

Judicial Review of Commercial Contracts

Wais / Pfeiffer

2022

ISBN 978-3-406-74398-6

C.H.BECK

a non-assignment clause in a sales contract is not surprising,⁸⁵ nor is the reservation of ownership.⁸⁶ A clause in a guarantee contract according to which the guarantor is liable to the bank for all current and future claims is surprising.⁸⁷ A clause which extends the liability of the guarantor to interests and other fees that stem from the credit contract is not surprising,⁸⁸ unless the guarantee contract contains a specific maximum liability cap.⁸⁹ An arbitration clause in an international commercial contract is not surprising.⁹⁰

g) Unfairness of standard terms. aa) Application. § 307 contains two distinct fairness requirements: substantive fairness and transparency. § 307(1) 1st St. provides the general rule underpinning the test of substantial fairness, whereby the existence of an unreasonable disadvantage contrary to the principle of good faith constitutes the decisive element. § 307(2) specifies the conditions which, when satisfied, must be considered as putting the counterparty at an unreasonable disadvantage. § 307(1) 2nd St. stipulates the requirement of transparency. Pursuant to § 307(3) 1st St., the test of substantial fairness under § 307(1) 1st St. and (2) applies only to specific standard terms. The transparency requirement, on the other hand, applies to all standard terms, regardless of their content (§ 307(3) 2nd St.).

§§ 308, 309 specify in detail when the courts consider a term ineffective due to its unfairness. Pursuant to § 310(1), §§ 308, 309 do not apply if the counterparty is an entrepreneur. According to the BGH, §§ 308, 309, although not applicable, do serve as an indicator of unfairness when applying § 307(1) 1st St. to B2B contracts. The consequence of this case law is that the counterparty is to a great extent protected by the same standard of fairness, irrespective of whether he is a consumer (§ 13) or an entrepreneur (§ 14).

With regards to B2B contracts, the order of the test is as following: pursuant to § 307 (3) 1st St. it must first be ascertained whether the term in question is subject to the test of substantial fairness. If the answer is in the affirmative, the courts will enquire whether it falls under the list in § 308 or § 309. If this is the case, the test requires an analysis whether that particular prohibition is a substantiation of § 307(2). Where this is confirmed, the term is usually ineffective. Where the term is not listed in §§ 308, 309, the court must enquire whether it is nonetheless caught by § 307(2). Where § 307(2) does not apply, the courts must analyse whether the ineffectiveness of the term may result from § 307(1) 1st St. directly. In contrast, in order to analyse the transparency of a term, the term need not meet specific requirements under § 307(3) 1st St., because pursuant to § 307(3) 2nd St., all terms, regardless of their object, fall within the scope of the transparency test. Importantly, according to § 310(1) 2nd St., the ‘Award Rules for Building Works, Part B [*Vergabe- und Vertragsordnung für Bauleistungen Teil B – VOB/B*]’ – separate legislation concerning terms and conditions for construction work – are not subject to the test of substantial fairness.

bb) Unreasonable disadvantage contrary to good faith. In order to determine whether a term puts the counterparty at an unreasonable disadvantage, the court must compare the term with the default rules of law that would govern the matter in absence of the standard term in question.⁹¹ A disadvantage is unreasonable if the user puts his interests first without paying due regard to the counterparty and making reasonable concessions to

⁸⁵ BGH, 24.9.1980 – VIII ZR 273/79; NJW 1981, 117, 118.

⁸⁶ Grüneberg, in *Palandt*, § 305c BGB mn. 6.

⁸⁷ BGH, 1.6.1994 – XI ZR 133/93; NJW 1994, 2145.

⁸⁸ BGH, 6.12.1983 – IX ZR 73/82; BeckRS 1983, 31078780.

⁸⁹ OLG Nürnberg, 20.6.1990 – 9 U 3650/89; NJW 1991, 232.

⁹⁰ OLG München, 16.8.2017 – 34 SchH 14/16; BeckRS 2017, 126222 mn. 70.

⁹¹ BGH, 23.9.2010 – III ZR 21/10; NJW 2010, 3568, 3569; BGH, 26.1.1994 – VIII ZR 39/93; NJW 1994, 1069, 1070.

him in order to achieve a balance between their conflicting interests.⁹² In order to ascertain whether this is the case, the courts must not examine the term merely by itself but must take into consideration the contract as a whole and the relationship between its individual terms.⁹³ Where an unreasonable disadvantage results only from a combination of different terms, each of these terms is ineffective.⁹⁴ The test requires a comprehensive analysis addressing the nature of the specific contract, the interests that are usually involved, and, where applicable, the typical commercial customs.⁹⁵ This appears to suggest a different standard of review for B2C contracts on the one hand and B2B contracts on the other, but the BGH has been very reluctant to uphold a term against an entrepreneur that would be ineffective had it featured in a contract with a consumer. Furthermore, a user will regularly argue that the use of terms that are disadvantageous to the counterparty allows him to offer his performance at a lower price, but the courts routinely reject this argument.⁹⁶

- 24 **cc) Deviation from essential principles of a statutory provision.** § 307(2) further substantiates the applicable standard of fairness. Pursuant to § 307(2) No. 1, a term is deemed to imply an unreasonable disadvantage for the counterparty if it is not compatible with essential principles of a statutory provision from which it deviates. Such essential principles are, for example, the principle that liability usually requires fault (§§ 280, 276)⁹⁷, that a party may void a declaration he made by mistake (§ 119),⁹⁸ that a creditor must set a deadline if he wants to revoke a contract due to delay of the debtor (§ 323)⁹⁹, that the creditor may not be charged for actions of the debtor which are in the debtor's interest and as such cannot be considered a contractual performance (in the case at hand a service fee for the conclusion of credit contract).¹⁰⁰ Theoretically, the presumption stipulated in § 307(2) is rebuttable. The user must demonstrate that upon an analysis of all relevant circumstances the term does not appear unreasonable.¹⁰¹
- 25 **dd) Jeopardising the purpose of the contract.** Under § 307(2) No. 2, rights and duties that are essential for the correct performance of the contract must not be limited, if, as a consequence of such limitation, the attainment of the purpose of the contract would be jeopardised. Whether an obligation is essential depends on the nature of the contract.¹⁰² Where a contract is regulated by specific statutory provisions, these provisions substantiate the nature of the contract.¹⁰³ In these cases, however, No. 2 is only of minor importance as a term that deviates from statutory law in such a manner will usually already be ineffective under § 307(2) No. 1. Hence, § 307(2) No. 2 is relevant particularly

⁹² BGH, 17.9.2009 – III ZR 207/08: NJW 2010, 57, 58; BGH, 17.1.2008 – III ZR 74/07: NJW 2008, 1064, 1065.

⁹³ BGH, 17.1.1989 – XI ZR 54/88: NJW 1989, 582.

⁹⁴ BGH, 9.12.2010 – VII ZR 71/10: NJW 2011, 2125, 2127; BGH, 5.4.2006 – VIII ZR 152/05: NJW 2006, 2115, 2116.

⁹⁵ BGH, 24.3.2010 – VIII ZR 304/08 NJW 2010, 2793, 2795; BGH, 4.7.1997 – V ZR 405/96: NJW 1997, 3022, 3023.

⁹⁶ BGH, 29.10.1956 – II ZR 79/55: NJW 1957, 17, 19; BGH, 29.9.1960 – II ZR 25/59: NJW 1961, 212, 213; BGH, 4.7.2013 – VII ZR 249/12: NJW 2013, 2502, 2504.

⁹⁷ BGH, 5.10.2005 – VIII ZR 16/05: NJW 2006, 47, 50; BGH, 9.4.2002 – XI ZR 245/01: NJW 2002, 1950, 1952. For more detail on §§ 276, 280 see Schulze, in *German Civil Code*.

⁹⁸ BGH, 28.4.1983 – VII ZR 259/82: NJW 1983, 1671, 1672. For more detail on § 119 see Wais, in *German Civil Code*.

⁹⁹ BGH, 25.3.1987 – VIII ZR 71/86: NJW 1987, 2506, 2507. For more detail on § 232 see M Oehm, in *German Civil Code*.

¹⁰⁰ BGH, 4.7.2017 – XI ZR 233/16: WM 2017, 1652; BGH, 5.6.2018 – XI ZR 790/16: NJW 2018, 2950, 2952.

¹⁰¹ BGH, 28.1.2003 – XI ZR 156/02: NJW 2003, 1447, 1448.

¹⁰² Grüneberg, in *Palandt*, § 307 BGB mn. 34.

¹⁰³ *ibid.*

where a specific contract is not regulated by default law and as such is not protected through 'essential principles of a statutory provision' under No. 1.¹⁰⁴ Where no such provisions exist, the court will determine the nature of the contract on the basis of the general expectations of the public.¹⁰⁵ Where no customary content can be established, it is for the court to substantiate the nature of the contract by enquiring into the reasonable expectations of fairness in the relevant field of business.¹⁰⁶ Essential obligations are usually mutual obligations which safeguard that the parties reciprocally honour their contractual obligations.¹⁰⁷ Accessory obligations can be essential if they are paramount for the protection of the counterparty.¹⁰⁸ Finally, the requirement that the purpose of the contract must be in jeopardy does not imply that it must be precluded altogether.¹⁰⁹

ee) The role of §§ 308, 309 BGB. §§ 308, 309 contain an enumeration of terms that are considered to be *possibly* ineffective or *always* ineffective, respectively. § 310(1) 1st St. states that, to a large extent, §§ 308, 309 are not applicable in B2B contracts. Nonetheless, the BGH considers most of the prohibitions of §§ 308, 309 to indicate the ineffectiveness of a term in B2B contracts under § 307(1) 1st St., (2), unless the principal argument of the relevant prohibition does not hold true in B2B transactions.¹¹⁰ This case law is less problematic when it comes to the *indirect* application of § 308, as the 'possibility of evaluation' leaves room for the court to pay due regard to the particular needs of B2B transactions. In contrast, it is quite problematic when reference is made to § 309, as a 'possibility of evaluation' is not provided. This means that frequently a term that pursuant to § 309 would be ineffective in a B2C contract will be held ineffective in a B2B contract.¹¹¹ Methodically, the *indirect* application of §§ 308, 309 in B2B contracts is based primarily on § 310(1) 2nd St., according to which the inapplicability of §§ 308, 309 does not preclude a prohibited term from being ineffective under § 307(1) 1st St., (2). The obvious advantage of this case law of the BGH is that it provides the courts (and everyone interested) with a guideline for the interpretation of the rather vague requirements in § 307. Arguably, this is also the reason why in many cases the courts will find that the special requirements of B2B transactions do not justify a different standard of fairness, as this would put the onus back onto the court.

Relevance of the prohibitions contained in § 308 in B2B contracts		
Provision	Relevance	Comments
No. 1 (period of time for acceptance and performance)	Yes ¹¹²	Economic flexibility plays a major role for businesses. They must not be left in unreasonable uncertainty with regard to the conclusion of a contract or its performance. Specific business practices may justify shorter timeframes. ¹¹³

¹⁰⁴ Stadler, in *Jauernig*, § 307 BGB mn. 12; Pfeiffer, in *AGB-Recht*, § 307 BGB mn. 133.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ BGH, 24.10.2001 – VIII ARZ 1/01: NJW 2002, 673, 675; BGH, 23.2.1984 – VII ZR 274/82: NJW 1985, 3016, 3018.

¹⁰⁸ BGH, 31.10.1984 – VIII ZR 226/83: NJW 1985, 320, 322; BGH, 20.6.1984 – VIII ZR 137/83: NJW 1985, 914, 915.

¹⁰⁹ BGH, 11.11.1992 – VIII ZR 238/91: NJW 1993, 335, 335.

¹¹⁰ BGH, 10.9.2014 – XII ZR 56/11: NJW 2014, 3722, 3726; BGH, 19.9.2007 – VIII ZR 141/06: NJW 2007, 3774, 3775.

¹¹¹ See the table below.

¹¹² Grüneberg, in *Palandt*, § 308 BGB mn. 10; Stadler, in *Jauernig*, § 308 BGB mn. 3.

¹¹³ Stadler, in *Jauernig*, § 308 BGB mn. 3.

Relevance of the prohibitions contained in § 308 in B2B contracts		
Provision	Relevance	Comments
No. 1a (period for payment)	Yes	Direct application to B2B contracts pursuant to § 310(1) 1 st St.
No. 1b (examination and acceptance period)	Yes	Direct application to B2B contracts pursuant to § 310(1) 1 st St.
No. 2 (additional period of time)	Yes ¹¹⁴	‘Additional period of time’ refers to the requirement in e.g. § 281(1) and § 323(1) according to which a creditor who wants to revoke the contract or seek damages because of a delay of the performance must set the debtor a deadline for the fulfilment of his obligations.
No. 3 (reservation of the right to revoke)	Yes ¹¹⁵	The underlying principle is considered to be relevant in B2B contracts. However, a less restrictive assessment of an objective justification is required; in particular, the existence of a commercial practice may be decisive. ¹¹⁶ The user need not specify the reasons for revoking the contract with the same precision that is required for B2C contracts. ¹¹⁷
No. 4 (reservation of the right to modify)	Yes ¹¹⁸	Such term is mostly used to avoid that a performance may be deemed defective due to a discrepancy of the actual condition of a performance and the condition it ought to be in.
No. 5 (fictitious declarations)	Yes ¹¹⁹	Arguably, the user need not specifically point out the consequences of his silence to a counterparty who is a business. ¹²⁰
No. 6 (fictitious receipt)	Yes ¹²¹	Unlike fictitious receipt, fictitious declarations do not fall under this provision. ¹²²
No. 7 (reversal of contracts)	Yes ¹²³	Determining whether the remuneration or reimbursement is ‘unreasonably high’ requires a comparison to the sum normally provided for under the statutory provisions. ¹²⁴ The term may provide for a lump sum, but it must not exceed the average amount due under those provisions in a typical situation. ¹²⁵

¹¹⁴ *ibid.*, mn. 4.

¹¹⁵ BGH, 29. 10. 2008 – VIII ZR 258/07: *NJW* 2009, 575, 576; BGH, 12.1.1994 – VIII ZR 165/92: *NJW* 1994, 1060, 1064.

¹¹⁶ Grüneberg, in *Palandt*, § 308 BGB mn. 23.

¹¹⁷ BGH, 12.1.1994 – VIII ZR 165/92: *NJW* 1994, 1060, 1064; BGH, 14.11.1984 – VIII ZR 283/83: *NJW* 1985, 738.

¹¹⁸ Stadler, in *Jauernig*, § 308 BGB mn. 5.

¹¹⁹ BGH, 10.9.2014 – XII ZR 56/11: *NJW* 2014, 3722, 3726; BGH, 17.9.1987 – VII ZR 155/86: *NJW* 1988, 55.

¹²⁰ Grüneberg, in *Palandt*, § 308 BGB mn. 34.

¹²¹ Stadler, in *Jauernig*, § 308 BGB mn. 8.

¹²² Grüneberg, in *Palandt*, § 308 BGB mn. 36.

¹²³ Grüneberg, in *Palandt*, § 308 BGB mn. 45.

¹²⁴ BGH, 29.5.1991 – IV ZR 187/90: *NJW* 1991, 2763, 2764.

¹²⁵ BGH, 22.3.1983 – VI ZR 108/81: *NJW* 1983, 1491, 1492.

Relevance of the prohibitions contained in § 308 in B2B contracts		
Provision	Relevance	Comments
No. 8 (unavailability of performance)	No ¹²⁶	Such clauses are considered normal in B2B contracts and are not generally unreasonable. ¹²⁷

Relevance of the prohibitions contained in § 309 in B2B contracts		
Provision	Relevant	Comments
No. 1 (price increases at short notice)	No ¹²⁸	Only § 307(1), (2) constitute the relevant standard of review for such terms in B2B contracts. These terms may be permissible even if the counterparty is granted no right to rescind or terminate the contract, so long as his interests are adequately protected. ¹²⁹ When analysing the fairness of the term, all circumstances must be considered, in particular the nature and the duration of the contract. ¹³⁰
No. 2 (right to refuse performance)	No ¹³¹	§ 309 No. 2 aims to protect § 320 and § 273, which provide a right to refuse performance and a right to retention primarily if the other party refuses to perform his obligation. ¹³² The exclusion of § 320 and § 273 is generally permissible, but in any case must be objectively justified. ¹³³
No. 3 (prohibition of set-off)	Yes ¹³⁴	§ 309 No. 3 substantiates § 307(2) No. 1.
No. 4 (warning notice, setting of a period of time)	Yes ¹³⁵	Warning notices are required in particular where the creditor seeks damages for the delay of a performance under §§ 280(1), (2), 286(1). ¹³⁶ The setting of a period of time usually is a requirement for the right to revoke a contract under § 323(1) and to damages under § 281(1).

¹²⁶ Wurmnest, in *Münchener Kommentar (Band 2)*, § 308 No. 8 BGB mn. 8.

¹²⁷ *ibid.*

¹²⁸ Stadler, in *Jauernig*, § 309 BGB mn. 2; *Grüneberg*, in *Palandt*, § 309 BGB mn. 7.

¹²⁹ BGH, 16.1.1985 – VIII ZR 153/83: *NJW* 1985, 853, 854.

¹³⁰ *ibid.*

¹³¹ BGH, 10.10.1991 – III ZR 141/90: *NJW* 1992, 575, 576; BGH, 10.10.1991 – III ZR 141/90: *NJW* 1992, 575, 577.

¹³² For details on these provisions see Schulze, § 273 BGB, and M. Oehm, § 320 BGB, in *German Civil Code*.

¹³³ BGH, 4.3.2010 – III ZR 79/09: *NJW* 2010, 1449, 1450.

¹³⁴ BGH, 27.6.2007 – XII ZR 54/05: *NJW* 2007, 3421, 3422; BGH, 1.12.1993 – VIII ZR 41/93: *NJW* 1994, 657, 658.

¹³⁵ For warning notices: *Grüneberg*, in *Palandt*, § 309 BGB mn. 23; for setting an additional period of time: BGH, 18.12.1985 – VIII ZR 47/85: *NJW* 1986, 842, 843.

¹³⁶ For details on § 286 see the Schulze's comments in *German Civil Code*.

Relevance of the prohibitions contained in § 309 in B2B contracts		
Provision	Relevant	Comments
No. 5 (lump-sum claims for damages)	Yes ¹³⁷	Contrary to § 309 No. 5(b) the right to present proof that the damage or decrease in value is lower need not be permitted expressly; it is sufficient if the right as such is granted. ¹³⁸
No. 6 (contractual penalty)	No ¹³⁹	Penalty clauses are not <i>per se</i> unreasonable in B2B contracts, but are ineffective under § 307(1) if the counterparty, in the individual case, is put at an unreasonable disadvantage. This is the case if the penalty is higher than the user's interest in the performance protected by the penalty clause. ¹⁴⁰ In particular, the penalty must not be disproportionate to the breach and the consequences thereof. ¹⁴¹
No. 7 (exclusion of liability for injury to life, body or health and in case of gross fault)	Yes	See mn. 33.
No. 8 (other exclusions of liability for breaches of duty)	Yes: a) ¹⁴² b) aa) ¹⁴³ b) bb) ¹⁴⁴ b) cc) ¹⁴⁵ b) dd) ¹⁴⁶ b) ff) ¹⁴⁷ No: b) ee) ¹⁴⁸	The subject of § 309 No. 8 is the limitation of rights of the creditor where the debtor is in breach of contractual obligations; the short description mentions only liability and is as such misleading. ¹⁴⁹

¹³⁷ BGH, 19.9.2001 – I ZR 343/98: NJW-RR 2002, 1027, 1029; BGH, 27.11.1990 – X ZR 26/90: NJW 1991, 976, 977.

¹³⁸ BGH, 12.1.1994 – VIII ZR 165/92: NJW 1994, 1060, 1068.

¹³⁹ BGH, 12.3.2003 – XII ZR 18/00: NJW 2003, 2158, 2161; BGH, 30.6.1976 – VIII ZR 267/75: NJW 1976, 1886, 1887.

¹⁴⁰ BGH, 31.8.2017 – VII ZR 308/16: NJW 2017, 3145; BGH, 7.5.1997 – VIII ZR 349/96: NJW 1997, 3233.

¹⁴¹ BGH, 31.8.2017 – VII ZR 308/16: NJW 2017, 3145 in which the BGH considered ineffective a term that provided for a penalty of 2,500 € for every failure to honour a beer delivery contract between a brewery and a pub. For further examples see Grüneberg, in *Palandt*, § 309 BGB mn. 38.

¹⁴² BGH, 29.10.2008 – VIII ZR 258/07: NJW 2009, 575, 576; BGH, 20. 3. 2003 – I ZR 225/00: NJW-RR 2003, 1056, 1060; BGH, 26.5.1986 – VIII ZR 218/85: NJW 1986, 3134.

¹⁴³ BGH, 26.1.1993 – X ZR 90/91: NJW-RR 1993, 560, 561.

¹⁴⁴ BGH, 2.2.1994 – VIII ZR 262/92: NJW 1994, 1004, 1005.

¹⁴⁵ BGH, 9.4.1981 – VII ZR 194/80: NJW 1981, 1510.

¹⁴⁶ Grüneberg, in *Palandt*, § 309 BGB mn. 77.

¹⁴⁷ BGH, 20.4.1993 – X ZR 67/92: NJW 1993, 2054, 2055.

¹⁴⁸ Grüneberg, in *Palandt*, § 309 BGB mn. 80.

¹⁴⁹ *ibid.* mn. 58.

Relevance of the prohibitions contained in § 309 in B2B contracts		
Provision	Relevant	Comments
No. 9 (duration of continuing obligations)	No	When applying § 307(1) 1 st St., (2), the courts must analyse whether the user has legitimate interests in establishing long-standing obligations and to what extent the economic freedom of the counterparty is restricted. ¹⁵⁰ In particular, large investments may serve as a justification. ¹⁵¹ Usually the duration must not be longer than 10 years. ¹⁵²
No. 10 (change of other party to contract)	No ¹⁵³	The courts must rather analyse whether a change in the person of the user interferes with the interests of the counterparty, in particular where the reliability of the contractual partner is important. ¹⁵⁴
No. 11 (liability of an agent with power to enter into a contract)	Yes ¹⁵⁵	Such clauses are often used when the contract is intended to bind both a juridical person and the natural person acting on its behalf. ¹⁵⁶
No. 12 (burden of proof)	Yes ¹⁵⁷	The statutory provisions on the burden of proof are deemed essential principles of fairness. However, the courts must examine whether the relevant statutory provision that is deviated from is applicable to businesses. ¹⁵⁸
No. 13 (form of notices and declarations)	No ¹⁵⁹	No. 13 only deals with notices and declarations of the counterparty; it is not applicable to notices and declarations of the user. ¹⁶⁰
No. 14 (waiver of lawsuit)	No ¹⁶¹	The provision is based on a decidedly consumer-orientated reasoning by the legislator.
No. 15 (advance payments and security deposits)	Yes: a) ¹⁶² No: b) ¹⁶³	§ 309 No. 15 a) must be read in conjunction with § 650m(1), according to which advance payments that amount to more than 90 % of the agreed remuneration may not be requested. § 309 No. 15 b) is tailored specifically to complement § 650m (2), according to which a consumer may request a security deposit for the correct implementation of the contractor's work.

¹⁵⁰ *ibid.* mn. 96.

¹⁵¹ BGH, 8.12.2011 – VII ZR 111/11: NJW-RR 2012, 626, 627; BGH, 6.12.2002 – V ZR 220/02: NJW 2003, 1313, 1315.

¹⁵² BGH, 3.11.1999 – VIII ZR 269/98: NJW 2000, 1110, 1113.

¹⁵³ Wurmnest, in *Münchener Kommentar (Band 2)*, § 308 No. 8 BGB mn. 8.

¹⁵⁴ BGH, 29.2.1984 – VIII ZR 350/82: NJW 1985, 53, 54.

¹⁵⁵ Stadler, in *Jauernig*, § 309 BGB mn. 20.

¹⁵⁶ Wurmnest, in *Münchener Kommentar (Band 2)*, § 309 No. 11 BGB mn. 10.

¹⁵⁷ BGH, 5.10.2005 – VIII ZR 16/05: NJW 2006, 47.

¹⁵⁸ Wurmnest, in *Münchener Kommentar (Band 2)*, § 309 No. 12 BGB mn. 22.

¹⁵⁹ Grüneberg, in *Palandt*, § 309 BGB mn. 114; Stadler, in *Jauernig*, § 309 BGB mn. 22.

¹⁶⁰ Grüneberg, in *Palandt*, § 309 BGB mn. 111.

¹⁶¹ Wurmnest, in *Münchener Kommentar (Band 2)*, § 309 No. 14 BGB mn. 17.

¹⁶² *ibid.*, § 309 No. 15 BGB mn. 18.

¹⁶³ *ibid.*, mn. 17.

- 27 It should be noted again that where a prohibition is relevant in B2B contracts, the term in question is usually ineffective pursuant to § 307(1), (2), unless there are specific reasons as to why the standard of review in B2B contracts should be a different one. It follows that notwithstanding the relevance of §§ 308, 309, the courts must still ascertain the ineffectiveness of any such term in a B2B contract. Furthermore, the irrelevance of a prohibition under §§ 308, 309 for B2B contracts does not by any means prevent the courts from applying § 307 to the standard term in question.
- 28 **ff) Terms excluded from the substantial fairness requirement.** Not all standard terms are subject to the strict fairness test under § 307(1) 1st St., (2). Terms that do not derogate from, or supplement, legal provisions, are precluded by virtue of § 307(3) 1st St. This is particularly important for terms pertaining directly to the subject of a principal obligation (kind, quantity, quality, price etc.) as usually the law does not regulate the specifics of the subject of a contract. In this case, a standard term is caught by § 307(3) 1st St. because there is no legal provision from which to derogate.¹⁶⁴ However, terms that reduce or erode the principal obligations stipulated in the agreement are not precluded from the judicial review under § 307(1) 1st St., (2).¹⁶⁵ Terms that concern the price are usually precluded,¹⁶⁶ but not where the effects on the price are only indirect.¹⁶⁷ Terms in the latter sense usually derogate from legal provisions and are subject to judicial review under § 307(1) 1st St., (2), e.g. terms that concern the due date of the price,¹⁶⁸ the advance performance of an obligation,¹⁶⁹ discounts,¹⁷⁰ or price-caps.¹⁷¹ Terms that stipulate a price for the performance of accessory obligations are precluded from the judicial review, unless it follows from the contract that by default the performance of such an obligation is free,¹⁷² or where no actual obligation is concerned, e.g. a service fee for the signing of a credit contract.¹⁷³ A term may also be excluded under § 307(3) 1st St. for the simple fact that it merely repeats the content of the relevant legal provision.¹⁷⁴
- 29 **gg) Transparency.** Pursuant to § 307(1) 2nd St., a term may also be unreasonable for the sole reason that it is not transparent. Importantly, the test of transparency also applies to terms that by virtue of § 307(3) 1st St. are excluded from judicial review under § 307(1) 1st St., e.g. a term that directly stipulates the price of the good does not fall within the scope of § 307(1) 1st St., but it may be ineffective under § 307(1) 2nd St. This provision applies to B2C and B2B contracts alike.¹⁷⁵ The user is required to stipulate the rights and duties of the counterparty in a clear, simple and precise manner.¹⁷⁶ However,

¹⁶⁴ BGH, 9.5.2001 – IV ZR 121/00: NJW 2001, 2014, 2016; BGH, 29.4.2010 – Xa ZR 5/09: NJW 2010, 1958, 1960.

¹⁶⁵ BGH, 29.4.2010 – Xa ZR 5/09: NJW 2010, 1958, 1960; BGH, 17.10.2007 – VIII ZR 251/06: NJW 2008, 214, 215.

¹⁶⁶ BGH, 24. 3. 2010 – VIII ZR 178/08: NJW 2020, 2789, 2791.

¹⁶⁷ BGH, 9.10.2014 – III ZR 32/14: NJW 2015, 328, 329; BGH, 17.9.2009 – Xa ZR 40/08: NJW 2009, 3570, 3572.

¹⁶⁸ BGH, 9.7.1981 – VII ZR 139/80: NJW 1981, 2351, 2354.

¹⁶⁹ OLG Düsseldorf, 21.12.1994 – 15 U 181/93: NJW-RR 1995, 1015, 1016.

¹⁷⁰ Grüneberg, in *Palandt*, § 307 BGB mn. 47.

¹⁷¹ BGH, 12.10.2007 – V ZR 283/06: NJW-RR 2008, 251, 253.

¹⁷² BGH, 13.2.2001 – XI ZR 197/00: NJW 2001, 1419, 1420; BGH, 18.4.2002 – III ZR 199/01: NJW 2002, 2386, 2387.

¹⁷³ BGH, 4.7.2017 – XI ZR 562/15: NJW 2017, 2986, 2988.

¹⁷⁴ BGH, 15.7.2009 – VIII ZR 56/08: NJW 2009, 2667, 2669; BGH, 9.4.2002 – XI ZR 245/01: NJW 2002, 1950, 1951.

¹⁷⁵ BGH, 25.10.2017 – XII ZR 1/17: NJW-RR 2018, 198, 199.

¹⁷⁶ BGH, 19.5.2016 – III ZR 274/15: NJW-RR 2016, 842, 844; BGH, 5.3.2008 – VIII ZR 95/07: NJW 2008, 1438, 1439.