In der Rechtspraxis scheint *Bork* nur stellenweise angekommen. Während das Bemühen der Kommission um eine wohlfahrtsorientierte und ökonomisch begründete Wettbewerbspolitik vom Ansatz der Chicago School beeinflusst sein dürfte, scheint *Bork*s Appell, das Kartellrecht an dem Ziel der Maximierung der Verbraucherwohlfahrt auszurichten, in den Gerichtssälen der EU bisweilen verhallt zu sein. Darüber hinaus wird deutlich, dass allein die Einführung der Möglichkeiten effizienzbegründeter Argumente häufig nicht ausreichen wird, um einer wohlfahrtsorientierten Wettbewerbspolitik gerecht zu werden.

Zur Bewältigung der mit der Ökonomisierung einhergehenden Herausforderungen kann *Bork*s Wirken als Erkenntnisquelle dienen. Das gilt weniger in Bezug auf konkrete Beurteilungen kartellrechtsrelevanter Verhaltensweisen. Diese Einschätzungen werden in ihrer Reinform ohnehin meist keine Unterstützung mehr finden. Es geht vielmehr um die Form und den Ansatz in „The Antitrust Paradox".

Wie *Bork* schon 1978 schrieb, ist das Kartellrecht eine „hybride"[114] Disziplin. Sowohl in den USA als auch in Europa geht man davon aus, dass das Kartellrecht Recht und Ökonomie vereint. Die Anforderungen beider Disziplinen müssen deswegen nicht zwangsläufig und in ihrer Gesamtheit umgesetzt werden. Das Kartellrecht muss einerseits den Anspruch haben, ökonomisch fundierte Antworten zu geben – so sollten auch die Post-Chicago Entwicklungen und der „more economic approach" verstanden werden – und andererseits für Rechtssicherheit sorgen, mithin juristisch „dogmatisierbar" sein. Entscheidend ist, dass Erkenntnisse der Ökonomie auch für Juristen verständlich und handhabbar sind. Hier liegt auch der Erfolg *Bork*s begründet: er hat ein klares Ziel formuliert und ein Konzept zugrunde gelegt, welches gerade auch für den Kartellrechtsanwender verständlich war.[115] Dass sich der Begriff der Verbraucherwohlfahrt – gewollt oder ungewollt – von seinem ökonomischen Ursprung losgelöst zu einem eigenen Standard im Kartellrecht entwickelt hat, kann man aufgrund des Vorgesagten durchaus auch als Garant (USA), bzw. Chance (EU) für die Weiterentwicklung des „hybriden" Rechtsgebiets begreifen.

114 *Bork*, (Fn. 1), S. 8.

115 Vgl. *Priest*, 31 Harv. J L & Pub Pol'y 455, 457 ff., 461 (2008).

Summary

Influences of an American antitrust scholar on the development of European competition law – a paradox? The works of Robert H. Bork (1927-2012) and the significance of "The Antitrust Paradox: A Policy at War with Itself" (New York 1978)

In December 2012 Robert H. Bork died at the age of 85. He was one of the most important antitrust scholars in the US. In 1978 he published his book "The Antitrust Paradox" which constitutes a milestone for the development of antitrust law. Representing the orthodox view of the Chicago School he came to the conclusion that the legislator had passed antitrust laws aiming solely at the maximization of consumer welfare. Starting from this premise Bork developed an economic approach that builds upon economics, namely price theory, and supports an efficiency focused application of antitrust law. In the following years and decades the US Supreme Court frequently cited Bork, declared the maximization of consumer welfare to be the goal of antitrust law and adopted his approach almost in its entirety.

Despite of natural obstacles to the influence on European competition law, such as different origins of competition policy as well as explicitly stated goals in the EU treaties and limiting legal structures, Bork's works are at least capable of the development of competition law in Europe. This is not paradox at all. However, the extent to which Bork has actually or potentially had an influence on the application of European competition law varies with regards to the areas of law and the institutions concerned. Whereas his works shimmer through when looking at the "more economic approach" adopted by The European Commission, the European courts exercise great control over too much economics and too speedy implementation of such. In this respect, Bork's works can display a great source of inspiration to meet the challenges of a "hybrid" discipline that connects economics and law.

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Arbitration Agreements between Parties of Unequal Bargaining Power – Balancing Exercises on Either Side of the Atlantic

For a long time arbitration has primarily been considered as a means of dispute resolution between business people of more or less equal bargaining power and sophistication who, in exercise of the party autonomy granted by the applicable arbitration law, deliberately agree to have their disputes resolved by arbitral tribunals instead of state courts. However, arbitration is, inside and outside the commercial realm, also used in situations in which the bargaining power and sophistication of the parties are far from being equal and in which the arbitration agreement is not based on a deliberate decision of all parties concerned. Where, as a result of these imbalances, one party is in a position to unilaterally impose the terms of the dispute resolution method on the other, this undermines one of the fundamental concepts on which arbitration is based, *i.e.,* the free will of the parties to have their dispute resolved by an arbitral tribunal instead of the otherwise competent state courts. This raises the question how this loss of legitimation can be compensated and weaker parties' fundamental procedural rights be safeguarded in arbitration.

In particular in the United States, the inclusion of arbitration clauses in employment, franchise, medical care, financial and all sorts of consumer contracts today is standard practice. So-

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called "mandatory arbitration" has become a major political issue and received increasing attention from public interest groups and legislative initiatives. The situation in the United States is in several regards due to particularities of the legal system which need to be taken into consideration when comparing the situation in the United States with that in other jurisdictions. However, also in jurisdictions such as Germany and other EU member states, arbitration between parties of unequal power, while still an exception, is on the rise.

The present article compares the approaches taken in the United States and in Germany in respect of arbitration between parties of unequal bargaining power and sophistication and, based on this comparison, examines how in these circumstances the fundamental rights of the parties can effectively be protected without sacrificing the advantages of arbitration.

I. The Issues Related to Arbitration Agreements between Parties of Unequal Power

Before turning to the respective approaches taken in the United Stated and Germany, this article first looks from a general perspective at what issues are typically related to arbitration agreements between parties of unequal bargaining power, in which areas such agreements are typically found and what are their risks and benefits.

1. Nature of Arbitration and the Impact of Imbalances of Power

Arbitration is a private dispute resolution mechanism which, as a rule, is based on a contract in which the parties agree to have their existing or future disputes finally resolved by an arbitral tribunal instead of the otherwise competent courts. According to most arbitration laws, the parties are to a large extent free to agree on the applicable procedure as long as certain minimum standards, in particular in respect of the right to be heard and the equal treatment of the parties, are respected. Instead of negotiating all details of the arbitral procedure themselves, the parties however mostly refer in their contracts to pre-formulated arbitration rules. The award rendered by the arbitral tribunal at the end of the arbitral proceedings, in most jurisdictions, as is the case in the United States and Germany, has the same force as a judgment rendered by a state court and is subject to only very limited judicial review.

In an ideal bargaining situation, a party makes a concession always in consideration of a benefit which it receives from the other party on the basis of the contract. As a result, the contract mechanism ensures that the terms of the contract reflect, to the extent possible, a compromise of the interests of all parties. In contrast thereto, statutory provisions, due to their general scope of application, also apply to situations which the legislator did not have in mind when enacting them. Therefore, contracts, at least in principle, are better suited to regulate the relationships between private parties than statutory provisions.

However, where the parties' respective bargaining powers strongly differ, the contractual mechanism fails. In this case, the stronger party is in a position to unilaterally impose legal provisions on the weaker party to the stronger party's own benefit. Party autonomy and the freedom to create private legal provisions can turn into the opposite for the weaker party. In case of arbitration agreements, this is particularly problematic because these agreements have a direct impact on the parties' right to access to justice.[1]

1 *See Niedermaier*, Schieds- und Schiedsverfahrensvereinbarungen in strukturellen Ungleichgewichtslagen, 2013, pp. 53 *et seq*.

2. Typical Imbalances of Bargaining Power

Power is a multifaceted phenomenon. Important aspects are the financial capacity, the available information and the intellectual capacity of a person. In addition, social and emotional aspects can play an important role. Furthermore, most people assume different roles when interacting with their environment. The balances of power may change from one situation to another. The complex and dynamic nature of power makes it extremely difficult to categorize imbalances of power.

Despite these difficulties, over the course of time, types of imbalances in power have evolved in respect of which there is more or less agreement that one party is typically stronger than the other. This is, for example, widely accepted for consumers *vis-à-vis* entrepreneurs, employees *vis-à-vis* employers, franchisees *vis-à-vis* franchisors, private investors *vis-à-vis* providers of financial services and athletes *vis-à-vis* sports organizations. Another type which is not based on the status of the parties to the transaction, but on the situation in which the contract is concluded, is the use of pre-formulated contract terms. In this case, the user of those terms benefits from the absence of negotiations and also from a better informational background.[2]

Imbalances of power exist in all fields of law and, to the extent that arbitration is not excluded by the applicable law, this is also true for arbitration. Arbitration agreements are regularly contained in franchise and distribution contracts, private investment contracts and in athlete declarations in the field of organized sports. The admissibility of arbitration agreements in consumer and employment contracts varies among the different jurisdictions.

3. Risks and Benefits

In case of imbalances of bargaining power, there is a risk that, as is the case with any contract, the stronger party one-sidedly designs the arbitral procedure to its own benefit. As *Justice Kagan* recently observed, the possibilities for stronger parties in this regard are endless.[3] The risks for weaker parties can be roughly separated into two categories.

On the one hand, the inclusion of an arbitration clause may, irrespective of the applicable law, increase the barriers for the other party to pursue its rights under the contract. The most important reason for this is the direct and indirect costs related to arbitration. As a private dispute resolution mechanism, arbitration must be fully financed by the parties. Contrary to the state court system, there is normally no cross-subsidy of small claims. Furthermore, in many jurisdictions, as is the case in the United States and Germany, legal aid is not available in arbitration. These facts alone may deter weaker parties from pursuing their rights in arbitration. The situation may become even more burdensome if the arbitration agreement provides that each party has to bear its own costs or that the hearing is to take place at a remote place, eventually in a foreign country with a different language and legal culture.

On the other hand, the stronger party may systematically utilize arbitration so as to achieve results which cannot be obtained in the competent state courts. This is possible where the arbitration law is more lenient toward the parties' agreements than the law applicable in court proceedings, for example, in respect of the choice of law, the choice of the arbitrators or the availability of certain procedural rights (*e.g.* collective redress or discovery).

2 *See id.*, pp. 62 *et seq*.

3 *See* the dissenting opinion of Justice *Kagan* in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2314 (2013).

As regards the choice of arbitrators, it has been stated that there is a "repeat player bias" among arbitrators. The underlying idea is that the stronger party, in most cases a business company or administrative body, is regularly involved in arbitrations. Arbitrators, it is said, are inclined to decide in favor of such "repeat players" in order to increase their chances of being re-nominated. However, an empirical study of AAA consumer arbitrations by the *Searle Civil Justice Institute of the Northwestern University School of Law* came to the conclusion that there is no evidence that arbitration suffers from a systemic flaw in situations of disparate bargaining power.[4]

Although arbitration agreements have a direct impact on fundamental procedural rights and, in case of imbalances of bargaining power, involve risks for weaker parties, it does not follow that arbitration is ill-suited *per se*. Due to its flexible nature, arbitration can provide weaker parties with significant benefits which the rigid state court system cannot offer.

Adapting the procedure to the particular needs of a contractual relationship can increase the time and cost efficiency of the proceedings. At the same time it can decrease the formalities which are normally inherent in legal proceedings. This can help to lower the barriers for weaker parties to pursue their legal rights. Accordingly, arbitration mechanisms have been successfully implemented for consumer disputes, for example, in Belgium and Portugal.[5] Furthermore, despite the valid concerns which have been raised against it, sports arbitration is a prime example of the benefits which arbitration can provide outside the commercial realm. A uniform legal framework, and the level playing field associated with it, would not be possible without a central arbitral institution and highly specialized arbitral tribunals which resolve disputes pursuant to the applicable rules, if need be, within hours rather than days.

In view of these benefits, also weaker parties may have a vital interest in resolving their disputes by arbitration. The primary question thus should not be whether to allow arbitration in such situations or not, but how arbitration needs to be designed in order to protect the weaker parties' interests. The following two sections provide an overview of how courts in the United States and Germany deal with arbitration agreements between parties of unequal power.

4 The Preliminary Report on Consumer Arbitration before the AAA of the Northwestern Searle Civil Justice Institute is available at: http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_010205&RevisionSelectionMethod=LatestReleased. There are several factors which speak against a systemic repeat player bias, most importantly the need for arbitrators to build a reputation of rendering predictable awards withstanding scrutiny in annulment and enforcement proceedings by applying the law as it stands. Nevertheless, in the recent past there have been instances in which doubts were raised as to the independence of the arbitral institution appointing the arbitrators. One example which has received wide-spread attention in the United States and beyond is the undisclosed relationship between the National Arbitration Forum (NAF), an arbitral institution based in Minnesota, and credit card companies leading to investigations by the Minnesota Attorney General. The case was settled upon the NAF's declaration to stop accepting debt collection and credit card arbitrations. *See Turmoil in Arbitration Empire Upends Credit Card Disputes*, Wall Street Journal, 15 October 2009, as well as http://oversight.house.gov/hearing/arbitration-or-arbitrary-the-misuse-of-mandatory-arbitration-to-collect-consumer-debts. Repeated concerns have also been raised as to the arbitration system of the Court of Arbitration for Sport (CAS) which *inter alia* provides for a closed list of arbitrators, most recently in the *Pechstein* case involving German speed skater *Claudia Pechstein*. *See Prozess wegen Dopingsperre Pechstein muss warten*, Süddeutsche Zeitung, 25 September 2013.

5 In Belgium, the *Geschillencommissie Reizen/Commission de Litiges Voyages* administers arbitrations between travelers and travel agencies. In Portugal, the *Centro de Arbitragem de Conflitos de Consumo de Lisboa* administers arbitrations between consumers and businesses. Both institutions have received positive ratings in different studies commissioned by the EU. See *Niedermaier*, *supra*, pp. 88 *et seq*.

II. United States

In the United States, arbitration is to a large extent regulated by federal law. The Federal Arbitration Act (FAA), which was enacted in 1925 and has not since been amended, applies where interstate commerce or commerce with foreign nations is concerned. The U.S. Supreme Court construes the FAA as applying in federal courts as well as in state courts.[6] Furthermore, while § 1 of the FAA provides that the statute does not apply to "*contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce*", the U.S. Supreme Court strictly limits this exception to transportation workers.[7] The FAA therefore is applicable to all employment outside interstate transportation as well as to consumer disputes. Since U.S. courts in general readily accept a connection to interstate commerce, the arbitration law of the individual states, which in many states is based on the Revised Uniform Arbitration Act (RUAA), plays a relatively minor role. According to the U.S. Supreme Court, "*Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.*"[8] This national policy favoring arbitration had led to a wide-spread proliferation in the United States.[9] This in turn has sparked a major political debate in the United States on the legitimacy of "mandatory arbitration". However, legislative projects to modify the FAA and to regulate the use of arbitration have so far been unsuccessful.

It will be shown below, which routes, in the absence of statutory limitations, U.S. courts have chosen to protect the fundamental rights of weaker parties under the existing law and to what extent these approaches have been sanctioned by the U.S. Supreme Court.

1. Arbitrability

One tool to protect weaker parties from the presumed risks of arbitration is to exclude from arbitration disputes which typically concern fundamental rights. In most jurisdictions, this is referred to as a limitation of "objective arbitrability". Another way is to deny access to arbitration to certain groups of persons considered as not sufficiently sophisticated. In most jurisdictions, reference in this regard is made to a limitation of "subjective arbitrability".

The term "arbitrability" is also known and used in the United States, however with a different connotation. Arbitrability in the United States relates to the question whether the parties have submitted a particular dispute to arbitration. It thus not only comprises the questions of objective and subjective arbitrability in its narrow sense, but also among others the validity and enforceability of the arbitration agreement. Arbitrability in the United States is closely related to the question who, the courts or the arbitral tribunal, decides the so-called "gateway matter" whether the arbitral tribunal has jurisdiction or not. In the absence of a clear and unmistakable agreement by the parties, the courts decide on this matter.[10] The procedural remedy normally is a motion to compel arbitration pursuant to § 4 FAA.

6 *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1985).

7 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

8 *Southland Corp. v. Keating*, 465 U.S. 1, 10.

9 *Stipanowich*, 92 Nw. U. L. Rev. 1, 3 ("*In the new era, arbitration is suddenly everywhere. A veritable surrogate for the public justice system, it touches the lives of many persons who, because of their status as investors, employees, franchisees, consumers of medical care, homeowners, and signatories to standardized contracts, are bound to private processes traditionally employed by commercial parties.*").

10 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83.

Leaving these differences in terminology aside, there is a series of U.S. Supreme Court decisions dealing with matters of "objective arbitrability" in which the Court continuously expanded the scope of disputes which are to be considered as arbitrable.

In *Wilko v. Swan*[11], which concerned a purely domestic matter, the U.S. Supreme Court ruled that, considering the legislator's intention to protect private investors, claims arising out of the Securities Act of 1933 could not be submitted to arbitration.[12] However, some 20 years later, the U.S. Supreme Court held in *Scherk v. Alberto-Culver Company*[13], which concerned claims under the Securities Exchange Act of 1934, that the dispute could be submitted to arbitration. It distinguished this case from *Wilko* mainly on the basis of the "*truly international*" aspects of the case.[14]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[15], which dealt with cross-claims arising from an international distribution agreement, the U.S. Supreme Court decided that the antitrust claims raised in the counterclaim under the Sherman Act could be submitted to arbitration, although the arbitration clause in the distribution agreement provided for arbitration in Japan and the distribution agreement was subject to Swiss law.[16] Referring to *Scherk*, the Court held that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes required that arbitration agreements be enforced even if the result in a domestic context would be different.[17] The Court albeit added that, in view of the public policy exception contained in the New York Convention, U.S. courts, having permitted the arbitration to go forward, would have an opportunity at the enforcement stage to ensure that the legitimate interests in the enforcement of the antitrust laws have been addressed.[18]

In Shearson/American Express, Inc. v. McMahon[19], the U.S. Supreme Court extended its arbitration friendly approach to domestic cases. Invoking the *"federal policy favoring arbitration",* it held that claims based on the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act could be submitted to arbitration and that the burden was on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.[20] It limited the reasoning of *Wilko* so as to exclude the enforceability of an arbitration agreement only where *"arbitration was judged inadequate to enforce the statutory rights"* under the Securities Act 1933.[21] Referring *inter alia* to *Mitsubishi,* the Court stated that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. In *Rodriguez de Quijas v. Shearson American Express, Inc.*[22], the Court expressly overruled *Wilko* in order to do away with the inconsistencies with *McMahon.*

Pursuant to the interpretation given by the U.S. Supreme Court, the FAA does not contain any implied limitation of the "arbitrability" of statutory rights. Rather, the party opposing arbitration must present "*well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'*".[23] This may in particular be the case where a party demonstrates that the arbitration agreement operates "*as a prospective waiver of a party's right to pursue statutory remedies.*"[24]

This development has been heavily criticized by various interest groups. With the different versions of the Arbitration Fairness Act (AFA) which have been introduced into Congress between 2007 and 2013, repeated attempts have been made to amend the FAA and limit the scope of disputes capable of being submitted to arbitration. So far, however, these legislative initiatives have not been successful. The current version of the bill, the AFA 2013, provides for the following limitations:

> "*Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.*"[25]

It is to be seen whether this version will be successful. For the time being, claims based on statutory rights are to be considered as "arbitrable" unless the arbitration agreement is unenforceable on grounds of revocation of any contract or Congress has made it sufficiently clear that certain disputes may not be submitted to arbitration. The latter is the case with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) which excludes pre-dispute arbitration agreements in respect of certain mortgage and credit contracts and excludes the arbitrability of certain disputes related to whistle-blowing.[26]

2. Form Requirements

For an arbitration agreement to be "*valid, irrevocable, and enforceable*", § 2 of the FAA requires the agreement to be in writing. The purpose of the writing requirement is exclusively evidential in nature and not intended to protect weaker parties.

In contrast thereto, some state laws contain highly detailed form requirements for arbitration agreements which aim at protecting weaker parties by directing their attention to the arbitration clause. To this extent, Montana law provided that an arbitration clause was unenforceable unless the contract contained on the first page a notice typed in underlined capital letters that the contract is subject to arbitration.[27]

The Supreme Court of Montana originally had held that this form requirement was in conformity with the FAA because it was not directed against arbitration agreements.[28] In a special concurring opinion *Justice Trieweiler* stated:

11 *Wilko v. Swan*, 346 U.S. 427 (1953).
12 *Id. at* 435 *et seq*.
13 *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974).
14 *Id.* at 515 *et seq*.
15 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 605 (1985).
16 *Id.* at 625.
17 *Id.* at 629.
18 *Id.* at 637.
19 *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987).
20 *Id.* at *225 et seq.*
21 *Id.* at *228 et seq.*
22 *Rodriguez de Quijas v. Shearson American Express, Inc.,* 490 U.S. 477 (1989).
23 *Id.* at 483 citing *Mitsubishi.*
24 Most recently, *American Express Company v. Italian Restaurants*, 133 S.Ct. 2304, 2310 (2013), citing *Mitsubishi.*
25 S. 878 (113th Cong. 2013-2014); H.R.1944 (113th Cong. 2013-2014).
26 Most recently, the newly created Consumer Financial Protection Bureau (CFBP) released a study titled „*Arbitration Study Preliminary Results effectuated on the basis of § 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act)*". *See* also *Niedermaier*, *supra*, pp. 169 *et seq*.
27 Mont. Code Ann. § 27-5-114(4) (1995). Similarly S. C. Code Ann. § 15-48-10(a) (2009) provides: „*Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*"
28 *Casarotto v. Lombardi*, 886 P.2d 931(Mont. 1994).

> *"Furthermore, if the Federal Arbitration Act is to be interpreted as broadly as some of the decisions from our federal courts would suggest, then it presents a serious issue regarding separation of powers. What these interpretations do, in effect, is permit a few major corporations to draft contracts regarding their relationship with others that immunizes (sic) them from accountability under the laws of the states where they do business, and by the courts in those states."*[29]

In *Doctor's Associates, Inc. v. Casarotto*[30], the U.S. Supreme Court reversed the decision and decided that form requirements of the kind contained in Montana law violated § 2 of the FAA. According to the Court, such form requirements discriminate against arbitration agreements and thus do not apply under the FAA.

Even though the Supreme Court of Montana first upheld its decision on remand,[31] it is now settled law that, unless federal law provides otherwise, state law submitting arbitration agreements to form requirements not applicable to contracts in general do not apply under the FAA.

3. Review of Content

The U.S. Supreme Court strictly adheres to the principle that arbitration agreements are "*placed on the same footing as other contracts*".[32] In order to find tools adequately protecting weaker parties against abusive arbitration agreements, courts therefore had to look within the strict limits of general contract law. Their search has often led them to the doctrine of unconscionability, a contract law doctrine which before was rarely applied by courts.[33] Section 208 of the Restatement (Second) of Contracts provides in respect of unconscionable contracts or terms:

> "*If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.*"

Section 2-302 of the Uniform Commercial Code (UCC) contains a similar provision. However, neither the Restatement (Second) of Contracts nor the UCC contains a definition of the term "unconscionable".

Generally, a distinction is made between procedural and substantive unconscionability. While the latter aspect relates to the content of the contract and looks at whether its terms are "*one-sided or overly harsh*",[34] the former concerns the circumstances of the contract conclusion, in particular whether the contract is a boilerplate contract or was concluded on a take-it-or-leave-it basis and is thus a result of surprise or oppression due to unequal bargaining power.[35] Most courts require the presence of both aspects and take a sliding scale approach, pursuant to which in case of clear substantive unconscionability, a relatively low degree of procedural unconscionability suffices to render the contract or its relevant part unenforceable. However the fact that the parties are of unequal bargaining power or that the contract was concluded on a take-it-or-leave-it basis as such is not sufficient to render it unenforceable.

The U.S. Supreme Court has sanctioned this approach, but made it abundantly clear that the doctrine of unconscionability may not be used to discriminate against arbitration agreements as compared to other contracts.[36] Against this background, state and federal courts have started developing case law setting limits for arbitration agreements between parties of unequal bargaining power. Besides the doctrine of unconscionability, also other state law concepts such as public policy are applied. In practice, the differences between these concepts and the doctrine of unconscionability seem to be minor.

The following provides an overview of some aspects which recently have caught the U.S. Supreme Court's attention.[37]

a) Costs

In *Green Tree Financial Corp. v. Randolph*[38], the U.S. Supreme Court decided that an arbitration agreement may be held unenforceable on the basis that it makes arbitration "*prohibitively expensive*".[39] Referring to *McMahon*, the Court held that the burden of proof for the "*likelihood*" of prohibitive costs lies with the party opposing arbitration. Since the defendant had merely stated that arbitration involved a risk of prohibitive costs and the evidence offered was too speculative, the Court could leave open the question when precisely the costs of arbitration are to be considered prohibitive. One way to read the decision is that the evidentiary burden falls upon the user of the arbitration clause once the party opposing arbitration has shown that the likelihood of prohibitive costs exists.

State and federal courts have taken different approaches in answering the question at which point the costs of arbitration are to be considered as prohibitive. Whereas some decisions compare the costs of arbitration with the costs of litigation, others pursue an isolated analysis taking into consideration the financial capacity of the party opposing arbitration.[40]

b) Class Arbitration (Waivers)

A question closely related to (prohibitive) costs of arbitration is to what extent the user of an arbitration clause can exclude otherwise available class-wide relief. In this regard it is to be noted that, originally, arbitration agreements were considered to automatically exclude such judicial remedy, because they would only bind the parties to the respective agreements. In

29 *Id.* at 939 *et seq*. (Trieweiler, J., concurring).
30 *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 679 (1996).
31 *Casarotto v. Lombardi,* 901 P.2d 596, 598 (Mont. 1995), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681 (1996).
32 *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225 et seq.*
33 See *Niedermaier*, *supra*, pp. 203 *et seq*.
34 *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). *See also* M*endez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 602 (Wash. App. Div. 2002); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 *et seq*. (9th Cir. 2006).
35 *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746. *See also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 602 ("*Generally, an adhesion contract is prepared on standard printed form, is prepared by one party and submitted to the other on a take it or leave it basis, and there is no true equality of bargaining power between the parties.*").
36 *Perry v. Thomas*, 482 U.S. 483, 492 Fn. 9 (1987) ("A *court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.*"); A*llied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S., 265 (1995) ("*What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.*").
37 For more details *see Niedermaier*, *supra*, pp. 204 *et seq*.
38 *Green Tree Financial Corp. v. Randolph*, 531 U.S. 90 (2000).
39 *Id.* at 92.
40 *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 f. (6th Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126, 1151, on the one hand, and *Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 895; *Kristian v. Comcast Corp.*, 446 F.3d 25, 52 f. (1st Cir. 2006), on the other hand. *See* also *Niedermaier*, *supra*, pp. 208 *et seq*.

Green Tree Financial Corp. v. Bazzle[41], the U.S. Supreme Court held that, in principle, an arbitration agreement may be construed as allowing for class-wide relief. The Court decided that pursuant to the terms of the agreement under consideration it was for the arbitrator to decide whether the arbitration agreement provided for such relief. Subsequently, arbitral institutions in the United States issued rules particularly designed for arbitration. Later, in *Stolt Nielsen v. AnimalFeeds International Corp.*[42], the U.S. Supreme Court clarified that a party may not be compelled to be a party to class arbitration absent an agreement to participate. In the meantime many companies which had used arbitration clauses to escape the risks related to class actions had started supplementing their arbitration agreements by adding express class arbitration waivers in the contracts. The enforceability of such class arbitration waivers has been one of the most contentious topics of U.S. arbitration law in recent times and subject to several decisions of the U.S. Supreme Court. In *AT&T Mobility LLC v. Concepcion*[43], the U.S. Supreme Court held that the FAA pre-empted a state law barring enforcement of class-arbitration waivers. The Court held that federal law does not ensure non-waivable access to class-wide relief. The Court however remained silent on the implications regarding the costs of arbitration and the circumstances under which an individual claim may render the arbitration agreement unenforceable.

In *American Express Company v. Italian Colors Restaurants*[44], the U.S. Supreme Court had to deal with whether the FAA permitted state law to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim. The respondent, the owner of a small restaurant, who opposed proceeding in arbitration contended that enforcing the class arbitration waiver would prevent the effective vindication of its federal statutory rights due to the costs related to individual claims as compared to class-wide relief. In respect of costs, the majority of the Court merely noted, without further dealing with *Randolph*, that the effective vindication exception "*would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.*" However, the majority of the Court stressed that "[t]*he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.*"[45] In a thoroughly reasoned dissenting opinion, Justice Kagan stated that the judgment constitutes a "*betrayal of our precedents, and of federal statutes like the antitrust laws.*"[46]

For the meantime, the U.S. Supreme Court seems to have finally decided that class arbitration waivers are permissible. It is however still unclear when the costs related to an individual arbitration are to be considered as being "*prohibitive*" or "*making access to the forum impracticable*".

c) Place of Hearing

Considering the extensive territory of the United States, it is surprising that relatively few cases deal with the place of the hearing.

In *M/S Bremen v. Zapata Off-Shore Co.*[47], which concerned a forum selection clause in favor of the London Court of Justice, the U.S. Supreme Court held that a freely negotiated forum selection clause was to be enforced unless the party opposing it *"clearly show(s) that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."*[48]

This ruling is also applied to arbitration agreements which in the United States are considered as a form of forum selection clauses.[49] In general, U.S. courts have been reluctant to invalidate an arbitration agreement on the basis that the hearing place is unreasonably inconvenient.

d) Legal Consequences

To date, no comprehensive approach as to the review of arbitration agreements between parties of unequal bargaining power and the applicable minimum standards has emerged. The same is true for the legal consequences of unconscionability, *i.e.,* whether it leads to the unenforceability of the entire arbitration agreement or only of the unconscionable term. However, in particular where only one term of the arbitration agreement is unconscionable, U.S. courts have upheld arbitration agreements by referring the parties to arbitration with a direction to the arbitral tribunal not to apply the unconscionable term.[50]

III. Germany

The German arbitration law is contained in §§ 1025 *et seq*. of the German Code of Civil Procedure (ZPO). It was fully revised in 1998 and modelled after the UNCITRAL Model Law on International Commercial Arbitration. The purpose of the revision was to adapt the law to the particular needs of international commerce and to promote Germany as a place of arbitration. The scope of application is however not limited to international or to commercial disputes. The law contains only a few mandatory provisions and thus to a large extent allows the parties to modify the rules according to their individual needs.

1. Arbitrability

In contrast to the United States, arbitrability in Germany is subject to several limitations. These limitations however relate to discrete types of disputes and groups of persons and thus do not follow a coherent concept.

As regards objective arbitrability, § 1030(1)1 ZPO provides that any claim involving an economic interest is arbitrable in principle, whereas an arbitration agreement concerning claims not involving an economic interest, under § 1030(1)2 ZPO, has legal effect only to the extent that the parties are entitled to conclude a settlement on the issue in dispute. Furthermore, pursuant to § 1030(2) ZPO, disputes on the existence of a lease of residential accommodation within Germany cannot be submitted to arbitration. The same to a large extent applies to employment disputes.

As regards subjective arbitrability, in particular the capacity of private investors to submit to arbitration before a dispute has arisen is limited pursuant to § 37h of the Securities Trading Act (WpHG). Furthermore, the capacity of judicial trustees to enter into arbitration agreements on behalf of the persons for whom they are acting is limited by law.[51]

While some disputes typically involving weaker parties such as lessees, employees or private investors cannot be submitted to arbitration, the arbitrability of disputes involving, for

41 *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 445 (2003).
42 *Stolt Nielsen v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010).
43 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011).
44 *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).
45 *Id.* at 2311.
46 *Id.* at 2313 (Kagan, J., dissenting).
47 *M/S Bremen v. Zapata Off-Shore Co*, 407 U.S. 1 (1972).
48 *Id.* at 10.
49 *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 519.
50 *See Niedermaier*, *supra*, pp. 223 *et seq*.
51 *See* § 1822 Nr. 12 BGB; § 1908i(1) BGB; § 1915(1) BGB.

example, consumers, franchisees or athletes whose bargaining power in general can be considered as equally weak is not restricted. The provisions on arbitrability therefore are not comprehensive and require supplementation by other tools.

2. Form Requirements

Like § 2 of the FAA, § 1031 ZPO contains a requirement of written form for evidential purposes. However, in addition, § 1031(5) ZPO provides that arbitration agreements to which a consumer is a party must be contained in a separate document which has been personally signed by the parties. With this provision, the German legislator intended to protect consumers from unknowingly forfeiting their constitutional right to access to court.[52]

This approach is problematic in two regards. On the one hand, it presupposes that the consumer understands what he or she is submitting to when signing the arbitration agreement. On the other hand, it assumes that the consumer has an alternative choice which may not be the case where, for example, an entire industry sector adopts standard terms.

Irrespective of the above, the form requirement applies only to consumers. Entrepreneurs whose bargaining position is comparably weak, as may be the case with franchisees, distributors or athletes, are not covered by § 1031(5) ZPO. Furthermore, since Germany has not made a reservation in respect of the applicability of the New York Convention to matters outside the commercial realm, § 1031(5) ZPO in international cases is derogated by Article II of the New York Convention. All in all, the protection following from § 1031(5) ZPO must be considered as rather weak.

3. Review of Content

Arbitration agreements are subject to a review of their content also under German law.[53] In the case of individually negotiated contracts, the threshold for such review is high. Pursuant to § 138(1) of the German Civil Code (BGB), an agreement is invalid if it is contrary to public policy. Standard contract terms, on the other hand, are ineffective pursuant to § 307(1) BGB if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract.[54] Considering that most arbitration agreements with weaker parties have been formulated by the stronger party, the review pursuant to §§ 305 *et seq*. BGB plays an important role in respect of the protection of weaker parties.[55]

a) Influence of EU Law

The review of standard contract terms under German law is strongly influenced by EU law, notably the directive on unfair terms in consumer contracts (Directive 93/13/EC).[56] The EU member states, notably through their courts, must give effect to Directive 93/13/EC. They receive general directions by the European Court of Justice in respect of the interpretation of the directive. However, the Court does not itself assess whether an individual clause is to be considered as unfair in the individual circumstances.[57] Since, in Germany, the national law on standard contracts is not strictly limited to consumer contracts, Directive 93/13/EC has an indirect influence on the development of the case law on standard terms in the commercial realm.

Pursuant to Article 3(1) of Directive 93/13/EC, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The directive contains an indicative and non-exhaustive Annex to Article 3. The Annex *inter alia* lists agreements "*requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions*" in Nr. 1 lit. q. According to the European Court of Justice, this provision does not exclude standard arbitration clauses in general.[58] Rather, it depends on the content of the arbitration agreement whether its terms are to be considered as unfair.

In a series of recent decisions, the European Court of Justice has held that the review of standard agreements under Directive 93/13/EC forms part of public policy and that the national courts must investigate on their own motion whether the terms of a given agreement are unfair.[59] By vesting Directive 93/13/EC with the status of public policy, the European Court of Justice has significantly increased the protection of consumers by judicial review without having to interfere with the principle of the national procedural autonomy of the EU member states.[60]

As a result of the approach taken by the European Court of Justice, arbitral awards against consumers cannot be enforced in a EU member state if the arbitration agreement is unfair within the meaning of Article 3 of Directive 93/13/EC and the national law, as the case is in almost all jurisdictions, contains a public policy exception, irrespective of whether the consumer participated in the arbitral proceedings without invoking the invalidity of the arbitration agreement. As a further consequence of these decisions, if the arbitral award was rendered in the EU, in case of violation of Article 3 of Directive 93/13/EC annulment can be sought not only on the basis of the absence of a valid arbitration agreement, but also for violation of public policy.

b) Costs

Neither the German Federal Supreme Court nor the European Court of Justice so far has directly addressed the costs of arbitration in the context of Directive 93/13/EC. Considering the wealth of decisions in the United States dealing with the costs of arbitration in the context of the doctrine of unconscionability, this is at first sight surprising.

One reason may be that the German Federal Supreme Court considers the lack of funds of a party as a matter of unen-

52 *See also* BGH, Judgment of 22 March 2011 − XI ZR 197/08.

53 The German Federal Supreme Court so far could leave this question open. However, arbitration agreements are regularly submitted to review by German courts of lower instances.

54 Pursuant to § 305(1)1 BGB, (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. Pursuant to § 310(3) Nr. 2 BGB, pre-formulated contract terms with consumers are also subject to review if they are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their content.

55 *See Niedermaier*, *supra*, p. 237 *et seq*.

56 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Germany has implemented the directive by amending the national law on standard terms which also applies to B2B-contracts.

57 ECJ, Judgment of 1 April 2004, C-237/02 – *Freiburger Kommunalbauten*.

58 The provision has not been included into §§ 308 and 309 BGB which contain lists of (potentially) unfair terms, but must be taken into consideration when applying the general provision § 307 BGB.

59 ECJ, Judgment of 26 October 2006, C-168/05 – *Mostaza Claro*; ECJ, Judgment of 4 June 2009, C-243/08 – *Pannon*; ECJ, Judgment of 6. October 2009, C-40/08 – *Asturcom*; ECJ, Judgment of 9 November 2010 - C-137/08 – *Ferenc Schneider*; ECJ, Judgment of 14 June 2012, C-618/10 – *Banco Español de Crédito*; ECJ, Judgment of 21 February 2013 – C-472/11 – *Banif Plus Bank*.

60 From a dogmatic perspective, the approach taken by the European Court of Justice is highly problematic, because it infringes on the individual national concepts of public policy of the EU member states. *See Niedermaier*, *supra*, pp. 339 *et seq*.

forceability of the arbitration agreement pursuant to § 1032(1) ZPO.[61] Where a party cannot afford to fund arbitral proceedings and the other party does not offer to pay the impecunious party's share, the arbitration agreement becomes "*incapable of being performed*" within the meaning of § 1032(1) ZPO. The parties can then refer the case to court where, in contrast to arbitration, the impecunious party can apply for legal aid.[62]

However, there are situations in which, while a party can afford the costs of arbitration in principle, the proceedings are so expensive that they must be considered as unreasonably disadvantageous. These cases have to be dealt with pursuant to §§ 305 *et seq*. BGB.[63] So far, there is no guideline as to when the costs constitute an unjustified disadvantage within the meaning of § 307 BGB.

c) Place of Hearing

As regards the place of hearing, the German Federal Supreme Court decided that the use of a standard arbitration clause providing for arbitration in the Netherlands by a Dutch company in a contract with a German party was justified by the legitimate interests of the user and therefore did not constitute an unreasonable disadvantage to the other party.[64] According to the decisions of several higher regional courts, the situation is different where the user of the arbitration clause lacks a legitimate interest which may in particular be the case if the clause provides for a remote hearing place to which neither party has a close connection.[65]

In respect of consumer contracts, the European Court of Justice held in *Oceano Grupo*[66] that where a jurisdiction clause confers exclusive jurisdiction on a court in the territorial jurisdiction in which the seller or supplier has its principal place of business, it must be regarded as unfair within the meaning of Article 3 of Directive 93/13/EC because it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Court explained that a term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile and thus may make it difficult for him to enter an appearance. In the case of small claims, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defense.[67] While in *Mostaza Claro*[68] and *Asturcom*[69], which both concerned arbitration clauses providing for a hearing at the seat of the supplier, the European Court of Justice did not itself assess the fairness of the arbitration clauses, it impliedly approved the decisions by the Spanish courts which had considered these arbitration clauses to be unfair.

Hence, it seems to be settled that in consumer contracts, arbitration clauses may not provide for a hearing at the seat of the seller or supplier. In commercial contracts, the user of an arbitration clause can freely choose the place of hearing to the extent that the choice is based on legitimate interests. What constitutes a legitimate interest remains unclear.

d) Legal Consequences

If a term is considered as unreasonably disadvantageous pursuant to § 307 BGB, this need not necessarily lead to the invalidation of the entire arbitration clause. This follows from § 306(1) BGB which provides that if standard terms are ineffective in whole or in part, the remainder of the contract remains in effect. In many cases, especially if the arbitration agreement is reviewed at the outset of the arbitration,[70] the agreement may be upheld without the unreasonably disadvantageous term. Instead of the invalid term the statutory default rule applies or, where no such specific provision exists the gap is to be closed by the arbitral tribunal pursuant to its general discretion in handling the arbitration (§ 306(2) BGB).[71] The invalidation of the entire arbitration agreement is justified if upholding the agreement would constitute an unreasonable hardship for one party (§ 306(3) BGB).

IV. Comparison between the United States and Germany

The above overview on U.S. and German law allows for some comparative observations regarding how situations of unequal bargaining power are addressed in the respective jurisdictions.

1. Arbitrability

The most notable difference between U.S. and German arbitration law exists with respect to arbitrability. While in the United States very few limitations exist in respect of arbitrability, German law provides for several specific limitations of subjective and objective arbitrability.

In general, the inflexible exclusion of certain disputes or even certain persons from arbitration is expression of a paternalistic approach. It may run counter to the very interests of the parties intended to be protected. It should be considered as *ultima ratio* and applied only where no alternative tools for effective protection are available. The very liberal approach taken by the U.S. Supreme Court, in turn, encourages initiatives militating a restrictive approach to arbitrability. As can be seen in Germany, specific restrictions of arbitrability cannot be considered as a comprehensive remedy to the problems caused by arbitration agreements between parties of unequal bargaining power.

2. Form Requirements

As regards form requirements, it seems to be fair to state that they do not play an important role regarding the protection of weaker parties in the United States or Germany and can rather be considered as a supplementary tool. Overly restrictive form requirements run the risk of increasing transaction costs without providing the parties the protection for which they have been enacted.

61 BGH, Judgment of 14 September 2000 - III ZR 33/00 (*Plumber* case).
62 *Cf.* OLG Köln, Order of 5 June 2013 - 18 W 32/13.
63 *See* LG Dortmund, Judgment of 29 May 2007 - 23 S 5/07.
64 BGH, Order of 26 June1986 - III ZR 200/85.
65 *See* the decisions by several German higher regional courts concerning arbitration clauses used by a franchise company seated in the Netherlands in its contracts with German franchisees providing for a hearing in the United States: OLG Dresden, Order of 7 December 2007 - 11 Sch 8/07; OLG Bremen, Order of 30 October 2008 – Sch 2/08; OLG Celle, Order of 4 December 2008 – 8 Sch 13/07; OLG Thüringen, Order of 13. January 2011 – 1 Sch 1/08. *See also* OLG Köln, Judgment of 24 February 2011 - 7 U 188/09; OLG München, Order of 7 June 2013 - 34 SchH 9/12.
66 ECJ, Judgment of 27 June 2000, C-240-244/98 – *Océano Grupo*.
67 *Id.* at paras. 22 *et seq*.
68 ECJ, Judgment of 26 October 2006, C-168/05 – *Mostaza Claro*.
69 ECJ, Judgment of 6 October 2009, C-40/08 – *Asturcom*.
70 At which point in time the review takes place, at the outset of the arbitration or in subsequent annulment or enforcement proceedings, *inter alia* depends on whether the party opposing arbitration applies for a decision by the competent court pursuant to § 1032(2) ZPO prior to the constitution of the arbitral tribunal. A party which does not invoke the invalidity of the arbitration agreement in its reply at the latest, is in principle precluded from invoking the invalidity of the arbitration agreement at a later stage in the arbitration or subsequent court proceedings. However, by elevating Directive 93/13/EC to the status of *ordre public*, the European Court of Justice has significantly reduced this risk. *See Niedermaier*, *supra*, pp. 145 *et seq*. and 328 *et seq*.
71 *Cf.* OLG Frankfurt a. M., Order of 11 July 2013 – 26 SchH 8/12.

3. Review of Content

In contrast the review of arbitration agreements plays an important role in the United States and in Germany. It constitutes a flexible tool which allows taking into consideration the circumstances of the individual case. The flipside of the coin is that without guidelines the outcome of the review is unpredictable. In the United States, despite a wealth of decisions, the application of the doctrine of unconscionability and comparable doctrines, in particular by state courts, still needs to be balanced with the arbitration friendly approach taken by the U.S. Supreme Court. In Germany, the number of cases dealing with the review of arbitration agreements constantly increases. As regards consumer contracts, courts and arbitral tribunals need to comply with the directions of the European Court of Justice when applying §§ 305 *et seq*. BGB.

V. Concept for Review of Arbitration Agreements

Considering the above, among the available tools for protection of weaker parties, the review of arbitration agreements appears to be best suited to address the interests of all parties concerned. This is in particular due to its flexible nature which allows for a balancing of the respective interests. At the same time, this flexible nature makes it difficult to predict the outcome of the review. In order to avoid unnecessary transaction costs, the parties of an arbitration agreement, in particular users of arbitration clauses, need to know whether and when the agreement is valid. This article therefore concludes with a summary of a proposal for a concept for the review of arbitration agreements under German law.[72]

1. Burden and Standard of Proof

The question of predictability is closely related to the question which party bears the risk that a relevant aspect cannot be resolved with certainty, *i.e.,* the burden of proof. In principle, it is the party opposing arbitration which must show that the arbitration agreement is invalid or unenforceable.

As regards standard contracts falling within the scope of application of Directive 93/13/EC, the European Court of Justice has decided that the burden of proof may not be put upon the consumer. Rather, it is the duty of the national courts to investigate on their own motion whether an arbitration clause is in conformity with the requirements of the Directive.

Courts sometimes reduce the standard of proof in order to balance situations in which, for example, one party has easier access to the relevant information than the other. If the party bearing the burden of proof fulfills the reduced standard of proof, the burden of rebutting the allegation made falls upon the other party without shifting the burden of proof itself.

2. Relevant Threshold

The party opposing arbitration, to the extent that it bears the burden of proof, must convince the court or the arbitral tribunal that the arbitration agreement constitutes an unreasonable disadvantage. This requires a comparison with a situation considered to be reasonable or fair. As regards arbitration agreements, it seems to be adequate to compare the situation under the arbitration agreement with the default rule in arbitration or where, as is often the case, such rule does not exist, with the situation which would exist without the arbitration agreement in state court litigation, *i.e.*, where would the hearing take place, what would be the costs and how would the costs be allocated, etc.[73]

Nevertheless, it would be wrong to impose the state court regime on arbitration. Otherwise, arbitration would not constitute an alternative to state court litigation anymore. Important advantages of arbitration are its flexible nature and the possibility to deviate from the state court system.

a) Contracts between Equal Business People

Hence, courts and arbitral tribunals should be slow in policing arbitration clauses between merchants and business people of more or less equal bargaining power. In these situations, one can expect that each party is able to look after its own interests (one option generally available is not to conclude the contract), and the principle should apply that the party opposing arbitration bears the full burden of proof for showing that the arbitration agreement constitutes an unreasonable disadvantage. Any legitimate interest should suffice to rebut this allegation.[74]

b) Contracts with Consumers

As regards consumer contracts, the situation is different. As set out by the European Court of Justice, consumers in general are in a take-it-or-leave-it situation and often lack the necessary information to assess the implications of the clauses submitted by the users of standard terms. In respect of arbitration clauses and their direct impact on the access to courts, it seems to be adequate that courts and arbitral tribunals take a closer look at the situation that exists in state court litigation with its differentiated system of procedural, substantive and conflict of law provisions. Pursuant to the jurisprudence of the European Court of Justice, courts need to inquire on their own motion whether an arbitration agreement is unfair. This justifies shifting the burden of proof to the party using the arbitration agreement.[75]

c) Contracts between Parties of Unequal Bargaining Power

As stated before, also in the commercial realm there are situations where one party typically is in a weaker bargaining position than the other. In these situations, not least from a constitutional perspective,[76] the protection of weaker parties should not inadequately fall behind that of consumers. Therefore, it seems to be justified to lower the standard of proof for the existence of an unreasonable disadvantage for groups of persons who typically are in a weak bargaining position, comparable to the one of consumers *vis-à-vis* entrepreneurs. The burden of proving such inferior bargaining position falls upon the party making the allegation.[77] Where a party which is to be considered as weak shows that a term in the arbitration agreement deviates from the rules applicable in state courts proceedings, it falls upon the user of the arbitration clause to explain why it has a legitimate interest in using the term. If the user fails to provide a reasonable explanation and the term constitutes a disadvantage to the weaker party, the invalidation of the term is justified.[78]

72 *See Niedermaier*, *supra*, pp. 349 *et seq*.

73 This however does not mean that a deviation from the rules in state court litigation are to be considered as a deviation from statutory provisions within the meaning of § 307(2) Nr. 1 BGB. Rather, these provisions may be considered as a model for what the legislator considers a balanced set of procedural rules.

74 *See Niedermaier*, *supra*, p. 361.

75 *See Niedermaier*, *supra*, p. 356 *et seq*.

76 *Cf.* BVerfG, Order of 17 February 1990 – 1 BvR 26/84.

77 As to the necessary standardization of types of imblances of power, *see Niedermaier*, *supra*, pp. 362 *et seq*.

78 *See Niedermaier*, *supra*, p. 361 *et seq*.

VI. Final Remark

In the United States and in Germany, arbitration agreements between parties of unequal bargaining power raise similar legal problems which first and foremost result from the failure of the contract mechanism. The protection of the weaker parties' rights however neither justifies nor requires the outright exclusion of arbitration agreements. Instead, more flexible solutions can be obtained by a review of arbitration agreements by arbitral tribunals and courts. A gradual concept of burden and standard of proof, as described in V. above, which (i) differentiates between contracts between equal business people, contracts with consumers and contracts between parties of unequal bargaining power and (ii) takes into account the applicable standards in state court litigation can provide for a reasonable degree of foreseeability and certainty. Considering the parallels which exist in U.S and German law and the number of decisions rendered by U.S. courts, from a German perspective, it is worth following the developments in the United States in this field of law.

*Ass. iur. Philip Wimalasena**

Germany as a Debtor: Ein (fast vergessenes) Stück deutscher Wirtschaftsgeschichte

DAJV-Vortrag von *Prof. Richard M. Buxbaum* am 22. Oktober 2013 an der Goethe-Universität Frankfurt am Main

Der Grundsatz, wonach jede Krise ihre Gewinner hat, beweist seine Gültigkeit auch in der gegenwärtigen europäischen Staatsschuldenkrise. Zu diesen Gewinnern gehören angesichts der fortdauernden Unsicherheit der Anleger hinsichtlich der wirtschaftlichen und monetären Zukunft des Euroraums auch deutsche Bundesanleihen. Während vor allem die südeuropäischen Euro-Staaten entsprechende Anleihen kaum oder nur mit hohen Risikoaufschlägen platzieren können, nehmen Anleger beim Erwerb deutscher Papiere wegen deren hoher Bonität gegenwärtig sogar Negativzinsen in Kauf.

Dem war allerdings nicht immer so. Dass deutsche Staatsanleihen in wirtschaftshistorischer Sicht keineswegs zu allen Zeiten eine risikofreie Anlageform darstellten, zeigte ein Vortrag von Prof. em. *Richard M. Buxbaum* (University of California at Berkeley), der am 22. Oktober 2013 auf Einladung der DAJV an der Goethe-Universität Frankfurt am Main zu Gast war. Prof. *Buxbaum* nutzte seinen Aufenthalt dazu, den zahlreich erschienenen Zuhörern aus Wissenschaft und Praxis in einem gleichermaßen ungewöhnlichen wie spannenden Vortrag eine besondere und bislang wenig beachtete Episode der deutschen Wirtschafts- und Finanzgeschichte näher zu bringen. Nach einer kurzen Begrüßung der Anwesenden übergab der Gastgeber und Regionalvorstand der DAJV, Prof. Dr. *Joachim Zekoll*, LL.M. (Goethe-Universität Frankfurt am Main), das Wort an den geladenen Gast.

„*If you don't like stories, this is your last chance to leave*." Nach dieser zu Beginn ausgesprochenen Warnung, die zu Recht folgenlos blieb, eröffnete Prof. *Buxbaum* seinen knapp einstündigen, in englischer Sprache gehaltenen, Vortrag mit dem Titel „*Before Argentina and Greece: Germany as a Debtor*", der eine Kurzfassung eines unlängst erschienenen Aufsatzes des Vortragenden (*Back to the Past: Old German Bonds and New U.S. Litigation*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 2013, 1, ergänzt durch neuere archivarische Untersuchungen, darstellte.

Einleitend referierte Prof. *Buxbaum* kurz zu den Hintergründen, die ihn zu einer Auseinandersetzung mit dem Thema des Vortrags bewegt hatten: Im Jahre 2005 wurde vor einem New Yorker Bundesgericht (*federal district court*) eine Klage gegen die Bundesrepublik Deutschland eingereicht, mit welcher die Zahlung von ca. USD 400.000.000,- auf der Grundlage anno 1928 ausgegebener, dollardenominierter Inhaberschuldverschreibungen (sog. Goldbonds) eines Konsortiums verschiedener Kommunal- und Provinzialbanken, die sich teils auf späterem westdeutschen, teils auf späterem ostdeutschen Territorium befanden, verlangt wurde. Die Anleihen mit einer Laufzeit von 30 Jahren waren an der New York Stock Exchange handelbar, die Rückzahlung sollte nach den Anleihebedingungen ebenfalls in New York stattfinden. Eine Rechtswahlklausel enthielten die Anleihebedingungen nicht. Für die Anleihen hatte seinerzeit das Land Preußen gebürgt. Die Klägerin *Mortimer Offshore Services Ltd*. machte geltend, die Bundesrepublik hafte als Rechtsnachfolgerin der Deutschen Demokratischen Republik bzw. des Landes Preußen für die Rückzahlung der Anleihen. Der District Court wies die Klage ab (2007 WL 2822214, S.D.N.Y. Sept. 27, 2007), der Court of Appeal for the Second Circuit bestätigte die Entscheidung (615 F.3d 97, July 26, 2010). Der Supreme Court hat den Antrag der Klägerin auf Zulassung der Berufung im Februar 2011 zurückgewiesen (cert. den., 131 S. Ct. 1502 (2011)).

Der Auseinandersetzung mit den durch diese Entscheidungen aufgeworfenen juristischen Fragen stellte Prof. *Buxbaum* das wesentliche Thema des Vortrags voran: Welche Geschichte verbirgt sich hinter diesen Anleihen und wie konnte es dazu kommen, dass ein ausländischer Investor knapp achtzig Jahre nach Emission der Anleihen und nach einer Reihe von grundlegenden politischen Umbrüchen auf den Erfolg einer solchen Klage hoffen konnte? Dieser einleitenden Frage folgte ein zeitgeschichtlicher Abriss in drei Akten, der vorliegend im Überblick dargestellt werden soll.

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