (§§ 437 No. 2 in conjunction with 441 BGB). The law is unclear in that the dependence of the reduction on the existence of a right of withdrawal is not clear. However, it is generally assumed that the buyer must first enforce the claim for supplementary performance even before the reduction. In this respect, one can draw a reverse conclusion from § 441 para. 1 sentence 2 BGB. According to § 323 BGB a withdrawal from the contract is only possible if the debtor has been set a reasonable period of time for performance or subsequent performance without success. In certain cases, it is not necessary to set a deadline (§ 323 Para. 2 BGB), whereby this also includes the constellation that the type of subsequent performance to which the purchaser is entitled has failed (§ 440 Sentence 1 BGB). In this respect, the legal model also assumes that, in principle, only a supplementary performance phase must be observed before withdrawal and that, among other things, if supplementary performance fails, the bill of exchange for withdrawal can be made. However, rescission is not only possible if the supplementary performance fails; rather, §§ 437 no. 2, 323 para. 2 BGB and § 440 sentence 2 BGB name a number of reasons for which a deadline is not necessary. A limitation of withdrawal and reduction to the failure of the subsequent improvement according to the General Terms and Conditions would thus counteract §§ 437 no. 2, 323 para. 2 and § 440 sentence 2 BGB and would thus be a violation of § 475 para. 1 BGB.

3. Costs of supplementary performance

Frequently, sellers try to pass on the costs of subsequent performance to the buyer. In the starting point, §§ 439 para. 2, 635 para. 2 BGB are of central importance, according to which the costs of subsequent performance in the case of a purchase contract are to be borne by the seller, in the case of a contract for work and services by the entrepreneur..

According to § 309 No. 8b cc) BGB, clauses according to which the expenses required for the purpose of subsequent performance are to be transferred to the buyer are prohibited. The following clause is therefore null and void: "Necessary spare parts and the working time incurred shall not be charged. This gives the impression that the buyer has to contribute to the

costs. The same applies to the wording: "The transport of the goods for the purpose of repair is at the expense and risk of the customer. It is particularly dangerous to attempt to combine the maintenance/maintenance of software with the warranty. The following clause is typical for this: "The rectification of defects is carried out on the basis of a separate order placed by the buyer/under a separate maintenance contract. Such attempts are all ineffective. This also applies to the corresponding maintenance contracts, which declare the removal of defects to be a (paid!) maintenance/care service. The customer can demand the return of the fee paid for such services; the maintenance contract itself is void in this respect..

Should an attempt be made in commercial transactions to pass on the costs of subsequent performance to the purchaser, § 307 BGB remains to be examined. In this respect, the legally prescribed rights of the buyer according to §§ 437 No. 1, 439 BGB, according to which the buyer can demand supplementary performance, must be considered. Subsequent performance consists, at the discretion of the buyer, in the remedying of the defect or the delivery of a defect-free item (§ 439 para. 1 BGB). Furthermore, § 439 para. 2 BGB stipulates that the seller must bear the expenses necessary for the purpose of subsequent performance. The question of the place of performance is difficult to clarify here. To clarify the extent of the corresponding transport obligations, the respective place of performance must be determined. In 2004, in a case in which someone bought a couch set in a furniture pick-up market, the District Court of Menden took the view that it was not the original place of performance, but the current place of occasion of the purchased item that was relevant. The seller was therefore in any event obliged to hand over the purchased item for repair as a debt to be discharged at the place of delivery. The subsequent performance is to be rendered at the respective location of the object of sale. In the meantime, the Federal Court of Justice has decided that the place of performance of subsequent performance is to be determined on the basis of the general provision of § 269 (1) BGB. Neither the place of performance applicable to the purchaser's primary performance claim is automatically decisive for the claim for subsequent performance, nor the current location of the object. Instead, the contractual agreements of the parties are to be taken into account first and foremost. In the absence of a party agreement, the respective circumstances, in particular the nature of the obligation, shall be decisive. If the place of performance cannot be determined in this way either, it should "ultimately be located at the place where the debtor had his residence or commercial establishment at the time the obligation arose" (§269 para. 2 BGB). The BGH argues that this is the only way to meet the requirements of the Consumer Goods Directive, according to which subsequent performance must be free of charge and without significant inconvenience.

These essential contractual obligations of the seller cannot be passed on to the buyer (§ 307 para. 2 no. 1 and 2 BGB). In this respect, reference can be made to the older literature on the exclusion of § 476a BGB within the framework of § 9 para. 2 no. 1 AGBG. However, in contrast to the evaluation at that time, it should be noted that the claim to subsequent performance is now legally anchored, whereas under the old law it was a nonmandatory right that was subsequently included in the terms and conditions of business, particularly for the benefit of the user of general terms and conditions. However, this does not change the fact that § 439 Para. 2 BGB already assumes that the seller has the legal obligation to bear the expenses for the supplementary performance. It will therefore also be necessary to infer from this provision the statutory order to counteract a waiver of this obligation to bear costs in the B2B relationship by means of a corresponding control of the general terms and conditions. Finally, an exclusion of liability with regard to the costs of subsequent performance is limited by § 444 BGB in the event of concealment of a defect and in the event of assumption of a guarantee.

These considerations also apply to the purchase of consumer goods. § 475 BGB expressly excludes a regulation made before notification of a defect to the entrepreneur, which would reduce the rights of the consumer according to § 439 BGB. This also includes any attempt to charge costs for subsequent performance. After notification of the defect, the parties can also agree on withdrawal, reduction or compensation for damages in the case of a purchase of consumer goods, in particular by comparing.⁹⁴

If entrepreneurs agree with entrepreneurs in individual contracts on the assumption of supplementary performance costs, it can be concluded from § 475 BGB e contrario that individual contracts in the B2B sector are permissible with regard to the assumption of costs.

4. Obligations to give notice of defects

Frequently, attempts are made to oblige the buyer to notify defects. It should be noted here that § 377 of the German Commercial Code (HGB) imposes obligations on merchants to give notice of defects. There are no such obligations for consumers on a legal basis. It is questionable whether these can be introduced by contract.

According to § 309 No. 8b ee) BGB, the user may set a period of notice for non-obvious defects; however, this period may not be shorter than the statutory warranty period. This provision corresponds to the previous provisions in § 11 No. 10e AGBG. Ineffective are therefore clauses such as:

⁹⁴ Weidenkaff, in: Palandt, 74. Aufl. 2015, § 439 Rn. 3.

- „Defects must be claimed in writing immediately after detection.“⁹⁵
- „Hidden defects must be reported in writing immediately after they become visible“.⁹⁶
- „All defects must be reported within three months.“
- „Defects must be notified immediately upon delivery. Otherwise any warranty and liability for such defects is excluded.“⁹⁷

However, an obligation to give notice of obvious defects within a reasonable period of time may be introduced in GTCs. The term "obvious defect" must be used; therefore the following wording is invalid:

- „Visible defects are to be reported immediately.“⁹⁸
- „Recognizable defects must be claimed in writing within fourteen days.“⁹⁹

With regard to the period for the complaint, four weeks from the date of handover shall be sufficient. Additional agreements which provide for a shorter period or which do not define the exact beginning of the period are in any case null and void in the non-commercial sector, such as:

- „Obvious defects are to be reported immediately in writing.“¹⁰⁰
- „Obvious defects must be reported in writing within four weeks.“

It should be noted that a written explanation of the complaint may be required. The introduction of an obligation to declare complaints by means of registered mail or special forms is invalid for non-traders according to § 309 No. 13 BGB. In contrast, a clause in the wording is permissible: "Obvious defects are to be notified in writing within four weeks of delivery of the goods."

It is important to note that the concept of defect has been significantly expanded in the new BGB. Defects also include cases of wrong and insufficient delivery (§ 434 (3) BGB). These two new constellations are now also the subject of a conceivable regulation on the duty to give notice of defects and should also be expressly mentioned as such in the general terms and conditions.

Between entrepreneurs, it should be borne in mind that within the framework of § 310 BGB, the obligations to give notice of defects between merchants play a central role. § 377 HGB

⁹⁵ *OLG Stuttgart*, Urt. v. 20.7.1979 – 2 U 53/79, BB 1979, 1468.

⁹⁶ *BGH*, Urt. v. 6.12.1984 – VII ZR 227/83, NJW 1985, 855.

⁹⁷ *BGH*, Urt. v. 3.7.1985 – VIII ZR 152/84, NJW-RR 1986, 52; ähnlich *OLG Hamm*, Urt. v. 13.6.1986 – 20 U 285/85, NJW-RR 1987, 311.

⁹⁸ *OLG Stuttgart*, Urt. v. 29.9.1978 – 2 U 81/78, BB 1979, 908; *BGH*, Urt. v. 6.12.1984 – VII ZR 227/83, NJW 1985, 855; *LG Köln*, Urt. v. 19.6.1985 – 26 O 409/84, NJW 1986, 67.

⁹⁹ *LG München I*, EzAGBG § 11 Nr. 10e Nr. 9.

¹⁰⁰ *LG Köln*, Urt. v. 19.6.1985 – 26 O 409/84, NJW 1986, 67, 69.

obliges merchants for defects and wrong deliveries to an immediate examination and notification of defects. If they do not comply with these obligations, they are excluded from asserting claims arising from these defects. The HGB is based on the recognizability of the defects and in this respect differs from the basic concept of the BGB, which is based on the obviousness. Therefore, the conclusion cannot be drawn from § 309 No. 8b ee) BGB that a limitation of warranty is excluded even in the case of obvious defects in the business sector. In the B2B area, the evaluation of § 309 no. 8b ee) BGB is therefore not decisive. The standard of review results solely from § 307 para. 2 No. 1 BGB in conjunction with § 377 HGB.

Furthermore, the application of the basic principles of content control is out of the question, provided that only the obligations to give notice of defects under the German Commercial Code (HGB) are integrated into the General Terms and Conditions (§ 305b BGB). However, significant deviations from the legal model of the HGB, in particular from the length of the examination obligations, are excluded. It is also inadmissible to base the right to complain on other circumstances, such as processing or redesigning of the goods.¹⁰¹

In the case of the purchase of consumer goods, the introduction of an obligation to give notice of defects is out of the question. § Section 437 of the German Civil Code (BGB) provides for rights of the buyer without regard to the compliance with the obligation to give notice of defects. § 475 para. 1 BGB prohibits the deviation from this legal model at the expense of the consumer. This harsh regulation is somewhat mitigated by § 442 para. 1 sentence 2 BGB. According to this, the buyer cannot assert warranty rights in the case of grossly negligent ignorance of a defect (unless there is a case of fraudulent intent or a warranty). In this respect, the buyer is already subject by law to certain inspection obligations if he should already have been aware of defects of an obvious nature when the contract was concluded. If products have defects, the consumer is entitled to a right of exchange, among other things. A clause in the General Terms and Conditions, according to which the goods must be returned within one week of receipt, is null and void after a decision by the Court of Appeal. The judges thus ruled in favour of an online shop operator who demanded that a competitor not use such general terms and conditions. But other conditions, such as the exclusion of the two-week right of withdrawal, were also inadmissible. The LG Hamburg has also dealt with the shortening of the notice of defects and has forbidden a large Internet mail-order company to use the clause "Please complain about material defects immediately to us or the employee who delivers the articles". In the same judgement, the Hanseatic League also prohibited a general terms and

¹⁰¹ *BGH*, Urt. v. 23.2.1984 – VII ZR 274/82, NJW 1985, 3016.

conditions clause for replacement delivery, according to which the customer was referred to an "article of equal quality and price" if the goods were no longer available. According to another judgement of the LG Waldshut-Tiengen, online merchants cannot exclude the right of return of defective goods by demanding in their general terms and conditions that the goods be returned exclusively in the original packaging..

In addition to shortening the period of notification of defects, some dealers have in the past also attempted to exclude the right of withdrawal applicable to so-called distance contracts by means of general terms and conditions. According to this, the customer can, according to § 355 para. 1 sentence 3, para. 2 in connection with § 312g BGB, the customer may return goods for two weeks without any ifs and buts and without giving reasons if he has ordered them from an online shop. The Memmingen District Court has decided that the right of withdrawal cannot be excluded by means of general terms and conditions, on the grounds that such a general exclusion would be contrary to good manners in competition. The new regulation of § 312k para. 1 BGB (German Civil Code), which has been in force since June 2014, now prohibits any deviation from or circumvention of the right of withdrawal vis-à-vis the consumer or a customer. However, the right of revocation does not apply without restriction. As soon as, for example, the seals of CDs, DVDs or CD-ROMs have been removed, the return is excluded according to § 312g para. 2 sentence 1 no. 6 BGB. The same applies to goods that have been specially produced according to the wishes of the customer (§ 312g para. 2 p. 1 no. 1 BGB). The BGH has issued a landmark ruling for the Internet dispatch of assembled PCs configured according to the customer's specifications: insofar as the individual components such as ISDN card or additional batteries can be easily separated from each other again, the two-week right of withdrawal remains in force despite the consumer's instructions.¹⁰²

Despite the right of withdrawal for the purchase of digital content at a distance, which has now been implemented since June 2014, some e-commerce merchants are of the opinion that this right of withdrawal does not exist for the purchase of digital content, or at least expires with its installation. In particular, the considerable potential for abuse is considered problematic if the contract is revoked after a download of digital content.¹⁰³

¹⁰² *BGH*, Urt. v. 19.3.2003 – VIII ZR 295/01, NJW 2003, 1665 = CR 2003, 480 = MMR 2003, 463.

¹⁰³ *Peintinger*, MMR 2016, 3.

In individual contracts, there are no objections to the introduction of obligations to give notice of defects, as long as these do not result in a de facto exclusion of warranty *e ipso* (e.g. "The buyer confirms that the goods are free of defects upon conclusion of the contract").

5. Liability

The question is whether, in addition to the warranty, limitations of liability can be introduced. First of all, it must be taken into account which evaluations § 309 BGB provides for in the area of B2C transactions apart from the purchase of consumer goods.

a) Separation of warranty - liability

The attempt to regulate warranty and liability in different clauses already seems problematic. In the past, warranty and liability were regarded as different sets of rules. Accordingly, the companies went in the direction of providing separate clauses for warranty and liability, in order to prevent the risk of a uniform liability rule being null and void. Such a separation will hardly be possible today. § 437 BGB is based on the basic idea that liability and warranty are coexisting rights and complement each other. Therefore, if a company were to include the clause "there is a guarantee for the statutory period" in its terms and conditions of business, the suspicion could arise that liability beyond the guarantee is out of the question. This in turn would be a violation of § 307 BGB or § 475 para. 1 BGB.

Prohibited are limitations of liability for

- fraudulent conduct (§ 444 BGB)
- the existence of guarantees (§ 444 BGB)
- the liability for damages resulting from injury to life, body and health (§ 309 No. 7a BGB)
- the liability for gross negligence (§ 309 No. 7b BGB)
- Claims from product liability law (§ 14 ProdHaftG)
- the violation of cardinal secondary obligations (§ 307 para. 2 no. 1 BGB).

b) Guarantee

It should be noted that the element of guarantee has replaced the old idea of assurance. Consequently, the prohibition of clauses in § 11 No. 11 AGBG (liability for warranted characteristics) has been dropped. However, the result does not change insofar as the entrepreneur assumes a guarantee for certain properties of the object or work and cannot exclude the resulting liability due to the precedence of the individual agreement. Incidentally, the Federal Court of Justice also sees a transparency problem in B2B contracts by using the term "cardi-

nal obligations" in the GTC without further explanation. The BGH had to examine the contract between a car manufacturer and an authorised dealer. As in many authorised dealer contracts, this contract also regulated liability in the case of so-called "cardinal obligations". The BGH considered this term to be non-transparent. It could not be expected of an average authorised dealer as a legal layman to know the content of the BGH's case law on so-called "cardinal obligations". Without further explanation, even if the contract is read carefully and attentively, it is not clear to him what is meant by "cardinal obligations". An abstract explanation of the concept of cardinal obligations, as defined by case law, is possible, but also sufficient, without having to enumerate exhaustively the contractual obligations which are essential for the type of distributor contract and whose violation endangers the purpose of the contract. The BGH itself suggests a formulation: "insofar as it is not a matter of the breach of an obligation, the fulfilment of which makes the proper execution of the contract possible in the first place and on the observance of which the customer may regularly rely. It is still unclear whether a liability limitation clause can be "saved" by using this new formula.

An independent guarantee obligation within the meaning of § 443 BGB can also arise solely from a presentation of the guarantee in advertising for a product. This does not require an effective conclusion of a guarantee contract. Such a guarantee obligation resulting from the advertising cannot be restricted by the following, non-negotiated guarantee contracts.¹⁰⁴

c) Prohibitions of clauses in § 309 BGB

While the exclusions with regard to breaches of duty caused by defects (§ 309 no. 8b BGB) have already been discussed to a large extent above, the exclusions of liability for other breaches of duty must now be considered. In particular, this concerns the exclusion of liability by clause for injury to life, body and health (§ 309 No. 7a BGB), gross negligence (§ 309 No. 7b BGB) and other breaches of duty with regard to the right to withdraw from the contract (§ 309 No. 8a BGB)..

aa) § 309 No. 7a BGB

With the insertion of this provision, the prohibition of the former § 11 No. 7 AGBG has been extended. A clause is ineffective according to § 309 No. 7a BGB if it provides for the exclusion or limitation of liability for damages arising from injury to body or health, provided that these are based on a negligent breach of duty by the user or an intentional or negligent breach of duty by his legal representative or vicarious agent. The prohibition of § 309 No. 7a BGB

¹⁰⁴ *OLG Frankfurt a.M.*, Beschl. v. 8.7.2009 – 4 U 85/08, BB 2009, 2225.

corresponds to No. 1a of the Annex to Directive 93/13/EEC (Unfair Contract Terms Directive). It has already been derived under the old law from § 9 para. 2 no. 1 AGBG and also secured by § 14 ProdHaftG. Since according to § 276 para. 3 BGB the liability for intent cannot be waived in advance for the debtor (user), the consideration of an intentional breach of duty by the user in § 309 No. 7a BGB is dispensable. The question arises, however, whether the prohibition of release from liability also applies to strict liability regardless of fault. This is initially contradicted by the wording of the law, which links the breach of duty to the standard of fault in § 276 BGB. An analogous application is not necessary either; rather, the materials are based on the decisiveness of fault in several places. Only from the wording of No. 1a of the Annex to Directive 93/13/EEC could an interpretative argument be derived for the inclusion of strict liability. According to this argument, fault on the part of the user is not taken into account in the case of his damaging action. However, the reason for not mentioning it is to be seen primarily in the fact that the concept of fault is developed differently in the European legal systems, and a definition of fault would therefore be contrary to the objective of harmonisation. It follows that § 309 No. 7a BGB does not preclude an exclusion or limitation of liability for damages based on a no-fault breach of duty.

bb) § 309 No. 7b BGB

While § 309 No. 7a BGB clarifies that liability for bodily injury cannot be limited even in the case of slight negligence, a release from liability within the scope of application of § 309 No. 7b BGB is only ineffective in case of gross negligence. The concept of breach of duty in § 309 No. 7b BGB also covers the areas of bad performance in the law of sale and thus also includes claims for damages from defects in the purchase. In the past, however, § 11 No. 7 AGBG covers all types of culpable breaches of performance from which claims for damages arise, i. e. in particular the positive breach of contract, culpa in contrahendo, delay and impossibility, but also claims for damages based on fault from warranty, in particular from the previous §§ 635, 538 para. 1 BGB and from § 13 No. 7 VOB/B. The inclusion of claims for damages arising from defects in the purchase is therefore logical and, according to the new conception of the law on sales, mandatory.

In that § 309 No. 7 BGB only refers to the facts of the breach of duty, a limitation of liability for damages from tort is not expressly excluded. Claims from §§ 823 ff. BGB will regularly compete with contractual claims arising from breach of duty in the area of pre-formulated contracts. Since liability in tort cannot lag behind contractual liability with regard to the same breach of duty, the application of § 309 no. 7 BGB that also the liability for grossly culpable tort, if it should be excluded in this respect, cannot be effectively excluded in GTC. The con-

current liability from §§ 823 ff. However, due to its weakly developed protection of assets, the German Civil Code (Bürgerliches Gesetzbuch - BGB) is applied above all in the scope of application of § 309 no. 7b BGB mostly run empty.

The following contractual provisions are invalid:¹⁰⁵

- „Any liability for defects is excluded.“
- „No liability is accepted for negligent behaviour on the part of the seller.“¹⁰⁶
- „We are not liable for consequential damages, loss of data and loss of profit“.¹⁰⁷
- „We are liable for damages (. . .) up to the amount of . . . Euro.“¹⁰⁸
- „We exclude any liability to the extent permitted by law.
- „We exclude our liability for slightly negligent breaches of duty.“¹⁰⁹
- „We are only liable for damages caused by gross negligence if these are reported immediately.“¹¹⁰
- „We only owe the timely and proper delivery of the goods to the transport company and are not responsible for delays caused by the transport company..“¹¹¹

Only one clause remains permissible, as follows:

We exclude our liability for slightly negligent breaches of duty, unless damages from injury to life, body or health or guarantees are affected or claims under the Product Liability Act are affected. Furthermore, the liability for the breach of obligations, the fulfilment of which makes the proper execution of the contract possible in the first place and on the observance of

¹⁰⁵ Bei der Klauselabfassung ist stets zu beachten, dass umfassende Freizeichnungsklauseln, die auch die Haftung für grobes Verschulden und Körperschäden ausschließen, wegen des Verbots geltungserhaltender Reduktion im Ganzen unwirksam sind, vgl. *BGH*, Urt. v. 21.1.1999 – III ZR 289–97, NJW 1999, 1031.

¹⁰⁶ *OLG Köln*, Urt. v. 2.7.1982 – 20 U 39/82, DAR 1982, 403.

¹⁰⁷ *LG Bayreuth*, Urt. v. 17.3.1982 – S 72/81, DB 1982, 1400.

¹⁰⁸ Diese Klausel war nach § 11 Nr. 11 AGBG für den Bereich der zugesicherten Eigenschaften als unwirksam angesehen worden. Sie wurde für Ansprüche wegen c.i.c. oder pVV nur zugelassen, wenn alle vertragstypischen und vorhersehbaren Schäden abgedeckt waren *BGH*, Urt. v. 23.2.1984 – VII ZR 274/82, ZIP 1984, 971; *BGH*, Urt. v. 12.5.1980 – VII ZR 166/79, BB 1980, 1011. Wann dies in concreto der Fall war, ließ sich jedoch kaum feststellen; demnach war und ist die Klausel auf jeden Fall zu gefährlich. Unzulässig ist ferner die Haftungsbeschränkung eines Fotolabors bei Beschädigung zu entwickelnder Filme auf den bloßen Materialwert, vgl. *BGH*, Urt. v. 28.4.1983 – VII ZR 267/82, WM 1983, 916.

¹⁰⁹ *BGH*, Urt. v. 29.1.1968 – II ZR 18/65, NJW 1968, 1567.

¹¹⁰ *BGH*, Urt. v. 21.1.1999 – III ZR 289-97, NJW 1999, 1031. Über das Setzen solcher kurzen Ausschlussfristen hinaus ist auch in der Abkürzung der Verjährungsfrist eine unzulässige Haftungserleichterung zu sehen, vgl. *BGH*, Urt. v. 2.12.1982 – I ZR 176/80, VersR 1983, 339.

¹¹¹ *BGH*, Urt. v. 6.11.2013 – VIII ZR 353/12, Rn. 8 = NJW 2014, 454 = MMR 2014, 166 = CR 2014, 195 = MDR 2014, 137; *Schwab*, JuS 2014, 836.

which the customer may regularly rely, remains unaffected. The same applies to breaches of duty by our vicarious agents.“¹¹²

However, it is questionable whether it really makes sense to include such a clause in a contract. After all, the supplier must be liable for all important breaches of duty and performance faults and cannot exclude liability in this respect.

cc) § 309 No. 8a BGB

As a consequence of the general basic principle of breach of duty, § 309 no. 8a BGB the prohibitions of clauses of the old § 11 No. 8 AGBG (default and impossibility) and § 11 No. 9 AGBG (partial default, partial impossibility) under the too narrowly defined heading “Other exclusions of liability for breach of duty”;. According to the provision, the right of withdrawal of the other part of the contract based on a breach of duty by the user may neither be excluded nor restricted. However, this shall not apply to cases in which the breach of duty consists of a defect in the purchased item or work. In this respect, § 309 No. 8a BGB behind § 309 No. 8b bb) BGB (limitation to supplementary performance in case of defects). Rather, the right of withdrawal from the contract under § 323 BGB is protected, which is also restricted under § 323 BGB. 326, paragraph. 5 BGB, as well as from § 324 BGB for violation of another obligation (§ 241 para. 2 BGB).

It should be noted that Section 309 No. 8a BGB only applies insofar as the user is also responsible for the breach of duty justifying the right of withdrawal. Accordingly, the exclusion of the right of withdrawal for a breach of duty for which the user is not responsible is not contrary to § 309 No. 8a BGB. The focus here is on §§ 323, 324 BGB, but also, for example, § 376, para. 1 HGB, according to which the creditor is granted the right of withdrawal regardless of the fault of the other party. On the other hand, an ineffective restriction of the right of withdrawal is given if the user prescribes to the customer that he must - according to § 323 paragraph 1 BGB not bound by time limits - right of withdrawal within a certain period. Against § 309 No. 8a BGB is therefore in breach of the clause: “In order to safeguard his right to withdraw from the contract, the customer is obliged to exercise this right immediately after expiry of the extension period, at the latest within one week after expiry of this period.“.

¹¹² Vgl. *BGH*, Urt. v. 6.11.2013 – VIII ZR 353/12, Rn. 20 = *NJW* 2014, 454 = *MMR* 2014, 166 = *CR* 2014, 195 = *MDR* 2014; *Schwab*, *JuS* 2014, 836; kein Haftungsausschluss für Verschulden eines Transportunternehmers.

The content control according to § 307 BGB is particularly relevant for the B2B sector, but also in cases that are no longer covered by the special evaluations of § 309 BGB (here in particular the problem of liability for simple negligence).

The prohibitions of clauses in § 309 No. 7 BGB win according to §§ 307, 310 paragraphs. 1 BGB is also of fundamental importance in transactions between entrepreneurs. Insofar as the culpable injury to health or life of the contractual partner is concerned, this arises without further ado, as the new version of § 309 No. 7a BGB only specifically takes up the principles already developed within the framework of § 9 AGBG. Also in business dealings therefore fails because of § 307 paragraph. 2 No. 1 of the German Civil Code does not violate the prohibition under § 309 no. 7a of the German Civil Code (BGB) as an exemption or limitation clause. In the same way, a violation of the valuation of § 309 no. 7b BGB within the framework of § 307 Para. 2 No. 1 BGB must be considered. Here, reference can be made to the established case law of the BGH on §§ 9, 11 No. 7 AGBG, according to which the user is fully liable for his own gross negligence and that of his executive employees as well as for serious organisational negligence. However, the BGH has so far left open whether the entrepreneur in the B2B relationship can generally be exempted for gross negligence of simple vicarious agents. This is to be rejected in any case if essential contractual obligations are violated. However, it also contradicts the natural sense of justice to consider liability for gross negligence of a simple vicarious agent to be deductible solely with regard to the subordination of contractual obligations. Moreover, experience has shown that a delimitation of contractual obligations according to their quality causes difficulties, especially since the modernisation of the law of obligations, with its concentration on the general facts of the breach of obligations, has tended to push the authoritative nature of certain types of contracts and the associated core obligations into the background.

Far more important than the above-mentioned problem is the question of the permissible exemption from simple negligence of the user and his vicarious agents. Thus, not only the area of B2B but also the relationship B2C is addressed, since the special provisions of §§ 309 No. 7b, 276 paragraph. 3 BGB only grossly culpable behaviour (intent & gross negligence) is covered. However, a distinction must be made in this question between the exclusion of liability in connection with a specific standard of fault on the one hand and the possibility of limiting the scope and content of contractual obligations by means of general terms and conditions on the other. In both cases a content check according to § 307 BGB is indicated. In

the latter case, the respective clause is linked to the prohibition of undermining in § 307 Para. 2 No. 2 BGB to measure.¹¹³

A release from the obligation to pay under section 280(2) 1 BGB (German Civil Code) is invalid in any case if the user has essential rights or obligations (so-called "liability for simple negligence"; cardinal obligations) arising from the nature of the contract in such a way that the achievement of the purpose of the contract i. S. d. § 307 paragraph. 2 No. 2 BGB is at risk. According to the established case law of the Federal Court of Justice, a formal release from liability for simple negligence may not lead to the undermining of legal positions of the contractual partner which are essential to the contract, for example because it removes or restricts such rights which the contract must grant to the contractual partner in accordance with its content and purpose (§ 307 Para. 2 No. 2 BGB). Furthermore, the limitation of liability must not have the effect of relieving the user of obligations the fulfilment of which makes the proper performance of the contract possible in the first place and on the observance of which the other party regularly relies and may rely.

Such a danger and thus ineffectiveness is also to be assumed if the liability of the user for slightly negligent violations of essential obligations by vicarious agents is excluded. Cardinal obligations include in particular those obligations whose fulfilment is essential for the proper execution of the contracts. This will also include the timely fulfilment of the contract. According to the new legal situation, this is of particular interest since the previous § 11 No. 8b AGBG, to which the predominant opinion refers the ineffectiveness of the exclusion of liability for damages caused by delay according to § 286 Abs. 1 BGB a. F. argued that the modernisation of the law of obligations did not take account of this. In this respect, too, Section 307(3)(a) provides 2 No. 2 BGB strengthens the standard. However, the cardinal obligations must not automatically be equated with the main obligations of a contract, as opposed to the protective or secondary obligations. For this reason, the claim for damages instead of performance under § 282 BGB (German Civil Code) for breach of an obligation pursuant to § 241 (2) BGB cannot be accepted. 2 BGB in the case of simple negligence, especially as this claim also presupposes that the creditor cannot reasonably be expected to accept the performance and that a release from liability would in any case jeopardise the achievement of the purpose of the contract. With regard to the aforementioned principles on liability for simple negligence, it is not appropriate to distinguish between the contractual relationships B2B and B2C.

¹¹³ Zur gestiegenen Bedeutung des § 307 Abs. 2 Nr. 2 BGB gegenüber dem früheren § 9 Abs. 2 Nr. 2 AGBG siehe v. *Westphalen*, NJW 2002, 12, 18 f.

The cardinal position of rights and obligations does not depend on whether the customer is a consumer or a business.

It should also be noted that the BGH also sees a transparency problem in the concept of cardinal obligations in B2B contracts. An average trader, as a layman in law, cannot be expected to know the content of the BGH's case law on so-called "cardinal obligations". Without further explanation, therefore, even with attentive and careful reading of the treaty, it is not clear to him what is meant by "cardinal obligations". It is possible, but also sufficient, to provide an abstract explanation of the concept of a cardinal obligation as defined by the case-law, without having to list exhaustively the contractual obligations which are essential for the type of authorised dealer agreement and which, if breached, jeopardise the purpose of the agreement.

Furthermore, the possibility of limitations of liability should be discussed. These merely limit the scope of liability and do not affect the origin of the claim on the merits. If the breach of contract caused by slight negligence has led to a financial loss which is not based on an injury to life and limb, a limitation of liability appropriate to the type of contract can be effectively defined in the GTC. Here too, however, the yardstick of § 307, Subsection 2 No. 2 BGB (German Civil Code), according to which the achievement of the purpose of the contract may not be endangered. The previous case law on limiting liability to a certain maximum amount also applies to the new German Civil Code (BGB). Sum total limitations of liability are permissible according to this, as long as they are in an appropriate relationship to the risk of damage typical for the contract and the typically foreseeable damage is covered. A limitation of liability to unforeseeable damages was already considered effective in the past. In the opinion of the BGH, an exclusion of liability is possible for more remote damages. It is questionable whether this regulation can continue to exist. In this context, recourse to international sales law is important (see Art. 74 UN Sales Law). After that, liability is limited to foreseeable damages. This idea should also be applied to the BGB, so that corresponding clauses are permissible. However, the criterion of the customary nature of exemptions in the industry alone cannot justify an effective waiver of liability in the area of slight negligence. However, a different decision may have to be taken if further circumstances are suitable to ensure that the purpose of the contract is achieved. However, reliable criteria have not yet been developed for this. Insofar as the Federal Court of Justice bases the validity of the General Terms and Conditions in the already quoted "Werftwerkvertrag I case"; not only on the criterion of customary industry practice but also on the circumstances of the comprehensive insurance protection of the injured party and his ability to co-manage the risks of damage affected by

the exemption, this is acknowledged to be an exceptional case which cannot be treated as a lump sum.

Before section 307 subsection. 2 BGB the following clauses are valid:

- „In the event of breaches of duty caused by slight negligence, we shall not be liable for atypical consequential damage that is not related to the risk inherent in the contract.
- „In the event of a negligent breach of duty by the user or his vicarious agent, liability is limited to . . . Euro, provided that this amount covers the foreseeable damage typical of the contract and the injuring party is not guilty of gross negligence.“¹¹⁴
- „No liability shall be assumed for slightly negligent breaches of duty by the user or his vicarious agent, unless these are obligations whose fulfilment is essential for the proper execution of the contract and on whose compliance the customer may regularly rely.“

However, the jurisprudence regarding cardinal obligations must be observed. If a clause merely summarizes the essential contractual obligations in a catchwordlike manner under the term "cardinal obligations"; the average customer, as a legal layman, will not understand what is meant by "cardinal obligations"; without further explanation. Therefore, the abstract reference to compliance with cardinal obligations should be invalid even in the B2B area due to lack of transparency.¹¹⁵

An infringement resulting from the use of the abstract concept of "cardinal obligations"; against the principle of equal treatment arising from § 307, Subsection 3, of the German Civil Code (Bürgerliches Gesetzbuch, BGB) is excluded. 1 sentence 2 BGB does not preclude the requirement of comprehensibility and transparency resulting from Article 1 sentence 2 BGB, contrary to the view of the Revision, that it would not be practicable to specify those obligations which are to be qualified as essential contractual obligations. It is true that the obligation to formulate the content of the clause in a clear and comprehensible manner only exists to the extent possible. It remains to be seen whether this framework would be exceeded by a concrete listing of essential contractual obligations - or examples of rules for this - because, as the revision argues, it would necessarily be incomplete and would suggest that the obligations not mentioned are not essential contractual or "cardinal"; obligations. In any event, an abstract explanation of the concept of a cardinal obligation as defined by case law would be possible, without having to list exhaustively the contractual obligations which are essential for

¹¹⁴ *BGH*, Urt. v. 20.7.2005 – VIII ZR 121/04, NJW-RR 2005, 1496.

¹¹⁵ *BGH*, Urt. v. 20.7.2005 – VIII ZR 121/04, NJW-RR 2005, 1496 = NJW 2006, 46 = WM 2005, 2002.

the type of dealership contract and whose breach would jeopardise the purpose of the contract. A possible formulation would be:

„We exclude our liability for slightly negligent breaches of duty, unless damages from injury to life, body or health or guarantees are affected or claims under the Product Liability Act are affected. Furthermore, the liability for the breach of obligations, the fulfilment of which makes the proper execution of the contract possible in the first place and on the observance of which the customer may regularly rely, remains unaffected. The same applies to breaches of duty by our vicarious agents.“

§ Section 475 paragraph. 3 BGB contains a remarkable relaxation of the rigid consumer protection regulations in the area of the purchase of consumer goods. Accordingly, the provisions on the mandatory nature of buyer rights do not apply to the exclusion or limitation of the claim for damages. In this respect, the law (m. E. unnecessarily) in the corset of the Consumer Sales Directive.

However, this only applies "without prejudice to §§ 307 to 309 BGB";. Therefore, the review of content, in particular according to § 309 No. 7b BGB.

For individual contracts, § 138 BGB, which prohibits a complete exclusion of Liability, however, for restrictions on permits.

6. A lump sum settlement of compensation claims

In addition to questions of release from liability and limitation of liability, the formal consolidation of the user's claims for compensation takes up a great deal of space in practice. The modernisation of the law of obligations has resulted in a significant change in the legal situation, which will simplify the application of the law and thus promote its reliability.¹¹⁶

While Section 309 No. 5a BGB literally corresponds to the former § 11 No. 5a AGBG, § 309 no. 5b BGB, the effectiveness of the clause now depends on the customer being expressly permitted to prove that he has suffered damage or loss. a reduction in value did not occur at all or was significantly lower than the flat rate. The not very handy "negative criterion"; of the former § 11 No. 5b AGBG, according to which the customer was not allowed to be "cut off"; from the corresponding proof, has in this respect rightly been replaced by a stricter and unambiguous "positive criterion";.

¹¹⁶ In der Begründung zu dem Regierungsentwurf, BR-Drs. 338/01, 355, wird ausdrücklich auf den vorherigen Missstand hingewiesen, dass sich die Praxis vom Wortlaut des § 11 Nr. 5b AGBG weit entfernt und zu einer Einzelfallrechtsprechung geführt habe, die sich kaum sicher vorhersagen ließ.

It follows from the above without further ado that the clauses to be classified as ineffective under the old legal situation also had to be considered as ineffective before § 309 no. 5b of the German Civil Code (BGB) could not have any validity. However, the requirement of an explicit permission to provide evidence in the general terms and conditions often leads to a reassessment of clauses that were previously considered valid by the courts. Inadmissible according to § 309 No. 5b are formulations like:

- ... surcharge of X % shall be applied,¹¹⁷
- ... compensation of 2 % shall be paid,¹¹⁸
- ... may claim X % as compensation without proof,¹¹⁹
- ... may claim X % as compensation without proof.¹²⁰

Effective under consideration of § 309 No. 5b BGB is however a clause version as follows:

„The entrepreneur may receive compensation for . . . H. v. X % (of the purchase price), unless the customer can prove that the breach of contract attributable to him has not led to any damage or reduction in value or that such a loss incurred by the company is significantly lower than the flat rate.“

The characteristic "substantial"; is usually fulfilled for deviations of about 10%, although for low flat rates (e. g. B. dunning costs) a higher percentage deviation is required and in the case of high lump sums a smaller deviation may be sufficient. The proposed wording also points out - in line with the old legal situation - that the customer has a burden of proof for the missing or lesser damage under the general rules on the burden of proof.¹²¹

Against the background of § 11 No. 5b of the AGBG had consolidated the view in case law that it was not possible to apply § 5b of the AGBG. Article 9, paragraph 2 No. 1 AGBG is also ineffective in the relationship B2B, if the counter evidence i. S. v. § 11 No. 5b AGBG is truncated, regardless of whether this truncation is explicit or only implied. It is questionable whether the stricter requirements of § 309 no. 5b of the German Civil Code (BGB) shall apply equally within the scope of § 307 BGB. This does not mean that the express or implied exclusion of counter-evidence is still inadmissible in business dealings. Rather, it should be considered whether the requirement of an explicit reference i. S. d. § 309 No. 5b BGB is to be derived. The result is that there are reservations about this, which are reflected in the approach

¹¹⁷ *BGH*, Urt. v. 31.10.1984 – VIII ZR 226/83, NJW 1985, 320, 321.

¹¹⁸ *OLG Hamm*, Urt. v. 1.7.1985 – 13 U 143/85, NJW-RR 1986, 273.

¹¹⁹ *BGH*, Urt. v. 29.4.1982 – I ZR 70/80, NJW 1982, 2317.

¹²⁰ *OLG Zweibrücken*, Urt. v. 5.3.1999 – 2 U 36/98, VuR 1999, 269.

¹²¹ Siehe dazu *OLG Düsseldorf*, Urt. v. 7.12.1993 – U [Kart] 8/93 WuW 1994, 951, 956.

taken in Section 310 (1). 1 sentence 2 half. 2 BGB. According to this, when applying Section 307 (3) 1 and 2 BGB (German Civil Code) to take appropriate account of the customs and practices applicable in trade. On the basis of the entrepreneur's usual business experience as a customer, it will be possible to consider an explicit reference to the possibility of counter-evidence as dispensable without violating the principles laid down in § 307 BGB. The business partner will regularly be aware of his own accord that he has the right to prove that the damage is missing or considerably lower, and will also be able to assert his rights resulting from this appropriately. The fact that the contracting party is less in need of protection in business dealings has also been taken into account in the case law of the Federal Court of Justice. Finally, the transparency requirement of Section 307 (1) of the German Stock Corporation Act is also applicable. 1 sentence 2 of the German Civil Code (BGB), since in determining the facts of the case of "unreasonable disadvantage", which are only substantiated by this, not only a general supra-individual consideration must be made, but also the typical clientele must be taken into account. § Section 310 paragraph. 3 No. 3 BGB even allows - for the area of consumer contracts - the consideration of concrete individual circumstances. In a "first-right conclusion", this aspect can also be used to substantiate the result found. For the B2B sector, it therefore remains within the scope of Section 307(3). 1 and 2 BGB with the old, to § 11 No. 5b AGBG oriented legal situation.

The prohibitions of general terms and conditions regarding the lump-sum settlement of claims for damages according to § 309 No. 5 BGB, in particular the claims for compensation according to §§ 280, 281 BGB, but not the claim from § 818 paragraph. 1 BGB. If one also wants to add claims for reduction according to §§ 441, 638 BGB, there is no collision with § 475 para. 1 BGB. Since a corresponding lump sum for reduction claims is normally only provided for in the terms and conditions of purchase, the existence of a purchase of consumer goods i. S. v. § 474 paragraph. 1 BGB are missing. Apart from this, a lump-sum settlement of the claims from §§ 441, 638 BGB does not constitute an agreement "to the disadvantage"; of the customer, but serves to strengthen his legal position.

With regard to individual contractual regulations for the lump-sum settlement of claims for damages, there are no reservations here.

7. limitation of actions

It is difficult to assess clauses which make the limitation of claims more difficult or (vice versa) facilitate it.

According to § 309 No. 8a ff) BGB, agreements in the B2C relationship which provide for a limitation period for claims against the user due to a defect in the cases of §§ 438 para. 1 No.

2 BGB and 634a paragraph. 1 No. 1 BGB facilitate. „ In other cases“; no limitation period of less than one year from the statutory limitation period may be achieved. § Section 438, paragraph. 1 No. 2 BGB regulates the liability for buildings and materials; § 634a para. 1 No. 1 BGB (German Civil Code), the liability for works whose success consists in the production, maintenance or modification of an object or in the provision of planning or monitoring services for it. In this respect, there is a five-year limitation period, for example for the purchase of software that is an integral part of buildings. Apart from these special cases, the reference in § 309 No. 8a BGB to the possibility of limiting the limitation period to one year. It is therefore possible to reduce the two-year warranty period to one year by means of general terms and conditions, if (in the rare case) a delivery of new goods outside of consumer goods sales contracts and contracts for work and services in the B2C sector is involved.

Furthermore, § 309 No. 7a and b BGB. In the event of liability, a shortening of the limitation period is equivalent to a limitation of the legal liability. In this respect, limitation rules are subject to the double proviso of inadmissible shortening and disguised limitation of warranty.

However, serious problems of demarcation arise here. § 309 No. 8b BGB applies only in the case of "defects"; as can be seen from the heading. This therefore only includes cases in which a right arises from the defectiveness of the item or service itself. Other claims for damages are not subject to the statute of limitations. In this respect, it is decisive for the admissibility of a limitation rule whether the basis of the claim is connected with a defect or not. Thus, at the latest here the old controversy arises again, whether a damage can be attributed to the deficiency of an item or not. For non-defect-related claims, the statute of limitations can be regulated within the framework of § 307 BGB, whereby it must be considered at the same time that § 202 Para. 1 BGB excludes a shortening of the limitation period with regard to intentional acts. § Section 309 No. 8 BGB also applies only to the delivery of new goods. Used products are not covered by the scheme. In this respect, attention should be paid to § 307 BGB.

These considerations should also apply to the case of B2B terms and conditions. According to § 307 BGB (German Civil Code), recourse to obligations essential to the contract shall apply here. As a mini-mum for a shortening of the limitation period, the one-year period referred to above can be considered here. However, a more generous treatment with regard to the special features of commercial traffic is also conceivable. § 309 No. 8a BGB also has an indicative effect on commercial transactions. Unlike under the old law, however, it no longer plays a decisive role in the required overall view that the statutory limitation periods are unreasonably

short. Rather, only the basic idea can be deduced from the old case law that if the limitation period is shortened, the purchaser must still be given the opportunity to discover hidden defects. For example, a reduction of the warranty period from five years for buildings to six months is likely to be negligent even under the new law. It is also ineffective if the start of the limitation period is brought forward before the moment of delivery. As a result, this means that, at least in the regular case, a reduction to less than one year is not permissible even for the purely entrepreneurial sector.

§ Section 475 of the German Civil Code (BGB) prohibits agreements that deviate from the provisions on the purchase of consumer goods (Subtitle 3). These legal requirements also include Section 479 (1). 2 BGB, which regulates the limitation of recourse claims of the entrepreneur against his supplier (§ 478 Para. 2 BGB). However, these claims are not those concerning the relationship between entrepreneur and consumer. In this respect, Section 475(4) 1 BGB does not. More important is § 475 paragraph. 2 BGB, according to which the statute of limitations for the purchase of consumer goods before notification of a defect cannot be facilitated by legal transaction, provided that the agreement leads to a limitation period of less than two years, in the case of used goods less than one year. Now the legal limitation period for most purchase objects is two years (§ 438 paragraph 1 No. 3 BGB). In this respect, the BGB permits a shortening of the limitation period for the purchase of consumer goods, at most for used goods.

For the extension of the limitation period, § 202 BGB is relevant. According to this, the limitation period in the case of liability for intent cannot be facilitated in advance by legal transaction (Section 202 (202) 1 BGB). Furthermore, the area of the guarantee (§ 444 BGB) is excluded from the statute of limitations, since a shortening of the statute of limitations would be equivalent to an inadmissible exclusion of warranty. Beyond a limitation period of 30 years, the limitation period may not be extended (Section 202 (202) 2 BGB). However, agreements extending the limitation period within the limits of § 202 Para. 2 BGB permitted..

8. Delay and impossibility/disruption of performance

According to § 309 No. 8a of the German Civil Code (BGB), any provision which, in the event of a breach of duty for which the user is responsible and which does not consist in a defect in the purchased item or work, excludes or restricts the right of the other party to the contract to withdraw from the contract. The scope of application of the provision is reduced to the question of the right of withdrawal; on the question of liability, § 309 no. 7b BGB must be observed. The regulation consistently implements the dogmatic changes of the BGB to the right to default; instead of default and impossibility, the facts of the "breach of duty for

which we are responsible"; now apply. Provisions on partial default and partial impossibility of performance are set out in § 309 No. 8a BGB.

Furthermore, the special rules for withdrawal in case of force majeure without the seller's fault must be observed. If the user wishes to release himself from the obligation to fulfil the contract in the event of non-availability of the service, he can do so for a factually justifiable reason; however, he must then immediately inform the buyer of the non-availability of the service and immediately refund the consideration, § 308 No. 3 i. B. M. No. 8 BGB.

9. UN sales law

literature:

Bierekoven, Vor- und Nachteile des UN-Kaufrechts für den Softwareerwerb und -vertrieb, ITRB 2008, 19.

Frequently, choice of law clauses are found in general terms and conditions, according to which "German law applies to the exclusion of the UN Convention on Contracts for the International Sale of Goods". It is questionable whether such clauses are useful. The UN Convention on Contracts for the International Sale of Goods is within its scope of application as part of the German legal system with precedence over Art. 27 ff. EGBGB applicable. Within its scope of application as well as in the case of partial agreement under German law, the UN Convention on Contracts for the International Sale of Goods shall therefore apply. However, the prevailing opinion with reference to Art. 6 of the agreement, the rules can be waived for.¹²²

The UN sales law was the model for the reform of the law of obligations. Therefore, no major differences between the German Civil Code and the UN Convention on Contracts for the International Sale of Goods can be identified; in particular, the former reason for the waiver, the allegedly particularly pronounced buyer-friendliness of the agreement, is no longer relevant. Both sets of rules are based on the model of the generic purchase, particularly in the warranty system under purchase law, and define freedom from defects as the subject of the obligation to fulfil. It is therefore recommended to refrain from the disclaimer and to only agree: "German law applies".

¹²² So auch *Benicke*, in: MüKo HGB, 3. Aufl. 2013, CISG Art.6 Rn. 2; *Mistelis* in: UN Convention on the International Sales of Goods, 2011, CISG Art.6, Rn. 8; *Magnus*, in: Staudinger, 16. Auflage 2012, CISG Art. 6 Rn. 8.

10. Sample Clause Warranty/Liability

For all the dangers and risks involved in model clauses and terms of business, the attempt to present a reasonably useful and effective warranty and liability clause is a daring one. Of course, the author does not guarantee the completeness and correctness of these clauses. It should also be pointed out that the clauses on warranty and on the obligation to give notice of defects do not apply to the sale of consumer goods. In this area, warranty clauses are generally not useful; instead, it is (only) advisable to regulate liability.

a) Suggestions for warranty (not for consumer goods purchase)

aa) guarantee

Defects in the delivered goods, including the manuals and other documents, will be remedied by the supplier within the legally prescribed period of two years from the date of delivery, following appropriate notification by the user. This is done at the choice of the buyer by free rectification of defects or replacement delivery. In the event of a replacement delivery, the buyer is obliged to return the defective item..

If the defect cannot be remedied within a reasonable period of time or if the repair or replacement delivery is to be regarded as having failed for other reasons, the Buyer may, at his discretion, demand a reduction in price (abatement) or withdraw from the contract. A failure of the rectification of defects is only to be assumed if the Supplier has been given sufficient opportunity to rectify the defects or make a replacement delivery without the desired success having been achieved, if the rectification of defects or replacement delivery is possible, if it is refused or unreasonably delayed by the Supplier, if there are justified doubts as to the prospects of success or if it is unreasonable to expect the Supplier to do so for other reasons.

bb) Duty to examine and give notice of defects

(1) The buyer is obliged to inspect the delivered goods for obvious defects which are easily noticeable to an average customer. Obvious defects also include the absence of manuals and considerable, easily visible damage to the goods. It also covers cases where a different item or too small a quantity is delivered. Such obvious defects must be notified to the supplier in writing within four weeks of delivery.

(2) Defects that only become obvious later must be reported to the supplier within four weeks of their detection by the user.

(3) In the event of a breach of the duty to inspect and notify, the goods shall be deemed to have been approved with regard to the defect in question.

b) Proposals on liability (including Purchase of consumer goods; see § 475 para. 3 BGB)

We exclude our liability for slightly negligent breaches of duty, unless damages from injury to life, body or health or guarantees are affected or claims under the Product Liability Act are affected. Furthermore, the liability for the breach of obligations, the fulfilment of which makes the proper execution of the contract possible in the first place and on the observance of which the customer may regularly rely, remains unaffected. The same applies to breaches of duty by our vicarious agents.

VI. others

The final clauses of many contracts are severability clauses, written form requirements for ancillary agreements as well as choice of law and jurisdiction clauses.

According to the case law of the Federal Court of Justice, a severability clause, according to which the possible invalidity of one or more provisions of this contract does not affect the validity of the remaining provisions, leads to a reversal of the burden of proof and demonstration. According to the reasoning of the Federal Court of Justice, the clause does not release the parties from the examination to be carried out according to § 139 BGB as to whether they rejected the partially void transaction as a whole or would have accepted the remainder. According to the BGH, the clause is, however, significant with regard to the burden of proof and demonstration: In deviation from § 139 BGB, the clause affects the party who, contrary to the preservation clause, considers the contract as a whole to be invalid. However, a clause according to which a void or ineffective provision is to be replaced by a provision which comes closest to the economic intention in a permissible manner is considered questionable, because this gives rise to a presumption of the effectiveness of the unaffected provisions which the other party cannot refute..¹²³

With regard to the written form, the case law of the Federal Court of Justice (BGH) on the even tacitly possible amendment of so-called simple written form requirements must be observed. The parties may lift the agreed formal requirement at any time. As an "actus contrarius"; for the formless establishment of the formal requirement, the cancellation of the formal agreement is also formless. Simple written form clauses can be tacitly waived, even if the parties have not considered the written form when making their oral agreement. It is sufficient that the parties have unanimously agreed that the oral agreement is authoritative. A writ-

¹²³ BGH, Urt. v. 6.4.2005 – XII ZR 132/03, NJW 2005, 2225 = MDR 2005, 1040 = NZM 2005, 502.

ten form clause is ineffective if it serves to undermine individual agreements made after conclusion of the contract in particular by giving the impression in the other part of the contract that a (merely) oral agreement is ineffective contrary to general legal principles.¹²⁴

The applicable law can be (apparently) contractually regulated by a choice of law clause. The Parties agree to apply a specific copyright regime to their legal relations. According to Art. Article 3, paragraph 1 Rome I-VO, a contract is subject primarily to the law chosen by the parties. Accordingly, if the parties reach an agreement on which law is to apply, this should always be given priority. Even the assumption of an implied choice of law can be considered. In particular, the agreement of a place of jurisdiction should be a (rebuttable) indication for the choice of the substantive law applicable at the place of jurisdiction. If the parties have not made a choice of law, the applicable law is determined according to Art. Paragraph 4 1 Rome I-VO. The determination is based on objective circumstances - i. e. by way of an objective link. The basic idea of the Art. 4, which replaces Art. 28 EGBGB is in accordance with the old legal situation. Thus, contracts should be subject to the legal system with which they are most closely connected. However, the external structure of the objective connecting factor shows clear differences from the old legal situation. While Art. 28 EG-BGB a. F. was generally based on the principle of the closest link, the existence of such a territorial link according to Article 5(1)(b) and (c). paragraphs 2-4 and Art. 28 para. 5 EG-BGB a. F. provided for a relaxation regulation, Art. Paragraph 4 1 Rome I-VO basically the contract-characteristic performance relatively rigid for individual types of contracts. The characteristic performance as such is only mentioned in second place. In the case of purchase contracts for software, gem. Art. Paragraph 4 1a Rome I-VO therefore the seat of the seller on the applicable law. The legal situation becomes complicated if the buyer has promised not only to pay for the software but also to fulfil extensive marketing and exploitation obligations. A clear assignment to one of the categories mentioned in paragraph. 1 is not possible, so that on Abs. 2 must be used. The law applicable shall be the law of the country in which the party who is required to perform the characteristic service of the contract has his habitual residence. The determination of the characteristic performance does not require any special features. In the case mentioned above, the buyer's non-economic obligations may well determine the contract, so that, depending on the importance of these obligations, the buyer's home law may apply. Where the applicable law can be determined on the basis of paragraphs 1 and 2, but there is a manifestly

¹²⁴ *BGH*, Urt. v. 27.9.2000 – VIII ZR 155/99, NJW 2001, 292 = NZV 2001, 124; ähnlich *KG Berlin*, Urt. v. 28.2.2005 – 12 U 74/03, NZM 2005, 457.

closer connection with another country, the escape clause in paragraph 3 applies. This regulation is a corrective for exceptional cases. Paragraph 4, on the other hand, requires the user of the law to determine the legal order by means of the principle of the closest connection, if the first two paragraphs do not produce a result. The previous initial provision of Art. 28 EGBGB a. F. therefore only has the status of an ancillary offence.¹²⁵

It should also be noted that the law chosen is the only law that is decisive for contractual legal relationships. For example, the tort law issues that often arise are not subject to the chosen treaty statute but are assessed under the tort statute. Since the Rome II-VO came into force the following applies in accordance with Art. 8 para. 1 the protection country principle. The applicable law is the law of the country for whose territory protection is sought, the so-called *lex loci protectionis*. The controversial question of whether in the case of copyright infringements direct reference is made to the crime scene rule of Art. 40 paragraphs. 1 EGBGB can be invoked, or whether the escape clause of Art. 41 EGBGB is applicable, it can therefore be left open. In contrast to the infringement of property rights, the *lex loci protectionis* also applies to preliminary questions of conflict of laws in the case of the infringement of intellectual property rights. This includes the origin of the copyright, the first ownership of the copyright and the question whether and which copyright powers are transferable.¹²⁶

However, the German Copyright Act contains mandatory regulations in favour of the author which cannot be overridden by a choice of law clause. These include the provisions on moral rights, the principle of assignment of purpose, the provisions on the appropriate remuneration of authors and on further participation in a particularly successful work (Sections 32, 32a UrhG; see expressly Section 32b No. 2 UrhG) as well as the right of recall due to changed convictions (Section 41 UrhG). Furthermore, a choice of law clause does not apply from the outset to the disposal transaction, i. e. the legal assessment of the transfer of rights of use. Thus, although the parties are given the possibility to choose the law applicable to their contractual relations, there are many areas in which such a choice of law is not possible. German copyright law is therefore also applicable if protected content stored on a server abroad is made accessible in Germany.¹²⁷

It should also be noted that the law chosen is the only law that is decisive for contractual legal relationships. For example, the tort law issues that often arise are not subject to the chosen

¹²⁵ *Martiny*, in: MüKo BGB, 6. Aufl. 2015, Art. 4 Rom I-VO Rn. 270.

¹²⁶ *BGH*, Urt. v. 2.10.1997 – I ZR 88-95, NJW 1998, 1395 = MMR 1998, 35 – Spielbankaffaire mit Anm. *Schricker*; ähnlich auch *LG Hamburg*, Urt. v. 4.9.2001 – 416 O 6/00, NJW 2002, 623 = ZUM 2002, 156.

¹²⁷ *LG Hamburg*, Urt. v. 5.9.2003 – 308 O 449/03, GRUR Int. 2004, 148 = MMR 2004, 558 = CR 2004, 855 – Thumbnails.

treaty statute but are assessed under the tort statute. Although it is controversial whether in the case of copyright infringements direct reference is made to the crime scene rule of Art. 40 paragraphs. 1 EGBGB can be invoked or whether the escape clause of Art. 41 of the Introductory Law to the Civil Code, it is generally accepted that the principle of the country of protection applies here, taking account of intellectual property. The applicable law is the law of the country for whose territory protection is sought, the so-called *lex loci protectionis*. In contrast to the infringement of property rights, the *lex loci protectionis* also applies to preliminary questions of conflict of laws in the case of the infringement of intellectual property rights. This includes the origin of the copyright, the first ownership of the copyright and the question whether and which copyright powers are transferable.¹²⁸

VII. The discovery procedure in warranty and default proceedings

literature:

Schneider, Handbuch des EDV-Rechts, 4. Aufl., Köln 2009; *Redeker*, Der EDV-Prozess, 2. Aufl., München 2000; *Brandi-Dohrn*, Der Software-Mängelprozess und seine Vorbereitung, in: Lehmann (Hrsg.), Rechtsschutz und Verwertung von Computerprogrammen, 2. Aufl., Köln 1993, Kapitel XIX.

The user of a defective program has a number of claims and rights. He is often less interested in withdrawal and reimbursement of the purchase price than in supplementary performance. The repayment or reduction of the purchase price does little to help him; he rather wants to establish the functionality of "his" program. However, once a lawsuit is brought, it is usually only a matter of withdrawal or compensation. If the supplier starts the process, it is a matter of sentencing the user to pay the agreed purchase price or compensation for work. If the user wants to defend himself against this by objecting to existing defects, there is the possibility of a counterclaim (§ 33 ZPO).

1. Preparation of the process

a) Problems of proof in case of defects

In the preparatory stage, the provability of defects must first be clarified. On the one hand, the parties can dispute about the target quality. For the determination of such defects, the requirements specification or at least a performance specification is therefore of central im-

¹²⁸ *BGH*, Urt. v. 2.10.1997 – IZR 88-95, NJW 1998, 1395 = MMR 1998, 35 – Spielbankaffaire m. Anm. *Schricker*; ähnlich auch *LG Hamburg*, Urt. v. 4.9.2001 – 416 O 6/00, NJW 2002, 623 = ZUM 2002, 156.

portance. In the absence of such documents, it may be sufficient that the required functions have been discussed and jointly accepted during contract negotiations with the supplier. Important are meeting notes, correspondence and technical notes. It has to be presented in concrete terms what was said during which sales talk. The possibility of witness evidence must also be clarified. If the presentation is successful, the further process is simple. For it is precisely the deviation from contractual requirements which is the most gratifying group of errors from the point of view of the courts: usually no complicated expert opinions and disputes between the parties are required here. Instead, it is only a question of whether or not a particular service of the programme is available according to the agreements. Complaints must be substantiated so that an expert can examine them. A layman must have a private expert opinion prepared if required.¹²⁹

It becomes difficult when such performance requirements are lacking. Here only the usual use of a program can be used as a benchmark.

On the other hand, the parties may dispute about defects in the actual condition. However, special problems then occur in cases where the malfunctions occur during certain work processes with the computer system without being based on a reason that can be recognized as a specific software error. Such defects must first be examined for their reproducibility. The reconstruction of the error occurrence makes the keeping of an "error logbook"; useful in the research and problem containment phase. The IT layman only needs to describe the appearance of the error. It is harmless if the user additionally states wrong causes. Furthermore, it is to be ruled out as far as possible that the error is due to a possible hardware components from another manufacturer. Otherwise, it is to be expected that the hardware and software supplier will attempt to evade responsibility, both in the preliminary negotiations and in the trial, by referring to the other party.

b) fixing of a time limit

Once the processing and clarification of the defect issue has been completed, it is advisable to consider setting a possible deadline. In many cases, the law requires that the user at least asks the supplier to remedy the defect. In the case of a mutual commercial purchase, the buyer has the delivered soft- or hardware according to § 377 HGB. to examine hardware immediately after delivery and to give notice of any detected defects. In the case of a contract for work and services, the customer may request the contractor to provide subsequent performance (§§ 634

¹²⁹ *LG Stuttgart*, Urt. v. 7.2.1991 – 16 S 243/90, CR 1992, 226.

No. 1, 635 BGB). Before he can claim compensation for expenses or reduction, the supplementary performance must have failed or not have taken place.

Within the scope of the UN Convention on Contracts for the International Sale of Goods, the obligation to give notice of defects applies to everyone (Art. 39 CISG). In cases of delay in delivery or rectification of defects, the buyer may notify the seller in accordance with the provisions of § 3. Art. 47 paragraph. 1 CISG for delivery within a reasonable grace period. From para. 2 of the provision it results that the buyer cannot exercise any legal remedies due to the breach of contract with the exception of compensation for damages caused by delay, i. e. in particular cannot withdraw from the contract. The limits of those provisions are disputed in detail. This concerns, for example, the requirement of a threat of refusal. It is therefore advisable, in case of doubt, to set a time limit for rectification or Set subsequent delivery with threat of rejection.

When setting a grace period, care must be taken to ensure that the period is reasonable. Admittedly, a period of time which is too short also sets a reasonable period of time in motion, but the rejection of an offer of services after expiry of only the too short period of time results in the illegality of the refusal of acceptance. A period of time is reasonable if it is sufficient for a contractual partner who has endeavoured to remedy the defect to remedy the defects, provided that he starts the work necessary for this purpose immediately. For example, a period of 14 days was considered unreasonably short for a large number of requests for rectification. Changes made during the execution of the contract - e. g. B. Updating of the specifications or addition of further program functions to the scope of services - is to be taken into account by correspondingly longer periods.

In the event of actions brought by the supplier for payment of the purchase price or compensation for work, it must be ensured that the user is really in default with his payment, i. e. that he is in default of payment in accordance with § 286 Para. 1 BGB possibly the necessary reminder has been sent. The compensation for work is due upon acceptance, § 641 BGB. It should also be considered whether an attempt should not be made before the action is brought to obtain payment by means of the order for payment procedure under Paragraphs 688 et seq. to obtain ZPO.

c) Risk analysis and alternatives

In the subsequent assessment of litigation risks, a number of possible cost factors must be taken into account. Above all, the high costs of proving defects by IT experts must be taken into account. Often the amount of the claimed reduction or compensation is not in a reasonable relation to the costs of the expert opinion. Due to the by no means self-evident expertise of

even sworn experts, a critical evaluation of the expert opinion is very important. Also, a procedure takes a long time, so that the disputed service is outdated and thus devalued. Also, the user is often less helped with the repayment of the purchase price; he will prefer efficient rework and further support services from the supplier.

As an alternative to legal proceedings, the user should first consider the possibility of a settlement in or out of court. It should be noted that all services to be regulated, in particular also considerations which are to be provided concurrently, are titled in an enforceable form. In view of the problems encountered, reference may be made to the wording of the application.

A cost regulation should also be considered. In the event of payment by instalments, the settlement should contain a forfeiture clause; this prevents that in the event of unpunctual payment of instalments, enforcement can only be sought for the outstanding instalments and not immediately for the total amount.

There is also the possibility of arbitration proceedings; the final arbitral award is equivalent to a court decision under sec 1055 ZPO in terms of enforceability. The arbitration procedure also has the advantage for the supplier that it is not public. Software defects are therefore not discussed coram publicum and are communicated to a wider public via the media. This is how arbitration helps to protect the company's image.

If only the actual deficiencies are to be clarified autonomously by the party, the possibility of an arbitration opinion should be considered.

d) Independent evidence procedure

Too little use is made of the independent procedure of taking evidence in the run-up to warranty proceedings (§§ 485 ff. ZPO). On the basis of such a procedure, an expert can establish the deficiencies of the program "court-proof"; and the user can then eliminate the deficiencies without encountering problems of proof. Such an early evidence procedure is therefore particularly appropriate when

- the user can no longer use defective software and therefore wants to sell or delete it,¹³⁰
- defects can only be proved by witnesses (personnel) or experts during operation of the plant: After switching to another data processing system, the user will soon no longer be able to operate the old (in dispute),
- the user wants to remedy the defects himself in order to be able to work quickly with the program (however, in this case, due to § 45 UrhG, which is within the scope of §§ 69a ff.

¹³⁰ Siehe *LG Oldenburg*, Urt. v. 24.4.1991 – 12 O 204/90, NJW 1992, 1771.

UrhG applies, probably also the possibility to keep the original data carrier with the defective version and to remedy the defects on a copy),

- the user wants to have certainty about the fault as quickly as possible in order to purchase a new system and shut down the old one.

According to Section 204 Paragraph. 1 No. 7 BGB, the statute of limitations is suspended if the application for a judicial hearing of evidence is served on the opponent to secure the evidence. The independent taking of evidence is faster than a main trial and can in many cases lead to the avoidance of a main trial.

aa) responsibility

If the main action is not yet pending, the court which, according to the information provided by the applicant, would be competent for the main action is responsible for the independent procedure of taking evidence (Section 486(4)(a) of the Basic Law). 2 sentence 1 ZPO). If the independent procedure of taking evidence is followed by a trial on the merits, the applicant can no longer invoke the lack of competence of the court. If the main action is already pending, the following shall be required pursuant to § Article 486, paragraph 1 ZPO the court of litigation is locally responsible. An exception to these provisions is made in Section 486 (4). 3 ZPO for urgent cases. The district court in whose district the witness to be heard or the object or person to be examined is located shall be responsible for this. § 486 ZPO is intended to ensure that the independent taking of evidence is carried out at the same court as the main proceedings, so that the immediacy of the taking of evidence is guaranteed. This territorial jurisdiction cannot therefore be changed by agreement between the parties. However, it is inadmissible in that sense only the establishment of a special jurisdiction for the procedure of taking evidence, a special jurisdiction and a special jurisdiction for the prosecution. U. admissible agreement on jurisdiction for the main proceedings, on the other hand, also has an effect on the independent taking of evidence.

bb) Subject-matter of the proceedings and authority to award contracts

The first option available is the application pursuant to Section 485 (1). 1 CODE OF CIVIL PROCEDURE. The proceedings may include any inspection, hearing of witnesses or expert assessment. The far-reaching possibilities of this procedure variant are, in return, linked to strict conditions. Thus, the power of application i. S. d. § 485 paragraph. 1 ZPO only with the consent of the opponent or if the loss or the use of the evidence may be made more difficult. In practice, however, these conditions are by no means rare. If the user has e. g. B. If application software is purchased whose defectiveness is disputed, the mere delivery and installation

of a new version (without this version having to be aimed solely at eliminating the error) may give rise to the fear of loss of evidence. From an economic point of view, nobody can be expected to leave a computer system in exactly the same condition for the duration of a process in which the fault occurred. The requirements of § 485 para. 1 ZPO will therefore be practically by no means rare.

However, the possibility of § 485, Subsection 485 is used more frequently. 2 ZPO has been made use of. This standard imposes fewer requirements on the right to file an application, but also restricts the subjects and means of evidence that can be considered. Accordingly, the applicant's interest in determining the value or condition of an object, the cause of a material defect or the amount of expenditure required to remedy the damage is all that is required. For these cases, there is the possibility of an expert opinion in the form of a written expert report. In practice, the great importance of this is due to the fact that the collection of evidence usually depends on an expert opinion, whereas the use of other evidence plays a rather minor role. The only problematic question in the context of the application under Section 485 (485) 2 ZPO is that according to the existence of a legal interest. The question of whether a narrow or rather a broad interpretation is appropriate in this respect is viewed inconsistently. In principle, however, it can be assumed that, in accordance with the provisions of Section 485 (4) of the German Stock Corporation Act, the 2 sentence 2 ZPO, the legal interest is given if the determination can serve to avoid legal disputes. This is always to be assumed if the prerequisites of a procedurally significant claim, an asserted objection or objection can be clarified in the independent procedure of taking evidence. A legal interest is also to be affirmed if the condition of the object is decisive for the legal relations of the parties, which is the case especially for warranty claims.¹³¹

cc) Content of the application

The applicant must first of all substantiate the requirements for the independent taking of evidence, in particular the legal interest, as well as those facts which establish the jurisdiction of the court (section 487 no. 4 ZPO). The application shall identify the opponent (section 487 no. 1 ZPO). This may sometimes be difficult, but it is practically indispensable in order to achieve the intended binding effect of the evidence procedure. Although this information may be used in exceptional cases (cf. 494 ZPO), but the defendant in the form of the supplier is usually confronted with a potentially responsible person, so that the purpose of the independent pro-

¹³¹ *Thieme*, MDR 1991, 989.

cedure of taking evidence should not be jeopardised by waiving the statement of the defendant.

In the warranty process, the question of the existence and materiality of defects is of particular importance. However, when describing the facts about which evidence is to be taken in the form of the written expert opinion, no question of proof of the content may be asked as to whether the software in question is defective or not. Rather, a more concrete specification of the defects to be examined is required, which should represent the deviation from the nominal quality. The nominal quality results either from the prepared specification sheet or from normal use. The defects complained of must be described precisely and completely, because the application suspends the limitation period only for these defects (Section 204 (2) 1 No. 7 BGB). The formulation of the question of proof is therefore a kind of balancing act. The cause of the defect need not be stated, unless its clarification is important, e. g. B. because the manufacturer of the software claims operating errors as the cause. In this case, however, it is sufficient to state that the cause of the defect is to be found in the service and is not based on an operating error.

It is difficult to formulate the application if there are several defendants. Such cases may arise when different programmes are combined, for example in the context of a larger computer project. For the formulation of the question of evidence, an inadmissible request for investigation must be avoided on the one hand, and on the other hand the applicant must be able to meet the requirement, with the result of the independent procedure of taking evidence, to name the person who caused the defect or damage in the case of several suppliers with initially unclear causal contributions. This means that in cases where two defendants are involved, the question of the cause of damage is to be substantiated in terms of whether the actual cause of damage lies in the component supplied by the respective defendant..

dd) Possibility of the defendant

It is very difficult to shake expert opinions which have been prepared in the independent procedure of taking evidence later on, especially because the result of the evidence according to § 1 is not always clear. 493 ZPO is binding in the main proceedings. The defendant may submit informal counter-objections and suggest that the order be set aside. In addition, he may, by way of a counter-motion, question the validity of the questions of evidence and put forward deviating topics as evidence. This initiates an independent procedure of taking evidence, as long as it is not merely a matter of supplementary questions. Finally, there is the possibility of rejecting the expert on the grounds of partiality.

If it is necessary for the supplier to secure the evidence, e. g. B. to his upstream supplier, he may request his own evidence procedure. If a separate request for evidence before the same court is admissible, the supplier should seek to combine the proceedings. If, on the other hand, two different courts are involved, the possibility of obtaining the appointment of the same expert by means of a reference to the other pending evidence procedure should be considered. In addition, the supplier may, in the correct opinion, notify the pre-supplier of the dispute.¹³²

ee) costs

If the independent evidence proceedings are followed by main proceedings, the costs of the evidence proceedings are part of the costs of the main proceedings; their distribution is therefore based on the outcome of the subsequent proceedings. If the applicant withdraws the application to conduct the independent procedure of taking evidence, he shall bear the costs by analogy with section 269 of the Code of Civil Procedure. If it is established in the independent evidence procedure that the claimant was wrong and the claimant does not subsequently bring an action, the defendant may set a time limit for the court to bring the action (section 494a(1)(a)). 1 ZPO). If the applicant does not bring an action within that period, he must bear the costs of the evidence proceedings (Paragraph 494(4) of the Bundesgerichtshof Rules of Procedure). 2 ZPO).

2. The procedure before the court - jurisdiction

The competent court must be determined before the action is brought: Where can I bring an action (local jurisdiction)? Is the local or regional court responsible (substantive jurisdiction)?

a) local jurisdiction

The local jurisdiction may initially arise from an agreement on jurisdiction. Such a clause is permissible if the parties are registered traders, legal persons under public law (e. g. B. University) or special funds under public law (section 38 ZPO). Otherwise, the local jurisdiction is based on the residence or place of business of the defendant supplier (§§ 13, 17 ZPO). At this general place of jurisdiction the following actions for abatement are to be filed.

The special place of jurisdiction of the place of performance (§ 29 para. 1 ZPO), on the other hand, can be considered for the action of rescission and all other actions for restitution. The place of performance for such claims is in accordance with h. M. the place where the item to be returned is located according to the contractual agreements. This is likely to be a regular

¹³² Siehe hierzu *Hoeren*, ZZP 108 (1995), 343 ff. m.w.N.

feature of the residential or be the registered office of the user, who can therefore also bring the action for restitution before the domestic court.¹³³

The legal situation is controversial in the event that the software is already completely at the supplier's premises, for example because the supplier wants to carry out rectification work. The same applies if the item is not at the supplier's premises, but also not at the place of performance. If the user is unsure of the jurisdiction of "his" local court, the only option is to sue at the supplier's general place of jurisdiction. In the event that the supplier brings an action for payment, § 29 ZPO is also applicable. In the absence of any other agreement, the place of performance pursuant to § Section 269, paragraph. 1 BGB the domicile of the debtor, i. e. of the user.

The Swiss Federal Supreme Court had to decide a case in which two conflicting agreements on jurisdiction had been made in one contract. It concluded that in this case no valid choice of court agreement was concluded at all. Since no place of performance was agreed and Art. 5 paragraphs. 1 lit. b Lugano is applicable only in cases where the software is transferred in a material form (which the applicants have not submitted), recourse must be had to the general rule according to which, in the case of a licence agreement, the place of performance is the debtor's domicile.

b) jurisdiction over the subject[-matter]

For the substantive and/or functional competence, the competence of the Chamber for Commercial Matters must be taken into account. If the underlying transaction (for example B. Purchase of software) a bilateral commercial transaction i. S. d. § 343 HGB, then according to § 95 Par. 1 No. 1 GVG the Chamber of Commerce. A possible loss of the plaintiff's merchant status does not affect the competence; according to § 95 GVG, the decisive factor is rather the defendant's merchant status, so that the Chamber for Commercial Matters does not have competence if the defendant loses his merchant status. In some courts there are now special banners for computer matters. Their responsibilities are determined by the respective schedule of responsibilities.

3. The Statement of Claim

Apart from the general requirements for a statement of claim (§ 253 ZPO), the question of the correct application in the IT process causes the most difficulties.

¹³³ *OLG Nürnberg*, NJW 1974, 2337; *OLG Hamm*, MDR 1989, 65; a.A. *LG Tübingen*, Beschl. v. 18.12.1985 – 2 O 360/85, MDR 1986, 756.

In particular, the correct drafting of the action for annulment is complicated. In addition to the repayment, redemption costs that only arise after a legally binding decision has been made should be taken into account. However, the main problem of the request is that it is based on payment concurrently with the return and/or deletion of the software or of the copies made. Either the media on which the program is stored must be returned or the data must be deleted so that it is no longer usable by anyone. The application must be sufficiently precise in relation to the goods supplied for it to be enforceable. The documents to be issued or the software packages must be named exactly for this purpose. They must be described in sufficient detail so that the bailiff can find them, distinguish them from other similar items and take them away from the debtor. A claim for the surrender of software stored on diskettes is only then sufficiently determined and enforceable if sufficient external characteristics, e. g. B. Diskette labels are communicated. The indication of only the stored content does not meet the requirement of certainty of § 253 para. 2 No. 2 ZPO and renders the action inadmissible. In certain circumstances, the description provided by the supplier in the contract may be used to specify the performance. If hardware is to be returned, it must be ensured that data stored on the hard disk is deleted beforehand.

a) Standard software

This must include the exact name, version number and type of data carrier (if possible) as well as the serial number of the individual product. This must include the exact name, version number and type of data carrier (if possible) as well as the serial number of the individual product.

b) Individual software

In the case of the latter, the likelihood of confusion is likely to be lower, but the more difficult it is to identify the exact mark. This is because once the program, which was created individually for the user, has been improved, reprogrammed or reprogrammed, the software in question will no longer be able to be identified by means of certain sets of diskettes or streamer tapes. In this case, it is recommended to propose a deletion of the programs in question, combined with the assurance of the user that all programs have been deleted.

c) Handling of the withdrawal

The data created by the user with the help of the program are not part of the programs. They are not affected by the deletion (return). They do not therefore need to be excluded from the return request.

If the court does not consider the concurrent application to be sufficiently precise, it is to be expected that the action will be dismissed as inadmissible according to the case law of the BGH on the insufficiently quantified payment claims.

However, the dismissal of the action as inadmissible does not constitute a judgment on the substance of the case. According to § 204 para. 2 BGB, the inhibitory effect of the first action can then be maintained by bringing an action again within a period of six months. If, however, it was not possible to specify the counterclaim sufficiently in the first trial, it appears questionable whether this will change in the second trial. If the defendant has his own legal interests in the clarification, for example because he wants to get all the software back in case of a conviction, there is nothing to prevent him from cooperating.

Precise wording of the application should also take into account the fact that unfortunate wording results in conditional titles instead of concurrent titles. The creditor can only prove that the conditions of such a title have been met by means of a public or publicly certified deed, which is an almost impossible requirement with regard to the publication and, above all, the deletion of programs. In order to enforce the title, it is then necessary to file an action according to § 731 ZPO.

With regard to enforcement, there is again the problem of proving that the debtor is in default of acceptance of the performance offered by the creditor or has already been satisfied. This, in turn, can only be done by public or publicly certified deed (§ 756 ZPO). It is therefore advisable to request, in cases of a concurrent application, that a further application be filed to establish that the debtor is in default of acceptance of the consideration. In view of the difficulties explained, there is also an interest in a declaratory judgment for this application.

d) Action for withdrawal from leasing contracts

In the case of leasing, the typical leasing assignment structure must be observed. In this case, an action for repayment of the payment made must be brought against the supplier, whereas payment may only be demanded from the lessor. An application for payment to the lessee proposed in some places, combined with the addition that the payment could also be made to the lessor, would not be feasible, because in a leasing relationship the lessee is generally not entitled to repayment of the payment made for the delivered software in the event of withdrawal. An action for such a payment would therefore be admissible, but unfounded.

With regard to the contract costs, it should be noted that their reimbursement can also be claimed directly from the lessee.

4. The representation of the applicant

For the IT process, the high complexity of the often technical issues causes difficulties. When describing the subject matter, terms from technical jargon are usually unavoidable, so their meaning must always be explained. These explanations not only help the court, but are also of great importance for clarifying the facts between lawyer and client. If the client is an IT-experienced client, the explanations on the facts of the case can be re-read after the written statement has been prepared, so that misunderstandings can be cleared up at this level. This is especially true since many technical terms are used in different meanings depending on the context and problem definition, and the technical language itself is not always uniform. For the question of the necessary level of explanation one should be prepared for the court. Before a special chamber for IT questions a different lecture may be appropriate in this respect than before a court which is only exceptionally concerned with a DP-specific issue. However, special attention must also be paid to the presentation of the operational processes for which the data processing programs are to be used, since these can play a role in determining the desired quality.

It is not advisable to refer to annexes to supplement one's own presentation. Although it may be permissible to add one's own pleadings in the annex, even in this case the reference does not contribute to clarity. On the other hand, a reference in parallel proceedings can be advantageous, because then almost inevitable deviations in the facts of the case can be avoided and the court is spared duplication of work. It should be noted, however, that in appeal proceedings in particular, a reference to pleadings other than one's own is regarded as inadmissible by different courts.¹³⁴

Reference to private expert opinions or out-of-court correspondence is only permissible if it merely serves to substantiate the own presentation. In this case the following applies: it is the written sentence and not the annex that determines the matter in dispute. It is therefore inadmissible to refer to an attached expert opinion with regard to the deficiencies; these must rather be explained in the written statement. These principles also apply to all other facts supported by expert opinions. The general reference to an expert opinion is even problematic if all the deficiencies are to be presented, which a short expert opinion lists and the expert can be expected to read the expert opinion.

¹³⁴ *BGH*, Beschl. v. 18.7.2001 – XII ZB 106/96, *NJW* 1993, 3333; *BGH*, Beschl. v. 18.10.1993 – II ZB 7/93, *BB* 1993, 2327.

5. Burden of proof and demonstration

In this respect, the general rules apply to the IT process: The party asserting a claim must present and prove all facts necessary to substantiate the claim. Accordingly, the person who refers to an objection must also present and prove the facts that are suitable to substantiate the objection. Problems arise, however, when applying these principles to individual cases.

a) Withdrawal and reduction process

In the event of a claim for defects, the supplier bears the burden of proof that he has delivered properly, completely and free of defects. In the case of a contract for work and services for individual software, the burden of proof for the content of the agreements, which can more closely identify the agreed and/or customary quality of the software or which can establish a warranted characteristic, lies with the Purchaser when asserting warranty claims. The burden of proof is only reversed when the user accepts the performance as fulfilment (§ 363 BGB), unless the user is obliged to pay the purchase price in advance. The acceptance as fulfilment to be proven by the supplier does not already lie in the physical acceptance of the performance. Rather, it is necessary that the conduct of the User during or after the acceptance of the performance shows that he wishes to have it regarded as essentially proper performance against him.

In the case of a contract for work and services, the contractor must prove that the work is free of defects until acceptance of the work. According to recent, dogmatically unconvincing case law, an acceptance is only given if the software has worked without defects for a certain period of time in the client's company after instruction of the personnel and overcoming recurring initial difficulties. Case law thus helps the user to postpone the limitation period. Incorrect takeover confirmations therefore do not lead to a reversal of the burden of proof on the customer. In the case of acceptance without restrictions, the user bears the burden of proof that a manual was not delivered.

If the software has already been delivered or accepted, the user must present and prove the existence of the claimed defect. He must prove that the defects he claims were already present at the time of the transfer of risk. The user is obliged to prove the contractually agreed target quality. For this purpose, manuals, manufacturer's brochures and similar materials shall be consulted in addition to the contractual performance specifications. Explanations regarding the normal use of the product in question or the state of the art are permissible, but require proof. However, the mere fact that a software does not exhibit a certain characteristic may mean that the supplier must prove that this condition of the software does not constitute a

defect if the user provides a conclusive reason why such a characteristic is to be expected according to the general standard.

In the presentation of the defect, after the description of the service owed and the description of the defect occurring, special attention must be paid to the impairment of the usability of the software. The description of the defect on the user level is completely sufficient. The defect must only be described in such a way that it is comprehensible and verifiable for court and experts. It is therefore sufficient to describe the effect; explanations of the cause of a malfunction are not required. The impairment of the usability of the program by the claimed defect(s) becomes particularly decisive if it is not a matter of individual serious defects, but of several smaller defects, which together make work more difficult or impossible. The impression that only minor defects are complained about is to be avoided. Here again, it is sufficient to explain the error at the user level; it is not necessary to explain the cause of the error. It is only necessary to make clear where the impairment lies. In the event that a defect only occurs after a system has been retrofitted, the supplier bears the burden of proof that the defect was not yet present when the system was handed over to him.

However, the approach proposed so far does not go far enough when dealing with the - practically frequent - case of a system not consisting of only one component. In practice, the use of software from only one manufacturer is a practically never occurring case, and conflicts always occur in interaction with the hardware used. Due to the extensive standardization, the possibility of errors being caused by individual components can usually be excluded. Nevertheless, a software supplier will often try to blame other system components for the error that occurs. The error analysis necessary for clarification is usually not possible without a private expert opinion. The burden of proof lies with the purchaser. Because of these unpleasant consequences in the process, DP systems should be purchased from a supplier (which is often the case), who is then responsible for the functionality of the entire system.

Since terminations and error messages can also be based on operating errors, several aspects must be considered in order to explain the defectiveness. Here again, it is recommended to keep an error log. In this way it can be documented in which application environment, which application part or with which program function the error occurs. In addition, you should determine whether the entries made by the user correspond to the specifications in the program documentation.

The frequency with which the described defect occurs is particularly serious for the question of the materiality of the defect. Here, an error statistic can be presented on the basis of the log kept in a test phase. If the user submits substantiated errors, it is not sufficient if the supplier

denies them across-the-board because they cannot be demonstrated or because they are due to operating errors..

If the service owed is the creation of individual software, the reference to faulty specifications of the Purchaser shall also be considered as a defence. In such cases a possibly established specification sheet gains importance. If the manufacturer defends himself with faulty specifications of the customer, he must demonstrate that he had no duty to advise in this respect or could not recognise their faulty nature before the program was created. This does not apply if the customer has insisted on the faulty specification despite a reference to the faulty specification. If no requirements specification has been created, although this was agreed upon, this shall constitute a breach of contract by the customer. The customer then bears the burden of proof for the fact that functions which were criticised as being missing were agreed from the outset. The absence of a specification sheet to specify the performance owed shall not prevent an obligation to produce a computer program corresponding to the state of technical development. In such a case, the supplier shall have the extended obligation to obtain the necessary information from the user.

If the underlying contract is a mutual commercial transaction, the user must also demonstrate the timeliness of the notification of defects. In addition to the acquisition of standard software, which is to be classified as a purchase in kind, this also applies to the creation of individual software, provided that this is a contract for work and materials. If a software producer claims that an established defect has already been remedied, he bears the burden of proof.

In the case of a withdrawal process, the question of compensation for use applies in addition to the reversal of the transaction. The burden of proof and demonstration of actual use by the purchaser as well as the amount of the compensation is borne by the software supplier.

During the reduction process, the amount of the reduction must be presented. There are no general rules for determining value. In practice, the amount of the reduction is often based on the costs of eliminating the defects. However, this is unlikely to be compatible with § 441 (3) BGB. Instead, the ratio of the value of the defective software to the defect-free software is to be taken into account. The amount of the costs for the removal of defects may be of significance here, but it is only one element in determining value.

b) Action for damages

If the user claims damages, he must explain and prove the culpable violation of contractual obligations, a damage as well as the causality between violation of obligations and damage. If the cause of the damage lies within the debtor's sphere of risk and responsibility, the debtor shall bear the burden of proof that he is not responsible for the breach of contract. As a result,

this means that the user has to present and, if necessary, prove the breach of the contractual obligation. The supplier must then in turn demonstrate that he is not responsible for the breach of duty.

In the case of success-related obligations, the presumption in favour of the user is that a breach of duty has occurred if the owed success has not occurred. If defective software is created, the contractor must therefore demonstrate and prove that he has used the necessary means to prevent the delivery of defective software.

A special problem is the presentation of the damage, if it concerns loss of sales and profit. Here, § 287 ZPO and § 252 BGB (German Civil Code) intervene in favour of the user. In this respect, the presentation and proof of facts which make the achievement of profit probable are sufficient. However, these facts must relate to the situation of the injured party; a comparison with other companies is not sufficient. The probability of making a profit, as demonstrated here, is also not disproved by the serious possibility that the profit was not made.

If the Supplier relies on the fact that an asserted damage item represents costs which would also have been incurred in addition to the price paid for proper consulting or software development, the Supplier shall be obliged to present and prove this claim..

If it is a matter of a breach of duties to advise, the burden of proof and the burden of demonstration are factually separate. In this case, the user is initially responsible for explaining the violation, but can usually only do this in a general manner. However, he must demonstrate that a consulting relationship has been established between him and the supplier. The supplier must then explain how and when he provided advice. The user must then explain the latter, so that the supplier has the main burden of proof, while the customer has the main burden of proof.

c) Statute of limitations problems

If one of the two parties invokes the statute of limitations, it is obliged to present and prove this. For example, the supplier must prove the date of acceptance or delivery. If the customer wishes to prove that the limitation period has been suspended, he must demonstrate that the supplier has attempted to remedy the defects claimed.

6. Procedure before (the) taking of evidence

After the application has been lodged, and at the latest upon receipt of the statement of defence, the Court of First Instance will take a decision on the further action. In concreto, the court will either set an early first date according to § 275 ZPO or set the deadlines for the written preliminary proceedings according to § 276 ZPO. Which procedure is chosen is at the

free judicial discretion of the court. The working habits of the chamber, the specific subject matter of the case and the workload of the court can play a role in this.

The preliminary written procedure is particularly important in the event of a possible judgment by default, but it is rather unsuitable for conducting complicated proceedings. It is difficult for the parties to decide to what extent the complicated process material should be stratified and superfluous explanations avoided. In view of the preclusion rules, this can only be done safely if the parties can see what the court considers to be essential. In IT processes, an early first appointment in the main proceedings is probably mostly offered in the form of a preparation appointment. From the court's point of view, this usually has the purpose of further organizing the subject matter of the case. For the plaintiff, it may be significant that a reply may be useful because of the defendant's defense.

It is problematic whether the expert should already be invited to the discussion meeting. It is primarily the task of the parties to prepare and present the subject matter of the case in a way that the court can understand. In addition, the involvement of experts, even within the framework of § 273, Subsection 2, Sentence 4, ZPO, is only possible in principle if the matter in dispute is a matter of litigation. If, for example, one has not yet reached the disputed issues in the preparatory meeting, the expert acts as interpreter. This is problematic against the background of the limits of § 139 ZPO, since the expert is an auxiliary person of the court. In general, a summons from the expert is welcome at the hearing in order to avoid misunderstandings in technical details. However, this must not lead to the expert clarifying the facts of the case for the court himself by way of "translation" and subsequently presenting them to the court. Such an official investigation must be avoided in any case. It must be ensured that the court retains control over the extent to which there are indications of the presentation or defectiveness of the presentation.

7. The taking of evidence

literature:

Berger, Die Beweisführung mit elektronischen Dokumenten, NJW 2005, 1016; *Bergmann/Streitz*, Beweiserhebung in EDV-Sachen, NJW 1992, 1726; *Schnupp*, Von virtuellen Wahrheiten, NJW-CoR 1999, 217.

As a rule, disputed issues that require detailed technical consideration must be clarified in the IT process. The taking of evidence is therefore usually decisive for the process, and its careful preparation and execution is therefore one of the most important parts of the process.

a) The Evidence Warrant

From the point of view of the court, a distinction must be made between two possible ways of taking evidence. The court can take evidence that is present, such as a witness. This does not have to take place in a separate hearing and releases the court from formulating an order to take evidence; an informal order to take evidence is sufficient in this respect. In IT processes, however, it is generally to be assumed that a written expert opinion and a separate date for the expert's report are required. This then constitutes a separate procedure within the meaning of § 358 ZPO and makes a formal order of taking evidence necessary. The formal strictness of the decision forces the court to formulate the questions of evidence and therefore requires a certain clarification of the facts by the court. The expert must be given clear instructions as to what he has to investigate or what he is to examine. For example, if the order for reference concerns deficiencies, the deficiencies whose existence or non-existence must be established must be clearly identified. An order of proof with the content that the expert should examine the software in dispute as to whether it corresponds to the state of the art is considerably too imprecise as a specification and only opens the door to one type of official investigation by the expert. It is therefore advisable to invite the expert as early as in the discussion proceedings, so that he can provide assistance in the formulation of the order of taking evidence.

In order not to allow the expert's assessment to go astray due to misleading wording, the ZPO provides for close cooperation between the court and the expert (§§ 404a (2), 407a (2) sentence 1 ZPO). According to these provisions, the court can, on the one hand, involve the expert in the formulation of the decision on evidence and, on the other hand, the expert in turn is obliged to cooperate with regard to clarification in the event of ambiguities. The involvement of the expert in the formulation of the decision in particular deserves preference for reasons of procedural economy, since a subsequent amendment of the order of evidence before it is executed under § 360 of the Code of Civil Procedure is only possible with the agreement of the parties.

As a general rule, a precise decision on evidence presupposes that the parties have clearly stated their views on the issues at issue. Only those issues that have been presented in a clear manner can be included in the evidence warrant for clarification. Even if, in principle, indications may be required under § 139 ZPO, it is primarily up to the parties to take this into account in their submissions from the outset.

b) The evidence

Civil procedural law generally follows the principle of strict evidence; only the five types of evidence expressly permitted in the ZPO (inspection, witness, expert, deeds and hearing of parties) are admissible. Evidence which can also be furnished by means of statements in lieu of an oath is only admissible in the examination of procedural and appeal requirements and in the written procedure and the proceedings under § 495a ZPO. These are minor disputes which are of no significance for the problems to be dealt with here.

Appearance is any perception by the Court of First Instance of facts which are relevant to the evidence. Contrary to the wording, it is irrelevant by which sense organ this is done. Appearance may also be effected by means of technical aids. The judge can therefore get an impression of the functionality of a software. The reason why this rarely happens in practice is that the courts - often quite rightly - assume that they lack the necessary expertise for a binding assessment. As a rule, the inspection by the court alone is therefore not meaningful and is therefore almost irrelevant in practice.

Witness evidence may be considered with regard to contractual issues, such as the agreed scope of performance. However, witness evidence has its limits in the area of the presentation of software defects. If a user can, under certain circumstances, very probably describe problems in the handling of software and thus also the existence of defects, a witness is very likely to be accused of incorrect operation by the other party. In order to avoid this risk, the witness should therefore be avoided as the sole means of evidence.

However, the witness evidence is of great importance in cases where the state of the software or an error is concerned which cannot be reproduced easily. If, for example, the error has only occurred a few times or/and has been eliminated in the meantime by a newer version of the software used, the witness evidence may be the only way to demonstrate the defect. In addition, a witness can testify to the correctness of an error log or logbook - which alone is not conclusive - provided that the witness has also created this documentation. It may make sense to call in an expert for the examination of witnesses, who acts as a kind of translator for the court. The expert may question the witness.

c) In particular the expert evidence

The expert evidence is the most important evidence for the assessment of the sometimes complex technical details. It can be used to determine defects in the actual condition and to determine what the parties have agreed as performance.

aa) Selection of the expert

Although the expert is an assistant of the court, he is only treated as a means of referral in the CCP. According to § 144 ZPO, the court may also take the evidence of its own motion, without a corresponding request by one of the parties. On the other hand, it can also disregard the parties' requests for evidence if it considers itself sufficiently expert. However, the court must notify the parties of this intention in advance and give them the opportunity to comment.

For the selection of the expert, the concrete question of evidence must be taken into account. For the respective fields, publicly appointed DP experts can be found. If the parties agree on the person, the court is bound by this (§ 404 Paragraph 4 ZPO). According to § 404 Abs. 2 ZPO publicly appointed experts are to be preferred, unless special circumstances require the choice of other persons.

Certain requirements must be made of the expert. He must be able to assess the evidence decision and the questions it raises in terms of their significance for the trial. Furthermore, he should be able to present and justify his investigation results in a way that is comprehensible to the layman in data processing.

Experts may be refused by the parties on the same grounds as judges (section 406 (1) ZPO). The mere occasional activity of an independent expert for a party is not sufficient to raise concerns of bias, but it is a permanent activity. In this case, such a close relationship with a party exists that a refusal of the expert can be considered.

bb) Tasks of the expert

The expert must transfer experience from his special field to the facts of the case communicated to him. If the court cannot sufficiently present the facts to be assessed, the expert can be commissioned to a certain extent to investigate the facts. According to § 372 ZPO the expert can be consulted during the inspection. The common practice of the courts, which almost always allows the expert to carry out the inspection alone, corresponds to the practical requirements, especially with regard to the high workload of the courts.

If the expert has carried out the inspection, he shall be treated as a witness in respect of the facts established. After the inspection, the expert shall assess the facts established and shall communicate his observations and the conclusions drawn therefrom to the Court of First Instance orally or in the form of a written report. The court may order the preparation of a written expert opinion pursuant to § 411 (1) ZPO at any time, even if the basic model of the Code of Civil Procedure provides for oral expert opinion (§§ 402, 394 ZPO). For a more intensive examination of the results of the expert opinion by the parties as well as for the preparation of an oral explanation in the appointment, the written expert opinion might be preferable.

cc) Powers of the expert

The expert shall have no authority to hear witnesses or to force the performance of the inspection. If the user with the burden of proof refuses the Expert access to the software to be examined, he shall be excluded with the means of proof. In all other respects the burden of proof due to thwarting of evidence shall again be borne by the Supplier if he does not present the object of sale returned to him to the Expert for the assessment of the defect.

The parties are also obliged to cooperate to a certain extent in the gathering of evidence. For example, the purchaser of individual software must provide the original diskette handed over to him for examination within the framework of the taking of evidence. In addition, from the court's point of view, before the expert evidence is collected, there is the possibility of holding a briefing appointment, which is rarely used in practice.

If a third party not involved in the proceedings refuses to examine the evidence, the means of evidence shall be lost; this fact shall be for the account of the party required to provide evidence. Even the existence of a civil law claim to tolerate the inspection against this third party does not help the party required to provide evidence. The party with the burden of proof must first enforce the claim to acquiescence in separate proceedings.

It is disputed whether a time limit can be imposed on the party providing evidence in the first trial by analogous application of § 431 ZPO for the purpose of titling and enforcement. Apart from the prerequisites for setting such a time limit, however, such a procedure does not appear to make sense in view of the expected delay in proceedings. A longer duration of the IT process is likely to jeopardise the entire purpose of the process due to the expected loss of value over such a not inconsiderable period of time.

Seen as a whole, the recommendation results from what has been said that a potential eye-shine object should not be given up as a party required to provide evidence.

The authority of the expert to use aids in his work is generally undisputed. Exceptions are only made if the costs for the use of such aids appear unreasonable in relation to a relatively small amount in dispute or if the aid is developed or distributed by one of the two parties. Although the use of such an aid is not fundamentally unjustified, it can give rise to suspicion of bias. In the case of expensive aids, it is recommended to consult the parties in advance.

dd) The expert report and its evaluation

In the assessment of the expert opinion, the court and the parties must ensure that the questions set out in the order for taking evidence are answered precisely. It must also be checked whether the expert assesses deficiencies which were not objected to. The court must assess the expert opinion independently of the parties and justify its decision in the judgment. The mere

inclusion of the expert opinion in the judgment is therefore not sufficient. However, the requirements for the court's reasoning are less strict if the parties do not object to the expert opinion.

If the software manufacturer does not grant the expert access to the source code, the consequences for the assessment shall be borne by the expert. As the OLG Hamburg states, the court may follow the expert's assessments if he insisted on the submission of the source code for the expert's assessment of the extent of the necessary rework. An attempt at reworking under real-time conditions is conceivable in terms of the process, if at all, in agreement with the customer. Such a procedure was not provided for in the ZPO. It would also allow - conscious or unconscious - manipulation at the expense of the customer. The software house would have the opportunity to think about the procedure for the rectification of defects in advance of the supervised attempt at rectification, so that the desired result could of course be achieved more quickly than would be the case in reality. Against this background, it remains the case that the complexity of the rectification of defects must be determined objectively by the expert.

Special requirements for the reasoning of the Court of First Instance arise in the event that the Court of First Instance does not wish to follow the expert opinion. In this case, the court puts its expertise in the place of the expert witness. In order to be able to refute the results of the expert opinion, the court will only have the necessary expertise in a few cases; in most cases, only a new expert opinion (§ 412 (1) ZPO) may be considered. From the parties' point of view, the prospect of shaking an expert opinion obtained by the court is relatively low (less than 3%). However, this can be achieved by means of a private expert opinion by a recognised expert, which will decisively shake the accuracy of the court's opinion. However, the obtaining of such a private expert opinion must be weighed against the possible success, also in view of the costs (the share of private expert opinions is less than 2%).

The separation of the evaluation of facts from legal issues in the assessment of the expert opinion is fundamentally problematic. Even if this is hardly possible to implement in practice, the expert should in principle carry out an evaluation of the facts from a purely factual point of view, while the legal evaluation of the results is solely the responsibility of the judge.

8. The Judgment

When the legal dispute is ripe for decision, a final judgment is issued in accordance with § 300 ZPO. According to § 310 ZPO, it is announced at the date on which the oral proceedings are closed or at a date to be announced immediately.

a) The substance of the judgment

Pursuant to § 308 ZPO, the court is bound by the requests of the parties in its decision and may not award anything which they have not requested. In the judgment, therefore, the action is either dismissed as inadmissible or unfounded or the plaintiff is awarded the requested benefit in whole or in part. As a rule, if the action is well-founded, the judgement tenor will reproduce the plaintiff's claim in wording. If the supplier is sued for payment, the payment requested will be awarded to the supplier. In the case of actions for annulment, a concurrent sentence is generally passed in that the user receives the purchase price or compensation for work concurrently against return of the hardware or software supplied. The judgement tenor must determine the services to be exchanged in such a precise manner that the bailiff can enforce the judgement. The consideration must be determined in such a way that the bailiff is able to check during enforcement whether the items handed over to him by the creditor and to be offered to the debtor correspond to the consideration owed according to the judgment in terms of completeness and accuracy.

b) Reviewercosts

With regard to general costs, the same rules apply in the IT process as in other processes. However, due to the peculiarities of the process material, the costs for private expert opinions are of particular importance. The central question is whether these costs are those for appropriate legal prosecution or legal defence within the meaning of § 91 (1) ZPO and thus whether they are reimbursable costs.

The principle applies that the costs of private expert opinions are not reimbursable. However, there are exceptions to this principle: If a party cannot meet its substantiation burden without such an expert opinion, or if the expert opinion is carried out on the basis of a court order, the costs are reimbursable.

9. execution of judgements

Enforcement in software causes difficulties in view of the data protection regulations to be taken into account, the questions regarding usability (of importance: Section 17 (2) UrhG) and identifiability. This is relatively unproblematic in the case of standard software, which can also be exploited by way of compulsory auction.

a) Ticket to Ride Title

In the software warranty process, the enforcement of concurrent titles is usually directed towards the surrender or deletion of software with regard to the consideration. The claim for

payment, on the other hand, can only be enforced if either the bailiff has offered the consideration in a way that causes the default or the fulfilment is proven by public or publicly certified documents. If the user has already asserted in the main proceedings that the opponent is in default of acceptance of the consideration, there are no particular problems. For in such a case, the declaratory judgement contains a public deed stating that there is default of acceptance. Difficulties always arise when the creditor, in the absence of such a request, actually owes the issuance and/or deletion of the program. In such a case, the consideration must be determined in the judgment formula in such a way that the bailiff, when executing the judgment, is able to check whether the objects handed over to him by the creditor and to be offered to the debtor correspond in completeness and accuracy to the consideration owed under the judgment. The bailiff must therefore offer the software owed in the event of restitution to the supplier. The bailiff shall be responsible for checking whether the debtor has been offered the performance to which he is entitled in a manner that causes default of acceptance, i.e. whether the performance owed to him according to the judgment has actually been proven to him in accordance with § 294 of the German Civil Code in the form required under § 756 of the Code of Civil Procedure.¹³⁵

If the judicial officer is unable to establish the correctness of the performance, he must refuse enforcement and leave it to the creditor to have the correctness of the performance established by means of an action.

First of all, it is difficult for the bailiff to identify the software. A conviction for issuing "software copies" has no enforceable content from the outset. The designation of the respective software version is hardly sufficient. The inclusion of program listings in the tenor is too extensive. The bailiff could hardly enforce a corresponding tenor. The identification of the program on site and the determination that the programs issued correspond to those to be issued cannot usually be carried out without the help of an expert - and thus at considerable additional cost. Furthermore, it is not the bailiff's task to check the implementation of a titled request for deletion; here, enforcement is governed by §§ 887, 888 ZPO.

b) Remedy title

Enforcement of titles for rectification of defects is governed by § 887 ZPO (German Code of Civil Procedure) as a title for a justifiable performance. The court can therefore authorise the creditor to commission a third party to carry out the necessary work. However, the classifica-

¹³⁵ *LG Landau*, Beschl. v. 15.12.1994 – 3 T 254/94, CR 1996, 30.

tion of the rectification title as such as a title on justifiable performance causes practical problems in the software warranty process. There, the rectification of defects is finally chosen precisely because, apart from the manufacturer of the software, hardly anyone else is able to restore the functionality of the program. This may be due to the need to inspect and modify the source code, but also to the time required for familiarization, which may make it too time-consuming for other parties to remedy the problem. The consequence for the creditor is that enforcement via § 887 ZPO is usually of no help to him, while the way via § 888 ZPO with the help of penalty payment or compulsory detention is denied to him.

c) Enforcement in software

literature:

Asche, Zwangsvollstreckung in Software, 1998; *Bleta*, Software in der Zwangsvollstreckung, 1994; *Breitenbach*, Computersoftware in der Zwangsvollstreckung, CR 1989, 873; *Franke*, Software als Gegenstand der Zwangsvollstreckung, 1998; *Koch*, Software in der Zwangsvollstreckung, KTS 1988, 49; *Roy/Palm*, Zwangsvollstreckung in Computer, NJW 1995, 690.

Due to the ever-increasing spread of software products, these can represent an important part of the debtor's assets for a creditor who enforces the execution.

aa) Applicable rules

In general, it is argued that an at least analogous application of the provisions of Sections 808 et seq. ZPO is possible for the enforcement of physical property. This is unproblematic for data carriers and the written accompanying material. This is more controversial in the case of transfer of the software to the user's computer without a data carrier; however, since in such a case an attachment does not seem practicable anyway due to the lack of realistic access possibilities for the executor, this problem does not need to be further elaborated.

bb) Implementation of the garnishment

In accordance with § 808 ZPO, the attachment is carried out by the bailiff taking possession of the objects by affixing a pledge seal. In general, seizure by the judicial officer will only be possible without any problems in the case of standard software, as this is recognisable to the judicial officer on the basis of the original data carriers. Data carriers that only contain the debtor's own data records are not likely to generate any proceeds and cannot be seized for reasons of data protection. The seizure of software only appears to make sense from the outset if any proceeds of exploitation can be expected at all, as otherwise the prohibition of useless seizure according to § 803 Para. 2 ZPO (German Code of Civil Procedure) is opposed. The bailiff, who, according to § 813 ZPO, is supposed to estimate the objects to be seized at their usual sales value, will usually not be able to do this in the case of software. In most

cases, the possible involvement of an expert pursuant to § 813 (1) sentence 3 ZPO will only lead to an increase in costs without an appropriate sales proceeds being expected. The seizure of software therefore only appears to make sense in the case of marketable standard software, where the executor can determine a market value, e.g. on the basis of the usual sales prices. However, care should then be taken to ensure that the software product in question is the latest version. An attachment of individual software will generally be opposed by the prohibition of useless attachment under § 803 (2) ZPO, as this is too much tailored to the operational problems of a specific user to allow exploitation at an acceptable price.

cc) Possible obstacles to seizure

It should be noted that the seizure of the physical object also includes the embodied material goods. It must therefore be ensured that any existing copyright in the computer program is not impaired. Since the author is entitled to the exclusive right of exploitation, a seizure according to § 803 paragraph 2 ZPO would be useless if the software could not be exploited due to the copyright. However, this is unproblematic if the software was acquired by the user by way of sale. According to § 69c No. 3 UrhG, the exclusive distribution right of the author is exhausted if the software has been put into circulation with his consent. However, this does not apply to subletting, § 69c No. 3 a.E. Copyright law does not prevent the exploitation of the software..

In the case of software, the prohibition of attachment under § 811 No. 5 ZPO must generally be observed. According to this, no objects may be seized which the debtor needs to continue his employment. This will frequently be the case, especially with accounting and word processing programs.

Chapter Four: Software Development Agreements

literature¹³⁶:

Fuchs/Meierhöfer/Morsbach/Pahlow, Agile Programmierung – Neue Herausforderungen für das Softwarevertragsrecht? – Unterschiede zu den „klassischen“ Softwareentwicklungsprojekten, MMR 2012, 427; *Fritzemeyer*, Die rechtliche Einordnung von IT-Verträgen und deren Folgen, NJW 2011, 2918; *Hecht/Becker*, Unberechtigte Mängelrügen bei IT-Projekten – Rechte und Pflichten der Vertragspartner und Hinweise zur Vertragsgestaltung, ITRB 2009, 59; *Hecht*, Schiedsgutachtenklauseln in IT-Verträgen – Vertragsgestaltung und Durchführung des Verfahrens, ITRB 2008, 184; *Karger*, Desorganisierte Leistungsänderungen in IT-Verträgen – Umgehung vereinbarter Verfahren, Missachtung von Formerfordernissen, fehlendes rechtliches Controlling, ITRB 2009, 18; *Koch*, Erstellung und Lieferung von Software nach Werkvertragsrecht – Ein Beitrag zum Umgang mit § 651 BGB, ITRB 2008, 233; *Müller-Hengstenberg/Kirn*, Die technologischen und rechtlichen Zusammenhänge der Test- und Abnahmeverfahren bei IT-Projekten, ITRB 2008, 755; *Müller-Hengstenberg*, Ist das Kaufrecht auf alle IT-Projektverträge anwendbar?, NJW 2010, 1181; *Naus*, Softwareerstellung als Projekt, Hamburg 2006; *Pagenberg/Geißler*, Der Softwarelizenzvertrag in der Praxis, in: Lehmann (Hrsg.), Rechtsschutz und Verwertung von Computerprogrammen, 2. Aufl., Köln 1993; *Roth/Dorschel*, Das Pflichtenheft in der IT-Vertragsgestaltung – Bedeutung funktioneller Beschreibungen, ITRB 2008, 189, 191; *Schneider/von Westphalen (Hrsg.)*, Software-Erstellungsverträge, 2. Aufl., Köln 2014; *Schneider*, Handbuch des EDV-Rechts, 4. Aufl., Köln 2009, insbes. Kap. H; *Schneider*, IT-Vertragsrecht, CR 2005, 695; *Schneider*, Softwareerstellung und Softwareanpassung – Wo bleibt der Dienstvertrag, CR 2003, 317; *Schneider*, Mitwirkungspflichten des Auftraggebers bei der Softwareanpassung – Organisatorische Änderungen beim Kunden als wesentliche Mitwirkungsleistung, ITRB 2008, 261; *Söbbing*, MAC-Klauseln in IT-Verträgen – Veränderungen im Projekt erkennen und Rechtsfolgen vertraglich regeln, ITRB 2008, 257; *Söbbing*, Rechtsfragen der Softwareentwicklung nach dem Prototyping-Verfahren, ITRB 2008, 212.

An important area of IT contract law is software creation contracts, i.e. contracts for the creation of individual software. The following types of contracts cover not only the programming of software according to the user's precisely specified, individual requirements, but also the adaptation of standard software to the specific needs of individual users (so-called customizing) and IT project contracts.

The IT project business in particular shapes the software market. Usually neither users nor programmers know at the beginning of their business relationship what they actually want. Software cannot be tailor-made like a skirt. The needs and wishes of the customer can only be determined and implemented in the course of the contractual relationship. Software contracts are usually complex long-term contracts, for which the German Civil Code is not tailored in

¹³⁶ siehe auch die Quellen zu IT-Outsourcing und Change Request.

the law of contracts for work and services. This results in numerous legal distortions, which have hardly been satisfactorily resolved to date.

If one starts with the planning phase, the first question that arises is whether a consultant is consulted in the planning of an IT project. Often complex IT projects cannot be implemented at all without consultants. The legal nature of a consulting contract is in dispute. It is conceivable to classify it as a contract of employment (§§ 611, 675 BGB). If the consultancy and project contract are combined, the whole can be regarded as a contract for work and services. This is particularly important for the classification of an overall contract, as the BGH assumes that § 651 BGB does not apply during an outstanding planning phase and thus the overall contract can be clearly qualified as a contract for work and labour. In the consulting situation, the following must be established

- Actual state analysis
- Weak point analysis
- Feasibility analysis
- Basic concept
- Technical concept.

A consultancy agreement is concluded with the consultant. Frequently, case law goes beyond the consultancy contract and affirms an increased liability of the consultant. Thus an implied consulting contract is to be concluded in case of information of high importance. It should also be borne in mind that trustee liability on account of culpa in contrahendo (§§ 311 Para. 2, 280 Para. 1, 241 Para. 2 BGB) may be considered. A consultant's statement may also give rise to liability consequences vis-à-vis third parties, for example within the framework of a contract with protective effect for third parties. The BGH also affirms a reversal of the burden of proof for consultants with regard to the causality between breach of duty and success. Accordingly, the consultant must prove that the consultant would have acted accordingly even without the advice. The consultant is subject to the significantly lowered quality standards under § 280 BGB (German Civil Code) from the normal employment contract. In this respect, liability only comes into consideration in the event of culpable poor performance. These are cases in which the consultant does not appear at all or only partially. However, this can also include a case in which the consultant does not have the required skill level and lacks the necessary industry know-how. However, § 280 of the German Civil Code (BGB) only brings liability with regard to compensation. Subsequent performance and rescission are not provi-

ded for in the law on contracts of employment; instead, rescission is excluded by the possibility of extraordinary termination in accordance with § 626 BGB.

Detached from the role of the consultant, typical procedural steps in the run-up to an IT project must be considered. This includes team building, for example. An IT project typically involves the involvement of the management, controlling, human resources, external consultants and the IT, tax and legal departments. An invitation to tender must be issued. Within the scope of this tender, potential providers must be selected. The tender documents must be specified. If necessary, a draft contract is to be attached and a data room set up for the bidders in which they can view the technical and organisational infrastructure of the project. The bids are then received, which are then examined, followed by further discussions with the bidders. A preliminary selection can be secured by means of a Letter of Intent (see below).

A necessary component of preliminary planning is also the internal due diligence. Due diligence is generally understood to be the examination of the legal, tax-related financial and economic circumstances. In relation to an IT project, the first step is to determine the current IT budget and possibly also to make clear cost allocations at the expense of individual departments. The IT systems affected in each case must be determined. It is necessary to check whether the systems are owned by the client or whether they are only leased. It should also be examined whether the systems are also used for other areas and if so, whether it is legally possible to separate the different areas (e.g. by sublicensing). Similarly, the maintenance contracts for the existing systems should be examined. It should be clarified whether there are termination options for existing maintenance contracts, whether the maintenance contracts can be transferred, or whether there are other options for separating from the contracts. The existing software contracts also need to be examined, particularly with regard to their transferability, termination options and the costs of breaking away from the contract. Then it is necessary to examine the required property rights which are needed for the use of the new software. A distinction must be made between the provision of in-house software development and contract development by third parties. It is more often questionable whether rights can be granted by the client in general. For this purpose, the customer must determine whether he is really the owner of the rights to "his" software. Finally, the current, customary and required service levels must be determined. The critical systems must be identified - also with regard to damage and emergency scenarios.

Clear planning of such a complex contractual relationship is important. Ideally, an IT project starts with a comprehensive preliminary determination of the desired requirement profile that the software is to fulfil. It is best for the user to check with the help of qualified IT consultants

what he wants and how this can best be implemented in IT terms. This profile is documented in a requirements specification. Based on the requirements specification, a tender is then issued; suitable software houses are asked to send cost estimates. Letters of Intent and confidentiality agreements should already be concluded with all parties involved in this preliminary phase, as they will learn a great deal about internal company matters from both the software house and the user. It is not forbidden to poach external employees in this phase. It is only anti-competitive if unfair circumstances are added, especially if unfair means are used or unfair purposes are pursued. Examples of this are:

- enticing away for the purpose of hindering and damaging the previous employer (§ 4 no. 4 UWG). Always dependent on overall circumstances: How many employees were poached (a whole team?)? Were the employees central to the company? Consequences for the company? Intention to cause damage?¹³⁷
- enticement for the purpose of acquiring business and trade secrets¹³⁸
- Incitement to breach of contract (e.g. post-contractual non-competition clauses): The unfairness of taking advantage of another's breach of contract does not result from the fact that the mere willingness of the competitor to employ the employee in breach of contract may strengthen the latter in his decision to become in breach of contract and may to a certain extent encourage the breach of contract.¹³⁹
- In contractual relations: Company may not penetrate into the clientele of its contractual partner during the term of its contract § 241 para. 2 BGB.¹⁴⁰

According to § 75f HGB (and § 110 GewO), an agreement by which one employer undertakes to another employer not to employ employees of the other is not enforceable. The application to active enticement is also disputed. According to h.M., a poaching prohibition does not restrict the employee's freedom of decision to change jobs and is therefore permissible.¹⁴¹

Only after a detailed examination of the incoming offers is the contract awarded to a single provider. In most cases, the acceptance of a bid is connected with the fact that individual performance requirements must remain open, as their scope and contours only become apparent

¹³⁷ *Ohly*, in: *Ohly/Sosnitza*, UWG, 6. Aufl. 2014, § 4 Rn. 10/24 ff.; *Köhler*, in: *Köhler/Bornkamm*, UWG, 33. Aufl. 2015, § 4 Rn. 10/105 ff.

¹³⁸ *Ohly*, in: *Ohly/Sosnitza*, UWG, 6. Aufl. 2014, § 4 Rn. 10/27; *Köhler*, in: *Köhler/Bornkamm*, UWG, 33. Aufl. 2015, § 4 Rn. 10/106.

¹³⁹ *BGH*, Urt. v. 11.1.2007 – I ZR 96/04, JuS 2007, 1155 = GRUR 2007, 800.

¹⁴⁰ *BGH*, Urt. v. 3.2.1978 – I ZR 163/76, GRUR 1978, 536 – B.u.W.-Spedition.

¹⁴¹ *So v. Hoyningen-Huene*, in: *MüKo HGB*, 3. Aufl. 2010, § 75f Rn. 5; *Oetker*, in: *ErfK Arbeitsrecht*, 15. Auf. 2015, § 75f HGB Rn. 1; a.A. *Schloßer*, BB 2003, 1382, 1384.

in the course of the project. In such a case, the integration of change request models into the contract is a good idea.

Incidentally, even among lawyers, the insight is increasingly gaining ground that in many cases it is no longer sufficient to concentrate on the legal core business, the drafting of the project contract. Rather, it has been recognized that it is important to avoid legal mishaps that could threaten the entire project already during contract negotiations or during implementation and even beyond. In this context, lawyers are required to have skills that are not part of their classical training repertoire.

This begins with the selection of the right negotiation strategy to start planning the project. The basis for successful contract negotiations is a solid collection of all relevant information regarding your own situation and the perspective of the other party. In addition to clarity about his own strengths and weaknesses, the skilled negotiator must also be able to put himself in the position of the negotiating partner in order to collect and examine his possible arguments. Based on this information, the most goal-oriented negotiation strategy must be selected, always bearing in mind that one should be prepared to compromise and that it may be better not to start the project if irreconcilable differences arise during the negotiations. Otherwise, this "birth defect" can quickly lead to a lengthy and costly legal dispute.

In addition, decisions on the conclusion of important contracts should not be based on a gut feeling, but on a rational consideration of all economic, legal and technical opportunities and risks. To this end, "best practice" guidelines for risk identification, risk assessment and for taking suitable countermeasures should be drawn up and implemented within the company. A premature conclusion of a contract under gross disregard of entrepreneurial diligence, which thereby leads to financial burdens for the company, can possibly even trigger a liability of the executive board (§ 93 Paragraph 2 AktG) or the managing directors (§ 43 Paragraph 2 GmbHG) and should therefore not be underestimated.

From the point of view of "best practice", the literature discusses how the so-called IT Infrastructure Library (ITIL) can be made fruitful for the legal drafting of contracts and the enforcement of claims or for changes to contractual agreements during the performance of the contract. The ITIL is a collection of best practice approaches, which in recent years has become the de facto standard in the area of IT service management and operation, on the question of which processes an IT organization should clearly regulate in order to be able to work successfully. ISO/IEC 20000 provides standardized definitions and process requirements. However, both ITIL and ISO/IEC 20000 only define minimum requirements for regulations in IT project contracts, but do not provide concrete contract clauses, so that gaps in the

contract cannot be closed by mere reference. However, it seems to make sense to use both collections for the development of Service Level Agreements (SLA), Operational Level Agreements (OLA) for uniform definitions of terms and the definition and division of process phases and within the framework of the change management procedure for the purpose of uniform structuring.

For smaller software development projects it is suggested to use the so-called prototyping procedure instead of the phase model of ITIL, as this leads quickly to first results and also allows an early feedback regarding the agreement of a solution approach. The solution of the phase model makes pro-totyping more flexible, as the requirements of the users can be continuously specified and verified, thus reducing the risk of a wrong development. The disadvantage, however, is that this blurs the boundaries of responsibility, which could prove problematic for later liability issues. Legally, it would be advisable to regulate the development according to prototyping procedures within the framework of a GbR in order to achieve a distribution of risk in line with the interests of the parties involved..¹⁴²

Increasingly, projects based on so-called agile programming are being implemented in the IT manufacturing sector. Here, requirements are continuously developed and at the same time, previously fixed requirement catalogues are avoided. At the same time, the need for comprehensive documentation is reduced. The basis of agile programming is the so-called "Manifesto for agile Software Development" from 2001. Planning phases prior to the start of a project prove to be unnecessary; at the same time, the creation of a requirements specification is also dispensed with. In this respect, agile programming proves to be ideal to meet the difficult character of complex long-term contracts, which especially in the area of IT project business ensures that precisely named requirement profiles for the software to be created can hardly be named in advance. Instead, only basic statements are made about the respective project purpose and the intended application area of the software. In terms of contract typology, it is unclear whether regulation models based on contracts for work and services can be applied at all. Rather, a classification as a contract of employment or a partnership agreement is conceivable. The particular problem with service contracts is that the client would bear the full risk for the success of the project and would therefore have to assume full responsibility for the project. However, this is unlikely to correspond to the interests of the parties. The classification as articles of association within the meaning of § 705 et seq. BGB, for example in the form of a casual partnership. Here, however, the pursuit of a common purpose is often la-

¹⁴² *Söbbing*, ITRB 2008, 212, 214.

cking, as the parties rarely cooperate as equal contracting parties. Rather, the guiding model of the client and contractor is retained. Accordingly, the software itself does not become part of a jointly used company asset with a joint ownership. Rather, the end product of the project should be at the sole disposal of the client. It is therefore also advocated that such contracts should also be placed under the "umbrella" of a contract for work and services. Due to the dominant planning component, there are no reservations about deviating from the assessment of § 651 BGB and subjecting such a contract entirely to the law on contracts for work and services.¹⁴³

The installation of a software update previously purchased by the customer from the software manufacturer by an IT company on site on the server of this customer is to be classified as a contract for work and services (§§ 631 ff. BGB).

I. Delimitation of work and purchase contract law

literature:

Müller-Hengstenberg, Ist das Kaufrecht auf alle IT-Projektverträge anwendbar?, NJW 2010, 1181; *Dietrich*, Typisierung von Softwareverträgen nach der Schuldrechtsreform, CR 2002, 473; *Fritzemeyer*, Die rechtliche Einordnung von IT-Verträgen und deren Folgen, NJW 2011, 2918; *Redeker*, Softwareerstellung und § 651 BGB, CR 2004, 88; *Maume/Wilser*, Viel Lärm um nichts? Zur Anwendung von § 651 BGB auf IT-Verträge, CR 2010, 209; *Schmidt*, Softwareerstellung und § 651 BGB – ein Versöhnungsversuch, MMR 2004, 590; *Thewalt*, Softwareerstellung als Kaufvertrag mit werkvertraglichem Einschlag, CR 2002, 1; *Schweinoch*, Geänderte Vertragstypen in Software-Projekten, CR 2010, 1; *Müller-Hengstenberg*, Ist das Kaufrecht auf alle IT-Projektverträge anwendbar?, NJW 2010, 1181; *Krauss*, Die Auswirkung der Schuldrechtsreform auf Softwareverträge, 2004; *Zirkel*, Gestaltung von Software-Verträgen nach der „Silobauteile“-Entscheidung des BGH, GRUR-Prax 2010, 237.

The law on contracts for work and services applies to software contracts in several cases:

Firstly, the provisions of the law on contracts for work and services are applicable if the parties have expressly agreed upon the application of the warranty provisions of the contract for work and services and a uniform reversal of the contract when the contract is concluded. Insofar as the parties have only specified the Supplier's rights to remedy defects, it must be examined whether the application of the rules of the contract for work and services as a whole should be agreed. This shall also apply if the parties subsequently agree to rectify a defect in the event of a defect occurring in an otherwise sales-contractual arrangement of the contract.

¹⁴³ *Fuchs* u.a., MMR 2012, 427, 433.

In addition, the "nature" of the contract may also give rise to a right of rectification for the entrepreneur. Furthermore, the law on contracts for work and services applies to contracts for the creation of individual software.¹⁴⁴

If, in addition to the delivery of standard software, the Supplier undertakes to provide not inconsiderable adaptation services ("reknitting" or "customizing") to the individual needs of the user, it is disputed whether the warranty provisions of the purchase contract or the contract for work and services are to be applied in the event of a software error. For the user, the focus is on achieving success from materials to be procured by the entrepreneur and the transfer of ownership of the finished work. The interests of both parties are therefore, even without an agreement, more in line with the warranty regulations of the contract for work and services, in particular the possibility of rectification and the clearer regulation of acceptance. The Higher Regional Court of Hamm considers the delivery and installation of standard and special software to be subject to the law on contracts for work and services if the focus of the service is on the installation and adaptation of the software. This also applies in the case of a contract for the extension of an internal company network. Application of the law on sales contracts may be considered if the adaptation is minor and insignificant in relation to the delivery of the software. Insignificant, however, is for example not yet per se an adjustment service, the value of which reaches approximately 10 percent of the total value of the service. In addition, it must be clarified whether the software only becomes usable for the customer as a result of the adaptation or whether this was already the case before - even if only to a limited extent. The delivery of hand scanners and adaptation to the operational needs of the customer have both sales-contractual and work-contractual elements. If the adaptation of the hand scanners to the specific operational requirements is the main focus of a contract, it is a contract for work and services.¹⁴⁵

A contract for the delivery and installation of a law firm software as well as for the conversion of the operating system of the EDP in the law firm of a lawyer is subject to the law on

¹⁴⁴ So zum alten Recht vor der Schuldrechtsreform *BGH*, Urt. v. 30.1.1986 – I ZR 242/83, NJW 1987, 1259; *BGH*, Beschl. v. 24.11.1998 – X ZR 21/96, NJW-RR 1999, 347, 348; *BGH*, Urt. v. 23.1.1996 – X ZR 105/93, NJW 1996, 1745, 1745 f.; *BGH*, Urt. v. 3.11.1992 – X ZR 83/90, NJW 1993, 1063; *BGH*, Urt. v. 15.5.1990 – X ZR 128/88, NJW 1990, 3008, 3011; *OLG Düsseldorf*, Urt. v. 18.7.1997 – 22 U 3-97, NJW-RR 1998, 345, 346; *OLG Hamm*, Urt. v. 22.8.1991 – 31 U 260/90, NJW-RR 1992, 953; *OLG Koblenz*, Urt. v. 4.10.1991 – 2 U 403/88, NJW-RR 1992, 688, 689; *OLG Köln*, Urt. v. 22.9.1995 – 19 U 65/94, NJW 1996, 1067; *OLG München*, Urt. v. 24.1.1990 – 27 U 901/88, NJW 1991, 2158; *OLG Stuttgart*, Urt. v. 1.10.1986 – 4 U 187/85, CR 1987, 857; zur Problematik der Einordnung von Individualsoftware in § 651 BGB.

¹⁴⁵ *LG Frankenthal*, Urt. v. 13.1.2014 – 2 HK O 79/12.

contracts for work and services if the economic focus lies in the installation and conversion work. If a source code is handed over to the buyer under exclusion of the guarantee for errors and the specific usability of the program for the buyer and the sole right to use, further development and exploitation of the software is handed over, the purchase of rights - here still under the old law before the reform of the law of obligations - is applicable.¹⁴⁶

A big problem arose with the reform of the law of obligations when § 651 BGB was modified - without any hardship. From now on, the law of sale is to apply to contracts for the delivery of goods. If one takes the view that software is property in the sense of § 90 BGB, one can be of the opinion that also in the case of the delivery of individual software, the factual reference is decisive and therefore purchase law is applicable to a software creation contract. In my opinion, however, contracts for the creation of individual software are not primarily about the fact that the user wants to have things, i.e. a program with data carrier and documentation. Rather, the user's primary concern is success, a system that can run in itself, the realization of a situation in which he can work with his IT without any complaints. In this respect, even after the reform of the law of obligations, the qualification of software production contracts as contracts for work and services will remain.¹⁴⁷

The BGH has also provided further fuel. In its ruling of 23 July 2009, the court decided that the law on sales was to be applied to all contracts with an obligation to supply movable goods to be manufactured or produced. The purpose of the parts, namely to be installed in buildings, did not justify a different assessment. A different assessment is also not justified if the subject matter of the contract also includes planning services that must precede the manufacture of the construction and plant components and do not form the main focus of the contract. An exception should only be made if a planning service is so dominant that it forms the main focus of the contract and therefore requires the application of the law on contracts for work

¹⁴⁶ *OLG Hamm*, Urt. v. 8.7.2007 – 12 U 26/07, CR 2008, 77, m. Anm. *Rössel*, ITRB 2008, 52.

¹⁴⁷ *Alpert*, CR 2001, 213, 214; *Bartsch*, CR 2001, 649, 655; *Diedrich*, CR 2002, 473, 477 f.; *Spindler/Klöhn*, CR 2003, 81, 83; *Stichtenoth*, K&R 2003, 105, 109; *Sprau*, in: Palandt, 74. Aufl. 2015, Einf. v. § 631 Rn. 22, § 651 Rn. 5; *Bamberger/Roth/Voit*, Rn. 13; *Peters/Jacoby*, in: Staudinger, 15. Aufl. 2013, Vor § 631 Rn. 66; undeutlich *Schneider*, Handbuch des EDV-Rechts, 4. Aufl. 2009, S. 1331 ff.; vgl. zum früheren Recht auch BGH, Urt. v. 4.11.1987 – VIII ZR 314/86, BGHZ 102, 135, 141 = CR 1988, 124 = NJW 1988, 406; *BGH*, Beschl. v. 24.11.1998 – X ZR 21-96, NJW-RR 1999, 347, 348; *BGH*, Urt. v. 23.1.1996 – X ZR 105/93, NJW 1996, 1745, 1745 f.; *BGH*, Urt. v. 3.11.1992 – X ZR 83/90, NJW 1993, 1063; *BGH*, Urt. v. 15.5.1990 – X ZR 128/88, NJW 1990, 3008, 3011; *OLG Düsseldorf*, Urt. v. 18.7.1997 – 22 U 3-97, NJW-RR 1998, 345, 346; *OLG Hamm*, Urt. v. 22.8.1991 – 31 U 260/90, NJW-RR 1992, 953; *OLG Koblenz*, Urt. v. 4.10.1991 – 2 U 403/88, NJW-RR 1992, 688, 689; *OLG Köln*, Urt. v. 22.9.1995 – 19 U 65/94, NJW 1996, 1067; *OLG München*, Urt. v. 24.1.1990 – 27 U 901/88, NJW 1991, 2158; v. *Westphalen*, CR 2000, 73.

and services, e.g. if the assignment essentially concerns the general planning solution of a constructive problem.¹⁴⁸

Furthermore, the Regional Court of Bonn applies the law on contracts for work and services to the provision of a merchandise management program produced for a wide range of users if further program variants are to be continuously created and delivered according to a list of perspectives and settings are to be made which are in any case partly individually tailored to the needs of the customer; in this respect the character of the contract for work and services prevails over the character of the purchase contract.¹⁴⁹

Surprisingly, the Federal Court of Justice has meanwhile pointed out in the Internet-Systemvertrag decision that a contract for the creation or processing of special software tailored to the needs of the client must regularly be regarded as a contract for work.

The federal government is currently planning a new law to reform the law on sales and work contracts. Although many of these planned regulations relate to construction, consumer construction, architects, engineers and property developers' contracts, they also contain various amendments to general contract for work and services law that are relevant to IT contracts. Following a statement by the Bundesrat and a corresponding response by the federal government, the bill has now been referred by the Bundestag to the committees involved for further discussion

II. Distinction from service contract law

The parties' will expressed in the contract shall be decisive for the delimitation of the service contract and the contract for work. It depends on whether on this basis a service as such or as the result of work is owed its success. These principles also apply to contracts in which the contractor undertakes to provide research or development services. Both types of services can be the subject of a service contract or a contract for work and services. In the former case, the contractor owes only a procedure in accordance with the rules of science and technology, in the latter case the achievement of a success. This success may consist in a certain result of the work or only in the proper execution of investigations and the preparation of reports. What is owed in individual cases is subject to the agreement of the parties.

In the absence of an express provision in the contract, a variety of circumstances may be relevant to its interpretation. The existence of a contract for work and services can be argued for

¹⁴⁸ *BGH*, Urt. v. 23.7.2009 – VII ZR 151/08, NJW 2009, 2877 = CR 2009, 637.

¹⁴⁹ *LG Bonn*, Urt. v. 15.1.2008 – 10 O 383/06, CR 2008, 767.

if the parties specifically define the task to be performed and the scope of the work or agree on a performance-related remuneration. For the question of whether the contractor wants to be responsible for the occurrence of success, it can also be of importance with which probability the occurrence of success can be expected according to the conception of the parties. It is neither logical nor legally impossible for the software producer to assume the risk of success even if the occurrence of success is uncertain. However, the greater the imponderables visibly associated with the activity, the further it may be, even from the point of view of a reasonable purchaser, that the entrepreneur nevertheless wishes to assume the risk of success. A rule that the research contract is to be qualified as a contract of service and the development contract as a contract for work and labour can hardly be established because the boundaries between research and development can be blurred in individual cases. Irrespective of this, the contracting parties are free in individual cases to conclude a contract for work and services despite the relatively high risk involved. Further provisions of the contractual agreement may also reflect the ideas of the parties as to who should bear the greater and who the lesser risk that the desired research or development goal will not be achieved or will not be achieved at the expense expected when the contract is concluded.

Accordingly, the legal classification of a freelance activity does not depend solely on whether it involves the creation of individual software. Rather, the criteria of payment, determination of place of work, time and speed as well as the management of project control are decisive for the question of contractual warranty law. Conversely, the fact that the general terms and conditions of the contractor refer to "service contract" and "service" is not a clear indication of the existence of a service contract..¹⁵⁰

For example, the remuneration may include a "risk premium" for the entrepreneur. However, the remuneration, in particular if it is to be paid in the form of instalments or regular payments on account, may also indicate that the entrepreneur cannot accept the risk of a failure of the research or development project economically or - for example in the case of a software producer bound by public law - in a legally reasonable manner, which in turn may be an indication that the contracting parties do not want such a risk co-acceptance. The assignment of a concrete contract is only possible after taking into account and weighing up all relevant aspects of the individual case.

It is also difficult to classify the persons who work on IT projects alongside the client and contractor. Thus, there is an abundance of consultants, some of whom are also involved in

¹⁵⁰ *OLG Düsseldorf*, Urt. v. 18.7.1997 – 22 U 3/97, CR 1997, 732 = NJW-RR 1998, 345.

project management. It should be noted here that pure consulting, refereeing and information services only have a contractual character. In case of doubt, a service contract must also be assumed for "accompanying measures" or "participation in the project" services mentioned in the contract. If, on the other hand, control and inspection is carried out during the project period, this can be seen as an element of a contract for work, similar to the supervision of building objects by architects. The law on contracts for work and services also covers time planning and cost controlling.

III. Main obligations

1. Obligations of the contractor/subcontractor

With regard to the main performance obligations, it must first be noted that the customer must not only regulate the transfer of the software, but also the transfer of the associated rights of use.

a) Provision of software and documentation

With regard to the transfer of the software itself, the following must be clarified:

- In which format is the software transferred (object code or source code)?
- If only the object code is passed: Is a deposit agreement useful with regard to the source code?
- What documentation is provided?
- How should the software be programmed (programming language, structured programming)?
- Which technical performance data must be observed?¹⁵¹

The documentation is particularly important. In the case of software development contracts, the developer is also regularly obliged to provide the customer with documentation. This must be designed in such a way that the customer can work with the system; in this respect, a comprehensive written definition of the function and operating rules is owed. The handing over of such documentation is an (unwritten) primary obligation. Even if nothing in the contract is expressly regulated regarding the documentation obligation, such an obligation exists. However, the documentation shall be due after the software has been produced, i.e. after the owed programming has been completed. It cannot be expected that the software de-

¹⁵¹ Die Durchsetzung dieser Pflichten wird häufig mit Vertragsstrafen gekoppelt.

veloper will document every stage of his work without regard to possible changes. The absence of documentation concerning the operation of the locally installed hardware and software and the resulting inability to operate the application software constitutes a defect that entitles the software developer to refuse acceptance. In this context, however, it is discussed whether the necessity of a user manual, as a form of technical documentation, should not be restricted against the background of further technical development, especially in the field of interactive software. Due to the technical progress in the development of interactive software systems in recent years, the usability of the program, with the corresponding dialog design, is in many cases no longer dependent on a manual, so that it is no longer necessary for the intended use in these cases.

b) assignment of rights

Particular care must be taken with the wording of the rights to be transferred. Anyone who has software individually programmed to meet his or her needs can also be granted an exclusive right of use by contract.

Particular care must be taken with rights clearing in projects involving several software developers. Under certain circumstances, the persons involved in programming and further development may be co-authors within the meaning of § 8 UrhG; these must then be jointly included in the contract. The prerequisite for co-authorship is a uniform creation, which presupposes a corresponding natural will to act on the part of the authors involved. As a rule, co-authorship does not exist in the case of contributions which are staggered over time; for co-authorship presupposes that each participant has made his (creative) contribution in subordination to the common overall idea. If this is not the case, because the later additions and improvements are not covered by the original programmer's will to act, co-authorship of all participating authors must be denied. In this case, the later modifications are dependent adaptations with the consequence that the authors involved in the creation of the program would have been able to dispose of their copyrights without being bound by the overall contractual relationship and could have granted rights of use.

The Higher Regional Court of Düsseldorf prohibited the reproduction and distribution of a computer game because one of the co-authors had not effectively transferred the rights of use to a presentation engine developed by him before the project began and used for the project to the manufacturing company. As co-author within the meaning of Section 8 (2) sentence 1 UrhG, the programmer was not actively entitled to claim damages on his own, but only to all co-authors as a community of joint owners, but this did not apply to the right to injunctive

relief. Rather, the complete distribution could be stopped also due to the infringement of the rights to a small part of the program

The Higher Regional Court (OLG) of Hamm had to decide a case concerning the question whether there had been a false designation of the author and thus a violation of § 13 UrhG. The project contract provided for a complete transfer of the rights of use for a hotel software. The defendant marketed the result of the project under its own name without mentioning the plaintiff. It was decided that even a comprehensive and exclusive grant of the rights of use and exploitation pursuant to Section 31 (1) and (3) UrhG did not allow the defendant to claim the moral rights and to omit the references to another authorship. In spite of the non-transferability and indispensability to the basic right, an agreement, even an implied one, on the non-exercise of the right to bear the name is possible in principle, but strict requirements must be made in this respect to protect the author. In this connection, a weighing of interests had to be carried out in each individual case, taking into account in particular the intensity of the encroachment on the author's right of personality, the necessity with regard to exploitation in the context of contractual exercise, the customary practice in the industry and the purpose of the contract or exploitation. The court did not consider these requirements to be fulfilled and granted the action for discontinuation of distribution, damages and even destruction of all copies produced so far..

As a result, it turns out to be very dangerous if, in the case of complex software projects, thorough care is not taken to ensure that all rights required for the production and distribution of the program have been obtained and used within the legal framework, otherwise there is a risk of serious financial consequences.

It becomes dangerous if only the granting of a simple right of use is made the subject of the contract. Then the developers are still free to sell the software to others a second time. References to the transfer of the "original right" or "copyright" are pointless. Such contracts do not correspond to the German understanding of copyright law, according to which the copyright itself cannot be transferred. Such formulations are therefore only irritating, as they do not solve the question of the scope of the right of use specifically transferred. Moreover, it is correct to raise the question of the transferability of rights of use. § Section 34 (1) UrhG is based on the principle that any transfer of rights of use to third parties or their assignment in any other way depends in any case on the consent of the author. According to a decision of the OLG Frankfurt a.M., such consent may also be implied. If a computer program created by order is released to the client and the client has made the payment in return, an unrestricted implied granting of the contractually provided rights of use is to be assumed. In order to prevent this,

it is recommended that the transferability of the rights of use to third parties be expressly regulated in the contract. If there are doubts about the indeterminacy, the programmer can restrict the group of persons, e.g. to the companies belonging to the group as defined in § 18 AktG. If there is no explicit regulation regarding the transferability, considerable problems are imminent. In such a case, the author's consent to further transfer must be obtained retrospectively, which the author cannot, however, refuse in bad faith (Section 34 (1) sentence 3 UrhG). An exception to the consent requirement applies only in the case of a complete sale of the enterprise or the sale of essential parts of the enterprise, especially in the field of M&A (mergers and acquisitions). It seems reasonable to introduce a duty to inform in case of a further transfer of the rights of use, according to which the client must inform the software house about the further transfer. Such information is important, for example, in order to clarify the fate of care and maintenance contracts with the new user.

c) Changes to services

Unilateral changes in performance by the client are generally not possible; corresponding rights require a special agreement between the parties. Exceptions can only be made from the point of view of a change in the basis of the business from the idea of good faith. If the dates are postponed due to an order of the client, an additional remuneration will be considered. Decisive in this respect are unilateral measures of the client or his authorized representative. In this respect, it is a question of measures which originate from the risk area of the client. No remuneration shall yet be due if the contractor for his part fails to comply with his obligations to cooperate by omitting to do so. Non-binding suggestions or wishes of the client do not yet fall under the term "order". However, implied instructions are sufficient, for example if the client allows extended services to be performed without contradiction in the knowledge of changed circumstances. Unforeseen events do not trigger any price changes, for example in the event of unforeseen difficulties with programming or delivery. The distinction between directly agreed and additional services shall be based on the contractual agreements, whereby the mere desire for additional services and their simple acceptance as such shall not lead to an extension of the contract. Ineffective are clauses in GTC according to which the client may demand services not mentioned in the contract without special remuneration if they are necessary for the fulfilment of the contractual services. Similarly, the Federal Court of Justice has declared clauses invalid according to which any subsequent claims are excluded if they are not based on written additional and supplementary orders of the client. The BGH saw the main problem in the fact that such a clause also excludes legal claims, for example from enrichment law or GoA. For the same reason, case law has held that a GTC clause which makes

the claim for remuneration for additional services dependent on a written price agreement is invalid.

2. Obligations of the client/orderer: Remuneration

On the remuneration side, the client is of course obliged to pay the agreed remuneration for work. However, there are also a number of legal difficulties in the drafting of contracts.

a) Appropriate remuneration (Sections 32, 32a UrhG)

On the one hand, it must be considered that §§ 32, 32a UrhG provide for a legally anchored claim to remuneration also in favour of the software house. According to § 32 (1) UrhG, the author is entitled to reasonable remuneration, especially if the agreed remuneration was already unreasonable at the time of conclusion of the contract. § Section 32a UrhG regulates the case of subsequent changes in the relationship between remuneration and economic return. Thus, the author can demand a change in the contract in order to obtain a further appropriate share which compensates for the existence of a subsequently arisen conspicuous disproportion to the income and advantages from the use of the work.

In order to examine whether such a disproportion exists, the appropriate remuneration at the time of the conclusion of the contract must be compared with a remuneration determined according to the same principles at the time of the decision on the request for participation. The disproportion is in any case conspicuous if the appropriate remuneration during the participation period deviates from the appropriate remuneration by more than 100%.

According to the wording of the law, the main criterion is the relationship between the agreed remuneration, which was appropriate at the time of the conclusion of the contract, and the income and benefits achieved. Revenue is the gross proceeds, not the profit.

Both remuneration claims are due to all authors, including the authors of the software. However, it is still disputed whether this claim also applies to authors who are employed. The appropriate remuneration of the author is also to be determined in individual cases in accordance with Section 32 (1) sentence 3 UrhG on the basis of an objectively generalizing yardstick from an ex ante perspective. The appropriateness of the remuneration requires that the fee structure basically reflects the scope and intensity of the actual use of the work. This principle of participation is regularly taken into account by means of sales remuneration.¹⁵²

¹⁵² *OLG München*, Urt. v. 8.2.2007 – 6 U 5785/05, NJOZ 2007, 4825 = ZUM 2007, 317.

b) Remuneration under contract for work and services law

Preparatory work is typically not to be remunerated under the law on contracts for work and services. An exception is only made in the case of a separate contract, for which the contractor would be required to provide information and evidence. Even in the case of extensive project planning work, a claim for remuneration is only possible if a corresponding obligation to pay remuneration in the event that the contract is not awarded has been expressly agreed. Accordingly, provisions in the General Terms and Conditions of Business according to which a processing fee can be charged for cost estimates are ineffective. Exceptions can only be considered if the client can be proven to have acted fraudulently, for example because he demands preliminary work, although he only wants to use this work free of charge for his own planning.

If the contract is concluded, the client owes the agreed price. Here the burden of proof must be observed. Typically, the burden of proof is borne by the person who is the principal of a remuneration. If, however, the original price agreement is undisputed, the client bears the burden of proof for a remuneration agreement deviating from it later. The same applies if no fixed price agreement was initially made, but the client claims a fixed price agreement. Price clauses, reservations of value and reservations of price can be agreed in individual contracts. Problems arise with regard to the legal requirements of general terms and conditions. For example, price increase clauses are prohibited for a maximum period of four months after conclusion of the contract (§ 309 No. 1 BGB). In this respect, clauses which generally state all prices as "subject to change" are also invalid. Wage and material price escalation clauses must be clearly designated in such a way that a violation of the transparency principle is excluded. In this respect, the principles of calculation must be open and the contractor must provide evidence of which costs have led to an increase in the price. The reference to the fact that the client has the right to determine the work at his own reasonable discretion requires special reasons and is otherwise invalid, in particular if a price determination is agreed at the client's free discretion. When agreeing on approximate prices or non-binding target prices, an excess is generally not possible. If at all, the Contractor can only justify such an excess if he refers to expenses which clearly exceed the "Circa price". If the parties to a software contract allow themselves time in determining the fixed price and agree on a "fixed price until", the Contractor may in any case demand the "usual remuneration" (§ 632 para. 2 BGB). In this case, the Higher Regional Court of Düsseldorf had taken the view that the contractual relations were to be regarded as terminated at the agreed time. The "pay-when-paid" agreement plays a special role, especially in subcontracting agreements. According to this agreement, the

subcontractor does not receive remuneration from the main contractor until the main contractor in turn has received remuneration from the client. Such an agreement is admissible in an individual contract, but within the framework of the law on general terms and conditions it is to be regarded as a violation according to § 307 BGB (German Civil Code) with regard to the unreasonable disadvantage of the subcontractor. Dogmatically, the agreement is to be qualified as a deferment of payment which does not call into question the existence of the claim to remuneration for work. When calculating the price, the contractor assumes the risk of corresponding miscalculations. However, it cannot be excluded by GTC that the contractor may invoke the legal regulations of the German Civil Code and the corresponding case law on calculation errors. By the way, it should be noted that there is no obligation of the client to describe the services to be rendered. However, in a detailed description of the services to be rendered, the client must clearly and exhaustively outline the corresponding items. From the respective objective horizon of the recipient, corresponding specifications are to be analysed, whereby wording, circumstances of the individual case and the principles of good faith are to be taken into account. Thus, the client may not impose an unusual risk on the contractor. From the principle of good faith it follows that the client must describe the risks lying within his risk area more precisely. At the same time, however, the contractor is also subject to the obligation to check and inform the client about the details of the planned execution of the order. The contractor may not simply accept a recognizable or recognized incomplete specification sheet, but must clarify questions of doubt before submitting his offer and give appropriate advice. Information into the blue is considered speculative and even "frivolous". Therefore, the contractor must also check whether the planning is suitable for achieving the owed performance. The contractor is responsible for omitted checks and notifications if he could have recognized defects with the knowledge expected from an expert in his field. However, if the Contractor fails to carry out the required checks and notifications, he shall not be solely responsible for the resulting damage. Rather, defects in the planning and other execution documents may constitute a contributory negligence on the part of the client pursuant to § 254 BGB. A contributory negligence on the part of the Client and his vicarious agents is of course only possible if the Contractor has only negligently breached his obligations to inspect and provide information. If the contractor fails to point out defects that he has recognised, he is always solely responsible for the damage. Recognized defects must, moreover, cause the Customer to examine the specifications particularly carefully for further defects. In this respect, he cannot rely on the fact that the plans originate from experts. In this respect, the concept of protection of confidence is the yardstick for weighing up the respective contributi-

ons of the contractor and client in relation to the damage. Only to the extent that the contractor has actually relied and was allowed to rely on plans and other documents can he be exonerated. In this respect, the BGH assumes a responsibility clearly in favour of the client and at the expense of the contractor. This contractor-hostile attitude of the BGH is often criticized; in fact, a client can make a bad tender and thus assign enormous risks and dangers to the contractor. It is argued that the contractor should be held liable for incomplete specifications according to the rules of fault at the time of conclusion of the contract. In particular, the contractor should not be obliged to provide information even if the specifications are drawn up by an expert office and the contractor does not have the necessary extensive specialist knowledge. The preparation of a correct requirements specification is one of the cardinal obligations of the client; in this respect, the Federal Court of Justice has also considered a clause to be non-transparent: "upon submission of the offer, the bidder assumes the guarantee that the offer contains everything that belongs to the preparation of the work" or "after submission of the offer, the bidder may not invoke ambiguities in the offer documents or regarding the content and scope of the service to be provided".

If there is no remuneration provision in the contract, the Contractor may in any case demand the usual remuneration from the Client in accordance with § 632 (2) BGB. However, the contractual agreement shall always take precedence, including any tacit agreements. In all other respects, an effective contract must have been concluded at all, which is not the case if there is still no agreement on the exact amount of the remuneration. The contractor bears the burden of proof that his performance could only be expected in return for remuneration (argument ex § 632 para. 1 BGB). He must at least prove circumstances according to which the acceptance of the transferred performance can only be expected in return for remuneration. If such circumstances exist, there is a presumption of remuneration. Even if there are friendly ties between the parties, this does not yet justify the assertion of non-remuneration for not inconsiderable commercial services. If the customer claims a particularly favourable price agreement, the contractor shall bear the burden of proof for an appropriate or customary remuneration. In the case of this negative proof, the contractor must refute the circumstances that could argue for the agreement of the main wage for work.

If the parties have concluded a contract for work and services with a lump-sum price agreement, additional work and services not provided for therein may have to be paid for by the customer even without the conclusion of an additional contract for work and services concerning them. However, such an increased claim for remuneration requires that considerable, initially unplanned services are added to the service content on which a lump-sum price agree-

ment is based at the instigation of the purchaser, irrespective of whether the parties have reached an agreement on the new pricing.

In accordance with § 632a BGB, partial payments for partial services already rendered are also possible. Changes to this regulation regarding the amount and the purchaser's right to refuse payment are planned in the new law reforming the law on sales and contracts for work and services.

c) Approval

A further problem results from the fact that according to § 641 para. 1 sentence 1 BGB the remuneration is only payable upon acceptance of the work. In this respect, it is necessary for the due date of the remuneration that the client declares acceptance. There are particular problems here because, under certain circumstances, the client can refuse acceptance even if the contract for work has been properly fulfilled.

A further source of failure in IT projects is the different assessment standards of business informatics and jurisprudence with regard to testing and acceptance procedures. Business information scientists treat test procedures as an indispensable part of quality assurance as defined by DIN EN ISO 9000 ff. Lawyers, on the other hand, have a narrower field of vision and relate the test obligations only to the phase of acceptance in order to determine the contractual fulfilment or acceptance within the meaning of §§ 438 Para. 2, 640 BGB and § 377 HGB. It is therefore necessary for the smooth success of the project that the technical process model and the development phases defined therein, with their tests and the associated documentation, are legally implemented in the project contract by setting out the necessary test procedures in detail as genuine contractual obligations. This is the only way to ensure that defective or delayed services or cooperation services, even in the case of technical approvals of partial results, can be warned as a contractual breach of duty prior to acceptance.

Software development contracts are regularly not insolvency-proof. In this case, the BGH speaks of "licence agreements" and assigns them to the right of option under section 103 InsO. If a software creation agreement has therefore not yet been mutually fulfilled, the insolvency administrator can refuse further fulfilment. Since the Insolvency Code came into force, licence agreements have been subject to the insolvency administrator's right of choice. If the insolvency administrator refuses to fulfil the contract by exercising this option, the contractual relationship is reorganised and the contractual partner is only entitled to compensation for non-performance as a simple insolvency claim. He is thus referred to a usually very low quota. The BGH remained true to this case law in its decision of October 2015 and specified the requirements for the mutual performance of a license agreement. The decisive factor is the

formulation of the performance obligations of the license agreement. If the payment of the purchase price and the distribution of the license represent the main performance obligations of the license agreement, the BGH is of the opinion that license purchase agreements are "generally" completely fulfilled after the exchange of the main performance obligations. With this wording, the BGH has room for future decisions concerning unfulfilled obligations to provide (ancillary) services and to cooperate.

In 2007 and 2012, the legislator had planned the introduction of a new section 108a InsO in draft laws amending the Insolvenzordnung. For the purpose of better protection of licensees, this was intended to regulate that the license agreement is no longer subject to the right of choice of the insolvency administrator, but remains valid in insolvency proceedings. In addition, in the event of a blatant disproportion between the agreed remuneration and a remuneration in line with market conditions, the insolvency administrator should be able to demand an adjustment of the remuneration. In such a case, however, the licensee would then have had an extraordinary right of termination. Ultimately, however, the changes in the law came about in each case, so that the old legal situation remains unchanged.

The Higher Regional Court of Munich has challenged the legal opinion of the Federal Court of Justice. For the question of the insolvency resistance of simple rights of use, it was necessary to consider whether an in rem disposal of the right of use was executed in fulfilment of the obligation under the law of obligations. In this case, there was no longer an open claim due to the fulfilment at the time of the opening of insolvency proceedings, so that the scope of application of § 103 InsO is not opened. After the Federal Court of Justice had still resorted to this means in the past, the alleged "in rem character" of rights of use is no longer applicable in the latest decision of the Federal Court of Justice

If there is a delay in the execution of the programming, the user can withdraw from the contract due to delay according to § 323 BGB. However, the user must set the software provider a reasonable deadline for performance or supplementary performance. Under the conditions of § 323 para. 2, such a deadline is dispensable; for example, if the software producer fails to fulfil its contractual obligations to such an extent that the user can no longer be expected to adhere to the contract or if production within a reasonable period is objectively no longer possible anyway. The burden of demonstration and proof for such exceptional reasons is borne by the user. In the case of only insignificant delays, the right to withdraw from the contract must be exercised in breach of faith.

In all other respects, the user shall bear the risk of delay if the delays have occurred due to a breach of his obligations to cooperate. No major IT project will succeed without the coopera-

tion of the user. The software producer needs numerous key data from the user's company; he must have access to premises, computers and technical know-how on site. It is therefore important to include such obligations to cooperate in SLAs and to sanction their violation in the framework agreement, for example by imposing a penalty. Without corresponding clarification in the contract, the obligation to cooperate will not be seen as a (legally enforceable) secondary obligation, but as a mere obligation. If the user does not comply with his obligation to cooperate, he is in any case threatened with termination of the contract by the software manufacturer in accordance with §§ 643, 649 BGB. In this case, the user must pay the compensation for work less any expenses saved by the manufacturer.

In addition to the traditional cooperation activities, such as the delivery of test data, there is also the obligation to cooperate in adapting the own organization to the new software. As Schneider rightly emphasizes, this topic cannot usually be completely regulated in the project contract, since the full extent of the participation cannot be foreseen at the beginning of the project. A distinction must be made between "genuine" obligations to cooperate according to §§ 642, 643 BGB, which are necessary for the successful creation of the work, and the so-called "internal project" at the customer's, which includes the adjustment to the software. According to Schneider, the contractual arrangement of the connection between these in the project areas can be achieved by an appropriate design of the requirements specification, an activity and deadline plan and targeted budgeting in the form of bonus points for the customer. In addition, there is the possibility of upgrading the cooperation in accordance with §§ 642, 643 BGB from a secondary obligation to a primary obligation through contractual arrangement.

In most cases, rescission is irrelevant for software development contracts, since due to the special bond between the parties, a rescission of the contract is not desirable; the user is usually more concerned that the project is finally brought to a positive end. In contrast to the old law, a corresponding threat of rejection is no longer necessary for setting a deadline. In this respect, there is no longer a need for clear letters indicating the end of the IT project. In the event of a withdrawal, the user typically commissions another programmer with the realization of the project and demands reimbursement from the original software house for the increased programming costs as well as the lost profit.

IV. Subcontractual obligations

In addition to the main performance obligations, the secondary obligations must be observed. Depending on their importance for the project, these may be mere obligations, secondary obligations sanctioned by compensation (§ 280 BGB) or even enforceable secondary obligati-

ons. Important is the aforementioned obligation of the client to cooperate. In addition, confidentiality obligations on both sides are in the foreground.

1. Confidentiality and data protection

From the very first pre-contractual contacts, the special confidentiality requirements must be observed. In the course of an IT project, both parties learn a great deal about each other's operational know-how. It is therefore important to contractually agree special confidentiality obligations and to secure these by means of sanctions.

During the contract the special obligation to observe data protection regulations is added. The Contractor then has regular access to the data of the Client, especially with regard to personal data of customers and employees. Therefore, the special requirements of data protection law must be observed, especially in the context of an IT project. First of all, there are special problems within the framework of § 203 StGB. This criminal provision prohibits the disclosure of confidential data to third parties without the consent of the person concerned. The provision is primarily addressed to companies that process medical data, as well as to law firms and health/life insurance companies. These business sectors may not - except with the express consent of the data subject - disclose personal data to IT project companies. This makes the provision of IT services in this sector very problematic.

Otherwise, the general data protection requirements of the EU Data Protection Basic Regulation (DSGVO), which has been directly applicable in all member states since 25 May 2018, apply primarily. The DSGVO does, however, contain possibilities for deviation in many places. The national legislator has taken advantage of these opening clauses and, in this context, has adapted the Federal Data Protection Act (BDSG) in force up to that date to concretise the rules contained in the DSGVO.

Before the DSGVO, data protection law in Germany satrk was influenced by the EU Data Protection Directive 97/66/EC and the requirements of the BVerfG's census decision. According to this, every citizen has the right to informational self-determination resulting from Article 2 (1) and Article 1 (1) of the Basic Law and is thus "in principle entitled to decide for himself on the disclosure and use of his personal data [...]". It resulted from this that data processing agencies have comprehensive obligations to inform citizens so that they always know who knows what, when and on what occasion about them. In the context of data collection, the principle of self-disclosure applied above all. This principle requires that data be obtained directly from the citizen concerned before information is obtained from third parties. Restrictions of the right to informational self-determination required an explicit legal basis. Finally, the collection and processing of personal data was subject to strict purpose limitation. How-

ever, these principles continue to be upheld within the framework of the DPA in order to guarantee the individual the greatest possible protection of his or her personal data (cf. Art. 5, 15 DPA).

First of all, it should be noted that choice of law clauses according to Art. 3, 9 Rome I-VO have no effect on the applicability of data protection law. According to Art. 3 of the DPA, the territorial applicability of the DPA depends decisively on whether the person responsible for data processing has an establishment within the EU and processes personal data from it (establishment principle) or whether goods or services are offered to a data subject in the Union (marketplace principle).

The DSGVO applies without restriction to the fully or partially automated processing of personal data of natural persons and to the non-automated processing of personal data which are or are to be stored in a file system. (Art. 2 para. 1 DSGVO). According to the legal definition, personal data is "any information relating to an identified or identifiable natural person" (Art. 4 No. 1 DSGVO). Data protection is therefore limited to natural persons. Sensitive company data is therefore not protected by the Data Protection Act, but at most by the regulations for the protection of business and trade secrets in the Unfair Competition Act or by § 823 Para. 1 BGB (on the law of the established and practiced business or the general personal rights of a company).

The DSGVO covers the protection for the processing of personal data (Art. 1 para. 1, 6 para. 1 BDSG). Processing is understood to mean any operation or set of operations carried out with or without the aid of automated procedures in connection with personal data, such as collection, recording, organisation, organisation, storage, adaptation or alteration, reading, consultation, use, disclosure by transmission, dissemination or any other form of provision, comparison or combination, restriction, deletion or destruction (Art. 4 No. 2 FADP). In principle, any processing of personal data is prohibited. Exceptionally, processing is permitted if one of the conditions listed in Art. 6, para. 1 FADP is fulfilled. According to this, the consent of the data subject pursuant to Art. 6 para. 1 lit. a) DSGVO is particularly relevant. However, strict requirements are linked to this (Art. 7 DSGVO). For example, the person responsible for data processing must prove that consent has been given and that it was given voluntarily. In addition, reference should also be made to Art. 6 para. 1 lit. f) DPA, which permits the processing of personal data to safeguard the legitimate interests of the controller or of a third party, unless the interests or fundamental rights and freedoms of the data subject which require the protection of personal data outweigh these. This requires a comprehensive weighing of all the cir-

cumstances of the individual case, so that general statements on the predominance of one of the two interests are not permitted.

2. Pre-contractual obligations

In contract negotiations, the parties are in principle free in their resolutions until the final conclusion of the contract. However, they often protect themselves pre-contractually against an unjustified termination of the contract negotiations by a so-called "Letter of Intent" or (more specifically) by a "Memorandum of Understanding". Such a letter of intent typically ensures a special exclusivity of the contractual negotiations; in addition, there are confidentiality and secrecy obligations.

With regard to the imminent conclusion of the contract, it should be noted that the abrupt termination of contractual negotiations may, under certain circumstances, trigger obligations to pay damages (§§ 280 para. 1, 241 para. 2, 311 para. 2 BGB). This applies if a trust has been created with regard to the conclusion of the contract and the contractual negotiations are then broken off without good reason. It is unclear whether fault is a prerequisite for such a liability for damages. In some cases it is argued that § 122 BGB is analogously taken into consideration as the basis for a claim and in this respect only the strict liability in reliance is taken into account. A valid reason for the termination of the contract is a more favourable offer of a third party or the takeover of the contractor by the competition. Exaggerated assurances with regard to the late conclusion of the contract or the reference to other internal approval requirements for the conclusion of the contract are not valid reasons. The legal situation consists in the obligation to compensate for the negative interest (in particular expenses for the cost estimate and loss of income).

An exclusion of this liability by general terms and conditions is hardly possible, since § 309 no. 7, 307 para. 1 BGB (German Civil Code) establishes rigid requirements with regard to compensation obligations. If there is no liability from c.i.c., even in the case of extensive project planning work, a claim for remuneration only exists if a remuneration obligation has been expressly agreed upon in the event that the order is not placed. Provisions in GTCs according to which a processing fee can be charged for cost estimates are regularly invalid. An exception to this invalidity applies in the case of fraudulent intent on the part of the client, for example, because he demands preparatory work although he only wants to use it free of charge for his own planning.

a) Reimbursement of expenses, § 284 BGB

The principle of freedom of conclusion also applies if the other party has already incurred expenses in anticipation of the contract. Therefore, the expenses of a software developer in the run-up to a creation contract are generally not to be reimbursed by the user.

However, according to a judgement of the Stuttgart Regional Court, a software company can also demand compensation from the customer for expenses incurred prior to the conclusion of the contract if the customer has expressed the wish to make up for the expenses that would have been incurred if the contract had not been concluded. However, the obligation to pay compensation only applies to the customer if the non-conclusion of the contract is justified in his sphere of responsibility. Furthermore, only such expenses are to be reimbursed which the client must expect and which are to be regarded as justifiable. The latter is, for example, the case with such expenses which are necessary to determine the needs of the client or which are made for the purpose of being able to start work immediately upon conclusion of the contract.

b) Requirements specification

Within the scope of a contract for the production of individual software, the user is not unilaterally responsible for the creation of the most comprehensive specifications possible. The provider must e.g. determine the internal needs on his own initiative, insist on the fact that the user puts them down in a specification sheet, clear up ambiguities and needs recognizable for him, cooperate in the formulation of the task and submit an organization proposal for the problem solution. If the provider fails to do so, he is responsible for the fact that a program lacks the necessary simplicity and suitability for the individual needs of the user. In principle, it is the responsibility of the purchaser to draw up the requirements profile for the supplier that is necessary for programming the software. However, the contractor must participate in this process in such a way that he determines the internal needs, wishes and ideas, clarifies any ambiguities that are recognisable to him, helps in formulating the requirements and submits organisational proposals for solving the problem. However, it is questionable whether he can demand remuneration for such additional services. In my opinion, such a claim will have to be affirmed on the basis of the basic idea of management without a mandate. Ultimately, the client is supporting a business and interest group that is at least foreign to him. He is then also entitled to compensation for the necessary expenses, including the usual remuneration for work.

V. Warranty under contract for work and services law

Warranty in the law on contracts for work and services is very similar to that in the law on sales. Therefore, many elements of the law of sale can also be transferred to the law on contracts for work and services.

1. Defect in the sense of § 633 BGB

According to § 633 (2) BGB, warranty rights not only trigger deviations from the agreed or contractually stipulated quality, but also differences from normal use. The customer is obliged to present and prove the content of agreements which could further characterize the agreed and/or usual quality of the software or which could establish a warranted characteristic. This results from the general procedural principle that the claimant must present and prove the circumstances that are favourable to him and justify the claim. In this respect, there are no special features of the law on contracts for work and services; in particular, the customer must prove the target quality beyond the time of acceptance.

However, the provision of Section 434 (1) sentence 3 BGB with regard to advertising statements was not adopted. The legislator assumed that advertising by third parties hardly plays a role in the law on contracts for work and services. In this respect, advertising statements in the run-up to a software development contract do not trigger any responsibility. Since dealers and manufacturers are regularly identical in the law on contracts for work and services, advertising statements by the entrepreneur are nevertheless part of the quality agreements and can therefore trigger warranty rights. It should also be noted that the documentation owed in the law on sales is only owed in the law on contracts for work and services when the work on the product is completed. In the absence of a specification sheet, a software solution corresponding to the state of the art with an average standard of execution is owed. The absence of documentation concerning the operation of the locally installed hardware and software and the resulting inability to operate the application software shall constitute a defect entitling the customer to refuse acceptance.

Prior to acceptance, the customer must otherwise only demonstrate that there is a software defect or that the software is incomplete. It is then up to the software producer to demonstrate and prove that his work is not defective and that the service provided is not inferior to that contractually owed. Prior to acceptance, it is also the responsibility of the software manufacturer to prove that the customer is acting in breach of contract if he claims a defect or incompleteness of the work performed on the grounds that the defect or incompleteness of the software is irrelevant. The software producer must also prove that the software was produced in

good time. On the other hand, the customer who invokes a right of withdrawal prior to acceptance must in principle only prove the time of maturity, the setting and expiry of the deadline, and the declaration of withdrawal. These rules on the burden of proof result from § 363 BGB. The BGH had to decide on a case in which a software company was responsible for the delivery and installation of a merchandise management system and its connection to several online shops. The court clearly rejected the high requirements assumed by the lower court for the presentation of defects in software supply contracts. The purchaser of software satisfies his burden of proof by precisely describing the symptoms of the defect, which he attributes to a faulty performance of the company. It is therefore sufficient if the customer states that the contractor was responsible for the production of interfaces and that these would not work. On the other hand, the question of whether the deficiencies are due to non-contractual performance by the contractor is only the subject of the evidence, not already of the submission of facts.

Furthermore, the question arises as to whether the software manufacturer can demand compensation for expenses incurred due to functional errors which are not attributable to him. A situation is to be considered here in which the customer falsely claims that a system malfunction is caused by a manufacturer-related programming error. The manufacturer can incur high financial and personnel expenses in the analysis of the conceivable causes of the malfunction. In my opinion, these expenses are reimbursable from the point of view of a management without order (§§ 677, 683, 670 BGB) in the amount of the necessary replacement costs.

The Contractor fraudulently conceals a defect if he knows about the defect, considers it to be substantial, yet nevertheless pretends that it is free of defects or does not notify or remedy the defect although he would be obliged to disclose it in good faith, especially with regard to the significance of the defect. Malice always presupposes knowledge of the defect; mere negligence is not sufficient. Organisational fault is a form of behaviour equivalent to fraudulent concealment in which a contractor has a work produced on a division of labour, has breached his organisational duty in the production and acceptance of the work and as a result of this breach a defect was not recognised which would have been discovered if the work had been organised correctly.

2. Warranty rights

a) supplementary performance

The customer may initially demand the removal of defects through subsequent performance (§ 634 No. 1 BGB in conjunction with § 635 BGB). In contrast to the contract of sale (§ 439

Para. 1 BGB), the customer cannot, in the case of a contract for work and services, demand either rectification of the defect or new production at his own discretion. Rather, the right of choice lies with the software company according to § 635 para. 1 BGB; the software company is free to decide in what form it will comply with the request for supplementary performance. The entrepreneur is involved in the manufacturing process and can therefore, due to greater expertise, better judge than the customer which measure is appropriate. If the form of supplementary performance chosen by the Contractor is unreasonable for the Customer, he shall be entitled in good faith to reject the Contractor's approach. This may be the case if the removal of the defect leads to unreasonable consequential costs on the user side, for example due to increased training and personnel costs. The Contractor may refuse subsequent performance if it requires disproportionate effort (§ 635 para. 3 BGB) or if it is impossible (§ 275 para. 1 BGB). A rectification of defects is unreasonable, for example, if the software does not run even after numerous attempts to rectify the defect or if the high development costs involved in rectifying the defect are disproportionate to the significance of the defect. Subsequent performance may also become impossible if the user refuses to provide the necessary cooperation. In the case of short-lived economic goods - e.g. software programs - a remedy which is no longer economically viable after several years have elapsed since delivery is excluded in any case if the creditor himself has delayed the decision on his application for authorisation of the substitute performance for several years.

A right of self-removal by the customer with a claim to advance payment and reimbursement of costs exists if the contractor is in default with the subsequent performance and the setting of a period of grace was not successful (§ 637 para. 1, 3 BGB). It is irrelevant for the reimbursement of costs that the costs for the substitute performance in the software area can be high precisely because of the difficult troubleshooting.

As a matter of principle, the customer shall only be entitled to reimbursement of expenses incurred in remedying defects if he has previously set the contractor a reasonable period of time for subsequent performance. The setting of a deadline is an urgent reminder that the defects are now to be eliminated within the deadline at the latest. The wording in a letter setting a date for acceptance, according to which the Customer reserves the right to assert its rights in the event that defects are discovered on the acceptance date, is not equivalent to setting a deadline for the removal of defects. A setting of a deadline for the removal of defects is dispensable in exceptional cases if the contractor finally refuses the rectification of defects or if rectification of defects has been carried out without success in the past and the client therefore has considerable doubts about the reliability and ability of the contractor. In order

to demonstrate the dispensability of setting a deadline, concrete defects must be named and the time of the complaint and the subsequent activity of the contractor must be presented for each defect in order to be able to assess the exact number, type and severity of defects and the reaction of the contractor and to draw legal conclusions from this. Clichéd general assertions of defects are not sufficient for this purpose.

The setting of a grace period is subject to the conditions of § 637 para. 2 BGB in conjunction with § 323 para. 2 BGB and, if the remedy of the defect has failed or is unreasonable for the customer (§ 637 para. 2 sentence 1 BGB), the setting of an extension is dispensable. It is unclear how many attempts at subsequent performance the customer must allow the entrepreneur until "failure" can be assumed. In all other respects, the setting of a deadline is irrelevant if the parties subsequently agree on the continued validity of the contract.

Subsequent performance, including self-execution, is one of the central remedies in cases of software defects. In most cases, the customer is not interested in subsequently withdrawing from the contract or reducing the remuneration for work. Rather, he wants the executable software at last, after extensive project preparation and test phases have already been completed. Also, the distinction between rectification of defects and new delivery - in contrast to purchase law - does not regularly play a major role. There are no fixed product types here. From the customer's point of view, reworking and new delivery of a new product are indifferent as long as the software finally runs and fulfils the intended functionalities.

If the client claims for the removal of defects before acceptance, he only needs to provide evidence of the first appearance of a defect. The Contractor shall be obliged to present and provide evidence for the performance of the contract. He shall be obliged to prove that the manufactured work is free of defects until the work is accepted. After acceptance, the claim for performance expires and is reduced to the obligation to remedy the defects. However, in addition to rectification of defects, this also includes new production if this is the only way to eliminate the defects permanently. If the defect has been caused by an explicit instruction of the customer, the contractor is not obliged to remedy the defect or to provide supplementary performance. However, this only applies if he has informed the Customer of the negative consequences of the instructions. This shall apply in particular if the Customer clearly does not bring his own expertise with him. In a case of explicit instructions, the Contractor may demand a subsidy towards the costs of rectification and subsequent performance. If, in the course of rectification, services are required which the Contractor was not obliged to perform under the contract, these so-called "business-as-usual costs" shall be reimbursed. This does not apply, however, if the Contractor promised a certain success at a certain price under the

contract and the contractually agreed method of execution later turns out to be insufficient. If the client receives any other advantage as a result of the rectification, such as an increase in value, the principles of benefit equalization may intervene. How the contractor remedies the defects is up to him. The client is not entitled to give instructions. Exceptions only apply if the entrepreneur plans a completely insufficient rectification of defects, which from the outset cannot lead to a sustainable elimination of defects. However, the Customer may release the Contractor from its liability for defects, provided that it complies with the Customer's requests for subsequent performance. The costs of rectification shall be borne by the Contractor (§ 635 para. 2 BGB). This includes the costs of preliminary and ancillary work. The entrepreneur obliged to remedy the defect shall not only bear the necessary expenses, in particular transport, travel, labour and material costs. He must also remedy damage to other property of the customer which inevitably arises in the course of the rectification of defects. The loss of earnings is not part of this claim for compensation; it can only be justified as part of the compensation. The Contractor may refuse to remedy a defect if this involves disproportionate expense (§ 635 (3) BGB). However, disproportionality can only be assumed if the insistence on proper performance of the contract, taking into account the objective interest of the Purchaser in proper performance, is a breach of good faith in relation to the effort required for such performance, taking into account all circumstances. In principle, an entrepreneur cannot ward off a claim for performance by pointing out that the proper rectification of defects is too expensive for him. If the defect was caused by gross negligence, the objection of disproportionately high expense does not apply. If there is a noticeable impairment of the functionality of the work, the reference to the disproportionality is also not permissible. If the contractor wrongfully refuses to rectify the defects/subsequent performance, the client may declare withdrawal from the contract without setting a further period of grace. If he nevertheless unnecessarily sets the Contractor a deadline, he is bound to it for the time being. The client can only refuse to remedy the defect if it is unreasonable to expect him to do so. If the client refuses to remedy the defect due to disproportionate effort, he loses his rights to claim for defects. If he does not have necessary preliminary work carried out by other contractors, there is also no claim to rectification/replacement. All the same, every entrepreneur must check whether the preliminary work of another entrepreneur, on which his own performance is based, forms a suitable basis and does not have any characteristics which could call into question the success of his own work. If he has any doubts in this respect, he must inform the client.

If the Contractor is in default with the removal of the defect, the Client may, in accordance with § 637 para. 1 BGB (German Civil Code), remove the defect himself or have it removed

by way of substitute performance. If the Customer announces substitute performance, this shall not constitute acceptance of the work performance. The right of self-help according to § 637 para. 1 BGB requires default of the contractor, in particular the client must not have eliminated the concretely warned defect in due time. The decisive factor is that the Contractor allows the reasonable period of grace granted to him for subsequent performance to expire without result. If the Contractor has rightly refused subsequent performance, the Customer's right to replacement shall also lapse. Setting a deadline shall not be necessary in cases where the Customer's confidence in the success of such subsequent performance or in the reliability of the Contractor has been permanently shaken. The contractor must be granted a reasonable period of time for the rectification of defects. The duration of this period shall depend on the individual case. In the case of extensive and difficult work, however, the Contractor must start the supplementary performance as soon as possible, at least within a reasonable period of time, and complete it quickly. If the contractor does not react, the client does not have to set a further deadline again. In practice, it is important to set a double deadline, firstly an initial period of time to explain whether the defect has been remedied and then a further period of time for the remedy of the defect itself. If the client is forced to remedy the defects himself or with the help of third parties, he has a claim for reimbursement of costs under § 637 (1) BGB. The client's own expenses are to be reimbursed. The costs for the determination of the defects by a third party, as well as the value added tax, but not lost profit. In the question of the necessity of the expenses, the client is not obliged to make special efforts to find the most favourable third party contractor. In particular, he does not have to obtain different offers or organise invitations to tender. Furthermore, the client is also entitled to demand the expected expenditure for the removal of defects as an advance payment from the contractor (§ 637 para. 3 BGB). This obligation to make an advance payment shall not apply if the rectification of defects has already been carried out and invoiced by the external contractor. If the contractor does not carry out the rectification of defects in a foreseeable time, the advance payment shall also be refused. The advance payment must be settled; in particular, the contractor shall be entitled to full information on the use of the advance payment. Any excess amounts must be repaid under the contract. However, an excess advance can be retained if further defects become apparent after the advance has been requested. The client then has a right of refusal to perform under § 320 BGB (German Civil Code) in relation to the contractor's repayment request..

In another case, the Federal Court of Justice decided that a main contractor has a right to refuse performance due to defects in the subcontractor's work performance, irrespective of the

claim by the customer. The main contractor's right to refuse performance then only depends on the fact that the purchaser does not allow the defect to be remedied. The defence of non-performance of the contract under § 320 BGB by the main contractor is not contrary to good faith.

b) Withdrawal or reduction

In addition, the customer may reduce the remuneration or withdraw from the contract (§ 634 No. 3 in conjunction with §§ 636, 638 BGB). However, according to § 281 BGB, this requires that he has set the entrepreneur a reasonable deadline for subsequent performance to remedy the defect without success. According to the wording of § 281 para. 1 BGB, it is not a prerequisite that the customer declares that he wishes to refuse to remedy the defect after expiry of the deadline. The setting of a deadline is dispensable if the rectification of the defect is not possible, is refused by the entrepreneur or the immediate assertion of the claim is justified by a special interest of the customer (§§ 281 para. 2, 636 BGB). Withdrawal from the contract is not possible in the case of an only insignificant reduction in the value or suitability of the work (§ 323 Para. 5 Sentence 2 BGB). A total withdrawal requires that the total performance is indivisible. Whether a service is divisible can be determined on the basis of the criteria of § 139 BGB. The Cologne Higher Regional Court also had to deal with this question in its decision. Four software modules were ordered, each of which could also be used separately from the other modules. Withdrawal from the entire contract was therefore excluded because it was not apparent, either on technical or legal grounds, that a uniform, indivisible service had been agreed. If separate prices are paid for individual modules, this is an indication of the possibility of a partial withdrawal and against a loss of interest in accordance with § 323 Para. 5 BGB on the basis of the price calculation.

The reduction shall result in a reduction of the remuneration of the Contractor. In contrast to withdrawal (§ 323 Para. 5 Sentence 2 BGB), the reduction is also possible for insignificant defects. For the calculation of the reduction the time of the conclusion of the contract is decisive (§ 638 para. 3 sentence 1 BGB). The claim for reduction shall include the costs of any remedy of defects as well as a reduction in the marketable or technical value. The costs of a removal of defects are reimbursable even if the customer does not have the defect removed at all. In the event of complete worthlessness of the work performance, the claim for reduction of the price shall lead to the surrender of the entire remuneration.

Important in addition to the reduction is also the claim for damages due to non-fulfilment (§ 634 No. 4 BGB). The client has the right to choose whether he wants to keep the work performance and demand the damage caused by the defect (small compensation) or, if the work

is rejected, demand the entire damage caused by the non-performance (large compensation). Missed advantages of use as part of the compensation can be claimed. In the opinion of the BGH, the temporary impairment of use as a result of a tortious interference can constitute a compensable financial loss. It is, however, disputed whether this case law on § 823 (1) BGB can also be applied to the contractual right to damages. The lost profit, for example due to loss of use or loss of profit, can be liquidated in any case via § 634 No. 3 BGB.

VI. Acceptance within the meaning of § 640 para. 1 BGB

literature:

Ralf Leinemann, das neue Bauvertragsrecht und seine praktischen Folgen, in: NJW 2017,3 1113; Jennifer Ehrl, das neue Bauvertragsrecht im Überblick, in: DStR 2017,2395; Tobias Breitling, Abnahme und Zustandsfeststellung nach neuem Recht, in: NZBau 2017,393; Höpfner/Vollmann, die Reform des kaufrechtlichen Gewährleistungsrechts, in: NJW 2017,3745; Witzel, Vertragsgestaltung für Generalunternehmer in IT-Projekten, in: CR 2018, 345.

As in the law on sales, delivery, in the law on contracts for work and services, acceptance within the meaning of § 640 para. 1 BGB (German Civil Code) is in particular a prerequisite for the commencement of the two-year limitation period (§ 643a para. 1 no. 1 BGB in conjunction with § 634a para. 2 BGB). The declaration of acceptance is a primary contractual obligation, which can be sued for in isolation; if the customer does not declare acceptance despite the defectiveness of the work, the contractor can withdraw from the contract or demand damages for non-performance after unsuccessful setting of a deadline with the threat of rejection.

The due date of the remuneration depends decisively on the acceptance (§ 641 BGB). The acceptance of the construction work is not relevant for advance payments. Until acceptance, the contractor bears the risk of remuneration (§§ 644, 645 BGB). He shall continue to bear the risk of accidental loss, which causes the accidental deterioration or accidental infeasibility of the work performances.

Acceptance is no longer required if the client, despite refusal to accept, expressly demands neither completion nor rectification of defects, but only compensation and reduction in price. An express acceptance is present with declarations of the client or an authorized representative that he agrees with the work performance, the work performance is in order, one is "satisfied" with the software. If the client makes only "provisional" declarations, this shall not constitute acceptance. "Preliminary" declarations have no legal effect unless the parties have expressly regulated this in the contract.

Acceptance may not be refused on the grounds of minor defects in accordance with § 640 (2) sentence 2 BGB. For the distinction between major and minor defects, the following shall be taken into account:

- the scope of the remedial action,
- the consequences of the defect for the functionality of the overall work performance,
- the reasonableness of the use despite corresponding impairment,
- the client's worthiness of protection with regard to removal before acceptance.

Acceptance readiness is also present, for example, if existing residual defects are so significant after all circumstances of the individual case that it is reasonable for the customer, taking into account the interests of both parties, not to delay a speedy execution of the contract and therefore not to insist on the advantages which are available to him before acceptance. If the client has sold the work which has not been accepted, refusal of acceptance is no longer possible if this has prevented further improvements.

Acceptance fictions are problematic. It is true that § 640 (1) sentence 3 BGB provides that it is equivalent to acceptance if the client does not accept the construction work within a reasonable period of time specified by the contractor. However, this obligation only comes into effect if the client is obliged to accept the work at all. This condition may be regulated in the individual agreement, but not in the general terms and conditions of business. The fictitious acceptance is to be newly regulated in the new law for the reform of the purchase and work contract law. According to this, § 640, Subsection 1, Sentence 3, BGB, will be dropped. It is replaced by a new paragraph 2, which inserts new regulations on fictitious acceptance. According to this, acceptance is faked if the Contractor has set the Customer a reasonable deadline for acceptance after completion of the work and the Customer has not refused acceptance within this deadline, stating defects. Instead of fulfilling the intended "disciplinary action of the Customer" and no longer merely exercising succinct refusals of acceptance, the new regulation has the effect that the Contractor has fewer opportunities to fake acceptance. Because according to the new wording of the law, untruthful and insignificant claims of defects are sufficient to reject the acceptance. However, this also means that if the customer does not react, e.g. because he does not consider the work to be completed, the fictitious acceptance also occurs in the case of works which obviously contain significant defects.

Acceptance "of the work produced in accordance with the contract" is understood to be the physical acceptance by way of transfer of possession, combined with the declaration of the customer that he accepts the work as the main thing after performance in accordance with the contract. In extension to delivery within the meaning of § 438 para. 2 BGB (German Civil

Code), acceptance requires an express or tacit approval of the performance as essentially in accordance with the contract. In the past, it was disputed whether software was even capable of being accepted. Today, however, this is basically affirmed. In the case of computer services, approval presupposes the possibility of examining the software, i.e. its complete and proper delivery. A prerequisite is an approval by the buyer, because only then the customer can check the "fit". A proof of work with the note "Hand over the system in order" is not sufficient.

The implied acceptance is permissible and includes a behaviour supported by the will of the client, by which the client expresses that he considers the construction to be essentially in accordance with the contract. If the parties agree on a formal acceptance, this must always take place. Only in very narrow exceptional cases can the implied cancellation of the formal acceptance be assumed. An implied cancellation of the formal acceptance requirement is out of the question if the client sends a comprehensive request for rectification of defects to the contractor in due time after the object has been referred to, with the remark that nothing stands in the way of a formal acceptance after rectification of these defects.

A conclusive acceptance lies, for example, in

- the intended use,
- the use of the work without complaint,
- the unconditional payment of the work wage,
- the withholding of the amount for defects notified during the final discussion.

The implied acceptance can be that the customer does not complain about defects after completion of the service, occupation of the completed building and expiry of a testing period of six months. If the performance is only partially performed and contrary to the contract, an implied acceptance shall not be considered. Nor does a termination of the contract constitute an implied acceptance. Likewise, the use of the software "under pressure" cannot be regarded as tacit acceptance. Payments on account do not constitute an implied acceptance either. Accordingly, the unconditional payment of a (partial) invoice for an additional service does not contain any statement by the client that at the same time the existence of the fulfilled claims as a whole or in individual relationships will be out of dispute. Advance payments are down payments with regard to the claim for remuneration for the entire work. After termination of the contract, the Contractor must finally settle its services. This obligation follows from the

agreement on provisional payments and exists regardless of whether it is expressly regulated in the contract.

The approval of the customer by tacit declaration can be seen both in a continuous productive use in spite of existing defects and in the continuation of the use of the goods after knowledge of the defects. However, this does not apply in the case of so-called emergency use to reduce impending damage. An extensive exchange of correspondence between the parties with notices of defects and requests for rectification of defects speaks against the tacit approval of the purchaser. Acceptance of application software created within the framework of a contract for work and services requires commissioning in the company for which it was developed. In contrast, a work certificate with the note "System handed over in good order" only proves the defect-free delivery of the system intended for operation with the program, not the functioning of the application software. The payment should also be regarded as an implied acceptance. An implied declaration of acceptance before completion of the software is inconceivable; in this respect, acceptance can only be declared here at the earliest when the user manual is handed over.

Unconditional acceptance has the effects of § 640 para. 2 BGB, according to which the client is only entitled to warranty rights in the case of acceptance of a defective work if he reserves his rights in respect of the defect at the time of acceptance. However, an exclusion of the warranty rights can only be considered if the Client carries out the acceptance in knowledge of the defect, which includes the Client's positive knowledge of the defect that cancels or reduces the value or the contractual suitability of the work. Mere knowledge is not sufficient for the exclusion of warranty claims.

A conclusive acceptance is also possible if the software has been resold. Even the retention of an amount for notified defects shall entail an acceptance. In general, notices of defects or reservations of defects on the acceptance date shall not exclude an implied acceptance. However, if the client expressly rejects acceptance, there is no longer any room for the acceptance of an implied acceptance. Even in the case of incomplete performance of the work performance, for example in the absence of documentation, tacit acceptance shall not be considered. Acceptance is only effective at the respective distribution level, so that an acceptance in the relationship of general contractor-client does not mean anything for the question of acceptance in the relationship of general and subcontractor.

Mere silence on the part of the purchaser is generally not sufficient. A final refusal of acceptance on the part of the customer sets the limitation period in motion. A confirmation of acceptance signed by the customer does not include acceptance within the meaning of § 640

BGB (German Civil Code) despite the often different wording, as the usability can obviously not yet be assessed by all parties involved at the time of signing the confirmation, so that it cannot be assumed that the customer approves. A fiction of acceptance contained in the general terms and conditions of the supplier is basically ineffective, e.g. acceptance if the customer refuses to sign the acceptance certificate. The clause contained in the general terms and conditions of a software supplier: "Terms of payment: 30 % of the order volume payable on placement of the order, 40 % after completion of installation and instruction and 30 % four weeks after conversion" is unclear and subject to interpretation. In the case of such a clause, the most favourable interpretation for the customer should result in the fact that the 40 % rate also presupposes readiness for acceptance.

It is also conceivable to divide the acceptance into partial acceptances. Partial acceptances can be agreed upon, as far as they are independently assessable parts of the overall performance. A software developer can only demand an acceptance in parts on the basis of a corresponding agreement. This agreement must be unambiguously worded.

Acceptance is of central importance in the law governing contracts for work and services, including

- the concretization to the accepted work,
- the loss of the right to new production,
- the transition from fulfilment claims to warranty claims,
- the due date of the remuneration (§ 641 BGB),
- the transfer of the risk of remuneration (§§ 644, 645 BGB)
- the start of the limitation period for warranty claims (§ 634a para. 2 BGB),
- the exclusion of known, not reserved defects (§ 640 para. 2 BGB).

Advance payments according to § 632a BGB are also conceivable. According to this, the Contractor can demand an advance payment from the Customer if he has provided a self-contained partial performance in accordance with the contract or if he has specially manufactured or delivered materials or components and if he has transferred ownership of the parts of the work, its materials or components to the Customer or has provided security for them. In this way the contractors shall be protected from having to pre-finance the corresponding services in full until acceptance. The claim to payment on account therefore also arises independently of the submission of an invoice or acceptance, even if they neither constitute an acknowledgement nor a reversal of the burden of proof.

An invoice or comparable statement will in any case be necessary if the amount of the advance payment can only be calculated and checked on this basis. In accordance with § 12 No. 2

VOB/B (German Construction Contract Procedures), the term "partial performance completed" must be defined in such a way that the functionality is guaranteed independently of other components. In the literature on building law, it is pointed out that the term "more generous" should be used and that it must be taken into account that the service is independently valuable, independently usable and thus also billable. In the draft of § 632 a, Subsection 1, BGB, it is provided that the yardstick for the calculation of a payment on account should be the value of the service provided by the entrepreneur and contractually owed. Accordingly, the concept of increase in value will no longer be applied, but rather the value of the work performed and contractually owed. The new amendments are viewed quite positively, since above all difficulties of interpretation can be better avoided in cases of doubt. The term "contractual performance" means that the performance must not have any defects. In case of insignificant defects, the demand for payment on account will be limited accordingly, also with regard to the client's right of retention according to § 641 para. 3 BGB. The draft law on § 632 a BGB stipulates that the customer may refuse to pay an appropriate part of the advance payment in the event that the services rendered deviate from the contractual condition. Thus, even in the case of substantial defects, the customer is only granted a right of retention, which is still disputed under current law. This innovation was criticized in the Bundesrat's statement on the draft bill. The requirements of § 632a BGB can be changed under individual law, but not in general terms and conditions. Important for advance payments and payments on account are settlements of services. Without such a settlement, the client can make his own invoice and limit himself to the deduction for what corresponds to his level of knowledge with reasonable exhaustion of the sources available to him. After completion of the services, the Contractor is furthermore obliged to provide information as to whether the advance payment covers the final payment obligation or whether additional payments are still to be made. In the event of overpayment, claims for repayment do not arise from the right of enrichment, but from a tacit agreement.¹⁵³ If the Client refuses to pay the requested advance payment, the Contractor shall be entitled to terminate the contract without notice and without further notice. The obligation to pay instalments shall not affect the right to retain counterclaims by way of offsetting. In the event of defects, a right to refuse performance with regard to the final payments shall also remain in force. § Section 641 (3) of the German Civil Code (BGB) also gives the customer the right to withhold at least three times the anticipated costs of remedying defects. In this

¹⁵³ *BGH*, Urt. v. 2.5.2002 – VII ZR 249/00, *BauR* 2002, 1407; *BGH*, Urt. v. 11.2.1999 – VII ZR 399/97, *NJW* 1999, 1867.

respect, a trial would then result in a conviction step by step - reduction against rectification of defects. After the final invoice has been issued, there is no longer any entitlement to agreed payments on account. The same applies to the termination of the contractual relationship or the complete provision of services. The right to provisional settlement expires upon issue of the final invoice. A corresponding lawsuit would have to be reinterpreted to mean that only a partial amount of the final invoice is claimed.

The Client may deduct a security amount from the remuneration due for the work, provided there is an agreement to that effect between the parties. The fact that a contract provides for a 5% deduction does not constitute an agreement to provide security. GTCs may provide for such agreements, but a 5% security deposit must be linked to the contractor's ability to redeem the security deposit by means of a bank guarantee or payment into a blocked account. Rights of retention and rights to refuse performance are not excluded by the security deposit. However, the security deposit must be taken into account in the amount of the retention of performance. Security may be provided in the form of withholding of wages or the provision of a guarantee. Typical combinations are (for example, 5% retention of security for two years, redemption by bank guarantee is possible). It is not possible to agree a guarantee on first demand in the form of a form in accordance with GTC law.

The scope of § 645 BGB (German Civil Code) must also be taken into consideration for software development contracts. According to this, the Contractor can demand a part of his remuneration if the work has become unfeasible prior to acceptance as a result of a defect in the material supplied by the Customer or due to an instruction from the Customer. If a software project fails due to incorrect instructions from the Customer, the Customer may bear the risk in the form that he owes the software producer (the software house) a part of the remuneration. The same applies to "material" defects. The term "substance" is to be understood broadly and includes any object, including the person of the purchaser. In this respect, the substance also includes an unsuitable implementation environment for the software.

At the beginning of March 2017, the German Bundestag passed the "Act to Reform Building Contract Law and Amend Liability for Defects under Purchase Law", which is to apply to all contracts concluded from 1 January 2018. The law is intended to modernise the often undetailed regulations of the law on contracts for work and services with regard to the diverse types of possible contractual objects and to adapt them to the increasingly complex construction law. In addition, supplementary, consumer-protecting regulations in the area of construction contract and work contract law will be created. For this purpose, a whole range of special re-

gulations for particular types of contract is planned (e.g. building contract, consumer building contract, architect's contract, etc.).

Changes are also planned for the area of acceptance in the contract for work. The aim is to accelerate the acceptance procedure and thus to create legal certainty with regard to remuneration in accordance with § 640 (1) BGB. Thus, the currently valid acceptance fiction pursuant to § 640 para. 1 sentence 3 BGB, which requires non-acceptance within a certain period of time despite the obligation to do so, is to be modified. The fiction of acceptance thus already occurs if the purchaser does not refuse acceptance within the set period of time, stating a defect. In contrast to § 640 BGB, the customer is now obliged to react actively to a request for acceptance in order to avoid the occurrence of a fictional acceptance combined with a reversal of the burden of proof. Otherwise, acceptance shall be deemed to have been granted, even if there are actually significant defects.

The recast changes two main details. Firstly, the completion of the work becomes a prerequisite for setting a reasonable period for acceptance, in order to avoid abuse of the acceptance function by premature delivery of the work. And secondly, the entrepreneur can bring about the acceptance himself from § 640 para. 2 BGB n.F., in which he sets a deadline after completion of the work and the customer does not refuse acceptance by stating "at least one defect". The change in the wording "at least one defect" was only made at the last second of the Bundestag discussions as a proposal for amendment from the relevant technical committees. It is relatively fatal for the IT industry. While it may be easy in normal building law to designate an individual defect as such, this is likely to be difficult in the area of IT contracts. The numerical classification of defects is hardly possible there. A malfunction can be defined and described as a partial or independent defect.

However, it remains doubtful whether the objectives set by the modification, namely "to distribute interests, risks and burdens fairly between the parties" and to prevent an "abusive refusal to accept", will actually be achieved. The customer can prevent a unilateral inducement of acceptance by refusing acceptance by stating any defect, even a minor one, whereby the actual existence of the defect is initially completely irrelevant for acceptance (§ 640 para. 2 sentence 1 BGB n.F.).

VII. Termination

literature:

Hoeren, Die Kündigung von Softwareerstellungverträgen und deren urheberrechtliche Auswirkungen, CR 2005, 773; *Meyer-van Raay*, Der Fortbestand von Unterlizenzen bei Erlöschen der Hauptlizenz, NJW 2012, 3691.

According to § 649 sentence 1 BGB, the user may terminate any contract for work and services until its completion. However, according to § 649 sentence 2 BGB, he must then pay the agreed remuneration minus saved expenses. In all other respects there is always a right of termination for good cause according to § 314 BGB. According to the new law on the reform of the law on sales and contracts for work and services, such a right of termination for good cause should also be regulated in a new § 648 a BGB. If the user refuses to accept the software and the other services of the supplier, then this constitutes a termination of the contract, which gives the supplier a claim according to § 649 BGB. The Contractor is entitled to terminate the contract for work and services if the Purchaser permanently refuses to allow the offered remedy of defects without these justifying reasons. The right to terminate the contract also exists if the contractor does not offer to remedy individual defects, but rightly refuses to do so as being disproportionate, because the success of the remedy of defects would be in no reasonable proportion to the amount of money spent on it.

In principle, every contract for work and services can be terminated for good cause. However, according to the regulation in force at the time, termination without notice is only justified if the relationship of trust has been culpably violated, so that a continuation of the contractual relationship is not reasonable. According to the Higher Regional Court of Düsseldorf, the mere failure to meet a deadline does not necessarily entitle the client to terminate the contract for good cause if no opportunity to make up for lost time has been granted. . The extraordinary termination of a contract for work could be reinterpreted as a free termination if the client wanted to terminate the contractual relationship in any case. In this case, the Contractor is entitled to remuneration for the services rendered, as well as to remuneration for the services not rendered, less expenses saved and other purchases. The possibility of a free termination is not excluded by the fact that the contract can only be terminated for good cause during the agreed term. In the new § 648 a BGB, a termination for good cause should also be possible without observing a notice period. According to this, an important reason exists if, taking into account all circumstances of the individual case and weighing up the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship until the work is completed. Paragraphs 2 and 3 of § 314 BGB apply accordingly.

Furthermore, these provisions provide for a claim of the parties to a joint determination of the performance status. This is to avoid possible disputes about the status of the work at the time of termination, which is relevant for the determination of claims for remuneration that have arisen up to that time.

However, a recall according to § 41 UrhG would be dangerous, which would lead to a loss of rights. This provision is particularly relevant if a software developer realizes that his distribution partner cannot market the software. The developer can then recall his once transferred right of use with reference to § 41 UrhG. However, this is not possible in the employment relationship, for example in favour of employed programmers. Even if an employment relationship is not to be assumed, a recall by the originator of computer programs is not possible if the client has paid a lump-sum fee and no ongoing license fee.

The effects of such a recall on the already transferred rights to use the software are questionable. If the granting of the right of use is causally linked to the existence of the obligation to grant rights under the law of obligations, the right of use may no longer exist after the contract has been terminated. Thus the application of the principle of abstraction is partly rejected in case law and literature. The right of use is connected with the author's remaining parent right (Section 29 sentence 2 UrhG) in such a way that it automatically reverts to the author if the specified purpose no longer applies. The author's right thus became a full right again. If the principle of abstraction is actually not valid within the framework of copyright contract law - contrary to the view advocated on this side - a separate reassignment to the author would not be necessary once the underlying obligation transaction has been completed.

The callback is generally considered to be *ex nunc*. The recall only prevents further exploitation of the work by the previous authorised user. Already completed acts of use cannot be recalled. The copy of the work itself does not have to be issued. Furthermore, the recall only affects the parent rights, but not the grandchildren's rights (e.g. in the case of sublicensing). These remain in force despite termination.

The client's free right to terminate the contract can be waived in principle; it would also be conceivable to have individual contractual provisions on other remuneration rates in the area of services not provided. However, such a waiver is not possible in GTC. The Federal Court of Justice (BGH), for example, declared a clause according to which the contract can only be terminated for good cause to be invalid, as this would undermine the statutory provision of § 649 BGB. Equally ineffective would be a clause of the contractor, according to which the contractor is entitled to full remuneration without regard to the services rendered. Also prohibited is a clause according to which a claim to remuneration exists only insofar as the indivi-

dual services rendered are actually used by the client. Lump sums for the corresponding remuneration may not be unreasonably low or high.

A special right of termination still exists in accordance with § 650 BGB (German Civil Code) in the event of a cost estimate being significantly exceeded. The cost estimate is only a non-binding calculation of the expected costs. However, a substantial exceeding of the cost estimate will still lead to the right of termination. In this case, the contractor is only entitled to a claim to a part of the work remuneration corresponding to the work performed and reimbursement of the expenses not included in the remuneration (§ 645 BGB analogously). For the protection of the client, the contractor must notify the client immediately if a significant exceeding of the cost estimate is to be expected (§ 650 para. 2 BGB). Failure to give such notice shall trigger a claim for damages due to breach of duty. If the Contractor continues to work despite exceeding the estimate, it is problematic whether he will be remunerated for this additional work. The prevailing opinion is that in this case the contractor is only entitled to remuneration in the amount of the cost estimate plus the permissible excess.

In all other respects, any contract for work may be terminated by the client for good cause. The right of termination results from the basic ideas of § 242 BGB in connection with § 649 BGB. It is not contractually restrictable, not even in individual contracts. Only serious culpable violations or other destruction of the contractual relationship of trust are sufficient grounds for termination. It must have become unreasonable for the client to continue the contract. A warning and setting of a grace period is not necessary in principle. Claims arising from § 649 BGB (German Civil Code) with regard to the remuneration for the part still outstanding shall not apply. However, a claim to remuneration for services rendered shall remain in force insofar as the services are still usable for the client. Important reasons are deemed to be:

- the non-compliance with contractual deadlines of particular importance for a reason for which the contractor is responsible
- the serious breach of cooperation obligations, e.g. by tying his services to the placing of a follow-up order,
- the execution of a project against the rules of technology,
- the constant disregard of the wishes of the client,
- particularly serious defects,
- the ties of further work to the payment of further, unjustified remuneration,
- unjustified termination without notice and lack of cooperation.

If there is no termination for lack of good cause, the termination is to be understood in such a way that a dismissal is intended.

The Contractor may terminate the contract in accordance with §§ 642, 643 BGB (German Civil Code) if the Client violates its obligations to cooperate and the Contractor has set the Client a reasonable deadline for the Contractor to make up for lost time with the threat of rejection. In addition, the Contractor may terminate the contract in accordance with general principles of law if there is good cause, in particular if the Customer endangers the contractual relationship and the Contractor can no longer be reasonably expected to continue the contract. Such termination for good cause is possible, for example, in the case of

- the violation of cooperation obligations, such as unjustified termination without notice,
- the serious and final refusal to pay due invoices on account.

In the event of a termination, special problems arise with regard to the claim to compensation for work. The termination results in the contract being cancelled *ex nunc*. In this respect, the Client retains the right to demand the removal of defects for the services provided to date. Once the programming has been completed and the project is finished, there is no more room for termination. In this respect, there is then also an obligation to accept which cannot be undermined by termination. Partial terminations are permissible if it is possible to separate individual services into individual services. With the termination, the contractor's right to demand advance payments is no longer applicable. As a right to structure, the termination is unconditional. In accordance with § 649 BGB (German Civil Code), the Customer may terminate the software agreement at any time without notice and without giving any special reasons. The Contractor may then in turn demand full payment for the work. He must allow himself to offset what he saves in costs as a result of the termination of the contract or what he acquires or maliciously omits to acquire by otherwise using his labour and his business. With regard to the savings, the client does not have to accept that the settlement deprives him of any benefits from the concluded contract. However, he may also not take advantage of the fact that a contract that is unfavourable to him has been terminated. There must be a causal connection between the termination and the other profitable employment, so that the contractor has only been put in a position to carry out another order by the termination of the contract. However, the Federal Court of Justice already wants to have so-called "filling orders" credited in the context of the other acquisition. The contractor bears the burden of demonstration and proof for the rate of remuneration, also with regard to the saved expenses and the alternative acquisition. The Customer shall bear the burden of proof that higher savings or more was achieved in other purchases than the Customer wishes to have credited. The Contractor's presentation

of the saved expenses must be such that the Client can verify the relevant information and take a stand. It is not sufficient if the client simply claims savings without substantiation and wants to provide expert evidence. The contractor must subsequently compile his relevant price calculation criteria and present them specifically with regard to the saved expenses in order to enable the client, who is usually not informed, to make an appropriate statement.

As part of the termination, the reform of the building contract law as of January 1, 2018, extends the previous termination option under Section 649 of the German Civil Code (BGB) to include the possibility of termination for good cause under Section 648a of the new version of the German Civil Code (BGB). The provision repeats in other parts § 314 BGB. Termination may be effected without notice and an important reason is already given if a contractual partner cannot reasonably be expected to continue the contractual relationship until the completion of the work, taking into account all circumstances of the individual case. This is intended to recognise the possibility of extraordinary termination, which has hitherto been based on judicial law, and thus to create legal certainty in practice. The draft refrains from a special termination event of insolvency, as regulated in §§ 8, 9 VOB/B: An insolvent entrepreneur proves to be unreliable and inefficient. However, in individual cases, such as in the "protective screen procedure" pursuant to section 270 InsO, there is, as an exception, no important reason for termination. Ultimately, every software development contract is thus regarded as a long-term contract that comes close to a continuing obligation.

A genuine novelty is the partial termination provided for in Section 648a (2), which refers to a "part of the performance which can be delimited according to the contract". In contrast to § 8 Para. 3 VOB/B, this does not focus on the hurdle of the "self-contained part of a service", so that a clear distinction can be made between services rendered and services still to be rendered. In the case of partial termination, it seems to make sense to assess the delimitable services according to the criteria provided in the contract. For the IT scene, this results in the need to divide projects more clearly into self-contained units. Only if the parties take the trouble to define self-contained partial acceptance steps can they provide for new partial termination options in the contract in their mutual interest. For the judiciary, too, there is no need to always think about the failure of the overall project in IT projects

The obligation to cooperate in determining the state of performance resulting from § 648a para. 4 BGB n.F. is also an important innovation in this context. If one of the parties violates this obligation to cooperate by refusing to cooperate or by failing to appear at a date fixed within a reasonable period of time, the burden of proof pursuant to § 648a para. 4 sentence 2

BGB n.F. shall pass to this party, unless it is not responsible for its absence and immediately notifies the other party thereof. This is intended to create an incentive to cooperate in determining the quantitative evaluation of the services rendered up to the time of termination in order to prevent a subsequent dispute about the exact scope of the services.

The wording of the provision is difficult to understand

„(4) After termination, either Party may require the other to cooperate in a joint determination of the level of performance. If one of the parties refuses to cooperate or fails to meet a deadline for the determination of the level of performance agreed upon or determined by the other party within a reasonable period of time, the burden of proof for the level of performance at the time of termination shall be borne by the other party. This shall not apply if the contracting party is absent as a result of circumstances for which it is not responsible and which it has immediately notified to the other contracting party.“

Pursuant to Section 648a (4), the first steps have been mapped out for transition and termination management. However, the question arises how the obligations regulated there can ever be enforced. This should not be a main claim for performance which can be sued as such. In this respect, it is more a matter of obligations to cooperate within the framework of secondary obligations. Accordingly, § 648a, Subsection 4 links to the refused cooperation a kind of reversal of the burden of proof for the state of performance at the time of the termination. In the IT sector, this would lead to the fact that the assertions of the other side with regard to, for example, services already provided or not provided would essentially be presumed to be correct.

However, an exception to the exception is again provided for if the absent party was not responsible for the absence on the date and the other party was immediately informed of the relevant circumstance. The wording is not entirely clear here. § Paragraph 648a(4) mentions two circumstances for the reversal of the burden of proof, namely the refusal to cooperate or absence on a date set by the other contracting party for the determination of the state of performance. The exception to the exception shall only apply if the contracting party "remains absent" as a result of a circumstance for which it is not responsible. The exception in sentence 3 refers only to the agreed and appropriately set date. The refusal to agree on a date shall not be equated with the refusal to make a determination. The other party to the contract still has the possibility to set a reasonable deadline for the determination. In addition to the refusal to determine the state of performance, a refusal of the determination is possible. One party to the contract is deprived of the possibility to determine the level of performance (e.g. by a prohibition to enter the property). In addition to the reversal of the burden of proof, this results in a

claim for damages for positive breach of contract due to subsequent cooperation obligations under §§ 241, 280 et seq. BGB.

It is questionable what effect the determination of the level of performance has. Even if the determination is not comparable to the acceptance, the determined level of performance should decide in the final result on the remuneration still owed. The determination of the level of performance in § 648a corresponds to the regulation in § 4 Para. 10 VOB/B:

„The condition of parts of the performance shall be determined jointly by the Client and the Contractor upon request if these parts of the performance are withdrawn from the inspection and determination by further performance. The result shall be recorded in writing.“.

Ultimately, this means that the structures of the VOB/B are transferred to the general law on contracts for work and services. However, §648a BGB goes beyond the VOB/B, as the latter only applies to determine "the condition of parts of the performance" "if these parts of the performance are withdrawn from the inspection and determination by the further execution". The VOB/B, for example, is concerned with statements on fire protection devices which can no longer be inspected in shafts and ceiling areas which are subsequently closed. In essence, the determination of the state of performance is not necessarily linked to the question of defects; it is essentially only a determination with reference to the "condition" and thus a purely objective determination of the performance. It can, however, additionally include a determination of freedom from defects, which is, however, conceptually not necessarily the case. There is agreement in the VOB literature that the pure determination of the condition does not include a partial acceptance in a legal transaction and thus is not linked to the general effects of an acceptance/partial acceptance.

As a result of this finding, the person who wishes to invoke a different level of performance could bear the burden of proof and demonstration. In § 648a, Subsection 4, BGB, it is added that the burden of proof is not only transferred after joint determination, but already when the refusal to determine or the absence of the date is made.

VIII. Limitation period

The determination of the period of limitation for warranty rights in software development contracts is problematic. Very rarely does the statute of limitations for construction defects apply. For example, the delivery of software for the control of a building heating system is not work on buildings and is therefore not subject to the five-year limitation period for defects. Furthermore, the delimitation between § 634a para. 1 no. 1 and no. 3 BGB (German Civil

Code) for software development contracts is unclear. Warranty claims shall become statute-barred after two years if the work consists in the manufacture, maintenance or modification of an object; in the case of the manufacture of other works, the regular limitation period of three years (§ 195 BGB) shall apply in accordance with § 634a para. 1 No. 3 BGB. In this respect, it must be decided whether software development is to be regarded more as the production of an object or as the production of other works. However, this question leads to absurdities: Whoever, when qualifying software development contracts within the scope of § 651 BGB, refuses to classify the contractual obligations as being directed to the production of an object, cannot now evaluate the limitation period differently. He would have to plead for the application of § 634a para. 1 no. 3 BGB due to lack of factual reference and thus for the very unconstrained limitation period of three years from knowledge of the defect. However, precisely this criterion is very often unsuitable for software projects. It is hard to imagine when the user had knowledge of a certain defect and to what extent. The two years are also calculated as a very long period. It would be better to apply § 634a para. 1 No. 1 BGB, especially with the provision being linked to acceptance as the beginning of the limitation period. One would only be able to achieve the desired result by not considering software development as the creation of a product for the contract typology, whereas under statute of limitations law the core of a software development contract is assumed to be the creation of a product. The associated "schizoid" attitude cannot be avoided. As a result, the statute of limitations is correctly two years from acceptance of the software.

In addition to the above explanations on the limitation of warranty claims under sales law, reference is to be made to the important interruption of the acknowledgement within the meaning of § 212 para. 1 no. 1 BGB. This can be seen, for example, in the execution of a supplementary performance in the knowledge that the customer is obliged to guarantee. Whether the performance of subsequent performance is to be regarded as an interruption is to be decided on the basis of whether, from the customer's point of view, the supplier has acknowledged the warranty claim, taking into account the scope, duration and costs of the subsequent improvement. Although a waiver of the defence of limitation prior to the commencement of the limitation period is invalid, pursuant to § 242 BGB (German Civil Code), the invocation of the defence of limitation until the expiry of the fixed period or the failure of the negotiations plus a short period of grace in the case of a pronounced waiver is contrary to good faith. It is questionable whether the software producer can make the limitation of claims more difficult or easier. According to § 202 para. 1 BGB, the limitation period in case of liability due to

intent cannot be facilitated in advance by legal transaction. § 202 para. 2 BGB prohibits the aggravation of the statute of limitations beyond a period of 30 years.

Also in the context of § 307 BGB, the one-year period is to be taken as the lowest common denominator. In this respect, § 309 no. 8b ff) BGB also has an indicative effect on commercial transactions. The statute of limitations for claims arising from § 634 no. 1, 2 and 4 BGB, as regulated in § 634a para. 1 no. 2 BGB, may not be facilitated pursuant to § 309 no. 8b ff) BGB. "In other cases", the limitation period may not be less than one year from the beginning of the statutory limitation period. §§ Sections 634a (1) No. 2, 634 Nos. 1, 2 and 4 of the German Civil Code govern the limitation period for claims for subsequent performance, self-execution and damages in the field of construction works and planning or monitoring services for a building. "Other cases" are therefore withdrawal from the contract and reduction in price for buildings and all rights arising from § 634 BGB for non-buildings. In these cases, the reference in § 309 No. 8b ff) BGB to the possibility of limiting the limitation period to one year applies. In individual cases, however, a longer or shorter period may be appropriate. The period must be calculated in such a way that even hidden defects can be discovered before its expiry.

A shortening of the limitation period can de facto constitute a limitation of liability in a liability case. According to the provisions of § 309 No. 7a and b BGB, such a clause is inadmissible. The customer can assert a right to refuse performance against the contractor due to a defect in the work performance after the limitation of the claims for defects according to § 215 BGB, if this defect has already become apparent before the expiry of the limitation period and therefore a right to refuse performance based on this defect could be asserted in a period not subject to limitation.

IX. Special features of liability

1. Special features of liability for software defects

In the law governing contracts for work and services, the customer may demand not only a reduction in price and withdrawal from the contract but also compensation for damages if the defect is based on a circumstance for which the contractor is responsible, §§ 634 No. 4, 636 BGB in conjunction with §§ 280, 281, 283 BGB. This claim does not differ from the provisions for damages in the law on sales. It is a liability for fault, whereby the burden of proof for (non-)fault lies with the entrepreneur, § 280 para. 1 sentence 2 BGB. In the case of quality guarantees, the standard of fault is shifted at the expense of the entrepreneur, § 276 para. 1 BGB. The Customer may only claim damages instead of performance if he has unsuccessfully

set the Contractor a deadline for subsequent performance, § 281 BGB. The claim for damages is in addition to the rights of withdrawal and reduction, § 325 BGB.

The customer can either keep the software and claim compensation for the remaining damage or return the software and claim compensation for the entire damage.

The claim for damages from § 634 No. 4 BGB includes

- the costs of fault diagnosis,
- the company's own expenses for determining the damage,
- the own expenditure for error correction including fictitious VAT, but without the calculated entrepreneurial profit,
- the lost profit.

The claim shall become statute-barred within two years of acceptance. The old distinction between damage caused by defects, narrower and more distant consequential damage caused by defects shall no longer apply. All damages are now equally covered by § 634 No. 4 BGB.

2. Drafting of contracts

In contrast to the law on sales, the law on contracts for work and services is strongly based on the dispositivity of all provisions. In particular, there is no counterpart to § 475 BGB; the relationship between B2C is largely freely negotiable. Incidentally, § 651 BGB also refers to the law of sale and thus also to § 475 BGB for contracts for work and services.

Individual contracts are therefore freely negotiable in the B2B and B2C sectors. One limit concerns immorality (§ 138 BGB) and the area of fraudulent intent and guarantee (§ 639 BGB). Only when using pre-formulated conditions does the area of content control according to §§ 307, 309 BGB (for B2C) and § 307 BGB (for B2B) come into effect.

Important for the control of general terms and conditions are § 309 no. 7 and 8b BGB. Reference can be made to the above parallel considerations (under Third Chapter, V.) on the law of sale. § 309 No. 7 BGB regulates the limitation of claims for damages; in particular, the reduction of liability in case of violation of certain legal interests as well as in case of intent and gross negligence is inadmissible. § 309 No. 8b BGB prohibits the exclusion of warranty, the obligation to pay the costs of subsequent performance and the limitation of the rights of withdrawal and reduction. Due to the absence of § 475 BGB, a limitation of the limitation period up to one year is also permissible for consumers in the law on contracts for work and services (§ 309 No. 8b ff. BGB).

X. caveat emptor

Firstly, it is questionable whether the software producer can completely exclude the warranty. With regard to consumers, such a clause would violate § 309 No. 8b aa) BGB.

The agreement of a certain quality of the work and thus the definition of material defects or defects of title is possible within the scope of § 633 (2) sentence 1 BGB. However, such a clause is also inadmissible if it de facto represents an exclusion of warranty. Also between merchants, a clause which completely excludes a warranty is invalid. According to §§ 310 para. 1 sentence 2 BGB, the evaluations of §§ 308 and 309 BGB are also to be used in the context of § 307 BGB. It follows from §§ 309 No. 8b aa), 639 BGB that the legislator regards the warranty as an essential contractual obligation of the software producer, from which the software producer may not deviate. Moreover, via § 307 BGB, the evaluations of § 640 para. 2 BGB also apply to general terms and conditions between entrepreneurs, so that here, too, with regard to a clause that sees the declaration of freedom from defects in the acceptance, the above applies.

Even a clause declaring that the work is free of defects upon acceptance could be equivalent to an exclusion of warranty. However, a violation of § 309 No. 8b aa) BGB is not necessarily to be assumed due to the valuation of § 640 para. 2 BGB. According to this, such a clause is only inadmissible if it assumes the fiction of freedom from defects irrespective of the user's knowledge of the defect and does not grant the user the right to reserve warranty rights.

In accordance with § 639 BGB, an exclusion of warranty is also not permitted in individual contracts if the entrepreneur has maliciously concealed the defect or has assumed a guarantee. From this, however, it can also be concluded that the warranty can be excluded. This also results from the fact that a regulation corresponding to § 475 BGB (German Civil Code) is missing in the law on contracts for work and services.

XI. Exclusion or limitation of subsequent performance

According to §§ 634 No. 1, 635 BGB, the user has the right to supplementary performance, i.e. removal of defects or new procurement, if the work is defective. It is questionable to what extent the warranty can be limited or excluded with regard to subsequent performance. For general terms and conditions that are applicable between two entrepreneurs, the basic values of § 309 BGB apply via §§ 307, 310 para. 1 BGB. Before acceptance, the client can demand that already existing defects be removed and the work be produced in accordance with the contract. However, as after acceptance, he may not demand a specific type of defect removal

or contractual production if the contract can also be fulfilled in another way. The client can only demand new production if the contractual fulfilment is not possible in any other way.

According to § 309 No. 8b bb) BGB, a limitation to subsequent performance is only permissible if the user expressly reserves his further rights in the event that subsequent performance fails. This is in any case the reduction according to § 634 No. 3 BGB. The right to withdraw from the contract must be reserved to him in accordance with § 309 No. 8b bb) BGB only in the case of services other than construction services.

The clause that the customer can demand "rectification of defects" infringes § 309 No. 8b bb) BGB for two reasons. Firstly, the purchaser who is unfamiliar with the law might think that he cannot assert any rights other than remedy. However, § 309 No. 8b bb) BGB requires that the further rights must be expressly reserved. On the other hand, the concept of supplementary performance goes far beyond that of rectification of defects. It includes both the removal of the defect and the delivery of a defect-free item (§ 635 para. 1 BGB).

However, the software producer may limit the customer's right of subsequent performance to one of the above mentioned methods. In contrast to the purchase right, he can choose according to § 635 para. 1 BGB whether he wants to eliminate the defect or produce a new work. Because of this standardised right of choice, however, such a restriction is on the one hand superfluous, and on the other hand could even be unfavourable for the entrepreneur if he thereby irrevocably binds himself to one type of supplementary performance.

It is questionable whether a limitation of the number of subsequent performance attempts is permissible. According to § 440 sentence 2 BGB, the rectification of defects is deemed to have failed after the second unsuccessful attempt. According to § 651 BGB this also applies to contracts for work and services. For the other contracts for work and services there is no correspondingly standardised assumption. In individual cases, the type and severity of the defect, the technical complexity of the work or the economic disadvantages of the user are decisive. In individual cases, therefore, only an attempt can be reasonable. It is therefore not advisable to commit to a certain number of attempts at subsequent performance. However, if you want to fix a number contractually, you could try to fix the number of two attempts mentioned in § 440 sentence 2 BGB for simple IT projects with reference to the proximity to the law of sale.

The software producer can demand the return of the defective work from the customer in accordance with § 635 (4) BGB (German Civil Code) if he has produced a new work. E contrario § 309 no. 8b dd) BGB, it follows that he may also make subsequent performance dependent on the prior payment of a proportionate part of the remuneration for the work. Only a

clause according to which the entire remuneration or a disproportionate part is to be paid in advance is inadmissible. The ratio of the compensation for work to the reduced value of the work is to be taken into account. The obligation to make an advance payment of half of the remuneration for work is inadmissible, for example, if the usability of the item is excluded by the defect, but not if only minor defects need to be repaired.

The purchaser must therefore expressly reserve the right to reduce the purchase price and withdraw from the contract in the event of failure. A restriction of these two rights is not permitted. Moreover, in the law governing contracts for work and services, there is no standardized right of recourse of the software producer against its suppliers - in contrast to the law governing the sale of goods. According to § 478 BGB, § 651 BGB only applies to contracts for work and services. However, the software producer can enforce this against his supplier in his general terms and conditions. In addition, he also has the warranty rights under purchase law vis-à-vis his supplier, with whom he usually concludes purchase contracts.

Individual contractual arrangements are largely possible. In this respect, a limitation of the warranty rights to subsequent performance is generally permissible. This is also supported by the fact that a limitation in the law on contracts for work and services according to § 639 BGB is expressly excluded only in cases of warranty and fraudulent intent.

XII. Costs of supplementary performance

The software producer will have an interest in the user bearing the costs of subsequent performance. It is questionable whether a corresponding agreement is permissible. An individual agreement of the user's obligation to bear the costs between contractors is permissible. In the case of general terms and conditions, the evaluations of § 309 BGB (German Civil Code) must be observed. According to § 635 para. 2 BGB, the software producer has to bear the expenses required for the purpose of subsequent performance. § 309 No. 8b cc) BGB declares such clauses inadmissible which, contrary to this obligation of the software producer, impose the expenses on the user in whole or in part. The attempt to impose the costs of subsequent performance on the customer by linking the subsequent performance to the conclusion of a separate contract is problematic in this context. This involves combining maintenance and care with the warranty. Such clauses are also all invalid in the law on contracts for work and services.

In contrast to § 476a of the old version of the Civil Code, to which § 633.2 sentence 2 of the old version of the Civil Code referred, there is no exception to the entrepreneur's obligation to bear the costs in § 635.2 of the Civil Code. It follows from this, as well as from the clear wording of § 309 no. 8b cc) BGB, that such exceptions cannot be agreed in general terms and

conditions either. According to §§ 634 No. 1, 635 BGB, the customer can demand supplementary performance. According to § 635 para. 2 BGB, the software producer bears the necessary expenses. These are essential contractual obligations of the software producer which cannot be transferred to the customer, § 307 para. 2 no. 1 and 2 BGB. This is also not contradicted by the fact that the type of subsequent performance, i.e. the remedying of defects or new production, is expressly at the disposal of the software producer according to § 635 para. 1 BGB. On the contrary, it follows from this that the subsequent performance itself and the obligation to bear the costs according to the will of the legislator are among the contractual obligations of the software producer. According to § 310 para. 1 sentence 2 BGB, the evaluations of §§ 308 and 309 BGB in the context of § 307 BGB must also be observed. Thus, the invalidity of a cost bearing clause at the expense of the user also in the commercial area results from § 309 No. 8b cc) BGB.

In the case of large IT projects, the question arises whether the IT manufacturer can demand reimbursement of costs if the software customer claims defects, but operating errors subsequently turn out to be the cause of the malfunctions. The BGH has ruled on such a claim for damages following an unjustified demand for the removal of defects by the buyer. Such a claim would exist if the customer culpably violated a contractual obligation existing towards the IT company with his request for removal of defects (§ 280 para. 1 BGB). An unjustified demand for the removal of defects according to § 439 para. 1 BGB constitutes a breach of contract obliging the customer to pay damages if the customer has recognised or negligently failed to recognise that there is no defect in the object of purchase, but that the cause of the appearance complained of by the customer lies within his own area of responsibility. This does not invalidate the right of the buyer to demand the removal of defects. Within the scope of his possibilities, he only has to carefully check whether the appearance he complained about is due to a cause which is not within the seller's area of responsibility. If it remains uncertain whether a defect is actually present, the buyer may assert defect rights without having to fear liability for damages due to a culpable breach of contract, even if his request turns out to be unjustified in the result. Since the buyer's duty of inspection is only concerned with excluding causes within his own sphere of influence, it does not depend on special technical knowledge, which under certain circumstances only the seller has.

XIII. Obligations to give notice of defects

The obligations to give notice of defects arising from §§ 377, 378 HGB are not applicable to contracts for work and services. Therefore, in the B2B sector, a contractual imposition of obligations to give notice of defects is possible. Individual contractual obligations to give notice

of defects can be agreed without further ado. Insofar as this de facto represents an exclusion of warranty, § 639 BGB must be observed. Obligations to give notice of defects can also be agreed in general terms and conditions between companies. However, an inappropriate disadvantage within the meaning of § 307 BGB may exist in an individual case if the period is so short that it effectively constitutes an exclusion of warranty.

According to § 309 No. 13 BGB, the form of notification may only be required to be in writing. The requirement of special forms of access, e.g. "by registered mail", is not permissible. However, § 309 No. 13 BGB is not applicable to general terms and conditions between entrepreneurs. This is due to the fact that the entrepreneur can usually meet the required formal requirements within the scope of his business operations without any problems. A violation of § 307 BGB can, however, be assumed under certain circumstances if the required form does not correspond to the entrepreneurial customs and habits or is not justified in the individual case.

XIV. Exclusion of self-execution

According to §§ 634 No. 2, 637 paragraph. 1 BGB (German Civil Code), the software purchaser may, after the fruitless expiry of a period of time set by him for subsequent performance, remedy the defect himself and demand reimbursement of the necessary expenses. Here, a restriction of the right of self-execution in terms of general terms and conditions is also problematic in the B2B sector due to the evaluations of § 309 BGB. The self-repair is warranty right i. S. d. § 309 No. 8b aa) BGB, so that the exclusion is generally ineffective. However, the restriction to subsequent performance at the expense of self-performance is permissible. E contrario § 309 No. 8b bb) BGB does not have to reserve the right of self-remedy for the user even in the case of failure of the supplementary performance. Because of § 307 Par. 2 No. 1 i. B. M. § Section 637, paragraph. 1 BGB, the software manufacturer may not determine the deadline. Furthermore, a clause is ineffective according to which the right to self-execution is to be dependent on default or any other fault of the software producer. From this regulation in § 633 paragraph 3 BGB a. F. is the legislator with the new version in § 637 para. 1 BGB just moved away.

In the case of the provisions of section 637 subsection 2 i. B. M. § Section 323, paragraph. 2 BGB, the software producer cannot demand a deadline. A clause requiring a deadline to be set "in any event"; is therefore inadmissible.

Pursuant to Section 637 (1). 3 BGB, the user can demand an advance payment from the software producer for the expenses necessary to eliminate the defect. For the subsequent improvement by the seller, this claim was previously contained in § 476a a. F. BGB is standardized.

This was made possible by § 633 Para. 2 sentence 2 BGB is also used to justify the user's claim for reimbursement of expenses. An exclusion of this right would also be inadmissible under § 307 BGB.

The right of the customer to carry out the work himself is governed by an individual contract in § 637 Para. 1 BGB can probably be waived. The limit also exists here according to § 639 BGB in case of fraudulent intent and the existence of a guarantee. It is problematic, however, whether the right of self-execution may be made dependent on the software producer's default under individual contracts. The fact that this requirement is not included in the new version of Section 637 (1) of the German Civil Code speaks against this. 1 BGB has just been abolished. It can be argued that the legislator has not created a norm corresponding to § 475 BGB in the law on contracts for work and services. One must conclude from this that in principle everything should be negotiable in individual contracts.

XV. contracting out of liability

§ Section 634 No. 4 i. B. M. §§ 636, 280, 281, 283 and 311a BGB gives the user a claim for damages or i. B. M. § 284 BGB for compensation for futile expenditure. Claims for damages by the user may also arise from a criminal offence.

According to § 307 i. B. M. § In accordance with § 639 BGB (German Civil Code), a disclaimer of liability for fraudulent intent and in the case of the assumption of a guarantee, also between entrepreneurs, is ineffective. Under guarantee in this sense, one understands a no-fault warranty liability. § 14 ProdHaftG finally prohibits the exclusion of liability according to ProdHaftG. Under the old law, liability for warranties was already considered a fundamental principle of the legal regulations. For fraudulent intent, this was expressly stated in § 637 BGB a. F. standardized. § 639 BGB now prohibits the exclusion of liability both for fraudulent intent and in the case of the assumption of a guarantee, so that the liability for this cannot be limited even in commercial transactions.

The evaluation of § 309 no. 7a and b BGB comes within the scope of § 307 paragraph 1 BGB to the application. According to § 309 No. 7a BGB, the limitation of liability for damages resulting from injury to life, body and health is also not permissible for slight negligence. § 309 No. 7b BGB also prohibits an exclusion of liability for gross negligence. § 309 No. 7a and b BGB cover all types of culpable breach of contract from which claims for damages can arise, i. e. also warranty claims based on fault. In the opinion of the BGH, an exclusion of liability is therefore also possible in the B2B sector only for damages that are atypical for the contract and therefore hardly foreseeable.

There is also scope for individual contractual arrangements. According to Section 276 Paragraph 3 BGB, liability for intent cannot be waived in advance for the debtor. According to § 278 sentence 2 BGB, however, this does not apply to the liability of vicarious agents. In addition, an exemption from liability for negligent actions - also for gross negligence - is possible by individual contract for own fault.

XVI. Ausschluss des Kündigungsrechts

§ Section 649 sentence 1 BGB gives the software user a right of termination until the completion of the work. It is questionable to what extent this can be excluded or limited. The right of termination may be waived in principle by way of an individual contract. The situation is different with AGB. § 309 BGB does not contain a prohibition of such a clause. However, the valuation of § 649 sentence 1 BGB applies via § 307 BGB. According to the will of the legislator, the right of termination is an essential contractual obligation from which no deviation is permitted. An inadmissible deviation is not only the total exclusion of the right of termination, but also, for example, the right to terminate the contract. B. also the clause: "The contract may only be terminated for good cause . . .";

According to § 649 sentence 2 BGB the entrepreneur has a claim for reimbursement of costs. Any expenses saved must be offset against this. A clause according to which the user has to reimburse the software producer "all costs incurred by his termination"; is therefore probably also invalid. However, an appropriate lump sum is possible, as long as the purchaser reserves the right to prove otherwise. This applies to contracts both between entrepreneurs and with consumers.

XVII. Reimbursement of the cost estimate

The software producer has an interest in receiving remuneration from the user for his cost estimate. The individual contractual agreement of a remuneration of the cost estimate is permissible without any problems. In the case of general terms and conditions, § 307 BGB (German Civil Code) contains the values of § 632 para. 2 BGB application. After that, the cost estimate "in case of doubt"; is not to be remunerated. It is questionable whether such a case of doubt exists if the obligation to pay is expressly stipulated in the GTC. According to previous case law, remuneration should only be considered if the estimate is the subject of a separate and mutually binding contract. Only then would there be no doubt i. S. d. § 632 paragraph. 2 BGB before. It is also not sufficient that the obligation to pay remuneration is only included as a clause in the general terms and conditions of the main contract. However, a clause stipulating an obligation to pay remuneration may be effectively agreed in a contract

for the cost estimate. This requires that it be prominently displayed and prominently displayed to the consumer.

XIX. Other clauses

literature:

Huppertz/Schneider, Software-Lizenzaudits in Unternehmen, ZD 2013, 472;

Schrey/Krupna, Softwarelizenzmanagement – Ein unterschätztes Compliance-Risiko, CCZ 2012, 141; *Kotthoff/Wieczorek*, Rechtsrahmen von Softwarelizenzaudits – Zulässigkeit und Grenzen, MMR 2014, 3.

Furthermore, the software creation agreement - similar to the software goods transfer agreement - contains a number of "other"; clauses at the end, for example on the place of jurisdiction and applicable law. The clause "A set-off against the fee claim is only permissible with an undisputed or legally established claim"; is invalid under the law of general terms and conditions. An unreasonable disadvantage exists if the customer is forced by the prohibition of offsetting in the billing relationship of a contract for work and services to pay for a defective or unfinished service in full, although he is entitled to claims in the amount of the costs of remedying the defect or completion. Because this would interfere with the equivalence relationship created by the contract between performance and consideration in a way that is unacceptable for the customer.

1. Arbitration Clauses

It makes sense, especially in the case of more complex software development contracts, to also appoint an arbitration tribunal to make a decision instead of or in addition to a jurisdiction regulation. This is particularly useful for more complex issues, such as those of a technical nature. An arbitral tribunal will typically operate under the rules of the German Institution of Arbitration (DIS). The DIS-Rules are incorporated by means of an arbitration clause, as follows:

„All disputes arising in connection with the contract (. . . designation of the contract . . .) or concerning its validity shall be settled in accordance with the Rules of Arbitration of the German Institution of Arbitration e. V. (DIS) has made a final decision excluding the ordinary course of law.“

2. Audit clauses

Every year the large software companies approach their customers and demand access to their IT systems as part of a "software licensing audit";. The auditing measures serve to ve-

rify compliance with copyright usage rights. In most cases, software companies agree on contractual audit clauses in the transfer agreements, which should enable them to check the "licenses"; used on site. In the absence of a contractual agreement, a claim to inspection can also arise from § 101a UrhG and from good faith according to §§ 101a UrhG, 242 BGB or §§ 809 ff. BGB.

With the introduction of Section 101a of the German Civil Code (BGB), the legislator has given rights holders the opportunity to actively review the infringement of their rights. In the case of an infringement committed on a commercial scale, the claim also extends to the presentation of bank, financial or commercial documents. However, in all cases it is necessary that the software licensee has committed an infringement with sufficient probability. This must be presented by the claimant. The aim of the claim must not be to investigate the respondent, but rather to establish concrete connecting facts and suspicious facts. With an audit, the software company, in contrast, pursues the purpose of an audit independent of the occasion, whether the software used by the software user is sufficiently licensed. § 101a UrhG is, however, to be interpreted restrictively as *ultima ratio* with regard to the intensity of the interference with the rights of the licensee and cannot be used to justify a general auditing claim. The relationship of Section 101a UrhG to further civil law claims has not been clarified. However, there is a strong case for making the claim a *lex specialis* to § 242 BGB and §§ 809 et seq. BGB, by which these are suppressed.

These considerations lead to large IT companies anchoring the auditing obligation contractually. These contracts are typically standard contracts. Even if they are concluded in the B2B area, the limits of § 307 BGB apply to them. Here is § 307 paragraph. 2 No. 1 BGB, which prohibits clauses that are not compatible with the fundamental ideas of the legal regulation. It is common practice in case law to incorporate the evaluation of copyright law into the control of content under general terms and conditions precisely via this provision. § Section 101a UrhG provides for a claim to presentation and inspection if an infringement of rights is sufficiently probable. If this is the case, the claim may not be accepted as a further hurdle according to § 101a paragraph. 2 UrhG must not be disproportionate.

If the general terms and conditions agree on an examination independent of the occasion, it appears doubtful whether this is in line with the evaluations of the German Copyright Act. The person being claimed is not an infringer of rights, but an abstract examination of the usage behaviour is carried out during the audit. Audit clauses, which are supposed to give external access to the IT of the company, therefore appear for this reason alone to be hardly com-

patible with the evaluations of the copyright law and therefore with § 307 Para. 2 No. 1 BGB is agreed upon.

Furthermore, the considerations regarding the proportionality of the use of i. R. d. § 101a UrhG and to give full consideration to the interests of the licensee. Account must be taken of the interest of the undertaking concerned in protecting its business secrets. The auditing company is given the opportunity to intervene in the operational know-how of the user. The testing company learns about numerous details of the inner workings of a company and also gets an idea of when, where and how work is being done on which projects within a company. In this respect, the audit affects the protection of know-how within the scope of § 17 UWG. Auditing is also problematic in cases of § 203 StGB, for example if the company to be audited is a company from the medical or legal sector. If the company carrying out the examination should gain knowledge of medical data, the consent of the persons concerned would have to be obtained in advance. In this respect, the factual and legal situation is more similar to the question of third-party maintenance of IT services in the medical sector. Even if there is no case of § 203 StGB, the data protection regulations must be observed. An audit company learns a lot that falls into the area of personal data, for example about the data access of individual employees and their IT usage behavior.

In order to avoid the imponderables of the GTC, the software company has the option of an individual agreement with the licensee. For this to happen, however, there must have been genuine contractual negotiations in which the licensee influenced the inclusion and formulation of the clauses. Another conceivable alternative: the customer is obliged to carry out a self-audit. If there are doubts about the correctness of the self-disclosure, the customer shall make a declaration in lieu of an oath. If there are still doubts, the path via the public prosecutor's office or the the general civil law possibilities for the inspection and seizure of documents.

XX. Agile programming

1. introduction

Many software development contracts traditionally follow the typical waterfall model in its sequential approach based on long development cycles, where the individual sub-project steps „requirements analysis, design, programming and testing“; are completed one after the other. This, however, creates numerous challenges in both factual and legal terms. This is because the model assumes that you can complete each phase of the project completely before you start the new phase. Sequential processing means that changes in customer requirements lead to a new run through the process. Process failure is therefore (only) considered a breach of contract from the customer's point of view.

This is where the logic of agile programming comes into play. Agile programming is a software development process as a model in which progress is unpredictable and can always be threatened by disruptions. Therefore, a more flexible process is modelled and failure is built in as a risk.

2. What is agile programming?

a) The Agile Manifesto

In 2001, several software developers published the manifesto on agile programming. Among the twelve principles are:

- Customer satisfaction is best achieved through early and continuous delivery of valuable software.
- Functioning software is the first goal of development and should be delivered regularly within a short period of time.
- Changing requirements are welcome, even late in the development process.

b) The different cooperation in traditional projects and in agile projects

Developers and business teams interact very closely. For this purpose, the project is divided into small development units (called repeats or sprints). Each sub-project consists of an independent development of design, coding and testing within two to four weeks. Each result of a self-contained partial solution must be usable for itself. The aim should be to develop the most important basic functionalities from the customer's point of view first, while comfort functionalities are only developed at a later point in time. This is to ensure that the customer

receives a usable (partial) product at an early stage. This ensures that the result of an iteration based on the source code can be further developed by the client himself or a third party.

You have to go back to the purpose of a software development contract and ask yourself what purpose such a contract has. The purpose of the contract and its implementation in an executable product must be clarified. Waterfall projects often focus on the additional question of the failure of the project and the legal consequences. Accordingly, the law on contracts for work and services is conceivably unsuitable for IT projects. It is based on a success framework defined from the outset, which is checked once at the end of the project if possible and confirmed by the user if it is adhered to. Nicklisch has already pointed out that IT projects are complex long-term contracts that elude the grid of traditional contract for work and services law. Traditionally, the functional specification and definition of the purpose of the contract and its implementation as a continuous daily process is neglected. This is where agile programming comes into play, in which the key figures of the project, the structure of the project meetings and the elements of the project documentation are worked out much more clearly.

c) The tendency of lawyers to search for the type of contract

It is wrong to assume a certain type of contract in relation to agile projects. Rather, depending on the purpose of the contract, care must be taken to combine possible flexibility with hard contours in terms of purchasing and pricing in general. Not all activities need to be agile, but a combination of customizing and agile development is also conceivable. It is therefore also important to determine before the start of the project which sub-project should be carried out agile and which not. Accordingly, it is advisable not to enter into the discussion about service contracts or contracts for work and labour from the outset, even if the lawyer is genetically burdened with this thinking in such templates and such classifications subsequently play a major role in the course of the project. It may also be advisable to combine both types of contract, e. g. a service contract framework with partial services based more on a work contract. As will be shown below, the definition of done is a means of combining a framework contract for services with slimmed-down contracts for work at the single-sprint level. The distinction is only important if the parties resort to standard contracts, which, according to Section 307 (1), are 2 number 1 BGB of a AGB control are subject. Individual contracts, on the other hand, are subject to almost unlimited contractual freedom.

d) clarity

It is questionable whether the parties should regularly provide for such a definition. At this point at the latest, a decision must be made as to whether a contract of employment or a contract for work and services exists. One argument in favour of a contract for work, for example, is that the BGH, in its decision of 23. July 2009 (silo plants case) because of the predominant planning phase. This also excludes the application of § 651 BGB. The extensive planning work of an agile project therefore argues in favour of starting from the contractual warranty and focusing above all on acceptance as an important element. If this should be the case, something needs to be said about tests and reviews. A corresponding agreement must also include that all programming standards are adhered to and that the necessary documentation is available in full. It is a misconception to think that agile projects can do completely without documentation. The OLG Frankfurt a. M. emphasises that, in cases of doubt, documentation of the system architecture must be available at the earliest when the result of the project has become so solidified in the course of the project that a correction to the system architecture is no longer to be expected. If the parties should dispute about the fulfilment of such definitions, a dispute settlement mechanism is available. The project is finished when all aspects have been entered in the backlog (so-called Backlog Items) are developed and finished according to the Definitions of Done. The list of tasks at the beginning is quite different from the list at the end of the project.

3. New role allocation in the agile project

The fundamental roles determine agile programming, especially in the Scrum model.

a). Product owner

There is the "product owner", who is the key representative of the client, even if he is not identical with the client. He is responsible for successfully communicating the customer's vision and his requirements to the development team. He also decides whether a backlog entry was completed during a sprint. He creates, organizes and manages the Product Backlog and prioritizes/revises it permanently during the project according to the customer requirements. He also participates in all meetings of the development team during each sprint. He is appointed by the client and has access to all relevant stakeholders of the client. It is important that the qualification for dealing with Scrum projects is clear from the beginning. The egg owner must have sufficient time and technical freedom to carry out his tasks and is obliged to react immediately to questions from the development team.

b). The development team

The next step is to define the role of the development team. This is responsible for the current development work and the delivery of increments within each sprint. It must have the necessary competence to work in Scrum projects and be open for members who have experience with coding or testing. In most cases the customer's technicians do not have the necessary technical skills to work efficiently. In addition, interference on their part makes it very difficult to establish a clear allocation of risks and liability between customer and developer. Therefore, development teams are often mixed so that all the necessary skills are available to deliver the increment. In any case, the contract must specify how the customer is involved in the composition of the development team. It is of central importance that the agile set of rules and the rituals contained therein are communicated to the whole team so that these rules are incorporated into the development work on a daily basis. If the parties are unable to agree on a team within a set time, the contract must be terminated without risk of liability. It must also be regulated that each member of the development team is fully involved in the project during the duration of the project and cannot be dismissed without prior written consent of the customer.

c). Scrum master

The role of the program master or Scrum master still remains. He has the actual key role in the project; his tasks are similar to those of a coach. It ensures that the development team and the owner of the product work together cooperatively according to the project plan. He is not a product coordinator, but only supports the owner of the product and the development team. Contractually it is possible to remove the Scrum Master from the development staff or to involve a third party independent of the customer or the developer. Key tasks of the Scrum Master have to be regulated in the contract and the independence of the Scrum Master as well as the availability during the project period has to be ensured.

4. The product vision

Only the product vision is described as a starting question. The accompanying statement describes the overall purpose and objectives of the project. A corresponding document therefore belongs in any case at least in the development contract. This should not be confused with the product backlog, which is a description of the requirements to be developed. Structured according to importance, individual requirements are prioritized here.

The individual characteristics of the program to be developed are described, its economic importance is estimated, as well as the time required. Then a priority is set for each task. User stories often arise as follows: "As a user, I want feature X so I have advantage Y." The aim is to keep the description short. The priorities must be described as clearly as possible and are regularly reviewed by the product owner. An estimated 5-10% of a sprint should be used to collectively redefine the product backlog. Since Product Backlog-Item are often differently complex, estimation units have to be found. Normally, sprints are always the same length and therefore the same price. However, depending on the effort involved, different numbers of backlog entries are processed. Experience shows that development teams (assuming continuity of personnel) also become faster and can work through more work later than at the beginning. It is recommended to develop and discuss the product backlog between the product owner and the development team in an initial workshop. The initial product backlog should then still be used by the development team to provide the product owner with an estimate of the effort required (see below). According to the contract, the estimate is made with reasonable care and on the basis of fair assumptions. When the cost estimate is complete, the product owner should be required to prioritize each task based on effort and business value. The parties should be obliged to regularly redefine the product backlog during a sprint in a workshop, if necessary. The product owner is also free to change the product backlog at any time. Exceptions are one-sided changes in the cost estimate or the priority areas during a sprint.

It is questionable whether the application of §§ 313-315 BGB is helpful. Here too much emphasis is placed on the unilateral determination of performance by one of the parties and/or in accordance with equity. Thus, in a contract under Section 313 of the German Civil Code (BGB), too little is communicated, but rather a one-sided determination is made. Lawyers should be as flexible as possible in order not to suffocate an agile project in legal constraints from the outset. However, it should be noted, as shown below, that the modalities of pricing, in particular in relation to off-take, should be more closely regulated.

For the customer it is very unpleasant that he apparently has to accept a blank check for the project costs. It is therefore necessary to introduce a system of targets into the Treaty. Price models include a fixed price per user story. The conflict is between the need for clear descriptions of performance and flexibility in agile projects. It is recommended that the price payment be linked to the achievement of certain software functionalities, which can be determined by means of function point analysis, for example. It is important to clearly define the initial requirements and to follow a checkpoint phase in which, after initial implementation,

decisions are made on the further implementation of the overall project. Only then can fixed prices and purchases be contractually agreed. For complex projects, a specification phase can also be provided for after the project application phase and before the offer phase, which leads to a preliminary specification and thus more realistic fixed prices. Similarly, planning is carried out via a feasibility study, followed by a contract phase; the feasibility study (so-called Sprint Zero) can be sensibly located in service contract law, while all other solutions are designed as contracts for work and services.

A product description is recommended, which includes a detailed description of the functions and design of the finished product and shows how the finished product is consistent with the product vision. The product vision should be open to comments and change requests from the customer and should be linked to a dispute resolution mechanism. The legal warranty includes the freedom of the product from defects and the compatibility with the product description. Warranty and liability are limited in time; the use of open source software and virus protection should also be clarified.

5. The sprint process

The parties determine the duration of sprints, usually as a very short period of time (two to four weeks). This definition of the duration should not be changed, even if the progress of the project is out of line. Unfinished work should better be re-evaluated in a product backlog and prioritized.

Every sprint typically has three types of meetings. At the beginning of the sprint there is the planning meeting between product owner, development teams and the Scrum Master. The product owner will explain to the development team which points have a high priority in the current sprint and which goals and business contexts are connected to each point. The development team will then determine which particularly important goals are developed during the current sprint. After this meeting, a sprint backlog will be created by the development team, breaking down the overall task into individual tasks and determining the effort required for each individual task. Then there are short daily meetings of the development team (so called Daily Scrums) where it is described which work has been completed by which member of the development team and which one is currently pending. Also discussed are emerging obstacles to completing the work. At the same time, the cost estimates are updated. A sprint chart is recommended, which shows the cost estimate for the individual module in the context of the overall cost estimate. Finally, there is a Sprint Review Meeting. Here it is important to record the goals achieved. In this respect, a definition of done is required (see below).

Contracts should specify the progress of the sprint process, so that the development teams are jointly obliged to determine how many key elements can be developed in the current sprint. The customer is obliged to acknowledge the agreed tasks in the sprint. It is also determined how the sprint backlog is updated, depending on planning meetings. The development team is committed to implementing the planned improvements in the next sprint. The sprint process continues until the project is completed or the contract is terminated. The dispute is whether the result of the sprint process should be considered contractually binding. In our view, if you have backlog entries for a sprint, including the Definition of Done, we are dealing with elements of a contract for work. This then leads to the problem that backlog entries that have not been reached but agreed upon would normally have to be processed in the next sprint without additional remuneration, which is difficult for the teams in practice.

6. Definition of Done, Prices and warranty

Acceptance is of central importance in the law governing contracts for work and services, including

- the concretization to the accepted work,
- the loss of the right to new production,
- the transition from fulfilment claims to warranty claims,
- the due date of the remuneration (§ 641 BGB),
- the transfer of the risk of remuneration (§§ 644, 645 BGB)
- the start of the limitation period for warranty claims (§ 634a para. 2 BGB),
- the exclusion of known, not reserved defects (§ 640 para. 2 BGB).

Acceptance "of the work produced in accordance with the contract" is understood to be the physical acceptance by way of transfer of possession, combined with the declaration of the customer that he accepts the work as the main thing after performance in accordance with the contract. In extension to delivery within the meaning of § 438 para. 2 BGB (German Civil Code), acceptance requires an express or tacit approval of the performance as essentially in accordance with the contract. In the past, it was disputed whether software is capable of being accepted at all. Today, however, this is generally affirmed. In the case of computer services, the approval presupposes the possibility of examining the software, i.e. its complete and proper delivery. A prerequisite is approval by the purchaser, because only then can the customer check the "fit". A proof of work with the note "System handed over in order" is not sufficient. The acceptance should be regulated as clearly as possible in the contract, in parti-

cular to clearly regulate disputes about the beginning of the warranty and compensation obligation.¹⁵⁴

The implied acceptance is permissible and includes a behaviour supported by the will of the client, by which the client expresses that he considers the construction to be essentially in accordance with the contract. If the parties agree on a formal acceptance, this must always take place. Only in very narrow exceptional cases can the implied cancellation of the formal acceptance be assumed. An implied cancellation of the formal acceptance requirement is out of the question if the client sends a comprehensive request for rectification of defects to the contractor in due time after the object has been referred to, with the remark that nothing stands in the way of a formal acceptance after rectification of these defects. It is therefore a misconception that the mere productive use of software applications is already faking the acceptance.

A conclusive acceptance lies, for example, in

- the intended use,¹⁵⁵
- the use of the work without complaint,
- the unconditional payment of the work wage,¹⁵⁶
- the retention of the amount for notified defects during the final discussion.¹⁵⁷

The implied acceptance can be that the customer does not give notice of defects after completion of the service, purchase of the completed work and expiry of an inspection period of six months. If the performance is only partially performed and contrary to the contract, an implied acceptance shall not be considered. Nor does a termination of the contract constitute an implied acceptance. Likewise, the use of the software "under pressure" cannot be regarded as tacit acceptance. Payments on account do not constitute an implied acceptance either. Accordingly, the unconditional payment of a (partial) invoice for an additional service does not contain any statement by the client that at the same time the existence of the fulfilled claims as a whole or in individual relationships will be out of dispute. Advance payments are down payments with regard to the claim for remuneration for the entire work. After termination of the contract, the Contractor must finally settle its services. This obligation follows from the agreement on provisional payments and exists regardless of whether it is expressly regulated in the contract.

¹⁵⁴ *Bergsmann*, Requirements Engineering für die agile Softwareentwicklung, 2014, S. 237, 242.

¹⁵⁵ *BGH*, NJW 1985, 731.

¹⁵⁶ *BGH*, NJW 1970, 421; *OLG Köln*, BauR 1992, 514, 515.

¹⁵⁷ *OLG Koblenz*, NJW-RR 1994, 786.

It is also conceivable to divide the acceptance into partial acceptances. Partial acceptances can be agreed upon, as far as they are independently assessable parts of the overall performance. A software developer can only demand partial acceptance on the basis of a corresponding agreement. This agreement must be unambiguously worded.

Of particular importance here is also the reform of building contract law as of January 1, 2018, which will also benefit agile projects in software development. The aim is to accelerate the acceptance procedure with regard to a rapid inflow of remuneration to the contractor and thus to create legal certainty with regard to remuneration in accordance with § 640 (1) BGB. Thus, the currently valid acceptance fiction according to § 640 para. 1 sentence 3 BGB, which requires non-acceptance within a certain period of time despite the obligation to do so, is to be modified. The fiction of acceptance thus already occurs if the Purchaser does not refuse acceptance within the set period of time, stating a defect. In contrast to § 640 BGB, the customer is now required to react actively to a request for acceptance in order to avoid the occurrence of the fiction of acceptance, combined with a reversal of the burden of proof. Otherwise, acceptance shall be deemed to have been granted, even if there are actually significant defects.

The recast changes two main details. Firstly, the completion of the work becomes a prerequisite for setting a reasonable period for acceptance, in order to avoid abuse of the acceptance function by premature delivery of the work. And secondly, the entrepreneur can bring about the acceptance himself from § 640 para. 2 BGB n.F., in which he sets a deadline after completion of the work and the customer does not refuse acceptance by stating "at least one defect". The change to the wording of at least one "defect" only resulted in a proposal for amendment from the relevant technical committees at the last second of the Bundestag discussions. This is very helpful for an agile project, as now the customer is requested to report any defects of the project as early as possible and to discuss them with the project team. The customer can prevent unilateral acceptance by refusing acceptance on the grounds of any defect, even a minor one, whereby the actual existence of the defect is initially completely irrelevant for acceptance (§ 640 para. 2 sentence 1 BGB n.F.).

7. Termination

The advantage of agile development is that the customer is not bound to long delivery cycles and receives flexible products that are technically scalable at short notice. The production parts are functional after the sprints. However, the customer should have the option to leave the project after each completion of a project step. For this, measurable knock-out criteria

must be defined and it must be regulated how knock-out criteria are dealt with during the course of the project. It is questionable whether this right should also be given to the developer, as he could then simply stop working in the middle of the project. The insolvency risk should also be regulated. Furthermore a termination management is needed. The fate of payments already made should also be contractually determined. Finally, it is worth looking at a dispute settlement mechanism, as it is usually not worthwhile to take such cases to a state court. However, the questions that arise in this context are so complex that it is not possible to discuss them in depth in the context of this article.

In the context of the termination, the previous termination option under Section 649 of the German Civil Code (BGB) is extended by the option of termination for good cause under Section 648a of the German Civil Code (BGB), as amended. The provision largely repeats § 314 BGB. Termination may be effected without notice and an important reason already exists if a contractual partner cannot reasonably be expected to continue the contractual relationship until the completion of the work, taking into account all circumstances of the individual case. This is intended to recognise the possibility of extraordinary termination, which has hitherto been based on judicial law, and thus to create legal certainty for practice. The draft refrains from a special termination of insolvency, as regulated in §§ 8, 9 VOB/B: An insolvent entrepreneur proves to be unreliable and inefficient. However, in individual cases, as for example in the "protective shielding procedure" according to § 270 InsO, there is, as an exception, no important reason for termination. Ultimately, every software creation agreement is thus regarded as a long-term contract that comes close to a continuing obligation.

A real novelty, especially for agile projects, is the partial termination provided for in § 648a para. 2 BGB n.F., which refers to a "part of the service that can be delimited according to the contract". In contrast to § 8 Para. 3 VOB/B, the hurdle of the "self-contained part of a service" is not taken into account here, so that a clear delimitation of services rendered and services yet to be rendered can be made. In the case of partial termination, it seems to make sense to assess the delimitable services according to the criteria provided in the contract. For the IT scene, this results in the need to divide projects more clearly into self-contained units. Only if the parties take the trouble to define self-contained partial acceptance steps can they provide for new partial termination options in the contract in their mutual interest. For the justice system, too, there is no longer any need to always think about the failure of the overall project in IT projects.

The obligation to cooperate in determining the state of performance resulting from § 648a para. 4 BGB n.F. is also an important innovation in this context. If one of the parties violates

this obligation to cooperate by refusing to cooperate or by failing to appear at a date fixed within a reasonable period of time, the burden of proof pursuant to § 648a para. 4 sentence 2 BGB n.F. shall pass to this party, unless it is not responsible for its absence and immediately notifies the other party thereof. This is intended to create an incentive to cooperate in determining the quantitative evaluation of the services rendered up to the time of termination in order to prevent a subsequent dispute about the exact scope of the services.

According to § 648a para. 4 BGB n.F., the first steps for a transition and termination management have been outlined. However, the question arises how the obligations regulated there can ever be enforced. An exception to the exception is also provided for again if the absent party was not responsible for the absence on the date and the corresponding circumstance was immediately notified to the other party to the contract. The wording is not entirely clear here. § 648a, Subsection 4, BGB, new version, mentions two circumstances for the reversal of the burden of proof, namely the refusal to cooperate or the absence at a date determined by the other contracting party for the determination of the state of performance. The exception of the exception shall only apply if the contracting party "stays away" as a result of a circumstance for which it is not responsible. The exception in sentence 3 only refers to the agreed and appropriately set date. The refusal to agree on a date is not to be equated with the refusal to establish the date. The other party to the contract still has the possibility of setting a reasonable deadline for the determination. In addition to refusal to determine the performance status, it is also possible to refuse the determination. One of the contracting parties is deprived of the possibility to determine the state of performance (e.g. by a prohibition to enter the property). In addition to the reversal of the burden of proof, this results in a claim for damages for positive breach of contract due to subsequent cooperation obligations under §§ 241, 280 et seq. BGB.

Ultimately, this means that the structures of the VOB/B are transferred to the general law on contracts for work and services. However, § 648a BGB n.F. goes beyond the VOB/B, as the latter only applies to determine the "condition of parts of the performance" "if these parts of the performance are withdrawn from the inspection and determination by the further execution". The VOB/B is concerned, for example, with findings regarding fire protection devices that cannot be inspected in shafts and ceiling areas that are closed later. In essence, the determination of the performance condition is not necessarily linked to the question of defects; it is essentially only a determination with reference to the "condition" and thus a purely objective determination of performance. It can also include a determination of freedom from defects, which is not necessarily the case conceptually. There is agreement in the VOB literature

that the pure determination of the condition does not include a partial acceptance in a legal transaction and is therefore not linked to the general effects of a (partial) acceptance.

As a result of the finding, the person who wishes to invoke a different, deviating level of performance could bear the burden of proof and demonstration. In § 648a para. 4 BGB n.F. it is added that the burden of proof is not only transferred after joint determination, but already when the refusal of the determination or the absence of the date takes place.

8. Conclusion

Agile programming is, to a certain extent, a counterpoint to legally pre-planned project design. As little law as possible, as much law as necessary. This can only be the motto for a well designed agile project. The new building contract law is very much in line with the trend towards agile projects, in that it calls for projects to be planned and awarded in separate subunits and to rely accordingly on partial acceptance.

Chapter Five: **Software Rental**

literature:

Karger, Software-Miete, in: Redeker (Hrsg.), Handbuch der IT-Verträge, Loseblatt, Kap. 1.9; *Redeker*, IT-Recht, 5. Aufl., München 2012, Rz. 596 ff.; *Redeker*: Software – ein besonderes Gut, NJOZ 2008, 2917; *Schneider*, Handbuch des EDV-Rechts, 4. Aufl., Köln 2009, Kap. J IV; *Härtling/Folmayer*, Kauf oder Miete von Business Software – Entscheidungsfindung bei kleinen und mittleren Unternehmen, BC 2008, 202.

In the software sector, it is quite possible to rent software in addition to purchase and work contracts. It can be assumed that any temporary transfer of rights to use software can be regarded as a rental contract or legal lease. Moreover, the law of tenancy plays a role for software leasing. For the user of software, the leasing solution has the advantage that leasing payments are tax deductible as operating expenses. Furthermore, leasing is off-balance sheet, so that investments via leasing do not lead to a deterioration within the balance sheet (see below 6. chapter). Software leasing also plays a role in the area of Application Service Providing and Cloud Computing (see below 8. chapter, p. 338).

I. Applicable provisions for rental agreements

The application of leasehold law is already opposed by the fact that, as a rule, there is no authority to draw fruit in favour of the user of software. The granting of an economic exploitation right of the software within the meaning of the copyright law is typically not intended by the software manufacturers.

Pre-printed, commercially available rental agreements are the typical case of application of GTC law. These form rental agreements are particularly common for software rental. Here, pre-formulated contract texts are predominantly used, which are used as GTC in the sense of § 305 para. 1 BGB of the content control according to §§ 307 ff. BGB are subject to content control. If the parties are referred to as buyer and seller in a product note on an IT configuration, the individual agreement "rental/leasing" should not prevent the acceptance of a purchase contract; this individual agreement should rather be seen as a financing arrangement accord-

ing to which the purchase price was deferred until the end of the year and the buyer was to pay "rent" in return.

II. Limitation of warranty

The lessor must keep the object in a usable condition during the rental period. This also applies, for example, in the event that regulations change subsequently and the program has to be adapted accordingly. It is true that in some jurisdictions the existence of a defect is denied in such a case. However, such a subsequent reason for the unusability of an EDP system also constitutes a defect.

It is in line with the usual contractual design, also in the case of IT rental agreements, that the landlord attempts to limit his warranty for material and legal defects of the leased object as far as possible in pre-formulated standard agreements. It is questionable whether and to what extent such a limitation is permissible.

1. Confirmation as "in accordance with contract".

Frequently there are clauses in rental agreements in which the lessee of software confirms that the object is in accordance with the contract: "The lessee is aware of the essential functionalities of the computer program provided. He acknowledges them as proper, appropriate for the purpose and suitable for use in accordance with the contract. By means of these clauses, the user attempts to completely exclude his warranty from § 536 BGB for existing software defects by having the existing defects confirmed as being in accordance with the contract.

a) §§ 308, 309 BGB

The effectiveness of such clauses is determined - apart from the special regulations for residential rents in § 536 paragraph 4 BGB - according to §§ 308, 309 BGB. In contrast to purchase law, warranty restrictions in rental contracts are not already negligent according to § 309 No. 8b BGB, since this provision, like the previous provision of § 11 No. 10 AGBG, is not applicable to rental contracts. However, a clause in which the lessee's knowledge of the defective condition of the leased property and its recognition as being in accordance with the contract is assumed constitutes an inadmissible reversal of the burden of proof within the meaning of § 309 No. 12 BGB. According to § 536b BGB, the lessee is not entitled to warranty rights if he was aware of existing defects at the time the contract was concluded. The Lessor shall bear the burden of demonstration and proof that the Lessee was aware of the defects. A clause in which the tenant's knowledge of all existing defects is faked as a blanket statement

therefore constitutes an inadmissible change in the burden of proof to the disadvantage of the tenant.

However, it is permissible and advisable to list existing software defects explicitly in the contract, as the lessee then gains actual knowledge of the specific defects through the conclusion of the contract, which excludes warranty claims (due to these defects) according to § 536b sentence 1 BGB. It is also sufficient to state that the software provided is a beta version, as this makes it clear to the user that certain risks of use are normal.

b) § 307 BGB

In the case of software rental agreements with entrepreneurs, § 309 BGB is not applicable. However, burden of proof reversal clauses and factual confirmations between entrepreneurs are subject to the content control of § 307 BGB. According to this, a blanket clause is also ineffective in the entrepreneurial field, according to which the entrepreneur declares that he is aware of the software defects. Therefore, a provision in which the lessee certifies that the leased object is free of defects is also inadmissible in lease agreements with entrepreneurs: "The lessee confirms the contractual conformity of the leased object upon conclusion of the contract."

2. caveat emptor

In contrast to purchase law, tenancy law, which lacks a regulation corresponding to §§ 444, 475 BGB, allows an individual contractual exclusion of warranty for defects of the rental object.

In general terms and conditions, the limit of § 307 para. 1 BGB must be observed both in relation to consumers and in the business sector. According to this, the exclusion of warranty may not lead to the lessee of IT products being made without rights. A complete release of the Lessor from the warranty for defects under the rental agreement, e.g. by a clause such as "The Lessee shall have any defects in the software remedied at his own expense; a reduction of the rent due to defects is excluded" contradicts the legal model of § 536 BGB and thus constitutes an unreasonable disadvantage within the meaning of § 307 Paragraph 2 No. 1 BGB. An exception to this are IT leasing contracts in which the lessee is not defenceless despite the defectiveness of the leased goods due to an exclusion of warranty in favour of the lessor, if the lessor directly and unconditionally assigns to him the (purchase law) warranty claims against the supplier.

According to § 307 Paragraph 2 No. 2 BGB, an unreasonable disadvantage to the tenant may also be that the purpose of the rental agreement is jeopardised by the limitation of the warranty for defects. Clauses which exclude the warranty for all defects as a lump sum are contrary to the purpose of the contract, as they also cover defects which prevent the intended use of the rental object.

A complete exclusion of warranty rights by general terms and conditions is also considered a violation of § 307 paragraph 2 No. 1 BGB (German Civil Code) in tenancy law. However, with regard to the right to reduction, it should be permissible to refer the person entitled to reduction to his claims from the right of enrichment with regard to the overpayment of rent. The tenant's right to have the defects rectified (§ 535 BGB) must also be taken into account. In addition, there is the right of self-remedy known from the law on contracts for work and services, in cases of delay with the remedy of defects. Like the law governing contracts for work and services, the German Civil Code also provides for the right of self-remedy for rental contracts: If the landlord is in default with the removal of the defect, the tenant may remove the defect himself and demand reimbursement of the necessary expenses from the landlord (§ 536a para. 2 no. 1 BGB). Furthermore, the lessee of software has a right of termination according to § 543 para. 2 No. 1 BGB if considerable defects are not remedied despite determination and corresponding threat.

III. Claims for damages

Just like the law on sales, the law on tenancy distinguishes between warranty claims and claims for damages. According to § 536a para. 1 BGB (German Civil Code), the landlord is liable for initial defects regardless of fault and for subsequent defects if he is responsible for them. § 536a para. 1 BGB is therefore *lex specialis* for claims for damages due to material defects and defects of title to the regulation of § 280 para. 1 BGB. The liability does not include responsibility for damages in connection with hacker attacks on a rented telephone system, for example. A contractual liability for damages in connection with hacker attacks on a rented telephone system does not result from the agreed obligation to keep the system operational and the Lessor's obligation to eliminate program errors and all malfunctions caused by natural wear and tear during proper use at his own expense. Nor does the contractual provision to maintain a trouble-free operation of the system result in an obligation of the Lessor to increase the protection against hacker attacks on his own initiative.

The landlord's liability from § 536a BGB (German Civil Code) can be contractually agreed for all tenancies. This also applies to form contracts, in which however - as already explained

elsewhere - the general limit of § 309 No. 7 BGB for exclusions of liability by clause must be observed.

A formally worded clause excluding the lessor's warranty liability for initial defects is therefore unobjectionable: "The strict liability of the lessor for initial defects of the software is excluded". The limitation of this clause to strict liability does not constitute a case of § 309 No. 7 BGB. Since this exclusion also includes culpable breaches of duty within the meaning of § 309 No. 7 BGB, such an undifferentiated exclusion of liability is invalid (§ 307 BGB in the corporate sector).

Also important is the obligation to return the goods from § 546 paragraph 1 BGB. The lessee of software is obliged to return the computer programs at the end of the rental period. First of all, the technical problem has to be considered that a return of software is regularly not possible in the form of handing over a physical copy. Usually the software is installed on a hard disk. A return of these installation copies is regularly ruled out. Instead, a corresponding obligation to delete results from § 546 para. 1 BGB. However, in the technical field, a deletion by pressing the DEL key is not sufficient. The DEL key only causes a deletion of the stored contents in the index line. For deletion, the hard disk actually needs to be reformatted, which as such, however, is very costly and probably disproportionate. For this reason, it is probably assumed in practice that the obligation to return the software under § 546 Para. 1 BGB is fulfilled by returning physical copies and making an affidavit stating that the IT renter will refrain from using the software provided. This declaration can also be secured by an appropriate contractual penalty without this colliding with the provisions of § 309 No. 6 BGB in terms of the General Terms and Conditions. If the lessee does not return the software after termination of the lease, the lessee shall in any case be obliged to continue to pay the agreed software lease as a kind of minimum damage (§ 546a para. 1 BGB). Claims for damages remain unaffected in this respect (§ 546a para. 2 BGB). These claims may arise from the Lessee's delay in returning the software (§§ 286, 280 Para. 2 BGB) and from the idea of positive breach of contract (§ 280 Para. 1 BGB). In addition, there is a possible claim for enrichment from § 812 para. 1 sentence 1 Var. 1 BGB.

It is considered effective to link the IT rental with a ban on using equipment from other manufacturers. However, I do not see why the lessee should be denied the right to use software from other manufacturers. Should a connection with the IT equipment of third parties have negative technical consequences, the lessee will be able to assume a corresponding exclusion of liability for possible damages in favour of the lessor. A blanket exclusion in connection with third party equipment and third party software would place an excessive burden on the

Lessee, especially in cases where the connection of such equipment does not pose any risks for the leased software and its use.

Chapter Six: Software Leasing

literature:

Beckmann, Computerleasing, Köln 1993; *Beckmann*, Aktuelle Rechtsfragen bei Finanzierungsleasingsgeschäften, DStR 2006, 1329; *Brandt*, Softwarelizenzen in der Insolvenz- unter besonderer Berücksichtigung der Insolvenz des Lizenzgebers, in: NZI 2001 337; *Büschgen*, Praxishandbuch Leasing, München 1998; *Hoeren/Spittka*, Aktuelle Entwicklungen des IT-Vertragsrechts – ITIL, Third Party Maintenance, Cloud Computing und Open Source Hybrids, MMR 2009, 583; *Vander*, Urheberrechtliche Implikationen des EDV-Leasings – „Rental Rights“ im Blickpunkt, CR 2011, 77.

Even under the old legal situation, the warranty provisions under tenancy law were also applicable to atypical contract types similar to tenancy law, as the purpose of the contract is the temporary transfer of an object for a fee. The reform of the law of obligations has not changed this. In the software sector, the classic rental contracts have been replaced by IT leasing contracts. These are regularly a transfer of use agreement under which the lessor procures the leased object, finances it and makes it available to the lessee. In the case of an operating lease, which is limited in time and can be terminated by the lessee at any time, this is a case of so-called operating leasing, which is assessed according to the law governing lease agreements.

In the case of finance leasing, which is characterised by the lessor's granting of use of a newly acquired object against payment up to full or partial amortisation, the new provision of § 506 BGB must be observed. This provision, which explicitly refers to finance leases, replaces the former § 3 No. 1 VerbKrG and declares the provisions on the right of revocation and objection enforcement (§§ 358, 359 BGB), the form requirement of § 492 (1) BGB, the right of revocation of § 495 BGB and §§ 496-498 BGB to be applicable accordingly. In addition, the parties are free to formulate their leasing agreements as they see fit, especially in the B2B constellations typical for software. For example, a contractually stipulated minimum contract duration of 42 months was allowed. Agreements on the place of jurisdiction are permissible in this relationship, also with regard to the supplier acting as third party to the contract.

The leasing contract, which is generally treated as an atypical rental contract, differs from the rental contract primarily in that the leaseholder's warranty claims against the lessor are severely limited or completely excluded and the lessee bears the risk of deterioration and destruction of the leased object himself. Depending on the specific terms of the contract, the lessee remains obliged to pay the leasing instalments in these cases. A particularly careful separation between the individual legal relationships is required if the lessor assigns to the lessee his claims against the manufacturer or supplier in respect of the leased asset: In the relationship

with the supplier, purchase law applies, while the legal relationship between the lessor and lessee is determined by the content of the leasing contract, which usually combines elements of a lease agreement (with regard to the transfer of use) and a loan agreement (with regard to financing) in one contract.

If only the hardware is handed over to the lessee in the case of a leasing agreement for hardware and software, the legal consequences are not based on warranty law (§§ 536 ff. BGB), but on the provisions for partial services, including termination in accordance with § 542 BGB. This and the claim for remedy with a deadline (§ 542 Paragraph 1 Sentence 2 BGB) must be addressed to the lessor, unless the supplier is authorised to receive it.

I. Exclusion of warranty under previous law

According to the previous legal situation, the complete exemption of the lessor from his liability for material defects under the lease agreement was permissible by AGB if the lessee is not made liable for defects in the leased goods, but can assert warranty claims under purchase law directly against the lessor's supplier. A prerequisite for this is that the Lessor assigns the Lessee the warranty claims against the supplier completely and unconditionally, which can also be done in the Lessor's GTC:

„In the case of material defects and defects of title, we assign our claims and rights under purchase law against our suppliers to the lessee upon conclusion of the leasing contract. These claims also include the right to subsequent performance, withdrawal from the contract, reduction of the purchase price as well as to damages and reimbursement of futile expenses. Otherwise, our warranty for material defects and defects of title is excluded.“

This so-called assignment construction is neither surprising for the lessee in the B2C sector nor in commercial business transactions within the meaning of § 305c para. 1 BGB, nor does it constitute an unreasonable disadvantage within the meaning of § 307 BGB. It is not legally objectionable if the interests of the lessee have been sufficiently taken into account. Accordingly, the lessee cannot terminate the leasing contract without notice in the case of defective and therefore unusable software, analogous to § 543 Para. 1, Para. 2 S. 1 BGB, because the use of the leasing object is not granted, before he has taken legal action against the supplier. This shall also apply if, instead of the assignment, an authorization of the lessee within the meaning of § 185 BGB for the unconditional assertion of warranty claims against the supplier in his own name is agreed. Furthermore, the Lessor may also reserve the right to revoke the assignment in the event that the Lessee fails to meet his contractual obligations.

1. §§ 474 ff. BGB

The strengthening of rights in consumer purchasing raises the question of whether it will be sufficient in future to grant a private lessee (only) the warranty rights to which the lessor is entitled vis-à-vis his supplier. In the relationship between the lessor and the supplier, it is usually not a consumer purchase, so that the special protective provisions of §§ 474 ff. BGB are not applicable to the supplier contract. Between lessor and supplier, the limitation of the claim for subsequent performance under §§ 437 No. 1, 439 BGB is therefore just as permissible as the shortening of the limitation period for warranty claims. The Lessor thus does not acquire any warranty rights protected by § 475 BGB, which he can transfer to the Lessee.

The private lessee would thus be worse off under the assignment structure practised up to now than if the leased asset had been purchased directly (by the consumer) from the company. However, the provision of § 475 BGB is not directly applicable in the relationship between lessee and lessor, as the leasing contract is not a purchase contract. The prohibition of clauses in § 309 No. 8 BGB is also inapplicable.

2. § 307 BGB

As a result, the previously customary assignment construction in form leasing contracts is subject to general content control in accordance with § 307 BGB, both in the commercial and non-commercial area. It should be noted that the reform of the law of obligations has changed the legal model of the warranty under purchase law, which is the standard for the control of clauses according to § 307 BGB. According to the previous legal situation, there was no separate consumer protection in the assignment of material defect claims according to the model of the law of sale (as compensation for a formal exclusion of the lessor's warranty under tenancy law). However, the precondition was that the design of the rights relating to defects in the terms of delivery was in line with the legal concept.

By strengthening consumer rights in §§ 474 ff. BGB, it could no longer be considered sufficient in future by the courts if the lessor completely excludes his own warranty for defects without at the same time providing the private lessee with the (unrestricted) rights from the purchase of consumer goods. As a result, this would mean that the lessor would be obliged to make the warranty claims in relation to the supplier equal to the purchase of consumer goods or to compensate for the differences between the purchase of business and consumer goods by assuming its own warranty obligations towards the lessee. Previous clauses which unconditionally refer the lessee to warranty claims against the supplier under exclusion of the lessor's warranty without taking into account the special provisions of § 475 BGB (German Civil

Code) would be invalid as unreasonable discrimination pursuant to § 307 BGB. This in turn would have the consequence that lessors who do not adapt their general terms and conditions to the new legal situation would be subject without restriction to the warranty for defects under tenancy law.

However, it is not yet foreseeable whether the case law will follow this literature view or whether it will continue to consider it sufficient if all warranty claims to which the lessor is entitled against the supplier are assigned to the lessee (as consumer), even if these are only claims in the B2B area. The BGH did not explicitly discuss the new legal situation, but in two rulings it assumed in all probability implicitly the possibility of the leaseholder's exemption from liability under tenancy law by assigning effective claims from the purchase contract with the supplier. This assumption is supported by the fact that separate consumer protection was only introduced for the purchase of consumer goods, while the warranty provisions under tenancy law remained unchanged despite the consideration of the leasing contract within the framework of the reform of the law of obligations. Until this dispute is clarified by the courts, a cost-benefit analysis should examine whether and which protective provisions of §§ 474 ff. BGB are implemented in leasing contracts. In doing so, the effects on amortisation should be taken into account in particular: Longer warranty periods and a possible claim for a new delivery lead to an increased risk for the lessor if the compensation for use (for the use of the defective item) to be paid by him to the seller is not compensated by the higher value of the replacement item and the added value remaining at the end of the contract.

In the case of leasing, a repayment of the purchase price in warranty cases is only possible insofar as the payment to the lessor is made in exchange for the return of the object of purchase. In this respect, the reverse transaction in the case of IT defects takes place in the relationship between lessor and supplier. If, however, the purchase contract is reversed, the business basis of the leasing contract shall also cease to apply with the request for a refund. If there is a dispute about the reversal, the statute of limitations for the leasing instalments is suspended..

The question of the attribution of a consulting fault is particularly explosive. If the lessee receives incorrect advice from the supplier, problems arise because there is no contract between the two. Nevertheless, various instructions are used here to try to take the lessee's interests into account. For example, the supplier has an obligation to release the lessee from his obligations under the leasing contract if the IT solution is unusable.

It is also unclear what the meaning of a confirmation of acceptance by the lessee is, if this declaration is incomplete. If the Lessee signs an incorrect confirmation of delivery without

any need to do so, he shall bear the burden of proof with regard to the incompleteness of the performance. In such cases, claims for damages against the Lessee in relation to the Lessor are also conceivable.

In all other respects, the lessor remains commercially obliged to give notice of defects in accordance with § 377 HGB even if the lessee is not a merchant. In this case it is advisable to include an obligation to give notice of defects in the leasing contract. For if the lessor does not inform the lessee of the existing obligation to notify the supplier of defects within the scope of the assigned claims for defects, the lessor is liable for damages to the supplier. The lessee would then have to fulfil the obligations to give notice of defects pursuant to § 377 HGB irrespective of his status as a merchant.

The Higher Regional Court of Hamm and later the Federal Court of Justice (BGH) had a case of an inspection of general terms and conditions in a bundle lease agreement. The contract contained a clause by which the lessor reserved the right to withdraw from the leasing contract in the event of failure of the project up to a latest completion date set by the lessee and to tender the goods and services provided to the leasing customer and which obliges the leasing customer to reimburse pre-financing payments and payments made to the supplier and to re-enter into the contracts concluded with the supplier in place of the lessor. The Higher Regional Court (OLG) of Hamm declared the clause null and void due to a violation of § 307 (1) BGB. The customer was de facto deprived of rights, which was a serious violation of the equivalence principle. In addition, the obligation to make a public offering violated § 305c para. 1 BGB. In its appeal, the Federal Court of Justice largely followed the vote of the Higher Regional Court of Hamm. The regulation is incompatible with essential basic ideas of the rental law applicable to finance leases. It is particularly important that only the failure of the project is taken into account, without it being important that the leasing customer is responsible for the failure. The BGH made no further comments on § 305c (1) BGB.r.

The Higher Regional Court of Brandenburg had to decide within the framework of a software project that had failed due to limited usability and which was also financed by leasing, whether an acceptance had taken place in the knowledge of the defect. The court classified the contract as a contract for work and services, whereby § 640 BGB applies. In this context, a receipt within the meaning of § 368 BGB was considered as acceptance.

It is therefore evident that very thorough attention must be paid to an appropriate distribution of risk between all parties involved in the IT project so that there are no protracted legal disputes if the project fails.

II. Duration of the warranty period

The minimum warranty period of two years prescribed in § 475 BGB for the purchase of consumer goods could be taken into account in leasing contracts with consumers for the delivery of new goods by means of the following clause:

„In the case of material defects and defects of title, we assign our claims and rights under purchase law against our suppliers to the lessee upon conclusion of the leasing contract. Otherwise our warranty is excluded, unless the lessee's claims against the supplier are excluded under the supplier's terms and conditions of delivery/business, because the warranty period for material defects and defects of title is shorter than two years.“

III. Limitation of the supplementary performance to removal of defects

It is standard contractual practice in leasing agreements to restrict the lessee to a right of repair instead of the delivery of a replacement item in order to secure the lessor's amortisation. In the case of the purchase of consumer goods, § 475 of the German Civil Code (BGB) prohibits limiting the statutory claim to subsequent performance under §§ 437 No. 1, 439 Para. 1 BGB (including the right to new delivery) or the right of withdrawal and reduction by means of an upstream right of the seller to rectify the defect. The conclusion drawn from this in the literature is that corresponding rectification clauses are also inadmissible in leasing contracts with consumers, as the lessor must transfer all material defect claims from the supplier contract, i.e. including the unrestricted right of subsequent performance, to the lessee.

This view is contradicted, however, by the fact that the lessee, according to the warranty provisions of the lease agreement, i.e. even if the lessor himself provides an unlimited warranty for defects (as a result of an invalid exclusion of warranty), is only entitled to rectification of defects in accordance with § 535 Para. 1 Sentence 2 BGB, but not to a new delivery of the leased object. An unreasonable disadvantage within the meaning of § 307 BGB can therefore only be assumed if the lessee is denied the right to withdraw from the leasing contract if the agreed rectification of defects fails or is unreasonable. A corresponding clause in a leasing contract with a consumer concerning the supply of new goods could look as follows:

„Insofar as the assigned claims against the supplier for withdrawal from the contract or reduction of the purchase price are dependent on a failed rectification of defects (subsequent improvement), the lessee is entitled to extraordinary termination of the leasing contract if the subsequent improvement is unreasonable for the lessee. A claim for new delivery due to material defects shall only exist if the supplier's terms of delivery provide for this.“

IV. Termination

Finally, it should be noted that, in the event of substantial defects, the lessee's right of termination under Section 543 of the German Civil Code (BGB) may not be excluded by completely passing on the risk of material and counter-performance to the lessee, even if such passing on is in principle part of the typical content of the leasing contract and must therefore be approved as appropriate. If the lessee's (tenancy law) obligation to transfer use is limited to repairs, the BGH is of the opinion that a right of termination must be provided for "not insignificant damage". A clause according to which the lessee is liable without limitation "for loss and damage of any kind" is therefore also ineffective.

Seventh chapter: Software maintenance and support contracts

literature:

Bartsch, Softwarepflege nach neuem Schuldrecht, NJW 2002, 1526; *Bischof/Witzel*, Softwarepflegeverträge. Inhalte und Problemstellungen, ITRB 2003, 31; *Habel*, Softwarewartung, CR 1993, 55; *Hardt*, Vertragstypen und Haftungsrisiken bei Softwarepflegeverträgen, CR 1991, 200; *Hardt*, Haftungsbeschränkung durch AGB bei Softwarepflege, CR 1991, 718; *Hartmann/Thier*, Typologie der Softwarepflegeverträge, CR 1998, 581; *Koch*, Schlechtleistung bei softwarebezogener Nacherfüllung – Fehler in neuen Softwareversionen oder -updates, ITRB 2008, 131; *Moritz*, Der Softwarepflegevertrag – Abschlusszwang und Schutz vor Kündigung zur Unzeit?, CR 1999, 541; *Schneider*, Risikobereiche des Pflege-Vertrages, CR 2004, 241; *Schneider*, Vollpflege von Standardsoftware, CR 2004, 408; *Schneider*, Der Vertrag zur Softwarepflege, CR 1999, 157; *Schreibauer/Taraschka*, Service Level Agreements für Softwarepflegeverträge, CR 2003, 557; *Welker/Schmidt*, Kündigung von Softwarepflegeverträgen durch sog. End-of-Life-Schreiben, CR 2002, 873; *Wohlge-muth*, Computerwartung, München 1999; *Zahrnt*, Abschlusszwang und Laufzeit beim Softwarepflegevertrag, CR 2000, 205.

The legal nature of service contracts has not yet been clarified. The spectrum of the views represented ranges from the classification as contracts for work, rent or service contracts to the qualification as sui generis contracts and consideration as insurance contracts. In the meantime, the BGH has decided that software maintenance contracts do not constitute rental contracts, but are to be treated according to the law governing contracts for work and services. However, the Higher Regional Court of Cologne notes that, in view of the diverse range of services covered by a contract, the application of tenancy law to a subordinate part of the service, such as the pure provision of software, does not appear to be excluded. In my opinion, "the" service contract does not exist. Rather, a large number of individual services must be distinguished, which, however, are provided on the basis of a uniform contractual obligation, the general service contract.

There are different levels of the software maintenance agreement. First there are the basic agreements. The basic contracts focus, for example, on the delivery of hardware that is to be regarded as a sales contract. The delivery of "naked" software also takes place regularly within the framework of purchase contracts. On the other hand, the delivery of individual software and the adaptation of standard software to the special needs of the customer within the framework of contractual work arrangements are typical.

On the second level is the general service contract. This is a service contract as a continuing obligation, which basically only expresses the general willingness of the care company to be there for the needs of the user. Furthermore, the general service contract contains an offer from the care company to conclude individual contracts.

In this respect, the general service contract refers to the third level contracts, namely the individual contracts for individual services. These individual services have completely different characteristics. When it comes to individual maintenance and repair, we are dealing with a service contract. The delivery of updates and upgrades is essentially to be qualified as a sales contract. The provision of a service hotline and other forms of advice is based on service contract obligations.

The assumption of a 24-hour availability guarantee by a company specialising in the maintenance of computer software does not violate § 307 BGB according to a decision of the OLG Cologne. For it is not evident that such a company would be unreasonably disadvantaged by the assumption of this obligation contrary to good faith. Rather, it is reasonable and therefore appropriate that a company whose departments working at different locations have to communicate with each other must ensure that any failure of the system is remedied at short notice. The maintenance company, as a designated specialist, could also assess this risk very precisely when concluding the contract.

I. The general service contract

The general service contract is freely concluded by the parties. A claim to the conclusion of such a contract can only be affirmed in accordance with the requirements of cartel law (§ 19 (2) GWB and Art. 102 TFEU) if an entrepreneur concludes service contracts and refuses to conclude them for an individual user without any objective reason.

1. Main obligations

a) Obligations of the obligated party

Contracts of employment can oblige to services of any kind (§ 611 paragraph 2 BGB). By the service contract the entrepreneur commits himself in particular to

- Have personnel on call and ready to
- Keeping machines ready.

The beneficiary's primary claim against the obligated party is the claim for performance of the contract of employment (§§ 611 para. 1, 241 para. 1 BGB), which the beneficiary can assert by way of an action for performance. However, enforcement is excluded in the event of a dispute in accordance with § 888 (3) ZPO..

With regard to the more detailed specification of the scope of services, scenarios for the response times and scope of response are typically defined in maintenance contracts. Such

scenarios are typically not subject to general terms and conditions control, since they concretize main service obligations. However, the transparency requirement also applies to the concretization of main service obligations. In this respect, the Federal Court of Justice was right to prohibit a clause according to which service obligations are only provided within the scope of what is "technically possible".

The party obligated under a software maintenance agreement with respect to a law firm software must, in the event of changes in the legal provisions, adapt the software to the changed requirements and provide a version that runs on the agreed operating system.

If in a software maintenance contract the provision of the maintenance service is basically agreed upon by remote maintenance (in particular online), then the lessor can, in the opinion of the LG Cottbus, be invoiced separately for the cost of an on-site service expressly requested by him.

A clause is unproblematic in terms of GTC law, according to which the maintenance is carried out in the form of maintenance on call by the customer. If the maintenance is carried out poorly and the system as a whole is then in a condition susceptible to faults, this is considered to be poor work performance. The burden of proof for a deficiency in the maintenance lies with the customer. If maintenance on call and a fixed minimum term of the maintenance contract is provided for, no acceptance is required; acceptance is deemed to be implied. A separate acceptance is also not required because the maintenance services must be performed continuously. If a hotline is offered free of charge, information provided by such a hotline may nevertheless entail liability for intent and negligence. This applies in particular if the provider informs the customer that he is available for further questions.

b) § 307 BGB

The service owed by the obligated party must be determined by interpreting the contract.

The content review of §§ 307 ff. BGB extends in accordance with § 307 exp. 3 sentence 1 BGB only to regulations, by which one deviates from legal regulations. As a primary obligation of a party to a service contract, the appropriateness of the remuneration is therefore not subject to content control.

How and when personnel and machines have to be made available is specified by the right of management of the employee. In case of doubt, however, the service is to be provided personally by the obligated party (§ 613 sentence 1 BGB). If external service companies provide services instead of the obligated party, this does not constitute fulfilment of the service contract. The person entitled to services need not put up with another contractual partner wit-

hout permission (§ 415 BGB). The obligated party can agree on the possibility of such a change. However, he must observe the limits of the law on general terms and conditions. According to this, a provision according to which a third party enters into the contractual obligations in service contracts is invalid. An exception only applies if the third party is named by name or if the person entitled to service is granted the right to withdraw from the contract. However, the period of notice is too long if the user can only terminate the contract after one month. Also with merchants a free change is not foreseeable in the context of GTC.

However, the transfer of duties within the framework of subcontracting may be permissible. In the literature, however, such an unrestricted possibility of transferring duties to vicarious agents is considered questionable in view of the particular sensitivity of the care sector.

Conversely, in case of doubt, the person entitled to services cannot transfer his or her entitlement to the services to third parties (§ 613 sentence 2 BGB). In particular, he is prohibited from pointing out to the obligated party that his services would no longer make sense for him and that he should therefore work for another company. Also, clauses in purchasing conditions, for example, which provide for such a free bill of exchange, violate the law on general terms and conditions. A transfer of the obligations from the care contract to a third party cannot be provided for under GTC law. c) Duties of the person entitled to service

The beneficiary must pay for the services. The remuneration can be calculated according to service (§ 614 sentence 1 BGB) or time (§ 614 sentence 2 BGB). It should again be noted that price agreements are not subject to a control of general terms and conditions. An (apparent) exception only applies to ancillary price agreements that deal with the way the price is calculated. An advance payment obligation is ineffective at least if it concerns a payment for one year in advance. In this case, the model of the law on service contracts (§ 614 BGB), according to which the remuneration is due at the end of the individual period of time, must be observed. In the literature it is suggested that at least a quarterly pre-payment should be considered effective.

If a "circle price" is agreed upon for the care, the care company can only charge up to 110% of the circle price for its subsequently higher expenditure. An invoicing of the lump sum owed at the beginning of a calendar year is not permitted under GTC law. However, an action for advance payment shall be permissible.

If the parties to a software maintenance and support contract agree on the regular payment of a flat-rate service fee on the first of the respective month, this fee is owed for the permanent provision of personnel and material over a longer period of time, irrespective of whether ser-

VICES were actually provided or a certain success was achieved during the corresponding period.

2. Secondary obligations

In addition to the main performance obligations, secondary obligations (§ 241 para. 2 BGB) shall apply. In the event of culpable conduct, a breach of these obligations leads to claims for damages under §§ 280 para. 1, 241 para. 2 BGB and in the pre-contractual area under §§ 311 para. 2, 241 para. 2, 280 para. 1 BGB ("c.i.c.").

The secondary obligations of the obligated party include the obligation to report imminent damages. Furthermore, he/she is obliged to provide correct information about important key data of the care. This also includes information about alternatives, such as the possibility of a free update or a sensible update to another program version. Since he can learn a wealth of trade secrets within the scope of his maintenance obligation, he also has an implicit obligation to maintain these trade secrets. This applies in particular in relation to users who are subject to official secrecy (§ 203 StGB), above all lawyers and doctors. Furthermore, the user has the obligation to set up a proper data backup and to provide documents requiring maintenance and a technically experienced contact person for queries.

A secondary obligation of the beneficiary is to do everything possible to avoid damage to life and limb of the care provider. He/she is subject to extensive duties of cooperation and information, especially with regard to the realisation of the purpose of the contract. If the user takes over the obligation for regular data backups in addition to the contract, claims for damages against maintenance companies due to data loss are regularly excluded. It is disputed whether he is obliged to take over the latest program version. For the maintenance company it is often a problem that the user expects maintenance on the basis of outdated program versions. Such maintenance can become very time-consuming and costly over the years. It is therefore understandable that maintenance companies contractually oblige the user to always include the latest program version. A difficult question is whether high frequencies of updates can be provided for in the general terms and conditions as an obligation for the customer to take over. With regard to the general interpretation within the framework of § 307 para. 1 BGB, one will have to consider whether the customer still has alternatives, such as resetting the software in case of remaining errors in the new version. The customer will also have to be given the opportunity to demand maintenance on the basis of the old version for a longer period of time after the release of the new version. The LG Hamburg has now approved corresponding clauses.

Furthermore, a clause in the general terms and conditions of a software producer is effective, according to which the maintenance always refers to the entire stock of the customer of the software of the producer, as far as the producer offers maintenance for this. This also includes an expansion of the inventory through possible later acquisitions. The software must either be completely maintained by the manufacturer or the maintenance must be cancelled ("total maintenance"). This applies even if the clause further stipulates that this provision also covers software of the manufacturer which the customer has obtained from third parties and for which the manufacturer offers maintenance.

II. Non-fulfilment and defective fulfilment

The service contract law of §§ 611 ff. BGB does not contain any warranty rules of its own even after the reform of the law of obligations. Contractual agreements using pre-formulated terms and conditions of business that regulate the liability risk for performance disruptions are therefore of central importance in service contract law. The general clause of § 280 Para. 1 BGB, as a regulation of the general law of obligations, also has an effect on service disruptions in the area of software maintenance. According to this clause, the employer is entitled to compensation for damages caused by the culpable violation of a contractual main or secondary obligation in addition to the continuing claim to performance. However, service contract law does not recognise an independent reduction of the remuneration.

The other warranty rights from the right of purchase exist in part in analogous application, in particular the claim to reduction of the care fee and to withdrawal from the contract..

The rescission of the software maintenance agreement could in individual cases also include the underlying software agreement, provided that the maintenance and software agreement are parts of an overall business. It is sufficient for uniformity if only one of the parties to the contract has a desire for uniformity and this was recognizable to the other partner and approved or at least accepted by the latter. It is not necessary for the acceptance of a uniform legal transaction that legal transaction conditions have been established. Nor did the agreements have to belong to the same legal type of transaction; they could be quite dissimilar in nature. A business unit was not excluded even by the fact that the same persons did not all participate in the legal transactions.

Software documentation is defective if it contains a significant number of screen dialogs that are not (no longer) up to date, do not correspond to the dialogs in the program or are not documented at all, if a table of contents is missing or if it does not enable the user to install

the software again or on another system if necessary. The maintenance creditor is entitled to an actualized software documentation with every "update" of the software.

If the creditor is no longer interested in the performance of the contract of employment due to poor performance, section 280 subs. 1, subs. 3 BGB in conjunction with § 281 BGB grants a claim for damages instead of performance. In practice, this legal consequence, which among other things is aimed at reimbursement of the costs of a service that can still be carried out through subsequent performance, should become relevant above all in the case of service contracts in which the service is not provided within the framework of a continuing obligation but as a one-off service, e.g. in the case of consultancy services within the framework of a client relationship (tax consultant, lawyer). Poor performance is to be assumed in particular if the obligated party fulfils its obligation to work but performs work that is defective.

In the area of non-performance-related secondary obligations, a breach of duty exists if other legal assets and pecuniary interests of the beneficiary are damaged during the (proper) performance of the service. In the area of company law, for example, this can be assumed in the case of repeated violations of a secondary contractual prohibition of competition by a shareholder. If the prerequisites are met, § 280 para. 1, para. 3 BGB in conjunction with § 282 BGB grants damages instead of performance.

In case of non-fulfilment of care obligations, the user can sue for fulfilment. Here there is also the possibility of a substitute performance within the scope of § 887 ZPO. Furthermore, he can refuse the agreed remuneration (§ 320 para. 1 BGB). If the services cannot be made up for, especially due to the lapse of time, a case of impossibility exists. In the event of late performance, the general rules for default apply.

III. Termination of the service contract

There are many decisions in the case law that deal with the validity of termination declarations in service contracts.

1. Ordinary termination

An employment contract ends upon expiry of the period for which it was concluded (§ 620 BGB).

Apart from such fixed-term contracts, the German Civil Code (BGB) provides for special periods for ordinary termination (Section 621 BGB). If the remuneration is calculated according to quarters, the period of notice is six weeks for the end of the calendar year (§ 621 No. 4 BGB). The right of ordinary termination is indeed transferable. However, the user must have

a first possibility of termination after two years at the latest. Tacit renewals may not exceed one year. At the expense of the user, a longer notice period than three months cannot be introduced. However, these regulations do not apply to commercial transactions. In this case, the respective commercial customs and habits must be observed. These may make it appropriate to allow a ten-year commitment to a contract.

The forfeiture of a right of termination - even an extraordinary one - cannot be assumed before two months have elapsed, even in the case of an IT maintenance contract with a 24-hour availability guarantee. In this respect, it must also be taken into account that the debtor must have had the opportunity to seek a substitute solution before terminating the contract..

Without an individual contractual agreement on a long-term software maintenance period, there is no general obligation of the maintenance company to ensure the agreed services for the entire "life cycle" of the software sold. In literature and case law, exclusions of termination are discussed in rare individual cases, e.g. in the event that the maintenance company, in the case of software that is still new and currently being sold on the market, deliberately wants to avoid a need for adjustment (conversion to the year 2000, conversion to the Euro, etc.) that was already apparent when the contract was concluded, or in the event that the customer is to be made to pay for services that are not owed as a result of termination. However, it is basically the autonomy and responsibility of the contracting parties to negotiate a minimum contract period independently and freely, if desired. Therefore, there can be no exclusion of termination rights for the first years under the aspect of good faith.

2. Termination for good cause (§ 626 BGB)

According to § 626 BGB, every employment contract can be terminated for good cause. This right to extraordinary termination is not transferable. A limitation to certain important reasons is also inadmissible. The same applies to severity of termination, such as the introduction of a "lump sum for damages". Only a waiver of this right after its creation is effective. What is to be regarded as an important reason in IT service contracts is disputed in detail. Poor service can - regularly after a warning - lead to termination for good cause, especially in the case of frequent poor performance and poor response times. It is doubtful whether a termination is also permissible when the user stops using the EDP system. It should not be a reason for termination as a user to refer to the unreasonableness of new versions. Force majeure can in turn justify an extraordinary termination.

3. Cancellation due to special trust (§ 627 BGB)

A special extraordinary right of termination is provided for in § 627 of the German Civil Code (BGB) for services which are transferred on the basis of special trust. This right can be agreed upon individually and contractually. However, whether a clause stands up to content control is disputed.

IV. The individual contracts - The delivery of software updates: Contract of sale

Here it is important to distinguish between program adaptations to a more powerful hardware environment on the one hand and software updates for mere error correction on the basis of the existing hardware infrastructure on the other. Typically, maintenance contracts only include software updates for error correction, but not additional maintenance and error correction measures on site. The program adaptations must be adapted to the contractually required hardware. If there is a lack of compatibility of the update with the hardware, this constitutes a defect in the maintenance service. Nor may the customer be contractually obliged to purchase the software again against payment for each program change. If the software maintenance companies no longer wish to carry out a program version that is older, they must observe the usual periods for the oral termination. Old errors that are not sufficiently removed by an update will lead to the revival of warranty rights. In addition, there is a breach of duty from the maintenance contract (§ 280 BGB). It is disputed whether maintenance services must be provided with corresponding documentation; such a (tacit) documentation obligation was rejected for the area of hardware maintenance.

When delivering software updates, the purchase right must be observed. Insofar as the updates eliminate software defects, the regulation of § 308 No. 8 BGB must be observed. Subsequent performance shall be free of charge, so that it is not permitted to pass on costs to the user. The combination of software updates to eliminate defects with program adaptations to a more powerful environment, i.e. the combination of warranty and improvement program, proves to be problematic. The question is still unanswered whether in such cases an indication of the distinction is necessary in order to put the user in the right light about the costs actually incurred. However, updates and new software versions do not always eliminate errors, but can also cause new technical problems. In this context, the question arises as to what extent new errors in defect removal updates trigger new subsequent performance claims with new warranty obligations, how errors in the update affect unchanged parts in the originally delivered program copy and how the provision of a new full version is to be evaluated within the scope of subse-

quent performance. Subsequent improvement by means of updates is a so-called combined subsequent performance, which consists of subsequent delivery, delivery of a new program from the series and subsequent improvement in the form of rectification of defects in the new program. Even in the case of successful supplementary performance by delivery of an executable program, compensation for installation, test and new instruction can be claimed in addition to the service according to § 280 para. 1 BGB. If more than two attempts at subsequent performance fail, the customer may even withdraw from the contract pursuant to § 440 sentence 1 BGB. If, as a result of the update, new errors occur in the originally delivered copy of the program, the causes of which did not exist before or at the time of the transfer of risk pursuant to § 446 BGB, no warranty law but the general law on disruptions to performance shall apply. If new defects adhere to the subsequently delivered program, the new delivery also triggers new warranty rights. Effects of errors in the program part not covered by the update and therefore unchanged, fall under the warranty law as a new, subsequently delivered cause of defects, just as the subsequently delivered error itself. In principle, a new full version with a higher, error-cleaned version number can also be delivered as a subsequent delivery if there are no significant disadvantages compared to the old version and the subsequent delivery is completely free of charge. There is no kind of deduction "new for old". If the new version itself is again defective, this is also subject to warranty rights due to the transfer.

V. Repair/full maintenance: Contract for work

1. Delimitation AÜG

Temporary employment - often also referred to as a temporary employment relationship - is when a self-employed entrepreneur (lender) "lends" an employee (temporary worker) with whom he has concluded an employment contract to another entrepreneur (borrower) on an occasional or short-term basis. Pursuant to § 1, Subsection 1, AÜG, a temporary employment contract is deemed to exist if the employee is provided by his contractual employer to a third party for work performance within the scope of his economic activity. Thus, at least three parties are required. The relationship under the law of obligations between the lender and the hirer is referred to as a temporary employment contract. The hirer acquires the right derived from the employer, i.e. the lender, to demand from the temporary employee the performance of the work to be performed in order to fulfil the contract of assignment and to be able to concretise it by means of more detailed instructions (right of direction). The employment relationship between the lender and the temporary employee continues to exist, i.e. the lender owes the remuneration, continued remuneration in the event of vacation and illness, etc.

According to § 1 para. 1 sentence 1, the Employee Leasing Act applies only to the leasing of employees within the scope of economic activity. It covers any action by which goods or services are offered on a certain market. The previous version of the law, which was valid until December 2011, still required commercial activity, i.e. activity with the intention of making a profit. This objective is now no longer required. A contract between an employer and a third party is not a temporary employment contract within the meaning of the Law on Temporary Employment if it is a contract for services or work. If the entrepreneur organizes the necessary actions himself to achieve economic success, he remains responsible for the performance of the services provided for in the contract with the third party or for the creation of the work contractually owed to the third party. If he uses the employees subject to his instructions as vicarious agents, this shall constitute a contract of service or a contract for work. If, however, according to the content of the contract, the third party in whose area the employees are to work is free to decide how and when to use the employees for which work, this is called a temporary employment contract. If, in order to justify a dismissal for operational reasons, the employer invokes the loss of the job by subcontracting the work previously performed by the dismissed employee, a replacement dismissal that does not justify the dismissal is given if the subcontracting is not performed independently by the third party, but the third party is integrated into the operations of the (dismissing) employer. If the external service is not carried out in the company's own operational organisation, but according to the operational requirements of the (terminating) employer, this regularly constitutes covert employee leasing, which cannot justify a dismissal for operational reasons.

If an employee is employed by his employer on the basis of a contract for work and services in the operation of another company and if the instructions of the Party Ordering under labour law only occasionally deviate from the normal daily routine, this shall not lead to the assumption of an unauthorised hiring of employees. According to the BAG's established case law, not every third-party assignment is a temporary employment contract within the meaning of the AÜG. Rather, it is characterized by a specific structure of the contractual relationships between the lender and the user on the one hand (the temporary employment agency agreement) and between the lender and the employee on the other hand (the temporary employment agency agreement) and by the absence of an employment relationship between the employee and the user. The necessary content of a temporary employment contract is the obligation of the temporary employment agency towards the hirer to provide the hirer with employees in order to promote the hirer's business. His contractual obligation towards the hirer ends when he has selected the employee and placed him at the disposal of the hirer.

In contrast, in the case of a contract for work and services, one entrepreneur works for another. The contractor organizes the necessary actions to achieve economic success according to his own operational requirements and remains responsible to the third party company for the performance of the services provided for in the contract or for the production of the work owed. The employees used for the execution of the contract for work are subject to the instructions of the Contractor and are its vicarious agents. However, as can be seen from § 645 (1) sentence 1 of the German Civil Code (BGB), the Purchaser may give instructions for the execution of the work to the Contractor itself or its vicarious agents. Such contracts for work - just like contracts of employment - are not covered by the German Law on the Provision of Workers.

When differentiating between instructions under labour law and those under a contract for work and services, it must be taken into account that the instructions of the Ordering Party for work and services are objectively limited to the specific work. If there is no definable work which can be attributed to the contractor as his own performance and which can be accepted, this points to the provision of temporary workers, because the Ordering Party then determines the object of the performance to be rendered by the employee in the first place through his instructions and thus organizes work and commitment for him in a binding manner. However, it should be noted that the supply of temporary staff requires that the right to give instructions to the employer is exercised solely by the owner of the company or its personnel for the duration of the assignment.

Evidence of a contract for work:

- Entrepreneurial personal responsibility and disposition possibility of the contractor towards the customer,
- Agreement and preparation of a qualitatively individualizable work result attributable to the work contractor,
- exclusive right of the contractor to give instructions to the employees in the customer's company and to perform his duties under the contract for work and services,
- bearing the entrepreneurial risk, in particular the warranty,
- production-related remuneration regulation.

The following indications speak in favour of hiring out employees:

- Planning and organisation of the work by the customer,
- Admission of the employees to the business premises of the customer,

- lack of the right to issue instructions and personnel sovereignty of the contractor, obligation to submit personnel deployment and attendance lists,
- Equipment with tools of the orderer,
- Use of the social rooms of the customer

In addition to the business registration, the commercial supply of temporary workers requires a permit in accordance with the Temporary Employment Act (§ 1 (1) sentence 1 AÜG). There is a claim to the granting of the permit if none of the reasons for refusal of § 3 AÜG are present.

The differentiation of the commercial supply of temporary workers from other types of contracts or from the permit-free supply of temporary workers is not only important for the application of the AÜG. In addition to labour law, it also affects social security law, criminal law and the law on administrative offences. If it is incorrectly assumed that a permit-free form of third-party personnel deployment is involved and the lender does not have a valid temporary employment permit, both the lender and the borrower suffer adverse consequences. In order to determine whether personnel leasing exists, the BAG consistently focuses on the actual business content in accordance with the practical implementation of the contract.

One issue that has not yet been clarified is the impact of the minimum wage law on the IT sector. For example, Section 13 MiLoG, by means of a reference to Section 14 of the German Law on the Posting of Employees (AEntG), stipulates that a client must also be liable for the payment of the minimum wage for all subcontractors. If one of the subcontractors of the client does not pay its employees the statutory minimum wage, the employees may demand payment of the net wage directly from the client, regardless of why the contractor as their direct employer has not paid so far. In this respect, the contracting authority shall be liable in the same way as a guarantor who has waived the defence of pre-litigation. However, this construction does not apply to contracts of service or work contracts for purely internal matters. The law should only apply to the so-called general contractor, i.e. the contractor who delegates to other (sub) contractors the duties that he has in the external relationship with clients. In order to solve possible liability problems, some general contractors may be granted extensive rights to inspect the subcontractor's payroll documents by contract; in some cases, the client may even have the right to inspect the payroll documents at the subcontractor's premises ("audit right"). Both are very questionable with regard to data protection regulations beyond the consent of the employee.

2. Problem: Compensation rules

Prohibited in the law on contracts for work and services is a remuneration provision in general terms and conditions which provides for an obligation to pay remuneration for the pure activity. Such prohibited clauses include, for example, regulations such as "travel times are considered working times". On the other hand, it is considered permissible if the software producer invoices on the basis of hours or provides for a regulation within the scope of individual contracts which fixes a flat-rate vehicle cost share.

3. Clauses in general terms and conditions

The above-mentioned provisions of the general law on breach of contract are in principle contractually negotiable even after the reform of the law of obligations. Since the law on contracts of employment, and, for example, § 475 BGB in the law on sales, does not contain any limits for a contractual modification of the law on breach of contract, the admissibility of clauses limiting liability in standard contracts of employment is governed by §§ 307 et seq. BGB. For example, a clause such as "new parts or replacement parts at your option" is prohibited.

a) exclusion and limitation of liability

In contrast to the law on sales and contracts for work and services, the law on service contracts does not present the problem of different regulatory complexes for warranty and liability. Terms and conditions in service contracts that refer to "warranty" must therefore - unless they are already invalid under § 307 (1) sentence 2 BGB due to a violation of the material transparency requirement - first be measured against the standard of § 309 No. 7 BGB. Ineffective is therefore the clause "Our liability is limited to intentional acts", which is frequently found in contracts for telecommunications and Internet services. The invalidity of this limitation of liability towards the end user cannot be avoided by adding the sentence "unless there are mandatory legal provisions to the contrary".

Clauses which "limit liability to the minimum amount permitted by law" are also invalid. This empty phrase does not comply with either the prohibition of clauses in § 309 No. 7 BGB or the transparency requirement of § 307 para. 1 sentence 2 BGB, as it is not apparent to the contractual partner to which cases of liability the limitation refers and from which the "admissible minimum amount" results. Therefore - as already shown elsewhere - only a clause remains permissible which only excludes liability for slightly negligent breach of duty and

contains an exception for duties essential to the contract, damages from injury to life, body and health as well as claims from the Product Liability Act.

b) Limitation of performance obligations

Numerous service contracts contain clauses in which (sometimes even under the heading of "warranty") the user's obligations to perform are limited in order to generally exclude liability for default. This is inadmissible as a (indirect) exclusion of liability if the contractual obligation whose violation is the basis of the liability for damages is already limited by this. The same applies to a faulty classification of the owed performance obligations in terms of contractual typology, for example, if a service is described as a work performance and the contractual partner is referred to the warranty provisions of the law on contracts for work and services.

Clauses such as "One hundred percent usability of the system cannot be guaranteed" or "In the event of unexpected system failures or temporary restrictions of performance features, we shall only be liable if the fault is not remedied by us within ... days" are invalid. With regard to consumers, this is directly derived from § 309 No. 7 BGB, since no distinction is made as to whether the performance disruption is based on a slightly negligent breach of a non-substantial contractual obligation. In addition, § 307 Para. 2 No. 2 BGB prohibits the endangerment of the purpose of the contract both towards consumers and towards entrepreneurs by restricting rights and duties essential to the contract. In the case of service contracts, it is therefore regularly inadmissible to again restrict a main service obligation in a GTC clause (in order to avoid liability for culpable breaches of duty) if the primary contractual purpose consists precisely in the provision of this service. The possibility of system failures should therefore already be taken into account in the positive service description, for example by agreeing on a certain tolerance limit with regard to the number and duration of failures per time unit.¹⁵⁸

Nevertheless, even in the case of an unlimited benefit promise, it may make sense to include a purely declaratory clause in the GTCs, in which reference is made to possible system-immanent faults. Although this does not limit the liability for disruptions in performance as a result of culpably caused breaches of duty, it does make sense to include a purely declaratory clause in the GTC. If, however, the contractual partner is informed in good time at the time of conclusion of the contract of the possibility of non-culpable, system-immanent service disruptions, the risk for the user is reduced that he will not be able to withdraw from the contract in accordance with § 280 Para. 1 BGB or § 280 Para. 1, Para. 3 BGB in conjunction with § 280

¹⁵⁸ Vgl. *Jessen*, ZUM 1998, 282, 287; *Cichon*, Internetverträge, Köln 2000, S. 21.

Para. 2 BGB. § 282 BGB due to violation of a duty of disclosure. The same applies to pre-formulated references to possible risks in consulting and agency agreements of lawyers, tax consultants or auditors.

Conversely, clauses in which a certain quality of service is guaranteed ("We guarantee a usability of our systems of 99.99 %") can have the effect of aggravating liability. Although the legislator has refrained from using the legal term "guarantee" outside of the warranty law relating to sales (§§ 443, 444 BGB) as a connecting factor for a general warranty for all types of contract, the law of the Federal Republic of Germany has not yet been amended to include this term. Clauses promising a certain quality of service ("we guarantee"), however, concretise the contractually owed performance in such a way that culpable non-compliance with the guaranteed services constitutes a breach of duty within the meaning of §§ 280 ff. BGB. The explicit assurance of a certain quality of service can also constitute a corresponding obligation to guarantee the promised quality feature ("24h availability", "99.99 % security", "virus-tested"). In these cases, limitations of liability which limit the above assurances ("We are not liable for short-term failures unless we have given an express guarantee for this") are already invalid due to violation of the transparency requirement of § 307 (1) sentence 2 BGB. Furthermore, it also applies here that the liability for a breach - even a slightly negligent breach - of essential contractual obligations cannot be excluded.

4. Reduction of the limitation period for claims for damages

a) § 309 BGB

A shortening of the limitation period for claims for damages is also to be regarded as a limitation of liability within the meaning of § 309 No. 7 BGB. For general terms and conditions in employment contracts, this means that in the cases covered by § 309 No. 7 BGB (see above), a shortening of the limitation of liability in §§ 195 ff. BGB is inadmissible in the cases covered by § 309 No. 7 BGB (see above).

b) § 307 BGB

The situation is different for limitation clauses in standard service contracts used against a contractor. Here, § 309 no. 7 BGB is not applicable (§ 310 para. 1 BGB), so that the admissibility of limitation agreements is governed by the general clause of § 307 BGB. In contrast to the law on sales and contracts for work and services, the law on contracts for services does not allow the use of standard periods under warranty law. The legislator has deliberately refrained from setting statutory minimum periods outside the law of sales and service contracts

and has only set a general maximum period of 30 years in § 202 BGB. However, the general legal idea underlying warranty law, namely that the contractual partner must still have the opportunity to examine the contractual conformity of the performance and to take legal action even if the limitation period is shortened, is also transferable to contracts of employment.

As a result, it must be examined - as was already the case under the old legal situation - in the business sector whether the shortening of the statutory limitation period would have the effect of largely preventing the enforcement of any claims for damages.

5. Subject to change

A further important innovation brought about by the reform of the law of obligations is the applicability of § 308 No. 4 BGB also to reservations of the right to make amendments and revocation clauses in employment contracts. § 308 No. 4 BGB also prohibits the "agreement of a right of the user to change or deviate from the promised performance if the agreement of the change or deviation is not reasonable for the other party taking into account the interests of the user."

Since this is a prohibition of clauses with the possibility of evaluation, reservations of change are not generally inadmissible. According to the old legal situation (§ 10 No. 4 AGBG), reservations of amendment were already permissible outside of labour law in pre-formulated service contracts if the unilateral amendment of the service is justified by a considerable interest of the user, the equivalence interest is not disturbed and the contractual partner is not disadvantaged. According to the new legal situation, it will also be possible to fall back on the standard of § 313 BGB, which regulates the disturbance of the basis of the transaction.

According to the case law, clauses which entitle the service provider to delegate the service owed to a third party without any objective reason are also inadmissible. The reason given is that the service owed is a highly personal duty according to the legal model of § 613 sentence 1 BGB. This means that a formal reservation of the right to make amendments is also invalid if it extends to foreseeable hindrances (holiday). In addition, in the case of services which are based on a special personal relationship of trust (IT consulting), the unreasonableness of a unilateral change by the service provider must generally be assumed. In practice, therefore, greater care should be taken to ensure that an explicit, individual contractual agreement is reached for a delegation in the event of a foreseeable prevention of the service provider. With regard to other changes in services which do not affect the person but the performance of the service owed, the previous case law on § 10 No. 4 AGBG can be referred to. Thus, unilateral reservations regarding the extension of orders for additional services subject to payment are

also inadmissible after the reform of the law of obligations. It should also be noted that, according to the case law of the Federal Court of Justice, clauses are inadmissible which give the user the right to change the description of services. It is also prohibited to use a clause that links a change in performance to a fictitious consensus of the parties and refers the customer to a right of objection.

6. Changes to the general terms and conditions

Service contracts are typically contracts of indebtedness that are designed for a longer term. In view of the need for changes brought about by the reform of the law of obligations, the question therefore arises as to how the adapted general terms and conditions can be incorporated into already existing contractual relationships. Here, too, the principle of § 305 Para. 2 BGB (German Civil Code) applies to consumers, according to which new general terms and conditions only become part of the contract if the contractual partner agrees to them.

a) Unreserved right to change

In practice, many general terms and conditions contain modification clauses which contain an unconditional right of modification for the user: "We reserve the right to modify these general terms and conditions at any time. The customer will be informed of this in good time".

Such clauses, which provide for an unlimited, unilateral amendment of the general terms and conditions, are, according to h.M., inadmissible due to unilateral preference of the user of the clause. A unilateral right of modification is not permitted within the scope of §§ 307 ff. BGB (German Civil Code) is only permissible if the amendment of the contractual conditions is subject to the reservation that it is reasonable for the contractual partner. This can only be assumed if the changed contractual conditions do not involve any economic disadvantages for the customer, which is not the case, for example, if the previous liability regulations are changed to the disadvantage of the customer.

b) Right of objection

A modification clause, on the other hand, is unobjectionable, in which the customer is granted the right to terminate the contract if he does not agree with the modified contractual conditions, otherwise, after a reasonable period of time, the agreement is feigned. Such clauses must, however, meet the requirements of § 308 No. 5 BGB, i.e. the clause must provide that the user informs the contractual partner of the new GTC, grants him a reasonable period of time to make an express declaration, and the customer is also informed at the beginning of the period

that the contractual relationship will continue with the new GTC without his objection or termination.

If the customer makes use of his right of objection, which must be granted to him by force in the case of disadvantageous changes, the contract shall initially be continued under the previous conditions. It is then incumbent upon the service provider to terminate the contract in an orderly manner and thus force a new conclusion of the contract in accordance with the amended GTC. However, the user's objection to the new GTC alone does not justify termination without notice by the service provider.

It is simpler to amend GTCs in the case of services which are not offered within the framework of a continuing obligation, but are offered in each case upon conclusion of a new contract with immediate performance of services (call-by-call systems etc.). For these services, the above-mentioned applies to the inclusion of the GTC, so that new GTC are included under the conditions of § 305a No. 2b BGB through the use of the service.

Chapter Eight: **Special software contracts**

I. Depository agreements

literature:

Bömer, Hinterlegung von Software, in: Kölner Tage zum Softwarerecht, September 1997, Tagungsunterlagen, 385 ff.; *Grützmacher*, Hinterlegungsvereinbarung, in: Redeker (Hrsg.), Handbuch der IT-Verträge, Loseblatt, Kap. 1.7; *Grützmacher*, Insolvenzfeste Softwarelizenz- und Softwarehinterlegungsverträge – Land in Sicht?, CR 2006, 289; *Hoeren*, Die Pflicht zur Überlassung des Quellcodes, CR 2004, 721; *Kast/Meyer/Peters*, Software Escrow: The SAGA continues, CR 2004, 147; *Lensdorf*, Aspekte der Software-Hinterlegung, CR 2000, 80; *Mayer*, Die Hinterlegung von Quellcodes und Prioritätsverhandlungen in der notariellen Praxis, RNotZ 2011, 385; *Milzer*, Software Escrow-Agreements als notarielle Hinterlegungsvereinbarungen, ZNotP 2004, 348; *Oberscheidt*, Die Insolvenzfestigkeit der Softwarehinterlegung, Diss. Münster 2002; *Paulus*, Der Escrow-Agent, CR 1994, 83; *Rath*, Risiken und Nebenwirkungen beim Software Escrow, CR 2013, 78. *Rössel*, Escrow-Agreements: Hinterlegung des Quellenprogramms. Lässt sich eine insolvenzfeste Hinterlegung vertragliche regeln?, ITRB 2001, 223; *Rath*, Risiken und Nebenwirkung beim Software-Escrow, CR 2013, 78; *Roth*, Wege zum Quellcode II, ITRB 2005, 283; *Schneider*, Hinterlegung von Software, Escrow, in: Schneider/von Westphalen (Hrsg.), Software-Erstellungsverträge, 2. Aufl., Köln 2014, Kap. L; *Siegel*, Software Escrow, CR 2003, 941; *Stiemerling*, Sachgerechte Verifikation bei Software-Escrow – Anforderungen an die Prüfung von Sourcecode und Dokumentation bei der Software-Hinterlegung, ITRB 2013, 87; *Wallner*, Insolvenzfeste Nutzungsrechte und Lizenzen an Software, NZI 2002, 70.

The question has long been discussed in literature and case law as to the extent to which the supplier has an obligation to provide or deposit the source format within the framework of software licensing agreements.

Ownership of the source format includes the possibility of editing and modifying a program and thus the risk of uncontrollable piracy: Anyone who owns the source format of a program can remove all references to the author, especially copyright notices and serial numbers, and make extensive changes within the program structure. For this reason, the user is generally only provided with the program in object format; otherwise he would disclose the IT know-how contained in the program and be exposed to uncontrollable further use.

However, this in turn poses particular risks for the user: Since software companies are usually very small in terms of personnel and have a low capital base, many such companies have recently fallen into insolvency. For the user, this can mean that maintenance of his programs becomes impossible unless he himself has the source format. Especially large users (banks, etc.), who depend on the rapid elimination of software errors, can no longer use their programs without the source format.

In this situation, the question arises to what extent the supplier has an obligation to surrender or deposit the source format even without express agreement.

1. Obligation to provide the source format

Up to now, case law has largely assumed that there is no obligation to provide the source format, as it is not customary in the trade or commerce. A general obligation of the supplier to hand over the source format would also not be in line with the interests of the user: If the supplier were to hand over the source format, the user would have the opportunity to make extensive changes, in particular to exploit the know-how contained in the program. On the other hand, the supplier would normally be able to carry out the necessary maintenance and troubleshooting work himself; the user would only be dependent on the source format if the supplier actually fell into insolvency. Therefore, an obligation of the supplier to provide the source format to the user must be rejected, especially in the case of standard software. The Regional Court of Cologne has drawn the legal consequences from this: If the transfer of the source code is not part of the performance obligations of the manufacturer, neither for standard nor for individual software, the transfer of the source codes of the created software can also be effectively excluded by the manufacturer through GTC. The sentence certainly has its pitfalls. Conversely, one would have to conclude from this that attempts to exclude the obligation to perform according to GTCs would be doomed to failure if an obligation to provide the source codes existed by way of exception. More decisive might be the argument of the lack of control ability. Principal service obligations are contractually controllable and are not subject to any GTC control. The transfer of the source code is always a component of a main perfor-

mance obligation due to its technical significance, so that its fate can also be freely regulated in terms of general terms and conditions.

There are a growing number of cases in which the courts exceptionally, under special circumstances, affirm an obligation to surrender. For example, the Munich I District Court has affirmed such an exception very early on if the manufacturer has not concluded a long-term maintenance contract with the user, the warranty period has expired and fault rectification by third parties is necessary. This can only be regarded as an outdated error judgement. The software producer is - apart from special constellations under cartel law - not obliged to conclude maintenance contracts. The user is responsible for ensuring the long-term usability of the software. He must take care of Third Party Maintenance - especially after the warranty period has expired. It is a violation of the fundamental risk distribution of software contracts to impose a post-contractual obligation on the manufacturer to provide the source code.

The situation was different in a case which the LG Köln had to decide. In this case, the user had been entitled to make changes to the program in accordance with the purpose of the software agreement. However, an obligation to provide the source code had not been contractually stipulated. The Regional Court nevertheless affirmed the obligation to provide the source code. In the case of the creation of individual software, at least in those cases in which a maintenance contract is not concluded at the same time, the source code is to be handed over to the purchaser of the software if, according to the purpose of the contract, the purchaser of the software should be able to make changes himself or through third parties. Similarly, the Higher Regional Court of Karlsruhe considered the contractual obligation to provide documentation to imply an obligation to provide the source code. If the manufacturer of a control system undertook to produce complete documentation with circuit diagrams and descriptions that would enable proper operation and maintenance, a significant defect would be deemed to exist if the source code was not made available at least to the extent that this was a prerequisite for adapting the control system to changes that usually occur in practice.

The LG Aschaffenburg argues even more generously, which affirms an obligation to deliver when creating individual software for further sales to customers of the client. The LG Frankfurt a.M. has demanded a delivery of the source code for every program creation contract, and this even before acceptance. In some cases, the literature already accepted a claim for surrender if the manufacturer refused to remedy the error after the warranty period had expired.

The BGH first ruled on the escrow case in 1987. In this case, the court argued in favour of having a precise contractual analysis decide on the scope of the transfer obligations. The decisive factor was "to be based on the purpose of the contract and the use of the programs pre-

supposed thereafter". It had to be asked whether the user required the transfer of the sources in order to use the programs. If the user is not entitled to make changes and correct errors, he does not need the source code either. On the contrary: The publication of the source code could now lead to changes in the programs, which could at least make it more difficult, if not impossible, for the software producer to fulfil his obligation to change and maintain the source code.

In its ruling of 16 December 2003, the Federal Court of Justice then emphasised that the express agreement of the parties was the decisive factor. In the absence of such an agreement, the obligation to surrender was to be assessed according to the circumstances of the individual case. In addition to the amount of the agreed remuneration for work, it may be of particular importance whether the program is created for marketing by the customer and whether the customer needs access to the source code for maintenance and further development of the program. In the specific case, particular importance should be attached to the fact that the user intended to continue marketing the software in the cooperative banking sector, as well as to his representation that the source code was required for error correction, maintenance and modification work on the software. In the absence of other indications, these considerations should in themselves indicate that it was agreed that the source code was to be handed over to the plaintiff. Moreover, the agreed remuneration is to be given considerable weight. It does not depend on how many person-months the judicial expert finally considered necessary for the development effort, but on the cost calculation of the manufacturer. This should be decisive for conclusions as to whether the pricing is in favour or against the fact that the transfer of the source code was agreed upon.

Here, the BGH is extending its existing catalogue of indications for the assumption of an obligation to transfer. Not only the existence of a user's right to edit should speak in favour of an obligation to surrender. In addition also price questions and the question of the intended marketing would come. The relation between the criteria is unclear, especially whether they are adjacent to each other or complement each other to form an overall picture. It is also questionable how one can read anything about the source code question in a cost calculation of the manufacturer. In every marketing case, it is crucial to grant the user the right to change and edit the source code. But this brings us to the decisive point. Because the user already has a right of modification to a certain extent by law. § Section 69d (1) UrhG grants him a legal right of modification to ensure the intended use, which cannot be excluded by contract. Also, § 69e UrhG grants him a legal right to decompile the object code - albeit under very restrictive conditions. In this respect, the indication of the user's right to edit the object code mentio-

ned in the older case law no longer applies in the way it used to. As a criterion for a contractual obligation to surrender the software, one will have to take into account whether the user has been granted a comprehensive right to edit the software. This will regularly not be the case with standard software. In this respect, an obligation to surrender software can only be considered for individual software anyway.

The legal situation in Austria is seen somewhat differently. In this case, an obligation to surrender the software requires a corresponding provision in the software creation agreement. In the absence of such a provision, an interpretation geared to the purpose of the contract is required. It is not sufficient that the software to be created should be used for external marketing.

It should also be noted that the question of the transfer of future source codes is also a sensitive one under insolvency law. If the software developer has undertaken to provide program documents in the future, this is not insolvency-proof. This is because under Section 91 (1) InsO, rights to the objects of the insolvency estate cannot be effectively acquired after the opening of the insolvency proceedings. However, dispositions of future objects or rights subject to a condition precedent are insolvency-proof if the object in question has already been created up to the opening of insolvency proceedings and the condition occurs thereafter. This has been recognised by the BGH for the source code transfer. It has since been clarified that a transfer of rights of use subject to a condition precedent is insolvency-proof, unless the insolvency itself is defined as a condition. Accordingly, processing rights can be agreed upon for the case of deposit subject to a condition precedent. A deposit case is the discontinuation or improper performance of the care services conceivable.

2. Depositing the source format

It is conceivable, however, that the source code is made available in sealed form. It is then contractually agreed with the user that he may only break the seal in special, precisely specified cases. Non-compliance with this rule can be sanctioned with a contractual penalty. Typically, the supplier will deposit the source format with a third party and thereby give the user the opportunity to access it in case of insolvency and to maintain his software on his own responsibility. It is therefore necessary to examine to what extent the supplier is obliged to deposit the source format and whether corresponding agreements are at all reasonable.

a) Filing requirements

First of all, it is questionable to what extent the purpose of the software license agreement can justify an obligation to deposit the source format and to transfer it in the event of insolvency.

The commodity character of standard software speaks against such an obligation: standard software is bought as a "mass product" by many users. With such products, however, the buyer basically bears the risk that maintenance or spare parts delivery by the supplier is no longer possible due to insolvency. If he wants to protect himself against this risk when purchasing software, he must include special provisions in the contract and - against payment of a separate fee - secure access to the source format. As a result, the software supplier is not obliged to deposit the source format in good faith.

b) Depository agreements

Deposit agreements can be found in numerous transfer agreements. The core of these agreements is the fiduciary transfer of a copy of the source format to a notary or a depository company. If the supplier later falls into insolvency or is no longer willing or able to fulfil his contractual obligations for other reasons, the user can turn to the trustee and demand that he hand over this copy. The legal status of the trustee is regulated differently in each case: In some cases he is to acquire ownership of the copy of the source format; however, the supplier often reserves ownership and only authorises the trustee to hand over the copy in the event of insolvency.

However, the question of the extent to which such agreements are useful has hardly been discussed so far. Doubts could arise in particular from considerations of IT technology and insolvency law.

aa) computer problems

If a deposit agreement is to achieve its objective, the deposited source format must be checked to ensure that it really corresponds to the program used by the user. Otherwise, the supplier could also deposit any program lines that are worthless for the user with the trustee in order to prevent disclosure of the program structure.

The recommendation of American lawyers typically goes in the direction of contractually enshrining an obligation on the supplier to deposit the correct source format, so that the supplier would be liable for damages if this agreement were breached. However, this breach of contract only becomes apparent in insolvency proceedings when the source format is handed

over; then, however, the user is likely to have great difficulty in obtaining compensation from the software supplier.

Before the insolvency case occurs, however, the question arises to what extent the trustees are able to check the deposited source format for its conformity with the object format. Notaries, for example, are unlikely to be in a position to check the source format for its 'authenticity', as they do not as a rule have the necessary computer skills for such an examination. Even the notary's demand for an affidavit in lieu of an oath of completeness and correctness, which is common in practice, is unlikely to dispel the doubts. It is therefore important to involve technically experienced escrow agents, such as Escrow Europe (Deutschland) GmbH, Escrow International Deutschland GmbH or Hanse Escrow Management GmbH.

But even the deployment of IT specialists in depositaries does not lead any further here: complicated programs often consist of thousands of program lines, the reading of which also requires an immense amount of time and personnel. The source format of the CP/M operating system, for example, comprises several thousand pages, which may take several months to work through even with a large staff of EDP experts.

This problem is further aggravated by the fact that software engineering, i.e. a methodical and clear programming methodology, has not yet become established in the computer industry: programming is still regarded as a breeding ground for daring individuals who are creatively engaged in programming the computer. This programming "style", however, is not conducive to clear programming, due to the frequent use of jump instructions or complex nested chains of commands. A program designed in this way represents a time bomb ticking away silently: Nobody but the programmer himself can overlook the confusing structure of the source format. If, for example, the programmer changes employer, no one can maintain the program and correct errors. Accordingly, it is pointless to store the source format of a program designed in this way.

But even if certain methods of "structured programming" have been used, many source formats, which are initially still clear, become completely unmanageable when programs have to be "patched" when errors occur. The experts entrusted with the analysis are then usually no longer able to comprehend the thoughts of the original program creator.

Moreover, the high costs of the deposit must be taken into account. A one-time deposit fee, annual storage fees and special fees for the deposit of updates or verification of the material are to be paid regularly. In the case of deposit by notaries, the costs are even calculated according to the value of the material within the scope of the KostO.

bb) Insolvency law problems

Deposit agreements are pointless and ineffective if the copy of the source format belongs to the insolvency estate within the meaning of section 35 InsO and the user cannot therefore demand its separation in the event of insolvency. Furthermore, it is important with regard to a possible insolvency challenge that the escrow agreement is concluded directly in connection with the software agreement.

A contractual agreement would be conceivable, according to which the purchaser of the software is considered to be the "manufacturer" within the meaning of § 950 BGB. For this purpose, § 950 of the German Civil Code (BGB), which is part of the law governing matters relating to movable property, would have to be applied analogously. In such a case, however, the user would immediately become the owner of the material without any further conditions, which the parties usually do not want in cases of deposit. Bömer's idea that the depository should only acquire ownership of the physical objects, but the rights to the data could be granted to the user subject to a condition precedent, is also questionable. A separation of ownership and other rights is artificial, especially as a right to data has not yet been recognised.

In fact, a deposit of the source format is generally made in the form of a so-called unbeneficial trust, in which the depository acts in the interest of the software supplier. Such a fiduciary relationship can be established in two different contractual forms.

On the one hand, the depository and the software supplier may be linked to each other within a so-called fiduciary relationship. For example, the contractual conditions of the National Computing Centre, the most important European depository, state: "The Material and Modifications shall remain the confidential property of the owner". The ownership of the copy should therefore remain with the software supplier (trustor), while the depository (trustee) is only entitled to hand it over to the user. In this case, the copy of the source format belongs to the insolvent estate in any case; in this respect, the user's right to segregation is out of the question from the outset. Rather, the insolvency administrator has the obligation to immediately take possession of and administer the source code. As a trustee, the depository is obliged to notify the insolvency administrator that it is in possession of the copy; if it fails to do so or delays the notification, it is liable for all damages resulting from this.

On the other hand, the depository and the software supplier can agree on a so-called true fiduciary relationship, whereby the depository as trustee is to become the owner of the source format. Apparently, the source format is not part of the insolvency estate due to the lack of ownership of the common debtor, so that a right of separation at least of the depository would

be considered. However, literature and case law unanimously assume that in such fiduciary relationships the trustee has only become the "formal" owner of the trust property. The settlor has remained the "material" beneficiary, since more has been transferred to the trustee than would have been necessary for the economic purpose. The trust property therefore continues to belong to the insolvency estate and can be claimed back by the insolvency administrator.

As a result, the user does not have the right to discard the source format. In the event of insolvency, he cannot access the source format. All in all, therefore, suspension agreements are not insolvency-proof and therefore fail to achieve their regulatory objective. The transfer of ownership of the data carriers by way of security and a right of use subject to a condition precedent through the surrender are not in themselves sufficient to establish a claim for surrender against the insolvency administrator.

The deposit agreement is to be regarded as a contract of agency within the meaning of § 675 BGB. According to §§ 115, 116 InsO, the agency agreements expire upon the opening of insolvency proceedings. In this respect, the insolvency administrator then has access to the material and can demand a corresponding return from the depository. Normally, the deposit agreement is a fiduciary relationship under insolvency law. Even if the depositor should obtain ownership of the deposited material, the question of the economic allocation of the object is asked. In this respect, a double trust in favour of the user and the depositing company is to be assumed. In such a case, however, the principle that the trust property falls into the mass still applies. However, the Federal Court of Justice has clarified that an obligation to transfer the trust property to the insolvency administrator can only exist if the trust property has not already been finally removed from the assets of the settlor. In this respect, everything depends on a skilful drafting of the contract with regard to the insolvency agreement, with the aim of bringing about the final withdrawal of the Sources from the assets of the settlor. Any form of an obligation to return the software house must be contractually excluded. In the event of a termination of the escrow agreement, a mere obligation to destroy the software must suffice.

Furthermore, the question of the contestability of the deposit remains to be clarified (section 143 InsO). Finally, it must be ensured that the debtor receives an equivalent consideration directly for the transfer of assets. An indirect disadvantage is sufficient, for example if the usability of the assets would be impaired in favour of a potential buyer of the software company. In this respect, a rescission according to § 134 InsO is particularly possible if the deposit is a gratuitous service of the software house and this service was made earlier than four years before the application to open insolvency proceedings. In this respect, it is urgently recommended to link the deposit with the remuneration for the software deposit and creation.

Dangerous constellations are those in which a deposit agreement is subsequently concluded after conclusion of the software licensing agreement.

cc) Drafting of contracts

In essence, deposit agreements should first consist of a sufficiently specified description of the object of the deposit (programme name; modules; formats). Then the obligations of the provider should be specified. These include, among other things, the transfer of the source code including updates and compilers as well as the assumption of a guarantee for the completeness, correctness and adequacy of the material. The software house must accept that the sources are checked by the depository.

The depository's obligations include, first of all, the obligation to maintain secrecy with regard to the know-how transferred. The sources must be kept safe (especially with regard to risks of damage, theft, humidity, heat). The insurance question must also be clarified with regard to possible damage.

The criteria for release to the user must also be defined. Cases for surrender should be included:

- The opening of insolvency proceedings on the assets or the rejection of an application for insolvency due to lack of assets - proof by presentation of a legally binding decision at least in certified copy,
- deletion of the provider's company name due to lack of assets or entry of the liquidation resolution in the Commercial Register - proof by presentation of a certified extract from the Commercial Register,
- the written consent of the provider to the publication,
- a final judgment or decision regarding the submission of a declaration of consent by the provider,
- the Supplier's delay in fulfilling essential contractual obligations, if the setting of a deadline with the threat of a demand for return is fruitless - proof by presentation of a registered letter with return receipt and an affidavit of the user and
- other cases where the supplier ceases its activities (outsourcing, loss of key programmers).

3. Obligations of the user

The user also has obligations. He may only use the material for contractual purposes. A commercial use of the material can be excluded, for example. Further obligations of secrecy are to be regulated.

II. Envelope contracts

Literatur:

Contreras/Slade, Click-Wrap Agreements: Background and Guidelines for Enforceability, CRi 4/2000, 104; *Davidson/Bergs*, Open, Click or Download: What Have You Agreed To?

The Possibilities Seem Endless, *The Computer Lawyer* Vol. 16, No. 4, April 1999, 1; *Karger*, Download im Rahmen bestehender Softwareüberlassungs- und Pflegeverträge. Probleme mit Click-Wrap-Agreements, *ITRB* 2003, 134; *Kreutzer*, Verbraucherschutz bei digitalen Medien, Hamburg 2006; *Schulz*, Dezentrale Softwareentwicklungs- und Softwarevermarktungskonzepte, Köln 2005; *Söder*, Schutzhüllenverträge und shrink wrap license, München 2006.

The software industry uses three different ways to make direct agreements with the user:

On the one hand, it attempts to conclude so-called shrink-wrap licensing agreements with the user, which are usually concluded as follows: A user buys a software package in a specialist shop and goes home with it. There he discovers that this package is shrink-wrapped or that the data carrier is sealed with a sticker. Enclosed he will find a piece of paper on which the manufacturer's terms and conditions are printed - together with the note that by opening the protective cover or removing the sticker the user agrees to these terms and conditions. In addition, the user has the right to return the software package if he has not removed the seal and does not agree with the GTC.

In addition, the software packages often contain pre-printed agreements (RETURN agreements) which the user must sign and return to the manufacturer. Software manufacturers such as BORLAND or MICROSOFT have now started to enclose pre-printed acknowledgement cards with their software packages in addition to their GTC, which the user must sign and return to the manufacturer.

Finally, software manufacturers often enclose their GTCs with the program package (ENTER agreements) and point out to the user during the program run that the use of the software also includes an implied agreement to the manufacturer's GTCs.

The marketing of such contract models is legally bizarre. One speaks here of End User License Agreements (EULA) and thereby gives the impression that these are contracts that the end customer has to conclude with the manufacturer. The term "license" is also nebulous; German copyright law does not recognize a "license". The end user does not need a "licence" from the manufacturer; he has contracts with the dealer which entitle him to use the product. All acts of use necessary for the use of the program are already permitted to him by virtue of § 69d para. 1 UrhG and the statutory right of use contained therein. In the USA, attempts have been made to make EULA contract models effective by means of special laws. According to UCITA, license agreements should also be valid if the user can only view them after purchasing the software. In addition, the software producers should have the right to technically disable the "license". The proposed law has never been enforced; it has only been applied in a few states (in Maryland and Virginia).

In legal terms, EULAs are an attempt by the manufacturer to conclude a second contract with the user - in addition to the agreement with the dealer. The software package with the mentioned protective cover and the visible contractual conditions is the legally effective offer of the manufacturer to the purchaser to conclude a "license agreement". However, the tearing of the protective cover by the purchaser is an action which directly only has the purpose of removing an obstacle to the use of the software. A direct declaration of acceptance is therefore not present. However, a behaviour which directly aims only at an actual success cannot indirectly express a legal consequence, i.e. be evaluated as a declaration of intent. Protective cover contracts are consequently ineffective in the absence of the user's consent to the conclusion of the contract. The same applies to attempts to construct a contract by pressing the Enter key.

III. Application Service Providing and Cloud Computing

Literatur:

Bisges, Urheberrechtliche Aspekte des Cloud Computing - Wirtschaftlicher Vorteil gegenüber herkömmlicher Softwareüberlassung?, MMR 2012, 574; *Boos/Kroschwald/Wicker*, Datenschutz bei Cloud Computing zwischen TKG, TMG und BDSG. ZD 2013, 205; *Czychowski/Bröcker*, ASP – Ein Auslaufmodell für das Urheberrecht?, MMR 2002, 81; *Dietrich*, ASP – öffentliche Zugänglichmachung oder unbenannte Nutzungsart, ZUM 2010, 567; *Grützmacher*, Application Service Providing – Urhebervertragsrechtliche Aspekte, ITRB 2001, 59; *Lehmann/Giedke*, Urheberrechtliche Fragen des Cloud Computings, CR 2013, 681; *Müller*, Cloud und Privatkopie, ZUM 2014, 11; *Pötters*, Beschäftigtendaten in der Cloud, NZA 2013, 1055; *Pohle/Ammann*, Über den Wolken – Chancen und Risiken des Cloud Computing, CR 2009, 273; *Schultze-Melling*, IT-Compliance in a Globalized World, CRi 2008, 142; *Sujecki*, Internationales Privatrecht und Cloud Computing aus europäischer Perspektive, K&R 2013, 312; *Wagner/Blaufuß*, Datenexport als juristische Herausforderung: Cloud Computing, BB 2012, 1751; *Wicker*, Durchsuchung in der Cloud - Nutzung von Cloud-Speichern und der strafprozessuale Zugriff deutscher Ermittlungsbehörden, MMR 2013, 76; *Witzel*, Gewährleistung und Haftung in Application Service Providing-Verträgen. Ausgestaltung von Gewährleistung und Haftung in ASP-Verträgen, ITRB 2002, 183; *Zech*, Lizenzen für die Benutzung von Musik, Film und E-Books in der Cloud, ZUM 2014, 3.

Due to the different areas of application and forms of data outsourcing, the use of outsourcing service providers affects a wide range of legal areas. Especially with regard to the possibilities of an international distribution of resources, an exact analysis of the legal regulations affected in each individual case and the consequences associated with them is necessary. In particular, the provisions of the Federal Data Protection Act (BDSG) must be observed in German law. In addition, there are user-dependent product and industry-specific features (e.g. AO).

In addition to the framework conditions of German law considered and assessed here, it should be noted, however, that additional risks may arise from foreign laws. As an example, "pretrial discovery" should be mentioned here. Pretrial discovery is a special feature of

Anglo-Saxon procedural law and has taken on a special character, particularly in the USA. The pretrial discovery procedure, which is defined in the Federal Rules of Civil Procedure (Fed. R. Civ. P.), is a very far-reaching procedure for the determination of evidence prior to the oral proceedings. Risks emanating from foreign legal systems should be additionally assessed in a case-by-case review for the respective country.

1. Purpose of the contract

The ASP (Application Service Providing) concept has been around since the 1970s. By means of "time-sharing services", computers and applications were made available to small and medium-sized companies. Today, especially industry-specific applications are rented in the network to save expensive investments in IT structures and know-how. The software applications are located in a powerful, secure and highly available data center (Internet data center). The products are rented for a fee.

The ASP business is linked to the Internet in such a way that "Software as a Service" (SaaS) is offered. The Internet is used to access external servers that hold the software in stock. In this way, they can always access the latest software versions without having to purchase or rent the expensive software directly. However, such a process requires that the software is ASP-compatible. It must be web-capable, scalable and multi-user capable. As an infrastructure, an efficient computer centre is a basic requirement for ASP business operations. ASP is sold by specialized ASPs; these can be software companies as well as Internet service providers or telecommunications companies. The software manufacturer itself can also come into play as an ASP. ASP software can be offered by way of emulation, where the user has only one user interface to access the software. However, it is also conceivable to use maintenance ASP, where the user can maintain and update the software. The services offered also vary from the mere use of the software to functionalities such as payroll accounting or the so-called full-service provider.

From the purpose of the contract, the service profile of ASP consists of the fact that the provider is and remains the owner of the respective software. He offers an IT infrastructure that can be used for a monthly service fee. The ASP also takes care of system management and guarantees access via the Internet. With such a profile, the main service obligations of the contractor consist of providing hardware whose capacity the user can use temporarily. The capacities depend on the system, time of day and connections; a transfer point is to be defined, for example from the VPN.

Another problem of new types of software use is the legal classification of the business models cloud and grid computing. Grid computing is the use of resources of remote computers for electronic data processing. Here, the data exchange between the communicating computers takes place via Internet connections. The term cloud computing, on the other hand, refers to the possibility of using applications and services in the described infrastructure, whereby not only the right of use is made available, but also filespace and databases, i.e. services that go beyond conventional ASP. The fact that the user can no longer trace on which server his data is stored once he has entered it into the "cloud" means that there is a data protection problem as soon as personal data is involved. But questions of civil liability for data loss and lack of security are also largely unresolved.

2. Legal nature

The legal nature of ASP is controversial. Typically, a complex long-term contract with various service elements is assumed here. The classification of ASP contracts is otherwise disputed. Based on contracts for the use of technical infrastructure, a classification as a lease agreement is obvious. It is true that the ASP does not leave online use to the ASP end customer permanently, but only provides him with network access and software when the customer activates access from his computer. The permanent use of a particular item, which in itself is a feature of tenancy law, is thus only guaranteed for the length of the online session, but not for the entire term of the contract. However, agreements which are not aimed at the procurement of possession but only at the brief use of an object are also subject to tenancy law. In this sense, the Federal Court of Justice qualified a computer centre contract under which the customer had access to the remote data transmission capacities of a computer centre as a rental contract. In a recent ruling on ASP contracts, the Federal Court of Justice (BGH) has accepted the classification as a rental agreement which has as its object the transfer of use of a movable object against payment. As a typical service, the granting of online use of software for a limited period of time is the focus of contractual obligations. The application of tenancy law is not precluded by the fact that the software is not an object within the meaning of § 90 BGB. The BGH has repeatedly ruled that standard software embodied on a data carrier is to be regarded as a movable object to which rental or purchase law is applicable, depending on the agreed form of transfer.

Even if the user does not obtain ownership of the software, this does not exclude a classification under a lease agreement, as the sole use of the product for lease is not mandatory. In this respect it does not bother that the software is released for access by different users. An additi-

onal work contract element can be added by the fact that success with regard to the customer's business processes is also owed.

Other authors do not consider tenancy law to be applicable. Although tenancy law does not necessarily require the leased property to be handed over, it does at least provide the possibility of actual access to the property (albeit for a limited period of time). This could not be said in the case of ASP, which offers a mere possibility of use. With ASP the Provider does not want to take over also regularly the "success thought" of the work contract right (§§ 631 ff. BGB). The most likely way is to think of applying the provisions on the contract of employment (§§ 611 ff. BGB).

3. Leasing: copyright - contractual

With regard to the classification as rent, problems arise if one considers that the principle of exhaustion in copyright law does not apply to subletting in accordance with Section 69c No. 3 sentence 2 UrhG old. In this respect, the ASP requires a separate consent of the rights holders for the use of the software in the ASP network and cannot claim to have purchased the software. However, it is disputed whether one can even speak of subletting if the software is made available online for access.

The relationship between ASP and Open Source is also difficult. The GPL does not contain a rule that allows you to charge a fee when renting software. If ASP were to be regarded as a rental, this could therefore lead to a conflict with the GPL.

4. Main obligations

a) Performance obligation

aa) Success owed

ASP contracts must be technically precisely coordinated. For example, it must be clarified which technical data is guaranteed in SLAs. Contractual penalties regulate the failure of the system. In general, the security precautions in the data center and security management (firewall, encryption, authentication) must be specified. A contingency plan for unexpected web traffic is required; the question of data protection by backups should also be discussed. In addition, key data of the user support (24h availability) are to be included.

In the case of ASP contracts, it is above all the availability of transmission capacity that creates problems. If the telecommunications connection between the customer and the data center fails, the company cannot operate. The data center should not only ensure high availability

rates, but also build up backup structures. In essence, the technical data of the ASP business must be specified in an SLA. This includes questions such as the bandwidth of the connection and the monthly transfer volume. With regard to the owed access success, annual availability rates must be specified. It must also be regulated how quickly access to the software is restored in the event of a fault. Any maintenance windows must also be specified precisely.

bb) Things

With regard to the delivery items to be provided, it should be noted that not only access to the software is owed, but also the provision of appropriate documentation. Online documentation is sufficient here. The documentation must in any case contain brief installation instructions. The provision of documentation cannot be replaced by the provider referring to training programs.

cc) Rights

Incidentally, when granting rights, it should be noted that the emulation of the ASP software on the user interface, i.e. the mere program flow according to h.M., does not constitute a reproduction. Something different would possibly apply if, in addition to the user interface, the software were also stored in the computer's main memory (RAM). With the maintenance ASP (see above) this problem is definitely given, because here the user does not only look at the corresponding ASP software on the user interface, but has increased access to the software via the working memory. Again, it is unclear whether this is a case of subletting under copyright law or whether it is a case of making the software available to the public (§ 19a UrhG).

b) Remuneration

The ASP customer typically owes the remuneration stipulated in the rental agreement on a monthly basis. The rent usually increases if the customer comes to an unauthorized overuse. However, proof is required that the customer is responsible for the overuse or use by third parties. The latter is especially the case if the customer is negligent with passwords. The remuneration is typically invoiced monthly. In order to simplify payment, the obligation to pay is coupled with a direct debit order. A regulation on the exclusion of objections with regard to the invoice amount would also be conceivable. It would then have to be specified that objections to the invoice amount can only be raised in writing within six weeks of receipt by the provider.

If ASP business is to be classified as a rental agreement, the lessor/ASP provider is responsible for maintenance and repair (§ 535 para. 1 sentence 2 BGB). Every restriction of the usability

ty of the ASP system automatically leads to a reduction of the rental fees, § 536 para. 1 BGB. It should be noted that the BGH has considered CPU increase clauses to be effective for rental solutions; in this respect, the ASP can demand an increased usage fee in the event of changes to the technical infrastructure on the user side.

5. Additional performance obligations

In the case of ancillary service obligations, it is disputed whether a ban on the use of equipment from other manufacturers can be pronounced. It is true that such a ban is acknowledged in the literature. In my opinion, however, this is not correct, as a blanket exclusion of the use of third-party software and hardware would place an excessive burden on the lessee. This applies in particular to cases where the use of the other equipment and programs does not have a negative effect on the rented software. It takes sufficient account of the interests of the Lessor to accept an exclusion of liability in his favour for damages caused by the connection of the leased software with the IT of third party manufacturers.

Unwritten there is an obligation for data backup on the part of the customer. The creation of a requirements specification is the responsibility of the customer; if the provider creates such a requirements specification for the customer, this is an additional contractual service. The ASP provider for his part is obligated to take care of the obtaining of the necessary rights by means of a collateral contract. Here it is above all important that the provider is aware of the fact that the copyright classification of ASP is unclear. It should also be noted that ASP is typically a separate type of use that is not covered by old contracts (see § 31 (5) UrhG).

In all other respects, the customer's obligation to cooperate is part of the contract:

- the cooperation in quality assurance measures
- the provision of all information required by the ASP
- the designation of contact persons
- the provision of test data
- the granting of access to the customer's premises
- the message where the customer's legacy data is to be transferred to
- the temporary suspension of use during maintenance periods.

For its part, the customer has the obligation to accept updates, if necessary, from § 242 BGB. If the customer is generally obliged by GTC to accept each update, this would be a violation of § 307 BGB, if the customer is not granted a special right of termination in the case of such a far-reaching obligation.

Also important in this context is the post-contractual breach of duty ("culpa post pactum finitum"). If the contract is terminated, the customer has the right to remove his own data (§ 539 para. 2 BGB). However, this right of removal is subject to a short limitation period of six months from termination of the contract (§ 548 para. 2 BGB). According to § 307 para. 2 BGB in connection with § 539 para. 2 BGB a clause is ineffective which provides for a right of the Provider to delete all data in such a case. The contents provided by the customer are rightfully entitled to the provider. In this respect the ASP is obliged to hand over all backup copies. Furthermore, the client is entitled to deletion claims for reasons of data protection (§ 35 para. 2 no. 3 BDSG).

6. Data protection law

The purpose of data protection law is to protect the individual from having his or her personal rights affected by the handling of personal data. If the cloud provider processes personal data, the provisions of the DSGVO must be observed.

a) Processing of personal data

Especially when using cloud-based systems, software and data are no longer processed and stored locally, but on an external infrastructure. This regularly affects personal data. According to Art. 4 No. 1 DSGVO, personal data is all information relating to an identified or identifiable natural person. The processing of this data is only permitted if one of the conditions listed in Art. 6 Paragraph 1 DSGVO is fulfilled, whereby in particular the consent of the person concerned is considered. In practice, however, it will be virtually impossible to obtain the consent of all persons affected by the processing.

b) Contract data processing

Furthermore, in the context of the processing of personal data, it is possible that the controller does not process the data alone, but rather by order of a natural or legal person, authority, institution or other body which processes personal data on behalf of the controller (Art. 4 No. 8 DPA). In this case, one speaks of commissioned data processing, which is regulated in Art. 28 DSGVO.

Numerous requirements must be met in order for commissioned data processing to be permissible. For example, the party responsible for data processing must select only those processors who offer sufficient guarantees that appropriate technical and organisational measures are implemented in such a way that processing is carried out in compliance with the requirements

of the DPA and guarantees the protection of the rights of the data subject (Art. 28 para. 1 DPA). Once a processor has been selected, he or she must be subject to instructions from the controller with regard to data processing (Art. 29 DPA).

If the processor wishes to use other processors, he may only do so with the written consent of the original controller (Art. 28 para. 2 DPA). This ensures that the person responsible always retains control of the data processing. This is important because, despite the involvement of other bodies, the controller is responsible to the data subject for compliance with the data protection regulations and is liable in the event of a breach. In addition, the same data protection obligations are imposed on each additional processor as were established in the relationship between the controller and the original processor (Art. 28 Para. 4 DSGVO).

The contract processing relationship, whether between the responsible person and the processor or between the processor and other processors, must be established in writing by contract or other legal act (Art. 28 para. 9 DPA). This must contain all essential points, in particular the object and duration of the processing, the nature and purpose of the processing, the type of personal data, the categories of persons concerned and the obligations and rights of the controller (Art. 28 para. 3 DPAO). This ensures that the processor is bound by the controller. The processor is subject to a number of obligations, including the obligation to maintain confidentiality and to provide the controller with all information required to demonstrate compliance with data protection regulations.

The situation is different in the case of cloud computing. In principle, this form of control described above contradicts the concept of cloud computing, since the flexible handling of resources used by the cloud provider in detail should ensure optimal utilization of storage and servers. A splitting of data packages or a short-term data shift to other (e.g. storage) resources is therefore not unusual, but rather part of the actual cloud concept. This is what gives the "cloud" the great advantage of dynamically adapting resource requirements to current needs. However, this has the consequence that the client either does not know the resources used or cannot even determine them in general. A controlling access to the data, e.g. an access and access control by the customer for all data processing in the cloud, is therefore not easily possible with the original concept of cloud computing. A conceivable solution to this problem is for the cloud provider to make a data protection offer within the framework of the contract and thus ensure, for example, that the data remains within the EU area.

c) Placing of orders in third countries

If a contractor based in a third country (outside the EU/EEA) is commissioned or if data processing is to take place in such a third country, additional requirements must be met. In the case of data processing outside the EU/EEA, the principle of an adequate level of data protection in the recipient country and the associated provisions of Art. 44 - 50 DSGVO apply. For a data transfer to a third country to be possible, there must either be a Commission adequacy decision with regard to the data level of the third country (Art. 45 DPA) or other appropriate safeguards provided by the controller or processor (Art. 46 DPA), in particular binding internal data protection rules (Art. 47 DPA). In addition, the consent of the data subject may also lead to the permissibility of the data transfer, whereby there is an express duty to inform the data subject of the possible risks of such a transfer (Art. 49 para. 1 lit. a) DSGVO). The transfer of data to third countries is therefore permissible above all if an adequate level of data protection exists there. In this context, the DSGVO does not introduce any innovations compared to the previously applicable BDSG.

Pursuant to Art. 45 para. 9 DSGVO, binding statements by the Commission, which it has issued in the context of Art. 25 para. 6 DPA on the adequate level of data protection in third countries, remain in force until they are amended, replaced or repealed by a Commission decision. For the following countries, corresponding adequacy decisions were taken under the then existing Art. 25 (6) Data Protection Directive in accordance with the old legal situation and are still in force today:

- Andorra (ABl. v. 21.10.2010, Nr. L 277/27),
- Argentina (ABl. EG v. 5. 7. 2003, Nr. L 168/19),
- Australia, special case PNR data (ABl. EG v. 8. 8. 2008, Nr. L 213/47),
- Faroes (Abl. v. 5.3.2010, Nr. L 58/17),
- Guernsey (ABl. EG v. 25. 11. 2003, Nr. L 308/27),
- Israel (Abl. v. 1.2.2011, Nr. L 27/39),
- Isle of Man (ABl. EG v. 30. 4. 2004, Nr. L 151/51 sowie Berichtigung in ABl. EG v. 10. 6. 2004, Nr. L 208/47),
- Jersey (ABl. EG v. 28. 5. 2008, Nr. L 138/21),
- Canada (ABl. EG v. 4. 1. 2000. Nr. L 2/13), Sonderfall PNR-Daten (ABl. EG v. 29. 3. 2006, Nr. L 91/49),
- New Zealand, (Abl. v. 30.1.2013, Nr. L 28/12),
- Switzerland (ABl. EG v. 25. 8. 2000, Nr. L 215/1),

- Uruguay (Abl. v. 23.8.2012, Nr. L 227/11).¹⁵⁹

d) Special features USA

The Commission had taken a specific decision concerning data transfers to the USA. According to this decision, the "safe harbor" package negotiated with the US Department of Commerce guaranteed adequate data protection. This was conditional on the recipient in the USA agreeing to comply with certain data protection principles by means of a declaration to the relevant US authority. However, in its ruling of 6 October 2015, the European Court of Justice overturned the safe harbour package that had been in force until then, as it contained an exception rule that allowed authorities to generally access the content of electronic communications. This was a violation of the essence of the fundamental right to respect for private life. In order to continue to allow data transfer to the USA, which is not recognised as a third country with an adequate level of data protection, the EU Commission subsequently developed the so-called EU-US Privacy Shield. As a result, an appropriate level of data protection in the USA was decided on July 12, 2016, so that data transfer to the USA has been possible on the basis of the privacy shield since then.

e) Possibility of circumvention through encryption techniques

Actually the encryption of data is assigned to the area of data security. In principle, however, the question arises as to whether no personal data may be transported at all when using appropriate encryption techniques and the subsequent transmission, since Art. 4 No. 1 DPA defines personal data as information relating to an identified or identifiable natural person. However, this information is not transported in an encrypted data record. It is true that the encrypted data still constitute personal data for the body holding the "key". However, the encryption has the consequence that the personal reference is excluded for all non-key holders, since the content of the data can only be accessed by means of an unauthorized, usually complex decryption. The data is therefore not personal, but anonymous data for persons to whom the code is inaccessible, so that the DSGVO is no longer applicable. There is no need for protection against the mere disclosure of the data, as no personal information is transmitted. The key code, however, must be absolutely inaccessible to third parties. If the code is subsequently disclosed, the previously anonymous data becomes personal data. It is crucial that the encryption can be classified as secure according to the current state of the art and that

¹⁵⁹ Pauly, in: Paal/Pauly, DS-GVO BDSG, 2. Aufl. 2018, Art. 45 DSGVO Rn. 34.

there is no danger of decoding by unauthorized third parties. For effective encryption, the keys must be secret. However, the secrecy of the key must under no circumstances be confused with the secrecy of the encryption algorithm itself, the disclosure of which even contributes to the security of the encryption according to the so-called Kerckhoff principle. Whether the necessary security standards have been observed must be proven by the person encrypting the data in case of doubt. The DSGVO is therefore generally applicable to the transmission of encrypted data, unless the data exporter proves that the data is securely encrypted and that only the person concerned or an authorised person in accordance with the DSGVO can view the data with the key.

7. German Fiscal Code (AO)

If the contractor is to process data relevant to tax law, the provisions of §§ 146 ff. AO are to be observed.

a) Financial accounting in Germany

According to § 146 Abs. 2 sentence 1 AO books and the otherwise necessary recordings are to be led and kept in principle in the area of application of this law. In this respect, outsourcing electronic data to a contractor in Germany is unproblematic with regard to the AO.

b) Financial accounting abroad

aa) In EU/EEA

After § 146 Abs. 2a AO the responsible tax authority can approve on written request of the taxpayer that electronic books and other necessary electronic recordings or parts of it outside of the area of application of the AO in an EU member state or an EEA member state can be led and kept. A condition for a permission is that the taxpayer communicates the location of the data processing system to the responsible tax authority and with assignment of a third party design name and address, the taxpayer its obligations resulting from the §§ 90, 93, 97, 140 to 147 AO and 200 exp. 1 and 2 AO duly fulfilled, the access to data of the German tax authority after § 147 exp. 6 AO in its entirety is possible and the taxation is not impaired thereby. In addition, the obligation of a comprehensive procedure documentation exists. If these conditions are present with an application for shifting of the electronic bookkeeping into the EU/EEA foreign country, a claim of the taxpayer on permission by the tax office is to be affirmed; if however the conditions of the No. 1 or No. 2 are not fulfilled, the tax office may grant the permission according to § 146 exp. 2a sentence 2 No. 5 AO only if the taxation is not impaired thereby. For the area of "regular outsourcing", outsourcing of financial ac-

counting within the EU or EEA does not therefore give rise to any major problems. The requirements of the AO can be fulfilled by the client without exception. With regard to the cloud computing concept, the problem of location information arises due to the flexible data storage already described. Due to the design of cloud systems, it is not possible to name a concrete location of the data processing system without further ado. However, the dynamic adjustment of the IT systems to the requirements of the financial authorities is in no way hindered by the access of the financial authorities. As a result, access by the authorities within the framework of cloud computing remains identical to that of "regular outsourcing".

bb) Outside EU/EEA

A relocation of electronic accounting to the rest of the world is permitted, under the same conditions as outsourcing within the EU (see above aa) and § 146 para. 2a AO). In essence, the tax authorities will only approve such a relocation if the taxation is not affected by it. When a taxation is not impaired, results neither directly from Abs. 2a nor from the law materials or from § 148 AO, in which also this element of fact is used; decisive might be that an electronic exterior examination is possible for the German tax office according to § 147 Abs. 6 AO and the taxpayer did not injure his tax obligations up to now. The booking vouchers available in paper form must remain in the inland. The approval is a discretionary decision and represents an administrative act. If the foreign office revokes its approval for access by the German tax authorities, the approval for the relocation of electronic accounting must be revoked and the relocation of EDP accounting back to Germany must be demanded and proven by the taxpayer. If the taxpayer does not comply with this request, a so-called delay money (in the amount of 2500 € to 250 000 €) can be assessed against him. The late payment represents a penalty payment in the sense of § 329 AO, since it is directed at the performance of an act or toleration of the taxpayer.

c) Consequences of incorrect accounting

Where errors are corrected without prejudice, the accounting result must be corrected on the basis of supporting documents and records. The situation is different, however, if material transactions are incorrectly presented. According to § 158 AO only the proper bookkeeping has probative force. A not proper bookkeeping can lead to an estimate after § 162 AO, to coercive means after § 328 AO or to a punishment after § 379 Abs. 1 AO. In the case of cessation of payments or insolvency it can also lead to a punishment according to § 283 StGB (bankruptcy) or § 283b StGB (violation of the bookkeeping obligation).

8. Works Constitution Act (BetrVG)

The provision of § 87 BetrVG regulates the mandatory right of co-determination of the works council in social matters. The regulation concerns the core range of the participation and codetermination of the employees. The operating partners must agree on all measures and decisions, which refer to the affairs specified in ? 87 exp. 1 BetrVG. There is a positive consensus principle. Neither the employer nor the works council can act effectively without the consent of the other party. If a company's data is outsourced by way of data outsourcing, the installation of a digital access system is mandatory in order to continue to guarantee employees access to the company's data. As a rule, this is done by a password-protected user account system (via intranet or internet). As a result, the employer is able to monitor the work behavior and possibly also the work performance of the employees by assigning individual user accounts to specific employees. The installation of such an access system triggers the co-determination right of the works council § 87 BetrVG. The work council has a right of co-determination according to § 87 exp. 1 No. 6 BetrVG, as far as a legal or collective agreement regulation does not exist, with the introduction and application of technical mechanisms, which are suitable or intended for it to supervise the behavior or the achievement of the employees. The co-determination facts of § 87 exp. 1 No. 6 BetrVG cover only such monitoring measures, which are accomplished with the help of technical mechanisms. By the employment of this technical monitoring equipment data must be raised, which permit conclusions on the behavior and/or the achievement of the employees. In addition, the technical equipment used by the employer to monitor workers must have an independent monitoring function. In addition, the use of the technical equipment must be objectively suitable for monitoring the behaviour or performance of workers, given the technical conditions of the equipment and the specific way in which it is used. However, the employer's intention to monitor or the subsequent use of the information obtained from the technical device is irrelevant. It is also immaterial whether the technical device is a measure necessary for the work or whether the monitoring of the worker is merely a side effect of the use of the technical device. However, the works council's right of participation is not open if there is only a theoretical possibility of monitoring the employees by a technical device. Works council involvement is only necessary if the equipment has a concrete function to monitor the behaviour or performance of the employees. If a technical process is controlled by the use of the technical equipment, a monitoring in the sense of § 87 exp. 1 No. 6 BetrVG is present only if the use of

the technical equipment makes at the same time a user control possible or permits conclusions on the behavior or the achievement third.¹⁶⁰ A data access system will regularly allow conclusions to be drawn about the behaviour and performance of employees. The works council's right of co-determination pursuant to § 87 (1) no. 6 BetrVG therefore also applies to the use of technical equipment when using e-mails and when using the Internet as well as access control systems to the Internet. The works council can demand that the employer refrain from measures which violate its co-determination rights. The right to injunctive relief must be asserted in the resolution procedure. After the resolution has become final and absolute, it can be revoked in accordance with § 85 Paragraph 1 ArbGG, §§ 888 ff. ZPO can be enforced. If the measure continues to have an effect, the works council can also take legal action to have the measure reversed. On the other hand, electronic monitoring of the employee at the workplace, which is aimed solely at monitoring the employee's behaviour, is generally not permitted in Switzerland under Article 26 of Regulation 3 of the Labour Code, and the results collected with the spyware cannot therefore be used in court. Instead, the employer must already use preventive measures (blocking).

IV. General Public License (GPL)

literature:

Andreewitz, Opensource und proprietäre Software: Das Verknüpfungsproblem, Medien und Recht 2005, 240; *Auer-Reinsdorff*, Escrow-Lizenzen und Open Source Software – Regelungsbedarf in Escrow-Vereinbarungen, ITRB 2009, 69; *Beardwood/Alleyne*, Open Source Hybrids and the Final GPLv3, CRi 2008, 14; *Demmel/Herten-Koch*, Vergaberechtliche Probleme bei der Beschaffung von Open-Source-Software, NZBau 2004, 187; *Funk/Zeifang*, Die GNU General Public License, Version 3 – Eine Analyse ausgewählter Neuregelungen aus dem Blickwinkel deutschen Rechts, CR 2007, 61; *Heussen*, Rechtliche Verantwortungsebenen und dingliche Verfügungen bei der Überlassung von Open Source Software, MMR 2004, 445; *Jaeger/Metzger*, Open Content-Lizenzen nach deutschem Recht, MMR 2003, 431; *Jaeger/Metzger*, Open Source Software. Rechtliche Rahmenbedingungen der Freien Software, 2. Aufl., München 2006; *Jaeger/Metzger*, Open Source Software and German Copyright Law, IIC 2001, 52; *Jaeger/Metzger*, Open Source Software und deutsches Urheberrecht, GRUR Int. 1999, 839; *Jaeger/Metzger*, Die neue Version 3 der GNU General Public License, GRUR 2008, 130; *Koch*, Probleme beim Wechsel zur Version 3 der General Public License (Teil 1) – Die neuen Regelungen in Version 3 der GPL, ITRB 2008, 261; *Platz*, Open Contents im deutschen Urheberrecht, GRUR 2002, 670; *Spindler* (Hrsg.), Rechtsfragen bei Open Source, Köln 2004; *Strobel*, So content with Open Content – Zufriedenheit dank Open-Content-Lizenz?, MMR 2003, 778.

¹⁶⁰ BAG, Beschl. v. 9.9.1975 – 1 ABR 20/74, NJW 1976, 261.

The "General Public License" (GNU/GPL) version 3 (see 9. Chapter Model Contracts, VII.) from 2007, developed by the GNU system under the leadership of Richard Stallman and published by the "Free Software Foundation", is considered the basic model for Open Source Software licenses. As a genuine so-called "copyleft" license, it grants an unlimited, simple right of use free of charge and in return relieves the contractual partners of the obligation to release their modifications for general use in accordance with the GPL conditions. Despite the occasional designation as free software, the author has not waived his rights. In addition to the GPL, there is also the BSD Copyright License. The BSD license applies in particular to the use of Unix. The Apache software license is also important, which is mainly used in the web software sector. The BSD and Apache licenses allow the marketing of adaptations as proprietary products and in this respect they differ strongly from the GPL. Therefore, there is no compulsion to distribute completed versions of the software based on open source products under an open source license. Since the release of the GNU General Public License Version 3 (GNU GPLv3), which in No. 4 Para. 2 allows that the remuneration for making a copy of a program or making it available to the public can be freely determined, the attractiveness of recourse to free software has increased.

An additional difficulty in dealing with open source licenses usually results from the fact that these licenses originate from the North American legal area and therefore there are regularly problems of interpretation in the light of the German legal system. This applies especially to questions of interpretation in connection with the German principle of abstraction, but also to the lack of an obligation under the law of obligations, since those licenses do not know any obligations for users to pay consideration.

The FSF has so far only approved the original English versions of the GNU licenses, because making qualified translations into other languages is too complicated and expensive. Any translation error could shake the entire open source community. Since the licenses usually do not contain any choice of law clauses, the principles of private international law apply accordingly. Essential in this context are essentially the conflict-of-law regulations Rome I (EC No. 593/2008) and Rome II (EC No. 864/2007) of the European Union, as well as international copyright law, for example in the form of Article 27 (I) AEMR..

In order to create legal certainty, it is always advisable to include a choice of law clause when drafting the respective framework contract under the law of obligations (software licensing, software development, maintenance), with the provision that German law should apply to disputes, excluding the UN Convention on Contracts for the International Sale of Goods.

The effectiveness of the GPL is largely accepted and accepted today. In August 2008 the United States Court of Appeals for the Federal Circuit ruled in favour of a programmer who had published a free program for controlling model railways under the open "Artistic License". The defendant had used the source code commercially without the necessary attribution. The district court had only seen this as a breach of contract. However, the Federal Court overturned this decision, as it considered the violation of the requirements of an open license to be a copyright infringement. Similar decisions were made in Germany by the LG München and LG Frankfurt a.M. In its reasons for the ruling, the United States Court of Appeals for the Federal Circuit also explicitly mentions Creative Commons licenses and the use of the GPL for Linux. In the same way, the District Court of Amsterdam affirmed the validity of a Creative Commons license for photos and awarded damages for violation. The district court of Bochum has also accepted a claim for damages and information due to violation of open source conditions for software, despite the fact that it was provided free of charge. The compatibility of the GPL with the German copyright and cartel law has been confirmed by various courts in this respect, these are general terms and conditions.

Most open source licenses are based on the so-called copyleft principle, which basically allows the licensee to make and distribute copies of the program source code on any media under certain conditions (see GPLv3 No. 1). In addition, Licensee may create its own works and modifications based on the original program, whereby those license terms shall apply to the work as a whole and the new software version may only be distributed including the entire source code.

From this copyleft principle of § 3 GPLv2, in the opinion of the LG Hamburg, a simple right of use is only granted if the user undertakes to offer the adaptation or modification created by him again under the conditions of GPLv2. This is the only way - according to the Regional Court - to ensure the further development and improvement of the Open Source software offered under a GPLv2. According to § 4 GPLv2, a violation of the provisions of GPLv2 automatically leads to a loss of all rights of use. Therefore, it is an offence terminating the rights of use if the complete source code for the corresponding object code is not published. With regard to a risk of repetition within the meaning of § 97 (1) UrhG, the Halle Regional Court assumed that this risk was already indicated after a first violation of the provisions of GPLv3. Furthermore, offering software under the license GPLv2 without reference to the GPL and without including the license text and source code is illegal.

If an open source code is mixed with a commercial program, it is called an "open source hybrid". Here the problem arises that the conditions under which the use of the OS source is

permitted are transferred to the commercial hybrid product as a so-called "viral effect" and classify it as Open Source overall, but at the same time a violation of the GPLv3 leads to the expiration of the rights of use. If the OS conditions are not met, this may result in the entire product no longer being allowed to be used. The LG Frankfurt a.M. has granted a claim for injunctive relief for copyright infringement due to violation of the GNU GPL by referring to § 139 BGB and the resulting total nullity of the granting of rights, but refrained from an assessment of the case under cartel law. However, this is not to be followed in this way; because the GPL is about general terms and conditions, § 306 BGB takes precedence as *lex specialis*. According to § 306 para. 1 BGB, the contract remains valid for the rest in case of invalidity of the GTC. The exception rule of § 306 (3) BGB has not yet acquired any practical significance. It should therefore have been examined further.

The wording "provided that the following conditions are met" refers to a grant of use which is linked to a resolutive condition in the sense of § 158 para. 2 BGB. This construction of conditions should also apply to open source distribution under version GPL 3.

The legal nature of open source constellations is controversial. In some cases, the argument is made here with gift law. Others focus more on corporate structures. Finally, it could also be argued that, in view of the commercialised idea of resale, these are normal purchase and work contracts. Another view basically recognizes a gift as the legal nature of open source contracts, which does not require notarization, since both the conclusion and the execution of a gift contract can be seen in the downloading of the software. Since in practice open-source software is often sold with additional services and installation obligations (contract for work and services), it is more likely to be a mixed type of contract.

With the aim of granting the user the widest possible right of exploitation, the GPL allows the free reproduction and modification of the source code. The editing right includes the permission to modify and further develop the source code as well as the authorization to decompile and compile. The users may in turn freely reproduce and distribute these modified works provided that they are again placed under the GPL (§ 2). The basic authorisations are still to be found under No. 2 GPLv3, the transfer of modified source code versions is now regulated in No. 5 GPLv3; the requirement that the new works are also placed under the GPL is now found in No.5 lit.c GPLv3. The so-called "Linux clause" in § 32 Paragraph 3 Sentence 3 UrhG ensures that the remuneration claims of individual authors are effectively excluded under German law.

It is stipulated in all forms of licensing that a reference to the original source of the software must be included in the marketing. If the reference is forgotten, the software must not be dis-

tributed without reference. Notices that the software can be used under exclusion of any liability are ineffective. Such a clause is not compatible with German law as a disclaimer (§§ 309 No. 7 and 8b, 475 BGB). Even in the case of a gift, liability for intent and gross negligence remains according to German understanding (§§ 276 para. 3, 521, 523, 524 BGB). GPLv3 accepts for the first time that a worldwide effective limitation of liability and warranty cannot be formulated. Therefore, it contains two new ways to harmonise the standards: Section 7 lit. a allows each licensor to formulate different liability and warranty provisions of Sections 15 and 16 with respect to his added program components. In addition, No. 17 contains a request to evaluation courts to apply the local law which implies the lowest liability standard. In German law, this is the gift-law liability standard of §§ 521, 523, 524 BGB.

In detail, however, this contract in German law leads to numerous questions of interpretation, especially with regard to the theory of transfer of purpose applicable in copyright contract law. Firstly, the effective inclusion of new types of use pursuant to Section 31a UrhG is disputed. Since GPLv3 dates from 2007, but is always agreed upon anew with the originator, it is problematic in the case of more recent licences whether other types of use are also included. Undoubtedly, the note in paragraph 14 GPLv3 that all later versions are covered is no answer to this question. A solution for future contracts should be achieved by referring to the version of the GPL. However, this does not help with earlier agreements. It is sometimes argued that the time of the first distribution of the software should be taken into account. If a software is successively processed according to this approach, two different licenses would be necessary.

A second central question is which exploitation rights are included in the GPL. Expressly, the GPL only includes the right of reproduction, distribution and processing. Thus, under German law, the rights of rental, the right of communication to the public and the right of making available to the public are not granted by this agreement. With regard to the right under § 19a UrhG, it is problematic that one of the most important distribution channels, the Internet, would be cut off. However, § 31 (5) UrhG clearly speaks against a supplementary interpretation.

A third problem is the dogmatic classification of the conditions for granting the right of reproduction and distribution. It is argued that the conditions led to the agreement of a resolutive condition within the meaning of § 158 (2) BGB. Others, on the other hand, assume a restriction in rem in the sense of a separate type of use. In the opinion of the Munich I District Court, the GPL contains general terms and conditions which are applicable in Germany according to §§ 305 et seq. BGB can be effectively included in contracts of use. The obligation clauses in numbers 5 and 6 of the GPL do not violate in particular § 307 BGB. If a user viola-

tes the obligations under the GPL, his rights of use expire and claims can be made against him by the rights holder for copyright infringement. If the rights of use according to No. 8 p. 2 GPLv3 become effective and lapse, the rights of the user according to § 69d UrhG (German Copyright Act), such as the intended use of the computer program according to § 69d para. 1 UrhG (German Copyright Act), continue to exist under the condition that the user has lawfully acquired the software according to Art 5 para. 1 of Directive 2009/24/EC. An unlawful acquisition under copyright law is to be seen in a first distribution in violation of the GPL, as well as in an unauthorized distribution of a software processed by the transfer.

The way in which open source contracts are fulfilled is also problematic and controversial. On the one hand, within the framework of the fulfilment of the contract, all designated exploitation rights are granted by all previous developers, such as under GPLv3 No.10. The software itself, however, is transferred by the respective last licensor. It is argued that this separation does not apply to the conclusion of a contract with end users, since the right of use already results from § 69d para. 1 UrhG (German Copyright Act), since all necessary rights of use are already covered by this provision.

Questions of public procurement law in connection with open source are also still unresolved. In some cases, the public sector wants to award contracts only to entrepreneurs who disclose the source code of their products and give the licensing rights to the client free of charge. Such a request could be seen as a purely political and therefore inadmissible "non-awarding-related" criterion that makes the awarding procedure illegal. It remains to be seen what possible changes will result from the Modernisation of Public Procurement Law (VergRModG) adopted in April 2016.

V. IT-Outsourcing and Change Request

literature:

Auer-Reinsdorff, Vertragsstrafenregelungen in IT-Projekten, ITRB 2005, 24; *Blöse/Pechardecheck*, Die rechtliche Absicherung von IT-Outsourcing-Projekten. Risikooptimale Durchführung von Auslagerungsmaßnahmen im IT-Bereich, CR 2002, 785; *Bräutigam*, IT-Outsourcing, 2. Aufl. 2009; *Bräutigam*, SLA: In der Praxis alles klar? Optimale Konkretisierung von Umfang und Qualität geschuldeter Einzelleistungen beim IT-Outsourcing, CR 2004, 248; *Crisolli*, IT-Outsourcing und Betriebsübergang. Neuregelung der Unterrichtungspflichten und des Widerspruchrechts gem. § 613a BGB, CR 2002, 386; *Fritzemeyer/Schoch*, Übernahme von Softwareüberlassungsverträgen beim IT-Outsourcing. Rechtliches Vorgehen und Gestaltungsmöglichkeiten unter Beachtung des Urheberrechts des Lizenzgebers, CR 2003, 793; *Hilber*, Die Übertragbarkeit von Software-Rechten im Kontext einer Outsourcingtransaktion, CR 2008, 749; *Hörl/Häuser*, Service Level Agreements in IT-Outsourcingverträgen. Ausgestaltung und rechtliche Wirkungen von Qualitätsvereinbarungen bei der Auslagerung von IT-Leistungen an externe Anbieter, CR 2003, 713; *Koch*, IT-Change Management nach ITIL und ISO/IEC 20000, ITRB 2008, 61; *Mann*, Vertragsge-

staltung beim IT-Outsourcing – Besonderheiten und Fallstricke, MMR 2014, 499; *Nolte*, Benchmarking in IT-Outsourcing-Verträgen, CR 2004, 81; *Seffer/Horter*, Datenschutzrechtliche Aspekte des EDV-Outsourcing privater Versicherungsunternehmen, ITRB 2004, 165; *Schultze-Melling*, Effizientes Information Security Management im Rahmen von IT-Outsourcing-Verträgen, ITRB 2005, 42; *Söbbing*, Das IT-Outsourcing- und Business Process Outsourcing-Vertragswerk. Strukturen und Aufbauhilfen, ITRB 2004, 44; *Söbbing*, Der Letter of Intent, ITRB 2005, 240; *Ulmer*, IT-Outsourcing und Datenschutz bei der Erfüllung öffentlicher Aufgaben. Über die datenschutzrechtliche Zulässigkeit von Outsourcing-Vorhaben in der öffentlichen Verwaltung und Grundlagen der Umsetzung, CR 2003, 701; *Voßbein*, IT-Outsourcing. Ein Beitrag zum Lean Management?, RDV 1993, 205.

IT outsourcing is generally understood to mean both the outsourcing of one's own IT departments and areas of responsibility to an external service provider, as well as the purchase of external IT services to replace one's own infrastructure when a company is founded. If individual tasks are transferred, this is referred to as partial outsourcing, whereas in the case of a full outsourcing of the IT area, this can be referred to as "full outsourcing", although there must always be a possibility of controlling and monitoring the service provider, particularly with regard to data protection regulations (such as Art. 29 EU-DSGVO, Section 11 (2) BDSG)

IT outsourcing entails a number of risks that must be honestly stated. These include, in particular, the emerging dependence of the client on the external service provider. In particular with regard to possible poor performance or the risk of insolvency, the company can suffer considerable damage. The company placing the order also loses operational know-how, and its outsourcing fees ensure that the service provider receives operational knowledge. This also entails the security risk that third parties may gain access to internal company information. Due to the fixed contract periods that are common in this area, outsourcing regularly also entails a loss of flexibility. In the long term, moreover, it can lead to cost increases, especially compared with the costs of internal IT use. The problems of job cuts will not be discussed in detail; it is obvious that IT outsourcing can lead to a significant deterioration in the internal working climate.

In this respect, a clear analysis of the interests of the parties involved is necessary. The outsourcing provider will be particularly interested in service quality, cost control and flexibility. In the area of service quality, he is concerned with the definition of the requirements at the time the contract is concluded; here the exact modalities of the desired services must be specified exactly. If there is progress in innovation during the contract period, the service provider will want to be involved. Incidentally, the quality of service is also safeguarded by liability and termination rules in the event of poor performance. In the area of cost control, the inte-

rest of the outsourcing provider is directed towards achieving a favourable price, both when the contract is concluded and during the contract period. In particular, he will want to avoid having to bear additional costs. With regard to flexibility, the interest of the service provider is to provide for a right to change and exit.

For its part, the outsourcing client has a profit interest above all. He is interested in securing a sufficient profit margin. Long maturities should compensate for the initial investment. Similarly, the outsourcing client will want to protect itself against financial losses in the event of premature changes to services by the client. The profit can also be secured by exploiting internal synergies. Typically, the outsourcing client is not only active for one customer, but also takes over the contract for a number of similar cases. In addition to the profit interest, the outsourcing client also wants to protect himself against risks, for example by refusing quality assurances and reducing liability in the event of poor performance.

It is difficult to weigh up the various interests and bring them into a reasonable contractual corset. Outsourcing is a complex transaction. In particular, it affects a wide range of legal areas, including labour law, tax law and antitrust law. In addition, there are questions of service/work contract law and data protection law. It is a long-term contract with business-critical effects, which makes detailed contract design particularly important. In particular, the outsourcing contractor's know-how advantage must be taken into account, which guarantees him a contract negotiation advantage in the area of IT and transaction management. However, the outsourcing provider knows better the condition of his own business. In addition, there is the risk of a conflict of interest of the outsourcing provider's IT personnel, who may become future employees of the outsourcing company.

An IT outsourcing project must therefore be planned particularly carefully at the beginning. First, a team must be formed, which includes the management, the finance/controlling department and the personnel department. In addition, external consultants and the legal department must be included. The first step is a comprehensive examination of the current situation, which can be carried out with the help of a so-called "Total Cost of Ownership" (TCO) analysis, in order to be able to make a judgement as to whether IT outsourcing leads to positive economic effects. If the decision is made in favour of external procurement instead of in-house production, the results of the TCO analysis must be used to make a decision on the scope of outsourcing. It is necessary to make a tender in which potential suppliers are to be selected. Tender documents are to be specified, if necessary a draft contract is to be enclosed. A data room may also have to be set up for bidders, where they can find out about the main business processes in the company. After receipt of the relevant offers, they will be examined

and follow-up talks with the bidders will be held. Once a preferred bidder has been selected, it is a good idea to define the principles of further contract negotiations with this bidder in a letter of intent.

In addition to this procedure, an internal due diligence audit is required. The first step is to determine the current IT budget. The affected systems must also be specified more precisely. It must be checked whether the systems mentioned are owned by the outsourcing provider or only available by way of leasing. The book values of the systems are to be determined and their use in other areas. In addition to the IT systems, the existing maintenance and service contracts must be examined, particularly with regard to termination options, the possibility of transferring the contract to the outsourcing client and other exit options..

The software contracts must be checked to see whether they are transferable and/or terminable. In this regard, the existing transfer prohibitions must be taken into account. These can be of a contractual nature (see § 399 BGB and § 354a HGB). Furthermore, copyright law provides for a special consent requirement for the further transfer of rights of use (§ 34 UrhG). The employees affected by the transfer of business must be identified and classified according to salary, length of service and company pension scheme. It is then necessary to examine the consequences of a transfer of employees in individual parts of the business, which can be a problem especially in the case of parts of the business that are not clearly defined in terms of function or organisation. Then the probability of contradictions against the transfer of the business must be estimated and key players must be identified who are important for the transfer of the business. In addition to the IT systems and the employees, approval requirements must also be examined which either exist within the company (e.g. with regard to the supervisory board or shareholders) or which arise from public law (see for example § 25a KWG).

In the area of pre-contractual risk management, it is then a matter of clarifying with the selected bidder how further contractual negotiations will be conducted. In this context, the obligation to pay damages in the event of termination of the negotiations (§§ 280 (1), 241 (2), 311 (2) BGB) must be considered. Case law assumes that such a liability for damages can be considered if someone has created confidence in the conclusion of the contract and has broken off the contractual negotiations without good reason. However, a more favourable offer by a third party is considered a valid reason, as is the takeover of the provider by the competition. Compensation for damages shall be the reimbursement of expenses for the cost estimate as well as for lost revenue. An exclusion of liability by general terms and conditions is hardly possible. In this case, the exclusions of § 309 No. 7 and § 307 para. 1 BGB apply. For the further drafting of the contract, a distinction must be made between direct and indirect out-

sourcing. We speak of indirect outsourcing if the outsourcing is carried out within the framework of a joint venture between the outsourcing provider and the outsourcing client. In the field of IT outsourcing, the solution of direct outsourcing via new companies under company law is more common. However, indirect outsourcing has certain advantages, namely the possibility of controlling the services under company law. The parties are in a partnership, also in terms of profit and costs. Instead of the big "big bang", there is a step-by-step transfer process, for example by reducing the shareholdings under company law. In other respects, the corporate shareholding is itself again an additional value. However, indirect outsourcing is complex in terms of contract design and contract execution. Furthermore, there is a risk of conflicting objectives such as the interest in service versus the interest in profit.

The final contract is essentially concluded on the basis of a specification sheet. This is usually prepared by the outsourcing provider. If the outsourcing client prepares the requirements specification, it assumes additional liability risks (§ 280 (1) BGB). With the help of a so-called Letter of Intent (LoI), the duration of the contractual negotiations and existing confidentiality obligations are often specified in addition to the rough cornerstones and objectives of the main contract. Since documents of this kind frequently contain an explicit provision that legal ties are to be excluded, they usually fulfil the function of summarising previous results and psychologically preventing the negotiating parties from subsequently deviating from previous negotiation results. The main contract then has to clarify a number of questions of intellectual property law. In particular, the question of the possibility of assigning existing rights of use is difficult to clarify.

When changing employees, § 613a BGB must be observed. The legal transfer of a business unit leads to a series of fatal consequences for an outsourcing project. A business unit is an economic unit consisting of personnel and material resources and must therefore be distinguished from a mere transfer of functions. If a task previously performed internally by the company is merely outsourced, this does not constitute a transfer of operations if the outsourcing recipient takes over neither personnel nor equipment. In the case of a partial transfer of material resources or persons, quantitative or qualitative considerations must be made in each individual case. This applies in particular to the mere transfer of overhead functions (IT purchasing or IT training) or to persons with a double scope of duties. If a case of § 613a BGB exists, the employment relationships shall automatically be transferred to the outsourcing client. The outsourcing client shall enter into existing employment relationships on the key date, and the old employment contract shall continue to apply with the new employer, including existing works agreements or collective agreements. The same applies to the com-

pany pension scheme, which also remains in place. The parties to the outsourcing project have information duties according to § 613a para. 5 BGB. If possible, employees should be informed about the project one month before the transfer of the business. Joint information is recommended, preferably in writing with proof of receipt. The duty to inform refers to the planned time of the transfer of business (including possible demergers according to § 324 UmwG) as well as the reason for the transfer of business. Information must be provided on the legal, economic and social consequences for employees, in particular with regard to their rights under works agreements, collective agreements and pension schemes. The employee's existing right of objection must also be informed. The employee has a right of objection according to § 613a para. 6 BGB. This right of objection can be declared to the new or old employer. There is a period of one month from receipt of complete information, whereby deficiencies in the information lead to a right of objection which is unlimited in time. The objection must be declared in writing, but it is not necessary to give reasons. If the employee declares the objection, the employment relationship remains with the old employer. However, the former employer may then terminate the employment for operational reasons, if necessary, taking into account the rules for social selection for objective reasons. If there are more than 20 employees in the company, there is an obligation to inform the works council (§§ 111 et seq. BetrVG), otherwise an agreement with the works council on reconciliations of interests and the social plan is necessary. The transfer of employees must be reported to the Federal Employment Agency (§ 17 KSchG).

In the case of direct outsourcing, the question of the legal nature of the service relationship must first be examined. This can be a contract of employment if an activity as such is owed. In the case of a contract for work and services, on the other hand, the success of the corresponding activities would be owed. Especially in the case of software development, a contract for work and services within the meaning of § 651 BGB (German Civil Code) may also be considered. In most cases, outsourcing contracts are mixed contracts. These contracts include service contract components, especially with regard to IT system operation, hotline and telecommunications services. Work-contractual components are in particular system implementations and existing transition projects. The performance obligations are to be defined as concretely as possible in the specification sheet. This is typically done in attached service level agreements (SLA). The SLAs regulate the concrete performance parameters as well as operating times, availability, downtimes or reaction times. Typical service contents of the SLAs also refer primarily to data backup and data archiving as well as maximum downtimes. In addition, SLAs regularly contain quality control regulations and legal consequences in the

event of poor quality. It is controversial whether SLAs are subject to general control as general terms and conditions or whether they are omitted according to § 307 para. 3 BGB. In addition to the general service description, milestones and final terms are also regulated in the project contract. In addition, there are test and acceptance regulations as well as information on the cooperation obligations of the outsourcing client. The SLAs are concretizations of the performance requirements, but do not yet make the service contract a contract for work and services. If the SLAs are violated, there is a breach of contract which can lead to claims for damages according to § 280 BGB. However, the outsourcing client has the option of proving that he is not at fault. In addition, a reduction of the remuneration in case of non-compliance as well as extraordinary terminations in case of serious absent decisions according to § 314 para. 1, § 626 para. 1 BGB are common. A difficulty here is that compliance with the SLA is often not verifiable. In this case, concrete measurement procedures and reporting strategies must be regulated in the contract.

Also the concrete damage is often not clearly identifiable. Here, it is necessary to agree on contractual penalties/penalties in the contract (see §§ 339 ff. BGB). With regard to the rules of availability, it must be asked where and how availability is measured. Key time data are required for the calculation (monthly or quarterly). It is also necessary to deduct maintenance periods. Maximum downtimes are to be quantified more precisely with regard to the measurement data, especially with regard to recovery times. Fault categories must be defined with regard to response times. The aim is not to react to the technical extent of the disruptions, but to their effects on business operations. A distinction could be made here between business-critical disruptions, disruptions with significant effects on business operations and other disruptions, and reaction and recovery times could be defined for these. Penalties are to be regarded as contractual penalties in the sense of § 341 BGB, but can also be classified as lump-sum damages. In these cases, proof of the occurrence of damage is required, but not proof of the amount of damage. The assertion of a higher actual damage is not excluded. The penalties are to be graded as a percentage depending on the extent to which the SLA is undercut. They may increase if there is a repeated violation of an SLA. In the event of repeated breaches, an extraordinary right of termination may also be provided for.

Contractual penalties/penalties are regarded as the central means of pressure of the IT project. However, it should be noted that such contractual penalties are subject to a content control according to § 309 BGB. The control also extends to the amount of the contractual penalty. It is considered permissible to determine the amount in relation to a partial amount of the contract sum and in relation to the respective day of delay. The maximum limit is 5 % of the

order amount. If a higher amount is determined, a partial amount above the cap limit of 5% of the total contract sum would have to be submitted for judicial review (§ 343 BGB). Thus, the formulation of a contractual penalty could refer to a maximum amount of 8 % of the total contract sum, whereby the maximum amount above 5 % of the total contract sum would be set for judicial review and reduction within the scope of § 343 BGB.

In the case of changes in performance which do not affect the wording of the contract, a so-called change request procedure may be considered if changes and extensions to the performance objectives of the main contract remain possible. This is a formalised procedure of continuous exchange for the amendment of the service description, in the course of which the customer can submit requests for changes and the contractor, e.g. an outsourcing provider, responds with suggestions.

These Change Request Procedures are to be complied with on a binding basis if contractually agreed. In addition to such a procedure, any additional expenditure must be claimed (if necessary, in court) within the scope of a so-called adjustment procedure in accordance with § 313 BGB. Even if there had been a significant change in the content of the services provided in an all-inclusive price contract, which would have affected the basis of the price agreement, the contractor would still have the secondary obligation to report this circumstance promptly after the additional expenditure has been incurred, in order to keep the costs as low as possible. Here, a change request can be made by the outsourcing customer, for example. This must then carry out the advantages and disadvantages of the changes for the outsourcing provider. Any reductions or increases in remuneration as well as performance advantages and disadvantages for the outsourcing provider must be taken into account. The outsourcing provider is obliged to accept the changes if there are no disadvantages for him. If the change request is made by the outsourcing provider, the outsourcing customer would have to accept the offer and be informed about the advantages and disadvantages of the change. Pricing is difficult here, as each party will react sensitively to a corresponding price risk. It is conceivable to determine a fixed price, but this only makes sense if there is a clear definition of the service and a clear quantity structure. It would also be possible to determine the actual costs minus the defined cost savings. However, a mere grading according to expenditure has the disadvantage that no foreseeable cost budgets can be planned. There is also no incentive for the outsourcing client to save costs. The prices could also be staggered in relation to reference prices. Benchmarking techniques could also be used and external experts or comparative offers could be obtained.

Although the duties of cooperation of an outsourcing provider are not explicitly regulated by law, the outsourcing provider is obliged to cooperate. Despite the fact that a supposedly con-

clusive list of a contractual catalogue of obligations can never actually be conclusive, an abstract formulation in the framework agreement with reference to the participation rights named in the respective service certificate is recommended. Typical obligations are the timely provision of necessary information and documents, the designation of competent contact persons, as well as the supply of premises and workstations on site and of required hardware and software. He is also obliged to make decisions quickly and to participate in the project himself. Malfunctions and problems should be reported promptly. Data security measures, such as virus protection, must also be observed. In the event of non-compliance with the obligations to cooperate, the outsourcing customer may demand that the corresponding obligations be fulfilled. This should be coupled with an appropriate deadline. Under certain circumstances, the outsourcing client may carry out a substitute performance and demand reimbursement of the additional expenses. In addition, the outsourcing client shall be entitled to reasonable compensation for the costs incurred for maintaining the facilities in accordance with § 624 BGB (German Civil Code) and, under further conditions, a right of termination in the event of failure to cooperate in accordance with § 643 BGB.

With regard to the duration, the longest possible duration should be assumed; typically a period of five to ten years. An automatic extension is not recommended, as performance and prices usually have to be checked. It would be better to provide for an obligation to start negotiations on the renewal of a contract in good time before it expires. Ordinary termination is generally excluded during the basic term. Extraordinary termination is possible in the event of significant breaches of contract, such as multiple SLA violations or significant delays in the transition project. It is disputed whether an extraordinary termination can also be linked to the imminent insolvency of the other party. In most cases, special termination rights are also provided for, for example if the parties cannot agree on price adjustments. Here, the special termination rights are often coupled with redemption sums such as compensation for unamortized investments or for restructuring. It is important to have clear rules on termination support after termination. Here, for example, it can be provided that the outsourcing client is obliged to continue the service for a limited period of time. He must also be involved in transfer projects. As an option, a possibility to buy back software and hardware and to enter into contracts, also with corresponding employees of the outsourcing client, could be provided for. A deposit agreement regarding the sources is recommended in order to make a retransfer possible.

A particular problem with outsourcing is the legal aspect of data protection. In principle, outsourcing is only permissible if data processing is carried out by order (§ 11 BDSG). This re-

quires the conclusion of a written contract specifying the type and scope of data processing as well as further technical and organisational measures to secure the contractual relationship. The outsourcing provider must remain master of the data. He is responsible for compliance with the data protection laws, for the careful selection of the outsourcing contractor and for safeguarding the rights of the persons concerned. Accordingly, he requires a right of instruction and a right of control over the outsourcing client. The outsourcing client may only use the data for the purposes of the contractual relationship and must follow the instructions of the outsourcing provider. The employees of the outsourcing client shall be bound to data secrecy (§ 5 BDSG). Cross-border data transfer, especially outside the EU, should only be possible with the consent of the outsourcing client..

In the context of commissioned data processing, outsourcing is to be regarded as a transfer of functions (§ 28 BDSG). This is only permissible if the outsourcing serves the legitimate interests of the outsourcing provider and no overriding interests of the data subject are involved. As a special problem remains § 203 StGB, which makes genuine outsourcing almost impossible when it comes to credit institutions, medical and legal practices and life insurance companies. The banks rely here on § 25a para. 2 KWG, which makes outsourcing of essential areas of the banks possible under supervisory law. However, the relationship between the KWG and the BDSG has not yet been clarified in this respect. Furthermore, it is important to clarify the question of dispute resolution. A legal clarification is usually difficult, as the matter is technically complex. It is better to establish an escalation procedure and to provide for arbitration proceedings in addition to conciliation (et-wa via the International Chamber of Commerce).

The Basic Data Protection Regulation (DS-GVO), which is to be applied from 25 May 2018, greatly tightens the requirements for bodies processing orders. The most important change for outsourcing processes results from a reassessment of the transfer of personal data between the outsourcing provider and the outsourcing recipient. § Section 3 (8) BDSG granted a privilege to previously processing entities within the European Economic Area by not classifying the process of transfer as a collection (Section 3 (3) BDSG), to which further examination obligations are linked, but merely as an internal transfer. In future, external bodies processing orders will still not be treated as responsible parties within the meaning of Art. 4 No. 7 DSGVO, but the privilege described above will be completely abolished, so that every transmission should be a processing operation within the meaning of Art. 4 No. 2 DSGVO, which is subject to the provisions of the

Art. 9 para. 2 DSGVO would have to be measured. It is controversial whether each transfer process between the client and the service provider must be individually legitimised in future. If a processor does not comply with the instructions of the responsible party, these parties are deemed to be the responsible party with regard to the respective data processing, so that in future affected parties will be entitled to compensation claims against them in accordance with Art. 28 Para. 10 DSGVO in conjunction with Art. 82 Para. 1, Art. 83 Para. 5, Art. 84 DSGVO.

VIIT distribution contract law

literature:

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An area that has hardly been dealt with so far is the legal relationship between dealers and manufacturers in the IT sector. Software as a physical good is brought to market in a wide variety of forms; IT dealers play a decisive role in sales. They are organized in many different ways. In addition to a distribution system that is organised directly by the manufacturer via salaried employees, there are the classic forms of own dealer and sales representative

1. The Classification

According to the economic complexity of trade relations, the legal qualification of contractual relations is also complex. In some cases, a framework agreement is concluded with a preliminary contract. In such a framework agreement, the number of individual contracts as well as the delivery quantity remain open. The dealer is only obliged to generally check the manufacturer's products for their usability. Dealer and manufacturer agree on a general cooperation, without the details of this cooperation being regulated. A permanent supply contract is also conceivable (§ 311 (1) BGB). Here, the dealer undertakes to the customer to deliver an unspecified quantity of software copies in unspecified, consumption-dependent instalments. A constant readiness to perform is owed. No particular problems are posed by the contract on business equipment with software, in which the manufacturer undertakes to equip the dealer with software for trial purposes. However, there are also some obligations to support the dealer with advertising material

A particular challenge here is regularly the software manufacturer's interest in being able to agree its own license and usage conditions with end customers. This is not only due to economic objectives, but also due to own obligations, such as the compliance with the terms of use resulting from the software development. Practically relevant in this context is the joint distribution of proprietary software with open source content ("embedded" distribution), in the context of which the manufacturer must usually undertake to pass on its own software under the condition that the original license is passed on

In practice, there are three possible solutions:

First, the dealer could commit himself under the central distribution agreement to adopt the manufacturer's licensing terms in identical terms. However, this would mean that he would also have to prosecute infringements of these in the manufacturer's interest and, if he distributed a large number of different software products, he would have to keep track of them at all times. Therefore, this approach seems impractical.

Alternatively, the dealer could act as a representative of the manufacturer and conclude contracts on the manufacturer's behalf, taking into account the desired conditions. However, this solution appears to be feasible only at an extremely high cost. The software manufacturer would have to constantly monitor whether the dealer was acting as his representative within his power of representation - this appears impractical and would lead to high costs.

Finally, the distributor could act in his own name, but could undertake to pass on the manufacturer's licensing terms to the customer. Whereas the latter was previously required to send a signed declaration to the manufacturer before the software was put into operation, in practice there are two other, more efficient types of contract, where the customer, by his own conclusive behaviour alone, declares his acceptance of the licence conditions. So-called "enter" or "return" contracts are based on the actual use of the software, whereas shrink-wrap or click-wrap contracts are effective from the moment the packaging is opened. In both variants, comprehensive knowledge of the conditions by the customer appears highly doubtful.

a) Trade and commerce

IT retailers typically start out as small business owners. As such, they are not registered in the commercial register and can apply simplified accounting. As far as trade tax is concerned, they are often below the tax-free amount of currently 24,500 euros. Important for traders is the tax number, which you get from the tax office when you register. It is also necessary to register a trade and apply for a trade licence. Above a certain size, IT traders are merchants as defined by the German Commercial Code (HGB). § 1 HGB stipulates that every trader is a

businessman, unless his company does not require a business operation that is commercially equipped in terms of type and scope. The following indications speak in favour of being a merchant: Diversity of the product range, scope of business relations, turnover, number of employees, use of credit etc. If you are not a merchant, you can still be entered in the commercial register in accordance with § 2 HGB, so that you are on an equal footing with a merchant..

b) Sales representative

Special rules apply if the dealer is a commercial agent (§§ 84 ff. and §§ 93 ff. HGB). According to § 84 (1) sentence 1 HGB, a commercial agent is someone who, as an independent trader, is constantly entrusted with the task of mediating business for another entrepreneur or concluding business on his behalf. § Section 84 (1) sentence 2 HGB stipulates that a self-employed person is one who is essentially free to determine his activity and working hours. The commercial agent bears his own risk and can also be a partnership (OHG, KG) or a legal entity (AG, GmbH). In principle, the contract between the company and the commercial agent (commercial agency contract) does not require a special form. However, according to § 85 of the German Commercial Code (HGB), each contractual partner can demand that the content of the contract be specified in writing.

Commercial agents are subject to special obligations in relation to the manufacturer. First of all, they are subject to the obligation to act as intermediaries and to conclude contracts (§ 86 Para. 1 Half. 1 HGB). The commercial agent is obliged to make constant efforts to broker or conclude business. Furthermore, the duty to safeguard interests (§ 86 Para. 1 Half. 2 HGB) is important. The commercial agent must always look after the interests of the company he represents, e.g. also customer service after the conclusion of the transaction. The commercial agent is also subject to reporting obligations (§ 86 Para. 2 HGB)- Business mediation and business transactions as well as any breach of contract must be reported to the represented company without delay. Of course, there are confidentiality obligations (§ 90 HGB); no company secret may be used after termination of the contractual relationship. The prohibition of competition/competition aims in similar directions. This prohibition results from the duty to protect interests. The commercial agent may not work for a competing company in the business line of the represented company (even if this is not regulated by contract). This also applies to the multiple-company representative. (In addition, prohibitions of extension to substitute products can be contractually agreed - e.g. a commercial agent for butter may not at the same time represent margarine of the competitor). Further obligations can be contractually

agreed, e.g. the obligation to keep stocks, to provide customer service or a non-competition clause after the end of the contract.

In addition to the commission payment obligation (§ 87 (1) HGB), the represented IT manufacturer is obliged to provide the commercial agent with all documents required for the performance of his activities. The entrepreneur is further prohibited from competing with his own commercial agent.

The usual remuneration of a commercial agent is the commission (§ 87 HGB). It is a success fee and not a performance fee and is only earned when the company he represents has carried out the business he has mediated (§ 87a Paragraph 1 Sentence 1 HGB). The amount and settlement of the commission are regulated in §§ 87b and c HGB. In the event of termination of the commercial agent relationship, the commercial agent has a claim to compensation in accordance with § 89b HGB. The commercial agent's right to compensation is a consideration for advantages which the principal has obtained through the commercial agent's activities and which he can use unilaterally after termination of the agency contract without any ongoing commission obligations. The claim results from § 89b HGB and is an additional claim for remuneration based on the equalization of advantages. The commercial agent relationship must be terminated. The type of termination is not important. Sufficient, for example, are agreed solutions of the contractual relationship, contract conversions, terminations, expiry of time, conditions subsequent, insolvency of the entrepreneur or the death of the commercial agent. The claim must be asserted within one year after termination of the contractual relationship (§ 89b (4) sentence 2 HGB).

The claim is excluded in the event of the commercial agent's own termination (§ 89b para. 3 no. 1 HGB). An exception applies if the conduct of the entrepreneur has given reasonable cause for termination. The entitlement to commission also exists if the continuation of the contract is not reasonable for the commercial agent due to age or illness. The commercial agent may also act through no fault of his own or even lawfully; the decisive factor is whether this creates a situation which is no longer acceptable to the commercial agent in good faith. Finally, the claim does not exist in the case of termination for good cause (§ 89b (3) No. 2 HGB). The exclusion of the claim can also be contractually agreed, but not in advance, i.e. before termination of the contract (§ 89b para. 4 HGB). Effective are agreements after the termination of the contract or agreements in a cancellation agreement which simultaneously terminate the contract (but ineffective if the simultaneous cancellation occurs at a later date).

The claim presupposes that the commercial agent has acquired new customers for the principal. The entrepreneur must derive considerable advantages from this after termination of the

contract (§ 89b (1) No. 1 HGB). Decisive is the expected volume of business within the customer base created by the commercial agent. If the principal sells the business after termination and the acquirer continues the business, it is usually assumed that the transfer price also includes a fee for the customer base and the principal thus has a considerable advantage.

The claim for compensation must appear reasonable under consideration of all circumstances (§ 89b para. 1 no. 2 HGB). A reduction in the claim may be caused by, for example, a pension plan financialised by the entrepreneur, forbidden competitive activities of the commercial agent, a decrease in total turnover or the suction effect of the famous brand (up to 25% deduction)..

The amount of the claim is (§ 89b (2) HGB) limited to an annual commission (or other annual remuneration), calculated according to the average of the last five years (in principle, all types of commission claims are to be considered with a net amount).

It is disputed whether excess commissions (= commissions based on contracts concluded during the contract period, but which are only due after the end of the contract, § 87a para. 1 sentence 1 HGB) are also to be used for calculation. This is partially denied because the maximum limit is calculated according to the average of the last five years, but the excess commission is only due after the termination of the activity as a commercial agent. According to h.M., excess commissions fall under the meaning and purpose of § 89b HGB in the calculation of the maximum limit. This is based on transactions between the entrepreneur and the customer which were already made before the end of the agency relationship. The entitlement was acquired through the activity of the commercial agent during the contract period, therefore excess commissions are economically part of the income earned during the contract period.

In case of doubt, the statutory due date shall be immediately applicable (§ 271 (1) BGB). A delay is ineffective, such as in the case of the due date of the compensation claim only after acknowledgement or payment in three annual instalments.

The burden of proof is generally on the commercial agent. For customer business to be conducted in accordance with § 87 Para. 1 Sentence 1 Old German Commercial Code (HGB), it is sufficient for the commercial agent to furnish proof of an activity which, according to general experience, may have been a contributing factor in the conclusion of the customer contract. It is the entrepreneur's responsibility to prove that this activity of the commercial agent in the specific case did not even contribute to the later conclusion of the transaction or at least there is a serious possibility that a contributory causality can be excluded.

c) Own traders

The commission claim for commercial agents is of central importance for IT sales. The regulations on commercial agents are also applied accordingly by the courts to proprietary traders. According to established case law, a claim for compensation comparable to § 89b HGB (German Commercial Code) must be granted to an own-dealer if a legal relationship exists between him and the supplier that is not limited to a mere buyer-seller relationship, but integrates the own-dealer into the sales organization of the supplier on the basis of contractual agreements in such a way that his rights and obligations are similar to those of a commercial agent. Such contractual ties typical of commercial agents are regularly the duty to safeguard interests, a non-competition clause, the duty to provide customer service and the manufacturer's authority to issue directives. It is not sufficient that the dealer is granted the exclusive right of distribution for two countries and that he should purchase his products exclusively from the supplier and sell them on his own account and at his own price. It is also not sufficient that the authorised distributor of a software supplier, when selling the programs to end users, is obliged to mediate a "licence agreement" between the buyer and the supplier.

Furthermore, it is necessary that the dealer is obliged to hand over his customer base to his supplier upon termination of the contractual relationship, so that the supplier can immediately and easily make use of the advantages of the customer base. It is irrelevant whether this obligation is to be fulfilled only upon termination of the contract or - as in this case - already during the contract period by continuous transmission of the customer data to the manufacturer; what is decisive is that the manufacturer is thereby actually in a position to continue to use the customer base even after termination of the contractual relationship.

The dealer does not receive a commission contractually agreed with the entrepreneur (manufacturer/supplier) like the commercial agent, but a comparable remuneration through his margin after deduction of his costs, the dealer discount. The starting point for the calculation of the rebate is usually the software manufacturer's recommended retail prices (UPE). Discounts granted can lead to a reduction of the compensation claim within the scope of equity considerations (§ 89b para. 1 no. 3 HGB). This right only applies if the merchant was previously active in the market area within which companies make recognizable offers to consumers (B2C).

2. (recourse) claims of the dealer against the manufacturer

Dealers have particular problems when selling defective software. As a rule, they are not able to detect software defects in advance. So they are at the mercy of the manufacturer and his

specifications. Since the reform of the law of obligations, the German Civil Code has therefore rightly granted dealers special recourse. According to § 478 BGB, they have a right of recourse against the manufacturer. This right only applies if the dealer was previously active in the B2C sector. When selling to commercial users, the dealer is not entitled to recourse. The claim requires that the customer has returned the software due to a defect or reduced the purchase price. In the case of § 478 para. 2 BGB, the supplier's obligation to represent the customer is not relevant. In the case of a return as a gesture of goodwill, recourse shall not be considered. The recourse cannot be cancelled out by general terms and conditions (§ 478 para. 4 sentence 1 BGB); the regulations in §§ 433-435, 437, 439-443 BGB are in this respect not negotiable, unless the dealer receives an equivalent replacement by contract. The equivalence of the compensation is therefore of decisive importance. It is questionable what the legislator had in mind when it came to equivalent compensation; it seems to follow from the definition of "adequacy" under § 307 BGB that the criterion of "equivalence" limits the freedom of the contracting parties to choose the type and manner of compensation. From a purely economic point of view, § 478.4 of the Civil Code thus has a mandatory character. In the case of subsequent performance, equivalence would be, for example, the agreement of the supplier's assumption of performance vis-à-vis the entrepreneur by means of his own new delivery. On the other hand, possibilities of equivalent compensation in the case of exclusion of rights of withdrawal and reduction as well as in the case of shortening of limitation periods are hardly conceivable. Finally, § 478 (4) sentence 3 BGB contains a prohibition of circumvention of the aforementioned provisions.

The limitation period for recourse begins at the earliest two months after fulfilment of the contract, then runs for two years and is a maximum of five years (§ 479 BGB).

Please also note § 478 Para. 6 BGB, according to which the regulations on the commercial duty to examine and give notice of defects (§ 377 HGB) apply at least accordingly for the commercial customer. The prerequisite is that both parties to the transaction are deemed to be the merchant within the meaning of §§ 1 ff. HGB (German Commercial Code) and a commercial sale within the meaning of § 343 HGB exists. According to § 377 para. 1 HGB, the entrepreneur must inspect the goods after delivery by the seller and notify the seller immediately of any defect that is detected. This notification of defects may be made informally. This obligation can then considerably limit the liability risk of the manufacturer; a breach of the obligation to notify defects excludes the right of recourse according to § 478 BGB (cf. § 377 para. 2 BGB). Consequential damage caused by a defect - such as loss of business as a result of goods that are no longer justifiable - can only continue to be claimed under tort law. As a

result, the seller can only claim obvious defects in the goods if he inspects the goods immediately upon receipt and immediately reports the defect to his supplier.

With regard to the commencement of the duty to examine and notify of defects pursuant to § 377, it is not relevant from which point in time a delivery within the meaning of § 377 para. 1 HGB (German Commercial Code) is present in the case of software transactions in the absence of a deviating agreement. According to one opinion, a detailed test by the customer must first have been carried out without any errors in the end, so that the customer can formulate a sufficiently concrete and factually substantiated complaint. Another view contradicts this broad interpretation, namely that a single thorough test and trial run is sufficient after prior instruction.

A third approach, represented by the Federal Court of Justice, assumes that the delivery has been completed if it has been brought within the buyer's sphere of influence with the intention of performance in such a way that an investigation has become possible for the buyer. This is justified by the fact that software must be treated as a movable object of purchase, there is no legal basis for a corresponding special regulation..

The seller has the right to demand compensation from his supplier for the expenses which he had to incur on behalf of the buyer. These are mainly costs for the removal of a defect or the delivery of a defect-free item. In addition, the transport, labour and material costs to be borne by the seller shall be added.

According to § 478 (5) BGB, the supplier for his part can also pass on the rights in the supply chain. He can therefore assert the same rights against his supplier.

Typical clauses for the general terms and conditions of the trader recourse are, for example In those cases in which our customer does not purchase consumer goods within the supply chain, the provisions of §§ 474-479 BGB do not apply. If the customer wishes to resell the goods within the scope of a purchase of consumer goods, compensation for expenses incurred within the meaning of § 478 BGB can only be claimed if the customer provides evidence of the expenses incurred. Compensation for such expenses shall only be granted up to a maximum of 2% of the net value of the goods. Further claims based on § 478 BGB are covered by the 24-month warranty agreed in favour of all customers as an equivalent compensation within the meaning of § 478 (4) sentence 1 BGB. In the field of software trading, there is no commercial custom that the manufacturer grants the wholesaler an unlimited and quantitatively unrestricted right of return. The agreement of an unlimited and quantitatively unrestricted right of re-

turn in the purchasing terms and conditions of a wholesaler therefore discriminates unreasonably against its contractual partners and is invalid according to § 307 BGB.

On the other hand, the Federal Court of Justice considered a clause to be invalid which provided for a new start of the limitation period in the event of subsequent delivery by the supplier. However, a formulation is conceivable which refers the new limitation period only to the delivery of a replacement item and allows the supplier to reserve the right to make a new delivery only as a gesture of goodwill. Moreover, in this judgment the Federal Court of Justice considered an extension of the limitation period to 36 months from the transfer of risk to be effective. The buyer has a legitimate interest in the extension, as the sale of the goods typically takes place over a longer period of time and he therefore has to deal with his customers in case of defects even after the expiry of two years (applies only to traders). The BGH again considers an extension to ten years for liability for defects of title to be invalid.

The rules on dealer recourse also apply to defects of title. The dealer is naturally entitled to the same warranty rights against the manufacturer (or a supplier in the "chain of recourse") as the buyer is entitled to against the buyer (subsequent performance, withdrawal, reduction, compensation). If the supplier is an entrepreneur (§ 14 BGB) and as such the final seller vis-à-vis a consumer within the meaning of § 13 BGB (purchase of consumer goods), the supplier may, for his part, take recourse against his supplier within two years and demand compensation for expenses regardless of fault if the consumer reduces the purchase price or withdraws from the contract due to a (legal) defect (see also Art. 4 of the Consumer Goods Sales Directive). This right of recourse is independent of any (not always demonstrable) fault on the part of the supplier.

3. Claims of right holders against dealers of pirated copies

The owner of original or third-party derived copyrights and ancillary copyrights is entitled to various defence, compensation or information claims in order to take action against the trade with illegally copied software in embodied form, i.e. computer programs on data carriers (e.g. CDs, DVDs). In particular, the holder of rights has a claim for injunctive relief and damages against a software dealer who sells counterfeit computer programs under § 97 (1) UrhG. A trader who resells purchased counterfeit software encroaches on the distribution right for computer programs under Section 69c No. 3 sentence 1 UrhG, according to which only the rights holder has the exclusive right to carry out any form of distribution of the original of a computer program or of copies, including rental. By distribution right, the Act understands the right to offer the original or copies of a work to the public or to put it into circulation, Section

17 (1) UrhG. Offering is in particular the offering for sale and exhibiting for the purpose of sale as well as the dispatch of lists of offers, brochures or catalogues; in the case of illegally copied computer programs even the offering to a single person. Placing on the market shall be deemed to have occurred if workpieces are given to persons who are not among the personal circle of acquaintances of the manufacturer or owner.

Since the end user of a pirated copy cannot usually be identified, the law aims to give the rightholder the opportunity to combat the preliminary stages which serve to bring the work to the public. He should be able to demand compensation from the distributor in the form of damages, which the distributor can of course pass on to the consumer. In addition, the rightholder almost never succeeds in recording the first act of distribution and preventing it by means of injunctive relief, which is why he should also be able to access the following acts. In principle, therefore, anyone who has (co-)caused the copyright infringement adequately is liable.

Exhaustion of the distribution right within the European Union pursuant to Section 69c no. 3 sentence 2 UrhG is out of the question, since the consent of the rights holder is lacking when counterfeit computer programs are marketed.

In the event of a claim for omission, the intermediary is liable regardless of fault. It is therefore sufficient that the infringement is unlawfully committed, which is always the case when reselling counterfeit software. In contrast to this, a claim for damages additionally requires the intermediary to be represented in the form of intent or negligence, § 97 para. 2 UrhG. If the intermediary has positive knowledge that the computer programs are pirate copies, he acts unproblematically with intent. According to § 276 Abs. 2 BGB acts negligently, who disregards the care necessary in traffic. It is questionable which standard of care is to be applied in the context of liability for negligence.

For a person working in the computer industry, an unusually low price (well below the exclusion limit for the original version) must be a reason to either obtain a guarantee of authenticity or to verify that the software is properly licensed. Also, original programs contain features of a certificate of authenticity; the industry expert must investigate any doubt about the originality of the software. Thus, the Munich District Court decided that the dealer must have programs acquired as suspicious programs investigated by the original manufacturer. According to a more recent decision by the Düsseldorf Higher Regional Court, in case of doubt the dealer must even ensure that the copies he sells are not counterfeits by undoing the existing seal on one of the software copies.

The extent of the compensation for damages is determined by §§ 249 et seq. BGB. Concrete damages include expenses frustrated by the violation of the law and the loss of profit. How-

ever, in the case of infringements of intellectual property rights, it often proves to be extremely complicated to explain the nature and extent of one's own use and the hypothetical development of profits, despite the fact that § 252 BGB makes it easier to provide evidence. To counter these difficulties, the injured party can choose between three methods of damage liquidation. He can liquidate the damage

- calculate concretely,
- charge the usual licence fee (principles of licence analogy) and
- claim the profit of the infringer (so-called infringer's profit).

When calculating damages following a copyright infringement due to the sale of unauthorized software as OEM versions (software that may only be sold together with the hardware of authorized manufacturers), it should be noted that it is not the price of the retail version but the comparison price of a legal OEM version that is decisive.

On the basis of §§ 242, 259, 260 BGB (German Civil Code), case law also grants a right to information and invoicing if the beneficiary is in a debatable way uncertain about the scope of his right, he cannot reasonably obtain the information himself and the obligor can easily forgive it.

4. Antitrust law and IT distribution contracts

In the case of distribution contracts, the particular problems of antitrust law must be taken into account. There is a particular risk here of anti-competitive agreements between dealers and manufacturers and of abuse of power by dominant or powerful manufacturers. The assessment under cartel law is never made in the abstract, but always in relation to the market, so that a market definition must precede the assessment of the conduct in question. The relevant product market is determined on the basis of functional equivalence. All goods that are interchangeable from the point of view of the opposite side of the market belong to one market. If, from the point of view of the average customer, certain goods or services can meet his needs in the same way, they are products on the same market. A special standard usually also defines an associated uniform market. In this respect, it is quite possible to assume that the Microsoft Windows operating system has its own relevant product market. However, the question remains open whether alternatives to Microsoft Windows could be created by open source software, which would interpret the market concept accordingly. The relevant geographic market is determined by the area in which a company offers its products or services. Language barriers play a major role here, especially in the case of software, since German customers usually expect a German-language version of the software. In special segments which are

characterised by a particular internationality, however, it is also possible to consider the European or world market as the relevant market. The dominance of such a market depends on whether the company has such a powerful position that it can pursue a market strategy independent of competitors. Essentially, the market share is taken into account. According to Section 18 (4) GWB, a market share of 40% is presumed to constitute a dominant position. This also corresponds to the presumption rule in European competition law. If the allegation of a powerful oligopoly is made, the market share must be 50-60 %. With market shares below 10%, a dominant position per se is excluded. Microsoft is certainly dominant in the field of operating systems. Cases in which unreasonable purchase or sales prices have been forced are particularly abusive. A restriction of sales to the detriment of the consumer is also prohibited (see Art. 102 lit. b TFEU).

Agreements between manufacturers and distributors and agreements between distributors and end-users are known as vertical agreements. Both Art. 101 TFEU and the GWB contain restrictions under competition law for such vertical agreements. With the 7th and 8th amendment of the ARC, the ARC provisions on agreements restricting competition were aligned with Art. 101 TFEU. § Section 1 GWB now also covers vertical agreements. For example, the fixing of sales prices or terms and conditions of business vis-à-vis the contracting party or third parties is prohibited (Art. 101 (1) lit. a TFEU). Licensing and distribution agreements are frequently encountered, but are also problematic in the light of Art. 101 TFEU, as are exclusivity agreements, exclusive purchasing agreements, non-competition clauses, agreements on minimum purchasing volumes and territorial restrictions on the distribution area. Furthermore, tying contractual services with the obligation to take over further services which are neither objectively nor according to commercial practice related to the subject matter of the contract are prohibited (Art. 101 (1) lit. e TFEU). In addition, unreasonable prices and conditions for software maintenance are also contrary to cartel law (Section 19 (2) no. 3 GWB).

The cartel authorities had the possibility to exempt certain individual contracts from the prohibition of Art. 101 TFEU on the basis of an individual exemption. However, this possibility was hardly used in the past, especially in the software sector. Since the 7th amendment to the GWB, the system of legal exception (Section 2 GWB) has also been applicable in German cartel law, following the example of the European requirements introduced in 2003. According to this principle, behaviour which fulfils the conditions in the clearance clauses of Art. 101 (3) TFEU or Section 2 (1) GWB is exempted from the ban on cartels without requiring a prior decision by a cartel authority, Art. 1 (1) and (2) Regulation 1/2003. Furthermore, according to Section 2 (2) sentence 2 GWB, the block exemption regulations issued by the

Commission apply accordingly. Two of these regulations are relevant for software contracts: The Regulation on the Exemption of Technology Transfer Agreements (TTBER) No. 316/2014, and the Regulation on the Exemption of Certain Vertical Agreements (TTBER) No. 330/2010. If these regulations do not apply to a specific software license agreement, an individual assessment under Art. 103 TFEU is still possible.

The Block Exemption Regulation for Technology Transfer Agreements (BER-TT) of 2014, in contrast to the BER-TT of 1996, explicitly includes software licenses in its scope of application (Art. 1 para. 1 lit. b, lit. c BER-TT) and thus - if the other conditions are met - also exempts pure software licensing agreements from the ban on cartels. A prerequisite for exemption is that the software license-

agreement enables the production of contract products. In the case of software license agreements, the contractual product is regularly the software copy. Software licence agreements with end users are therefore generally not covered by the scope of application of the TTBER. Simple resale licences are also not covered. On the other hand, the provision of a master copy of software with a licence to produce and distribute copies is likely to be covered by the TTBER. If, however, the manufacturer grants the distributor the master licence with the permission not to make copies himself, but to grant sub-licences for the production of copies (for example in the case of the distribution of software by download via the internet), then the production of contract products is not the subject of the agreement, so that the TTBER is not applicable. Agreements on Application Service Providing (ASP) and outsourcing agreements are also not directly related to the production of contractual products (software copies), so that these types of agreements are also excluded from the TTBER.

The Block Exemption Regulation for Vertical Agreements (BER-VV) of 330/2010 exempts certain vertical agreements for the purchase or sale of goods and services from the ban on cartels. According to Art. 2(3) of the Block Exemption Regulation, the exemption also applies to agreements containing provisions on the assignment of intellectual property rights, provided that these provisions do not constitute the primary object of the agreement and provided that they relate directly to the use, sale or resale of goods or services. The transfer of a simple licence for use to end users is thus also excluded from the scope of the BER-TT, as is already the case with the BER-VV. As a rule, therefore, no block exemption regulation is applicable to software license agreements with end users. On the other hand, a wide field of application opens up for the BER-VV in the area of software distribution agreements. A prerequisite for the application of the BER-VV to software distribution agreements is that the manufacturer provides the dealer with physical copies of the software for distribution, other-

wise the license agreements would be the main subject matter of the agreement and the exemption would be blocked pursuant to Art. 2(3) BER. Agreements between manufacturer and dealer on the distribution of copies which have already been produced by the manufacturer are thus exempted from the ban on cartels by the Block Exemption Regulation - provided the other conditions are met. This also applies to the distribution of pre-installed software with corresponding hardware. However, if the distribution model provides that the dealer is only provided with a master copy, by means of which he is to produce the copies to be distributed himself, this agreement focuses on the granting of rights of use (reproduction and distribution rights) so that no exemption can be granted by the BER-VV; however, the BVO-TT intervenes in these cases. Even in those cases in which the manufacturer provides the dealer with physical copies of the software, but the distribution model only provides for the granting of sub-licenses by the dealer, the granting of licenses is in the foreground, so that application of the BER-VV is ruled out due to Art. 2 Par. 3. For the same reason, outsourcing and ASP contracts also fall outside the scope of application of the BER-VV. Also not covered are bans on sublicensing and floating licenses that cover the maximum number of users. In addition, field of use clauses, the restriction of contractually determined types of exploitation and use of the subject matter of the contract as long as the manufacturer does not hold a dominant position on the European internal market are also not included.

Exceptions to the general prohibition of restrictive agreements also apply if the restriction of competition is not likely to have an appreciable effect on competition. In so-called "de minimis" notices the European Commission and the Federal Cartel Office have regulated the question of appreciability. An agreement that impairs competition is not appreciable if the share of the participating companies in the relevant market does not exceed 5 % or 5-15 % in total. This exemption, in turn, does not apply to particularly serious competition infringements, such as the fixing of binding minimum or fixed prices.

A further problem is that European competition law is only applicable where there is an effect on trade between Member States. It can be assumed that a vertical agreement is capable of restricting competition between states if its effects are not limited to the territory of a single member state. Thus, agreements on software distribution on the Internet are regularly subject to EU antitrust rules. EU law is similarly applicable when it comes to export restrictions. In the Commission's view, agreements between small and medium-sized enterprises (so-called SMEs) are rarely capable of appreciably affecting trade between Member States. A small or medium-sized enterprise is defined as an enterprise which has fewer than 250 employees, an

annual turnover not exceeding EUR 50 million and a balance sheet total not exceeding EUR 43 million.

The prohibition of cartels in Art. 101 TFEU also does not apply if a restriction of competition is inherent in the nature of a legally regulated distribution system. With reference to this so-called immanence principle, the EU Commission has exempted the genuine agency agreement from Art. 101 TFEU. Thus, if a software vendor is to be regarded as a genuine commercial agent, agreements between him and the manufacturer would be unobjectionable under cartel law from the outset. However, such a case is rare, since software is less often brought to market by way of commercial agency agreements. It is disputed whether the rules on commercial agents cannot be transferred to authorised dealers or franchisees. Part of the literature wants to put software dealers on an equal footing with commercial agents if the appearance of both is economically identical. This interpretation, however, contradicts the Vertical Guidelines, which subject restrictive contractual agreements in authorized dealer agreements and agreements of non-authorized commercial agents as a whole to a prohibition in Art. 101 TFEU.

In addition to Art. 101 TFEU, the question of abuse of a dominant market position also plays a role (Art. 102 (1) TFEU and Sections 19, 20 GWB). The question of the relevant market is decisive here.

In principle, the manufacturer is free to design his distribution structures according to the contract. If he decides on a system of (genuine) commercial agents, he is free from cartel law, but bound by strong commercial law requirements - especially with regard to the entitlement to commission. Own traders who operate in their own name and on their own account cannot be bound by the principle of exhaustion and the central idea of the free movement of goods. However, a selective distribution system would be conceivable. This is a contractual system in which the supplier undertakes to sell the contract goods or services only to dealers selected on the basis of fixed characteristics. For their part, the dealers undertake not to sell the goods or services in question to dealers who are not authorised to distribute them. Such a system is not objectionable under antitrust law if the product sold requires a selection among the distribution partners for image reasons or quality assurance. The latter would certainly be the case with software, especially special programs, since special technical requirements for the correct handling of the program must be met. Selective distribution of software is also permitted if the selection criteria are objective and qualitative, e.g. if the dealer and his staff are sufficiently qualified; a differentiation according to sales criteria would again be prohibited. All restrictions on active and passive sales to final consumers are prohibited; if a free distributor

has obtained software, resale to final consumers cannot be prohibited. Finally, cross-supplies between distributors within a selective distribution system must also remain free.

In addition, the general requirements of the UWG must also be complied with when selling. If, for example, two software suppliers are in dispute over the question of whether the rights of the other party are infringed by the distribution of complex software, it is unlawful under Section 3 of the UWG if the allegedly infringed party states in a vague and sweeping manner in a circular letter to its customers, who are at the same time potential customers of the other party: "Now we have had to establish that a product is being offered by a third-party company which is intended to replace our [...] system. We have a report on this from an expert who was publicly appointed and sworn in by the Chamber of Industry and Commerce [...]. The result of this report has prompted us to seek immediate legal assistance. We will return to the matter in due course.

Chapter nine: **Model contracts**

I. Software license agreement

§ 1 Preamble

Subject of the contract is the delivery of software products by XXX to the buyer.

§ 2 Main obligations

(1) The customer has the non-exclusive right to use the products in unchanged form to the extent of the agreed type of use on the devices for which they are intended.

The customer may make a copy of each product for data backup purposes. In doing so, he must reproduce alphanumeric identifiers, trademarks and copyright notices without alteration and keep records of the whereabouts of the copies. Documentation may not be duplicated.

Der Anwender darf die Software auf jeder ihm zur Verfügung stehenden Hardware einsetzen. Wechselt der Anwender jedoch die Hardware, muss er die Software von der bisher verwendeten Hardware löschen.

The user may use the software on any hardware available to him. However, if the user changes the hardware, he must delete the software from the previously used hardware

The user may duplicate the delivered program as far as the respective duplication is necessary for the use of the program. The necessary duplications also include the installation of the program from the original data carrier to the mass memory of the hardware used as well as loading into the working memory.

The user may sell and give away the software including the manual and other accompanying material to third parties on a permanent basis, provided that the acquiring party agrees to the continued validity of these contractual terms and conditions also towards him. In the event of a transfer, the user must hand over to the new user all program copies including any existing backup copies or destroy the copies not handed over.

The retranslation of the program code into other code forms as well as other types of retranslation of the various manufacturing stages of the software including a program modification for own use is permitted, in particular for the purpose of error correction. If the act is performed for commercial reasons, it is only permissible if it is indispensable for the creation, maintenance or functioning of an independently created computer program and the necessary information has not been published and/or is otherwise accessible.

The customer will ensure that the products, their copies and the documentation are not rented to third parties without the written consent of XXX.

(2) The right to use the products is transferred to the customer upon full payment of the purchase price.

§ 3 Warranty and liability

(1) Defects in the delivered goods, including the manuals and other documents, will be remedied by the supplier within the legally prescribed period of two years from delivery after appropriate notification by the user. This shall be done at the purchaser's option by means of free rectification or replacement delivery. In the case of a replacement delivery, the purchaser is obliged to return the defective item.

(2) If the defect cannot be remedied within a reasonable period of time or if the repair or replacement delivery is to be regarded as having failed for other reasons, the purchaser may, at his discretion, demand a reduction of the remuneration (abatement) or withdraw from the contract. A failure of the rectification of defects can only be assumed if the supplier has been given sufficient opportunity to rectify the defects or to make a replacement delivery without the desired success being achieved, if the rectification or replacement delivery is impossible, if it is refused or unreasonably delayed by the supplier, if there are justified doubts as to the prospects of success, or if it is unreasonable to expect the supplier to do so for other reasons.

(3) The purchaser, unless it is a consumer, is obliged to inspect the delivered goods for obvious defects that are easily noticed by an average customer. Obvious defects also include the absence of manuals as well as considerable, easily visible damage to the goods. They also include cases where a different item or too small a quantity is delivered. Such obvious defects must be reported to the supplier in writing within four weeks of delivery.

Defects that only become obvious later must be notified to the supplier within four weeks of their detection by the user..

In the event of a breach of the obligation to inspect and give notice of defects, the goods shall be deemed to have been approved with regard to the defect in question.

(4) We exclude our liability for slightly negligent breaches of duty, unless damages from injury to life, body or health or guarantees are affected or claims under the Product Liability Act are affected. Furthermore, the liability for the breach of duties, the fulfilment of which is essential for the proper execution of the contract and on the observance of which the customer may regularly rely, remains unaffected. The same applies to breaches of duty by our vicarious agents.

§ 4 Miscellaneous

(1) Subsidiary agreements must be in writing

(2) Should a provision of this contract be invalid, this shall not affect the legal validity of the remaining provisions. In this case, the invalid provision must be replaced with a provision that

corresponds to the intended meaning and purpose of all parties and is feasible in terms of its content.

(3) For legal disputes arising from this contract, the registered office of XXX shall be the place of jurisdiction if

- a) the buyer is a merchant or
- b) the buyer has no general place of jurisdiction within the territory of the Federal Republic of Germany or
- c) the buyer is a legal entity under public law.

XXX is also entitled to sue at any other place of jurisdiction provided by law. The law of the Federal Republic of Germany shall apply, excluding the UN Convention on Contracts for the International Sale of Goods.

II. Software development agreement

Samples for software development contracts are not very useful, since such contracts are typically not conceived in the form of general terms and conditions and, moreover, are very complex and case-specific due to the variety of necessary individual regulations. In the following, only some typical contract components are described in a typifying way.

§ 1 Preamble

T has been active for many years in the insurance sector as an IT service provider and in this context provides IT systems, IT consulting and specialist know-how to its clients and partners. F is a company that develops software for insurance companies. The essential content of these contracts is the provision, further development of modules and maintenance of the insurance software Insutrans to be developed by F. The technical key data of the software are laid down in the attached specification sheet, which is an integral part of the contract. The parties undertake to take into account the special rights and forms of cooperation during the term of the contract, including activities outside of this contract.

§ 2 Main obligations

(1) F undertakes to provide T with ready-to-use software in accordance with the specifications of T on the basis of a contract for work and services and to maintain and ensure operational readiness within the scope of the necessary maintenance. For this purpose, F shall provide and maintain for T the functions of the software listed in the specification sheet and any service level agreements which are altogether part of the contract. The owed software also includes the corresponding technical documentation as well as the source code, in each case on the current program and update status.

F already now grants T the rights of use with regard to the software which are necessary according to the purpose of the contract. T receives an exclusive right of use of the software which is unlimited in time and space. This right is transferable and also entitles the granting of simple rights of use. The right of use also includes future, new forms of use. In particular, T receives the right to use the software

- to reproduce, including reproduction on CD-ROM; DVD; Blue Ray, loading into memory,
- to be disseminated, including via the Internet,
- to redesign and edit, while respecting any moral rights that may exist, and
- to make it available to the public in an incorporeal form, including making it available via the Internet and intranet.

(3) F shall perform the entire contract in person. The performance of services by third parties is excluded unless T agrees to the performance of the contract by third parties expressly and in writing. T agrees to this only if there is an urgent need for subcontracting and no important reason speaks against the person of the subcontractor.

(4) F assumes - apart from the warranty owed - the maintenance of the software, in particular the diagnosis and elimination of malfunctions not caused by warranty. The maintenance shall be carried out within the time period specified in the Service Level Agreement (Annex 3). The scope of the maintenance services is defined in Annex 3 (Service Level Agreement), the handling of the maintenance service is regulated in Annex 4 (Service Management Processes).

(5) T owes F the remuneration agreed in the respective service vouchers 14 days after their invoicing. Unless otherwise agreed, invoicing shall take place after the service has been provided. Insofar as the service requires acceptance by T, the payment period shall not commence until acceptance has taken place. The statutory value added tax is to be shown separately in the invoices.

§ 3 Additional performance obligations

(1) The parties shall mutually provide each other with all information and documents necessary for the performance of the contract. The parties undertake to properly store all documents provided or prepared within the scope of this contract and to protect them from being viewed by third parties.

(2) The parties undertake to ensure that all information and documents received within the scope of the cooperation, regardless of their nature, are to be treated as strictly confidential and used exclusively for the purpose specified in the preamble. The confidential information may not be disclosed to third parties without the prior written consent of the Parties. In additi-

on to knowledge of product and business policy and distribution channels, this applies in particular to all information that is designated as confidential or is identifiable as company or business secrets. This includes basically all business, technical, financial and other information about business activities, projects and customers. The parties are aware that information may also be subject to banking secrecy. The parties and the advisors they employ undertake to maintain strictest secrecy about such information in accordance with the statutory provisions.

(3) All persons who are or may be involved in the performance of the resulting tasks for the parties in connection with this contract shall be obliged to maintain data secrecy in accordance with § 5 BDSG and shall be advised of the criminal and administrative offence provisions of the BDSG and other relevant legal provisions.

(4) All technical and organisational measures shall be taken which are necessary to ensure that the provisions of the aforementioned laws are implemented, in particular the requirements specified in the Annex to Section 9 of the BDSG.

(5) The obligation to comply with confidentiality and banking secrecy shall continue to apply indefinitely beyond the date of termination of this Agreement.

(6) The parties shall refrain from enticing away employees of the other party during the existing contractual relationship or for a period of one (1) year after termination of this Agreement. In the event of a violation, a contractual penalty shall be due and payable to the affected party, the amount of which is determined at the reasonable discretion of the party pursuant to § 315 BGB (German Civil Code) and is subject to judicial review in the event of a dispute. This does not apply if the other party can prove that it did not poach the employee.

(7) This provision shall apply accordingly if the employment relationship is established with a company affiliated to one party under group law or with this company on a freelance basis.

§ 4 Warranty and liability.

(1) F shall comply with the due dates for services to be agreed with T in the individual bills of quantities. Unless otherwise agreed, these due dates are fixed dates. If F does not provide the service on the due date, it is automatically in default without the need for a reminder. In the event of debtor's default, T shall be entitled to the statutory rights regulated in the BGB in full.

(2) F shall be responsible for the fact that its work performances have the characteristics agreed in this contract, the specifications and the SLAs, correspond to the acknowledged rules of technology according to the latest state of the art and do not have any defects which cancel or reduce the value or the suitability of the work for the usual or contractually presupposed use. In the event that the work performance is defective, T shall be entitled to the statutory

warranty rights in accordance with §§ 631 et seq. BGB in full. Insofar as a period of grace is required by T for the assertion of warranty claims, this period shall be set at a maximum of 3 calendar days for T due to the extraordinary urgency of the project

T ist bei Werkmängeln nach Ablauf einer gesetzten Nachbesserungsfrist insbesondere berechtigt, die Mängel im Wege der Selbstvornahme durch Dritte zu beheben oder die Werkleistung bei Mängeln durch Dritte auf Kosten von F erbringen zu lassen. Zur Durchführung der Selbstvornahme ist T berechtigt, einen Kostenvorschuss von F in Höhe von 80 % der erwarteten Kosten auf Basis eines Kostenvoranschlags des Dritten von F auf erstes Anfordern einzufordern.

(3) The contracting parties shall be liable to each other in accordance with the general liability provisions of the BGB. Without prejudice to any further claims and rights, F shall, in the event of non-performance or poor performance, indemnify T and other persons or companies deriving rights from T against all claims asserted against them by third parties, including the costs of any reasonable legal defence. F will inform T about all events that have led to complaints and provide all information that T needs to examine the legal and factual situation.

The parties shall be liable to each other without limitation in case of intent or gross negligence for all damages caused by T as well as by its legal representatives or vicarious agents. In case of slight negligence, the parties shall be liable without limitation in case of injury to life, body or health. The parties shall otherwise be liable to each other - irrespective of the legal grounds - for direct property damage and financial losses caused by their employees or by third parties engaged by them up to an amount of twelve monthly amounts of the use-dependent remuneration.

§ 5 Termination Support

F undertakes to provide T with termination support for the continuation of the project if the contract is terminated. The contracting parties shall conclude a corresponding individual contract for this purpose within one (1) week after termination of the framework agreement. For this purpose, F shall prepare a transfer concept within four (4) months after termination of the framework agreement by sufficient employees in cooperation with a team of specialists from T or a possible future partner. This concept must include a transit process together with a specification sheet, which in its level of detail must at least correspond to the local rules and regulations. After the concept has been approved by T, F will ensure the physical implementation of the transition by X suitable and appropriately trained employees within the framework of a new individual contract for work and services.

The parties to the agreement will determine the consideration for the preparation of the transfer concept and the implementation of the transition.

In the event that the transfer of the process back to T is delayed beyond the end of the framework agreement, F undertakes to provide the services of the concluded individual contracts and service vouchers at least until a successful transition to the new service provider has been completed, even against payment of the agreed consideration.

§ 6 Other provisions

(1) This Agreement contains all the provisions of the Parties relating to the purpose of this Agreement. There are no verbal collateral agreements. The General Terms and Conditions of the contractual partners shall not apply in the relationship between the contractual partners. Amendments, supplements as well as an agreement on the termination of this contract must be made in writing to be effective. A waiver of the requirement of the written form can only be made by means of an express written agreement.

(2) The law of the Federal Republic of Germany shall apply exclusively to the present contractual relationship. The UN Convention on Contracts for the International Sale of Goods - CISG is excluded.

(3) XX is agreed as the place of jurisdiction for legal disputes arising from this contract, its implementation and the validity of the contract. XXX is also entitled to sue at any other legal venue provided by law.

(4) The parties shall not be entitled to offset or withhold any claims to which they are entitled under this contract on the basis of counterclaims of the other party, unless the claims to be offset have been acknowledged in writing by the parties.

(5) Each party shall be entitled to demand changes to the contractual services, in particular if the service requirements change during the term of the contract. The respective other party shall comply with the change request if this is reasonable within the scope of its operational performance and if its original business order is not jeopardized thereby. Each change request must be formulated in writing and submitted to the other party for review and implementation.

(6) Should any provision of this agreement be invalid or become invalid during the term of the agreement, this agreement shall not be affected in all other provisions and shall continue to apply unchanged. The invalid provision shall be replaced by another, permissible provision which comes closest to the meaning and purpose of the invalid provision.

III. User agreements with employed programmers

In addition to the employment contract concluded today, the following agreement is reached between the parties:

§ 1 Rights to work results

(1) The results of work within the meaning of this agreement include in particular the data collections (databases) and data processing programs in source and object program form created by Mr. Y's activities in planning, development, research, customer consulting, maintenance or administration, inventions, algorithms, procedures, specifications, reports as well as documentation and training material on system analysis, rough and detailed design, testing, installation, use, maintenance and servicing of the data collections and data processing programs.

(2) X has the right to exploit or have exploited all work results arising from the activities of Mr. Y for X or which were stimulated by information not generally known to X or which are based to a significant extent on the experience, work or documents of X, without any restrictions in terms of material, time or space.

(3) Protectable inventions and technical improvement proposals are subject to the provisions of the Law on Employees' Inventions. Service inventions within the meaning of the ArbNEG must be reported separately and immediately to X in writing.

(4) Insofar as work results according to (1) and (2) are copyrighted works, Mr. Y grants X exclusive rights of use, unlimited in time and space, for all known types of exploitation. This includes in particular the right to make changes, adaptations or other redesign, to copy, publish, distribute, demonstrate, transmit via pipelines or wirelessly and to use the work results in the original or in modified, edited or redesigned form and to use them for the operation of data processing systems and devices.

(5) No further consent on the part of Mr. Y is required for the full or partial exercise of the rights under paragraph (4).

(6) X is authorized to transfer the rights under paragraphs (3), (4) and (5) in whole or in part to third parties or to grant corresponding rights to third parties without obtaining further consent from Mr. Y.

(7) Mr. Y acknowledges that there is no obligation to name the author.

(8) Mr. Y waives access to the original work, all programs in source code and all other work results within the meaning of paragraphs (1) and (2).

(9) The granting of rights remains unaffected by the termination of the employment relationship. An obligation on the part of X to make the work results created by him during the term of

the employment relationship accessible to Mr. Y who has left the Company is expressly excluded (no right of access).

§ Section 2 Compensation

(1) The rights to work results referred to in § 1 are covered by Mr. Y's current remuneration, including for the period after termination of the employment relationship

(2) Mr Y's entitlement to statutory remuneration for service inventions and technical improvement regulations under the ArbNEG shall remain unaffected. Its corresponding application to software products is expressly excluded.

§ 3 Mr. Y's own software and inventions

(1) In the annex to this contract, Mr. Y shall inform X in the form of a title list of all inventions, data processing programs, preliminary drafts, specifications, problem analyses, rough concepts and the like which were made or developed by himself prior to the commencement of the employment relationship and over which he is fully or partially entitled to dispose.

(2) Mr. Y assures that he no longer has access to any further data processing programs, preliminary designs, requirement specifications, problem analyses, rough concepts and the like at the time of signing this agreement. Both parties agree that all products developed by Mr. Y as of today are presumed to have been developed for X and that they have not been developed for X before or within the scope of the employment relationship, unless listed in the Annex.

(3) If Mr. Y intends to bring the inventions, data processing programs and related documentation mentioned in the title list according to paragraph (1) into the company of X, this requires the prior written consent of X. If X agrees to the use of this material, a separate written agreement shall be made regarding the right of use and remuneration. If such or other programs are contributed tacitly, X shall receive a right of use free of charge and for an unlimited period of time without the need for an express agreement to this effect, unless Mr. Y has expressly reserved his rights in writing to the management at the time of contribution.

§ 4 Sideline software exploitation

(1) Any direct or indirect exploitation of work results according to § 1 is prohibited for Mr. Y

(2) The commercial exploitation of other software created by Mr. Y in addition to his work for X, which is not a result of his work within the meaning of §§ 1 and 2, as well as his own software in accordance with § 3, requires the prior written consent of X. This consent may not be denied for reasons other than the protection of business or trade secrets of X.

(3) During the term of the employment contract, Mr. Y will not engage in any competitive activity against X, and in particular will not participate - even as a minority shareholder or dormant partner - in a company which is in competition with X.

§ 5 Third party information, documents and software

(1) Mr Y undertakes not to provide X with confidential information or documents belonging to others. The employee will also not cause such confidential information or documents to be used in his company without the knowledge of X.

(2) Mr. Y undertakes not to provide X with any data processing programs and related documentation which he has acquired, licensed or otherwise obtained from third parties, unless expressly authorized by the Company. Mr. Y will also not arrange for such material to be used in their companies without the knowledge of X.

(3) Mr. Y shall, at the request of X, truthfully declare for work results created by him within the meaning of § 1 whether the work results were created by him in the original and/or which parts were taken over directly or indirectly in modified or edited form from external sources.

§ 6 Business and trade secrets

(1) Mr. Y is obliged to keep secret all business or trade secrets of X. This includes in particular all documents, data collections and data processing programs marked as confidential or internal to the company or recognizable as such as well as associated documentation and training material. This also applies in particular to all knowledge which Mr. X acquires in the course of advising customers of X about their business operations.

(2) The obligation under subsection (1) shall continue to apply after termination of the employment relationship.

(3) The betrayal of business and trade secrets of X or the customers of X is subject, among other things, to the criminal law provisions of the law against unfair competition. An extract from this law is attached to this agreement as an annex.

§ 7 Scientific publications and lectures

(1) Manuscripts for scientific publications and lectures by Mr. Y, which are related to the field of activity of X, shall be submitted to X for approval. A release shall be effected unless justified operational interests prevent a publication

(2) For scientific publications or lectures in accordance with paragraph (1), Mr. Y shall receive an exemption from § 1 paragraph (2) and paragraph (4) to the extent necessary for the purpose of the publication and/or lecture, which includes a waiver by X of any fee claim.

IV. Model of a confidentiality agreement with employees

Preamble

The undersigned employee has been made aware that the business activities of the XXX are highly sensitive and secret activities. In particular, the instruments and methods used for financial analysis are protected by law in many ways, including as trade secrets. Any un-

authorized disclosure of information from the XXX environment can result in serious damage to the company. It should also be noted that the XXX is an internationally active company whose customers and partners are recruited from all parts of the world. For these reasons, XXX must insist that the employee undertakes to maintain strict confidentiality in all activities within the scope of further provisions.

§ 1 For these reasons, the Employee undertakes to maintain strict and unconditional secrecy with regard to all facts, information and documents (in oral, printed or machine-readable form) concerning the business operations of XXX referred to in the Preamble (hereinafter referred to as "confidential information"). Confidential information includes in particular

- the technologies and data models developed by the XXX Group for computer-aided analysis of financial markets,
- the software developed by the XXX Group for analysis, including source code, object codes, program documentation, data flow charts, user documentation and other technical bases,
- the identity of XXX customers, partners, suppliers and distributors
- the financial and strategic framework of the XXX Group,
- the information underlying the cooperation between clients and XXX regarding the economic activities of the clients,
- the financial information that XXX provides or intends to provide to its clients.

§ 2 Without the express written consent of the XXX, the Employee may not collect, copy, store or in any way use the Confidential Information for his own purposes or for the benefit of third parties. Manuscripts for scientific publications and lectures related to the field of activity of the XXX Group must be submitted to the XXX for approval. A release is made, provided that justified operational interests do not conflict with a publication

§ 3 The Employee undertakes to pass on confidential information within the XXX only to those who absolutely need this information to carry out their respective work task in the XXX area. In doing so, the guidelines of the management board with regard to the respective work tasks shall be observed.

§ 4 The employee is obligated on the basis of his contract of employment to comply with the latest state of the art with regard to data security and the protection of information. He shall inform the XXX of existing and impending security gaps. When selecting and appointing maintenance, care and other technical personnel, he shall ensure that the persons working in each case, for their part, observe the latest state of data security and take into account the confidential nature of XXX information in all their activities.

§ 5 The employee undertakes to observe the highest standards of confidentiality in communications within the company and in dealings with the outside world. In particular, he will not transmit information via Internet services without encryption. He shall ensure that suitable firewall systems are used and that virus checks are always kept up to date. He shall also ensure that the computers used by him are not accessible to unauthorized persons, in particular that they are protected against access by third parties by efficient technical protection systems. The employee also has special duties of care with regard to the secure handling of passwords..

§ 6 The Employee shall store and use confidential information on computers outside the XXX rooms only after consultation with the Management. Written documents containing confidential information may only be used outside the XXX rooms to the extent that this is necessary to carry out a specific work order. Documents containing confidential information which the employee no longer requires must be returned to the employer or deleted immediately after the employer has been informed accordingly

§ 7 It is pointed out to the employee that any violation of this confidentiality agreement may result in high claims for damages by XXX against him. The employee is also already advised of the conceivable criminal law consequences of unauthorised disclosure, in particular with regard to §§ 17, 18 of the German Unfair Competition Act (UWG) (conceivable here, if not entirely unproblematic: contractual penalty).

§ 8 During the term of this agreement, the employee shall not, without the consent of the Company, directly or indirectly invest in companies which compete with the Company or with which the Company maintains business relations

§ 9 The employee further undertakes for a period of two years after termination of this agreement not to work in any way for an enterprise operating in the field of activity of the Company without the consent of the shareholders, nor to engage in any transactions for its own or third party accounts in this field of activity, nor to acquire any direct or indirect interest in an enterprise operating in the field of activity of the Company. (Proposal: The employee receives compensation, the amount of which is agreed individually between the XXX and the employee)

§ 10 Major gifts or other significant advantages from persons who have a business relationship with the company or who are seeking such a relationship may only be accepted by the employee with the prior consent of the shareholders' meeting.

§ 11 All records and documents drafted during the period of employment are the property of the company. The employee is obliged to hand over the documents and records to the

Company upon first request, but no later than upon termination of the contract. Neither from the point of view of intellectual property rights nor for any other reason shall the employee have a right of retention.

XXX has the right to exploit or allow the exploitation of all work results arising from the employee's activities for XXX Group or which were stimulated by information not generally known to XXX Group or which are significantly based on experience, work or documents of XXX Group, without material, time or space restrictions. Insofar as work results are copyrighted works, the employee of XXX Group grants XXX Group exclusive rights of use for all known types of exploitation, without restrictions in time or space. In particular, this includes the right to make changes, adaptations or other modifications, to copy, publish, distribute, distribute, demonstrate, transmit via pipelines or wirelessly and to use the work results in the original or in modified, edited or modified form and to use them for the operation of data processing systems and devices. The full or partial exercise of the rights does not require any further consent from the employee. XXX is authorized to transfer the rights in whole or in part to third parties or to grant corresponding rights to third parties without obtaining further consent from the employee. The granting of rights remains unaffected by the termination of the employment relationship.

V. Sample agreement on the Change Request

Preamble

The parties are aware that this is an absolutely critical process for XXX. They are also aware that the requirements will continue to develop in the future due to changes in the industry and that there will therefore be a considerable need to adapt the process within the framework of the cooperation. The parties agree on business process outsourcing on a work contract basis in accordance with the provisions of the following framework agreement.

§ 1 Contract Management

This framework agreement describes the general rules for the provision of services for XXX by outsourcing contractors.

The provisions of this contract shall apply to all individual contracts concluded between XXX and the outsourcing contractor after its entry into force, if and to the extent not expressly agreed otherwise in the individual contract.

Individual contracts within the meaning of this contract shall be concluded in the form of service vouchers. These service vouchers regulate the details of the services to be provided. An updated overview of the valid service certificates is created monthly as part of reporting.

Service slips determine the scope of services (quantities and terms), their remuneration, obligations to cooperate, service level agreements and any acceptance guidelines. They are to be drawn up in X-format and are to be signed for the purpose of concluding the contract by the authorised signatories of both contracting parties determined by the steering committee.

An individual contract is only concluded on the basis of a written order from XXX on a service certificate and its written confirmation by the outsourcing contractor.

The technical and organisational handling of the outsourcing project as well as the modification, addition and cancellation of elements of the framework agreement are exclusively coordinated by a steering committee to be constituted between the parties. However, changes to the scope of services and individual contracts will be implemented in accordance with the change management procedure set out in clause 4.d. of this framework agreement. The Steering Committee shall have sole decision-making authority and shall be a continuous institution of both Parties. It consists of 3 members of each contracting party and will adopt its own rules of procedure.

- a) Each Contracting Party shall nominate and provide a generally responsible contact person who shall act as coordinator of all contract-related activities in the area of responsibility of that Contracting Party and as a member of the Steering Committee. The Contracting Parties will provide for a deputy in case the coordinators are prevented from attending and will inform each other immediately of the person of the deputy. During the duration of the contractual relationship, the coordinators will meet at regular intervals and discuss all questions and problems of the contractual cooperation. However, the coordinators of the contracting parties are also entitled to call meetings of the Steering Committee at any time due to important issues.

If the coordinators are unable to reach agreement within two weeks in problem cases, the responsible members of the management of the contracting parties will be entrusted with the matter. They are to reach a joint solution within two weeks. The coordinators will prepare a written problem report for this purpose

In the event that the management members of the contracting parties are also unable to agree on an amicable solution to the problem, the right to determine performance pursuant to § 315 BGB is at the free discretion of XXX

In order to enforce the performance of services with outsourcing clients, XXX is entitled to appoint one of its coordinators of the Steering Committee as "Authorized Manager", who is authorized to give instructions to the employees of outsourcing clients

regarding the performance of services. The instructions are binding and cannot be overruled by the management of the outsourcing company.

- b) The Steering Committee will also appoint authorised signatories of the respective parties, who are exclusively authorised to make and sign legally effective declarations within the scope of the contractual relationship. However, these authorised signatories may not be identical with the coordinators.
- c) Apart from contract management, the steering committee has the following tasks:
 - Ensuring that services are provided in accordance with requirements,
 - Technical capacity planning for the provision of services,
 - Internal arbitration procedure in case of disagreements.
- d) Within the framework of contract management, the coordinators have the task of implementing the so-called change management procedure. Change management means that XXX can demand changes in the service provision of already issued service certificates or new services due to the issue of new service certificates within the scope of the outsourcing contractor's performance.

Change Management is bound to the following procedure:

- XXX may demand changes in the scope of services after conclusion of individual contracts within the scope of the outsourcing customer's performance, unless this is unreasonable for the outsourcing customer.
- The change shall be documented in a change request document in accordance with X format, describing the request and the scope of the change by XXX.
- The Outsourcer shall review XXX's change request and notify XXX within 10 business days whether the change procedure is unreasonable or impracticable for them. If the change procedure is reasonable or feasible, it shall at the same time inform XXX whether or not a comprehensive review is required.

If a comprehensive audit is required, the outsourcing customer must at the same time submit a corresponding audit offer with details of the remuneration. XXX will either issue or reject the audit order within 10 working days.

If a comprehensive examination of the amendment procedure is not necessary, the outsourcing customer shall either submit an offer for implementation, stating the implementation period, planned dates and effects on remuneration, or agree to implement the requested amendments.

XXX will accept or reject the realization offer of the outsourcing customer within the offer commitment period. Agreed changes to services must be documented in a binding

manner by corresponding adjustment of the individual contract or production of a new individual contract. The offer and the acceptance or rejection shall be signed by the authorised signatories appointed by the steering committee.

The contracting parties may agree that the services affected by the change request shall be interrupted until the necessary adjustment of the contractual agreements has been made.

If the necessary adjustment of the contractual agreements does not take place within the binding offer period of the realization offer, the work will be continued on the basis of the individual contract.

- e) Excluded from change management is the technology adaptation by the outsourcing partner. This means that the installed hardware and software is to be kept at the latest state of the art without any separate charge for the same scope of services. The outsourcing customer shall inform XXX in particular about possible optimization possibilities due to progressing technological progress
- f) The Steering Committee will meet 3 months before the end of a year in order to determine, as far as possible, the scope of services for the following year.

The contracting parties intend to define a certain scope of services, including foreseeable changes, already at this time and to agree on a flat-rate remuneration for this.

VI. Vertrag über Softwarepflege

Preamble

Subject of this contract are maintenance services which XXX provides for the customer. Other services such as installation, instruction, training, individual adaptation of the software or other services are not part of the maintenance service. If XXX offers such services, they must be agreed upon separately in writing.

§ 1 Main service obligations

(1) XXX offers the following software maintenance services:

- The customer is offered those new program versions (e.g. updates) of the contractual software which are released during the term of the contract;
- During the official business hours of XXX, the customer will be provided with technical support by telephone for troubleshooting and error correction or workarounds;
- the customer will be given advance information on planned new program versions.

The maintenance relationship begins - unless otherwise expressly agreed - with the delivery of the software. In this case the payment obligation begins 6 months after the delivery of the software

(2) The maintenance fees are based on the current price list. The remuneration is invoiced in advance for each hull/calendar year.

§ 2 Secondary obligations

1) XXX is released from the obligation to provide maintenance services to the customer, without this having an effect on the obligation to pay the agreed remuneration, if the customer refrains from installing the current or previous version and the delivered problem solutions of the software, unless the delivered versions or problem solutions are faulty.

(2) Excluded from the maintenance service are repairs or increased expenditure for the maintenance of the software, which were necessary due to use contrary to the contract, use in another than the agreed upon operational environment, improper use, external influence, force majeure or similar circumstances, work on the software, which the customer has changed contrary to the contract or which was technically maintained by others than XXX, without a written agreement of XXX was present in each case before.

(3) Customer will notify XXX immediately if the Software does not work properly. In doing so, Customer shall describe in writing the circumstances of the occurrence of the errors and their effects.

(4) Customer shall take reasonable precautions for data backup so that the data from the data stock, which is provided in machine-readable form, can be reproduced with reasonable effort.

§ 3 Warranty

(1) XXX guarantees that the services provided within the scope of the care service are not afflicted with errors that cancel or reduce the value and suitability compared to the agreed scope of services. Insignificant deviations remain unconsidered

(2) If defects occur during contractual use, the customer is obliged to give XXX the opportunity to rectify these within a reasonable period of time. The customer has to inform XXX immediately about the defects in a comprehensible form and with information useful for the correction of the defects. The customer will support XXX within reasonable limits in the correction of the errors. XXX does not warrant for such defects which are not reproducible by XXX.

(3) If XXX does not succeed, despite repeated efforts, to eliminate the defect or to circumvent it in such a way that the software can be used in accordance with the product description, Customer is entitled to demand a reduction of the agreed remuneration or to withdraw from the contract in accordance with the statutory provisions.

§ Article 4 Termination

The care contract can be concluded for an indefinite period of time or for a limited period of time, which is to be recorded separately. In the case of an indefinite duration, the care service

can be terminated at the end of each year by each party to the contract with a notice period of 3 months. An extraordinary termination remains unaffected by this regulation.

§ 5 Miscellaneous

(1) Subsidiary agreements must be made in writing.

(2) Sollte eine Bestimmung dieses Vertrags unwirksam sein, so werden dadurch die übrigen Bestimmungen in ihrer rechtlichen Wirksamkeit nicht berührt. An die Stelle der unwirksamen Bestimmung muss für diesen Fall mit anfänglicher Wirkung eine solche treten, die dem beabsichtigten Sinn und Zweck aller Parteien entspricht und ihrem Inhalt nach durchführbar ist.

(3) For legal disputes arising from this contract, the registered office of XXX shall be the place of jurisdiction if

- a) the buyer is a merchant or
- b) the buyer has no general place of jurisdiction in the territory of the Federal Republic of Germany or
- c) the buyer is a legal entity under public law.

XXX is also entitled to sue at any other place of jurisdiction provided by law. The law of the Federal Republic of Germany shall apply, excluding the UN Convention on Contracts for the International Sale of Goods.

VII. The General Public License

Version 3, 29 June 2007

Preamble

The GNU General Public License is a free, copyleft license for software and other kinds of works.

The licenses for most software and other practical works are designed to take away your freedom to share and change the works. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change all versions of a program – to make sure it remains free software for all its users. We, the Free Software Foundation, use the GNU General Public License for most of our software; it applies also to any other work released this way by its authors. You can apply it to your programs, too.

When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for them if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs, and that you know you can do these things.

To protect your rights, we need to prevent others from denying you these rights or asking you to surrender the rights. Therefore, you have certain responsibilities if you distribute copies of the software, or if you modify it: responsibilities to respect the freedom of others.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must pass on to the recipients the same freedoms that you received. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.

Developers that use the GNU GPL protect your rights with two steps: (1) assert copyright on the software, and (2) offer you this License giving you legal permission to copy, distribute and/or modify it.

For the developers' and authors' protection, the GPL clearly explains that there is no warranty for this free software. For both users' and authors' sake, the GPL requires that modified versions be marked as changed, so that their problems will not be attributed erroneously to authors of previous versions.

Some devices are designed to deny users access to install or run modified versions of the software inside them, although the manufacturer can do so. This is fundamentally incompatible with the aim of protecting users' freedom to change the software. The systematic pattern of such abuse occurs in the area of products for individuals to use, which is precisely where it is most unacceptable. Therefore, we have designed this version of the GPL to prohibit the practice for those products. If such problems arise substantially in other domains, we stand ready to extend this provision to those domains in future versions of the GPL, as needed to protect the freedom of users.

Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in those that do, we wish to avoid the special danger that patents applied to a free program could make it effectively proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free.

The precise terms and conditions for copying, distribution and modification follow.

Terms and Conditions

0. Definitions.

"This License" refers to version 3 of the GNU General Public License.

"Copyright" also means copyright-like laws that apply to other kinds of works, such as semiconductor masks.

”The Program“ refers to any copyrightable work licensed under this License. Each licensee is addressed as ”you“. ”Licensees“ and ”recipients“ may be individuals or organizations.

To ”modify“ a work means to copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy. The resulting work is called a ”modified version“ of the earlier work or a work ”based on“ the earlier work.

A ”covered work“ means either the unmodified Program or a work based on the Program.

To ”propagate“ a work means to do anything with it that, without permission, would make you directly or secondarily liable for infringement under applicable copyright law, except executing it on a computer or modifying a private copy. Propagation includes copying, distribution (with or without modification), making available to the public, and in some countries other activities as well.

To ”convey“ a work means any kind of propagation that enables other parties to make or receive copies. Mere interaction with a user through a computer network, with no transfer of a copy, is not conveying.

An interactive user interface displays ”Appropriate Legal Notices“ to the extent that it includes a convenient and prominently visible feature that (1) displays an appropriate copyright notice, and (2) tells the user that there is no warranty for the work (except to the extent that warranties are provided), that licensees may convey the work under this License, and how to view a copy of this License. If the interface presents a list of user commands or options, such as a menu, a prominent item in the list meets this criterion.

1. Source Code.

The ”source code“ for a work means the preferred form of the work for making modifications to it. ”Object code“ means any non-source form of a work.

A ”Standard Interface“ means an interface that either is an official standard defined by a recognized standards body, or, in the case of interfaces specified for a particular programming language, one that is widely used among developers working in that language.

The ”System Libraries“ of an executable work include anything, other than the work as a whole, that (a) is included in the normal form of packaging a Major Component, but which is not part of that Major Component, and (b) serves only to enable use of the work with that Major Component, or to implement a Standard Interface for which an implementation is available to the public in source code form. A ”Major Component“, in this context, means a major essential component (kernel, window system, and so on) of the specific operating system (if any) on which the executable work runs, or a compiler used to produce the work, or an object code interpreter used to run it.

The "Corresponding Source" for a work in object code form means all the source code needed to generate, install, and (for an executable work) run the object code and to modify the work, including scripts to control those activities. However, it does not include the work's System Libraries, or general-purpose tools or generally available free programs which are used unmodified in performing those activities but which are not part of the work. For example, Corresponding Source includes interface definition files associated with source files for the work, and the source code for shared libraries and dynamically linked subprograms that the work is specifically designed to require, such as by intimate data communication or control flow between those subprograms and other parts of the work.

The Corresponding Source need not include anything that users can regenerate automatically from other parts of the Corresponding Source.

The Corresponding Source for a work in source code form is that same work.

2. Basic Permissions.

All rights granted under this License are granted for the term of copyright on the Program, and are irrevocable provided the stated conditions are met. This License explicitly affirms your unlimited permission to run the unmodified Program. The output from running a covered work is covered by this License only if the output, given its content, constitutes a covered work. This License acknowledges your rights of fair use or other equivalent, as provided by copyright law.

You may make, run and propagate covered works that you do not convey, without conditions so long as your license otherwise remains in force. You may convey covered works to others for the sole purpose of having them make modifications exclusively for you, or provide you with facilities for running those works, provided that you comply with the terms of this License in conveying all material for which you do not control copyright. Those thus making or running the covered works for you must do so exclusively on your behalf, under your direction and control, on terms that prohibit them from making any copies of your copyrighted material outside their relationship with you.

Conveying under any other circumstances is permitted solely under the conditions stated below. Sublicensing is not allowed; section 10 makes it unnecessary.

3. Protecting Users' Legal Rights From Anti-Circumvention Law.

No covered work shall be deemed part of an effective technological measure under any applicable law fulfilling obligations under article 11 of the WIPO copyright treaty adopted on 20 December 1996, or similar laws prohibiting or restricting circumvention of such measures.

When you convey a covered work, you waive any legal power to forbid circumvention of technological measures to the extent such circumvention is effected by exercising rights under this License with respect to the covered work, and you disclaim any intention to limit operation or modification of the work as a means of enforcing, against the work's users, your or third parties' legal rights to forbid circumvention of technological measures.

4. Conveying Verbatim Copies.

You may convey verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice; keep intact all notices stating that this License and any non-permissive terms added in accord with section 7 apply to the code; keep intact all notices of the absence of any warranty; and give all recipients a copy of this License along with the Program.

You may charge any price or no price for each copy that you convey, and you may offer support or warranty protection for a fee.

5. Conveying Modified Source Versions.

You may convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4, provided that you also meet all of these conditions:

- a) The work must carry prominent notices stating that you modified it, and giving a relevant date.
- b) The work must carry prominent notices stating that it is released under this License and any conditions added under section 7. This requirement modifies the requirement in section 4 to "keep intact all notices".
- c) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.
- d) If the work has interactive user interfaces, each must display Appropriate Legal Notices; however, if the Program has interactive interfaces that do not display Appropriate Legal Notices, your work need not make them do so.

A compilation of a covered work with other separate and independent works, which are not by their nature extensions of the covered work, and which are not combined with it such as to form a larger program, in or on a volume of a storage or distribution medium, is called an "aggregate" if the compilation and its resulting copyright are not used to limit the access or

legal rights of the compilation's users beyond what the individual works permit. Inclusion of a covered work in an aggregate does not cause this License to apply to the other parts of the aggregate.

6. Conveying Non-Source Forms.

You may convey a covered work in object code form under the terms of sections 4 and 5, provided that you also convey the machine-readable Corresponding Source under the terms of this License, in one of these ways:

- a) Convey the object code in, or embodied in, a physical product (including a physical distribution medium), accompanied by the Corresponding Source fixed on a durable physical medium customarily used for software interchange.
- b) Convey the object code in, or embodied in, a physical product (including a physical distribution medium), accompanied by a written offer, valid for at least three years and valid for as long as you offer spare parts or customer support for that product model, to give anyone who possesses the object code either (1) a copy of the Corresponding Source for all the software in the product that is covered by this License, on a durable physical medium customarily used for software interchange, for a price no more than your reasonable cost of physically performing this conveying of source, or (2) access to copy the Corresponding Source from a network server at no charge.
- c) Convey individual copies of the object code with a copy of the written offer to provide the Corresponding Source. This alternative is allowed only occasionally and noncommercially, and only if you received the object code with such an offer, in accord with subsection 6b.
- d) Convey the object code by offering access from a designated place (gratis or for a charge), and offer equivalent access to the Corresponding Source in the same way through the same place at no further charge. You need not require recipients to copy the Corresponding Source along with the object code. If the place to copy the object code is a network server, the Corresponding Source may be on a different server (operated by you or a third party) that supports equivalent copying facilities, provided you maintain clear directions next to the object code saying where to find the Corresponding Source. Regardless of what server hosts the Corresponding Source, you remain obligated to ensure that it is available for as long as needed to satisfy these requirements.
- e) Convey the object code using peer-to-peer transmission, provided you inform other peers where the object code and Corresponding Source of the work are being offered to the general public at no charge under subsection 6d.

A separable portion of the object code, whose source code is excluded from the Corresponding Source as a System Library, need not be included in conveying the object code work.

A "User Product" is either (1) a "consumer product", which means any tangible personal property which is normally used for personal, family, or household purposes, or (2) anything designed or sold for incorporation into a dwelling. In determining whether a product is a consumer product, doubtful cases shall be resolved in favor of coverage. For a particular product received by a particular user, "normally used" refers to a typical or common use of that class of product, regardless of the status of the particular user or of the way in which the particular user actually uses, or expects or is expected to use, the product. A product is a consumer product regardless of whether the product has substantial commercial, industrial or non-consumer uses, unless such uses represent the only significant mode of use of the product.

"Installation Information" for a User Product means any methods, procedures, authorization keys, or other information required to install and execute modified versions of a covered work in that User Product from a modified version of its Corresponding Source. The information must suffice to ensure that the continued functioning of the modified object code is in no case prevented or interfered with solely because modification has been made.

If you convey an object code work under this section in, or with, or specifically for use in, a User Product, and the conveying occurs as part of a transaction in which the right of possession and use of the User Product is transferred to the recipient in perpetuity or for a fixed term (regardless of how the transaction is characterized), the Corresponding Source conveyed under this section must be accompanied by the Installation Information. But this requirement does not apply if neither you nor any third party retains the ability to install modified object code on the User Product (for example, the work has been installed in ROM).

The requirement to provide Installation Information does not include a requirement to continue to provide support service, warranty, or updates for a work that has been modified or installed by the recipient, or for the User Product in which it has been modified or installed. Access to a network may be denied when the modification itself materially and adversely affects the operation of the network or violates the rules and protocols for communication across the network.

Corresponding Source conveyed, and Installation Information provided, in accord with this section must be in a format that is publicly documented (and with an implementation available to the public in source code form), and must require no special password or key for unpacking, reading or copying.

7. Additional Terms.

”Additional permissions“ are terms that supplement the terms of this License by making exceptions from one or more of its conditions. Additional permissions that are applicable to the entire Program shall be treated as though they were included in this License, to the extent that they are valid under applicable law. If additional permissions apply only to part of the Program, that part may be used separately under those permissions, but the entire Program remains governed by this License without regard to the additional permissions.

When you convey a copy of a covered work, you may at your option remove any additional permissions from that copy, or from any part of it. (Additional permissions may be written to require their own removal in certain cases when you modify the work.) You may place additional permissions on material, added by you to a covered work, for which you have or can give appropriate copyright permission.

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VIII. Düsseldorf Model - Proposal

1. Since a legal dispute is not yet pending and since the applicant has a legal interest in the state of affairs being established, the conduct of an independent procedure of taking evidence pursuant to Sections 485 et seq. ZPO ordered

- 2.

Evidence shall be obtained by obtaining a written expert opinion,

whether the source code and/or the database structure of the software and/or the database structure of the software and/or database tables and/or program algorithms of the software are located on a common development server of the defendant and/or on a computer of the defendant, in particular its managing director and

the extent to which the source code and database structure of the software offered by the defendant is identical or similar to the source code and/or database structure of the software created by the applicant, or to what extent the defendant's

software has been reprogrammed using the architecture and program sequences In particular, the expert shall compare the architecture of the two software as well as the database structure, database tables and program algorithms.

- a) Mr. Dipl.-Informatiker XX is appointed as expert, alternatively an expert to be appointed by the court.
 - b) In the interest of preserving any trade secrets of the respondent which might come to light during the assessment, the expert is instructed to avoid any direct contact with the applicant and to conduct necessary correspondence either through the court or with the lawyers. Furthermore, the expert must also maintain secrecy towards third parties
 - c) Due to the particular urgency of the case, the appraisal was carried out without prior summons and hearing of the defendant.
3. In addition, the following further orders will be made by way of an interim injunction:
- a) The lawyers shall be obliged to keep secret facts which have come to their knowledge in the course of the independent evidence proceedings and which concern the defendant's area of business, including from the applicant and its employees.
 - b) The competent bailiff shall be authorised to seize a common development server of the defendant and all computers of the defendant located in its business premises there, so that the expert can make an immediate on-site inspection of a common development server and all computers of the defendant and determine whether copies of the source code and/or the database structure and/or database tables and/or the program algorithms of the software are stored on them. In this context, the Expert shall be permitted
 - (1) commission a common development server as well as each individual computer and connect it to a printer, providing it with any user IDs and passwords that may be required and granting the access rights of the highest system administrator
 - (2) view the table of contents of the executable program files and the table of contents of the link files;
 - (3) to store the list of files appearing on the screen on a storage medium (USB stick) brought along by the authorized inspector, which is stored on a common development server and on the hard disk of the respective computer;
 - (4) print out the list of executable files obtained for a common development server and for each computer and submit the printout to the Court together

with a report showing which copies of the applicant's source code and/or database structure and/or database tables and/or program algorithms are stored on a common development server or on the respective hard disk, as evidenced by the list of program files thus obtained

- (5) to start the copies of the source code and/or the database structure and/or the database tables and/or the program algorithms of the applicant found on a common development server as well as on each individual computer of the defendant on a trial basis;
- c) With immediate effect and for the duration of the evaluation, the respondent is prohibited from arbitrarily making changes to the copies of the source code and/or the database structure and/or the database tables and/or the program algorithms of the applicant to be evaluated as well as to the software to be evaluated, unless a copy of the unchanged contents is kept in each case, and from transferring the copies of the source code and/or the database structure and/or the database tables and/or the program algorithms of the applicant to be evaluated and the software to be evaluated to another location.
- d) The defendant shall provide the expert with a copy of the source code to be assessed and the database structure of the opposing software on a CD-ROM or DVD. The respondent shall provide the Expert with access to the source code and the database structure to be evaluated and to the written or electronic development documentation and shall inform him of any necessary user IDs and passwords, whereby the Expert shall be granted the access rights of the highest system administrator. In doing so, it shall in particular grant the authorized expert access to a development server located at its premises and to the computers of the employees.
- e) The respondent shall tolerate that the expert inspects the source code to be assessed and the database structure as well as the development documentation of the opposing software and makes a copy of each of these for the purpose of further assessment.
- f) For each case of infringement of the orders referred to in b), c), d) and e) below, the respondent is threatened with a fine of up to two hundred and fifty thousand (250,000.00) euros, or alternatively with imprisonment for up to six months or, in the event of recurrence, for up to two years, to be enforced against the respondent's managing director.

After submission of the written expert opinion, the respondent will be given the opportunity to comment on any confidentiality interests on its side. The court will then decide whether the expert opinion will be brought to the attention of the applicant.

The conduct of the independent evidence procedure is dependent on the applicant paying an advance on expenses in the amount of seven thousand five hundred (7500.00) euros to the court cashier in Düsseldorf in advance.

The costs of the preliminary injunction proceedings shall be borne by the respondent.

