German Sales Law Two Years After the Implementation of Directive 1999/44/EC

By Peter Rott[*]

The implementation of Directive 1999/44/EC has turned German sales law on its head, and it has also led to a major reform of the general contract law. Old problems have been solved, and new ones created. Academics and practitioners have commented widely on the reform, and their perceptions range from fundamental opposition to strong enthusiasm. This article attempts to give an impression of the significance of these changes for German sales law, of the most controversially debated issues under the new law and also of the acceptance of the new provisions and of their European origin by academics and by the courts.

A. A Brief History of German Sales Law

The German Civil Code was adopted in 1895 and the provisions on sales had remained largely unchanged, before the Consumer Sales Directive 1999/44/EC had to be implemented. Only one major attempt to modernize contract law was made. In 1979, the former Minister of Justice commissioned a study on the reform of the German contract law. On the basis of this study,[1] a Commission on Contract Law Reform was established that produced an impressive report.[2] The proposals by this Commission were never enacted. However, they were of considerable influence when it came to the implementation of Directive 1999/44/EC.

Conceptually, German sales law was still based on Roman law and therefore out of date. Legal practice had remedied most problems. Consequently, the law in the books did not reflect legal practice anymore.[3] At the same time, German sales law

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[1] The report on sales law was produced by Ulrich Huber, in: *BMJ, Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. 1, 1981, 647.

[2] *BMJ* (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[3] *See* Andreas Heldrich, *Ein zeitgemäßes Gesicht für unser Schuldrecht,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2001, 2521, 22. For a proponent of this initiative *see* Jan Wilhelm, *Schuldrechtsreform 2001,* JURISTENZEITUNG (JZ) 2001, 861, and Holger Altmeppen, *Schadensersatz wegen Pflichtverletzung,* DER

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deviated largely from modern international sales law doctrine, as embedded in the Convention on the International Sale of Goods (CISG).[4]

First of all, the right to specific performance only existed until the specified good was delivered, irrespective of whether or not the good was in conformity with the contract. From the moment of delivery, a special warranty regime took over that deviated largely from the general rules on breach of contract ("warranty theory" or *Gewährleistungstheorie*). This special warranty regime was advantageous for the buyer compared to the general contract law, especially in allowing immediate rescission of the contract. On the other hand, one of its most problematic features was its short limitation period of only six months, rather than a period of 30 years that applied otherwise. This difference led to great difficulties in practice, in particular with a view to the question of whether goods delivered were defective (*peius*), with the consequence of a six months limitation period, or completely different (*aliud*), with the consequence of a thirty years limitation period for the delivery of the goods the parties had agreed upon.[5] Similarly, the distinction between defects and misrepresentation became enormously important, in particular in the context of the sale of enterprises, since – again – the limitation period for misrepresentation was 30 years.[6] This difference in limitation periods also necessitated a distinction between defects of goods and the breach of ancillary duties, such as correct instructions[7] or appropriate packaging,[8] and between defects of goods and consequential

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BETRIEB (DB) 2001, 1131; the latter with a reply by Stefan Lorenz, *Schadensersatz wegen Pflichtverletzung – ein Beispiel für die Überhastung der Kritik an der Schuldrechtsreform,* JZ 2001, 742, 45.

[4] For an account, *see* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, EUROPEAN REVIEW OF PRIVATE LAW (ERPL) 2001, 239.

[5] *See, e.g.,* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 49; Stefan Lorenz, *Aliud, peius und indebitum im neuen Kaufrecht,* JURISTISCHE SCHULUNG (JUS) 2003, 36.

[6] *See, e.g.,* Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuches,* WERTPAPIER – MITTEILUNGEN (WM) 2002, 1376, 79; Christiane Brors, *Zu den Konkurrenzen im neuen Kaufgewährleistungsrecht*, WM 2002, 1780, 84.

[7] *See* 47 BGHZ 312.

[8] *See* 66 BGHZ 208; 87 BGHZ 88. *See also* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 49; Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuches,* WM 2002, 1376, 78.

damage (so-called *Mangefolgeschaden*).[9] Finally, the short limitation periods led courts to apply tort law in certain cases where products were destroyed due to a defect of a component (the so-called *weiterfressender Schaden*) since tort law provided for a longer limitation period of three years from the time the purchaser was aware of the damage, with a maximum period of ten years.[10]

Secondly, the previous law of sales focused on the sale of specifically determined items, and consequently on the remedies of rescission and reduction of price.[11] Only in the case of goods described in a general manner (generic goods), replacement was an available remedy. The remedy of repair was not provided by the BGB, but was usually effected in practice by agreement.

And thirdly, German sales law was somewhat restrictive with regard to the relevant characteristics of the subject matter of the sale. Although German courts followed, in principle, a subjective approach under which the necessary quality of a good is determined by agreement between the parties, they were reluctant to consider descriptions of the goods that were made in public statements of either the seller or a third party.[12] Moreover, it was difficult to enforce statements on characteristics of the goods beyond their physical appearance and quality, such as the good reputation of a guest-house.[13]

Outside the scope of the Directive, one should mention that German sales law provided for different regimes for defects in quality and defects in the legal status of

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[9] On this issue, *see* André Janssen, *Die Zukunft des weiterfressenden Mangels nach der Schuldrechtsmodernisierung*, VERBRAUCHER UND RECHT (VuR) 2003, 60.

[10] *See*, in particular, *BGH*, NJW 1992, 1678; *BGH*, NJW 1998, 2282.

[11] *See* the critique by Gert Brüggemeier, *Zur Reform des deutschen Kaufrechts – Herausforderungen durch die EG – Verbrauchsgüterkaufrichtlinie*, JZ 2000, 529, 31.

[12] *See, e.g.*, Karl-Nikolaus Peifer, *Die Haftung des Verkäufers für Werbeangaben*, JURISTISCHE RUNDSCHAU (JR) 2001, 265; Simone Jorden & Michael Lehmann, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung*, JZ 2001, 952, 954. The view expressed by Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 46 seems overly optimistic.

[13] *See BGH*, NJW 1992, 2564, 65. *See also* Carola Glinski & Peter Rott, *Umweltfreundliches und ethisches Kaufverhalten im harmonisierten Kaufrecht*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 2003, 649, 50, concerning statements on environmentally sound or ethical production.

goods.[14] Another much criticised feature was the outdated previous regime for damages in sales law. Under the previous § 463 BGB, the purchaser could only claim damages if either the seller had guaranteed specific characteristics of the goods or if he had acted fraudulently. In cases of pure negligence, no such claim was granted.

B. The Implementation Debate and Process

It became clear at a very early stage that Germany, unlike other Member States, would not create an additional body of consumer sales law that would be separated from sales law in general.[15] Rather, the doctrinal underpinning of the sales law of the BGB was adjusted to Directive 1999/44/EC and the CISG, whilst some specific elements of the Directive were only reserved to consumer sales contracts. However, the main focus of the discussions was on the question of whether this provided an opportunity to modernize major parts of contract law and to integrate the consumer-specific legislation, hitherto adopted in a piece-meal fashion to implement the various measures of EC consumer law, into the BGB.[16] There were numerous supporters for both solutions;[17] more than 200 German professors signed a manifesto that favoured a narrow approach to implementation, restricted to sales law only.

In contrast, the former Minister of Justice, Herta Däubler-Gmelin, and the responsible official in the Ministry of Justice, Jürgen Schmidt-Räntsch, decided to renew the project of the 1980s and to reform contract law drastically.[18] Apart from the general

[14] Whether or not defects in the legal status of goods are subject to Directive 1999/44/EC is being discussed controversially in Germany. For an inclusion of defects in the legal status, see Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 50.

[15] *See* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 42. One of the reasons was that consumer sales contracts account for the vast majority of sales contracts anyway, *see* Christian Schubel, *Schuldrechtsreform: Perspektivenwechsel im Bürgerlichen Recht und AGB-Kontrolle für den Handelskauf,* JZ 2001, 1113, 15. Previous special rules for the sale of animals were abolished, *see* Harm Peter Westermann, *Das neue Kaufrecht* NJW 2002, 241, 52.

[16] On the latter, *see, e.g.,* Wulf-Henning Roth, *Europäischer Verbraucherschutz und BGB,* JZ 2001, 475.

[17] In favour of a restrictive implementation *see, e.g.,* Wolfgang Ernst & Beate Gsell, *Kaufrechtsrichtlinie und BGB,* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2000, 1410.

[18] *See*, in particular, Herta Däubler-Gmelin, *Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform,* NJW 2001, 2281.

need for reform, this decision was taken with an eye on the EC Commission's considerations to create a whole EC Contract Code. Instead of merely reacting to the development at EC level, the German Ministry of Justice intended to be at the forefront of contract law reform, and to introduce new rules that might be capable of serving as a model for EC legislation. In a process that was unprecedented in its openness and transparency,[19] the Ministry of Justice published a Consultation Paper in August 2000. This Consultation Paper was followed by intense discussion that included expert groups of government officials, academics and lobby groups, and also academic conferences. In May 2001, a bill was laid before Parliament[20] that was largely based on the expert groups' reports.[21]

The outcome of this process was a complete reform not only of consumer sales law and sales law in general[22] but also of the law of limitation periods,[23] of the consequences of breach of contract,[24] of the law of services,[25] of credit law,[26] and also of some fields of consumer law.[27] The sales law reform extends to all sales contracts

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[19] For an appraisal, *see* Claus-Wilhelm Canaris, *Die Reform des Rechts der Leistungsstörungen,* JZ 2001, 499, 524.

[20] BT-DrS. 14/6040.

[21] For a description of this process, see Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 41.

[22] Previous special rules for the sale of animals were abolished as well. For the rules on animals under the new sales law *see, e.g.,* Sascha Brückner and Antje Böhme, *Neues Kaufrecht – Wann ist ein Tier "gebraucht"?,* MONATSSCHIRFT FÜR DEUTSCHES RECHT (MDR) 2002, 1406.

[23] *See* Detlef Leenen, *Die Neuregelung der Verjährung,* JZ 2001, 552; Heinz-Peter Mansel, *Die Neuregelung des Verjährungsrechts*, NJW 2002, 89.

[24] *See* Claus-Wilhelm Canaris, *Die Reform des Rechts der Leistungsstörungen,* JZ 2001, 499; Daniel Zimmer, *Das neue Recht der Leistungsstörungen,* NJW 2002, 684; Johann Kindl, *Das Recht der Leistungsstörungen nach dem Schuldrechtsmodernisierungsgesetz,* WM 2002, 1313; Dieter Medicus, *Die Leistungsstörungen im neuen Schuldrecht,* JUS 2003, 521.

[25] *See* Herbert Roth, *Die Reform des Werkvertragsrechts,* JZ 2001, 543; Jörg Schudnagies, *Das Werkvertragsrecht nach der Schuldrechtsreform,* NJW 2002, 396.

[26] *See* Peter O. Mülbert, *Die Auswirkungen der Schuldrechtsmodernisierung im Recht des "bürgerlichen" Darlehensvertrags,* WM 2002, 465; Udo Reifner, *Schuldrechtsmodernisierung und Verbraucherschutz bei Finanzdienstleistungen,* ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 2001, 193.

[27] For a brief overview in English, *see* Peter Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe,* 2 OXFORD U

except from those that are covered by the Convention on the International Sale of Goods (CISG). The concept of conformity as layed down in Art. 2 of the Directive and the remedies that are provided in Art. 3 of the Directive now apply broadly. Merely the seller's redress, Art. 4, the reversal of the burden of proof, Art. 5 (3), some features of the consumer guarantee, Art. 6, and the mandatory nature of the rules, Art. 8 (1), were reserved to consumer sales contracts. At the same time, only few rules of the Commercial Code that apply exclusively to commercial contracts have survived the reform.[28]

C. The Implementation in Detail

Generally speaking, the new German sales law is in line with the requirements of Directive 1999/44/EC.[29] For linguistic reasons,[30] the legislator has changed most of the wording of the relevant provisions but he emphasised that the new law has, of course, to be interpreted in the light of the Directive.[31]

I. Relevance of the Distinction Between Consumer Sales Contracts and Other Sales Contracts

1. Exclusively applicable provisions and mandatory nature.

The distinction between consumer and non-consumer sales contracts is, of course, relevant insofar as there are a few rules that apply exclusively to consumer sales contracts as defined in § 474 BGB. Beyond that, the new sales law is only mandatory as far as consumer sales contracts are concerned, according to § 475 BGB, whilst the provisions can be deviated from by agreement in non-consumer sales contracts. Thus, in other sales contracts, exclusion clauses are still permitted to a

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COMPARATIVE L FORUM (2002) *at* http://ouclf.iumscomp.org. On the consumer law aspects of the bill, *see* Hans-W. Micklitz, Thomas Pfeiffer, Klaus Tonner, and Armin Willingmann (eds), *Verbraucherschutz und Schuldrechtsmodernisierung* (Baden-Baden 2001).

[28] *See, e.g.*, Gerd Müller, *Zu den Folgen des Rügeversäumnisses i. S. d. § 377 HGB,* ZIP 2002, 1178.

[29] For an overview *see, e.g.*, Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuches*, WM 2002, 1376; Harm Peter Westermann, *Das neue Kaufrecht,* NJW 2002, 241; Thomas Zerres, *Das neue Sachmängelrecht beim Kauf,* VUR 2002, 3.

[30] See the heavy critique by Heinrich Honsell, *Die EU-Richtlinie über den Verbrauchsgüterkauf und ihre Umsetzung ins BGB,* JZ 2001, 278, 79.

[31] An English translation of the relevant provisions by Geoffrey Thomas & Gerhard Dannemann is available at the webpage of the German Law Archive *at* http://www.iuscomp.org/gla.

certain extent, provided that they do not violate the law on unfair contract terms. The effects of this distinction between consumer sales and others can already be felt in the context of second-hand cars. These contracts appear to make up the bulk of the case-law applying the new sales law. Since exclusion clauses are no longer allowed, the focus is on means of avoiding liability nevertheless. One such way is that second-hand car traders formally act as mere agents for private owners of cars.[32] Consequently, the sale is not a consumer sale but a sales contract between private persons in which liability for defects can be excluded.[33] Even worse are contract clauses in which the purchaser confirms to be a trader.[34] This latter construction, however, does not hold once that the trader is aware of the fact that the purchaser is a consumer, since the consumer's rights cannot be negotiated away by negating his being a consumer.[35]

2. Principles of interpretation.

The new sales law provisions are intended as the implementation of Directive 1999/44/EC, and therefore they have to be interpreted in the light of this Directive. However, through the extension of most of the provisions of the Directive to sales law in general, the question arose as to whether sales law in general has to be interpreted in this way now.[36] Whilst no case-law is available yet on this particular issue, most German authors support this view, and case-law on doorstep selling law also points into this direction. The government has made it clear in its proposal for the new sales law, that all sales law should follow identical rules and principles. By definition, this must mean the principles of EC consumer sales law,[37] and for rea-

[32] *See* Markus Müller, *Die Umgehung des Rechts des Verbrauchsgüterkaufs im Gebrauchtwagenhandel,* NJW 2003, 1975, 78. The agency model was very popular from 1970 to 1990 for reasons of tax law, see Jens-Hinrich Binder, *Die Inzahlungnahme gebrauchter Sachen vor und nach der Schuldrechtsreform am Beispiel des Autokaufs „Alt gegen Neu",* NJW 2003, 393, 94.

[33] *See AG Rheda-Wiedenbrück*, DEUTSCHES AUTORECHT (DAR) 2003, 120, 121. *Contra*, Gert Brüggemeier, *Zur Reform des deutschen Kaufrechts – Herausforderungen durch die EG – Verbrauchsgüterkaufrichtlinie,* JZ 2000, 529, 32, who proposes to declare such contracts as consumer sales.

[34] *See* Markus Müller, *Die Umgehung des Rechts des Verbrauchsgüterkaufs im Gebrauchtwagenhandel,* NJW 2003, 1975, 79.

[35] *See AG Zeven*, DAR 2003, 379.

[36] *See, e.g.,* Hans Christoph Grigoleit & Carsten Herresthal, *Grundlagen der Sachmängelhaftung im Kaufrecht,* JZ 2003, 118, 19.

[37] *See* BT-DrS. 14/6040, 208. *See also* C.-W. Canaris, *Die Nacherfüllung durch Lieferung einer mangelfreien Sache beim Stückkauf,* JZ 2003, 831, 37.

sons of legal certainty this makes perfect sense. A similar principle was recently accepted by the *BGH* in the famous *Heininger* case on doorstep selling law. The ECJ had decided that the period of withdrawal cannot expire if the trader has not informed the consumer on his right to withdrawal.[38] The *Heininger* case, however, did not fall into the scope of application of the Directive at all because the contract was not concluded in one of the situations set out in Art. 1 of Directive 85/577/EEC. Instead, it came under the broader scope of application of the German implementation in § 1 of the old Doorstep Selling Act.[39] Thus, from an EC law point of view, there was no need to follow the ruling of the ECJ in that particular case.[40] Nevertheless, the *BGH* pointed out that one cannot assume without question that the German legislator intended to create different rules and to allow divergent interpretation of the same German provision, depending on whether the present case comes under the scope of application of both German and EC law or merely under the extended German rules.[41] In conclusion, all German sales law should now be interpreted in the light of Directive 1999/44/EC.

3. Frame of reference for the control of standard terms in commercial sales contracts.

Since the new sales law is merely mandatory for consumer sales contracts, contracting parties can agree on reduced protection of the purchaser in other sales contracts, particularly commercial sales contracts. This is very often achieved by the use of standard terms. In German law, such standard terms in business contracts are subject to a general fairness test which is, of course, less strict than in consumer contracts but has hitherto applied similar principles.[42] For example, the *BGH* held

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[38] *European Court of Justice*, Case C-481/99 *Georg und Helga Heininger v. Bayerische Hypo- und Vereinsbank AG*, judgment of 13/12/2001, 2001 ECR I-9945. This judgment has received wide attention in Germany. Follow-up preliminary proceedings, brought by the *LG Bochum*, NJW 2003, 2612, are now pending, *see* Peter Rott, *Gemeinschaftsrechtliche Vorgaben für die Rückabwicklung von Haustürgeschäften,* VUR 2003, 409.

[39] The Doorstep Selling Act (Haustürwiderrufsgesetz) has been integrated in §§ 312 and 355 of the *BGB*, *see, e.g.*, the commentaries by Peter Rott in: Wolfhard Kohte, Hans-W. Micklitz, Peter Rott, Klaus Tonner & Armin Willingmann, *Das neue Schuldrecht* (Neuwied 2003).

[40] *See also* Hans Christoph Grigoleit & Carsten Herresthal, *Grundlagen der Sachmängelhaftung im Kaufrecht,* JZ 2003, 118, 19; Christian Bärenz, *Die Auslegung der überschießenden Umsetzung von Richtlinien am Beispiel des Gesetzes zur Modernisierung des Schuldrechts,* DB 2003, 375.

[41] *BGH*, DB 2002, 1262, with a positive comment by Peter Ulmer, *Anmerkung,* ZIP 2002, 1080, 82. *See also* the critique by Mathias Habersack & Christian Mayer, *Der Widerruf von Haustürgeschäften nach der "Heininger"-Entscheidung des EuGH,* WM 2002, 253.

[42] *See, e.g.*, BGHZ 60, 377, 80.

that a clause that allowed rescission of the contract only after three failed attempts to repair the goods was void,[43] a judgment that was clearly inspired by case-law on consumer sales contracts.[44] Now, the rules on consumer sales that stem from Directive 1999/44/EC have become model for the regulation of sales law in general, and there is good reason to believe that the will also serve as a frame of reference for the control of standard terms in non-consumer sales contracts.[45] In fact, this would appear to make perfect sense since most of these new provisions equally or similarly appear in the CISG which is designed for the needs of commercial sales.[46]

II. Conformity

Under the new § 433 par. 1 s. 2 BGB, the seller has to deliver goods which are in conformity with the contract. This formula marks the shift from the old "warranty theory" to the "performance theory" (*Erfüllungstheorie*) that the CISG and Directive 1999/44/EC follow, namely that the seller only performs if he delivers goods which are in conformity with the contract.[47]

Section 434 par. 1 BGB implements Art. 2 (2), (4) and (5) of the Directive, whereas Art. 2(3) has found its equivalent in § 442 BGB. Under §434 par. 1 BGB, the goods as delivered are free from defects as to quality if, upon the passing of the risk, the goods are of the standard of quality agreed in the contract. If the quality has not been agreed expressly, the goods are free from defects as to quality (1) if they are fit for the use specified in the contract, and otherwise (2) if they are fit for the normal use and their quality is such as is usual in items of the same kind and can be expected by virtue of their nature. For the purposes of the latter, the normal condition includes features which the purchaser may expect by virtue of public statements concerning the goods' features that are made by the seller, the producer or persons assisting him, in particular in advertisements or in connection with labelling, unless

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[43] *BGH*, ZIP 1998, 70.

[44] *See* Christian Schubel, *Schuldrechtsreform: Perspektivenwechsel im Bürgerlichen Recht und AGB-Kontrolle für den Handelskauf,* JZ 2001, 1113, 15.

[45] For more detailed discussion, *see* Christian Schubel, *Schuldrechtsreform: Perspektivenwechsel im Bürgerlichen Recht und AGB-Kontrolle für den Handelskauf,* JZ 2001, 1113; Harm Peter Westermann, *Das neue Kaufrecht* NJW 2002, 241, 42.

[46] *See,* in particular, Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 45.

[47] *See, e.g.,* Dietmar Boerner, *Kaufrechtliche Sachmängelhaftung und Schuldrechtsreform,* ZIP 2001, 2264, 65; Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuchs,* WM 2002, 1376, 77.

the seller was not aware of the statement nor ought to have been aware of it, or at the time of the conclusion of the contract it had been corrected by equivalent means, or it could not influence the decision to purchase the item.[48] § 434 par. 2 BGB relates to assembly and instruction defects.[49] Again, it must be emphasized that the relevance of public statements and of assembly and instruction defects apply to sales law in general, despite considerable resistance of traders during the implementation process.[50] From an EC law perspective, the only criticism may relate to the fact that § 434 BGB, unlike Art. 2 (2)(a) of the Directive, does not mention models and samples *expressis verbis* so that § 434 par. 1 BGB lacks transparency in this respect.[51]

Importantly, the German legislator has also harmonized the regime for nonconformity, for delivery of an *aliud*, and for the delivery for the wrong quantity, § 434 par. 3 BGB.[52] This was done explicitly with a view to Art. 35 CISG, and it has solved a number of problems of the previous sales law.

In contrast, the legal consequences of the breach of ancillary duties other than installing goods or providing installation instructions have not been clarified in the implementation process. Thus, such breach could still come under the general rules on breach and therefore under the longer limitation period of three years. However, there are also scholars who propose to take assembly and corresponding instructions as *pars pro toto* for other ancillary duties, such as appropriate packaging, and to bring all those ancillary duties under the sales law regime. With respect to pack-

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[48] *See* on this issue Susanne Augenhofer, *Bedeutung von Werbeaussagen – sowohl des Verkäufers als auch des Herstellers – für die Begründung von Gewährleistungsrechten,* JURISTISCHE BLÄTTER (JBL). 2001, 82; Michael Lehmann, *Die Haftung für Werbeangaben nach neuem Schuldrecht,* DB 2002, 1090; Frank Weiler, *Haftung für Werbeangaben nach neuem Kaufrecht,* WM 2002, 1784; Friedrich Bernreuther, *Sachmangelhaftung und Werbung,* MDR 2003, 63; Carola Glinski & Peter Rott, *Umweltfreundliches und ethisches Kaufverhalten im harmonisierten Kaufrecht,* EUZW 2003, 649.

[49] For details, *see* Jan Stoppel, *Die Rechte des Käufers nach Lieferung einer mangelhaften Montageanleitung,* VUR 2003, 176.

[50] For support for this extension, *see* Simone Jorden & Michael Lehmann, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung,* JZ 2001, 952, 55.

[51] *See* Beate Gsell, *Kaufrechtsrichtlinie und Schuldrechtsmodernisierung,* JZ 2001, 65, 66.

[52] For details, *see* Stefan Lorenz, *Aliud, peius und indebitum im neuen Kaufrecht*, JUS 2003, 36. Indeed, some German authors argue that Art. 2 (1) of Directive 1999/44/EC requires the inclusion of the delivery of an aliud and of too low quantities, *see* Simone Jorden & Michael Lehmann, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung,* JZ 2001, 952.

aging, this would also mean to follow Art. 35 (1) CISG.[53] There is no judgment by a court on this issue at present.

A highly controversial issue is the extent to which the required quality can be lowered below the usual standard by agreement, for example by defining a car as "wreck".[54] A majority of authors support such a possibility as important for maintaining party autonomy in sales law.[55] However, there must also be limitations in order to prevent traders from circumventing the protection of the consumer.[56] Courts have already rejected such descriptions if they were in obvious contradiction with the protocol on the specific defects of the car.[57] It is certainly safer, from a trader's perspective, to name the defects of a second-hand car so that the consumer is aware of them and liability is excluded under § 442 BGB.[58]

The presumption of non-conformity during the first six months after delivery of Art. 5 (3) of the Directive merely applies to consumer sales contracts, § 476 BGB. This provision has been subject to some debate as well. In particular, its application to second-hand cars has been the subject of some controversy.[59]

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[53] *See* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 50 Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuchs,* WM 2002, 1376, 78.

[54] Which may cause a conflict with waste law, *see, e.g.*, Markus Müller, *Die Umgehung des Rechts des Verbrauchsgüterkaufs im Gebrauchtwagenhandel,* NJW 2003, 1975, 78, note 24.

[55] *See, e.g.*, Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 47; Markus Müller, *Die Umgehung des Rechts des Verbrauchsgüterkaufs im Gebrauchtwagenhandel,* NJW 2003, 1975, 76.

[56] On the relationship between interpretation of the contract and the prohibition of circumventing the law, under § 475 par. 1 s. 2 BGB, *see* Markus Müller, *Die Umgehung des Rechts des Verbrauchsgüterkaufs im Gebrauchtwagenhandel,* NJW 2003, 1975.

[57] *See AG Marsberg*, DAR 2003, 322: The description as *Bastlerfahrzeug* (kit car) was held void under § 475 par. 1 s. 1 BGB because the car was supposed to be admitted to public roads. See also *AG Zeven*, DAR 2003, 379: The description as *Schrottauto* (wreck) was held irrelevant with a view to an otherwise positive description of the car.

[58] *See* Christian Kesseler, *Der Kauf gebrauchter Waren nach dem Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetz,* ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 2001, 70, 71.

[59] *See, e.g.*, Kurt Reinking, *Die Haftung des Autoverkäufers für Sach – und Rechtsmängel nach neuem Recht,* DAR 2002, 15, 23. *See also infra*, at D. II. For an application of the new rules to second-hand animals, Sascha Brückner & Antje Böhme, *Neues Kaufrecht – Wann ist ein Tier "gebraucht"?*, MDR 2002, 1406.

III. Remedies

Section 437 BGB offers the purchaser of a defective good a variety of remedies: § 437 no. 1 BGB grants the right to repeat performance, a notion that includes replacement and repair, whilst § 437 no. 2 BGB mentions the rights to rescission and reduction of price. In addition to that, the purchaser can claim damages, § 437 no. 3 BGB. In contrast, unlike in contracts of works and services, the purchaser does not have the right to remedy defects himself and then seek compensation for expenses incurred afterwards.[60] Although not immediately obvious, the German legislator has maintained the hierarchy of remedies as provided for by Directive 1999/44/EC.[61] The system of remedies is now the same for defects in the legal status, § 435 BGB.

1. "Second performance."

Under § 439 par. 1 BGB, the purchaser can claim replacement and repair. The seller is liable for all expenses related to the second performance, in particular transportation, labour and material costs, § 439 par. 2 BGB. If the seller delivers another item to the purchaser, he can claim return of the defective item he first delivered, § 439 par. 4 BGB.

If replacement or repair is impossible, the seller will be automatically discharged of this duty, § 275 par. 1 BGB. If, however, replacement and/or repair is possible but merely at disproportionate expense, the seller can reject either, § 439 par. 3 BGB. What exactly is disproportionate is an important point of discussion in German literature. It was proposed to allow rejection completely once the costs make up for 150% of the total value of the goods. The *OLG Braunschweig* has clarified in a recent judgment that the costs for replacement or repair must be compared not to the purchase price but to the objective value of the goods. Thus, the fact that goods were sold at a reduced price, for example, during a promotional period, does not impact on the assessment of whether replacement or repair are disproportionate.[62] It is

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[60] *See, e.g.,* Christian Schubel, *Schuldsrechtsreform: Perspektivenwechsel im Bürgerlichen Recht und AGB-Kontrolle für den Handelskauf,* JZ 2001, 1113, 16; Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuchs,* WM 2002, 1376, 1379. This was recently confirmed by *AG Kempen*, MDR 2003, 1406.

[61] Simone Jorden & Michael Lehmann, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung,* JZ 2001, 952, 57. Concerning a discussion as to whether or not Member States are allowed to deviate from this hierarchy, *see* Peter Rott, *Minimum harmonisation for the completion of the internal market? – The example of Directive 1999/44/EC,* 40 COMMON MARKET LAW REVIEW (CMLREV) 1107 (2003).

[62] *See OLG Braunschweig*, NJW 2003, 1053, 54.

clear that repair is not disproportionate merely because the seller does not have his own repair facilities.[63] This was confirmed by the *AG Kempen* in a decision of August 2003.[64]

Furthermore, the seller can reject replacement or repair if the other remedy is cheaper and the purchaser is not seriously disadvantaged by the choice. For the choice between replacement and repair, a 10% limit was suggested.[65]

2. Rescission.

The purchaser can rescind the contract after having unsuccessfully set a reasonable period of time for second performance, § 440 s. 1 BGB. This rule implicitly contains the hierarchy of remedies set out in Art. 3 of the Directive. Exceptions apply where the seller refuses to perform again, or where he rejects replacement and repair in accordance with § 439 par. 3 BGB, or if replacement and repair have failed or are unacceptable to the purchaser. Failure of repair was clearly defined in § 440 s. 2 BGB: Repair has failed after two failed attempts unless the nature of the defect or the circumstances indicate otherwise.[66] This latter rule appears to be rather generous for the seller; perhaps even too generous when compared to Art. 3 (3) of the Directive. In fact, the leading academic opinion with respect to failure of repair under the CISG merely accepts one attempt by the seller.[67]

The above-mentioned obligation to set a reasonable period of time might be a second flaw of the German implementation with respect to remedies since Directive

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[63] *See* Georg Bitter & Eva Meidt, *Nacherfüllungsrecht und Nacherfüllungspflicht des Verkäufers im neuen Schuldrecht,* ZIP 2001, 2114, 22; against the explanations by the German government, BT-DrS. 14/6040, 232, and Harm Peter Westermann, *Das neue Kaufrecht*, NJW 2002, 530, 35.

[64] *See AG Kempen*, MDR 2003, 1406, with a comment by Arnold Dötsch.

[65] *See* Georg Bitter & Eva Meidt, *Nacherfüllungsrecht und Nacherfüllungspflicht des Verkäufers im neuen Schuldrecht,* ZIP 2001, 2114, 22.

[66] Some authors doubt that this rule is in line with Directive 1999/44/EC, taking into consideration that Art. 48 CISG is usually interpreted as allowing only one such attempt. *See* Brigitta Jud, *Die Rangordnung der Gewährleistungsbehelfe,* JAHRBUCH DER GESELLSCHAFT JUNGER ZIVILRECHTSWISSENSCHAFTLER (JBJZRWISS) 2001, 205, 18.

[67] *See* Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 53.

1999/44/EC implies that such a time-limit exists even without notice.[68] It has been argued that this rule is not in breach of the Directive since the disadvantage of having to set a time-limit is compensated by the advantage of legal certainty.[69] Others find compensation in a specific interpretation of § 440 BGB in the light of Art. 3 of the Directive. They argue that replacement or repair that takes too long can be regarded as failed even though no period has been set. This latter solution, however, appears to be too uncertain for the consumer.[70]

3. Reduction of price.

Under the same conditions under which he can rescind the contract, the purchaser may declare a reduction of price, § 441 par. 1 BGB. Technically, he can do that by unilateral declaration that lowers the purchase price. If the purchaser has already paid the higher price that the parties had agreed upon he can claim return of the difference, § 441 par. 4 BGB. In § 441 par. 3 BGB, the German legislator has specified how to calculate the reduction of price: The purchase price is reduced in the ratio which the value of the item free of defects would, at the time of the conclusion of the contract, have had to the actual value. Where necessary, the price reduction is to be estimated.

4. Damages.

In addition to this, the purchaser can claim damages. The previous extremely restrictive regime has been given up. However, in contrast to Art. 74 CISG, German sales law has maintained a fault-based system for damages even though the rules of the CISG have been adopted for a number of other issues.[71] At least, the purchaser's situation was improved by imposing the burden of proof on the seller, § 280 par. 1 s. 2 BGB. It should, however, be noted that in normal distribution chains the seller is under no obligation vis-à-vis the purchaser to examine goods that he merely

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[68] *See* Wolfgang Ernst & Beate Gsell, *Kaufrechtsrichtlinie und BGB,* ZIP 2000, 1418; Rolf Knütel, *Zur Schuldrechtsreform,* NJW 2001, 2519.

[69] *See* Brigitta Jud, *Die Rangordnung der Gewährleistungsbehelfe*, JBJZIVRWISS 2001, 205, 15.

[70] *See*, in particular, *European Court of Justice*, Case C-144/99 *Commission v. The Netherlands*, judgment of 10/5/2001, 2001 ECR I-3541, concerning Directive 93/13/EEC. See also the transparency requirement of Art. 9 of Directive 1999/44/EC.

[71] For details and critique, *see* Gert Brüggemeier, *Zur Reform des deutschen Kaufrechts – Herausforderungen durch die EG – Verbrauchsgüterkaufrichtlinie,* JZ 2000, 529, 535; Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuchs,* WM 2002, 1376, 82.

passes on to him. Therefore, he will usually not be negligent if he sells goods that are not in conformity with the contract.[72]

IV. Limitation periods

Limitation periods were at the centre of the implementation debate. As mentioned above, previous German sales law only granted a six months warranty. The 1980s Law Commission had proposed a three year period, and this proposal was resurrected during the course of the implementation debate. This solution was supported by the fact that a three year limitation period was introduced into the German contract law anyway, replacing the previous period of 30 years.[73] Thus, the harmonisation of limitation periods all over the law of obligations could have put an end to the remaining problems related to the distinction between defects and the violation of pre-contractual information obligations, and it could have also made unnecessary the much criticized case-law on damages for the destruction of goods due to a defect of a component.[74]

Nevertheless, in the end the legislator followed Art. 5 of the Directive. Thus, the limitation period in sales law is two years now, § 438 par. 1 no. 1 BGB. For second-hand goods, the two years period applies, in principle, as well. However, the contracting parties can agree to a period of no less than one year, § 475 par. 2 BGB. For claims for damages, the limitation period of two years can be reduced by agreement as well, § 475 par. 3 BGB. Of course, the control of standard terms remains in place with respect to such reduction.
A notification periods has never formed part of German sales law and was not introduced in the course of the implementation of the Directive.

V. Redress

The rules on the seller's redress that implement Art. 4 of the Directive[75] exclusively

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[72] *See also* Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuchs,* WM 2002, 1376, 83.

[73] *See, e.g.*, Stefan Grundmann, *European sales law – reform and adoption of international models in German sales law*, ERPL 2001, 239, 56.

[74] *See supra*, at A. The future of this case-law is now unclear, *see* Gert Brüggemeier, *Das neue Kaufrecht des Bürgerlichen Gesetzbuches,* WM 2002, 1376, 84; André Janssen, *Die Zukunft des weiterfressenden Mangels nach der Schuldrechtsmodernisierung,* VUR 2003, 60; Bernhard Klose, *Das neue Kaufrecht und der weiterfressende Schaden,* MDR 2003, 1215.

[75] On the requirements of Art. 4 *see* Martin Schmidt-Kessel, *Der Rückgriff des Letztverkäufers,* ÖSTERREICHISCHE JURISTEN-ZEITUNG (ÖJZ) 2000, 668.

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apply to consumer sales in the terms of § 474 BGB. German law grants the final seller remedies only against his supplier, not against the producer. This has been criticised, in particular, with respect to cases where the final seller is held liable for public statements made by the producer, without being given the right to bring a direct claim against the producer.[76]
§ 478 par. 1 BGB applies to cases where the consumer has rescinded the contract or has claimed a price reduction, whereas § 478 par. 2 BGB covers expenses made for repairing or replacing consumer goods. The redress chain ends with the producer of the final product. The suppliers of components included in the finished product are not included.[77] The presumption of non-conformity within the six months applies to the final seller as well, § 478 par. 3 BGB, so that he is not left with the burden of proof of a defect to his supplier that is presumed to have been in the good at the time of delivery in his relationship with the consumer. Also, under § 479 par. 2 BGB the limitation period for redress claims only expires after two months after the final seller has fulfilled the consumer's claims, which may be some time after the normal limitation period of two years after delivery has expired.

With respect to the final seller's expenses related to the consumer's claims, the situation is somewhat unclear. The wording of § 478 par. 1 and 2 BGB is very broad and covers all the final seller's expenses, including, for example, expenses for the examination of the good, and even lawyers' fees.[78] Some dispute has arisen about the recoverability of the expenses for the handling of consumers' claims, such as expenses for employing staff that deals with complaints.[79] These expenses may exceed the value of the consumer's claims by far.[80] Therefore, some authors suggest that the wording of § 478 par. 1 and 2 BGB was a mistake by the legislator that should be rectified by a narrow interpretation of these provisions.[81]

The rules are not fully mandatory. Instead, § 478 par. 4 BGB offers the traders the

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[76] *See* Dietmar Boerner, *Kaufrechtliche Sachmängelhaftung und Schuldrechtsreform,* ZIP 2001, 2264, 66.

[77] *See* Peter Mankowski, *Ein Zulieferer ist kein Lieferant,* DB 2002, 2419. For a discussion of the related problems of the producer *see* Annemarie Matusche-Beckmann, *Unternehmerregress im neuen Kaufrecht: Rechtsprobleme in der Praxis,* BETRIEBS-BERATER (BB) 2002, 2561, 64.

[78] *See* Stefan Ernst, *Gewährleistungsrecht – Ersatzansprüche des Verkäufers gegen den Hersteller auf Grund von Mangelfolgeschäden,* MDR 2003, 4, 5.

[79] *See* Claudius Marx, *Handlingkosten im Unternehmerrückgriff,* BB 2002, 2566.

[80] For details, *see* Jens Böhle, *Teleologische Reduktion beim Rückgriff in der Lieferkette,* NJW 2003, 3680.

[81] *See, e.g.,* Jens Böhle, *Teleologische Reduktion beim Rückgriff in der Lieferkette,* NJW 2003, 3680.

possibility of agreeing on different solutions provided that the final seller is, in an overall perspective, adequately compensated for the loss of his right to redress under § 478 par. 1 and 2 BGB in each individual case. The reason for such flexibility is that the producer may be the person that has to bear the consequences of non-conformity in the end. At the same time, he has, in principle, no influence on the compensation of the consumer by the final seller. Instead, he has to compensate the final seller for whatever expenses the final seller had.[82] Therefore, it was suggested that the producer could establish an after-sales services network that is available, free of charge, to the final seller. Or, a lump-sum agreement could be made that draws on experience made with a certain product.[83] Some authors have even raised the idea of avoiding the redress regime of § 478 BGB by selling goods through foreign subsidiaries.[84]

A major point of critique is that in the case of dual-use goods such as cars, computer equipment etc., the final seller decides *a posteriori* the legal relationship with his supplier. If he sells such goods to a consumer, §§ 478 and 479 BGB apply, what may have implications on the contractual relationship with his supplier. If he sells such goods to a trader as final purchaser, his supplier's liability will be significantly reduced. This creates some uncertainty in the contractual relationship between the final seller and his supplier.[85]

VI. Consumer Guarantees

Consumer guarantees are regulated in §§ 443 and 477 BGB. German implementation codifies previous case-law and follows Art. 6 of the Directive but does not make use of the option of specific language requirements as allowed by Art. 6 (4).

D. The Reaction of Academics and the First Court Decisions

I. Academics

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[82] *See* Jens Böhle, *Teleologische Reduktion beim Rückgriff in der Lieferkette,* NJW 2003, 3680, 81.

[83] *See* BT-DrS. 14/6040, 249. For more details, *see* Christian Schubel, *Schuldrechtsreform: Perspektivenwechsel im Bürgerlichen Recht und AGB-Kontrolle für den Handelskauf,* JZ 2001, 1113, 1118 et seq.; Jens Matthes, *Der Herstellerregress nach § 478 in Allgemeinen Geschäftsbedingungen – ausgewählte Probleme,* NJW 2002, 2505; Stefan Ernst, *Gewährleistungsrecht – Ersatzansprüche des Verkäufers gegen den Hersteller auf Grund von Mangelfolgeschäden,* MDR 2003, 4, 7.

[84] *See* Jens Matthes, *Der Herstellerregress nach § 478 in Allgemeinen Geschäftsbedingungen – ausgewählte Probleme,* NJW 2002, 2505, 08.

[85] *See* Annemarie Matusche-Beckmann, *Unternehmerregress im neuen Kaufrecht: Rechtsprobleme in der Praxis,* BB 2002, 2561, 63.

Unsurprisingly, the reform of contract law provoked a vast body of literature, and articles criticizing and interpreting the new sales law still abound. Although inevitably a generalisation, three different strands can be identified: There are those writers who try to read old concepts into the new provisions of the BGB,[86] partly ignoring their European origin. Secondly, and probably the majority view, writers welcome the reform and use the European origins of the new provisions in order to escape the constraints that were set by a hundred years of case-law on sales law. A third group of writers, mainly experts in the international sales law of the CISG, tend to emphasise the similarities of Directive 1999/44/EC, and of German sales law, with the CISG, and to argue that the new sales law should be interpreted in the light of German and international case-law on the CISG.[87] On the whole, one dares to say that the initial resistance has faded and that academics fully engage with the new sales law regime, not without, at times, criticizing the legislator heavily for perceived flaws of the new law.

II. Case-law

Case-law on the new sales law by the *Bundesgerichtshof* is not yet available. However, recent decisions by lower courts demonstrate their willingness to break with earlier case-law and to engage with the conceptual changes to German sales law.

The change of focus from the sale of specific goods to generic goods was confirmed in a judgment of 13 December 2002 by the *LG Ellwangen*.[88] A consumer had bought a new Volkswagen Golf that he had chosen from a selection of cars of the same state at the trader's yard. Since the car was not in conformity with the contract, the question arose as to whether the consumer had the right to rescind the contract or whether he could merely claim replacement which the trader offered. In line with the majority of academic writing on this issue,[89] the *LG Ellwangen* held that re-

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[86] *See, e.g.*, the analysis of § 434 BGB by Hans Christoph Grigoleit & Carsten Herresthal, *Grundlagen der Sachmängelhaftung im Kaufrecht*, JZ 2003, 118, 23.

[87] *See, e.g.*, Peter Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, 2 OXFORD U COMPARATIVE L FORUM, (2002) *at* http://ouclf.iumscomp.org.

[88] *LG Ellwangen*, NJW-RR 2003, 517.

[89] *See, e.g.*, Georg Bitter & Eva Meidt, *Nacherfüllungsrecht und Nacherfüllungspflicht des Verkäufers im neuen Schuldrecht*, ZIP 2001, 2114, 19. *Contra*, Stefan Lorenz, *Schadensersatz wegen Pflichtverletzung – ein Beispiel für die Überhastung der Kritik an der Schuldrechtsreform*, JZ 2001, 742, 44; *id.*, *Rücktritt, Minderung und Schadensersatz wegen Sachmängeln im neuen Kaufrecht: Was hat der Verkäufer zu vertreten?*, NJW 2002, 2497;

placement was the correct remedy. This opinion was shared by the *OLG Braunschweig* in a case where a Seat car that had already been registered and that had been driven for 10 km was sold.[90] The decision was welcomed by the majority of academic writing.[91]

The *LG Ellwangen* also applied a broad concept of conformity with the contract, and it explicitly declared the case-law of the *BGH* under the old sales law no more relevant. The court held that one of the defects of the car was that it had been manufactured in the Republic of South Africa whereas it was sold as manufactured in the EC.[92] Clearly, the place of manufacture does not as such have an impact on the physical quality of a product. Thus, under previous German sales law, courts would have been highly unlikely to regard a product as being defective for that reason. Nevertheless, consumers may put value to the place of manufacture. Under Art. 2 of the Directive, any characteristics of the goods that the parties agree upon, appear to be relevant, including those that are not physically connected with the goods in question, and indeed, the *LG Ellwangen* seems to have adopted this approach under the new § 434 BGB.

And finally, scholars have argued that the reversed burden of proof in consumer sales law of § 476 BGB does not apply to second-hand cars, due to their very nature as being used. This opinion was rejected by several courts in cases where cars had defects that were not due to the long-term use of the car. For example, in a case decided by the *OLG Köln*,[93] a ten-year old Porsche had a very untypical engine-defect. The defect came to light one day after delivery, when the purchaser had driven the Porsche for 700 km. Explicitly referring to Directive 1999/44/EC, the *OLG Köln* held that § 476 BGB applies, in principle, to second-hand goods as much as to new goods. A restriction may only be made where defects arise from normal use[94] but certainly not for as rare defects as the one in the present case.[95]

Andreas Thier, *Aliud- und Minus-Lieferung im neuen Kaufrecht des Bürgerlichen Gesetzbuches,* 203 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (ACP), 399, 403 (2003).

[90] *OLG Braunschweig*, NJW 2003, 1053.

[91] *See* Claus-Wilhelm Canaris, *Die Nacherfüllung durch Lieferung einer mangelfreien Sache beim Stückkauf,* JZ 2003, 831; Sebastian Pammler, *Zum Ersatzlieferungsanspruch beim Stückkauf,* NJW 2003, 1992.

[92] *LG Ellwangen*, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR) 2003, 517.

[93] *OLG Köln*, ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 2004, 40.

[94] *See, e.g., LG Dessau*, DAR 2003, 119; *AG Offenbach*, DAR 2003, 178.

[95] *See also AG Marsberg*, DAR 2003, 322; *AG Zeven*, DAR 2003, 379 (catalytic converter).

E. Conclusion

Overall, the new German sales law is a huge step towards modernisation and towards simplification in practice, and whilst the enthusiasm for the new provisions is not shared by all academics, practitioners and, in particular, courts appear to be rather positive about the reform. Certainly, the German implementation of Directive 1999/44/EC is not entirely beyond doubt, and it has been suspected that a number of questions will have to be decided by the ECJ.[96] Still, it was courageous and laudable attempt of deviating from piece-meal solutions and to create a new, coherent codification of sales law and its wider legal environment.[97]

In a more general perspective, the Consumer Sales Directive has achieved a breakthrough in German academia and practice in demonstrating an importance of EC private law for day-to-day practice that was hitherto underestimated. With all necessary caution, German academics and practitioners now noticeably engage with EC private law at a far earlier stage.

[96] At the same time, one should not overestimate the role of the *European Court of Justice* in interpreting the Directive. In particular, with a view to the interpretation of the manifold general clauses that describe the conformity and the remedies system of the Directive, the *European Court of Justice* might prove to be reluctant and try to avoid to become the highest instance to decide a multitude of individual cases. See, concerning the Unfair Terms Directive 93/13/EEC, the Opinion of A.G. Geelhoed of 25 September 2003, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ulrike Hofstetter und Ludger Hofstetter*, not yet reported.

[97] *See also* Harm Peter Westermann, *Das neue Kaufrecht* NJW 2002, 241, 53.