〈논 문〉

European and German Law on Product Liability and Standard Form Contracts

Prof. Dagmar Coester-Waltjen*

Ⅰ. Origin and Purpose of the Rules

Both fields, I shall be talking about, have developed during the last fourty years, in both fields the law of the European Union has had a considerabe influence, though the European activities took place in form of directives only in the last two decades. In both fields consumer protection has been an important, though not the only concern.

In both fields the member states of the European Union had to react to the directives, but the implementation of the European rules to the national laws varied at least slightly. Thus, though the solutions are similar, there is no complete unification of the national rules.[1)]

In the following remarks I shall start with the original German solutions, then consider the European influence and draw a rough picture of the legal solutions for the time being and their problems.

Ⅱ. The Law of Standard Form Contracts

1. Sources of Law

Though the special problems of standard form contracts had been raised by

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* Juristische Fakultät, Universität München, LL.M.(Univ. of Michigan)

1) See for unfair contract terms: *Schulte-Nölke*, NJW 1999, 3176; report of the EU-Committee of 27. 4. 2000, KOM [2000] 248; for product liability see: *van Gerven*, Tort Law, Jus Comune Case Books of the Common Law of Europe, Oxford 2000, G 6. 3, p.588 seq.

Ludwig Raiser already in the thirties of the last century, the German legislator reacted only in 1976 by enacting a special statute on standard form contracts. Up to then courts had tried to prevent the very unfair and the extremely unreasonable contract terms in standard forms by application of the public policy rule (§ 138 German Civil Code). It was felt, however, that this instrument was not sharp enough for handling the specific problems. Therefore the legislator enacted a law which the on the one hand preserved the advantages of standard form contracts in general, but was designed at the same time to prevent abuse of contractual freedom by unilateral pre-formulation of contractual terms. The concern and the main issue of the law is: keeping the market free from unfair terms. Legal relations altogether are the target, not only consumer protection. Therefore the statute applies to relations between merchants, between merchants and consumers as well as between consumers themselves. Notwithstanding some changes — mostly due to European law to which I shall come back in a moment —, this statute is in force today and has proved to be quite efficient and satisfactory. At the moment it is planned to integrate the statute into the civil code with only some minor changes.

The European initiatives in this field started in the early seventies resulting in the enactment of a directive on unfair terms in consumer contracts of 199 3.[2] The directive focuses on the protection of the consumer though the end in view is also to prevent the distortion of competition among member states by different standards of contractual freedom. The consumer protection is not limited to standard forms in the strict sense — purported to be used for numerous contracts — but includes also clauses which a merchant puts into a consumer contract in a single case without any chance of change. The directive also includes examples of possibly unfair terms (so called grey list) and leaves further protection to the national laws. This directive is a main source of law on the European level in this field. Further directives concern only very special questions like warranties[3] or information rights[4] or touch

2) 93/13/EEC, OJ L 95, 29, of 21. 4. 1993.

on procedural matters.[5)]

The German legislator — like many other European legislators[6)] — has implemented the directive on unfair terms by extending the applicability of the German statute and making some — more or less minor — changes in addition.

I shall now say a few words concerning the general structure of the statute, before I shall move to the question of applicability, fairness-test and procedural matters.

2. General Structure of the Statute

The German statute on standard form contracts defines its applicability with respect to the subject matter and to the parties concerned (§§ 23, 24, 24 a AGBG), gives a definition of standard terms (§§ 1, 24 a No. 1, 2 AGBG), specifies the conditions for including standard terms by varying the general rules (§§ 145 BGB) for reaching an agreement (§§ 2-4, 6 AGBG), describes the fairness-tests (§§ 9, 10, 11, 24 a No. 3 AGBG) and provides a special kind of group action to ensure that the market should be free from unfair terms (§§ 13-22 AGBG). Just recently the statute has been enlarged by a rule for the general prohibitory action against all kinds of infringements of consumer rights (§§ 22, 22 a AGBG). But this is outside the scope of standard form contracts.[7)]

3. Applicability

Due to the necessity to comply with the directive the German statute on standard form contracts applies also when a contractual clause is introduced

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3) Directive 99/44/EC, OJ L 171 of 7. 7. 1999.

4) Directive 97/7/EC, OJ L 144/19 of 4. 6. 1997.

5) 98/27/EC, OJ L 166/51 of 19. 5. 1998.

6) For a brief overview on the different ways of implementation in the member states see *Ulmer/Brandner/Hensen*, AGBG, 9th ed., 2000, Einl. no. 86 ff.

7) As are some minor changes in §§ 25 seq. AGBG.

into a consumer contract by the merchant party without any further discussion, though the clause might be used only in this single contract. Otherwise the statute is only applicable when clauses are designed for repeated use; the applicability is not confined to consumers only, but still covers in principle all legal relations (though with different fairness-tests).

With regard to the subject matter contracts in family and inheritance relations are excluded as well as labour contract and agreement for setting up companies (§ 23 I AGBG); in addition, there are some limited and very detailed exceptions for certain areas (§ 23 II AGBG).

4. Fairness-Tests

When a standard clause has been incorporated into a contract, which is only the case when a consumer has been expressly informed that standard clauses should apply, when he had the opportunity of reading the clause or clauses, when he at least impliedly — agreed to them and when they were neither surprising nor contradictional to the individually agreed terms (§ 2, 3, 4 AGBG),[8] the law provides special fairness-tests. Those tests, however, do not control the parity of exchange. It was felt that the compensatory principle has to be regarded as the very heart of party autonomy and should be left outside any judicial control. As one might imagine the boarder line between the elements of the price which are outside control and those conditions which influence the parity of exchange only indirectly, for example by additional fees or costs or conditions of payment or increase of prices, is hard to draw and there are many discussions and court decisions on this issue.[9]

The fairness-tests applied to standard terms (not concerning the price) varies according to the persons involved. If the terms have been set by a merchant

8) For contract between merchants the normal rules concerning the inclusion of contractual terms will apply, thus it will not be necessary that the merchant party will be expressly informed about the inclusion of standard clauses, the inclusion might result from a common practice between the parties or between parties to such trade.

9) *Staudinger/Coester*, AGBG, 13. ed., 1998, § 8 no. 11 seq.; *Ulmer/Brandner/Hensen*, Einl. no. 49, § 8 no. 10, 18.

in a consumer contract the fairness-test will be very strict: First, the statute contains two provisions in which certain clauses are specified as being unfair and therefore void (§§ 10, 11 AGBG). These provisions resemble very much the grey list of the European directive and forbid for example exemptions from liability in case of gross negligence and intent. Secondly, terms which are not eliminated by these specific provisions have to surpass the general test (§ 9 AGBG). According to the general test all terms are void which disadvantage the consumer in a way contrary to good faith and reasonableness. All circumstances of the contractual situation may be taken into account. The latter rule on the scope of the test has been introduced by the implementation of the directive and has to be regarded as a general European standard of fairness-test in consumer contracts.

If the contract at issue is between two non merchants nearly the same rules apply, but the individual circumstances of the contractual situation will not be looked at. The fairness of the term will be judged only by the term itself according to the specific provisions (of § 10 and § 11 AGBG) as well as to the general test.

If the contract is between merchants only the specific provisions do not apply but only the general test of fairness. This solution has been chosen because it was felt that the specific provisions might be too rigid for intercommercial relations. However, the underlying ideas of the specific provision may be applied here too.

So far, it seems that the general test is most important, because it allows a flexible reaction to new types of contracts and of new types of clauses. On the other hand, such a general fairness-rule causes uncertainty and renders the law unpredictable unless at least some principles can be drawn from the abundance of decisions and problems. To draw the right line between an open and flexible approach in order to allow for each case the exactly tailored decision on the one side and fast and rigid rules in order to allow certainty and predictability on the other side seems to be an everlasting and demanding challenge.

5. Group Action

The German legislator thought that the chances to eridicate unfair terms from the market will be much higher, if not only the individuals concerned may fight against the unfair terms in their contracts, but if associations of consumers, of competitors or of other interested groups could initiate judicial control of such terms. Therefore a special prohibitory action has been introduced. Certain kinds of association can lodge prohibitory actions against the user of an unfair term (§ 13 AGBG) and if the court finds the term unfair, the user will be prohibited to introduce it any more, otherwise he will be subject to a fine (§ 15 AGBG in connection with § 890 Code of Civil Procedure). The term will be regarded as void in all further proceedings not only between the same parties but will be res iudicata also for the benefit of other consumers and contracts with that user (§ 21 AGBG).

Beyond that the judgement will have considerable influence on the market in general, as the plaintiff may publish the holding, the unfair term and the name of the user of that term in the German Official Journal (Bundesanzeiger) or elsewhere (§ 18 AGBG).

The European directive on unfair terms (Art. 7) honoured that idea and obliged the member states to introduce such prohibitory action; in the meantime another directive concerning consumer protection in general[10] requires generally the introduction of prohibitory group actions if consumer protectional rules have been violated. The German legislator has enlarged the statute on standard contracts also in this respect, but it is expected that together with the reform on the law of obligations which shall integrate the substantive rules of the statute into the civil code, a new statute on procedural matters, especially prohibitory actions concerning all kinds of consumer protection shall be enacted. The prohibitory action concerning unfair terms will then be part of the new statute also.

To sum up: The statute on unfair terms including its procedural parts has

10) 98/27 EC, OJ L 166/51 of 19. 5. 1998.

proved to be quite sufficient and satisfactory, though even 24 years after its coming into force the market is not free from unfair terms. Especially smaller enterprises still use terms which do not pass the fairness-test. Whether the statute had any positive effect on the contractual terms used between merchants is still an open question. Especially the prohibitory action is used only very seldom by associations of competitors. There is an abundance of cases and the interpretation of the rules by different courts is not always identical, nor can one speak of unified approach within Europe. Despite these deficiencies the principal approach has to be welcomed.

Ⅲ. The Law on Product Liability

1. The Origin and Development in German Tort Law

The German law on product liability in its modern form mostly originates from a case in which a farmer had his chicken vaccinated, but most of them died because the serum had been contaminated. The farmer had no contractual relations with the producer and the claim under tort law seemed to fail because the farmer could not prove that the contamination of the serum was due to a negligent act of the producer. The court held that different from the normal rules of tort law (which had been applied in cases of product defects up to then) it was the producer who had to show that he was not at fault even though his product had defects.[11] After this decision, the shifting of the burden of the proof did become the main issue of the law of product liability and terminated the discussion on the construction of contractual guarantees between producer and consumer. This shifting of the burden of proof is quite an efficient tool and many claims — which would fail otherwise — are thereby successful. The rule applies to all cases where the defect of the product is due to wrong construction or wrong design, to shortcomings in the manufacturing process or to wrong instructions. At the beginning this "burden

11) BGHZ 51, 91.

shifting rule" was restricted to mass production, but it has been extended to small businesses also.12)

In addition, the courts held that the producer is also obliged to observe his products and their efficiency,13) to warn the consumer of possible dangers which might result from altering the product.14) In case dangers become visible or known the producer has to recall the faulty products. Finally, the courts give an extended interpretation to "damages to property" in product liability cases. Thus, they have found that the producer damages the property of the buyer, if faulty parts of his product have damaged other separable parts of the same product (so-called "Weiterfresserschaden"15)) or if other property of the buyer is damaged in removing the defect product.16)

In general, it can be said, that the duties to maintain the safety of products have been taken very seriously by the courts17) and that it is very difficult for the producer to satisfy the burden of proof that he did not act faulty.

2. The European Perspective

Parallel to this development the European Union has taken initiatives 18) in questions of product liability in order to ensure equal conditions for competition in the common market and for the benefit of consumer protection.

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12) BGHZ 116. 104 — the owner of a small restaurant had to show that he was not at fault when a marriage party got seriously ill from enjoying the desert which had been prepared in his kitchen; see also *Brüggemeier*, ZIP 1992, 419; *Giesen*, JZ 1993, 675.

13) BGHZ 80, 186 — Apfelschorf; BGHZ 116, 60 — Milupa baby tea and baby bottles.

14) BGHZ 99, 167; Honda-Case: The son of the plaintiff died in riding a Honda to which the predecessor had added a stearing appliance (not manufactured by Honda).

15) BGHZ 67, 359 — Schwimmschalter-Case.

16) BGHZ 117, 183 — Kondensator-Case.

17) BGHZ 104, 323 — Mehrwegflasche — the producer has to proof that the defect was caused after he had brought the product on the market; see also BGH, NJW 1995, 2162 — Mineralwasserflasche (applying the Statute on Product Liability).

18) The work started already in 1968.

The efforts resulted again in directives of which the most important to be mentioned here are the directive on product liability of 1985[19] and the directive on the safety of products of 1992.[20] Both directives have been implemented into German law in the form of two new statutes, the Statute on Product Liability of 1989[21] and the Statute on the Safety of Products of 1997.[22] The latter has mostly public law character: Products may be brought on the market only if they are safe. If they fail to be safe, administrative bodies may warn or even order the recall of the products. Possibly, negligence on part of the administrative bodies might cause an action for liability of the State (§ 839 BGB/Art.34 GG). A violation of the statute by the producer may give rise to claims of the user who has been damaged (§ 823 II BGB).

The Statute of Product Liability introduces strict liability for faulty products — as the directive requires. This strict liability has been viewed as a very important step in modern law of compensation.

However, the principle of strict liability is limited in various respects as the German legislator availed himself of the options for restrictions which the directive left to the member states. This, of course, is the reason, why the law on product liability within the member states is not unified despite the directives. And the restrictions within the Statute of Product Liability are the reason, why in German law the traditional approach to product liability via tort law with the shifted burden of proof is still the most important basis for claims. Even ten years after the coming into force of the statute of product liability there is only one decision of the Federal Court of Justice on this statute.

What are these restrictions, making the strict liability rule rather ineffective? First of all, there will be no compensation for immaterial loss, whereas tort law provides moral damages in case of bodily harm. Secondly, the

19) 85/374/EEC, OJ L 210/29-33 of 7. 8. 1985.
20) 92/59/EEC, OJ L 228, 24 of 29. 7. 1992.
21) BGBl. 1989 I 21 98.
22) BGBl. 1997 I 934.

compensation for damages for property is limited to damages to other things of a consumer. Thus, the law does not apply when property of the merchant has been damaged. No compensation will be given for damages to the product itself (§ 1 I 2 PHG).

In addition, the first 1125,- DM of the damages to things will not be compensated for, but must be borne by the owner (§ 11 PHG). Further, the law does not apply to natural products from farming, fishery or hunting. The strict liability concept cannot be applied where the duty to recall has been neglected. Finally, strict liability does not apply where the product complied with the scientific and technical knowledge at the time being when it was brought on the market (§ 1 I No. 5 PHG). This defence of "product development risk" is an important inroad to the strict liability rule. The German Federal Court of Justice in its only decision of the statute held that the rule has to be interpretated in a restrictive sense allowing the defence only for design defects, but not for defects in manufacturing. Whether the courts of other member states will interprete the language of the directive in their national laws in the same way is still an open question.

Nevertheless, the strict liability does not make much difference compared to the tort liability with the shifting of the burden of proof concerning fault. Thus, it seems that the European law insofar has changed the legal situation only indirectly by stressing important points, but that there are the national courts which develop efficient tools for consumer protection even if the statutes are not changed at all.

I hope that this short overview concerning two important and constantly challenging fields of law has given you some impression of the legal situation in Germany at the moment. Thank you very much for your attention.