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## Angloamerikanische Rechtssprache · Band 1

Anglo-American Legal Language · Vol. No. 1

Das Praxis-Handbuch „Angloamerikanische Rechtssprache“ bietet eine umfassende Überblicksdarstellung des angloamerikanischen Zivil- und Wirtschaftsrechts und der angloamerikanischen Rechtssprache.

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## Angloamerikanische Rechtssprache · Band 2

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Der zweite Band des Praxis-Handbuches „Angloamerikanische Rechtssprache“ ergänzt die umfassende Überblicksdarstellung des angloamerikanischen Wirtschaftsrechts und der angloamerikanischen Rechtssprache um wichtige weitere Fachgebiete.

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Beiträge aus dem US-amerikanischen, dem englischen, dem deutschen und dem österreichischen Rechtssystem geben einen fundierten Überblick über das jeweilige Rechtsgebiet in englischer bzw. US-amerikanischer Fachsprache. Den jeweiligen Facheinführungen folgen gebietsspezifische Glossare und Mustertexte für die praktische Arbeit. Beide Bücher können als Nachschlagewerk, als Lehrbuch oder auch als Behelf zum Selbststudium verwendet werden.

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Leseprobe Band 1



Leseprobe Band 2

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VII

### I.A Contract Law in the United States

#### I.A Contract Law in the United States

by Alexander Quest

Contract law in the United States is governed by a combination of various authorities including jurisdictional common law, state and federal statute, and the law of the contract itself. Unless otherwise modified by state or federal statute, the common law will interpret the rights and obligations the parties have agreed to under the specific terms of the contract, often referred to as the private law of the parties. An especially important source of contract law in the United States is the Uniform Commercial Code (U.C.C.), a body of uniform laws established by a non-governmental authority that has been adopted, usually with minor modification, in every U.S. jurisdiction. It generally regulates the sale of goods by merchants and is updated regularly to ensure the consistency of its interpretation and application across jurisdictions.

While a number of mandatory contract principles cannot be modified by the parties, e.g., the duty of good faith and fair dealing, the bulk of authority is generally considered to be default rules applicable only when the agreement is insufficient to determine the rights and obligations of the parties. While the freedom of contract approach has both strengths and weaknesses, the primary result is that greater weight is placed on interpretation of the agreement itself and the process by which it was reached than on the application of broad contract principles. The following discussion outlines general principles of contract law, starting with the four basic elements that are required for an enforceable contract: (i) the mutual assent of the parties; (ii) the presence of consideration; (iii) the capacity to contract; and (iv) legality of the contract terms.

#### 1. Mutual Assent

Contract law in the U.S. follows an 'objective' theory of assent where the external or objective appearance of the parties' intentions, as manifested by their actions, determines whether a valid contract is formed, not the actual or subjective intentions of the parties. Under this approach the opposing party must reasonably believe that the other party intended to be bound, thus, any manifestation of assent must be objectively reasonable.

#### 1.2 Offer and Acceptance

The manifestation of mutual assent is generally characterized by an offer and acceptance; however, mutual assent may be found without it. An 'offer' is the manifestation of a willingness to enter into a bargain that causes the offeree to reasonably believe his or her assent to the bargain will create an enforceable contract. Generally, an offer need not be in any particular form and can be implied from words or conduct. An offer is valid when received and may be accepted by the offeree for a reasonable time thereafter so long as it has not been revoked.

An 'acceptance' is defined as the action of the offeree which has the legal effect of making the offeror's promise enforceable and is valid only when made in accordance with the terms of the offer. An offer grants the offeree

contract law

private law of the parties  
non-governmental authority

interpretation  
application

mandatory  
duty of good faith  
default rules

freedom of contract

mutual assent  
consideration  
capacity to contract  
legality

assent

manifestation

offer, acceptance  
bargain  
offeree  
enforceable

to revoke  
legal effect

### I.B Contract Law in the United Kingdom

#### 5. Damages

The main remedy for breach of contract is money; an award of damages. Exceptionally, 'specific performance' (specific implement in Scotland) may be ordered. Such orders are discretionary, usually given only where money alone is not a sufficient remedy, e.g., because of serious hardship, or where the subject matter of the contract is unique or irreplaceable – as in contracts for the sale of land.

Case law provides that the basic purpose of an award of damages is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed". But not all losses are recoverable. The sum awarded depends not only on proof of loss, but in particular on the degree of 'remoteness' of loss or damage. The case law rule – from *Hadley v Baxendale*, 1854 – is that liability is imposed for losses "such as may fairly and reasonably be expected to arise naturally, that is, according to the usual course of things, from such a breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of it" – the usual sorts of losses in such cases, or the more specific kind of loss likely in this particular case.

Damages may exceptionally be given for injury to feelings, disappointment (such as for ruined weddings, holidays, etc), as well as for more usual physical or economic injuries, but generally not for trauma arising merely from involvement in legal proceedings.

#### 6. Mitigation

Unless the contract involves an obligation on the promisee to take reasonable care, i.e., not to be negligent, a wrongdoer's liability cannot be reduced by that party's contributory negligence. But in claims not involving repayment of a debt, a fixed sum, the innocent party has a duty to reduce – mitigate – his losses so far as reasonable in the circumstances. He will not be penalised if necessary and reasonable expenditure intended to restore his position in fact provides him with a 'betterment'.

#### 7. Liquidated Damages; Penalties

Liquidated damages are those sums of money specified in the contract as payable in the event of breach. If the contract is broken the specified sum will be awarded, but only if it is a genuine pre-estimate of loss, whatever the actual loss, and without the need to prove any loss at all. But if the sum is held to be a penalty, a punishment, the contract provision is void, and the claimant must then prove his losses.

#### 8. Other Remedies

Other possible remedies for breach of contract under English Law include a claim for an injunction (including a 'freezing' injunction, to prevent disposal of assets, which may be of a world-wide effect); quantum meruit ('as much as it is worth'), where the contract has been partly performed by the innocent party, or where no price has been agreed, or even where there is no

damages  
specific performance

remoteness

injury to feelings  
physical injury

mitigation  
negligent  
wrongdoer  
contributory negligence

liquidated damages

penalty  
claimant

remedy  
injunction

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**I.C Contract Law in Germany**

means that it is being assessed in the manner of how a third party would have understood the declaration.

Interpretation of declarations of intention must not be confused with supplementary interpretation or construction of a contract (*ergänzende Vertragsauslegung*). Supplementary interpretation or construction of a contract is a means of ascertaining the will or intention of the parties where there is a gap in the contract. The question is what the parties would agree upon in good faith after balancing their interests had they realised the gap.

**2.5 Severability clause**

In most contracts the so-called severability clause is of specific importance. By using this clause the parties agree that a void legal transaction shall be effective even without the void clause.

A severability clause regulates the opposite case of the statutory provision of Section 139 *BGB*. According to this provision, a legal transaction is void if any part of it is void, provided that it cannot be assumed that it would have been concluded even without the part that is void.

Ultimately a severability clause merely regulates the burden of proof. In the absence of such a clause the burden of proof (*Beweislast*) and of outlining the facts (*Darlegungslast*) lies with the party who wishes to maintain the partly void legal transaction. If a severability clause exists, the party relying on overall nullity of the contract has to set forth the facts and prove the same.

**2.6 GTC law**

General terms and conditions (GTC) as defined in Section 305 *et seq. BGB* are clauses that have been pre-worded for inclusion in a number of contracts which one party provides to another when concluding a contract. They must be regulations that are intended to be legally binding.

First of all, the GTC have to be incorporated into the contract. If the contracting party is a consumer, the incorporation is governed by Section 305 (2) *BGB*. According to that provision GTC become part of a contract if and when the user refers to them explicitly or, where no explicit reference can be made, by prominently displaying them at the place where the contract is concluded, and provides the other contracting party with a reasonable opportunity to take note of the contents of the same.

If the contracting party is a business, it is sufficient for the user to inform his or her contracting party about the GTC prior to conclusion of the contract and to give him or her an opportunity to take note of the same.

It is important to note that, pursuant to Section 305c *BGB*, surprising and ambiguous clauses do not become part of a contract. This refers, in particular, to the outer appearance of the contract.

Where GTC exist and have been effectively incorporated into the contract, the first thing to be checked is whether individual agreements have been made by and between the parties, because they would prevail over the GTC (Section 305b *BGB*).

If a dispute arises, the court will then check the contents as laid down in Sections 307 to 309 *BGB*. However, interpretation of the GTC will always prevail over the content check.

construction

gap

severability clause

effective

burden of proof

general terms and conditions

legally binding

consumer incorporation

to prevail

dispute

content check

**I.E Contract Law Cut & Paste**

**21. Severability/Partial Invalidity**

When one or more clauses of a contract become invalid or ineffective the question arises whether this may invalidate the entire contract. Usually the parties would like to avoid this undesired effect and either cut out ("sever out") such clause or clauses, as the case may be, and/or amend such clause(s) (above all covenants) to the extent necessary in order to make it/them valid and effective.

severability partial invalidity

**Sample A**

If any one or more of the provisions of this Contract should be found to be illegal or unenforceable, then all other provisions shall be given effect separately therefrom and shall not be affected thereby. If any covenants set forth are illegal or unenforceable, it is the intention of the parties that such covenants shall not thereby be terminated but shall be deemed amended to the extent necessary to render it valid and enforceable.

**Sample B**

If at any time any provision hereof is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity, nor enforceability of the remaining provisions hereof nor the legality, validity, or enforceability of such provision under the law of any jurisdiction shall in any way be affected or impaired thereby.

**Sample C**

If any of the provisions hereof is held to be invalid or unenforceable, it shall be considered severed from this agreement and shall not serve to invalidate the remaining provisions hereof.

**22. Counterparts**

Since multi-party contracts are often executed in several copies ("counterparts") the question may arise which of those actually constitutes the "contract" or whether it is necessary to produce all of those copies in order to evidence the "original contract".

counterpart

**Sample A**

This Contract may be executed in two or more counterparts, each of which shall be deemed an original and all of which shall evidence the same agreement, and it shall not be necessary in making proof of this agreement to produce or account for more than one such counterpart.

**Sample B**

This agreement has been executed in two (2) counterparts, each of which shall be deemed an original.

**23. Governing Law**

By means of this clause the parties agree on the applicable or governing law. The subject matter of a contract may limit the parties' choice just like the parties' respective jurisdiction.

governing law



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