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INTERNATIONAL B2B CONTRACTS - FREEDOM UNCHAINED?

Ingeborg Schwenzer & Claudio Marti Whitebread

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**INTERNATIONAL B2B CONTRACTS –
FREEDOM UNCHAINED?**

*Prof. Dr. Ingeborg Schwenzer, LL.M. & Claudio Marti Whitebread, MLaw**

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INTRODUCTION

Freedom of contract is regarded to be a general core principle in international Business to Business (B2B) contractual relationships.¹ This is especially true for sales contracts governed by the U.N. Convention on Contracts for the International Sale of Goods (CISG), which in Article 6 explicitly provides that “[t]he parties may . . . derogate from or vary the effect of any of its provisions.”

Although domestic legal systems also recognize the principle of freedom of contract in commercial practice, they still vary considerably with regard to the extent of this principle and to its possible limitations. First, this paper will discuss how international instruments as well as domestic legal systems draw the line between Business to Consumer (B2C) and B2B contracts. Second, the validity of exclusion and limitation of liability clauses will be examined as the most prominent example for the exercise of judicial control of clauses in B2B contracts.

I. PROTECTED PERSONS AND/OR TRANSACTIONS

A. Consumers

It is generally agreed that consumers deserve special protection in B2C relationships.² However, the definition of who is a consumer considerably differs on both the international and the domestic level.

The most widely used definition of “consumer” is found in Article 2(a) CISG, according to which a consumer is a person who buys goods for “personal, family, or household use.”³ This definition

¹ M. G. BRIDGE, *THE INTERNATIONAL SALE OF GOODS* ¶ 1.28 (3d. ed. 2013); 1 CHITTY ON CONTRACTS ¶ 1-029 (H. G. Beale et al. eds., 31st ed. 2012); E. A. FARNSWORTH, *CONTRACTS* 23 (4th. ed. 2004).

² CASES, MATERIALS AND TEXT ON CONSUMER LAW 2-3 (Hans-W. Micklitz, J. Stuyck, E. Terry, & Dimitri Droshout, eds. 2010); G. WOODROPPE & R. LOWE, *CONSUMER LAW AND PRACTICE* ¶ 1.15 (9th ed. 2013); G. HOWELLS & S. WEATHERILL, *CONSUMER PROTECTION LAW* 8-9 (2d. ed. 2005).

³ United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, art. 2(a) (1980), *available at*

is also typically used by common law⁴ and some Asian jurisdictions.⁵ The emphasis here is clearly on the intended use of the goods sold.⁶ The European Directive on Consumer Rights, which entered into force on 13 June 2014, defines consumer as a “natural person who . . . is acting . . . outside its trade, business, craft or profession.”⁷ Thus, this approach is slightly different to the CISG’s; however, it should not yield very different results. The UNIDROIT Principles, on the other hand, do not contain a specific definition of the “consumer.” Instead, they focus on the term “commercial” contracts, which leaves much leeway for interpretation.⁸

In Ibero-American legal systems it is common to find references to the ultimate purchaser, which suggests a focus on the relative position of a person in the supply chain.⁹ This definition is much broader than the ones described above. It may well lead to friction when dealing with a contract governed by an international instrument such as the CISG.

<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [hereinafter CISG].

⁴ Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, pt. 1(1) (Can.); Unfair Contracts Term Act 1977, c. 50, § 12(1) (U.K.).

⁵ Framework Act on Consumers, Act. No. 8372, Sep. 27, 2006, art. 2(2) (S. Kor.); Consumer Act of the Philippines, Rep. Act No. 7394, art. 4(n), (q) (July 2, 1991) (Phil.); Ordinance of Protection of Consumer’s Interest, art. 1 (Viet.).

⁶ M. P. FURMSTON, ET AL., LAW OF CONTRACT 28 (16th ed. 2012); CASES, MATERIALS AND TEXT ON CONSUMER LAW, *supra* note 2, at 31; I. Schwenzer & P. Hachem, in SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG) (3d. ed. 2010).

⁷ Council Directive 2011/83, art. 2(1), 2011 O.J. (L 304) (EC) [hereinafter Directive 2011/83]. Art. 2(f) of the Common European Sales Law (CESL) contains a similar definition. *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, at art. 2(f), COM (2011) 635 final (Oct. 11, 2011) [hereinafter CESL].

⁸ International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2010) [hereinafter UNIDROIT Principles], preamble, cmt. 2, available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

⁹ Consumer Protection Law, art. 2 (Costa Rica); Consumer Code, L. No. 29571, art. 2 (Peru).

B. Small and Medium Size Enterprises

Many legal systems broaden the scope of protection so as to also encompass certain small and medium size enterprises. In essence, there are two different approaches to extend the protection to this group. A variety of jurisdictions include into their consumer protection laws those artisans and small companies who acquire products or services to integrate them into a production process for the supply of products or services to third parties. For example, under Chinese and Mongolian law, farmers who purchase materials for production still qualify as consumers.¹⁰ In other jurisdictions—especially in Ibero-America—the same result is achieved by using the ultimate purchaser approach.¹¹

Other legal systems distinguish according to the size of the respective enterprise. With regard to the control of standard terms, the English and Scottish Law Commission suggests a revision to the Unfair Contract Terms Act to extend protection to small enterprises that do not employ more than nine persons.¹² A similar approach can be found in the Netherlands. There, enterprises having less than fifty employees or otherwise not obliged to publish their annual balance are put on a par with consumers.¹³

Another approach sets a monetary limit in distinguishing the level of judicial protection. Again, the English and Scottish Law

¹⁰ SCHWENZER, HACHEM & KEE, *GLOBAL SALES AND CONTRACT LAW* ¶ 6.25 (2012).

¹¹ Law No. 22240, Sept. 22, 1993, art. 1 (Arg.); Lei No. 8.078, de 11 septiembre de 1990, art. 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] 12.09.1990 (Braz.); Law No. 19496, Marzo 7, 1997, art. 1, DIARIO OFICIAL [D.O.] (Chile); Law on Consumer Protection, July 10, 2000, art. 2 (Ecuador); Ley No. 842, 10 Oct. 2013, Ley de Protección de los Derechos de las Personas Consumidoras y Usuarías [Law on Protection of the Rights of Consumers and Users] art. 4, DIARIO OFICIAL [L.G.], 10 Oct. 2013 (Nicar.); Law No. 1334, 1998, art. 4 (Para.); Consumer Protection Law, art. 2 (Uru.). *See also* E. MUÑOZ, *MODERN LAW OF CONTRACTS AND SALES IN LATIN AMERICA, SPAIN AND PORTUGAL* 47 (2011).

¹² The Law Comm'n & The Scottish Law Commission, *UNFAIR CONTRACT TERMS: REPORT ON A REFERENCE UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965* ¶ 5.40 [hereinafter *Unfair Contract Terms*], *available at* <http://www.scotlawcom.gov.uk/files/2512/7989/6621/rep199.pdf>.

¹³ Art. 6:235(1)(a) BW (Neth.).

Commission suggests, in the course of the Unfair Contract Terms Act, to apply the same control of standard terms as for consumers to transactions involving small enterprises with a volume of less than £500.00 GBP.¹⁴ The Australian Competition and Consumer Act 2010 applies to all transactions for the supply or sale of goods and services up to a limit of approximately \$40.00 AUD.¹⁵

C. Standard Terms or Individually Negotiated Terms

The classical German approach draws a sharp line between standard terms and individually negotiated terms. In general, individually negotiated clauses are not subject to special judicial scrutiny. The picture immediately changes as soon as a clause is part of standard terms.¹⁶ Judicial practice shows that virtually the same standard applies to both B2C and B2B contracts.¹⁷ Recently, this approach has received severe criticism.¹⁸ Anecdotally, German companies frequently opt out of German law and choose Swiss law to circumvent the German courts' scrutiny of standard terms.¹⁹ Unfortunately, the German approach has made its way to the European level. The distinction between standard terms and

¹⁴ Unfair Contract Terms, *supra* note 12, ¶ 5.59.

¹⁵ Competition and Consumer Act 2010 (Cth) s 4B(2)(a) (Austl.).

¹⁶ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBl.] 195, as amended, § 307 (Ger.) [hereinafter BGB].

¹⁷ Bundesgerichtshof [BGH] [Federal Court of Justice], May 16, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2007 (2176) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 19, 2007, BeckRS 2007 (18417); Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 3, 1988, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1785, 1988.

¹⁸ C. Kessel, *Zur Frage einer Reform des AGB-Rechts im unternehmerischen Rechtsverkehrs*, in STÄNDIGE DEPUTATION DES DEUTSCHEN JURISTENTAGES 69 (2012); E.M. Kieninger, *AGB-Kontrolle von grenzüberschreitenden Geschäften im unternehmerischen Verkehr*, in EINHEIT UND VIELHEIT IM UNTERNEHMENSRECHT 179 (2013); I. Schwenzer & F. Lübbert, *Neues AGB-Recht im unternehmerischen Rechtsverkehr?*, ANWALTSBLATT, H. 4. S. 292 (Apr. 2012); K.P. Berger, *Für Eine Reform des AGB-Rechts im Unternehmerverkehr*, NJW 2010, 465.

¹⁹ Ingeborg Schwenzer, in STÄNDIGE DEPUTATION DES DEUTSCHEN JURISTENTAGES 69 (2012); T. Pfeiffer, *Flucht ins schweizerische Recht*, in ZWISCHEN VERTRAGSFREIHEIT UND VERBRAUCHERSCHUTZ, FESTSCHRIFT FÜR FRIEDRICH GRAF VON WESTPHALEN 555 (F.C. Genzow, B. Grunewald & H. Schulte-Nölke eds., 2010); S. Brachert & A. Dietzel, *Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht*, ZGS 2005, 441.

negotiated terms was first introduced into the Directive on Unfair Terms in Consumer Contracts.²⁰ It was restricted to B2C contracts;²¹ however, the Draft Common Frame of Reference (DCFR),²² and subsequently the Common European Sales Law (CESL),²³ which was approved by the European Parliament in February 2014, extended the distinction between standard terms and negotiated terms to the area of B2B relationships.

In many other legal systems—at least insofar as B2B contracts are concerned—the fact that a certain clause formed part of standard terms is only one criterion among many others when assessing the fairness of the respective clause. This is true for most Common law jurisdictions,²⁴ and also for Switzerland²⁵.

II. EXCLUSION OR LIMITATION OF LIABILITY CLAUSES

The litmus test for any approach of judicial control of freedom of contract in B2B relationships is the question how a certain system deals with exclusion and limitation of liability clauses. These clauses can be found in almost every commercial contract, especially on an international level. Together with the description of the contractual duties, they form the core part of the contract and decide whether the aggrieved party may rely on a breach of contract and—if so—can get redress for it. It is all the more problematic that the different

²⁰ Council Directive 93/13, 1993 O.J. (L 095) (EC) [hereinafter Directive 93/13].

²¹ *Id.* art. 3(1).

²² PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) OUTLINE EDITION, art. II.-9:405 (Christian von Bar et al. eds., 2009), available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf

²³ CESL, *supra* note 7, at art. 86.

²⁴ INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW ¶ 12.03; FARNSWORTH, *supra* note 1, at 582-91.

²⁵ R.M. HILTY, BASLER KOMMENTAR: BUNDESGESETZ ÜBER DEN UNLAUTEREN WETTBEWERB (UWG), Art. 2, ¶ 2 (2013); M.M. PEDRAZZINI & F.A. PEDRAZZINI, UNLAUTERER WETTBEWERB (UWG) ¶ 4.06 (2d ed. 2002); C. BAUDENBACHER, LAUTERKEITSRECHT: KOMMENTAR ZUM GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB (UWG), Art. 2, ¶ 7 (2001).

approaches yield different results, thus making the outcome of a possible dispute highly unpredictable.

A. Typical Clauses

Limitation of liability clauses typically appear in three forms. First, they may seek to exclude liability entirely by excluding a certain cause of action or by increasing the threshold to meet the requirements for a certain cause of action. Second, they may seek to exclude liability for certain types of losses. Third, these clauses may seek to put an upper limit to the quantum of recoverable losses. In practice, more often than not all three forms of limitation of liability clauses are combined. For example, a clause may stipulate that the seller is liable only for gross negligence, that recovery of consequential losses is excluded, and that in all instances the quantum of recoverable loss is limited to the contract price.²⁶

B. Restrictions

There is agreement among all legal systems that, in both B2C contracts and B2B relationships, exclusion and limitation of liability clauses are subject to certain legal restrictions.²⁷

1. *Reasonableness* - The common starting point seems to be that such a clause is only valid if it is not unreasonable, unfair, unconscionable, or the like. Some legal systems explicitly refer to such a standard, including the English and Scottish Unfair Contract Terms Act,²⁸ the Uniform Commercial Code (U.C.C.) in the United States,²⁹ or the general clause in the German Civil Code.³⁰ It is noteworthy,

²⁶ Cf. 1 CHITTY ON CONTRACTS ¶ 14-003 (H. G. Beale et al. eds., 31st ed. 2012); SCHWENZER, ET AL., *supra* note 24, ¶ 44.299; EWAN MCKENDRICK, CONTRACT LAW: TEXTS, CASES, AND MATERIALS 406-09 (4th ed. 2010).

²⁷ See, e.g., BGB, *supra* note 16, § 276(3); Art. 1229 C.c. (It.); Art. 1102 C.C. (Spain); Obligationenrecht [OR] [Code of Obligations] Mar. 30, 1911, art. 100 (Switz.) [hereinafter Code of Obligations]; U.C.C. §§ 2-316, 2-719 (2014); Civil Code of Québec, S.Q. 1991, c. 64, art. 1474 (Can.).

²⁸ Unfair Contracts Term Act 1977, *supra* note 4, § 2(2) (U.K.).

²⁹ U.C.C. § 2-302 (2014).

³⁰ BGB, *supra* note 16, at § 307.

however, that the majority of legal systems do not distinguish between an outright exclusion and a mere limitation of liability.³¹

2. *Personal Injury* - It is often alleged that it is universally recognized that a party may not limit or even exclude its liability for personal injury.³² However, this is only clear in the case of personal injury to a consumer and where the exclusion or limitation of liability clause is found in standard terms.³³ Although it is true that personal injury will mostly occur to the ultimate purchaser or user of goods, and that in those situations the exclusion or limitation of liability most likely will be part of standard terms, there are no convincing reasons why the threshold of protection should be lowered in the case of personal injury to a business person or where the respective clause has been individually negotiated. Explicit equation of all cases of personal injury can be found in the English and Scottish Unfair Contract Terms Act,³⁴ as well as in the Civil Code of Quebec³⁵. Similarly, in Switzerland, at least some scholarly writings suggest this result.³⁶

3. *Gravity of Fault* - Civil law legal systems follow the fault-based liability approach.³⁷ Accordingly, restrictions on the ability of the parties to exclude or limit their liability are directed to the gravity of the *culpa*. However, the restrictions on the freedom of the parties to limit their liability to a certain degree of fault differ among legal systems and even differ within individual legal systems depending on whether

³¹ See *id.* § 309, No. 7; C.C. art. 1229 (It.); Civil Code of Québec, *supra* note 27.

³² Cf. SCHWENZER, ET AL., *supra* note 24, at ¶ 44.317; MARCEL FONTAINE & FILIP DE LY, DRAFTING INTERNATIONAL CONTRACTS 386 (2009).

³³ See BGB, *supra* note 16, at § 309, No. 7(a); Directive 93/13, *supra* note 20, at annex (a); U.C.C. § 2-719(3) (2014).

³⁴ Unfair Contracts Term Act 1977, *supra* note 4, at § 2(1) (U.K.).

³⁵ Civil Code of Québec, *supra* note 27.

³⁶ INGEBORG SCHWENZER, SCHWEIZERISCHES OBLIGATIONENRECHT ALLGEMEINER TEIL ¶ 24.14 (6th ed. 2012); P. TERCIER & P. PICHONNAZ, LE DROIT DES OBLIGATIONS ¶ 1267 (5th ed. 2012); W. WIEGAND, H. HEINRICH & N.P. VOGT, BASLER KOMMENTAR: OBLIGATIONENRECHT I art. 100, ¶ 4 (5th ed. 2011).

³⁷ SCHWENZER, ET AL., *supra* note 24, ¶ 44.63; KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 494 (3d. ed. 1998).

the clause is part of non-negotiated terms and whether it is a B2C or a B2B contract.³⁸

Broadly speaking, legal systems employing a fault-based liability approach agree that in consumer transactions liability for one's own gross negligence and intent cannot be excluded in standard terms.³⁹ Again, this approach is similar to the one with regard to exclusion or limitation of liability in the case of personal injury. Some of these systems allow an exclusion of liability for gross negligence where the clause has been individually negotiated and/or is part of a B2B contract.⁴⁰ Furthermore, if the breach of contract is due to the act or omission of an auxiliary, exclusion or limitation is possible even if this person acted intentionally,⁴¹ at least if it is not part of standard terms in a B2C contract.⁴²

4. *Warranty and Guarantee* – Many, if not most, legal systems prohibit exclusion and limitation of liability if the obligor expressly warrants or guarantees certain features of the contract, especially specific features of the goods in sales contracts.⁴³ It would appear contradictory to allow the obligor to limit or even exclude its liability where an express warranty or guarantee is given.⁴⁴ Here, however,

³⁸ SCHWENZER, ET AL., *supra* note 24, ¶¶ 44.311, 44.312.

³⁹ See, e.g., CÓDIGO CIVIL (Civil Code), Apr. 2, 1976, art. 350(1) (Bol.); BGB, *supra* note 16, §§ 309, No. 7(b), 475; Art. 1.102 C.C. (Spain); Código Civil Federal [CC][Federal Civil Code], *as amended*, Diario Oficial de la Federación [DO], Aug. 30, 1928, art. 2106 (Mex.); Código Civil (Civil Code), art. 1328 (Peru).

⁴⁰ See, e.g., Civil Code, art. 417(4) (Arm.); Civil Code, art. 372(4) (Belr.); BGB, *supra* note 16, at § 276(3) (Ger.); Code of Obligations, art. 395(2) (Geor.); GRAZHDANKII KODEKS ROSSIJSKOI FEDERATSII [GK RF] [Civil Code] art. 401 (Russ.).

⁴¹ BGB, *supra* note 16, §§ 278, 276(3); Civil Code, art. 809, 800 (Port.); Code of Obligations, *supra* note 27, art. 101(2) (Switz.).

⁴² BGB, *supra* note 16, § 309 No. 7(b).

⁴³ See, e.g., BGB, *supra* note 16, § 444. See also U.C.C. § 2-316(1) (2014).

⁴⁴ H. P. Westermann, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, VOL. 3 § 444 ¶ 14 (F.J. Säcker & R. Rixecker, eds., 6th ed. 2012); JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE 576 (2010).

everything will depend on when and how such a warranty or guarantee can be assumed in a B2B relationship.

5. *Minimum Adequate Remedy* - In accordance with the notion that no party may relieve itself of all risks under a contract by excluding its liability entirely, legal systems agree that each party must retain a minimum of remedial protection under a contract. A particularly visible statement is found in the United States where the Official Comment on Section 2-719 U.C.C. states, “it is of the very essence of a sales contract that at least minimum adequate remedies be available.”⁴⁵ The same reasoning underlies the German rule that, if repair of defective goods fails, the obligee at least must retain the right to either reduce the purchase price or avoid the contract.⁴⁶

III. EXCLUSION AND LIMITATION OF LIABILITY CLAUSES IN CISG CONTRACTS

The question whether a party may exclude or limit its liability under a CISG sales contract is important yet controversial. The CISG Advisory Council is currently preparing an opinion on this subject. According to Article 4 CISG, the “Convention . . . is not concerned with: (a) the validity of the contract or any of its provisions”⁴⁷ However, the CISG itself defines which questions are considered to be questions of validity and thus to be decided under domestic law.⁴⁸ It is, in essence, agreed that exclusion and limitation of liability clauses are questions concerning matters governed by the Convention in the sense of Art. 7(2) CISG.⁴⁹ Debate remains among the CISG Advisory Council, however, if general principles within the CISG can be found to settle this question.

⁴⁵ U.C.C. § 2-719, cmt. 1 (2014).

⁴⁶ BGB, *supra* note 16, § 309 No. 8(b)(bb).

⁴⁷ CISG, *supra* note 3, art. 4.

⁴⁸ H.P. WESTERMANN, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Vol. 3, art. 4 CISG, ¶ 8 (W. Krüger & H.P. Westermann, eds., 6th ed. 2012); Schwenger & Hachem, *supra* note 6, art. 4, ¶ 31; C. BRUNNER, UNKAUFRECHT – CISG, Art. 4, ¶ 5 (2005).

⁴⁹ Cf. WESTERMANN, *supra* note 48, art. 4 CISG, ¶ 6; Schwenger & Hachem, *supra* note 6, art. 4, ¶ 43.

CONCLUSION

A. B2B v. B2C

It seems to be unanimously agreed that, with regard to judicial control of contract terms and exclusion and limitation of liability clauses, there must be a clear distinction between B2C and B2B relationships.⁵⁰ Whereas consumers typically can neither influence the content of a contract nor have any real alternative to turn to, and thus freedom of contract has lost its justification altogether, in B2B contracts the situation is completely different. It is there where freedom of contract still retains its legitimate place as a starting point. However, this does not mean that there is unchained freedom of contract in these relationships below the threshold of public policy.

B. Unified Approach in International B2B Contracts

It has been shown that many different approaches and levels of scrutiny can be found in domestic legal systems. However, in cross border transactions, foreseeability and predictability is of utmost importance. This is particularly true for the core area of any contract, the respective liability regime, and its limits. Therefore, it is a matter of priority to achieve uniform results in this respect. If it were not possible to have these questions governed by the CISG, at least in international sales contracts, it must be a primary aim to strive for unification on an international level.

Having regard to the comparative overview the starting point for judicial control of contract terms in international B2B relationships seems straight forward. Hard and fast rules as they can be found in black (conclusively invalid) or grey (presumptively invalid) lists (or unfair or invalid contract terms) are suitable for B2C relationships. In

⁵⁰ Eva-Maria Kieninger, *AGB bei B2B-Verträgen: Rückbesinnung auf die Ziele des AGB-Rechts*, ANWALTS BLATT 301, 306 (Apr. 2012) (Ger.), available at https://ius.unibas.ch/uploads/publics/40215/20121206163733_50c0bbbd851e8.pdf; Barbara Dauner-Lieb, &Constantin Axer, *Quo vadis AGB-Kontrolle im unternehmerischen Geschäftsverkehr?*, ZIP, 2010, at 312-14 (Ger.); Barbara Dauner-Lieb & A. Khan, *Betriebsausfallschäden als Gestaltungsproblem*, in ZWISCHEN VERTRAGSFREIHEIT UND VERBRAUCHERSCHUTZ, FESTSCHRIFT FÜR FRIEDRICH GRAF VON WESTPHALEN 70-71 (Genzow, Grunewald, Schulte-Nölke, eds.).

B2C relationships, the bargaining positions and relevant interests of the parties involved do not differ very much. As previously indicated, business parties generally have the superior bargaining power. Likewise, the content of contracts in specific branches of trade is comparable. Therefore, in B2C relationships, standard terms prevail in these relationships. This militates unitary and simple rules.

In contrast, B2B contracts, and especially international B2B contracts, cannot be measured by the same yardstick. The respective bargaining position of the parties to an international contract can vary considerably. The same holds true for the contents of such contracts. Therefore, B2B contracts require differentiated solutions that can be adjusted to the individual circumstances of the case. Instead of black and grey lists, a general clause seems to be preferable.

The approach to the validity of exclusion and limitation of liability clauses in international B2B contracts should be one of fairness or reasonableness. As already explained above,⁵¹ reasonableness and fairness can be found in the English and Scottish Unfair Terms Act,⁵² the UNIDROIT Principles talk about clauses being grossly unfair,⁵³ the U.C.C. uses the term unconscionability,⁵⁴ and the German Civil Code employs the term of contravening principles of good faith albeit only related to standard terms.⁵⁵ As regards the CISG reasonableness can be regarded as a general principle underlying the CISG in the sense of Art. 7(2) CISG.⁵⁶ To meet the needs of foreseeability and predictability, a general clause must be accompanied by a list of criteria to be considered in the individual case.

⁵² Unfair Contracts Term Act 1977, c. 50, §§ 4(1), 11(1) (U.K.).

⁵³ UNIDROIT Principles, *supra* note 8, art. 7.1.6.

⁵⁴ U.C.C. § 2-302 (2014).

⁵⁵ BGB, *supra* note 16, § 307(1).

⁵⁶ CISG Advisory Council Opinion No. 6, Calculation of Damages under CISG Article 74, cmt. 2.1, *available at* <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148>; J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, WIENER UNKAUFRECHT (CISG) art. 7, ¶ 45 (ULRICH MAGNUS & MICHAEL MARITNEK eds., Jan. 2005).

C. Criteria to be Considered

One of the first criteria to be considered should be the position of the parties in the market and their respective bargaining power. This takes up the idea that many legal systems tend to extend the protection provided for consumers to small and medium sized enterprises (SMEs). A flexible approach certainly seems advisable, as there is a great variety also among SME's.

The fact of a specific clause forming part of standard terms or being individually negotiated might also be one criterion among others. However, this should not be the sole approach used to decide which level of judicial control to apply in international B2B contracts. To save transaction costs and due to the complex nature of the subject matter of the contract, most international B2B contracts depend on pre-formulated contract terms without one party necessarily being in a superior bargaining position. This is clearly evidenced by the current discussion in Germany, which heavily criticizes the practice of control of standard terms in B2B contracts.⁵⁷

In assessing the validity of an exclusion and limitation of liability clause in a B2B contract, regard should be given to the contract as a whole, especially in relation to other contractual terms.⁵⁸ This holds true for the interplay between warranties and guarantees on the one hand and exemption clauses on the other.

Unlike in many existing legislation which apply the same rules to exclusion as well as to limitation of liability clauses⁵⁹ the two should be clearly distinguished. There undoubtedly exists a difference whether liability is entirely excluded where certain kinds of damages are excluded or where the amount of recoverable damages is capped. Consequently, the level of scrutiny must be higher when liability is fully excluded than in the case of a mere limitation. It is here, too, where the principle of minimum adequate remedy should have its legitimate scope of application.

⁵⁷ Kessel, *supra* note 18.

⁵⁸ See CESL, *supra* note 7, art. 86(2)(c).

⁵⁹ See *id.*, § III(B)(1).

Neither gross negligence nor intentional breach of contract should lead to a limitation of liability clause to be void *ab initio* as is currently the case in many legal systems. Rather, the gravity of fault should be only one criterion among others to invalidate such a clause. The only case in which an *ab initio* invalidity is conceivable relates to personal injury where a differentiation between consumer and business person seems hardly justifiable.