

Chapter 2: Law of Banking Contracts and Credit Securities

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I. Introduction

Like insurance law, the banking belongs to European business law and may be even more important. Ranking aspects, however, shall not be argued here. We just have in mind, that there is quite a lot of EU-regulation, also in this field of law¹, and that the transpositions have been effectuated since long time in Germany. The basic matters of both, the current state of EU-regulation and the main aspects of the related German law shall be presented in the following.

As well as in the earlier chapters, it is tried to show the German transpositions in the context of basic principles, no matter whether they are influenced by the European law itself or not. At least the EU-directives have been transposed into each of the law of the member countries by respecting the specialities of the nationally developed law. Therefore, and by pedagogical reasons, the following gives an overview over the German private banking law as such, and has not been restricted to the parts, which are influenced directly by the EU-law. Private EU-law has been called as “islands” of law within the ocean of developed national structures.² The author and others³ have not shared this view, since long time. What is tried here, therefore, one can call bridges between the EU-law influenced norms and the traditional national fields of law.

¹ See, e.g., the directives on distance services (2004), as transformed in §§ 312b, 312d Civ.Code; on consumer credits (2002), as transformed in § 491 ss. Civ. Code; and on payment services (1993), as transformed in § 676a ss. Civ. Code (cited hereinafter as BGB).

² Heinrichs, NJW 1996, 2196; Palandt/Heinrichs, BGB-Commentary, 68th ed. 2009, introduction before § 241 BGB no. 27; 57th. ed. 1998, § 24 a AGBG Rdn. 21; cf. F. Rittner, JZ 1995, 849; with critical remarks to EU-law influences to the reform of the German civil code Medicus, ZIP 1996, 1925; Schlechtriem, JZ 1997, 441.

³ J. Basedow, in: F Schr. Brandner, 1996 p. 651 ff; p. 656 ff, passim; cf. P. Ulmer, Karlsruher Forum 1997, 39; Micklitz, EuZW 1997, 229, 236 f; E. Steindorff, EG-Vertrag und Privatrecht, 1996 p. 43; H. Herrmann, Recht der Kammern und Verbände freier Berufe, 1996, p. 489 ss.

As different from the insurance law chapters⁴, the banking law presentation does not fully integrate British law comparison. This is owed to the restrictions of author's personal competence. Of course, it would be very interesting to see the British transpositions, and to compare them to the German law, as far as possible, but this shall not be done without having deeper knowledge of both compared national laws. The more one has experience with law comparison, the more one can feel its difficulties in fields, which are not covered by research of the author, at least to a certain extent.

Again different from this, the subchapter on Credit Securities⁵ integrates the British law, as far as the EU-drafts of harmonization allow to do so. To this field of law, the author has contributed some research, already⁶, and comparative literature to this point is much more and much better accessible.

II. Supranational Law

1. Sources of European Law. Before the details of the European law can be examined, some basic questions of the nature of the legal sources must be analysed.

a. Primary and Secondary Law. The European antitrust law, being treated with in the following belongs to the so-called primary Community law of the European Community which is contained in the EU- and EC-Treaty itself. It can also be found in numerous regulations, directives and Court decisions (secondary law). But the main legal basis has been integrated in the EC-Treaty, because antitrust law appeared to be a constituent part to the founders of the European Economic Community for the fundamental purposes of the Commonwealth of Nations. This had obviously been the case during the founding time since 1957, because it was an economy Community for which rules, aiming directly at market and competition functions, were much more in the centre in contrast to rules of private law.

b. Directives and Regulations. The basic provision for the Community legislative process is Article 249 of the Treaty. One distinguishes between regulations, directives, decisions, recommendations and opinions. These can be issued either by Parliament in cooperation with the Council or from the Council and the Commission. What is a regulation in the sense of EC law?

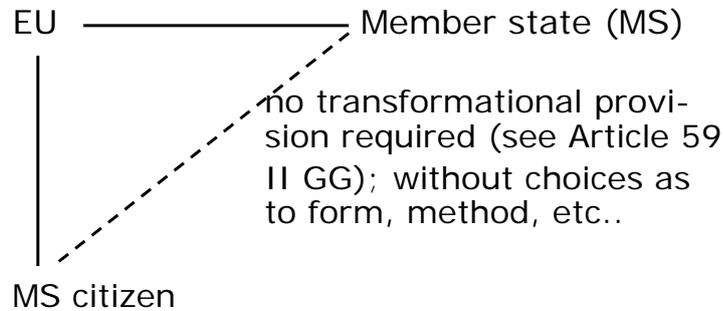
⁴ Ch. 2-3.

⁵ Ch. 4 IV.3.

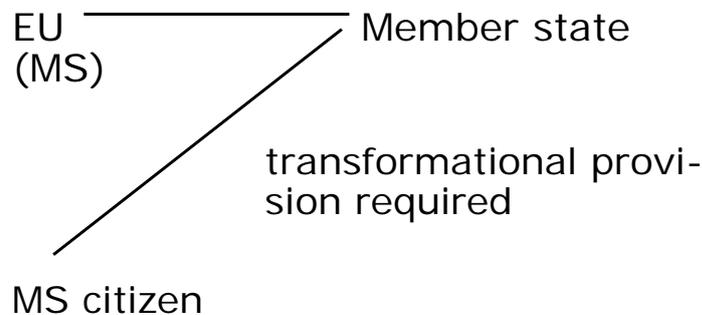
⁶ Herrmann, Privatrecht, Bd. 2, 2008, p. 110 ss.



Regulations (binding effects)



Directives (binding effects)



The main difference between a regulation and a directive consists in the fact that regulations are directly binding upon all citizens of the Member States. Therefore, Article 59 II GG is not applicable, which states that treaties pertaining to international law require a transformational provision in order to enter the national legal system and to be binding upon the citizens of the FRG. At most, supplemental regulations of the legislature or the executive can be enacted.

On the other hand, directives are only binding upon the Member States themselves. They have to pass transformational provisions, whereby they have a considerable legislative scope as to meet the objective of the directive as it only determines its aim and basic rules. To simplify and to describe it vividly, it can be said that the directives have only a horizontal binding effect whereas regulations have a vertical one.

2. Deregulation and Home Country Principle. Since long time, the European banking law has promulgated the so called home country principle (hcp). Today it is based on the 2nd Banking Coordination Directive of 1989⁷, as transposed into German law by § 53b KWG as amended 1998.⁸ The hcp means, that a foreign bank of Europe only needs a permission by the supervisory authority of its home country for being active in every members state of the EC. Hence it is no more necessary to apply for permissions in the countries of foreign activities.

By this enormous deregulation the EU-legislator intended to make effective the internal market and the interstate enterprise competition. Perhaps one can say, that the deregulation is one of the most important legal development, which has led to the consolidation of banks in Europe. High ranking examples are the merger of the Italian Unicredito with the German Hypo-Vereinsbank in 2005⁹ and the mega-deal of Fortis, ABN AMRO, Santander and the Royal Bank of Scotland in 2007.¹⁰ While Fortis seems to have major problems with the subprime crisis of the USA, the trend of consolidation of the banking markets will not be broken, probably.

Even the German market dominator Deutsche Bank AG may have become target of foreign take-over attempts, which it resisted pretentiously.¹¹ National consolidations, to a far reaching extent, are related to such foreign activities for market entry purposes. For not being object of unfriendly take-overs, one tries to become bigger by taking over another company and becoming big enough to prevent to be overtaken by a foreign competitor. Even developments of banque-assurance can be seen as prove in this field. Best examples were the merger of Allianz Insurances with the Dresdener Bank von 2001¹² and the most recent resale of Dresdener to Commerzbank. Other cases are the take-over of substantial IKB-shares by the KfW and the sale of KfW to the U.S.-American Lone Star of August 2008¹³ as well as the merger of the GLS Bank with the Integra Bank of June 2008.¹⁴

We cannot deal with the banking deregulation in further detail, because it belongs to the public law. Instead of it, we are going to focus on private banking law.

III. German Banking Law in Context

The view now switches to the German banking law and its European influences. Once again one must know that the law outside the supranational EU-law does not exist on its own, but is based on directives, which have to be transposed by national legislation. The focus of the following will be on European influences of this kind.

1. Legal Sources and Scope of View. The private banking law is not the subject of special legislation. Typically it is based, instead, on one or more contracts concluded between a bank and its customer. Accordingly, the legal basis is constituted by various chapters of the German Civil Code (Bürgerliches Gesetzbuch, BGB), the Commercial Code (Handelsgesetzbuch, HGB), which apply very generally to the conclusion of contracts (§§ 145 ss., 312 b/d BGB), to standard terms (§§ 305 ss. BGB), etc. The relevant EU-directives are the

⁷ Directive 89/646/EWG of 15.12. 1989, OJ No. L 386.

⁸ Statute of. 9.9.1998, latest amendment of. 12.8.2008, BGBl. I, 1672.

⁹ See *Manager-Magazin v. 6/162005*.

¹⁰ See www.de.fortis.com/presse/aktuelles/detailansicht/artikel/gemeinsame-mitteilung...v. 11.10.2007 (download v. 20.8.2008).

¹¹ Cf. „Ackermann verteidigt Stellenabbau bei der Deutschen Bank“, HBl. v. 2/26/2005

¹² See the overview of mega deals in *Herrmann, Versicherungsrecht*, script 2008 ch. 1.

¹³ See *E. Atzler*, KfW schultert IKB-Kapitalerhöhung, *Fin.Times Deutschland* (without date, 2007), internet version of 8/21/08; without author, Lone Star zahlt Schnäppchenpreis für IKB, *Fin.Times Deutschland* (without date, 2008), internet version 8/21/2008.

¹⁴ See www.ad-hoc.news.de/Aktie..., download of 6/22/2008.

one on distance sales and distance services (1998/2004) and the one on misuse of consumer contracts (1993). More specially, there are the directive on consumer credits (2002), which has been transposed to German law in §§ 491 ss. BGB, the one to payment services (1997) with its transposition in § 676a ss BGB, etc. Also the directive on securities trading (1986) with its German transformation in § 31 WpHG (duties of fair trade) and the general banking law have to be examined. Many impacts must be regarded within the law of loan contracts (§§ 607 ss. BGB), agency (§§ 675, 662 ss. BGB), suretyship (§§ 765 ss. BGB, § 350 HGB), and regular and irregular safe custody (§§ 688 ss., 700 BGB) etc. Additionally, the general provisions of the law of confidential relations are to be taken into consideration which are partially mere case law and partially belong to the law of tortious relations (§§ 823 ss. BGB).

None of the above- mentioned legal sources specifically address the bank-consumer-relationship. They apply very generally for all business transaction if it can be defined as an agency, a suretyship, a safe custody or the like. The provisions which are specific for bank relations can only be found in the case to case reasoning of the courts. Hence, by reason of the quite limited time I have at my disposal, restrictions have unavoidably to be placed on my subject:

First of all, I shall focus on provisions which, more or less, apply generally to all of the above mentioned banking contract-types and the related confidential relations; and finally, it would seem to be useful to restrict my report to aspects showing the basic structure of private banking law which leaves the responsibility and the economic efficiency to the autonomous decision of the transaction subjects themselves, without trying to influence it directly by government authorities. In this sense, banking services are not different in principle from industrial products, being market goods governed by competition functions of supply and demand; and I shall try to show you, that the German private law of bank-customer-relation can be seen in accordance with the related market economy principles.

We cannot overlook, however, that the freedom of competition and the freedom of concluding banking contracts is not granted without certain constraints aimed at diverse forms of social protection which are not expected to be realised by means of market functions. In this respect, the law may not only regulate the framework of workable competition, but it must follow regulatory concepts of market complementation or even market substitution. Certain concepts of consumer protection and of investors' protection have to be discussed mainly in this respect.

I shall try to show, however, that even the market substituting regulations of private banking law do not collide fundamentally with the principles of a market economy and the related German business law. For this reason I have further focussed my report on some current problems which are discussed broadly in terms of best compatibility of social protection and freedom of competition.

2. Business Types, and Customer Relationship. As to the basic terms, I have to say that the private law of banking does not apply only to banks in a narrow sense of the word, but also to all financial services institutions (Kreditinstitute) within the meaning of the Financial Services Act (Kreditwesengesetz, KWG). § 1 KWG defines institutions of financial services as „enterprises performing banking business, provided that the scope of it requires commercial business organisation“. Financial services are defined in No.1-6,8,9 of the same provision: deposits („Einlagengeschäft“), loans („Kreditgeschäft“), discounts („Diskontgeschäft“), securities („Effektengeschäft“), safe custody („Depotgeschäft“), investment („Investmentgeschäft“), guarantees („Garantiegeschäft“) and giro-transfers („Girogeschäft“). I am not going to give you further details of these types of banking business because most of you will certainly know exactly what is meant by the legal language of § 1 KWG. For the special legal implications I may refer to the further papers of this conference.

It is important, however, to see that the business types defined under § 1 KWG can be performed not only by commercial banks and investment banks, a distinction which does not exist in Germany, at all, but also by savings banks, mutual benefit associations, mortgage banks etc. In order to be regarded as a commercial organisation within the meaning of § 1 KWG, the scope of business must require a more formal organisational structure and skilled management such as book keeping and accounting as provided for under § 238 ss. HGB. Banks, savings banks and mortgage banks normally fall within the scope of § 1 KWG.

The term „customer relationship“ will also be used in a broad sense. It is not a statutory term. Similar, but narrower term is business relationship („Geschäftsbeziehung“) in § 347 Abs. 1 HGB, which provides for the due diligence of ordinary merchants for banks and other merchants, even if they have not (yet) completed a certain contract with somebody. Banks are merchants within the meaning of § 1 Sec.2 No.4 HGB. The term business relation („Geschäftsverbindung“) in No. 18 General Conditions of Banks (AGB-Banken) is likewise a similar but narrower term. This only means contract relations. Customer relationship, however, comprises both, business relationships and business relations.

Additionally, it seems useful to include the confidential relation of quasi-contract law (so called culpa in contrahendo, cic.) and the equivalent relation of the law of torts. The relevant business duties and standards of fair play are very similar to the due care duties of the contract law. Hence, the German courts do not yet apply exact differentiating criteria.

As to the term customer, it derives from the aforesaid that contract partners and others are included who are not bound by contract, but by the provisions of a confidential relation.

3. Contract Types, General Banking Contract Law and Law of Standard Terms.

The legal regime of private banking law is constituted, as I have already said, by the principles of general contract law and the provisions of the above mentioned contract types: §§ 607 ss., 675, 765 ss. and 788 ss. BGB. No special provisions exist for the bank-customer-relationship as a whole. Sometimes the courts call one of the various contracts of a bank a “banking contract“ without reflecting a certain legal basis¹⁵. This language and the common features of different contracts between a bank and its customers have led some authors to develop a theory of a general banking contract. This general contract is said to be concluded when first contact between the bank and its customer takes place. It is seen as a source of the duties of care and diligence and as a contractual basis for the application of the general conditions of contract (adhesion contract) used by the banks.

The theory of a general banking contract has been of some value for analysing similar duties of care in different contracts which may be concluded later. This is especially true for the altruistic duties, as the duty of confidentiality and the duties of information and warning. The common concept of these duties is the obligation to act in the interest of the customer (Interessenwahrungspflichten). The legal basis of the altruistic duties is, first of all, the law of agents (§§ 662, 665f) and secondly the special provisions for brokers in § 384 Sec. 1 HGB which state that the broker has „to safeguard the interests of the principal and to follow his advice“. Very similarly, the bank has to act in the interest of its customer even if the completed contract is not an order to buy or sell securities or the like. Also, the bank must give preference to the interests of its customers when performing a giro-transfer or when being party to a safe custody contract, a credit contract, etc., despite the fact that the relevant provisions of the BGB do not say anything about such a duty. - The bank, e.g., has to give a warning to its customer (A) when he orders a transfer to another customer's (B) giro-account, and the bank knows that B is going bankrupt and A is paying in advance¹⁶. Also, the duty of confidentiality is an essential part of a savings account as much as of a giro-account.

¹⁵See BGHZ 23, 222,223; Heymann/Horn, Anh.§ 372 HGB Rdn.5.

¹⁶See BGH WM 1986, 1409.

The prevailing opinion, however, does not accept this theory for the following reasons¹⁷: the general contract would be a kind of frame-consent without a main duty since the bank, unconnectedly, is not obliged to conclude special bank contracts after having accepted the general banking relationship. Instead of this, the bank can terminate the customer-relationship at any time and without being bound to a certain termination period. In German law, such a kind of contract, which would be exclusively designed to provide a basis for duties of care and to integrate general contract conditions into a later contract is unknown. Additionally, the exact content of the duties of care differs with regard to the concrete content of the main duties of the special banking contracts concluded later. The bank as a partner of a securities transfer contract, e.g., can act somewhat more egoistically in the capital market than when it has to perform an order for a giro transaction.

Certainly, the obligation of duties of confidentiality is generally accepted even if the parties, finally, do not conclude a contract in the end. The general contract theory, however, is not needed in order to construe such quasi-contractual duties because the liability of the bank has been generally accepted and has, since, become common law.¹⁸ The concept of a general banking contract cannot be accepted, therefore, as a legal source of private banking law.

Instead, the customer normally enters into a bundle of different contracts with the bank. He opens a bank account, concludes a loan contract, a contract for buying and selling securities or for using a safe. Typically, the basic contract is one of the use of a bank account for receiving and executing payments by remittance, cashing cheques, debit notes, or the use of cheque cards and credit cards or other multi-functional cards used in modern electronic payment systems.

The following list gives an overview:



Regular Banking Contracts & Main Duties

- **general banking** contract, § 675 BGB;
- giro contract, *ibid.*;
- **transfer** of giro claims and payments contract, §§ 676a ss. BGB;
- **credit contracts**, §§ 488 ss. BGB;
- investment contracts, § 675 BGB;
- deposit contracts, § 675 BGB
- information duties, §§ 675, **675a I.2**, e.g. **evaluation time** (Wertstellungsanspruch); transposition of EU-Directive on payment services (Überweisungsrichtl.).

The above mentioned contracts can be legally characterised as follows:
Opening a bank account is normally regarded as a contract of agency (Geschäftsbesorgungsvertrag, §§ 675, 662 ss. BGB). The same legal regime can be analysed for cashing cheques, credit cards etc. A loan contract falls under the provisions of §§ 607

¹⁷To the following cf. see only Heymann/Horn, Anh.§ 372 Rdn. 6.

¹⁸ Since 2002 see § 311 subsec. 2 BGB.

ss.BGB. The contractual relation for buying or selling securities is regulated by §§ 383 ss.HGB (Kommission). Also, the §§ 672, 662 ss. BGB have to be taken into consideration for this kind of banking contract.

Additionally, the so-called adhesion contract of banks (AGB-Banken) and the standard terms of savings banks (AGB-Sparkassen) normally come into play when one of the banking contracts is concluded. Another term for adhesion contracts is general contract conditions. They have been published by the responsible banking trade associations such as the Federal Association of German Banks, the Federal Association of German Saving Banks, the Federal Association of German Mortgage Banks, etc. While these publications can be seen as anti-competitive recommendations, they are exempted from the German antitrust law by § 102 Sec. 1 GWB. From time to time, the AGB are amended by the respective trade associations. The last amendment of the AGB-Banken and of the AGB-Sparkassen dates from 1993.

Despite the fact of being published, the AGB are not of the same legal quality as the above mentioned statutory sources are. They are no acts, but can be parts of the contract, if the parties integrate them properly into their consent. § 305 (2) BGB stipulates that it is sufficient for the integration of AGB if the contract contains an express reference to them and if the customer has had an opportunity to inspect the text before the conclusion of the contract. Also, unusual clauses which a customer need not expect do not become part of the contract (§ 305c (1) BGB), and unclear formulations have to be interpreted in favour of the customer (§ 305a (2) BGB). Clauses that, in an unfair way, are to the disadvantage of the customer are void (§§ 308-309 BGB). While §§ 305 (2), 308-9 BGB do not apply for standard terms used against enterprises/merchants within the meaning of §§ 2 ss.HGB, the banks try to maintain their AGB in accordance with these provisions since they, otherwise, would have to accept the risk of uncertainties whether some of their customers are merchants in a legal sense, or not.

4. Quasi-Contracts and Law of Tortious Liability (I). Besides the legal sources of contractual relations, the aforementioned confidential relationship without contract has to be characterised. The most important legal basis is the concept of culpa in contrahendo (cic.) which has been developed from various provisions of the BGB, but nowadays is accepted in § 311 subsec. 2 BGB.

Under the regime of the cic. the potential parties to a contract are bound by certain duties of care and diligence even if they never reach a binding contract. The reason for these duties can be seen in the insufficient protection by the law of torts. The relevant §§ 823 ss. BGB do not provide liability for simple damage to property. Generally, § 823 Sec.1 BGB provides tort liability only in the case where an absolute right, like the life of a human being, the health or the property has been violated, and this violation causes a damage. Damage to property, without violation of absolute rights, may only come under §§ 823 Sec.2, 826 BGB if, the damage is caused by a violation of a statutory provision or by an action which is against good morals. The German courts have unanimously held that this interpretation of the law of torts has to be completed by covering damage to property in cases where customers may place confidence in a potential contract partner, and the confidence is violated instead of a violation of an absolute right.

Finally, the confidential relationship between a bank and its customer can be analysed under §§ 823 Sec. 2, 826 BGB. In the first case, the bank must have violated a statutory provision which aims at consumer protection, or which, at least, has the like intention as a sub-purpose. It must be said, however, that the provisions of the most important KWG are no longer interpreted as directly intending consumer protection because § 6 Sec.3 KWG

stipulates that the Federal Office of the Supervising of Banks (Bundesaufsichtsamt für das Kreditwesen, BAKred) act only in the public interest¹⁹.

§ 826 BGB seems to be some more important in private banking law. It provides for damage compensation if the damage is caused by an action against good morals and with the intention to damage somebody. Both, the term of good morals and the intention to damage are interpreted broadly. Good morals are violated if the action is against the judgement of all fair thinking people. The tortfeasor, in this respect, does not have to intend the good morals violation. It is sufficient if he does it without due diligence. As to the damage intent, § 826 BGB will apply if the actor does not intend the damaging consequences directly, but knowingly accepts the risk of it.

5. Banking Contract Law. Following my analysis of the legal nature of the sources of private banking law, I would now like to present a more detailed analysis of the concrete understanding of the relevant provisions. Let me begin with the law of banking contracts. First of all, a banking contract must have been concluded properly.

a. Conclusion and Pre-Contractual Duties. The conclusion of banking contracts sometimes causes difficulties because the banks must have an opportunity to check the credit worthiness of its customer before entering into a credit contract or even giro account obligations with occasional credit transactions. The general contract law simply provides for an informal offer and as an informal acceptance²⁰. Both are declarations of intention which become binding when they reach the contract partner (§ 130 BGB). Offer and acceptance must contain consent in all essentials of the contract. Banks normally use offer-forms which have to be completed by the customer, most often assisted by one of the bank's employees. The employee, however, does not have representative power to accept the completed offer-form immediately. Instead, the form will be sent to the bank's main office and, after a certain time of checking the credit worthiness of the customer, it will be accepted by a formal statement of the bank. § 145 s. BGB stipulate that the customer is bound to his offer from the time it is given to the bank's employee until one can reasonably expect an acceptance (§ 145 s. BGB). During the same time, the bank has the possibility to refuse acceptance. Additionally, this waiting period of the customer can be extended by adhesion contract if the time of extension is not unfairly long or unclear (§ 308 No. 1 BGB).

The questions of fairness are left to the courts' reasoning. The Federal Civil Court (BGH), in the famous widow-case, held that a waiting period of 3 weeks may not be too long in a case of a multi-million credit contract, and it is not regarded as being unclear if this period begins after the application has reached the central office of the bank. Accordingly, the contested adhesion contract clause did not violate § 308 No.1 BGB, but it comes under the general unfairness provision of § 307 (1)BGB. The customer could not control how long his waiting period will really last while the bank would not only be easily informed, but could also extend or shorten the waiting time voluntarily. The court, therefore, held the banks declaration of acceptance not to be binding. The customer who had preferred a cheaper credit from another bank, in the meantime, was not bound to his contract offer. The unforeseeable period of waiting would have prevented him from making reasonable use of his market chances.

¹⁹ For former different views of the courts see BGHZ 74, 144; 75, 120; 90, 310.

²⁰ Only in certain cases of credit contracts, which require a duty to establish a mortgage, one has to see the notary for working out a formal paper, because the public authorities, doing the registration of rights on land, will not accept other than notaries' documents (§ 29 Abs. 1 GBO). For guaranties; for civil guaranties written form is requested (§766 BGB), if the guarantor is not a merchant (§ 350 HGB). If a bank guaranties, are merchant business (see former § 1 aubsec. 2 Nr. 4 HGB, which equals the actual version of § 1 subsec. 2 HGB).

Banking practise has reacted to this decision. Nowadays a waiting period of 2-3 weeks is still usual, but the period begins when the customer gives his offer to the bank's employee or when it reaches one of the bank's subsidiaries by mail. The widow-case, however, is even more important for general reasons. Here, the BGH has held for the first time that adhesion contract provisions are not allowed to prevent the consumer from taking his fair chances in the relevant competitive market.

Similar, but much more evident is the competitive aspect of the recent regulation of legal capacity for futures trading on the Stock Exchange (Börsentermingeschäftsfähigkeit) which the Stock Exchange Act amendments of 1989 and of 1994, in cases of private customers, have bound to certain information duties of the bank²¹. While futures contracts of private customers have been held void in order to keep non-merchants out of this risky business, these contracts shall now be valid if the „mature citizen“ has been given proper sources of information for taking his own market chances²². § 53 BörsG actually provides that the non-merchant must be informed about the typical risks of futures transactions by a written document. The information must at least contain the following advice

- „that the terminated rights received through futures transactions can expire or can be devalued, (and) that the risks of losses will be intensified if the consumer takes out a credit for fulfilling his contractual obligations of the futures's contract
- or if the obligated payments of the consumer are in foreign currencies“.

The trade associations of the banking business have edited a more concrete checklist of the necessary information which the banks, normally, send to their customers and which has to be signed and sent back. The BGH, in 1994 and, again, in 1997, held that this checklist is in accordance with the provisions of § 53 BörsG²³. In the literature this is seen as a market opening concept („Marktöffnungskonzept“) as opposed to a social-protectionist concept („Schutzkonzept“)²⁴.

This concept of market orientation and of the mature consumer is also continued and completed by a more recent judgement of the BGH²⁵ and the amendment of the BörsG of 1994²⁶. The consumer information must not be given exactly within a period of 1 year, but a time corridor of 10-12 months is sufficient if the bank wants to continue the legal futures market capability for another 3 years²⁷. This ruling has been commented on as follows: legal capacity for futures trading on the Stock Exchange must not be misused by such a strict interpretation of the provisions that the mature citizen, after having effected a transaction on the Stock Exchange having been well informed to all extents and purposes, and having suffered losses in so doing, can subsequently pass these onto the bank by pleading an alleged lack of information²⁸.

The information provisions described, however, do not apply generally to the completion of banking contracts, but are restricted to futures agencies. Nor do they do go as far as § 7 VVG does in granting information for the „mature consumer“ as a future party to an insurance contract²⁹. Before an insurance contract becomes binding, an insurer has to transfer a set of so-called consumer information containing the relevant general and special adhesion contracts, and the insured can revoke the contract within 2 weeks after having received the

²¹See the term of Schwark, in: F Schr. Steindorff, 1990, 473

²²S. Begr.RegE BörsG-Novelle, Drs.BT 11/4177 p. 10.

²³BGH ZIP 1994, 693, 694; 1997, 972.

²⁴Horn, ZIP 1997,1361,1362 with further ref. in fn.2.

²⁵BGH ZIP 1997, 972.

²⁶As printed in Baumb./Hopt, HGB, 29th ed.Schlußanhang III.

²⁷Quotation of. Horn, ZIP 1997 1361, 1365.

²⁸Cf. Horn, aaO. p.1364.

²⁹See Bruck/Möller/Herrmann, § 7 VVG.

information. This is evidently better at serving the purpose of making market oriented consumer decisions possible than the above mentioned provisions of banking law. The consumer shall be enabled to compare the general contract conditions as part of the price-quality relation.

In the banking business, however, it is been still held that the integration of adhesion contracts is possible under § 305 (2) BGB, provided that the bank simply offers to send its customer the general conditions „on his request“³⁰. In the light of the increasingly accepted „mature consumer concept“ banks will also have to send their general contract conditions without further demand of the customer.³¹

Finally, a further important aspect of the banking contract has been stressed by the courts in recent cases of investment recommendations by professional consultants and banks as in former cases of bank-to-bank information on behalf of customers. In the leading case of 1902, before the Reichsgericht (RG), a buyer of real estate had asked the notary about the quantity of registered mortgages, and the notary's information was negligently wrong. The RG held that the notary should have realised that the buyer wanted the information as a basis of an important business decision. The notary, therefore, implicitly declares the acceptance of a service contract offer when he gives the information requested. Hence, he must be liable for lack of due care³².

The notaries' liability has been regulated by the special BNotG (§ 19) in the meantime. For other liberal professions, however, the decision of the RG is still relevant. Tax consultants, attorneys, chartered accountants, business consultants and banks conclude information service contracts when the answer to questions which the client, who is asking, is relying on in order to decide about an important business transaction. As to the banks' liability, the courts, for the first time, adopted the opinion of the RG and assumed a direct consumer-contract in a case of inter-banking information. The inquiring bank is held to be a messenger of the contract offer of its customer. If more than one customer is asking, the number of potential contract partners must be relatively restricted and transparent for the Bank.³³

In investment business, also, the courts have been relatively generous in assuming an information service contract between an investor and the bank which performed the ordered investment transaction. There are, however, some restricting tendencies.

In the well known Bond-Case of 1993, the BGH had to decide about an investment in foreign currency bonds of an Australian enterprise group which had been sold by several German banks. While the Australian Rating Agency had already rated the bond as highly speculative (BB), it was admitted to the Frankfurt official securities market in March 1989. The bank, in casu, had informed its customer - correctly - that the investment did not contain currency risks, but it had not undertaken further efforts to find out about the Australian rating. The following bankruptcy of the bond group resulted in a total loss of the bonds' value.

The BGH construed that a contract had been concluded, exactly in keeping with the decision of the RG in the notary's case because the bank must have realised the investors substantial information interest and, therefore, was contractually bound either to find out about the rating or to tell the investor that it does not make rating investigations. The defendant bank was held liable for the total market price of the bonds the plaintiff had had to pay.

In the meantime, however, the BGH has held, a little more restrictively, that no information service contract will be concluded if the customer initiates the investment

³⁰See OLG Köln WM 1993, 369; a.A. LG Frankfurt NJW-RR 1992, 441 with consent of Köndgen, NJW 1996, 558,564.

³¹See again Köndgen, op. cit.

³²RGZ 52, 365; krit. Honsell, JuS 1976, 621, 625.

³³See BGH NJW 1979,1595, 1597.

contract and if he clearly intends an order for a certain bond paper, right from the beginning. The buying bank does not have to assume contractual information duties if the customer evidently does not want this, but seems to have already decided on a certain paper³⁴.

Some scholars have pointed out - for good reasons, I think - that the contract construed by the prevailing opinion is based on fiction about the contractual intent of the bank. If the contract law abstracts too far from the real intention of the parties, important competition functions of the capital markets would be impeded. I cannot say that this opinion has become dominant, until now, but the recent restriction of banking contract liability seems to be a further step in the pro-competitive direction.

While banking contracts, quite often, are prepared by occasion of a visit of a bank representative in the household of the customer, they are not held as doorstep contract under § 312 BGB, principally. If, by exemption, the decisive contract declaration of the customer is made in the household, already, §§ 312, 355 BGB apply, and the contract can be cancelled within the cooling-off time limit of 14 days, provided that there has been an information notice in clear and extra stressed words. If such a notice lacks, the right of withdrawal is possible for half a year (§ 355 subsec. 3 BGB).

These provisions have for historic origin an EU-directive, which has been mentioned already³⁵, and for which, in former times, an existing special statute was amended.³⁶ Nowadays, it has been integrated into the BGB as quoted (§§ 312, 355). However, the law has been changed again, by the German case law and by the ECJ, in cases when the decision of the private customer has been influenced so much by occasion of the visit in the household, that the final signing at the bank seemed to be a mere formal act.³⁷ If the credit contract is cancelled under § 355 BGB, and the customer pays back the credit money, he owes no penalty of pre-payment, which is provisioned for other cases by § 690 subsec. 2 BGB.³⁸

Normally, the cancellation right does not apply in cases of notary documentation, because there is a special exemption in § 312 subsec.3 no. 3 BGB, which is an implementation of the EU-directive. However, one does not help the consumer with his right to cancel the banking contract, if he must keep the house bought with the bank credit. This is why the ECJ, by an initiative of the German BGH under Art. 234 EG-Treaty (Vorlage), restricted § 312 subsec.3 no.3 BGB and the EU-origin by means of teleological interpretation, giving the customer the right to cancel the purchasing contract of the house, he bought with the credit money, also. The restriction depends on the factual question, whether the customer has been advised by the notary, in detail, or not.

b. Obligation to contract? Before we come to the banking contract itself and the relevant contractual duties, let us look briefly at the discussion of the obligation to contract (Kontrahierungspflichten) which are still pre-contractual duties, in a way. But the principle of contract liberty is implied, directly.

In the German literature, it has sometimes been argued that some banking services have become such essential factors of modern life that people have a right not to be excluded from them. One of the most recent discussions of these problems is related to the giro-transfer banking service. People shall have a „right to a giro account“³⁹. The prevailing opinion, however, does not agree.

³⁴See BGH WM 1996, 906; cf. Horn, ZBB 1997, 139, 143 f.

³⁵ Directive no. 85/577 of 12/20/1985, O.J. L 372/31. ;see above no. II.1.

³⁶ The Haustürwiderrufsgesetz of 1986, BGBI.I, 122..

³⁷ See BGH ZIP 2000, 177 (Heininger); BGHZ 150, 248, 258 s.; ECJ NJW 2002, 281; cf. Edelmann/Frisch, BKR 2002, 76.

³⁸ See again BGH ZIP 2000, 177 (Heininger). ;for details see Herrmann, BGB/HGB, vol. 1, op. cit., p. 70 s. infra no. III.5 f.

³⁹See. Reiffner, ZBB 1995, 243, 246 ss.; but see Köndgen, NJW 1996,558, 559.

The reasoning for a right to a giro account is based on the constitutional principle of a social state (Sozialstaatsgebot, Art. 20 Sec.2 GG) and on its consequences for § 826 BGB. People at the lower end of the social scale would be excluded from a basic necessity if they were cut-off from the giro-transfer services of banks. Hence, it would be against good morals within the meaning of § 826 BGB if a bank refused to consent to a giro contract offer of somebody.

The courts, however, have provided for the obligation to contract under much more restrictive pre-conditions than the mere fact that the desired economic good is very common. Instead, in principle, discrimination and unequal treatment are allowed in private law, and even seems legitimate as long as workable competition and the principle of contract liberty are granted. Only in cases of economic monopoly conditions or of misuse of market power, have special obligations to contract been developed. A cautious extension of these opinions to cases of misuse of political power is possible, if special constitutional liberties are affected by a demand for certain public goods, such as the membership in trade or sport associations with political functions. Similar facts can hardly be found in the cases of refused giro-contracts even if one were to attribute public functions to banks with regard to the supply of capital in a national economy. Therefore, the prevailing opinion is well-founded. In German law no right to a giro account can be claimed.

c. Due Care and Diligence. Let us now turn to the duties of banks when a contract really is concluded. I have already mentioned that I want to concentrate on the altruistic duties or duties of safeguarding of interests. Most of them are duties of information because the bank, typically, is better informed about the economic conditions of the banking service. The interest safeguarding function of the information duties can best be characterised in cases of conflicts of interests. The bank must not give preference to its own interests or the interests of some of its special customers, but the conflict has to be decided by a fair weighing of interest.

A good example for this kind of weighing of interests can be shown in the case of two bank customers one of them (A) planning to give a surety to the bank (G) for the obligation of the other (B). If the bank G knows that B is no longer credit worthy because of check-frauds, G must warn A before signing the surety contract.⁴⁰ The bank is also not allowed, in such cases, to insist on its duty of confidentiality, but it must try to be released from it by the customer B. If such an attempt is not proven the bank has clearly acted illegally by not giving information warning its customer A. If B does not release the bank from its duty of confidentiality, he himself is acting illegally. Hence, the bank must give preference to the interest of A and give him the warning.

Another example has been mentioned already: customer A orders a giro-transfer to customer B, hereby paying in advance for something bought from B. The bank knows that B has already had to apply for bankruptcy because of illiquidity. Here the bank must also try to have itself released from its duty of confidentiality and finally inform A⁴¹. If the bank has a self-interest in the payment to B because it has given B a major credit which could be saved by fresh money from A, the bank, nevertheless, must postpone its own interest and give A the warning⁴².

The information duties have been differentiated as duties to answer concrete questions (Auskunftspflichten), duties to give information (Aufklärungspflichten), duties to consult (Beratungspflichten), duties to warn (Warnpflichten) and duties to research (Erkundungspflichten). First of all, to the duties to answer concrete questions.

Their characteristic feature is that the customer asks for relatively concrete information. In comparison to the duties of giving information, the customer knows about his lack of

⁴⁰ See OLG Hamm ZIP 1982, 1061; OLG Köln WM 1990, 1616= NJW-RR 1990, 755

⁴¹ See BGH WM 1960, 1321,1322; 1961, 510, 511; BGH ZIP 1986, 1537.

⁴² See BGHZ 82, 92, 103 ss.=NJW 1978, 2145.

information and can define the possible relevance of it for his business interests. He knows, roughly, what he does not know. The right to be informed is well founded under § 242 BGB, the general fairness rule of the Civil Code, if the information wanted can be given by the defendant without undue effort, and the plaintiff has a lot more difficulty in getting the information. Evidently, as all duties to safeguard interests do, the duty to answer concrete questions depends on a weighing up of interests which must be done in the light of the contractual purposes.

The following example may serve for further illustration:

The customer was heir to a banking account. He asked the bank for information about possible donations of the testator which could be recorded as debit items on the banking account. The BGH gave a positive ruling based on the above mentioned principles⁴³. It seemed to be easy for the bank to give the information since it had performed - by order of the testator - the donations inquired about. The heir did not have a comparable source of information. The weighing of interests, hence, was to the advantage of the heir. - In casu the BGH awarded a right to performance as opposed to a damage claim. This can happen only by exemption when the claim is not on main contractual obligations but on secondary obligation. Generally, the legal consequence of a violation of secondary obligations would only be a damage claim, but a right to performance can be given if the damage claim would not give full compensation. The plaintiff, here, could not define a damage claim without knowing about possible donations of the testator.

Duties of giving information (Aufklärungspflichten) are related to facts, as I said, which the customer cannot indicate concretely. He only can ask very generally, if he asks at all⁴⁴, e.g. the customer asks if the planned investment will be safe or risky. The bank must decide on the basis of its better knowledge of the business which information the customer needs for his concret investment purposes. The duty of giving information simply stipulates that the customer, with regard to the prevailing opinion in the business, can fairly expect it⁴⁵. Examples for such information duties have been given above⁴⁶.

Duties of consulting can be differentiated because they contain judgements of valuation which may be combined with information on facts. In many aspects, the consulting duties are similar to the duties of giving information. Here, too, the main legal question is whether the customer can fairly expect the advice of the bank. The literature, partially, differentiates further between consulting duties and warning duties assuming the latter only if the relevant information is refers to a „concrete danger or risk“⁴⁷. This is true because the more distinctly one can predict dangerous consequences, the more an information duty has to be assumed. A clear distinction of consulting and warning duties seems to be impossible.

Finally, the duties of researching (Erkundigungspflichten) are very important. They have been developed by the BGH context of the liability for investment consult, esp. in the above mentioned Bond-case of 1993. In the meantime, the Federal Office of Securities' Trade (Bundesaufsichtsamt für den Wertpapierhandel, BAWe) has given them concrete form by regulating guidelines on the interpretation of §§ 31-33 WpHG⁴⁸. The bank is obliged to advise the customer adequately with regard to his individual investment purposes and the concrete conditions of the investment object (Anleger- und Objekt-gerechte Beratung). He may, however, differentiate between customers with professional knowledge and others. If the bank does not know the knowledge of its customer, it is obliged to put adequate questions in order

⁴³BGHZ 107, 104, 108 f.

⁴⁴ As different from the duty of giving correct answers to question, the duty of general information applies, see. Palandt-Heinrichs, § 242 Rdn.37.

⁴⁵ See BGH NJW 1970, 655; Palandt-Heinrichs, ,, 242 Rdn. 37.

⁴⁶See above.

⁴⁷See Horn,op. cit., p.. 141.

⁴⁸ Of 5/26/1997, BAnz. No. 98 v.3.6.1997 p. 6586 ss.

to be able to see how far the customer needs to be informed and consulted. The duty of research seems to be derived from the other duties of information.

I shall give you more details on these duties in the context of my report on the quasi-contractual confidential relation. Here, I can only highlight the general tendency of the courts and the practice of the BAWe. The imposition of information duties has gone too far in the past because they, partially, take normal market risks off the consumer which the law of capital markets lays on the consumer for purposes of market workability. The practice seems to have accepted the need that private banking law must be related to capital market law.

d. Computation of Time for Interest Calculation. Another much disputed problem is the computation of time for interest calculation. This is a special evaluation which is not necessarily the same as crediting or debiting the account. The date of crediting or debiting an account can be different from the date relevant for the interest calculation. This difference makes sense, e.g., if the bank, after having received money for the customer, cannot yet dispose of it.

Until the mid eighties, it was usual for mortgage banks to calculate the amount of a mortgage credit on the basis of the repayments at the end of the previous year even if the debtor has paid back monthly in the current year (so-called annuities credit, Annuitätendarlehen). For a long time this was supposed to be necessary since the banks, without the data processing facilities of today, needed a certain time to book and re-dispose of the money it had received from the repayments of the customer. The practice in the giro account business was similar, but there was a difference between the evaluation of credits and debits. While the computation date for debits was the actual day of the respective order of the customer, or only one day later, credits were evaluated up to 5 days later. This asymmetry can only be justified if the reasons for crediting and debiting are different in a way that the bank, typically, cannot dispose of the crediting amount before the time of computation for interest.

The terms of computation of time for interest calculation are usually determined in the general contract conditions or in the special adhesion contracts of the banks. Hence, they can be controlled under § 307 (1, 2) BGB. The BGH, for the first time, criticised the relevant general contract conditions of the mortgage banks arguing that the customer could not see how much interest he would have to pay in addition to the interest under conditions of prompt evaluation. This lack of clarity (Intransparenz) was seen as a violation of the general fairness provision of § 307 (1) BGB.

In addition, the court considered the customer to be unfairly disadvantaged within the meaning of § 307 (2 No.1) BGB because he had to pay interest, partially, on a credit amount which he had paid back already, while § 488 BGB provides that interest can only be agreed upon „for a credit“. § 307 (2 No.1) BGB provides that general contract conditions cannot derogate from the essential reason of § 488 BGB. Time lags in the computation could only be accepted if important economic and organisational reasons justified them.

The opinion of the BGH has been confirmed by various later decisions. Today, a maximum time lag of 3 months seems to be justified. Additionally, the Price Announcement Regulation (Preisangaben-Verordnung, PreisAngVO) provides that the banks, in cases of consumer credit, have to indicate the so-called effective interest rate in the written contract which gives relatively exact information on how much the time lag in the computation raises the interest expense. The customer can thus compare other market offers. Therefore, the BGB, in a more recent judgement, held that the indication of the effective interest rate is in accordance with § 307 BGB.⁴⁹

⁴⁹BGHZ 106,51; Palandt-Heinrichs, § 9 AGBG Rdn.15.

The question has not been settled yet whether this also applies when the bank fixes the computation of time of interest calculation at intervals of longer than 3 months. One would have to accept this because the necessary transparency is ultimately intended to make the customer able to compare other market offers and to base the banking business on conditions for workable competition. I shall not go further into the details of this discussion since it is a more special question of the price law.

A few final words, however, on the asymmetric evaluation in the giro business. Here, the courts have insisted on prompt evaluation of credits and debits if they result from giro-transactions. The BGH, in May 97, has held the bank must compute the time of receipt of the money if the customer is a private individual⁵⁰. A further judgement of 6/17 1997 has even confirmed this for cash payments into merchant customers' accounts⁵¹. Only in cases of check-payments is a time lag of several days accepted by the courts and the literature since the bank cannot dispose of the value promptly⁵². This is relatively restrictive, compared to the parallel problems of mortgage credit, but the difference can probably be justified since in the giro business an indication of effective interest rates is not possible.

e. Confidentiality. As a rule, the bank must keep the customer's affairs confidential, and in particular not give information about his assets with the bank or about his plans for certain financial transactions unless the customer has given his consent. The duty does not have an express statutory basis but is derived from the contractual relationship between the bank and the customer which implies a general fiduciary duty. The bank secrecy covers all „facts the customer wants to be held confidential“. This duty of the bank to observe the bank secrecy (Bankgeheimnis) includes the right of the bank to refuse testimony in civil proceedings (Art. 383 I, no. 6, 384, no. 3 ZPO). In criminal proceedings, the bank has no such right (Art. 53 StPO). The tax authorities have a limited right to ask for information from the bank (Art. 30a AO); in tax fraud proceedings, however, the bank has an unlimited duty to inform the authorities (Art. 385 AO).

It is a widely used commercial practice in Germany to ask a bank to give standard information about its customer's general credit worthiness. This information is normally given in general terms without disclosing precise figures. The information is only passed on to another bank representing the party that seeks this information. The information is only given if the customer has agreed to it.

Business customers normally agree to such information in order to enhance their credit standing, since a refusal of a bank to give any information about that customer could damage his credit standing more than less favourable information would. A general consent to such information is contained in the general conditions of contract agreed between the bank and its customer. The general conditions make a distinction between a business customer and a private customer, the latter being often not as inclined to allow information to be given about his financial situation. The bank will not give any information about his private customer unless he expressly agrees to it.

Besides the principle of confidentiality of banks as part of the private law as described, there exists a particular duty under the legislation on personal data protection. This protection of personal data is guaranteed by the German Constitution.

The duty of confidentiality of a bank does not only end in the aforementioned cases when the bank is questioned in a criminal proceedings or in a tax fraud case, but also in special situations where somebody is prepared to enter into a bargain or transaction with its customer, and the bank finds that this would be very dangerous for the other client. To give an example: Customer A wants to make an advance payment to customer B, and the bank knows that

⁵⁰BGHZ 106,259, 265 (Heidelberger Stadtparkasse).

⁵¹Reg. No. XI ZR 239/96, press release HBbl.v. 20.8.1997 p. 33

⁵²See Bülow EWiR Nr. 12 AGB-Banken 1/97, 723, 724.

customer B is facing imminent bankruptcy. Here, the bank is in a conflict of duties, and there are cases where it must warn customer A.

f. Duties of the Customer, Prepayment Penalty and Problems of Post-Contractual Securing. My next points are the contractual obligations and duties of the customer. Of course, the most important obligation of the customer is that he pays for the banking services, most frequently by paying interest for the given credit, or by paying an extra amount for the organisation of the banking account, the use of certain data processing facilities or over-the-counter services etc. For the many related problems in this field I would again refer you to the special literature.

We have to look, instead, at the secondary obligations and the duties which are based on the general fairness provision of § 242 BGB. The duty to give the bank clear, correct and complete information is very important. Other duties include being precise when giving certain orders, e.g. ordering giro transfers, and duties to check, e.g. checking the giro accounts or the statements of certain transactions the bank has carried out for the customer.

Generally, the violation of such duties leads to damage claims. In some exceptional cases, claims to performance can be awarded by the court, if the plaintiff's interests would not be satisfied by a damage claim. The pre-conditions of such exceptional performance claims are no different from the cases of violated duties of the bank which I have already mentioned.

Other duties are to the advantage of the customer himself and are called special obligations („Obliegenheiten“). They can serve the purpose of avoiding or minimise the damage when the bank has violated its information duties or duties of confidential relationship. The legal basis of such special obligations is § 254 Sec. 2 sentence 1 BGB, which stipulates that the customer is obliged to minimise a damage even if it is caused by the bank.

The following is an example of such a duty: the customer must give the bank notice within a reasonable period of time when facts change which are relevant for the performance of the contract, e.g., the name, or the address of the customer has changed, or the customer no longer has full power to dispose of his goods. In cases of giro-transfer orders, the customer must not give incorrect notice of the name or the giro account number of the receiver of the transfer. There are, however, different opinions on the question of information duties if, in cases of transfer delays or wrongly addressed transfers, special damage risks exist⁵³. A general solution to this problem seems to be impossible since it is a question of weighing of interests.

If the customer wants to pay back the credit earlier than provided in the credit contract, he can do so by certain reasons, e.g. becoming unemployed/workless (§ 690 subs. 2 sentence 1 BGB: “legitimate interest”). In such a case, however, he owes a prepayment penalty, because the creditor has a legitimate contractual expectation of returns on interest. For calculation, on accounts the residual time of the contract multiplied with the credit amount not mature and percent of interest. Until now, the case law has not held, that the bank has to agree to a deduction of other usage of the money, which has been repaid by the customer during the time of the non-cancelled contract.

Other problems arise from the general contract condition under which the customer has a duty to give further sureties or mortgages if his financial situation becomes worse. This so-called duty to extend sureties (Nachsicherungspflicht), in Nr. 13 Sec.2 of the banks' general contract conditions is based on the following facts:

- the financial situation become worse or threatens to become worse; or
- the sureties already given lose or threaten to lose their value“.

⁵³Cf. Löwe/v.Westphalen III 34.1 Rdn.22; diff. op.Horn in Wolf/Horn/Lindacher, AGB, 2nd ed. § 23,637.

The BGH has held a similar clause to be in accordance with § 307 BGB⁵⁴. Although there has been overwhelming agreement in the literature on this clause, it has been under dispute whether in order to establish an obligation to extend sureties, it must be proven that the bank has good economic reason⁵⁵ or not⁵⁶, and the only requirement is that the extension of sureties must not lead to an excess of cover for the bank⁵⁷, and that it is not demanded at an unfair time⁵⁸. The prevailing opinion seems to favour the first for the good reason that the risk that a customer is not credit worthy is normally a bank risk. Under § 307 (2 No.1) BGB the exemption from this normal risk allocation has to be justified by special reasons. Also, Nr. 13 of the general contract conditions of banks clearly stipulates that the risk extension must be indicated through new facts or newly known facts. Mere changes to the bank's management policy do not suffice⁵⁹.

With regard to consumer credit, however, general objections have been raised to the duty to extend sureties. After the enactment of the former Consumer Credit Act (VerbrKrG), and nowadays of § 492 BGB subsec. 1 no. 7 BGB, the problem has been solved for consumer credits, because the kind and the amount of sureties have to be agreed in the written text of the contract, and that they are fixed unchangeably. This seems to be an adequate reaction to some deficiencies of the competition functions in the cases of consumer credits.

g. Commitment interest (*Bereitstellungszins*). Despite the provision of § 246 BGB, the practice has developed a contractual duty of the customer to pay interest before receiving the credit. § 246 BGB seems to presuppose that one has to pay interest only in cases in which a certain amount of money was paid for credit or was booked to the advantage of someone. However, there are exemptions in the presented⁶⁰ value computation after customer back payments, as well as when the commitment interest is approved. This can be done without difficulty by individual contract clauses on the basis of the contract liberty.

If the respective clause is part of the standard terms, a violation of § 307 sec. 2 no. 1 BGB is possible, since § 246 BGB may be interpreted as an essential norm. However, from an economic perspective, it is logical that a bank that has received money from the European Central Bank, or from any other credit institution, to prepare a credit payment at the correct time to its customer is able to claim an equivalent for it. In the moment the bank receives the money, it has to pay interest. The duty to pay this interest plus some surplus, which could be bargained under competition conditions, has to be accepted as a standard term clause, without regarding it a violation of § 307 sec. 2 no. 1 BGB.

h. Transfer of Payment. A special type of banking contract can be consented to transfer money from one checking account to another.⁶¹ This transaction can only be carried out by credit institutes.⁶² As is the case in private law, the former institute of a payment order in the sense of § 665 BGB has been overruled. The transaction is now understood as a contract between the bank and its customer, which is separate from the checking account contract, and which requires organization of several contracts between the banks completing the transfer. In the first step of the transfer, the bank makes a passive booking on the account of the payer.

⁵⁴BGH NJW 1981, 1363, 1364; diff. op. Grunewald, ZIP 1981, 586.

⁵⁵ See Heymann/Horn Anh. § 372 Rdn.62; cf. Brandner, in Ulmer/Brandner/Hensen, Anh. §§ 9-11 Rdn. 661.

⁵⁶ See now Baumb./Duden/Hopt 29th ed. Nr. 13 AGB-Banken Rdn.7.

⁵⁷Cf. BGH aaO.

⁵⁸See BGH NJW 1983, 2701,2703.

⁵⁹See, fort the original credit security right under No. 13 ABG-Banken Baumb./Hopt, op.cit.No. 13 AGB-Banken no.4.

⁶⁰ See above no. III.5.d.

⁶¹ See already supra no. III.3; the directive is published in Palandt-Arch. I.B.8; download under www.palandt.beck.de.

⁶² See § 1 sec. 1 no. 9 KWG.

Next the book money (*Buchgeld*) is transferred to the intermediary banks by passive booking on the account that the one bank has with the other. Finally, the bank of the designated person (seller, creditor) books the payment to the account of its customer, which is seen as a payment transaction and leads to the termination of the payment claim (§ 362 BGB).

In cases of payment by credit card or by commercial papers, such as check, etc., the transaction can only be made if the seller/creditor accepts this kind of payment (§ 364 BGB). This also applies for the bank transfer of payments between checking accounts. The consent, however, will be done in advance if the business letters contain the account number of the seller's bank. Similarly, one will regard it as consent if there is a notice such as "credit cards accepted," etc. in the letter.

Cash transfer is also possible if the payment is done in cash to the bank and if a transfer contract is negotiated.⁶³ In the relationship between the buyer and seller (valuta relation), the transaction is done as said.

Most important is the question of whether the bank has a duty to warn the customer before his or her payment if doubts of solvency of the designated person/enterprise become publicly known. Under German law, banks can restrict themselves to formal examinations of correct account numbers, etc. A possible insolvency does not have to be revealed to the bank customer.⁶⁴ Exemptions to this principle are only accepted in cases in which the formal bank transfer seems to be against bona fide (§ 242 BGB). The well-known case of the German *IKW Bank*, which transferred billions of euros to the American bank *Lehman Brothers* in 2009 and only after the fact was made publicly known that the US government would not prevent the bank from insolvency,⁶⁵ it seems to potentially be a political, rather than legal, scandal. As stated, the question depends on the circumstances and their evaluation under § 242 BGB, to the extent German law applied to the international transfer. The author, as a university scholar, is not aware of such detailed facts. Noteworthy is that a more precise evaluation of the facts may be necessary to correct the prevailing public opinion.⁶⁶

IV. German Credit Securities and European Harmonization

The law of credit securities is distinctly separate from the law of banking obligations, and the general law of sales is held abstract from the law of property transfer. While the sales law is regulated by §§ 433 et seqq. in the 2nd book of the BGB, the section of property law is placed in §§ 903 et seqq., 929 et seqq. in the 3rd BGB book. Despite what is known as the abstraction principle, there are economic links, because it is a unique business to give a credit on the one side and to take a credit security on the other. Aspects of comparative law can also support dealing with credit securities in close relation to banking law, because the Anglo-American law family does not provide for an abstraction principle. A final brief section expanding this point is added in the following.

1. Forms of Retention of title (*Eigentumsvorbehalt, EV*). In German law, the basic form of credit securitization is the simple retention of title. § 449 BGB provides that ownership is transferred subject to the condition precedent that the purchase price is paid in full. One calls it *aufschiebende Bedingung* (condition precedent, § 158 BGB) in contrast to a condition

⁶³ BGH, NJW 2008, p. 2245 no. 41.

⁶⁴ BGH, NJW 2008, p. 2245.

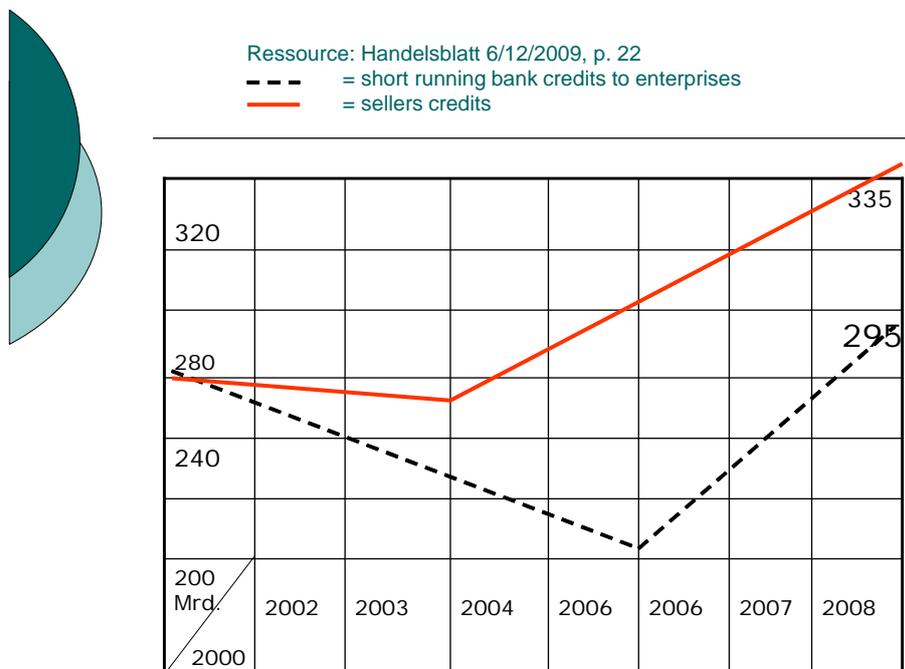
⁶⁵ See *Sueddeutsche Zeitung* of 9/22/2008 and of 7/1/2009.

⁶⁶ Cf. LG Frankfurt ordering back payment of salary for one of the board members of the KfW, the mother company of IKW.

subsequent (*aufhebend*, § 159 BGB). “Precedent” means that the legal effect of the ownership transfer shall not be completed before the condition is satisfied.⁶⁷

a. Economic Significance and Practical Overview. The economic consequences intended by retention of title are closely connected to the regulation in the insolvency law. The parties of an agreement on retention of title want the seller to be able to separate the ownership of the sold good from the insolvency assets (§ 47 InsO) if the buyer goes insolvent. This results in the seller not being restricted to an insolvency quota, but having a claim against the insolvency administrator to transfer the good to him in order to sell it elsewhere, and to take the full purchasing price for his or her own. Since the selling good no longer belongs to the insolvency assets (§ 35 InsO), this form of credit security nearly perfectly shifts the risk of insolvency to the buyer.

The following figure shows that the relationship between bank credits and the sellers’ credits has changed significantly in the past 7 years. In 2008, the relation between bank credits and sellers’ credits decreased to approximately 88%. While bank credits are secured by mortgages and sureties, sellers’ credits were often joined with retention of title.



Most often, the condition precedent is used for securitization (called simple form, or *einfacher EV*). Sometimes, however, conditions subsequent are preferred, since by this provision the buyer gets full ownership and automatically loses it in the case of insolvency. Differences can be seen in the effects of further ownership transfers or seizures during the time of unfulfilled conditions. In the case of conditions precedent, the former owner can recall the good on the basis of § 985 BGB, which has advantages when compared to the situation of the owner who has transferred his or her ownership by a condition subsequent. However, this cannot be further detailed here.⁶⁸

The seller may allow the buyer to conclude a sales contract with a further buyer subject to the condition the buyer (as a seller) retains title until payment by the (second) buyer (known

⁶⁷ If a legal transaction is entered into subject to a condition subsequent, the effect of the legal transaction (e.g. ownership transfer) ends when the condition is satisfied; at this moment the previous legal situation is restored.

⁶⁸ See Herrmann, op. cit., p. 75 et seqq., with analysis of the remainder (*Anwartschaftsrecht*).

as prolonged retention of title, *weitergeleiteter EV*). The second buyer does not get ownership, but gets an expectancy right, just as the previous seller (first buyer) had. The final transfer of ownership must meet two stipulations: firstly, the full price must be paid to the second seller; and secondly, the last price rate must have been paid to the first seller. He, the first seller, has consented to the further transfer under the double condition, which is possible under the provision of § 185 BGB.

If the consent is put under the condition of payment to the second seller only, the first seller loses his ownership in the moment that the second seller receives the money from the second buyer. One can call this form subsequent retention of title (*nachgeschalteter EV*). Of course, this form is more risky for the first seller, because he or she trusts that his or her buyer will pay him or her after receiving payment from the second buyer.

Finally, forms of extended retention of title (*erweiterter EV*) are quite often stipulated in practice, and each of the mentioned forms can be consented over the course of a longer and current business relation (*Kontokorrent-Vorbehalt*) and/or in relation to a corporate group (*Konzern-Vorbehalt*). We will return to this point later.⁶⁹

b. How to establish and terminate retention of title. As previously mentioned, the simple retention of title is constituted by condition precedent for the transfer of the ownership within the provision of § 158 BGB (§ 449 BGB). To establish this security, one has to rely on the general contract law, which puts a contract under the precondition that there is a binding offer of retention of title, and that this offer has been willfully accepted. Once the kind of retention of title is provided in the standard terms, and the terms are fairly communicated with the buyer (§ 305 sec. 2 BGB), this is considered an offer. The offer can be accepted by implied consent when the good is delivered and the buyer takes possession of it without protest against the relevant standard term.

In cases in which retention of title is not provided in the standard terms of the purchasing contract, such a clause can be integrated into the delivery contract. The clause concerning retention of title may be printed, e.g., in the back of the delivery papers transferred to the buyer, by the delivery person. The retention of title may then be in violation of the purchasing contract, but it is established in full legal effect, because here the abstraction principle of the German law comes into play: the relation of the law of property must be seen independently from the law of obligations.

Special problems arise when retention of title is not provided in the purchase contract, but a representative of the buyer has accepted the delivery with such a conditioning clause. If the representative has no power to accept the delivery contract, he or she acts as *falsus procurator*. His or her declaration derived from the acceptance of the delivery papers can be left without consensus of the buyer, which will lead, however, to the consequence that the buyer does not receive an expectancy right to ownership nor full ownership. The ownership transfer contract will simply become null and void. This is insignificant if the seller is still able to make a new contract which is now conditioned according to the buyer's wishes. This changes, however, if in the meantime the seller falls insolvent or if another creditor gets a security right on the sold good and hence the seller no longer has the right to transfer his ownership at all, much less to do it without preferred rights of third persons.

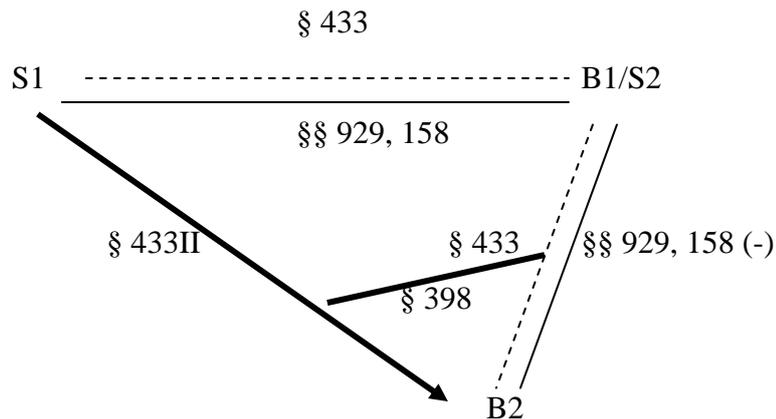
The retention of title shall normally be terminated when the condition is fulfilled, meaning that the last amount of money is paid. The buyer automatically becomes the full owner of the good, i.e. without any further action of the seller required. The exact timing of when full ownership is received depends on the moment of transaction of the payment obligation. In cases of banking transfers, this moment is the time of booking to the account of the seller (§ 362 BGB).⁷⁰ If payment is made with a commercial paper, e.g., by check or credit card, the

⁶⁹ Below to no. IV.1c/d.

⁷⁰ For this and the following cf. – in more detail – *Herrmann*, BGB/HGB, vol. 2, 2006, p. 28 et seqq.

exact timing is a little later, because this transfer is considered a substitute of the owed performance. This leads to a full performance, and thereby, to termination of retention of title when the seller accepts (§ 364 sec. 1 BGB), which is normally not done prior to taking cash from the checking account.

A further possibility to transform an expectancy right (to ownership) into full ownership is the transfer with agreement of the seller, because a disposition made by a person without the authority to do so becomes fully effective if the owner (seller) as the person entitled gives his or her consent either in advance or ex post facto (§ 184/185 BGB). If another retention of title shall be agreed upon, the claim of seller 2 against buyer 2 is transferred to seller 1, which can be done by a simple agreement between seller 1 and 2 (assignment, § 398 BGB).



The retention of title can also be terminated by processing or transformation of the good into a new movable thing, e.g., steel into parts of a motor car (§ 950 BGB). Even joining or mixing the good with others can lead to such an outcome (§ 947/8 BGB). These combinations and intermixtures, however, are avoided by special agreements of extended retention of title.⁷¹

In cases of insolvency of the buyer, the transfer of ownership subject to the condition precedent that the purchase price is paid in full will not be terminated, but this is the situation upon which the security is agreed. The insolvency administrator has the option to either pay the rest of the purchase price,⁷² or to return the good to the seller (§ 103 sec. 1 InsO). By choosing the latter, he or she can claim the paid amount back from the seller, because returning the item is considered a withdrawal from the sales contract (§ 449 sec. 2 BGB). The seller can also recall the good from the insolvent buyer, but here again the money has to be repaid according to the law of withdrawal (§§ 449, 346 BGB)

c. Retention of title with checking accounts and within enterprise combinations. The payment condition can be related to a certain status of a checking account being agreed upon under § 355 HGB. More than the one claim of the purchase price of a single good are combined, and the payment condition is fulfilled only if the payments of all combined prices are made, or paid up to a certain amount. Sales on storage are typical for such agreements, because the deliveries occur concurrently, and are preferably not interrupted because of insignificant late payments.

Sometimes even full payment is not considered enough, since the seller wants a certain security for the length of time of conducting business with the customer. The case law, however, has restricted this kind of securitization by applying § 138 sec. 1 BGB if there is an over-securitization by the seller enforced by his or her market power.⁷³

Problems also arise in cases in which the condition is related to claims of an enterprise combination. Former case law has held that these agreements can be contrary to public policy under § 138 sec. 2 BGB, since the inner relationship of the sale and the property transfer condition is lost.⁷⁴ The reform of the civil code of 2002 ruled against this and strictly interdicted such forms of retention of title (§ 449 sec. 2 BGB).

d. Extended retention of title. It has already been said that the provisions of §§ 947-950 BGB can be derogated by special contract clauses or clauses of standard terms. The buyer promises to work for the seller when combining the delivered good with others or changing it by furthering the production process. If working for the seller, the buyer cannot get ownership

⁷¹ See below no. IV.1d.

⁷² And to receive a full right for the insolvency assets.

⁷³ See BGHZ 94, 105, 112 et seqq.

⁷⁴ See BGH, BB 1988, 1065, leaving the question open.

under §§ 947-959 BGB, because it is not the latter who intermixed, mingles, processes or transforms the thing, but the seller him or herself.

One calls this extended or prolonged retention of title, and differentiates it from the clause by which the transfer of the good is allowed with further clauses of retention of title, and is combined with a transfer of the price claim of the second seller to the first seller.⁷⁵ We prefer the term “extended,” because extending seems to be more precise in cases in which there is no third person involved.

Special problems arise when the buyer works with products from more than one seller. The extending clause leads to the result that the buyer works for both sellers when processing the delivered goods. They are considered co-owners (§§ 741 et seqq. BGB) in relation to the value of the delivered goods, i.e. they are jointly entitled to ownership (co-ownership by defined shares).

2. Pledges and Hybrid Forms of Security Rights. Further realty credit securities are pledges (§§ 1204 et seqq. BGB). This form does not give the secured person full property rights in the secured case, but rather the right to sell the pledged item to third persons to seek satisfaction, i.e. to keep the purchase price to the extent it covers the secured claim (§ 1228 sec. 1 BGB).

a. Creation and Practical Significance. To create a pledge, the owner and the creditor have to agree that the creditor is to be entitled to the pledge and the owner has to deliver the thing to the creditor (§ 1205 sec. 1 BGB). The delivery of possession may be replaced; the owner, however, can never keep the item in his possession. This is why the pledge is not an adequate security if the security is given when the owner intends to use the item for realizing profits with which he or she would be able to repay the credit. The practice has developed the hybrid form of security assignment under the provision of § 930 BGB⁷⁶ for avoiding the aforementioned weakness of pledges.

A statutory security right of the contractor provided by § 647 BGB. For his claim under the contract, the contractor has a security right over the movable things of the customer that he has produced or repaired if they have come into his possession during the production or for the purpose of repair (*Werkunternehmerpfandrecht*). Moreover, the lessor, for his claims under the lease, has a security right over things contributed by the lessee (§ 562 BGB) and, perhaps most importantly, the creditor of a claim may have a security right under § 804 ZPO (destraint lien, *Pfändungspfandrecht*) which arises where enforcement (*Zwangsvollstreckung*) in movable assets take place after the creditor has won a case against the debtor before a court of justice and the title is made decisive (§ 804 sec. 2 ZPO).

Finally, pledges of rights and of a claim are possible (§§ 1273 et seqq., 1279 BGB). Such pledges of rights and of claims can also be created by the winner of a court claim having a decisive title in hand (§§ 829 et seqq., 859 ZPO). These kinds of pledges shall not be analyzed here in further detail, because they differ too greatly from liens on property.

As for the practical significance, it has already been said that the transfer of ownership as security under the provision of § 930 BGB has dominated for many years. The statutory pledges and the restraint lien under § 804 ZPO for enforcement of court decisions have kept their use in practice. In addition, one must see Nr. 14 of the standard terms of banks of

⁷⁵ See supra no. IV.1b.

⁷⁶ Delivery, which is usually necessary for transferring ownership, is replaced by a legal relationship being agreed between the owner and the acquirer by which the acquirer obtains indirect possession and therefore can use the things (e.g. machinery, cars). Ownership, however, is passed to the acquirer as security of the acquirer's claim against the owner until the claim is fulfilled.

1/1/2000,⁷⁷ which provides for securing “all existing, future and conditioned claims of banks or their subsidiary enterprises.” Commercial papers and possessions under custody of a bank may also become objects of pledges under this provision.

b. The Secured Claim. Pledges can be taken as securities for claims, no matter of which nature, provided that the claim has a stock exchange or market price, i.e. a commercial value. This is true with claims on a monetary payment, such as the back payment of a bank credit, or claims because of the status of a checking account. Additionally, claims on the delivery of goods or services can be secured by pledges, except, e.g., claims on marriage, adequate life or parents’ custody.

The claim must exist or must be expected to exist in the future (§ 1204 sec. 2 BGB). This precondition is called the accessory of the pledge, which has the consequence that the pledge becomes null and void if the claim does not exist or if it is terminated by a transaction (§ 362 BGB), e.g., by back payment of the credit. If the debtor needs the pledge for receiving further credits, he must establish a new one. This has disadvantages in cases in which other securities have been established on the respective item. When the pledge is terminated, it loses its priority over other rights. It is possible, however, to allocate the pledge to more than one claim, and also to claims that are expected to exist later (future or conditional claims). The rank of the pledge is defined by when it was created and not by when the future claim was created.

Once the secured claim is transferred to another creditor by means of § 398 BGB, the pledge, because of its accessory, accompanies it (§ 401 BGB). If one does not want this, one can agree to void the pledge, because § 401 BGB is dispositive.

The accessory is another disadvantage of the pledge in comparison to the security assignment, since here the debtor, having paid back the credit, has a claim on the creditor to get back his ownership. There is no automatic termination of the security right.

c. Objects of Pledges. Only movable things can be objects of pledges. The equivalent security on an immovable thing (proprietary possession) is a mortgage, which follows the provisions of §§ 873, 1113 et seqq., 1198 BGB. In particular, registration in the Land Register is required, while pledges can be established, as said, by simple agreement and transfer of possession.

If items in storage shall be taken for pledges, one must provide for a stipulation that the respective item is put onto a list of the storage. Otherwise, the object of the pledge would not be defined clearly enough. If the pledged item is taken out of storage and delisted, the right expires (§ 153 et seq. BGB).

This procedure is characterized by uncertainties, and thus quite complicated, especially when other securities are established on the stored items and one must know which security has time priority over the other. Thus here one can see disadvantages of using pledges compared to securities on proprietary possession.

Some items are exempt from statutory pledges in the sense of § 811 ZPO, because they are the owner’s personal belongings, such as clothing, hygiene articles or even radios and television sets. However, they can be objects of contractual pledges, provided that there is no contradiction with public policy (i.e. violating the standards of those being sensible of justice and equity, § 138 BGB).

d. Transfer of Possession and Bona Fide Establishment. As already said, the owner of the movable thing and the creditor must agree on the creation of the pledge and the owner must deliver the thing to the creditor (§ 1205 sec. 1 BGB). First of all, the direct possession

⁷⁷ As printed in Baumbach/Hopt, HGB-Kommentar, headline-No. 8, p. 1398 et seqq.

can be delivered to the creditor if the owner has such a position (ibid.). This is equivalent to the transfer of possession in § 929 BGB for the purpose of ownership transfer. Since there is no equivalent to § 930 BGB (i.e. delivery may not be replaced by a legal relationship), the debtor/owner cannot keep his or her possession and only transfer the position as indirect possessor to the creditor.

However, transfer of indirect possession is possible if a third person, instead of the owner, has the direct possession, provided that the transfer is indicated to the direct possessor (§ 1205 sec. 2 BGB). This form is very common in cases in which the object of the pledge has been leased to somebody, and shall be left in lease to him or her. Granting joint possession suffices instead of delivery of the thing if the thing is under the joint control of the creditor or, if it is in the possession of a third person, it may be delivered only to the owner and the creditor jointly (§ 1206 BGB). If the debtor or owner has no direct or indirect possession, he or she can give an order to the direct possessor to deliver the thing to the creditor for the purpose of creating a pledge. The *Geheißerwerb*, which allows the physical delivery by or to a person to be simultaneously also attributed to another person is not provided for by statutory law, but has been developed through case law.

In case the pledged item is in transport, there is no need to provide the direct possessor with special information. §§ 363 sec. 2, 424, 444 HGB provides that the delivery of the transport papers is sufficient.

The pledgor does not have to be the debtor of the secured claim (§ 1210 sec. 1), but must be the owner of the pledged item. Otherwise, the pledge can only be acquired in good faith (§ 1207 in connection with §§ 932, 934 et seq. BGB). The reference to the provisions of good faith regarding good faith acquisition of ownership is intentionally incomplete, since the indirect possession of a pledge within § 933 BGB is impossible.

e. Basic Structure of Ownership transferred as security. Ownership which has been transferred as security of the creditor's claim against the original owner does not only give the creditor a right to sell the secured item, but the full property is transferred to him or her, bound by special obligations. This is why there is no accessory as in pledge law.⁷⁸ When the secured credit is repaid, the creditor is still the owner of the item transferred to him as security of his claim, but he or she is obliged to give it back to the original owner.

Even more important, however, is the construction of this security in analogy to § 930 BGB. The security owner only gets indirect possession, which leads to the economic consequence that the debtor can keep the direct possession of the item to use it to earn profits with which he will be able to pay back the credit.

Special forms of this security are retention of title and the anticipated transfer of ownership agreement (*antezipiertes Besitzkonstitut*). Retention of title enables the securitization of a future credit by this form. We already know this from the presentation of the pledge, which also can be created for future credits (§ 1204 sec. 2 BGB). The same should be true for ownership transferred as security, because § 925 BGB only interdicts a declaration of conveyance regarding the transfer of ownership of a plot of land, which can be analyzed by "argumentum e contrario" as leaving liberty for transferring ownership of movable things subject to a condition.

An anticipated transfer of ownership agreement is a form of security in which the possession of the debtor lies in the future. For the time of possession, it is transferred to the creditor in advance, and without establishing transit property for the debtor. If the debtor has fallen insolvent in the meantime, the security property is already established for the creditor with full legal effect. Insolvency restrictions do not come into play.

⁷⁸ See above no. IV. 2. a.

The transfer of ownership as security has long been disputed in the literature, because the law of acquisition and loss of ownership of movable things seems to constitute a principle of *numerus clausus*. § 930 BGB applies directly to a definitive transfer of ownership – not to forms of securitization. The law of pledges is overruled by the practice of ownership transferred as security, which also seems to be in conflict with the *numerus clausus*. A less strict opinion wants to control standard term clauses of ownership transferred as security under the guise of § 307 sec. 2 no. 1 BGB, which interdicts clauses that are in conflict with dispositive statutory provisions having legal judicial purposes. It has been said, however, that there are provisions of statutory law (§§ 925, 930 BGB), which also seem to provide for statutory property. Additionally, practice and case law have long acknowledged this instrument of credit security and have proven its legality, which has led to binding law. The dispute, therefore, seems to be academic.

§ 930 BGB provides for replacement of delivery (*Übergabesurrogat*) only, and leaves the necessary agreement on the transfer of the ownership under § 929 BGB untouched. This is why clauses of ownership transferred as security have to be sufficiently certain,⁷⁹ and must clearly define the objects of the anticipated transfer of ownership agreement, so that it can be precisely defined when being transferred to the direct possessor.⁸⁰ Registration in lists of inventories is sufficient,⁸¹ but not necessary when the type of items within the agreement on the transfer of the ownership is distinctively described.⁸² Identification of a certain storage room is also acceptable if there is no differentiation within the same room.⁸³ There is not sufficient certainty when items are objects of the agreement on the transfer of the ownership only up to a certain value,⁸⁴ or under the provision that they belong to the security giver.⁸⁵

In cases of anticipated transfer of ownership agreement, certain additional acts must be realized,⁸⁶ and the agreement has to be continued until the time of transfer of the item.⁸⁷ In principle, however, the courts have acknowledged this form of credit securitization and it is accepted, because in practice it has been necessary. Despite this general view, there are special problems of over-securitization, because the anticipated transfer of ownership agreement includes a further perspective for future developments, which is necessarily accompanied by uncertainties and mistakes. While former case law held § 138 sec. 1 BGB applicable only in cases of over-securitization in which subjective aspects of immoral intents were at stake,⁸⁸ other more recent decisions allowed objective allegations to suffice.⁸⁹ This case law is not tied to § 138 BGB, but to the content control of the standard terms, which provided for keeping the security after back payment of the credit and which have been held inadequate under today's § 307 sec. 2 no. 1 BGB if an over-securitization of more than 150% is foreseeable. In cases 160 or 170% over the credit amount, however, one can be sure that the courts will apply § 138 BGB as well.

f. Transfer by Non-Owners and Insolvency Problems. If the ownership is transferred by somebody who is not the owner of the secured item or is not entitled to transfer ownership, the provisions of good faith acquisition of §§ 932 et seqq. BGB may apply. While § 933 BGB

⁷⁹ BGH, WM 1983, p. 1409.

⁸⁰ BGH, NJW 1995, p. 2348; Palandt/*Bassenge*, § 930 margin 2.

⁸¹ BGHZ 73, 253; NJW 1989, p. 2542.

⁸² BGH, NJW 1994, p. 133.

⁸³ BGH, NJW 1997, p. 2654.

⁸⁴ BGHZ 21, 52.

⁸⁵ BGH NJW 1986, p. 1985.

⁸⁶ BGH LM concerning § 930 BGB Nr. 9; Nr. 12.

⁸⁷ BGH WM 1977, p. 218; OLG Düsseldorf ZMR 1999, p. 474; Palandt/*Bassenge*, § 930 margin 10 with presumption in this sense.

⁸⁸ See esp. BGH NJW 1998, p. 2047.

⁸⁹ See esp. BGHZ 137, 212 Big Senate ("Großer Senat") = NJW 1998, p. 671.

provides that the creditor has gotten direct possession, which is atypical in cases of ownership transferred as security, under § 932 sec. 1, indirect possession may be sufficient. This is only acknowledged in very special cases in which the transferring person has relinquished any position of possession.⁹⁰

If the security giver becomes insolvent, the creditor has a right to get the object, which has been transferred as security, separated from the insolvency assets (§ 51 sec. 1 InsO). The item remains at the disposition of the insolvency administrator, who may sell it and transfer the realized sales price to the creditor, as long as it covers the outstanding credit and is not needed for covering the administrative costs (§ 170 sec. 1 InsO). This right is similar to the one of pledge law, and differs essentially from the right that an owner of full ownership would have, since the owner could claim the direct possession of the secured item and sell it him or herself (§ 47 InsO). The difference, however, is justified by the securing effect ownership transferred as security has, which is more similar to the pledge than to full ownership.⁹¹

In the case of the creditor's insolvency, the security giver can repay the credit, and has a claim of full transfer of the object of the security property (§ 47 InsO). If the credit is not repaid, the insolvency administrator can sell the object and take the purchase price for covering the credit claim. A possible residual amount must be repaid to the security giver.⁹²

3. EU-Drafts of Harmonization. EU law will change the credit security law in Europe, since trans-border commerce dealing with securitization needs has grown substantially. The international private laws of the Member States provide with (misleading!) uniqueness that the law of the state in which the secured item is in at the time of the security realization applies (*lex rei sitae*).⁹³ Unfortunately, there are vast differences in the laws of the EU Member States and other states in regards to the law of ownership transfer, pledges and ownership transferred as security. This is why some initiatives of harmonization were already undertaken quite some time ago. These shall be presented in the following section.

a. Reform Initiatives. Despite differing property laws of the states, there is a quite unique acceptance of the ownership transfer subject to the condition precedent that the purchase price is paid in full (retention of title) that can be established without a public register, but by written consent before delivery.⁹⁴ The remaining differences are concentrated in the methods of transferring ownership as security, with Germany considering the consensus and the transfer of indirect possession as sufficient, but GB and other countries requiring registration with public authorities.⁹⁵

One way of harmonization could be the promulgation of an EU directive. The political likelihood of such an initiative, however, does not seem to be very high, because the Member States have cancelled the efforts of a directive on the law of late payment,⁹⁶ and have thereby demonstrated that they are not willing to undertake binding initiatives in private law.⁹⁷

As a result, we are left with only two alternatives:

(1) Pattern provisions of expert groups can be developed as options for the contract parties within the framework of international private law. Similar initiatives have been realized by the Paris International Chamber of Commerce in the field of Incoterms;

⁹⁰ Cf. already BGHZ 56, 123, 130 (case of *brevi manu traditio*); for further discussion see *Russos*, Jura 1987, p. 403, 409.

⁹¹ The insolvency administrator has the option to give the item to the creditor for the purpose that he sells it on his own (§ 170 sec. 2 InsO).

⁹² See *Bülow*, Kreditsicherungsrecht, margin 1067; *Palandt/Bassenge*, § 930, margin 24.

⁹³ See, e.g., Art. 43 et seqq. EGBGB.

⁹⁴ But see § 449 BGB: without written document.

⁹⁵ See *Kieninger*, AcP 208 (2008), p. 182, 186 et seq., 210 et seqq. with further references.

⁹⁶ 2000/35/EC of 6/29/2000, OJ No. L 200/35 of 8/8/2000

⁹⁷ See *Kieninger*, AcP 208 (2008), p. 182, 196.

(2) Model acts can be stipulated, again by independent expert groups, which shall provide incentives for the national legislators to imitate. This would follow the experience of the USA with their Model Acts in different fields of private and commercial law.⁹⁸

In regards to the latter alternative, the publication of the Study Group on a European Civil Code on “Principles of European Law” is best known.⁹⁹ Based on this, a working group Common Core of European Private Law¹⁰⁰ has put together a list of common trends in the EU Member States, and has derived from this some reform needs of the German law.¹⁰¹ To better conceptualize a model act, one can refer to the Legislative Guide on Secured Transaction of UNCITRAL.¹⁰²

b. No Reform of retention of title. As to the content of the harmonization proposals, the most important question is if the requirements of public information by transfers of possession have international equivalents and can be transferred to transnational role models. For retention of title, as stated, there is a common trend requiring written documents only.¹⁰³ This would result in a change for Germany insofar as the security instrument could no longer be established by vocal agreement or by silent consent derived from preceding acts. However, the written form can be seen as a substitute for the lack of publicity, which is caused by the fact that the buyer may already hold the item in his possession, even if he is not yet the owner.

Why does the simple retention of title, in the proposals of the law comparison experts, not require public registration? The main argument is that the registration would hamper small business transactions, which quite often are not significant enough to justify the cost and time required for registration. Yet this cannot be true in cases of large value transfers, and it would be false to say that for these transfers, retention of title is atypical. The author has proposed, therefore, to require registration, but restrict it to business transfers of merchants. Examples of such restrictions can be seen in §§ 366, 377 HGB. Additionally, British law seems to have equivalents, since sec. 860 et seqq. Companies Act 2006¹⁰⁴ has introduced a unique registration procedure for companies, which is applicable for limited liability partnerships as well.¹⁰⁵

c. Public Registers versus Publicity of Possession. The Study Group on a European Civil Code has proposed to establish registers for pledges and transfers of ownership as security.¹⁰⁶ Arguments contra registration emphasize that its costs would be out of proportionality, since this credit securing instrument is typically used in small business.¹⁰⁷ One should weigh the costs against the information advantages that a public register would have.¹⁰⁸ Arguments in favor highlight the fact that modern internet technology would make it possible to keep registration costs low.¹⁰⁹

⁹⁸ See *Stürner*, Perfection and Priority of Security Rights, in: Eidenmüller/Kieninger, The Future of Secured Credit in Europe, in publication, cit. after *Kieninger*, op. cit., p. 196.

⁹⁹ *Drobnig*, Empfehlen sich gesetzliche Maßnahmen zur Reform der Mobiliarsicherheiten, Gutachten F to the 51. DJT 1976, F12 und F89f.

¹⁰⁰ www.sgecc.net/media/downloads/proprietary.securitiesjune_2005.psf (downloaded 10/17/2007).

¹⁰¹ See the report of *Kieninger*, AcP 208 (2008), p. 182, 196 et seqq.

¹⁰² UN Dokument A/CN.9/637 v. 28.9.2007, www.uncitral.org (Stand 21.1.2008); report in *Kieninger*, AcP 208 (2008), p. 182, 198.

¹⁰³ See the references above to no. IV. 3 a.

¹⁰⁴ See the references of *Kieninger*, AcP 208 (2008), p. 182, 205 et seqq.

¹⁰⁵ Limited Liability Partnership Regulations 2001, Statutory Instrument 2001 No. 1090, regulation 4 und Schedule 2.

¹⁰⁶ *Kieninger*, op. cit., at p. 211.

¹⁰⁷ *Wohlgemuth*, Vergemeinschaftung des Mobiliarsicherungsrechts, 2005, p. 285 et seqq.

¹⁰⁸ *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 3rd. Ed. 2000, p. 536.

¹⁰⁹ *Kieninger*, op. cit., at p. 211.

A key point is the discussion of the impact on publicity. While registers have advanced public information value, the publicity of possession, and even of indirect possession, should not be underestimated.¹¹⁰ The best solution, therefore, can be seen in a splitting provision, letting the written form and transfer of indirect possession in cases of small businesses suffice,¹¹¹ and requiring registration only in cases of “bigger business.” This solution would have the further advantage of being in line with the favored solution for the simple conditioned property. As in simple retention to title, the registration should be requested if both contract partners are merchants. The presented forms of anticipative possession constitute security ownership of goods in storage, etc., which will typically fall under the bigger business of merchants, and hence will be registered in the future.

One can also propose a good faith purchase, which is only possible in cases of registration.¹¹² Non-merchants should have an option to register to ensure that good faith purchase can take place, and to save investigation costs in trusting the content of the register.¹¹³

The register option/request can be relevant for pledges also. The arguments of cost weighing are the same as in the cases of the other credit securities presented here. The split of provisions between big and small business would also be adequate. Registration only seems to be impractical in cases of statutory pledges, as well as for liens enforcing judgments, in which registration requirements are already requested by the norms of the procedural law.

¹¹⁰ See *Herrmann*, BGB/HGB II, 2008, p. 22 et seqq., 94 et seqq.

¹¹¹ Cf. „Common Core of European Private Law“ s. www.jus.unitn.it/dsg.common-core (download of 10/31/2007); *Kieninger*, op. cit., at p. 186.

¹¹² See the proposal of the author in *Herrmann*, BGB/HGB II, 2008, p. 113.

¹¹³ For this economic aspect, see again *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 3rd. ed. 2000, p. 536.