Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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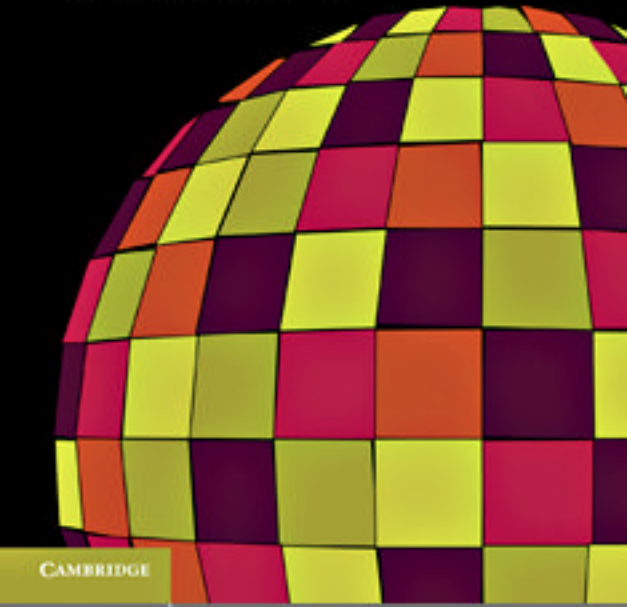

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discharged from their obligations because the contract has been frustrated. In that sense, what provisions of the type above endeavour to do is to set up a contractual regime for frustration, dependent only on what the parties have agreed upon, thereby providing the possibility of a greater degree of latitude.[178]

This may be illustrated by the leading case of *Super Servant Two*.[179] The defendants agreed to transport the claimants' drilling rig from Japan to the North Sea using, at their option, either the *Super Servant One* or the *Super Servant Two*. Shortly after the conclusion of the contract, the defendants allocated the *Super Servant Two* to transport the claimants' rig and the *Super Servant One* to the performance of another contract. Before the time set for performance of the contract with the claimants, the *Super Servant Two* sank and one of the issues for the Court of Appeal to decide was whether the contract with the claimants was frustrated. It was held that it was not frustrated because this was a case of self-induced frustration, i.e., it was not due entirely to events beyond the control of the defendants because they could have used the *Super Servant One* to fulfil the contract. This is a harsh decision and open to criticism,[180] but it is a vivid illustration of the narrow confines of frustration.

However, there was also a *force majeure* clause under which the defendants were entitled to cancel performance in the event of 'perils or danger and accidents of the sea'. The court held that, on a proper construction of this clause, the defendants were entitled to cancel provided that the sinking of the *Super Servant Two* was not attributable to any negligence on their part. Hence, a *force majeure* clause may allow for discharge in circumstances where the doctrine of frustration would not.[181] Whether a *force majeure* clause has this effect or not will, of

[178] See A. Berg 'The Detailed Drafting of a *Force Majeure* Clause', in E. McKendrick (ed.), *Force Majeure and Frustration of Contract*, 2nd edn (Informa Publishing, 1995).

[179] [1990] 1 Lloyd's Rep. 1.

[180] For example, the element of 'election' on the part of the defendant in preferring to fulfil the other contract with the *Super Servant One* could be eliminated if the question of which of the contracts was to be discharged was left to be determined not by the free choice of the promisor, but by a rule of law, e.g., by a rule to the effect that the various contracts should for this purpose rank in the order in which they were made. See, further, *Treitel*, para. 19–088.

[181] Another good example in this regard is that the closure of the Suez Canal was not regarded by the English courts as a frustrating event for the purpose of a number of charterparties. The crisis of 1956 produced only two reported cases in which frustration was successfully pleaded, but both cases were later overruled: *Carapanayoti & Co Ltd* v. *ET Green Ltd* [1959] 1 QB 131, overruled in the *Tsakiroglou* case [1962] AC 93; and *The Massalia* [1961] 2 QB 278, overruled in *The Eugenia* [1964] 2 QB 226. When the Canal

course, depend on its interpretation and, while it is to be construed like any other provision of the contract between the parties, one detects some influence from the doctrine of frustration itself.

A good example in this regard is *Thames Valley Power Ltd* v. *Total Gas & Power Ltd*.[182] The claimants operated a combined heat and power facility. By a contract entered into in 1995, the defendants agreed to supply the gas needed to operate the facility for a fifteen-year period. The contract contained a *force majeure* clause which referred to the parties being rendered by *force majeure* 'unable wholly or in part to carry out any of its obligations'. *Force majeure* was defined in the contract to mean 'any event or circumstances beyond the control of the party concerned resulting in the failure by that party in the fulfilment of any of its obligations under this agreement and which notwithstanding the exercise by it of reasonable diligence and foresight it was or would have been unable to prevent or overcome'.

In 2005, the defendants served notice that they would not be continuing to perform their obligations under the contract because of increases in the price of gas, a fact which had rendered it 'uneconomic' for the supply to the claimants to continue. The court held that this was not a *force majeure* event. In short, 'unable' did not extend to 'commercially impractical' in the absence of an express term to this effect. Although the judge stressed that 'each clause must be considered on its own wording and that *force majeure* clauses are not to be interpreted on the assumption that they are necessarily intended to express in words the common law doctrine of frustration', he was nonetheless influenced by earlier decisions in the context of frustration.[183] His approach was to follow that of Lord Loreburn in *Tennants Lancashire Ltd* v. *Wilson CS & Co Ltd*:[184] 'The argument that a man can be excused from performance of his contract when it becomes "commercially impossible" seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect.' Once again, one finds that the parties may set out their bargain for themselves and by doing so allow for

was closed in 1967, pleas of frustration were no more successful (e.g., *The Captain George K* [1970] 2 Lloyd's Rep. 21; *The Washington Trader* [1972] 1 Lloyd's Rep. 463). Some charterparties will now spell out the closure of the Canal as an event of *force majeure*. There was such a provision in the contract in *Super Servant Two*.

182 [2005] EWHC 2208 (Comm), [2005] All ER (D) 155 (Sep).

183 See, for example, *Davis Contractors Ltd* v. *Fareham Urban DC* [1956] AC 696.

184 (1917) AC 495 at 510. It should be noted that the sellers were excused by the express terms of the contract.

a greater degree of certainty[185] than the general law, but only to the extent that they have made their intention sufficiently clear.

3 Conclusion

It is hoped that this survey of some of the leading examples of boilerplate clauses will have confirmed the introductory points with which this chapter began. English law continues to adhere to the principle of freedom of contract, particularly in the commercial context, in the sense that, a few limited exceptions apart,[186] the courts will not interfere with the bargain made between the parties. However, the courts will look closely to see precisely what is the bargain which has been reached, and it has been shown that the employment of boilerplate clauses and standard form contracts is no guarantee against the appearance of 'gaps' into which the courts can introduce notions of reasonableness, fairness and good faith, principally via the medium of interpretation. In 1978, Griffiths J noted:[187] 'Much judicial ingenuity has been expended over the last 25 years to avoid the unjust results that would flow from the literal application of unfair trading conditions.' In the years since, not much has changed. If there is one thing more than any other that may be 'lost in translation' in the employment of English law boilerplate clauses under another governing law, it may be a full appreciation of this ingenuity.

[185] As well as a degree of flexibility when it comes to consequences, in that a *force majeure* clause can provide for suspension or extensions of time before any final discharge of the contract.

[186] For example, from the common law, the rule against penalties; and from statute, the Unfair Contract Terms Act 1977.

[187] *Green Ltd* v. *Cade Bros.* [1978] 1 Lloyd's Rep. 602 at 609.

8

The Germanic tradition: application of boilerplate clauses under German law

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1 Introduction

Germany was the world champion of exports for a few years.[1] The economic transactions leading to that result are all based on contracts which possess an international element. Many if not most of these contracts are drafted in English and use common law terminology. Some typical contract clauses stem specifically from the United States. Even between German merchants, contracts that are completely in English are not unfamiliar. However, international contracts other than sales or distribution contracts are frequently written in English, the modern *lingua franca*. This is particularly true for international construction contracts which are often based on the FIDIC (Fédération International des Ingénieurs-Conseils) contract form. It is thus not rare that German courts – and particularly arbitration tribunals – have to deal with such contracts. A specific problem that can arise in the construction of these contracts is the possible discrepancy between the common law style of the language of the contract and the applicable contract law that, in these cases, will often be German law. To exaggerate only slightly, there may be a 'clash of legal cultures'.

This specific kind of tension between the terms of a contract and a different applicable law has been the subject of some debate in Germany in recent years.[2] Nonetheless, the general phenomenon that parties act

[1] From 2003 until 2009, Germany was ranked first as export world champion. In 2009, China overtook Germany and gained first place.

[2] J. Gruber, 'Auslegungsprobleme bei fremdsprachigen Verträgen unter deutschem Recht' (1997) *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht*, 353–359; O. Meyer, 'Die privatautonome Abbedingung der vorvertraglichen Abreden – Integrationsklauseln im internationalen Wirtschaftsverkehr', *Rabels Zeitschrift für ausländisches und internationales*

on a legal basis different from the applicable law has long since been well known in German private international law. It is termed 'Handeln unter falschem/fremdem Recht' (acting under wrong/foreign law).[3] With respect to contracts, it means that one or both parties used contract terms which neither originate from nor conform to the law that governs the contract. The general solution German law provides for cases of this kind is to bring into line both the intended sense of the terms by the parties and the requirements of the applicable law, mainly by way of interpretation. This will be discussed in more detail below (see Section 4). However, the main focus of this chapter will be on the various contract clauses that are being used and on their interpretation (see Section 5). There are a relatively small number of German court decisions on this issue. However, there are two preliminary aspects that must first be addressed: the general method of interpretation of contracts in Germany as opposed to the method in common law countries (Section 2) and the question of which law applies to the issue of interpretation in international contracts (Section 3).

2 General method of interpretation of contracts

Only a few words are necessary on the general method of interpretation of contracts in Germany in contrast to the common law world. The German BGB (Civil Code) addresses the interpretation of declarations and contracts in two provisions of general application (§§133 and 157). §133 of the BGB[4] stresses the principle that the true intention prevails over the literal meaning of a declaration, while §157 of the BGB[5]

Privatrecht, 72 (2008), 562–600; V. Triebel and S. Balthasar, 'Auslegung englischsprachiger Vertragstexte unter deutschem Vertragsstatut – Fallstricke der Art. 31, 32 I Nr. 1 EGBGB', *Neue Juristische Wochenschrift* (2004), 2189–2196; S. Voß, *Warranties in Unternehmenskaufverträgen – Struktur und Wirkungsweise anglo-amerikanischer Gewährleistungskataloge in Unternehmenskaufverträgen, die deutschem Recht unterliegen* (MVK, Medien-Verl. Köhler, 2002). In contrast, a recent survey of principles of the construction of contracts does not even mention the interpretation of contracts governed by German law but drafted in English; see B. Biehl, 'Grundsätze der Vertragsauslegung', *JuS* (2010), 195–200.

[3] See thereto G. Dannemann, 'Sachrechtliche Gründe für die Berücksichtigung nicht anwendbaren Rechts', in G. Hohloch, R. Frank and P. Schlechtriem (eds.), *Festschrift für Hans Stoll zum 75. Geburtstag* (Mohr Siebeck, 2001), pp. 417–436; C. Münzer, *Handeln unter falschem Recht* (Peter Lang Verlagsgruppe, 1992).

[4] 'When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.'

[5] 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'

prescribes that the interpretation of contracts must recognise good faith and customary practice. Generally, under German law, any interpretation starts with the wording of the text of the contract and the parties' concurrent understanding of it. If this does not lead to a solution, the objective meaning in the light of the circumstances and interests of the parties is decisive.[6] In comparison to common law jurisdictions, there are still differences.[7] They concern mainly three aspects. First, courts in common law jurisdictions tend to rely on the written text of a contract more strictly than German courts do. The common law's 'parol evidence rule', which in principle allows no proof against the clear wording of a written contract, is an expression of this attitude, even though today there are many exceptions to this rule.[8] Under German law, a written contract creates only a rebuttable presumption of completeness.[9] Modifications of its content can be proved by any means.[10] Secondly, German law places greater weight on a teleological, purposive interpretation of contracts than common law does.[11] Thirdly, common law

[6] For the German method of interpretation of contracts, see K. Larenz and M. Wolf, *Allgemeiner Teil des Bürgerlichen Rechts*, 9th edn (Verlag C. H. Beck, 2004) §28; J. Busche, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1/1, 5th edn (Verlag C.H. Beck, 2006), §157, paras. 1ff.; H. Roth, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier, 2003), §157, paras. 1ff.

[7] Compare also Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2191ff.; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford University Press, 1998, translated by T. Weir), pp. 400ff.; further, J. Herbots, 'Interpretation of Contracts', in J. M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2006), pp. 325–347; S. Vogenauer, 'Auslegung von Verträgen', in J. Basedow, K. Hopt and R. Zimmermann (eds.), *Handwörterbuch des Europäischen Privatrechts*, vol. 1 (Mohr Siebeck, 2009), pp. 134ff.

[8] For English law, see K. Lewison, *The Interpretation of Contracts*, 3rd edn (Sweet & Maxwell, 2007), pp. 85ff.; for US law (with all caution against oversimplification because of the many differences among the single US states), see E. A. Farnsworth, *Farnsworth on Contracts*, 3 vols., 2nd edn (Aspen Publishers, 1998), §7.12.

[9] See BGH NJW 1980, 1680; BGH NJW 2002, 3164.

[10] See, for instance, BGHZ 20, 109; BGH NJW 1999, 1702.

[11] For England, see the so-called golden rule: 'In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further' (Lord Wensleydale in *Grey* v. *Pearson* (1857) 6 HL Cas. 61 at 106); see more recently *Jumbo King Ltd* v. *Faithful Properties Ltd* (1999) HKCFAR 279 (by Lord Hoffmann: 'If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to the language, even though the consequences may appear

courts are more reluctant than German courts to fill gaps or even to rewrite parts of the contract.[12] These differences also affect the interpretation of contracts that are drafted in common law style but are governed by German law.

However, in my view, the national interpretation methods of construing contracts should be 'internationalised' in cases of international contracts. That means that where an international meaning of terms and phrases can be identified, this meaning should be preferred to a purely national meaning. Sets of principles like the UNIDROIT Principles of International Commercial Contracts ('UPICC'), the Principles of European Contract Law ('PECL') or the Draft Common Frame of Reference ('DCFR') may be helpful in revealing that there is an almost uniform international understanding of certain contract clauses or terms.

3 Law applicable to the interpretation of international commercial contracts

3.1 Generally applicable law

3.1.1 Applicability of the *lex contractus*

It is because of nationally differing methods of interpretation that the first aspect of interpretation of international commercial contracts is always the question of which country's law will govern the issues of interpretation. This is a matter of conflict of laws. According to the rules of private international law, the construction of a contract or one of its terms generally follows the law that governs the contract. This had

hard for one side or the other. The court is not privy to the negotiation of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain'). See also Lewison, *The Interpretation of Contracts*, pp. 145ff. The position is very similar for the US: see Farnsworth, *Farnsworth on Contracts*, §7.12.

[12] In England, under certain conditions, the courts imply terms into a contract: see *BP Refinery (Westport) Pty Ltd* v . *Shire of Hastings* (1978) ALJR 20 (PC) (by Lord Simon of Glaisdale: 'In their [Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'). Again, the position is very similar in US law: Farnsworth, *Farnsworth on Contracts*, §7.16.

been the standpoint of the Rome Convention on the Law Applicable to Contractual Obligations of 1980 (hereafter, the Rome Convention).[13] The same rule was incorporated into German law.[14] The now directly applicable Rome I Regulation of 2009[15] has maintained this principle.[16] It is, for instance, also enshrined in the Inter-American Convention on the Law Applicable to International Contracts of 1994.[17]

It is thus a firm principle – and not only of German and European private international law – that the interpretation of a contract will generally be governed by the *lex contractus*. However, there are some exceptions to this rule (see below, Section 3.2ff.).

3.1.2 Choice of law

The applicable contract law is primarily the law the parties have chosen.[18] Although there are some limits to such a choice,[19] these limits regularly play no marked role for international commercial contracts. The choice may be express or implied.[20] If parties base their contract on a certain law, for instance, by referring to specific institutes of that law, this will often amount to a tacit choice.[21] However, the mere use of English as the contract language does not surrender the contract to English law, as English is used in many countries.[22] In the cases this chapter is mainly

[13] See Article 10(1)(a) of the Rome Convention.
[14] Article 32, para. 1, No. 1 of the EGBGB (Introductory Law to the Civil Code).
[15] OJ EU L 177 of 4 July 2008, pp. 6ff., corr. OJ EU L 309 of 24 November 2009, p. 87.
[16] Article 12(1)(a) of the Rome I Regulation.
[17] Article 14(a) of the Inter-American Convention.
[18] See Article 3 of the Rome Convention, Article 27 of the EGBGB and Article 3 of the Rome I Regulation.
[19] The following limits must be taken into account: in purely domestic or inner EU transactions, the choice cannot oust the mandatory domestic or EU law (Article 3(3) of the Rome Convention, Article 27(3) of the EGBGB and Article 3(3) and (4) of the Rome I Regulation); internationally mandatory provisions (*lois de police*) can override the chosen law (Article 7 of the Rome Convention, Article 34 of the EGBGB and Article 9 of the Rome I Regulation); the *ordre public* can prohibit the application of unacceptable provisions of the chosen (foreign) law (Article 16 of the Rome Convention, Article 6 of the EGBGB and Article 21 of the Rome I Regulation).
[20] See Article 3(1), sent. 2 of the Rome Convention, Article 27(1), sent. 2 of the EGBGB and Article 3(1), sent. 2 of the Rome I Regulation.
[21] See U. Magnus, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*; Article 27 of the EGBGB, paras. 75ff.; D. Martiny, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5th edn (2010), vol. 10; Article 3 of the Rome I Regulation, paras. 57ff.
[22] BGH NJW-RR 1990, 183; Martiny, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10; Article 3 of the Rome I Regulation, para. 63; Magnus, in

concerned with, the parties have expressly chosen a certain law but had drafted their contract on the basis of another law. In this case, the express choice prevails. Therefore, in principle, the interpretation rules of that law have to be applied.

3.1.3 Construction clauses

Contracts drafted in the common law style often contain a so-called construction clause, for instance, 'The terms and expressions of this contract are to be construed in accordance with English law' (or any other law). Such a clause designates at the very least the law according to which the contract has to be interpreted. If there are no indications that the parties intended to choose another law as the applicable contract law, such a construction clause is often regarded as an implied, or even express, choice of law for the whole contract, not merely for its interpretation.[23]

It will be rare that a construction clause and an accompanying choice-of-law clause will not designate the same law, but if so, any interpretation is governed by the law to which the construction clause refers.

3.1.4 Applicable law in the absence of a choice of law

In the absence of a valid choice of law by the parties, the principal rule in the EU is that the law of the country applies where the place of business of that party is located that is required to effect the characteristic performance of the contract.[24] Thus, in international sales transactions, the law at the seller's seat generally applies. In international distribution contracts, the law at the seat of the distributor generally applies.[25]

3.2 Contract interpretation under international conventions

A special case is the interpretation of a contract covered by an international convention such as the United Nations (Vienna) Convention on

Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Article 27 of the EGBGB, para. 85.

[23] See, for instance, OLG München IPRax 1989, 42 with note *W. Lorenz* (22) (explicit choice); LG München IPRax 1984, 318 (implied choice).

[24] See Article 4(2) of the Rome Convention, Article 28(2) of the EGBGB and Article 4(2) of the Rome I Regulation.

[25] See explicitly Article 4(1)(a) and (f) of the Rome I Regulation; for the prior law, compare Magnus, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Article 27 of the EGBGB, paras. 175ff., 286ff.; Martiny, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th edn (2006), vol. 10; Article 28 of the EGBGB, paras. 136ff., 226ff.

Contracts for the International Sale of Goods ('CISG') of 1980, which often applies to international sales transactions. This Convention is automatically applicable where the parties have their places of business in different contracting states of the CISG or where a court uses the rules of private international law that lead back to the law of a CISG contracting state.[26] Where the parties have chosen the law of a CISG state, the CISG therefore applies. This means, for instance, that where the parties have chosen German law, this choice regularly includes the CISG.[27]

In addition, the Convention covers the interpretation of contracts and their single terms, and contains its own autonomous method for the construction of contracts.[28] To that extent, the CISG supersedes any rules of (national) private international law concerning the interpretation of contracts. In the absence of a central court for the application of the CISG, only a uniform method of interpretation can preserve as uniform as possible an understanding of the Convention's provisions. However, uniformity of interpretation is not a purpose in itself, but shall secure better foreseeability and predictability and, thus, greater certainty of law. This serves the central aim of the CISG, as well as that of other uniform law conventions: to facilitate international trade and thereby promote peaceful relations between nations.[29]

First, according to Article 8 of the CISG, the intent of a party making a statement has merit if the other party knew or could not have been unaware what that intent was. Secondly, in all other cases, a statement has to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Thirdly, all circumstances relevant for the understanding of a statement in a case have to be given due consideration. National

[26] See Article 1(1) of the CISG.

[27] See BGH NJW 1997, 3309 (3310); BGH NJW 1999, 1259.

[28] This is the clear majority view: see J. Honnold and H. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention,* 4th edn (Kluwer Law International, 2009), para. 105; Magnus, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*; Article 8 of the CISG, para. 7; M. Schmidt-Kessel, 'Articles 8–9', in P. Schlechtriem and I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 5th edn (C. H. Beck, 2008), pp. 163–197, Article 8, paras. 1, 3. The autonomous method of interpreting contracts must not be mixed with the autonomous method of interpreting the CISG as such – both methods are not identical; as to the interpretation of the CISG, see Article 7 of the CISG and the commentaries to this provision.

[29] See the Preamble to the CISG.

peculiarities of interpretation such as the parol evidence rule of the common law are eliminated.[30]

Thus, if German law is applicable to an international sales transaction, this will mean that in most cases the CISG and its autonomous rules on contract interpretation have to be applied. Only if domestic German law has been chosen as the *lex causae* by clearly excluding the CISG will the 'German method' of interpretation apply to the sales contract that has to be construed.

The same principles apply to international contracts other than sales contracts.[31] Where uniform law conventions are applicable, such as the Ottawa Conventions on International Factoring or International Financial Leasing of 1988 or the many transport conventions, their interpretation rules must be respected. Only if they are inapplicable do the *lex causae* interpretation rules of the respective contract come into play.

3.3 Use of international trade terms

International contracts often incorporate terms which have an internationally standardised meaning. The most prominent example are INCOTERMS,[32] but there are many more. They are not enacted by legitimated legislators but are drafted by private organisations. Nonetheless, they are widely used and form a kind of modern *lex mercatoria*. According to the prevailing view, the *lex mercatoria* is not an autonomous body of law that applies by its own competence.[33] On the contrary, its rules are regarded as being generally subject to the control of

[30] See *MCC-Marble Ceramic Center, Inc.* v. *Ceramica Nuova d'Agostino, SpA*, 144 F.3d 1384 (11th Cir., 29 June 1998); cert. denied *Ceramica Nuova d'Agostino, SpA* v . *MCC-Marble Ceramic Center, Inc.*, 526 U.S. 1087 (26 April 1999); Honnold and Flechtner, *Uniform Law for International Sales*, para. 110.

[31] See generally on the interpretation of uniform law conventions: U. P. Gruber, *Methoden des Internationalen Einheitsrechts* (Mohr Siebeck, 2004); J. Kropholler, *Internationales Einheitsrecht* (J. C. B. Mohr, 1975), pp. 258ff.

[32] INCOTERMS 2000, prepared by the International Chamber of Commerce; see thereto J. Ramberg, *INCOTERMS 2000*, ICC Publication No. 620 (1999); J. Bredow and B. Seiffert, *INCOTERMS 2000* (Economica Verlag, 2000); A. Baumbach and K. Hopt (eds.), *Handelsgesetzbuch*, 34th edn (C. H. Beck, 2010). A revised version, INCOTERMS 3000, will become applicable in 2011.

[33] See, in particular, P. Mankowski, 'Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs', *Recht der internationalen Wirtschaft* (2003) 2–14, 13; P. Mankowski, 'Stillschweigende Rechtswahl und wählbares Recht', in S. Leible (ed.), *Das Grünbuch zum Internationalen Vertragsrecht*

the mandatory provisions of the applicable national law. However, it is rather self-evident that terms like INCOTERMS should not be interpreted according to the *lex causae* of the contract. They must be understood in the sense given to them by the international community, otherwise their unifying purpose could not be achieved. Their uniform understanding serves the aim of foreseeability and predictability of law in the international arena. It is therefore necessary to interpret them in an internationally uniform way without any redress to specific national methods or rules of interpretation.[34]

3.4 Use of international standard contracts

Certain branches almost always regularly use comprehensive standard contract forms that have been developed on the basis of a specific law and that regulate, more or less, all contractual problems on the background of this specific law that, in many cases, is English common law. Such use of international standardised forms is typical, for instance, for many international insurance contracts (using the Lloyds policy), for ship sales (using the Norwegian standard form), for charter parties (using the GENCON charter form) or for international construction contracts (using the FIDIC contract form). Rarely do the parties modify the standardised content of the form or add substantial parts.

Actually, the interpretation of these standard forms is formally governed by the *lex causae* of the contract – be that as the law chosen or applicable by objective designation. However, in order to support the unifying purpose of such international standard contract forms, it is again necessary to interpret them in an 'a-national' way. Specific national interpretation methods must be left aside in the interests of a uniform understanding. Further, the terms of these standard forms must be interpreted in an internationally uniform way.

3.5 Terms specific for a certain law

Occasionally the parties of a contract use specific terms that are known only to a specific law. An example is the use of a term that specifies a legal institute that does not exist in other legal systems, for instance, the term

(Sellier, 2004) pp. 63–108, 100ff.; Martiny, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*; vol. 10, Article 3 of the Rome I Regulation, paras. 36ff.

[34] See, in the same sense, Baumbach and Hopt, *Handelsgesetzbuch*; INCOTERMS Einl, para. 8.

'consideration'. It is a term of art in common law countries with a specific legal meaning that, as such, is unknown in civil law countries. If used in a contract drafted in common law style but governed, for instance, by German law, the term has to be given its common law meaning unless the parties agree or it is clear from the circumstances that the term means something different.

3.6 Mid-summary

When the law applicable to the interpretation of international commercial contracts is to be determined, it is the undisputed starting point that the law should be applied that governs the contract as a whole. However, there are important exceptions to this rule:

- As far as uniform law conventions are applicable, it is necessary that contracts covered by them have to be interpreted in the way the respective convention prescribes. Generally this is an autonomous method for whose content the solution provided by the CISG can serve as a model. First, the recognisable intent behind a contract or contractual declaration is decisive. Secondly, in all other cases, the meaning from an objective viewpoint in the light of all relevant circumstances has to be taken.
- Unified international trade terms (such as INCOTERMS) that the parties incorporate into their contract must be given their international meaning and must be interpreted in an internationally acceptable way, free from national peculiarities of interpretation.
- Internationally standardised contract forms too must be interpreted in an international manner.
- Terms that are known to have acquired a precise technical meaning in a specific legal system generally have to be understood in that sense.

Both uniform trade terms and international standard contracts come close to 'objective' law for which the individual parties' intentions matter less. Their interpretation must take account of this fact.

4 'Acting under wrong law'

4.1 A well-known phenomenon

The focus of the subject of this book is on the question of which law governs the interpretation of 'normal' international contracts where none of the peculiarities discussed above is present and where the *lex*

contractus and the legal background of the contract document fall apart. As already mentioned, the situation in which the applicable law and the legal background of a document differ is a well-known phenomenon of general private international law.[35] With respect to the interpretation of international contracts, this 'acting under wrong law' poses the question of whether the contract shall be interpreted in an international manner, according to the method prescribed by the applicable law or according to the method of the background law.

Mainly, in reality, the following factual situations are encountered,[36] provided always that German domestic law is the *lex contractus* and German courts are seised with the case: (1) both contract parties agree on a common law-style contract but only one of the parties originates from a common law country and is familiar with the common law background; (2) none of the parties is familiar with the common law background; (3) none of the parties, except for the representatives of both parties, are familiar with the common law background and have negotiated the contract; (4) both parties originate from a common law country.

4.2 The courts' view

The German courts generally treat these cases in the same manner.[37] The former Imperial Court (Reichsgericht)[38] held that the use of English contract clauses was an indication that the parties intended that the English understanding of the clauses should apply.[39] According to this Court, English clauses were therefore to be understood in their English sense. The Federal Court (Bundesgerichtshof) appears to distinguish now between the method of interpretation and the understanding of a certain term or formulation.[40] Concerning the method of interpretation, the Court seems to

[35] See, in general thereto, C. Bar and P. Mankowski, *Internationales Privatrecht,* vol. I, 2nd edn (C. H. Beck, 2003), pp. 211, 705ff.; G. Kegel and K. Schurig, *Internationales Privatrecht*, 9th edn (C. H. Beck, 2004) p. 66; S. Sonnenberger, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*; Einl. IPR, paras. 611ff.; Spellenberg, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*; Article 12 Rom I-VO, paras. 32ff.

[36] See thereto Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2190.

[37] As to the critique thereon, see Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2193ff.

[38] This court was the highest court in Germany from 1879 until 1945. Its successor is the Federal Court (Bundesgerichtshof, established in 1950).

[39] See RGZ 39, 65 (68); see also RGZ 122, 233 (235).

[40] See BGH NJW-RR 1992, 423 (425) (in that case German parties had used the GENCON Charter for a charter party. A dispute arose over whether the meaning of the term 'indemnity' in the GENCON form was to be understood in its English sense or in its

apply the law that governs the contract.[41] In all the above-mentioned factual situations, the general interpretation method would therefore be the method as prescribed by German domestic law. However, according to the Federal Court, the understanding or meaning of terms based on foreign law has generally to be that of the foreign law.[42] Like the Imperial Court, the Federal Court assumes that the parties intended to understand their contract and its terms in the sense of the foreign law. Therefore, in this Court's view, followed by the lower courts, this sense has to be accepted.[43] Only if the parties or reasonable parties had a common understanding that was different from the English meaning would this understanding prevail. In the *GENCON* case,[44] the Court formulated the principle that terms and clauses drafted under a foreign law should generally be given the meaning that the foreign law accords them. However, in the concrete case, the Court held that between German merchants, the German understanding of the terms 'indemnity' and 'deadweight' should prevail, because in German business circles, the indemnity clause was used in a specific sense, whereas in England, the validity of indemnity clauses was doubtful.

Largely, the German courts thus combine the interpretation method of the applicable law and the understanding of terms and clauses in accordance with the background law and apply this combination with some flexibility.[45]

4.3 *Critique and solution*

The approach of the Federal Court has been criticised.[46] It has been argued that, in most cases, neither the parties' intentions nor their

German sense). Similarly, see BGH IPRpr 1956/57 No. 55; OLG Hamburg TranspR 1993, 433 (434); OLG Hamburg RIW 1996, 68; RGZ 39, 65 (68).

[41] BGH IPRpr 1956/57 No. 55; see also OLG Frankfurt NJW-RR 1995, 36.

[42] BGH IPRpr 1956/57 No. 55 ('Die englischsprachigen Vertragsformulare, die nicht etwa Übersetzungen deutscher Texte sind, enthalten zahlreiche dem angelsächsischen Rechtsdenken angehörende Begriffe, die für jeden nach den jeweiligen Formularen geschlossenen Frachtvertrag gelten sollen, mag er im Einzelfall dem englischen oder einem anderen Recht unterstellt sein. Dies erfordert, dass derartige fremdsprachige Begriffe und Vertragsklauseln grundsätzlich nach dem Recht des Landes interpretiert werden, in dem sie entwickelt worden sind').

[43] BGH IPRpr 1956/57 No. 55. [44] BGH NJW-RR 1992, 423.

[45] See besides the quoted decision of the BGH, for instance, OLG Köln RIW 2004, 458ff. (the interpretation of whether a 'letter of transfer' means a full assignment or a mere subrogation must take into account both the applicable law and the background law).

[46] See, in particular, Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2190ff.

interests would justify deviating from the applicable contract law, thus subjecting contract formulations or terms to another law.[47] Instead, the *lex contractus* should generally govern the interpretation of contracts drafted in a foreign language and based on foreign law. Only where both parties originate from the country according to whose law the contract was drafted should the interpretation follow that law.[48]

In my view, the statutory provision must be the starting point: the interpretation of a contract follows, in principle, the *lex contractus*.[49] A question arises of when an exception from this rule should apply so that the sense of a formulation or term should be the meaning given by another law. The answer should be based on the central principle of international (commercial) contract law: the principle of party autonomy. Where the parties, either expressly or impliedly, have made clear that their contract should be understood in a sense different from the meaning that the *lex contractus* would arrive at, then this different meaning is to be applied. Quite generally, it is possible to choose a separate *lex interpretionis* that differs from the *lex contractus*.[50] However, there must be a clear choice. Where the parties explicitly expressed this intention, for instance, by a construction clause, the answer is simple. The expressly chosen law governs the interpretation.

Problems arise with an implied choice of a separate *lex interpretionis*. In order to become no pure fiction, the implied indication must be sufficiently clear.[51] The mere use of a contract form drafted in common law style is today in itself no sufficient indication of a respective choice of this law as the *lex interpretionis*. First, since the days of the Imperial Court, English has become the *lingua franca* of international trade and business. The use of contracts drafted in English and in common law

[47] *Ibid*., 2193ff. [48] *Ibid*., 2195ff.

[49] See Article 10(1)(a) of the Rome Convention, Article 32, para. 1, No. 1 of the EGBGB and Article 12(1)(a) of the Rome I Regulation.

[50] See S. Leible, in *Anwaltkommentar BGB*, vol. 1 (Deutscher Anwaltverlag, 2005); Article 32 of the EGBGB, para. 8; Magnus, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*; Article 32 of the EGBGB, para. 25.

[51] A parallel can be drawn to the tacit choice of the *lex contractus*: according to Article 3(1)(2) of the Rome Convention ('demonstrated with reasonable certainty'), Article 27(1)(2) of the EGBGB ('sich mit hinreichender Sicherheit . . . ergeben') and Article 3(1)(2) of the Rome I Regulation ('clearly demonstrated'), there must be a clear indication of the parties' common intention.

style is no longer an unambiguous indication of the intention to subject the contract to legal terminology and meaning as understood in England or English common law. Secondly, the common law varies rather widely among the so-called common law jurisdictions. Again, since the days of the Imperial Court, English and US law in particular, but also other common law jurisdictions, have developed in different directions. Thirdly, the use of common law contract forms may be no rational choice of a separate *lex interpretionis* at all, but just a matter of convenience – using a contract form for lack of something better and more appropriate. Therefore, today, further circumstances or signs are necessary to show the parties' common intention that, for instance, the English or US meaning of contract formulations or terms should prevail over the *lex contractus*.

5 Discussion of specific clauses

The following section deals with a number of specific clauses that are typical for contracts drafted in common law style and discusses how they are treated by German courts. It is difficult to categorise these clauses in a convincing way. According to the structure described in the introduction to Part 3, they are divided here into three different groups: first, clauses that aim at detaching the contract from the applicable law; secondly, clauses that use terms unknown to the applicable law; and, thirdly, clauses that regulate matters already regulated in the applicable law.

5.1 Clauses aiming at fully detaching the contract from the applicable law

Certain clauses of common law-style contracts try to make the contract waterproof against any outside influence, such as oral agreements, modifications, additions, interpretation sources, etc.

5.1.1 Entire agreement clauses

An entire agreement clause as drafted in common law jurisdictions could have the following wording:

> The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.

5.1.1.1 German law Under German domestic law, entire agreement clauses or merger clauses (Vollständigkeitsklauseln or Integrationsklauseln) are not unknown.[52] They aim at fixing and concentrating the content of the contract onto the written document, excluding any external addition or modification. Not surprisingly, their precise meaning depends on their formulation. The ordinary entire agreement clause[53] is regarded as raising a rebuttable presumption that the contract document is correct and complete.[54] The clause thus moderately strengthens the presumption of general law that a written contract is the correct and complete expression of the parties' intent.[55] For this reason, entire agreement clauses are relatively rare in Germany.[56] The presumption may be rebutted by any kind of proof.[57]

If the entire agreement clause is aiming at excluding any rebuttal of the presumption, it must, in principle, expressly state that aim (for instance, 'It is irrebuttably presumed that no additional agreements have been concluded').[58] However, although the courts have not yet decided the question, it is more than doubtful whether clauses of that kind are valid under German law, because they restrict the possibility to prove the contrary. §309, No. 12 of the BGB[59] prohibits clauses which change the burden of proof to the disadvantage of the other party and §307(1) of the BGB[60] declares any standard term that disfavours the other party

[52] See thereto, in particular, S. Kaufmann, *Parol Evidence Rule und Merger Clauses im internationalen Einheitsrecht* (Peter Lang, 2004), pp. 197ff.; A. Lüderitz, *Auslegung von Rechtsgeschäften – Vergleichende Untersuchung anglo-amerikanischen und deutschen Rechts* (Karlsruhe, 1966), pp. 217ff.; Meyer, 'Die privatautonome Abbedingung'.

[53] See the entire agreement clause in the introduction to Part 3 of this book. In German law, such a clause would run as follows: 'Mündliche Nebenabreden bestehen nicht' (compare BGH NJW 2000, 207).

[54] BGHZ 93, 29 (33) = NJW 1985, 623; Staudinger/Schlosser (No. 21) (2006) §305b, para. 51.

[55] Kaufmann, *Parol Evidence Rule*, p. 205; Lüderitz, *Auslegung von Rechtsgeschäften*, p. 222; Meyer, 'Die privatautonome Abbedingung', 589.

[56] Meyer, 'Die privatautonome Abbedingung', 585.

[57] BGHZ 79, 281 = NJW 1981, 922; BGH NJW 1985, 623; BGH NJW 2000, 207.

[58] 'Es wird unwiderleglich vermutet, dass Nebenabreden nicht getroffen sind.'

[59] §309 of the BGB does not apply to transactions between merchants (§310(1) of the BGB).

[60] §307 of the BGB applies to transactions between merchants as well as to consumer transactions. However, the yardstick of reasonableness and good faith in §307 of the BGB corresponds in commercial transactions largely to the standard expressed in §§308 and 309 of the BGB which formally apply only to consumer transactions (see BGHZ 90, 278; BGHZ 103, 328; BGH NJW 2007, 3774). If a clause would be invalid under §§308 and 309 of the BGB, this is a *prima facie* indication that the clause should also be invalid between merchants unless reasonable grounds justify upholding it.

to an unreasonable extent and offends the principle of good faith invalid. If the entire agreement clause excludes any proof to the contrary, this is a rather drastic and unreasonable restriction of evidence, although it is not a change to the burden of proof. In the interpretation of §309, No. 12 as well as §307(1) of the BGB, it now has to be taken into account that No. 1q of Annex 1 to the Unfair Contract Terms Directive (93/13/EEC) bans any clause that is 'unduly restricting the evidence available'.[61] Both provisions must be interpreted in line with the Directive and must thus include clauses that restrict the available evidence. Therefore, irrebuttable entire agreement clauses fall under both provisions. The clearly prevailing view rightly holds an irrebuttable entire agreement clause to be invalid if used in standard contracts, irrespective of whether or not the parties are merchants.[62]

Under German law, entire agreement clauses do not regularly restrict the use of prior negotiations, conduct, etc., as a means for the interpretation of terms and clauses of the written contract.[63]

5.1.1.2 English law The common law jurisdictions differ in their treatment of entire agreement clauses. English common law appears to ascribe such clauses with merely modestly stricter effects than German law does. It seems to be the prevailing view in England that the clause establishes a strong but not a completely irrebuttable presumption that

[61] In the same sense, see also H. Roth, in H. G. Bamberger and H. Roth, *Beckscher Online-Kommentar* (Beck-online, 2007) §309 No. 12, para. 2; a partly differing opinion is given in E.-M. Kieninger, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, §309, para. 5 ('undue restriction of evidence' is relevant only for the interpretation of the general provision of §307 of the BGB, but not for §309, No. 12 of the BGB; however, this view would mean that the Directive had not been implemented correctly).

[62] Baumbach and Hopt, *Handelsgesetzbuch*, Einl vor §343, para. 9; C. Grüneberg, in *Palandt, BGB*, 69th edn (C. H. Beck, 2010), §305b, para. 5; Kaufmann, *Parol Evidence Rule*, p. 232; Kieninger, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, §305b, para. 13; S. Roloff, in H. P. Westermann, *Erman, Bürgerliches Gesetzbuch*, 12th edn (Verlag Dr. Otto Schmidt, 2008), §305b, para. 11; Schmidt, in H. G. Bamberger and H. Roth, *Bürgerliches Gesetzbuch mit Nebengesetzen*, vol. 2, 2nd edn (C. H. Beck, 2008), §305b, para. 17; W. Teske, *Schriftformklauseln in Allgemeinen Geschäftsbedingungen* (Hetmanns, 1990), p. 165; P. Ulmer, in P. Ulmer, E. Brandner and H.-D. Hensen, *AGB-Gesetz.: Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen,* 9th edn (Verlag Dr. Otto Schmidt, 2001), §4, para. 39; G. von Westphalen, *Vertragsrecht und AGB Klauselwerke* (C. H. Beck, 2003), para. 37; M. Wolf, in M. Wolf, N. Horn and W. Lindacher (eds.), *AGB-Gesetz: Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen*, 4th edn (1999), §9, para. S 50.

[63] BGHZ 79, 281 = NJW 1981, 922; BGH NJW 2000, 207 (208).

the contract document is the final and entire agreement of the parties.[64] It can be established in several ways that additions or modifications have been agreed upon.[65] Correspondingly, the parol evidence rule is less strictly applied in England than in the US. English common law allows many more exceptions to the rule than the laws of US states.[66]

5.1.1.3 US law In the US, the courts of most US states regard merger clauses as establishing an almost irrebuttable presumption of the finality and completeness of the contract.[67] This corresponds to the stricter application of the parol evidence rule in the US. Moreover, a merger clause may, under certain circumstances, even exclude extrinsic evidence as a means for the interpretation of the contract.[68]

5.1.1.4 Discussion The meaning and effects of an entire agreement clause differ less between German and English law, whereas marked differences exist between German law and the law of most US states. If, for instance, the parties have orally agreed on certain specifications for certain products but have not included the specifications in their written contract, under German law, the entire agreement clause generally does not hinder a party from proving, by all available means, that the specifications are part of the agreement. Nonetheless, this proof is a rather heavy burden. The plaintiff must prove that, despite the written contract, a valid additional agreement was reached. In particular, the plaintiff must explain and prove why the agreed addition or modification was not made part of the written contract.

[64] *Brikom Investments Ltd* v . *Carr and Others* [1979] 2 All ER 753; *Henderson* v. *Commercial Union Investment Management Ltd and Another* (unreported, 22 January 1998, Lexis); *1406 Pub Company Ltd* v. *Hoare and Another* (unreported, 2 March 2001, Lexis); *Ravennavi SpA* v. *New Century Shipbuilding Co. Ltd* [2007] 2 Lloyd's Rep. 24; Lewison, *The Interpretation of Contracts*, pp. 99ff.; but *contra* (irrebuttable presumption) *Inntrepreneur Pub Co. Ltd* v . *East Crown Ltd* [2000] 2 Lloyd's Rep. 611; see also Kaufmann, *Parol Evidence Rule*, pp. 147 ff.; Meyer, 'Die privatautonome Abbedingung'; Lewison, *The Interpretation of Contracts,* pp. 580ff.

[65] See thereto Lewison, *The Interpretation of Contracts*, pp. 99ff.

[66] For English law, see Lewison, *The Interpretation of Contracts*, pp. 85ff.; for US law, see Farnsworth, *Farnsworth on Contracts*, §§7.2ff.

[67] See Farnsworth, *Farnsworth on Contracts*, §7.3 (pp. 225ff.: 'It is difficult to see why their effect should not be conclusive'); see further the comprehensive survey by Kaufmann, *Parol Evidence Rule*, pp. 157ff.; also Meyer, 'Die privatautonome Abbedingung', 575ff.

[68] See thereto, for instance, *767 Third Avenue LLC* v . *Orix Capital Markets, LLC*, 800 N.Y.S. 2d 357 (N.Y. Sup. Ct., 2005); see also Meyer, 'Die privatautonome Abbedingung', 575.

Under US law, it is likely that in the same situation, no proof of any addition or modification would be allowed.[69] Under English law, the many exceptions to the parol evidence rule make it probable that the oral agreement could be taken into account, for instance, on account of mistake, rectification or the like.

Thus, the German and the US understanding of the entire agreement clause would probably lead to different solutions, whereas in most cases, the German and the English understanding would not influence the final outcome. It therefore matters as to whether the clause is to be given its German or its US meaning, while the difference between the German and the English understanding can almost be neglected.

When faced with a merger clause drafted in common law style in a situation where German law is the *lex contractus*, the guiding principle should be first the explicitly and then the impliedly expressed intentions of the parties. Like the general aims of private international law, it should be the aim of the interpreter to rely on the understanding that the parties in fact intended and that is closest to them in the circumstances of the case.[70]

If in a hypothetical case both parties were German merchants who use an entire agreement clause, there is neither any need nor any reasonable justification to infer the parties' intention to apply the US meaning, unless the parties have unambiguously made clear that the US meaning should prevail or unless the contract has a close connection to a *specific* US state, so that it is reasonable for the parties and the performance of the contract to adhere to the US meaning valid in the specific US state. More or less, this is the outcome of the BGH decision of 1992 mentioned above.[71] There the Court set aside the dogma that foreign law-style contracts should be always interpreted according to the foreign law and should rely on the understanding familiar to both parties.[72]

On the contrary, if, rarely enough, German courts were assigned a case where both parties were US merchants, then it is generally justified to infer the parties' intention to interpret the merger clause in the sense familiar to both parties, despite German law being the *lex contractus*; again, unless the parties clearly agreed otherwise or the contract is closely

[69] It must, however, always be noted that there are differences between the single US states even with respect to the effects of a merger clause. It is therefore an oversimplification to speak of 'the US law' here.

[70] See also above in Section 4 *in fine*.

[71] BGH NJW-RR 1992, 423; see above in Section 4.

[72] BGH NJW-RR 1992, 425.