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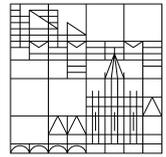
## **FDUL Intensive Course „Introduction to the German Law on Construction Contracts**

### **Excerpt of the German Civil Code**

This is an excerpt of the German Civil Code with most pertinent provisions discussed during the above mentioned course.

The translation is based on the older translation provided by the Langenscheidt Translation Service. Translation regularly updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning, online available at <[https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)>, site last accessed 01-20-2021. While this translation includes the amendment(s) to the Act by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I p. 3719), it does not include the amendments from the Act of April 28, 2017 (Federal Law Gazette I p. 969), nor from the Act of November 12, 2020 (Federal Law Gazette I p. 2392).

Hence an attempt was made to evolve the existing translation into a translation of the current German Civil Code. The excerpt relating to the General Law of Obligations (secs. 241 – 327 GCC) was left unaltered. In the provisions relating to works contracts (sec. 631 through 650) the 2018 amendments were made visible: new wording is underlined; old wording is ~~scratched~~. In order not to overly distract from the contents the underlining is omitted for the mostly new provisions in secs. 650a through 650v. They have been translated with the goal of maintaining linguistic consistency with the use of the English language in the pre-existing parts of the translation.



## Book 2

### Law of Obligations

#### Division 1: Subject matter of obligations

##### Title 1: Duty of performance

###### *Section 241 Duties arising from an obligation*

(1) By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance.

(2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

###### *Section 241a Unsolicited performance<sup>1</sup>*

(1) The supply of movable things that are not being sold by way of an execution of judgment or otherwise by authority of law (goods), or the provision of other services to the consumer by a trader, does not create a claim against the consumer if the consumer has not ordered these goods or other services.

(2) Statutory claims are not excluded if the performance was not intended for the recipient or was made in the mistaken belief that there had been an order, and the recipient was aware of this or could have been aware of this if he had taken reasonable care.

(3) There may be no derogation from the stipulations of this provision to the disadvantage of the consumer. The stipulations apply even if they are circumvented by other constructions.

###### *Section 242 Performance in good faith*

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

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<sup>1</sup> Official note: This provision serves to implement Article 9 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, p. 19).

###### *Section 243 Obligation in kind*

(1) A person who owes a thing defined only by class must supply a thing of average kind and quality.

(2) If the obligor has done what is necessary on his part to supply such a thing, the obligation is restricted to that thing.

###### *Section 244 Foreign currency obligation*

(1) If a money debt stated in a currency other than the euro is payable within the country, then payment may be made in euros unless payment in the other currency has been expressly agreed.

(2) Conversion occurs at the rate of exchange in effect in the place of payment at the time of payment.

###### *Section 245 Obligation payable in a specific denomination of money*

If a money debt is payable in a specific denomination of coin which is no longer in circulation at the time of payment, payment is to be made in the same way as if the denomination of coin were not specified.

###### *Section 246 Statutory interest rate*

If interest is payable on a debt by law or under a legal transaction, the rate of interest is four per cent per year, unless otherwise provided.

###### *Section 247<sup>2</sup> Basic rate of interest*

(1) The basic rate of interest is 3.62%.<sup>3</sup> It changes on 1 January and 1 July each year

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<sup>2</sup> Official note: This provision serves to implement Article 3 of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, p. 35).

<sup>3</sup> Since the following dates the basic rate of interest has been 1.1.2002 2.57% (public

by the percentage points by which the reference rate has risen or fallen since the last change in the basic rate of interest. The reference rate is the rate of interest for the most recent main refinancing operation of the European Central Bank before the first calendar day of the relevant six-month period.

(2) The Deutsche Bundesbank announces the effective basic rate of interest in the Federal Gazette without undue delay after the dates referred to in subsection (1) sentence 2 above.

#### *Section 248 Compound interest*

(1) An agreement reached in advance that interest due should in turn bear interest is void.

(2) Savings banks, credit institutions and owners of banking businesses may agree in advance that interest not collected on deposits should be held to be fresh interest-bearing deposits. Credit institutions entitled to issue interest-bearing bonds for the amount of the loans granted by them may, for such loans, have commitments made to them in advance to pay interest on interest in arrears.

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notice of 28.12.2001, Fed. Gazette 2002 no. 3 p. 98); 1.7.2002 2.47% (public notice of 25.6.2002, Fed. Gazette no. 118 p. 14537); 1.1.2003 1.97% (public notice of 30.12.2002, Fed. Gazette 2003 no. 2 p. 76); 1.7.2003 1.22% (public notice of 24.6.2003, Fed. Gazette no. 117 p. 13744); 1.1.2004 1.14% (public notice of 30.12.2003, Fed. Gazette 2004 no. 2 p. 69); 1.7.2004 1.13% (public notice of 3.7.2004, Fed. Gazette no. 122 p. 14246); 1.1.2005 1.21% (public notice of 30.12.2004, Fed. Gazette 2005 no. 1 p. 6); 1.7.2005 1.17% (public notice of 28.6.2005, Fed. Gazette no. 122 p. 10042); 1.1.2006 1.37% (public notice of 29.12.2005, Fed. Gazette 2006 no. 1 p. 2); 1.7.2006 1.95% (public notice of 27.6.2006, Fed. Gazette no. 119 p. 4754); 1.1.2007 2.70% (public notice of 28.12.2006, Fed. Gazette no. 245 p. 7463).

#### *Section 249 Nature and extent of damages*

(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.

(2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.

#### *Section 250 Damages in money after the specification of a period of time*

The obligee may specify a reasonable period of time for the person liable in damages to undertake restoration and declare that he will reject restoration after the period of time ends. After the end of the period of time the obligee may demand damages in money, if restoration does not occur in good time; the claim to restoration is excluded.

#### *Section 251 Damages in money without the specification of a period of time*

(1) To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damages must compensate the obligee in money.

(2) The person liable in damages may compensate the obligee in money if restoration is only possible with disproportionate expenses. Expenses incurred as a result of the curative treatment of an injured animal are not disproportionate merely because they significantly exceed the value of the animal.

#### *Section 252 Lost profits*

The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.

#### *Section 253 Intangible damage*

(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law.

(2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.

#### *Section 254 Contributory negligence*

(1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.

(2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.

#### *Section 255 Assignment of claims to compensation*

A person who must pay damages for the loss of a thing or a right is only obliged to compensate in return for the assignment of the claims which the person entitled to damages holds against third parties on the basis of ownership of the thing or on the basis of the right.

#### *Section 256 Payment of interest on expenses*

A person who is obliged to reimburse expenses must pay interest from the date of the expense onwards on the amount expended or, if other objects than money have been expended, on the amount payable as compensation for their value.

Where expenses have been incurred on an object that must be returned to the person liable in damages, interest need not be paid for the period of time for which the person entitled to damages is unremunerated for the emoluments or fruits of the object.

#### *Section 257 Claim for release*

A person who is entitled to demand reimbursement of expenses he incurs for a specific purpose may, if he assumes an obligation for this purpose, demand release from the obligation. If the obligation is not yet due, the person liable in damages may provide security to him instead of releasing him from the obligation.

#### *Section 258 Right of removal*

Anyone entitled to remove an installation from a thing that he must return to another person must in the event of removal restore the thing to its previous condition at his own expense. If the other person obtains possession of the thing, he is obliged to permit the installation to be removed; he may refuse permission until he is provided with security for the damage connected with the removal.

#### *Section 259 Extent of duty to render account*

(1) A person who is obliged to render account for management related to earnings or expenses must provide the person entitled with an account containing an orderly compilation of earnings or expenses and, where receipts are customarily given, must submit receipts.

(2) Where there is reason to assume that the information on earnings contained in the account has not been provided with the requisite care the person obliged must, upon demand, declare for the record in lieu of an oath that he has indicated the earnings as completely as he is able to.

(3) In matters of minor importance there is no duty to make a declaration in lieu of an oath.

*Section 260 Duties when returning or providing information on an aggregate of objects*

(1) A person who is obliged to return an aggregate of objects or to provide information on the inventory of such an aggregate must submit to the person entitled a list of the inventory.

(2) Where there is reason to assume that the list has not been prepared with the requisite care, the person obliged must upon demand declare for the record in lieu of an oath that to the best of his knowledge he has indicated the inventory as completely as he is able to.

(3) The provision of section 259 (3) applies.

*Section 261 Modifying a declaration in lieu of an oath; costs*

(1) The court may resolve to modify the declaration in lieu of an oath according to the circumstances.

(2) The costs of making the declaration in lieu of an oath must be borne by the person demanding the making of the declaration.

*Section 262 Alternative obligation; right of choice*

Where more than one act of performance is owed in such a manner that only the one or the other is to be effected, then in case of doubt, the obligor has the right of choice.

*Section 263 Exercise of the right of choice; effect*

(1) The right of choice is exercised by declaration to the other party.

(2) The performance chosen is deemed to have been the only performance owed from the beginning.

*Section 264 Default by the person entitled to the right of choice*

(1) If the obligor entitled to the right of choice does not exercise that right prior to the beginning of execution, the obligee, at

his choice, may direct execution to one performance or the other; however, as long as the obligee has not received the performance chosen, completely or in part, the obligor may release himself from his obligation through one of the other acts of performance.

(2) If the obligee entitled to the right of choice is in default, the obligor may demand that he exercises that right, specifying a reasonable period of time. At the end of the period of time the right of choice passes to the obligor, if the obligee does not undertake the choice in good time.

*Section 265 Impossibility in case of alternative obligations*

If one of the acts of performance is impossible from the beginning or if it later becomes impossible, the obligation is restricted to the other acts of performance. There is no restriction if performance becomes impossible due to a circumstance for which the party who is not entitled to the right of choice is responsible.

*Section 266 Part performance*

The obligor is not entitled to render part performance.

*Section 267 Performance by third parties*

(1) If the obligor need not perform in person, then a third party may also render performance. The consent of the obligor is not required.

(2) The obligee may reject the performance if the obligor objects.

*Section 268 Right of redemption of a third party*

(1) If the obligee effects execution which is levied on an object belonging to the obligor, anyone who risks losing a right in the object due to execution is entitled to satisfy the obligee. The possessor of a thing is entitled to the same right if he risks losing possession due to execution.

(2) The satisfaction may also take place by deposit or by set-off.

(3) To the extent that the third party satisfies the obligee the claim passes to him. The passing of ownership may not be asserted to the disadvantage of the creditor.

#### *Section 269 Place of performance*

(1) Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

(2) If the obligation arose in the commercial undertaking of the obligor, the place of the commercial undertaking takes the place of the residence if the obligor maintained his commercial undertaking at another place.

(3) From the circumstance that the obligor has assumed the costs of shipping it may not be concluded that the place to which shipment is to be made is to be the place of performance.

#### *Section 270 Place of payment*

(1) In case of doubt the obligor must transfer money at his own risk and his own expense to the obligee at the residence of the latter.

(2) If the obligation came about in the commercial undertaking of the obligee, then, if the obligee has his business establishment in another place, the place of the commercial undertaking takes the place of the residence.

(3) If, as the result of a change in the obligee's residence or business establishment occurring after the obligation arises, the costs or risk of transmission increase, the obligee must in the former case bear the extra costs and in the latter case the risk.

(4) The provisions on the place of performance are unaffected.

#### *Section 271 Time of performance*

(1) Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately.

(2) Where a time has been specified, then in case of doubt it must be assumed that the obligee may not demand performance, but the obligor may effect it prior to that time.

#### *Section 272 Interim interest*

If the obligor pays an interest-free debt prior to its falling due, he is not entitled to any deduction for interim interest.

#### *Section 273 Right of retention*

(1) If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention).

(2) A person who is obliged to return an object has the same right, if he is entitled to a claim that is due on account of outlays for the object or on account of damage caused to him by the object, unless he obtained the object by means of an intentionally committed tort.

(3) The obligee may avert the exercise of the right of retention by providing security. The providing of security by guarantors is excluded.

#### *Section 274 Effects of the right of retention*

(1) In comparison to a legal action by the obligee, assertion of the right of retention only has the effect that the obligor is to be ordered to render performance in return for receiving the performance owed to him (concurrent performance).

(2) On the basis of such an order the obligee may pursue his claim by way of execution, without effecting the

performance he owes, if the obligor is in default of acceptance.

*Section 275 Exclusion of the duty of performance<sup>4</sup>*

(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.

*Section 276 Responsibility of the obligor*

(1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of sections 827 and 828 apply with the necessary modifications.

(2) A person acts negligently if he fails to exercise reasonable care.

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<sup>4</sup> Official note: This provision also serves in part to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12).

(3) The obligor may not be released in advance from liability for intention.

*Section 277 Standard of care in ones own affairs*

A person who owes only the care that he customarily exercises in his own affairs is not released from liability for gross negligence.

*Section 278 Responsibility of the obligor for third parties*

The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation, to the same extent as for fault on his own part. The provision of section 276 (3) does not apply.

*Section 279 (repealed)*

*Section 280 Damages for breach of duty*

(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.

*Section 281 Damages in lieu of performance for nonperformance or failure to render performance as owed*

(1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280 (1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure. If the obligor has performed only in part, the obligee may

demand damages in lieu of complete performance only if he has no interest in the part performance. If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.

(2) Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The claim for performance is excluded as soon as the obligee has demanded damages in lieu of performance.

(5) If the obligee demands damages in lieu of complete performance, the obligor is entitled to claim the return of his performance under sections 346 to 348.

*Section 282 Damages in lieu of performance for breach of a duty under section 241 (2)*

If the obligor breaches a duty under section 241 (2), the obligee may, if the requirements of section 280 (1) are satisfied, demand damages in lieu of performance, if he can no longer reasonably be expected to accept performance by the obligor.

*Section 283 Damages in lieu of performance where the duty of performance is excluded*

If, under section 275 (1) to (3), the obligor is not obliged to perform, the obligee may, if the requirements of section 280 (1) are satisfied, demand damages in lieu of performance. Section 281 (1) sentences 2 and 3 and (5) apply with the necessary modifications.

*Section 284 Reimbursement of futile expenses*

In place of damages in lieu of performance, the obligee may demand reimbursement of the expenses which he has made and in all fairness was entitled to make in reliance on receiving performance, unless the purpose of the expenses would not have been achieved, even if the obligor had not breached his duty.

*Section 285 Return of reimbursement*

(1) If the obligor, as a result of the circumstance by reason of which, under section 275 (1) to (3), he has no duty of performance, obtains reimbursement or a claim to reimbursement for the object owed, the obligee may demand return of what has been received in reimbursement or an assignment of the claim to reimbursement.

(2) If the obligee may demand damages in lieu of performance, then, if he exercises the right stipulated in subsection (1) above, the damages are reduced by the value of the reimbursement or the claim to reimbursement he has obtained.

*Section 286 Default of the obligor<sup>5</sup>*

(1) If the obligor, following a warning notice from the obligee that is made after performance is due, fails to perform, he is in default as a result of the warning notice. Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice.

(2) There is no need for a warning notice if

1. a period of time according to the calendar has been specified,
2. performance must be preceded by an event and a reasonable period of time for

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<sup>5</sup> Official note: This provision also serves in part to implement Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, p. 35).

performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar,

3. the obligor seriously and definitively refuses performance,

4. for special reasons, weighing the interests of both parties, the immediate commencement of default is justified.

(3) The obligor of a claim for payment is in default at the latest if he does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment; this applies to an obligor who is a consumer only if these consequences are specifically referred to in the invoice or statement of payment. If the time at which the invoice or payment statement is received by the obligor is uncertain, an obligor who is not a consumer is in default at the latest thirty days after the due date and receipt of the consideration.

(4) The obligor is not in default for as long as performance is not made as the result of a circumstance for which he is not responsible.

#### *Section 287 Liability during default*

While he is in default, the obligor is responsible for all negligence. He is liable for performance in the case of chance as well, unless the damage would have occurred even if performance had been made in good time.

#### *Section 288 Default interest<sup>6</sup>*

(1) Any money debt must bear interest during the time of default. The default rate of interest per year is five per centage points above the basic rate of interest.

(2) In the case of legal transactions to which a consumer is not a party the rate of

interest for claims for payment is eight per centage points above the basic rate of interest.

(3) The obligee may demand higher interest on a different legal basis.

(4) The assertion of further damage is not excluded.

#### *Section 289 Prohibition of compound interest*

Default interest is not to be paid on interest. The right of the obligee to compensation for damage caused by the default remains unaffected.

#### *Section 290 Interest on compensation for value*

If the obligor is obliged to compensate for the value of an object that has been destroyed during a period of default or cannot be returned for a reason occurring during a period of default, the obligee may demand interest on the amount to be paid as compensation from the point of time onwards on which the determination of the value is based. The same applies if the obligor is obliged to compensate for the reduction in value of an object that deteriorates during the period of default.

#### *Section 291 Interest during legal proceedings*

The obligor must pay interest on a money debt from the date when litigation is pending onwards, even if he is not in default; if the debt only falls due later, interest must be paid from its due date onwards. The provisions of section 288 (1) sentence 2, (2) and (3) and section 289 sentence 1 apply with the necessary modifications.

#### *Section 292 Liability in the case of a duty to return*

(1) If the obligor must return a specific object, then, from the date when litigation is pending, the claim to damages of the obligee for deterioration, destruction or for

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<sup>6</sup> Official note: This provision also serves in part to implement Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, p. 35).

impossibility of return for another reason is determined under the provisions that apply to the relationship between an owner and a possessor from the date when litigation on a claim to ownership is pending, except where the obligation or the default of the obligor leads to a different conclusion in favour of the obligee.

(2) The same applies to the claim of the obligee to the return or payment of emoluments and to the claim of the obligor to compensation for outlays.

## **Title 2**

### **Default by the obligee**

#### *Section 293 Default in acceptance*

The obligee is in default if he does not accept the performance offered to him.

#### *Section 294 Actual offer*

The obligee must actually be offered performance exactly as it is to be rendered.

#### *Section 295 Verbal offer*

A verbal offer by the obligor suffices if the obligee has declared to him that he will not accept the performance, or if effecting the performance requires an act by the obligee, in particular if the obligee must collect the thing owed. Equivalent to an offer of performance is a demand to the obligee to undertake the action required.

#### *Section 296 Dispensability of the offer*

If a period of time has been specified according to the calendar for the act that the obligee is to undertake, the offer is only necessary if the obligee undertakes the act in good time. The same applies if the act must be preceded by an event and a reasonable period of time is specified for the act in such a way that it can be calculated from the event onwards according to the calendar.

#### *Section 297 Inability of the obligor*

The obligee is not in default if the obligor at the time of the offer or, in the case of section 296, at the time determined for the action of the obligee, is not in a position to effect performance.

#### *Section 298 Concurrent performance*

If the obligor is only obliged to perform in return for an act of performance by the obligee, the obligee is in default if, although he is willing to accept the performance offered, he does not offer the consideration demanded.

#### *Section 299 Temporary prevention of acceptance*

If the time of performance is not specified or if the obligor is entitled to provide performance before the specified time, the obligee is not in default merely because he is temporarily prevented from accepting the performance offered, unless the obligor notifies him of the performance a reasonable time in advance.

#### *Section 300 Effects of default by the obligee*

(1) The obligor is, during the period of the default of the obligee, only responsible for intent and gross negligence.

(2) If a thing designated only by class is owed, the risk passes to the obligee at the time when he is in default by not accepting the thing offered.

#### *Section 301 Cessation of interest*

During the period of default by the obligee, the obligor need not pay interest on an interest-bearing money debt.

#### *Section 302 Emoluments*

If the obligor must return or reimburse the emoluments of an object, his obligation is limited, for the period of default by the obligee, to the emoluments he takes.

### *Section 303 Right to abandon possession*

If the obligor is obliged to surrender a plot of land or a registered ship or ship under construction, he may abandon possession after the obligee is in default. The obligee must be threatened with abandonment beforehand, unless the threat is impracticable.

### *Section 304 Compensation for extra expenses*

If the obligee is in default, the obligor may demand reimbursement of extra expenses he was obliged to incur for the futile offer as well as for safekeeping and preservation of the object owed.

## **Division 2**

### **Drafting contractual obligations by means of standard business terms<sup>7</sup>**

#### *Section 305 Incorporation of standard business terms into the contract*

(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.

(2) Standard business terms only become a part of a contract if the user, when entering into the contract,

1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and

2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents,

and if the other party to the contract agrees to their applying.

(3) The parties to the contract may, while complying with the requirements set out in subsection (2) above, agree in advance that specific standard business terms are to govern a specific type of legal transaction.

#### *Section 305a Incorporation in special cases*

Even without compliance with the requirements cited in section 305 (2) nos. 1 and 2, if the other party to the contract agrees to their applying the following are incorporated,

1. the tariffs and regulations of the railways issued with the approval of the competent transport authority or on the basis of international conventions, and the terms of transport approved under the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services,

2. the standard business terms published in the gazette of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen] and kept available on the business premises of the user,

a) into transport contracts entered into off business premises by the posting of items in postboxes,

b) into contracts on telecommunications, information services and other services that are provided direct by the use of distance

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<sup>7</sup> Official note: This provision also serves to implement Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, p. 29).

communication and at one time and without interruption during the supply of a telecommunications service, if it is disproportionately difficult to make the standard business terms available to the other party before the contract is entered into.

*Section 305b Priority of individually agreed terms*

Individually agreed terms take priority over standard business terms.

*Section 305c Surprising and ambiguous clauses*

(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.

(2) Any doubts in the interpretation of standard business terms are resolved against the user.

*Section 306 Legal consequences of non-incorporation and ineffectiveness*

(1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.

(2) To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions.

(3) The contract is ineffective if upholding it, even taking into account the alteration provided in subsection (2) above, would be an unreasonable hardship for one party.

*Section 306a Prohibition of circumvention*

The rules in this division apply even if they are circumvented by other constructions.

*Section 307 Test of reasonableness of contents*

(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1. is not compatible with essential principles of the statutory provision from which it deviates, or

2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.

(3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.

*Section 308 Prohibited clauses with the possibility of evaluation*

In standard business terms the following are in particular ineffective

1. (Period of time for acceptance and performance) a provision by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rendering performance; this does not include the reservation of the right not to perform until after the end of the period of time for withdrawal under section 355 subsections (1) and (2);

2. (Additional period of time) a provision by which the user, contrary to legal provisions, reserves to himself the right to an unreasonably long or insufficiently specific

additional period of time for the performance he is to render;

3. (Reservation of the right to revoke) the agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract; this does not apply to continuing obligations;

4. (Reservation of the right to modify) the agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account;

5. (Fictitious declarations) a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless

a) the other party to the contract is granted a reasonable period of time to make an express declaration, and

b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time;

6. (Fictitious receipt) a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract;

7. (Reversal of contracts) a provision by which the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract, may demand

a) unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered, or

b) unreasonably high reimbursement of expenses;

8. (Unavailability of performance) the agreement, admissible under no. 3, of the reservation by the user of a right to free himself from the duty to perform the contract in the absence of availability of performance, if the user does not agree to

a) inform the other party to the contract without undue delay, of the unavailability, and

b) reimburse the other party to the contract for consideration, without undue delay.

#### *Section 309 Prohibited clauses without the possibility of evaluation*

Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:

1. (Price increases at short notice) a provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract; this does not apply to goods or services delivered or rendered in connection with continuing obligations;

2. (Right to refuse performance) a provision by which

a) the right to refuse performance to which the other party to the contract with the user is entitled under section 320, is excluded or restricted, or

b) a right of retention to which the other party to the contract with the user is entitled to the extent that it is based on the same contractual relationship, is excluded or restricted, in particular made dependent upon acknowledgement of defects by the user;

3. (Prohibition of set-off) a provision by which the other party to the contract with the user is deprived of the right to set off a claim that is uncontested or has been finally and non-appealably established;

4. (Warning notice, setting of a period of time) a provision by which the user is exempted from the statutory requirement of giving the other party to the contract a warning notice or setting a period of time for the latter to perform or cure;

5. (Lump-sum claims for damages) the agreement of a lump-sum claim by the user for damages or for compensation of a decrease in value if

a) the lump sum, in the cases covered, exceeds the damage expected under normal circumstances or the customarily occurring decrease in value, or

b) the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum;

6. (Contractual penalty) a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract;

7. (Exclusion of liability for injury to life, body or health and in case of gross fault)

a) (Injury to life, body or health) any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user;

b) (Gross fault) any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user;

letters (a) and (b) do not apply to limitations of liability in terms of transport and tariff rules, authorised in accordance with the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services, to the extent that they do not deviate to the disadvantage of the passenger from the Order on Standard Transport Terms for Tram and Trolley Bus Transport and Regular Public Transport Services with Motor Vehicles [Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen] of 27 February 1970; letter (b) does not apply to limitations on liability for state-approved lotteries and gaming contracts;

8. (Other exclusions of liability for breaches of duty)

a) (Exclusion of the right to free oneself from the contract) a provision which, where there is a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the right of the other party to free himself from the contract; this does not apply to the terms of transport and tariff rules referred to in no. 7 under the conditions set out there;

b) (Defects) a provision by which in contracts relating to the supply of newly produced things and relating to the performance of work

aa) (Exclusion and referral to third parties) the claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties;

bb) (Limitation to cure) the claims against the user are limited in whole or in regard to individual parts to a right to cure, to the extent that the right is not expressly reserved for the other party to the contract to reduce the purchase price, if the cure should fail or, except where building work is the object of liability for defects, at its option to revoke the contract;

cc) (Expenses for cure) the duty of the user to bear the expenses necessary for the purpose of cure, in particular to bear transport, workmen's travel, work and materials costs, is excluded or limited;

dd) (Withholding cure) the user makes cure dependent upon prior payment of the entire fee or a portion of the fee that is disproportionate taking the defect into account;

ee) (Cut-off period for notice of defects) the user sets a cut-off period for the other party to the contract to give notice of non-obvious defects which is shorter than the permissible period of time under double letter (ff) below;

ff) (Making limitation easier) the limitation of claims against the user due to defects in the cases cited in section 438 (1) no. 2 and section 634a (1) no. 2 is made easier, or in other cases a limitation period of less than

one year reckoned from the beginning of the statutory limitation period is attained;

9. (Duration of continuing obligations) in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user,

a) a duration of the contract binding the other party to the contract for more than two years,

b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract, or

c) a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract;

this does not apply to contracts relating to the supply of things sold as belonging together, to insurance contracts or to contracts between the holders of copyright rights and claims and copyright collecting societies within the meaning of the Act on the Administration of Copyright and Neighbouring Rights [Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten];

10. (Change of other party to contract) a provision according to which in the case of purchase, loan or service agreements or agreements to produce a result a third party enters into, or may enter into, the rights and duties under the contract in place of the user, unless, in that provision,

a) the third party is identified by name, or

b) the other party to the contract is granted the right to free himself from the contract;

11. (Liability of an agent with power to enter into a contract) a provision by which the user imposes on an agent who enters into a contract for the other party to the contract

a) a liability or duty of responsibility for the principal on the part of the agent himself, without any explicit and separate declaration to this effect, or

b) in the case of agency without authority, liability going beyond section 179;

12. (Burden of proof) a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by

a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or

b) having the other party to the contract confirm certain facts;

letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature;

13. (Form of notices and declarations) a provision by which notices or declarations that are to be made to the user or a third party are tied to a more stringent form than written form or tied to special receipt requirements.

#### *Section 310 Scope of application*

(1) Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Section 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings. In cases coming under sentence 1, section 307 (1) and (2) do not apply to contracts in which the entire Award Rules for Building Works, Part B [Vergabe- und Vertragsordnung für Bauleistungen Teil B - VOB/B] in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provisions.

(2) Sections 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers for the supply of electricity, gas, district heating or water from the supply grid to special customers to the extent that the conditions of supply do not derogate, to the disadvantage of the customer, from orders on general

conditions for the supply of standard-rate customers with electricity, gas, district heating and water. Sentence 1 applies with the necessary modifications to contracts for the disposal of sewage.

(3) In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos:

1. Standard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer;

2. Section 305c (2) and sections 306 and 307 to 309 of this Code and Article 46b of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] apply to preformulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the preformulation, had no influence on their contents;

3. in judging an unreasonable disadvantage under section 307 (1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.

(4) This division does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements. When it is applied to employment contracts, reasonable account must be taken of the special features that apply in labour law; section 305 (2) and (3) must not be applied. Collective agreements and private-sector works agreements or public-sector establishment agreements are equivalent to legal provisions within the meaning of section 307 (3).

### **Division 3**

#### **Contractual obligations**

##### **Title 1**

##### **Creation, subject matter and termination**

### **Subtitle 1**

#### **Creation**

##### *Section 311 Obligations created by legal transaction and obligations similar to legal transactions*

(1) In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.

(2) An obligation with duties under section 241 (2) also comes into existence by

1. the commencement of contract negotiations

2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or

3. similar business contacts.

(3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.

##### *Section 311a Obstacle to performance when contract is entered into*

(1) A contract is not prevented from being effective by the fact that under section 275 (1) to (3) the obligor does not need to perform and the obstacle to performance already exists when the contract is entered into.

(2) The obligee may, at his option, demand damages in lieu of performance or reimbursement of his expenses in the extent specified in section 284. This does not apply if the obligor was not aware of the obstacle to performance when entering into the contract and is also not responsible for

his lack of awareness. Section 281 (1) sentences 2 and 3 and (5) apply with the necessary modifications.

*Section 311b Contracts on plots of land, assets and an estate*

(1) A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary. A contract not entered into in this form becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected.

(2) A contract by which one party agrees to transfer his future property or a fraction of his future property or to charge it with a usufruct is void.

(3) A contract by which one party agrees to transfer his present property or a fraction of his present property or to charge it with a usufruct must be recorded by a notary.

(4) A contract relating to the estate of a third party who is still living is void. The same applies to a contract relating to a compulsory portion or a legacy from the estate of a third party who is still living.

(5) Subsection (4) above does not apply to a contract entered into between future heirs on intestacy relating to the hereditary share on intestacy or the compulsory portion of one of them. Such a contract must be recorded by a notary.

*Section 311c Application to accessories*

If a person agrees to dispose of or charge a thing, that duty, in case of doubt, also applies to accessories of the thing.

**Subtitle 2**

**Principles applying to consumer contracts; particular types of sale<sup>8</sup>**

<sup>8</sup> Official note: This subtitle serves to implement 1. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372 of

**Chapter 1**

**Scope of application and principles applying to consumer contracts**

*Section 312 Scope of application*

(1) The provisions of chapters 1 and 2 of this subtitle apply only to consumer contracts within the meaning of section 310 (3) that have as their subject matter the nongratuitous performance by the trader.

(2) Of the provisions set out in chapters 1 and 2 of this subtitle, solely section 312a subsections (1), (3), (4), and (6) applies to the following contracts:

1. contracts that have been notarially recorded

a) and that relate to financial services, where such contracts are off-premises contracts,

b) and that do not constitute a contract relating to financial services; this applies to contracts, regarding which the law does not require the contract or contract declaration to be notarially recorded, solely in those cases in which the notary instructs the parties that the information requirements pursuant to section 312d (1) and the right of withdrawal pursuant to section 312g (1) have ceased to apply;

2. contracts relating to the creation, acquisition or transfer of ownership of plots of land or other rights to same,

31 December 1985, p. 31), 2. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, p. 19), 3. and Articles 10, 11 and 18 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce" OJ L 178, p. 1).

3. contracts relating to the construction of new buildings or to the substantial conversion of existing buildings,

4. contracts relating to travel services pursuant to section 651a, if these are

a) distance contracts,

b) off-premises contracts, if the oral negotiations on the basis of which the contract is concluded were conducted in response to a previous order placed by the consumer, or

5. contracts relating to the carriage of passengers,

6. timeshare contracts, contracts relating to long-term holiday products, brokerage contracts, and exchange system contracts pursuant to sections 481 to 481b,

7. treatment contracts pursuant to section 630a,

8. contracts relating to the supply of food products, beverages or other household objects of everyday use which are supplied to the residence, place of abode or place of employment of a consumer by a trader in the course of frequent and regular rounds,

9. contracts that are concluded with the use of automatic vending machines and automated business premises,

10. contracts for the use of public payphones that are concluded with telecommunications operators through such public payphones,

11. contracts concluded for the use of one single connection by telephone, Internet or fax established by a consumer,

12. off-premises contracts, in which the performance is immediately rendered and paid for at the conclusion of the negotiations and the remuneration to be paid by the consumer does not exceed 40 euros, and

13. contracts relating to the sale of movable things by way of an execution of judgment or otherwise by authority of law.

(3) Solely the following of the provisions set out in chapters 1 and 2 of this subtitle apply to contracts relating to social services, such as childcare and support of families and

persons permanently or temporarily in need, including long-term care:

1. the definitions of off-premises contracts and of distance contracts pursuant to sections 312b and 312c,

2. section 312a (1) regarding the disclosure obligation in the case of telephone calls,

3. section 312a (3) regarding the effectiveness of an agreement directed towards obtaining extra payment in addition to the remuneration agreed upon for the principal performance,

4. section 312a (4) regarding the effectiveness of an agreement for fees for the use of means of payment,

5. section 312a (6),

6. section 312d (1) in conjunction with Article 246a section 1 subsections (2) and (3) of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] regarding the obligation to inform on the right of withdrawal, and

7. section 312g regarding the right of withdrawal.

(4) Of the provisions made in chapters 1 and 2 of this subtitle, solely the stipulations set out in subsection (3) numbers 1 through 7 apply to contracts relating to the rental of accommodation for residential purposes. The stipulations set out in subsection (3) numbers 1, 6, and 7 do not apply, however, to the creation of a lease relationship for accommodation serving residential purposes if the lessee has previously inspected the dwelling.

(5) In the case of contractual relationships relating to banking services and services of a credit, insurance, personal pension, investment or payment nature (financial services), that consist of an initial agreement with transactions following upon it or a series of separate transactions following upon it of the same type that have a temporal connection, the provisions made in chapters 1 and 2 of this subtitle apply only to the first agreement. Section 312a subsections (1), (3), (4), and (6) additionally applies to each transaction. Where the transactions set out in sentence 1 follow one another without such an agreement,

the provisions on the duties of a trader to provide information apply only to the first transaction. However, if no transaction of the same type occurs for longer than one year, the next transaction is deemed to be the first transaction of a new series within the meaning of sentence 3.

(6) Of the provisions made in chapters 1 and 2 of this subtitle, solely section 312a subsections (3), (4), and (6) applies to contracts relating to insurance policies as well as to contracts relating to the brokerage of such policies.

*Section 312a General obligations and principles applying to consumer contracts; limits to the agreement of remuneration*

(1) Where the trader or a person acting in his name or on his behalf makes a telephone call to the consumer with a view to concluding a contract with same, he shall, at the beginning of the conversation, disclose his identity and, where applicable, the identity of the person on whose behalf he is making the call, as well as the commercial purpose of the call.

(2) The trader is obliged to inform the consumer in accordance with the stipulations of Article 246 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche]. The trader may demand that the consumer cover freight, delivery, or postal charges and other costs only inasmuch as he has informed the consumer of these costs in accordance with the requirements established in Article 246 (1) number 3 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche]. Sentences 1 and 2 apply neither to off-premises contracts nor to distance contracts nor to contracts relating to financial services.

(3) A trader may conclude an agreement with a consumer that is directed towards obtaining extra payment from the consumer in addition to the remuneration agreed upon for the principal performance only if this is done expressly. Where the trader and the consumer conclude a contract in electronic commerce, such an agreement will form part of the contract only if the trader does

not bring about the agreement by means of a default option.

(4) An agreement obligating a consumer to pay a fee for the use of a certain means of payment by way of fulfilling his contractual obligations is ineffective if

1. no customary and reasonable payment method is available to the consumer that is free of charge, or

2. the fee agreed exceeds the cost borne by the trader for the use of such means of payment.

(5) An agreement obligating a consumer to pay a fee for those cases in which the consumer contacts the trader via a telephone line that the trader operates for the purpose of answering questions or providing explanations regarding a contract concluded by the parties is ineffective if the fee agreed upon exceeds the fee charged for the use merely of the telecommunication service as such. Where an agreement is ineffective pursuant to sentence 1, the consumer is not bound to pay a fee for the call to the telecommunication services provider, either. The telecommunication services provider has the right to demand the fee for the use merely of the telecommunication services from the trader who has concluded the ineffective agreement with the consumer.

(6) Where an agreement pursuant to subsections (3) to (5) has not come to form part of the contract or where it is ineffective, the contract remains effective in all other respects.

**Chapter 2 Off-premises contracts and distance contracts**

*Section 312b Off-premises contracts*

(1) Off-premises contracts are contracts

1. that are concluded with the simultaneous physical presence of the consumer and of the trader, in a place which is not the business premises of the trader,

2. for which an offer was made by the consumer in the same circumstances as referred to in number 1,

3. that are concluded on the business premises of the trader or through any means of distance communication, but where, immediately prior to such conclusion, the consumer had been personally and individually addressed, in a place which is not the business premises of the trader, in the simultaneous physical presence of the consumer and the trader, or

4. that are concluded during an excursion organised by the trader or with the trader's assistance, with the aim of promoting goods or services to the consumer and entering into the corresponding contracts with him.

Any persons acting in the trader's name or on his behalf are in a position equivalent to that of the trader.

(2) Business premises within the meaning of subsection (1) are any immovable retail premises where the trader carries out his activity on a permanent basis and any movable retail premises where the trader carries out his activity on a usual basis. Any retail premises in which the person acting in the trader's name or on his behalf carries out his activity on a permanent or usual basis are equivalent to the premises of the trader.

#### *Section 312c Distance contracts*

(1) Distance contracts are contracts for which the trader, or a person acting in the trader's name or on his behalf, and the consumer exclusively avail themselves of means of distance communication in negotiating and concluding the contract, except where the conclusion of the contract does not take place in the context of a sales or service-provision scheme organised for distance sales.

(2) Means of distance communication within the meaning of this Code are all means of communication which can be used to initiate or to conclude a contract, without requiring the simultaneous physical presence of the parties to the contract, such as letters, catalogues, telephone calls,

faxes, emails, text messages sent via the mobile telephone service (SMS) as well as messages broadcast and sent via teleservices.

#### *Section 312d Information requirements*

(1) In the case of off-premises contracts and of distance contracts, the trader is obliged to inform the consumer according to the stipulations of Article 246a of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche]. Unless the parties to the contract have expressly agreed otherwise, the information the trader provides by way of fulfilling this obligation shall become part of the contract's subject matter.

(2) In the case of off-premises contracts and of distance contracts for financial services, the trader is obliged, in derogation from subsection (1), to inform the consumer in accordance with the stipulations of Article 246b of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche].

#### *Section 312e Violation of information obligations as to costs*

The trader may demand that the consumer cover any freight, delivery, or postal charges and other costs insofar as he has informed the consumer of these costs in accordance with the requirements set out in section 312d (1) in conjunction with Article 246a section 1 (1) sentence 1 number 4 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche].

#### *Section 312f Copies and confirmations*

(1) In the case of off-premises contracts, the trader is obliged to forthwith provide the consumer with the following documents on paper:

1. a copy of a contract document signed by the parties concluding the contract such that their identity is recognisable, or
2. a confirmation of the contract reflecting the contract's content.

If the consumer agrees, some other durable medium may be used for the copy or the confirmation of the contract. The confirmation pursuant to sentence 1 must include the information specified in Article 246a of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] unless the trader has provided the consumer with such information on a durable medium, by way of fulfilling his information requirements pursuant to section 312d (1), already prior to concluding the contract.

(2) In the case of distance contracts, the trader is obliged to provide the consumer with a confirmation of the contract, on a durable medium, in which the content of the contract is set out, and to do so within a reasonable period of time after having concluded the contract, at the latest, however, at the time of the delivery of the goods or before the performance of the service. The confirmation pursuant sentence 1 must include the information specified in Article 246a of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] unless the trader has provided the consumer with such information on a durable medium prior to concluding the contract by way of fulfilling his information requirements pursuant to section 312d (1).

(3) In the case of contracts for the supply of digital content that is not contained in a tangible medium and that is produced and made available in digital form (digital content), the copy or the confirmation of the contract pursuant to subsections (1) and (2) is to likewise record, where appropriate, that prior to the performance of the contract, the consumer

1. has expressly consented to the trader commencing with the performance of the contract prior to expiry of the withdrawal period, and

2. has acknowledged that, by his consent, he will lose the right to withdraw from the contract upon the performance of the contract having commenced.

(4) This provision does not apply to contracts relating to financial services.

#### *Section 312g Right of withdrawal*

(1) In the case of off-premises contracts and of distance contracts, the consumer has a right of withdrawal pursuant to section 355.

(2) Unless otherwise agreed by the parties, the right of withdrawal shall not exist for the following contracts:

1. contracts for the supply of goods that are not pre-fabricated and the production of which is governed by an individual choice of or decision by the consumer, or that are clearly tailored to personal needs of the consumer,

2. contracts for the supply of goods which are highly perishable, or which may quickly pass their expiration date,

3. contracts for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons, if such goods were unsealed after delivery,

4. contracts for the supply of goods which, according to their nature, are inseparably mixed, after delivery, with other items,

5. contracts for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place at the earliest after thirty days following the conclusion of the sales contract, and the current value of which is dependent on fluctuations in the market which cannot be controlled by the trader,

6. contracts for the supply of sealed audio or sealed video recordings or sealed computer software, if they were unsealed after delivery,

7. contracts for the delivery of newspapers, periodicals or magazines with the exception of subscription contracts for the supply of such publications,

8. contracts for the supply of goods or the provision of services including the provision of financial services, whose price is dependent on fluctuations on the financial market which cannot be controlled by the trader and which may occur within the withdrawal period, including in particular services in connection with stock, with shares in open-ended investment assets

within the meaning of section 1 (4) of the Capital Investment Code [Kapitalanlagegesetzbuch], and with other tradeable securities, foreign currency, derivatives or money market instruments,

9. subject to the stipulations of sentence 2, contracts for the provision of services in the fields of accommodation other than for residential purposes, transport of goods, car rental services, deliveries of food and beverages, or services related to leisure activities, if the contract provides for a specific date or period of performance,

10. contracts that are concluded in the context of a method of sale where goods or services are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is obliged to purchase the goods or services (publicly accessible auction),

11. contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance; this shall not apply as regards additional services provided on the occasion of such visit that the consumer has not specifically requested, or as regards any goods delivered on the occasion of such visit that are not absolutely required as replacement parts in carrying out the maintenance or in making the repairs,

12. contracts for the provision of betting and lottery services unless the consumer has made his contract declaration by telephone or the contract is an off-premises contract, and

13. contracts that are notarially recorded; this shall apply to distance contracts relating to financial services only in those cases in which the notary confirms that the rights of the consumer set out in section 312d (2) are safeguarded.

The exception made in sentence 1 number 9 does not apply to contracts relating to travel services pursuant to section 651a if they are off-premises contracts, unless the oral negotiations on the basis of which the contract is concluded were conducted in

response to a previous order placed by the consumer.

(3) In addition, the right of withdrawal does not exist for contracts regarding which the consumer, under sections 495 and 506 to 512, is already entitled to a right of withdrawal under section 355, nor does it exist in the case of off-premises contracts regarding which the consumer is already entitled to a right of withdrawal pursuant to section 305 subsections (1) to (6) of the Capital Investment Code [Kapitalanlagegesetzbuch].

#### *Section 312h Termination and power of attorney to terminate*

If a continuing obligation is established between a trader and a consumer pursuant to this subtitle intended to substitute a continuing obligation existing between the consumer and another trader, and on the occasion of the establishment of the continuing obligation the consumer

1. declares the termination of the existing continuing obligation and commissions the trader or a third party commissioned by the latter to transmit the termination to the previous contractual partner of the consumer, or

2. empowers the trader or a third party commissioned by the latter to declare the termination towards the consumer's previous contractual partner,

the consumer's termination or the power of attorney shall require to be in text form.

### **Chapter 3**

#### **Contracts concluded in electronic commerce**

#### *Section 312i General obligations in electronic commerce*

(1) If a trader uses teleservices in order to conclude a contract for the supply of goods or the rendering of services (e-commerce contract), he must

1. provide the customer with reasonable, effective, and accessible technical means

with the aid of which the customer may identify and correct input errors prior to making his order,

2. communicate to the customer clearly and comprehensibly the information specified in Article 246c of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] in good time prior to sending his order,

3. confirm receipt of the order without undue delay by electronic means for the customer, and

4. provide the customer with the opportunity to retrieve the contract terms including the standard business terms when the contract is concluded and save them in a form that allows for their reproduction.

The order and the acknowledgement of receipt within the meaning of sentence 1 number 3 are deemed to have been received if the parties for whom they are intended are able to retrieve them in normal circumstances.

(2) Subsection (1) sentence 1 number 1 to 3 must not be applied if the contract is entered into exclusively by way of personal communication. Subsection (1) sentence 1 number 1 to 3 and sentence 2 must not be applied if otherwise agreed in a contract between parties who are not consumers.

(3) More extensive information obligations resulting from other stipulations of the law remain unaffected.

#### *Section 312j Special obligations vis-à-vis consumers in electronic commerce*

(1) On the websites used for electronic commerce with consumers, the trader is to indicate clearly and unequivocally at the latest at the beginning of the ordering process, in addition to the information provided pursuant to section 312i (1), whether any delivery restrictions apply and which means of payment are accepted.

(2) In the case of a consumer contract concluded in electronic commerce that has as its subject-matter a for-a-fee service provided by the trader, the trader must provide to the consumer the information in accordance with Article 246a section 1 (1)

sentence 1 number 1, 4, 5, 11, and 12 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche], and must do so in an unambiguous, comprehensible manner as well as prominently, directly before the consumer submits his order.

(3) In case of a contract in accordance with subsection (2), the trader is to arrange the ordering situation such that the consumer explicitly confirms with his order that he undertakes to effect a payment. If the order is placed using a button, the obligation of the trader under sentence 1 is only deemed to have been met if this button is marked in an easy-to-read manner with nothing else but the words “Order and Pay” (zahlungspflichtig bestellen), or with equally unambiguous wording.

(4) A contract in accordance with subsection (2) is only created if the trader meets his obligation under subsection (3).

(5) Subsections (2) to (4) do not apply if the contract is concluded exclusively by personal communication. The obligations set out in subsections (1) and (2) apply neither to websites concerning financial services nor to contracts relating to financial services.

## **Chapter 4**

### **Deviating agreements and burden of proof**

#### *Section 312k Deviating agreements and burden of proof*

(1) No agreements deviating from the provisions of this subtitle may be made, unless otherwise provided, that are to the disadvantage of the consumer or the customer. Unless otherwise provided, the provisions of this subtitle apply even if they are circumvented by other constructions.

(2) The burden of providing proof to the consumer that the information obligations provided for under the present subtitle have been complied with is incumbent on the trader.

### Subtitle 3

#### Adaptation and ending of contracts

##### *Section 313 Interference with the basis of the transaction*

(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

##### *Section 314 Termination, for a compelling reason, of contracts for the performance of a continuing obligation*

(1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.

(2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. Section 323 (2) number 1 und 2

applies, with the necessary modifications, as regards the dispensability of specifying a period for such relief and as regards the dispensability of a warning notice. Specifying a period for relief and issuing a warning notice can also be dispensed with if special circumstances are given which, when the interests of both parties are weighed, justify immediate termination.

(3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination.

(4) The right to demand damages is not excluded by the termination.

### Subtitle 4

#### Unilateral rights to specify performance

##### *Section 315 Specification of performance by one party*

(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it.

(2) The specification is made by declaration to the other party.

(3) Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.

##### *Section 316 Specification of consideration*

If the extent of the consideration promised for an act of performance is not specified, then in case of doubt the party that is owed the consideration is entitled to make the specification.

##### *Section 317 Specification of performance by a third party*

(1) Where specification of performance is left to a third party, then in case of doubt it is to be assumed that the specification is to

be made at the reasonably exercised discretion of the third party.

(2) If the specification is made by more than one third party, then in case of doubt, the agreement of all parties is necessary; where an amount is to be specified and several amounts are specified, then in case of doubt, the average amount applies.

#### *Section 318 Avoidance of specification*

(1) The specification of performance made by a third party is effected by declaration to one of the parties to the contract.

(2) Only the parties to the contract are entitled to avoid the specification made for mistake, duress or deceit; the opponent is the other party. Avoidance must occur without undue delay after the opponent has obtained knowledge of the grounds for avoidance. Avoidance is excluded if thirty years have passed since the specification was made.

#### *Section 319 Ineffectiveness of the specification; substitution*

(1) If the third party is to specify performance at its reasonably exercised discretion, the specification made is not binding on the parties to the contract if it is evidently inequitable. The specification is made in this case by judicial decision; the same applies if the third party cannot or does not want to make the specification or if it delays it.

(2) If the third party is to make the specification at its free discretion, the contract is ineffective if the third party cannot or does not want to make the specification or if it delays it.

## **Title 2**

### **Reciprocal contracts**

#### *Section 320 Defence of unperformed contract*

(1) A person who is a party to a reciprocal contract may refuse his part of the

performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part performance due to him until the complete consideration has been rendered. The provision of section 273 (3) does not apply.

(2) If one party has performed in part, consideration may not be refused to the extent that refusal, in the circumstances, in particular because the part in arrears is relatively trivial, would be bad faith.

#### *Section 321 Defence of uncertainty*

(1) A person who is obliged to perform in advance under a reciprocal contract may refuse to render his performance if, after the contract is entered into, it becomes apparent that his entitlement to consideration is jeopardised by the inability to perform of the other party. The right to refuse performance is not applicable if consideration is rendered or security is given for it.

(2) The person required to perform in advance may specify a reasonable period in which the other party must, at his choice, render consideration or provide security reciprocally and simultaneously against performance. If the period ends without result, the person required to perform in advance may revoke the contract. Section 323 applies with the necessary modifications.

#### *Section 322 Order to perform reciprocally and simultaneously*

(1) If a party brings an action for performance due to him on the basis of a reciprocal contract, the assertion by the other party of his right to refuse performance until consideration is rendered merely has the effect that the latter party is to be ordered to perform reciprocally and simultaneously.

(2) If the party bringing the action must perform in advance, then, if the other party is in default of acceptance, he may bring an action for performance after receiving consideration.

(3) The provision in section 274 (2) applies to the execution of judgment.

*Section 323 Revocation for nonperformance or for performance not in conformity with the contract<sup>9</sup>*

(1) If, in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.

(2) The specification of a period of time can be dispensed with if

1. the obligor seriously and definitively refuses performance,

2. the obligor does not render performance by a date specified in the contract or within a period specified in the contract, in spite of the fact that, according to a notice given by the obligee to the obligor prior to conclusion of the contract or based on other circumstances attending at the time of its conclusion, the performance as per the date specified or within the period specified is of essential importance to the obligee, or

3. in the case of work not having been carried out in accordance with the contract, special circumstances exist which, when the interests of both parties are weighed, justify immediate revocation.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met.

(5) If the obligor has performed in part, the obligee may revoke the whole contract only

if he has no interest in part performance. If the obligor has not performed in conformity with the contract, the obligee may not revoke the contract if the breach of duty is trivial.

(6) Revocation is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to revoke the contract or if the circumstance for which the obligor is not responsible occurs at a time when the obligee is in default of acceptance.

*Section 324 Revocation for breach of a duty under section 241 (2)*

If the obligor, in the case of a reciprocal contract, breaches a duty under section 241 (2), the obligee may revoke the contract if he can no longer reasonably be expected to uphold the contract.

*Section 325 Damages and revocation*

The right to demand damages in the case of a reciprocal contract is not excluded by revocation.

*Section 326 Release from consideration and revocation where the duty of performance is excluded<sup>10</sup>*

(1) If, under section 275 (1) to (3), the obligor is not obliged to perform, there is no entitlement to consideration; in the case of part performance, section 441 (3) applies with the necessary modifications. Sentence 1 does not apply if the obligor, in the case of failure to perform in conformity with the contract, does not, under section 275 (1) to (3), have to effect cure.

(2) If the obligee is solely or very predominantly responsible for the circumstance due to which the obligor does

<sup>9</sup> Official note: This provision also serves in part to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12).

<sup>10</sup> Official note: This provision also serves in part to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12).

not, under section 275 (1) to (3), have to effect cure, or if this circumstance for which the obligor is not responsible occurs at a time when the obligee is in default of acceptance, the obligor retains the entitlement to consideration. However, he must allow to be credited against him what he saves due to release from performance or acquires or wilfully fails to acquire from other use of his labour.

(3) If the obligee demands, under section 285, return of reimbursement obtained for the object owed or assignment of the claim to reimbursement, he remains obliged to render consideration. However, the latter is reduced under section 441 (3) to the extent that the value of the reimbursement or of the claim to reimbursement falls short of the value of the performance owed.

(4) To the extent that the consideration that is not owed under this provision is effected, what is performed may be claimed back under sections 346 to 348.

(5) If, under section 275 (1) to (3), the obligor does not have to perform, the obligee may revoke; section 323 applies with the necessary modifications to the revocation, subject to the proviso that it is not necessary to specify a period of time.

## Title 9

### Contract to produce a work and similar contracts

#### Subtitle 1

#### Contract to produce a work

#### Chapter 1

#### General Provisions

##### *Section 631 Typical contractual duties in a contract to produce a work*

(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration.

(2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service.

##### *Section 632 Remuneration*

(1) Remuneration for work is deemed to be tacitly agreed if the production of the work, in the circumstances, is to be expected only in return for remuneration.

(2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.

(3) In case of doubt, remuneration is not to be paid for a cost estimate.

##### *Section 632a Part payments*

(1) The contractor may demand a part payment from the customer for work carried out in accordance with the contract in the amount in which of the customer has received an increased value by virtue of the work value of his work. The part payment may not be refused because of minor defects. If the work is defective, the customer may refuse the part payment to an appropriate amount. The burden of proof for the conformity of the works with the

contract remains with the contractor until the acceptance. Section 641 (3) applies by analogy. The work must be documented by a list which must facilitate a rapid, secure evaluation of the work. Sentences 1 to 4 also apply to required materials or building components that are supplied or specially prepared and made available if ownership of the materials or building components is transferred to the customer or an appropriate security is provided for this, at his option.

~~(2) If the subject matter of the contract is the construction or conversion of a house or comparable building and at the same time entails an obligation incumbent on the contractor to assign to the customer ownership of the plot of land or to establish or assign a hereditary building right, part payments may only be demanded insofar as they have been agreed in accordance with an ordinance based on Article 244 of the Introductory Act to the Civil Code. [transferred to section 650v]~~

~~(3) If the customer is a consumer, and if the subject matter of the contract is the construction or conversion of a house or comparable building, the customer must be given a security amounting to five per cent of the remuneration claim on effecting the first part payment for the correct implementation of the work without major defects. If the remuneration claim increases by more than ten per cent as a result of amendments to or supplements of the contract, the customer is to be given a further security of five per cent of the additional remuneration claim on effecting the next part payment. At the request of the contractor, the security is to be provided by retention such that the customer retains the part payments up to the total amount of the security owed. [transferred to section 650m (2)]~~

~~(24) Securities in accordance with this provision paragraph 1 sentence 6 may also be provided by means of a guarantee or other payment undertaking by a financial institution or credit insurer entitled to operate in the scope of application of this Code.~~

### *Section 633 Material defects and legal defects*

(1) The contractor must procure the work for the customer free of material defects and legal defects.

(2) The work is free of material defects if it is of the agreed quality. To the extent that the quality has not been agreed, the work is free from material defects

1. if it is suitable for the use envisaged in the contract, or else

2. if it is suitable for the customary use and is of a quality that is customary in works of the same type and that the customer may expect in view of the type of work.

It is equivalent to a material defect if the contractor produces a work that is different from the work ordered or too small an amount of the work.

(3) The work is free of legal defects if third parties, with regard to the work, either cannot assert any rights against the customer or can assert only such rights as are taken over under the contract.

### *Section 634 Rights of the customer in the case of defects*

If the work is defective, the customer, if the requirements of the following provisions are met and to the extent not otherwise specified, may

1. under section 635, demand cure,

2. under section 637, remedy the defect himself and demand reimbursement for required expenses,

3. under sections 636, 323 and 326 (5), revoke the contract or under section 638, reduce payment, and

4. under sections 636, 280, 281, 283 and 311a, demand damages, or under section 284, demand reimbursement of futile expenditure.

### *Section 634a Limitation of claims for defects*

(1) The claims cited in section 634 nos. 1, 2 and 4 are statute-barred

1. subject to no. 2, in two years in the case of a work whose result consists in the manufacture, maintenance or alteration of a thing or in the rendering of planning or monitoring services for this purpose,

2. in five years in the case of a building and in the case of a work whose result consists in the rendering of planning or monitoring services for this purpose, and

3. apart from this, in the regular limitation period.

(2) In the cases of subsection (1) nos. 1 and 2, limitation begins on acceptance.

(3) Notwithstanding subsection (1) nos. 1 and 2, and subsection (2), claims are statute-barred in the standard limitation period if the contractor fraudulently concealed the defect. However, in the case of subsection (1) no. 2, claims are not statute-barred before the end of the period specified there.

(4) The right of revocation referred to in section 634 is governed by section 218. Notwithstanding the ineffectiveness of revocation under section 218 (1), the customer may refuse to pay the remuneration to the extent that he would be entitled to do so by reason of the revocation. If he uses this right, the contractor may revoke the contract.

(5) Section 218 and subsection (4) sentence 2 above apply with the necessary modifications to the right to reduce the price specified in section 634.

### *Section 635 Cure*

(1) If the customer demands cure, then the contractor may, at his option, remedy the defect or produce a new work.

(2) The contractor must bear the expenditure necessary for cure, including, without limitation, transport, workmen's travel, work and materials costs.

(3) The contractor may refuse cure, without prejudice to section 275 (2) and (3), if it is only possible at disproportionate cost.

(4) If the contractor produces a new work, he may demand from the customer return

of the defective work in accordance with sections 346 to 348.

#### *Section 636 Special provisions on revocation and damages*

Except in the cases of sections 281 (2) and 323 (2), there is no need for a period to be set even if the contractor refuses cure under section 635 (3) or if cure has failed or cannot be reasonably expected of the customer.

#### *Section 637 Self-help*

(1) If there is a defect in the work, the customer may, after the expiry without result of a reasonable period specified by him for cure, remedy the defect himself and demand reimbursement of the necessary expenses, unless the contractor rightly refuses cure.

(2) Section 323 (2) applies with the necessary modifications. A period of time need not be specified even if cure has failed or cannot reasonably be expected of the customer.

(3) The customer may demand from the contractor advance payment of the expenses necessary to remedy the defect.

#### *Section 638 Reduction of price*

(1) Instead of revocation of the contract, the customer may reduce the remuneration by declaration to the contractor. The ground for exclusion under section 323 (5) sentence 2 does not apply.

(2) If the customer or the contractor consists of more than one person, reduction of price may be declared only by or to all of them.

(3) In the case of reduction of price, the payment is to be reduced in the proportion which, at the time when the contract was entered into, the value of the work in a state free of defects would have had to the actual value. To the extent necessary, the price reduction is to be established by appraisal.

(4) If the customer has paid more than the reduced remuneration, the contractor must

reimburse the surplus. Section 346 (1) and section 347 (1) apply with the necessary modifications.

#### *Section 639 Exclusion of liability*

The contractor may not rely on an agreement by which the rights of the customer with regard to a defect are excluded or restricted, insofar as the contractor fraudulently concealed the defect or gave a guarantee for the quality of the work.

#### *Section 640 Acceptance*

(1) The customer is obliged to accept the work produced in conformity with the contract, except to the extent that, in view of the quality of the work, acceptance is excluded. Acceptance may not be refused by reason of trivial defects. ~~It is equivalent to acceptance if the customer does not accept the work within a reasonable period of time specified for him by the contractor, although he is under a duty to do so.~~

(2) A work is assumed to be accepted, if the contractor has specified a reasonable period of time for the customer to accept the work, and the customer has not refused to accept the work within this period supported by the indication of at least one defect. If the customer is a consumer, the legal consequences of sentence 1 will follow only, if the contractor has informed the consumer about the consequences of a failure to accept or a failure to motivate a refusal together with the specification of the period for acceptance; this information has to be in text form.

(23) If the customer accepts a defective work under paragraph 1 sentence 1, even though he knows of the defect, he only has the rights designated in section 634 numbers 1 to 3 if he reserves his rights with regard to the defect when he accepts the work.

#### *Section 641 Due date of remuneration*

(1) The remuneration must be paid upon acceptance of the work. If the work is to be accepted in parts and the remuneration for

the individual parts is specified, then the remuneration is to be paid for each part when it is accepted.

(2) The remuneration of the contractor for a work whose production the customer has promised to a third party is due at the latest

1. to the extent that the customer has received from the third party his remuneration or parts of his remuneration for the production of the promised work,

2. to the extent that the work of the customer has been accepted by the third party or is deemed to have been accepted, or

3. to the extent that the contractor has unsuccessfully set the customer a suitable deadline for information on the circumstances referred to in nos. 1 and 2.

If the customer has given the third party security on account of possible defects of the work, sentence 1 applies only if the contractor gives the customer an appropriate security.

(3) If the customer may demand remedy of a defect, he may, after becoming due, refuse to pay a reasonable portion of the remuneration; twice the costs necessary to remedy the defect are appropriate as a rule.

(4) If the remuneration is assessed in money, the customer must pay interest on it from the acceptance of the work on, except to the extent that remuneration is deferred.

#### *Section 641a (repealed)*

#### *Section 642 Collaboration by the customer*

(1) If, in the production of the work, an act by the customer is necessary, then the contractor may demand reasonable compensation if the customer, by failing to perform the act, is in default of acceptance.

(2) The amount of compensation is assessed on the one hand on the basis of the duration of the default and the amount of the agreed remuneration, and on the other hand on the basis of what expenses the contractor saves or what the contractor

can earn by employing his working capacity elsewhere.

#### *Section 643 Termination for failure to collaborate*

In the case of section 642, the contractor is entitled to give the customer a reasonable period of time for making up for the act to be performed by declaring that he will terminate the contract if the act is not undertaken by the end of the period of time. The contract is deemed to be cancelled if the act is not made up for by the end of the period of time.

#### *Section 644 Allocation of risk*

(1) The contractor bears the risk until acceptance of the work. If the customer is in default of acceptance, then the risk passes to him. The contractor is not liable for any accidental destruction or accidental deterioration of the materials supplied by the customer.

(2) If, at the demand of the customer, the contractor ships the work to a place other than the place of performance, then the provisions of section 447 governing purchase apply with the necessary modifications.

#### *Section 645 Responsibility of the customer*

(1) If the work, before acceptance, is destroyed or deteriorates or becomes impracticable as the result of a defect in the materials supplied by the customer or as the result of an instruction given by the customer for the carrying out of the work, without a circumstance for which the contractor is responsible contributing to this, then the contractor may demand a part of the remuneration that corresponds to the work performed and reimbursement of those expenses not included in the remuneration. The same applies if the contract is cancelled under section 643.

(2) A more extensive liability of the customer for fault is unaffected.

*Section 646 Completion in lieu of acceptance*

If acceptance is excluded due to the quality of the work, then, in the cases of sections 634a (2) and 641, 644 and 645, completion of the work takes the place of acceptance.

*Section 647 Security right of the contractor*

For his claims 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.

*Section 647a8 [paragraph 1 transferred to sec. 650e]*

The owner of a shipyard, for his claims in relation to the building or repair of a ship, may demand to be granted a ship mortgage over the ship under construction or ship of the customer; subsection (1) sentence 2 applies with the necessary modifications. Section 647 does not apply.

*Section 6489 Right of termination of the customer*

The customer may terminate the contract at any time up to completion of the work. If the customer terminates the contract, then the contractor is entitled to demand the agreed remuneration; however, he must allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five per cent of the remuneration accounted for by the part of the work not yet provided.

*Section 648a Termination for compelling reasons*

(1) Both parties may terminate the contract for compelling reasons at any time. A compelling reason exists, if, considering all facts of the individual case and balancing the interests of both parties, it is intolerable

for the terminating party to uphold the contractual relationship until the completion of the work.

(2) A termination of a part of the contract is possible; it must relate to a separable part of the owed work, however.

(3) Section 314 (2) and (3) apply by analogy.

(4) Following the termination both parties can ask the other party to participate in a joint assessment of the state of performance. If one party refuses to participate or if one party stays away from an appointment mutually agreed or indicated by the other party within an appropriate time frame, the burden of proof with regard to the state of performance at the time of the termination shifts to this party. This is not the case, however, if this party does not appear for a reason the party cannot be held responsible for and which it has indicated without undue delay.

(5) If a party terminates the contract for a compelling reason, the contractor keeps his claim to remuneration only for the part of the work performed until the time of the termination.

(6) The right to claim damages is not excluded by the termination.

*Section 650649 Cost estimate*

(1) If the contract is based on a cost estimate without the contractor guaranteeing the accuracy of the estimate and if it turns out that the work cannot be carried out without substantially exceeding the estimate, then the contractor is only entitled, if the customer terminates the contract for this reason, to the claim specified in section 645 (1).

(2) If such exceeding of the estimate is to be expected, then the contractor must notify the customer of this without undue delay.

*Section ~~654~~650 Application of sale of goods law<sup>11</sup>*

The provisions of sale of goods law are applicable to a contract dealing with the supply of movable things to be produced or manufactured. Section 442 (1) sentence 1 also applies to these contracts if the defect is caused by the material supplied by the customer. To the extent that the movable things to be produced or manufactured are not fungible things, sections 642, 643, 645, 649 and 650 apply, subject to the proviso that the applicable point of time under sections 446 and 447 takes the place of acceptance.

## **Chapter Two**

### **Construction contract**

#### *Section 650a Construction contract*

(1) A construction contract is the contract for the construction, the reconstruction, the demolition or the conversion of a building, outside facilities or a part thereof. For a construction contract the following provisions of this chapter will apply additionally.

(2) A contract for the maintenance of a building is a construction contract, if the work is considerably significant for the construction, its continued existence or its use as determined.

#### *Section 650b Change of the contract, customer's right to give directions*

(1) If the customer demands

1. a change of the result of the works as agreed upon (section 631 (2)) or
2. a change that is necessary to achieve the result of the work as agreed upon,

both parties strive for an agreement over the change and the appropriate increase or reduction of the remuneration. The contractor is obliged to make an offer with respect to the additional or reduced remuneration, however in the case of a change pursuant to sentence 1 number 1 only, if the change is acceptable. If the contractor indicates internal reasons why the change is unacceptable, he carries the burden of proof. If the customer is responsible for the planning of the building or the outside facilities, the contractor has to make an offer with respect to the additional or reduced remuneration only, after the customer has made new plans necessary for the change and handed them over to the contractor. If the customer demands a change, for which the contractor has no claim for additional remuneration pursuant to section 650c (1) sentence 2 the parties strive for an agreement; sentence 2 is not applied.

(2) If the parties do not find an agreement pursuant to paragraph 1 within 30 days after the demand of change reaches the contractor, the customer is entitled to direct the change in text form. The contractor is obliged to follow the direction, however in the case of a direction pursuant to paragraph 1, no. 1 only, if the performance of the direction is acceptable to him. Paragraph 1 sentence 3 applies by analogy.

#### *Section 650c Adaptation of remuneration in cases of directions pursuant to section 650b (2)*

(1) The amount of the remuneration due for the additional or reduced efforts of the contractor caused by the customer's direction pursuant to section 650b (2) has to be assessed based on the costs effectively necessary including appropriate markups for general costs, risk and profit. If the contractor also owed the planning of the building or the outside installation, he is not entitled to additional remuneration in the cases of section 650b (1) sentence 1 number 2,

(2) In order to calculate the remuneration following the direction the contractor may make use of his original calculation that he

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<sup>11</sup> Official note: This provision serves to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12).

has deposited as agreed by the parties. It is assumed that the remuneration based upon the original calculation corresponds with the remuneration based on paragraph 1.

(3) When calculating part payments to be paid under an agreement of the parties or under section 632a the contractor may use 80 per cent of the amount used in an offer made under section 650b (1) sentence 2, if the parties have not reached an agreement and no different amount has been fixed by a court decision. If the contractor proceeds in this fashion, and no different amount has been fixed by a court decision, the additional remuneration owed pursuant to paragraphs 1 and 2 becomes due only upon acceptance. Payments pursuant to sentence 1 exceeding the additional remuneration owed under paragraphs 1 and 2 have to be paid back to the customer including interest from the time at which the contractor was able to make use of them. Sections 288 (1) sentence 2, (2) and section 289 sentence 1 apply by analogy.

#### *Section 650d Preliminary injunctions*

When a preliminary injunction is to be issued in litigation over the right to direct changes pursuant to section 650b or the adaptation of the remuneration pursuant to section 650c after the beginning of construction works, it is not necessary to demonstrate the existence of grounds for a writ of seizure.

#### *Section 650e Mortgage of a building contractor*

The contractor for a building or an individual part of a building may demand, for satisfaction of his claims under the contract, that a mortgage over the building plot of the customer is granted. If the work is not yet completed, then he may demand that a mortgage is granted for a portion of the remuneration corresponding to the work performed and for expenses not included in the remuneration. [transferred from section 648 (1)]

#### *Section 650f Builder's security*

(1) A contractor for a building, outdoor facilities or a part thereof may demand a security from the customer for the remuneration also agreed in additional commissions and not yet paid, including associated incidental claims, which are to be estimated at ten per cent of the remuneration claim to be secured. Sentence 1 also applies to the same degree to claims replacing the remuneration. The claim of the contractor for a security is not ruled out by the customer being able to demand fulfilment or having accepted the work. Claims with which the customer is able to offset against the contractor's right to remuneration are disregarded when calculating the remuneration unless they are non-contentious or have been ascertained with the force of law. The security is to be deemed sufficient even if the provider of the security reserves the right to revoke his promise, in case of substantial deterioration of the financial circumstances of the customer, with effect for claims to remuneration for building work that the contractor has not yet performed when the declaration of revocation is received.

(2) The security may also be provided by means of a guarantee or other promise of payment by a banking institution or credit insurer authorised to conduct business operations within the area of application of this Code. The banking institution or credit insurer may only make payments to the contractor to the extent that the customer recognises the claim of the contractor to remuneration or has been ordered by a provisionally enforceable judgment to pay the remuneration and the requirements are met under which execution of judgment may be commenced.

(3) The contractor must pay to the customer the customary costs of provision of security up to a maximum amount of two per cent per year. This does not apply to the extent that the security must be maintained because of objections of the customer to the remuneration claim of the contractor and the objections turn out to be unfounded.

(4) To the extent that the contractor has obtained a security for his claim to remuneration under subsections (1) and

(2), the claim to be granted a mortgage under section 648 (1) is excluded.

(5) If the contractor has unsuccessfully set the customer a suitable deadline to provide the security in accordance with subsection (1), the contractor may refuse to carry out the work or may terminate the contract. If he terminates the contract, the contractor is also entitled to claim the agreed remuneration; he must however allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five per cent of the remuneration accounted for by the part of the work not yet provided.

(6) The provisions of subsections (1) to (5) are not applicable if the customer

1. is a legal person under public law or a special fund under public law with regard to the property of which insolvency proceedings are not permissible, or

2. is a natural person and is having the construction work done to build or repair a one-family house with or without a self-contained apartment attached.

Sentence 1 no. 2 does not apply if the construction project is looked after by a construction agent authorised to dispose of the financial resources of the customer.

(7) Any agreement deviating from the provisions of subsections (1) to (5) above is ineffective. [transferred from section 648a]

*Section 650g Assessment of condition in cases or refusal of acceptance; final statement of claims*

(1) If the customer refuses to accept while he indicates defects, he is nonetheless obliged upon request of the contractor to participate in a joint assessment of the condition of the work. The joint assessment should carry the date of its production and has to be signed by both parties.

(2) If the customer stays away from an appointment for a joint assessment mutually agreed or indicated by the contractor within an appropriate time frame, the contractor is entitled to assess the

condition of the work unilaterally. This is not the case, however, if the customer does not appear for a reason the customer cannot be held responsible for and which he has indicated to the contractor without undue delay. The contractor has to indicate the date of the unilateral assessment of condition, to sign it and to make available to the customer a copy of the unilateral establishment of condition.

(3) If the work has been transferred to the customer and an obtrusive defect is not contained in the assessment of condition pursuant to paragraphs 1 or 2, it is assumed that this defect has come into existence after the time of the assessment of condition. The assumption does not apply if the defect by its nature cannot have been caused by the customer.

(4) Payment is due if

1. the customer has accepted the work or the acceptance is not necessary pursuant to section 641 (2) and

2. the contractor has issued a final statement of claims permitting scrutiny by the customer

The final statement of claims permits scrutiny by the customer, if it contains a clearly arranged list of performances rendered that is comprehensible for the customer. It is assumed to permit scrutiny, if the customer has not put forward substantiated arguments against the final statement for its failure in this respect within 30 days after the final statement has reached him.

*Section 650h Written form of termination*

The termination of a construction contract requires written form.

## **Chapter Three**

### **Consumer construction contract**

*Section 650i Consumer construction contract*

(1) Consumer construction contracts are contracts by which an entrepreneur accepts an obligation towards a consumer directed

at the construction of a new building or the substantial conversion of an existing building.

(2) The consumer construction contract has to be concluded in text form.

(3) The following provisions of this chapter apply to consumer construction contracts additionally.

#### *Section 650j Description of the building*

The entrepreneur has to inform the consumer with respect to the details as laid down in Article 249 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] in the form provided there, unless the consumer or his mandatee are providing the essential directions for the plans.

#### *Section 650k Contents of the contract*

(1) The indications contained in the description of the building made available prior to the conclusion of the contract relating to the specifications of the building become an integral part of the contract, unless the parties have expressly agreed otherwise.

(2) If the description of the building is incomplete or unclear, the contract is to be construed considering all accompanying circumstances, in particular the standards of quality and comfort as indicated by the rest of the description. In cases of remaining doubts on the interpretation of the contract with respect to the performance owed by the contractor the contract is to be construed to the detriment of the contractor.

(3) The construction contract has to make binding indications relating to the time of completion of the work or, if this time cannot be indicated at the time of the conclusion of the contract, relating to the duration of the building measures. If the contract fails to give such indications, the indications given in the description of the building relating to the time of completion or to the duration of the building measures made available prior to the contract become an integral part of the contract.

#### *Section 650i Right of withdrawal*

The consumer has a right to withdraw from the contract pursuant to section 355, unless the contract was notarized. The entrepreneur has to inform the consumer pursuant to Article 249 section 3 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] on the consumer's right of withdrawal.

#### *Section 650m Part payments, securities for the claim for remuneration [transferred from section 632a o.v.]*

(1) If the entrepreneur requests part payments pursuant to section 632a, the total amount of the part payments must not exceed 90 per cent of the total remuneration as agreed in the contract including additional remuneration pursuant to section 650c.

(2) The consumer must be given a security amounting to five per cent of the remuneration claim on effecting the first part payment for the correct implementation of the work without major defects. If the remuneration claim increases by more than ten per cent as a result of a direction given by the consumer pursuant to sections 650b and 650c or as a result of other amendments to or supplements of the contract, the customer is to be given a further security of five per cent of the additional remuneration claim on effecting the next part payment. At the request of the contractor, the security is to be provided by retention such that the consumer retains the part payments up to the total amount of the security owed.

(3) Securities in accordance with paragraph 2 may also be provided by means of a guarantee or other payment undertaking by a financial institution or credit insurer entitled to operate in the scope of application of this Code.

(4) If the entrepreneur demands part payments pursuant to section 632a, an agreement according to which the consumer is bound to provide for a security for the claim for remuneration, exceeding

the next part payment or 20 per cent of the total remuneration as agreed, shall be ineffective.

#### *Section 650n Production and transfer of documentation*

(1) In due time prior to the execution of an owed performance the entrepreneur has to produce and hand out to the consumer the documents relating to the design which the consumer needs as evidence in his relation to public authorities to establish that the performance will be executed in compliance with the pertinent provisions of administrative law. This duty does not exist, insofar as the consumer or his mandatee has produced the essential directions for the planning.

(2) No later than the completion of the work the entrepreneur has to produce and to hand out the documents that the consumer needs to give evidence to public authorities that the performance has been executed in compliance with the pertinent provisions of administrative law.

(3) Paragraphs 1 and 2 apply by analogy, if a third person, e.g. a creditor, requires evidence for the compliance with particular conditions, and if the entrepreneur has given cause for the consumer's justified expectation that these conditions will be met.

### **Chapter 4**

#### **Mandatory provisions**

##### *Section 650o Deviating agreements*

Deviations from the provisions contained in sections 640 (2), 650i through 650l and 650n to the detriment of the consumer are invalid. These provisions will be applied as well in cases of circumvention by other constructions.

#### **Subtitle 2**

#### **Architect's contract and engineer's contract**

#### *Section 650p Characteristic obligations arising from architect's and engineer's contracts*

(1) As a result of the conclusion of an architect's or engineer's contract the contractor is obliged to render the performance necessary according to the state of planning and execution of the building or the outside installation, in order to achieve the goals relating to planning and supervision as agreed by the parties.

(2) Insofar as significant goals relating to the planning and supervision have not been agreed upon yet, the contractor has to provide for the grounds of planning to find out these goals. He puts forward the grounds of planning together with an estimate of the costs of the project for approval.

#### *Section 650q Applicable provisions*

(1) The provisions of chapter 1 of subtitle 1 as well as sections 650b, 650e through 650h are applied to architect's and engineer's contracts by analogy, unless this subtitle does not govern differently.

(2) The adaptation of the remuneration in the case of directions pursuant to section 650b (2) is governed by the Regulation on the remuneration of architects and engineers [Honorarordnung für Architekten und Ingenieure] in the pertinent version, as far as the services to be rendered or not to be rendered as a consequence of the direction are covered by this regulation. ~~With regard to other services the parties are free to agree on the adaptation of the remuneration to the increased or reduced efforts. If the parties to the contract do not reach an agreement, section 650c is applied by analogy. Beyond that section 650c is applied by analogy.~~<sup>12</sup>

#### *Section 650r Special right of termination*

(1) Following the production of documents in accordance with section 650p (2) the employer may terminate the contract. The

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<sup>12</sup> Amendments by the Act of November 12, 2020, Federal law gazette I p. 2392.

right to terminate the contract expires two weeks after the contractor has put forward the documents, the right of a consumer expires only, if the contractor has informed the consumer about his right to terminate the contract, the date of expiry and the legal consequences of the termination when putting forward the documents.

(2) The contractor is entitled to specify a reasonable period of time for the customer to approve pursuant to section 650p (2) sentence 2. He has a right to terminate the contract, if the employer refuses to approve or does not respond within the specified period.

(3) If the contract is terminated pursuant to paragraph 1 or 2, the contractor is only entitled to claim remuneration for the performance rendered until the termination.

#### *Section 650s Part acceptance*

The contractor may request part acceptance of the performances rendered by him from the time on in which the last remaining work of the executing contractor or the executing contractors has been accepted.

#### *Section 650t Joint and several liability with the executing contractor*

If the employer claims remedies against the contractor as a consequence of materially defective supervision that has led to a correspondingly defective building or outside installation, the contractor may refuse performance, if the executing

contractor is likewise liable for the defect and the employer has not without result set a reasonable period for the contractor for cure.

### **Subtitle 3**

#### **Developer's contract**

##### *Section 650u Developer's contract; applicable provisions*

(1) A developer's contract is a contract which has as its object the construction or conversion of a house or comparable building and at the same time entails an obligation incumbent on the contractor to assign to the customer ownership of the plot of land or to establish or assign a hereditary building right. With regard to the construction or conversion the provisions of subtitle 1 apply, unless the following provisions govern differently. With regard to the claim to assign ownership in the plot of land or to establish or assign a hereditary building right the provisions on sales contracts apply.

(2) Sections 648, 648a, 650b through 650e, 650k (1) as well as sections 650i and 650m (1) do not apply.

#### *Section 650v Part payments*

The contractor may request part payments only to the extent that they have been agreed upon in conformity with an ordinance on the grounds of Article 244 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche].