

Summary - Habilitation Thesis Dr. Martin Illmer

Towards a New German Law of Service Contracts

I. Background

One of the major changes over the last few decades, concerning the national markets and the European single market, is the transition from the traditional industry-based economy to a more service-based economy. While industrial production is declining, the amount of services rendered and the corresponding share of GDP is steadily rising, turning the services sector into a major backbone of the national economies as well as the European single market. According to recent studies, the services sector accounts for more than 50% of GDP within the EU. Despite this importance, the German law of service contracts is, as with many other national laws, still characterized by a lack of coherence and consistency.

II. Status quo and resulting open issues

While contracts of sale as well as contracts of hire and lease are regulated in a more or less rigorous and satisfactory way in regard to structure and content, service contracts – covered under German law by three different general contract types, *Werkvertrag*, *Dienstvertrag* and *Auftrag* – appear as a diffuse and inconsistent conglomerate of left-overs that are hardly bound together by overarching principles. Since the entry into force of the German Civil Code in 1900, legislators have not touched the general law of service contracts apart from some amendments and additions relating to employment and construction contracts. In recent times, there has been a tendency to create sub-types containing special rules complementing the three general types. Examples are travel contracts, contracts for medical treatment, construction contracts (so far only planned) and private drafts for a separate act on employment contract law. In practice, the boundaries between the three different general types are vanishing. Often, the courts operate with mixed contracts or divide a uniform contractual arrangement into separate contracts in order to allocate them to the “correct” contract type. Sometimes, the courts have even transferred the rules designed by the German Civil Code for one of the three contract types to another one of the three types. Overall, a contract is quite often allocated to one of the three types by way of considering which rules on a specific issue fit best. The problem with this approach is that the rules of one contract type may fit best on one issue while the rules of another contract type may fit best on another issue. As indicated above, operating with mixed contracts and separating single contractual schemes into separate contracts are the consequences. Moreover, rules contained in the law of mandate are applied by the courts not only to service contracts containing an element of management of another’s affairs (via the entry gate of § 675 of the German Civil Code) but also to other, normal service contracts on a case-by-case basis.

This status quo triggers a number of questions in relation to the taxonomy of the law of service contracts and its contracts types. What are the justifications for the existence of different contract types regulating service contracts? How are they designed and separated from each other? What is the relationship of those contract types to employment contracts? Intertwined with these issues of taxonomy are questions concerning the differences in the content as between the different contract types. Which contract types contain which rules for

what reason, and why are some rules contained only in one, but not the other contract types' regime? Where are gaps in the different contract types' regimes and how are they to be filled?

When analyzing these questions it appears wise to focus on three legal issues which are particularly relevant to each of the contract types and also to a comparison of the different contract types: liability for non-conformity of the services, passing of risk and unilateral termination rights (particularly those without prior notice). Regarding all three issues, the rules of the three contract types, in particular the rules covering a Dienstvertrag (obligation of skill and care) and a Werkvertrag (obligation to achieve a result) differ considerably. How did those differences emerge, tracing them back to Roman law? Are the differences justified? To what degree have legislation, scholarship and private-law setting in standard contract terms aligned the different rules since the entry into force of the German Civil Code?

On a European level, the EU legislature is not pursuing a coherent strategy concerning services and service contract law. In some sectors regulation is very detailed while in others legal rules are missing on a European level. The Commission proposal for a Common European Sales Law (COM(2011) 635 final), which encompassed only related services, has failed. The future of the Draft Common Frame of Reference (DCFR), which contains a separate chapter on service contracts, and its role in the creation of a uniform European contract law is uncertain. Certain, however, is a competition of the national laws and regimes when creating such a uniform European contract law. Hence, it is of great importance not only from a national perspective but also from a transnational European perspective to review and reformulate German law in order to turn it into a comprehensive, coherent model for such a competition. The drafters of the DCFR chapter on service contracts, willing to pursue a comparative approach, were facing the difficulty that the national laws on service contracts are very diverse and that their taxonomy and content is often incoherent or inconsistent and overall rather outdated. Often, legal practice and the courts have consequently modified the law as it still otherwise stands in the statute or codification. As a result, the drafters of the DCFR – while purportedly pursuing a comparative approach – developed a law of service contracts which is in its structure closely modeled after Dutch law, the Netherlands being the country where most of the drafters came from. Neither the DCFR nor the Common European Sales Law is analyzed any further in the Habilitation thesis. The author has already done so in separate publications at a time when these proposals were still on the agenda of the EU legislature.

III. Current Legal Research

In German scholarship there is very little basic research on the taxonomy, systematic structure and content of service contracts. Instead, one finds a vast number of practitioner's handbooks on the different sector-specific sub-types of service contracts, e.g. construction contracts, contracts for medical treatment, employment contracts and contracts for legal services. The focus of such handbooks is to provide a guide through the jungle of statutes in the respective field and case law rather than to either analyze the basic structure of service contract law or provide for a consistent and comprehensive system.

IV. Key Findings and Proposals

1. Goal

The goal of the Habilitation thesis, carrying the title “Strukturen eines Dienstleistungsvertragsrechts” (Towards a New German Service Contract Law), is to develop the systematic structure and content of a new uniform German service contract law *de lege ferenda*. Such a uniform contract type for the provision of services would fit as a third column alongside the existing two columns of sale contracts and contracts for hire and lease.

2. Approach

The approach pursued in the Habilitation thesis is a historical one with the focus on taxonomy, structure and the key content of the law of service contracts, particularly those key features where the different contract types deviate. Hence, the analysis starts with the roots of the German law of service contracts in Roman law and continues with developments in the *ius commune* including the *usus modernus pandectarum* and in natural law scholarship up until the pandectists and the early codifications and codification drafts of the 19th century in the German states. A major part is then dedicated to the drafting of the law of service contracts in the German Civil Code in the late 19th century. The analysis focusses in particular on continuity with and abandonment of the historical roots and the justifications for the decisions made. How and why did the German law of service contracts emerge the way it did? Against this background the analysis then turns to the development of the German law of service contracts from the entry into force of the German Civil Code in 1900 up until now, focusing on a convergence of the different contract types by legislation, case law, scholarship and private-law setting by way of standard contract terms *de lege lata* and *de lege ferenda*.

The historical approach has proved to be the ideal one for developing the structures and content of a new German service contract law. The analysis of developments since Roman law up until the 19th century reveals continuities and discontinuities in the German Civil Code’s law of service contracts. In many instances they are quiet surprising, sometimes seeming to be based on misunderstandings of Roman law sources and sometimes appearing to even be unconscious ones in the light of the historical development over the centuries. To a large extent the drafters of the German Civil Code’s law of service contracts determined the taxonomy, structure and content of the different contract types up until today since the legislature – unlike judges and scholarly writing – have left the status quo of 1900 more or less untouched. In doing so, the drafters conceptualized the *Werkvertrag* (obligation to achieve a result) as a contract which, like a sales contract, calls for an exchange of goods in return for remuneration rather than as a service contract providing one’s work and skill to achieve a specific result in return for remuneration. As a result, they modelled decisive parts of the *Werkvertrag*’s regime after the sales contract. The *Dienstvertrag* (obligation of skill and care) was by contrast designed as an employment contract rather than as a contract for the self-employed provision of services. Finally, the law of mandate was to a certain extent still influenced by the Roman ideal of gratuity. This led to a number of considerable deficiencies in the German law of service contracts. Yet the analysis of the historical development is crucial not only in order to reveal and fully discover those deficiencies. In several respects, the study of the historical background already indicates the way forward towards a unified and more apt law of service contracts *de lege ferenda*.

3. Structure

The Habilitation thesis itself is divided into five parts. The first part lays the groundwork by briefly addressing the systematic structure of the German law of obligations as well as the taxonomy and typology of the German Civil Code from a historical perspective. The second and third parts analyze the taxonomy and three particularly relevant content-related aspects, namely liability for non-conformity of the services, passing of risk and unilateral termination rights, from their Roman law roots up until the finalization of the German Civil Code in the late 19th century. On this basis, the fourth part examines the post-codification period up until now from the perspective of a convergence of the different contract types in relation to their positions on liability for non-conformity of the services, passing of risk and unilateral termination rights. This analysis is divided so as to consider the development in legislation, in case law and scholarship and in private law-setting via standard contract terms. Building on the critical analysis of the decisions made during the drafting of the German Civil Code's law of service contracts and post-codification developments, the structures of a new German service contract law are developed. The fifth part summarizes the main findings and presents the resulting new German service contract law.

4. Main Findings and Proposals

The new German service contract law builds as much as possible on familiar ideas, concepts and rules found in the current law of service contracts. The main purpose of the thesis is to restructure, modify and supplement the existing concepts and rules in order to create a coherent, uniform and services-oriented regime.

Even though the proposed service contract law provides for uniform solutions for most issues, in particular liability for non-conformity of the services, passing of risk and unilateral termination rights, uniformity does not extend to the main obligation of the service debtor. Rather, even within a uniform service contract type one has to distinguish between an obligation of skill and care on the one hand and an obligation to achieve a result on the other hand. This distinction takes account of a basic need of the parties when it comes to the provision of services: Does the service debtor owe a duty to achieve a result which then forms part of the contractual obligation or does the service debtor merely owe skill and care in providing the services, but not a result to be achieved by them? In other words: Who carries the risk of a failure to achieve the result finally intended to be achieved? In contrast to the status quo, however, this distinction does not result in different contract types with different rules applying to them, instead being relevant only for determining the exact content and scope of the service debtor's main obligation. Beyond and regardless of this distinction, uniform rules apply in relation to nearly all matters, including liability for non-conformity of the services, passing of risk and unilateral termination rights. The first advantage of such a uniform set of rules for all service contracts is the resulting irrelevance of a delimitation between different contract types to which different rules apply. There is no longer a need to allocate a contract to different contract types and there is also no longer a need – or at least a very limited need only in special cases – to regard the contract as a mixed contract (which results in intricate problems) or to subdivide a single contract into parts allocated to different contract types. The second advantage of the newly developed uniform rules is that they modify the existing rules of the different contract types so as to strictly take account of the distinct character of service contracts, especially in contrast to sales contracts. Hence, the parties to a service contract are provided with a uniform system which is truly tailored to the nature of service contracts. Still, uniformity of the rules does not exclude different

applications, interpretations or even minor modifications of certain rules, depending on whether the obligation extends to achieving a result.

With regard to liability for non-conformity of the services, passing of risk and unilateral termination rights, which are at the core of the analysis and the proposed new regime, the rules applying *de lege lata* to a *Werkvertrag* (obligation to achieve a result) form the basis for a new regime governing liability for non-conformity of the services and the rules applying to a *Dienstvertrag* (obligation of skill and care) form the basis for a new regime governing the passing of risk. The new regime governing unilateral termination rights is not based on an existing model. However, it builds upon and makes use of elements already in force in the current regimes of *Dienstvertrag* and *Werkvertrag*.

With regard to liability for non-conformity of the services in instances of a *Werkvertrag*, the central modification lies in the abrogation of the service creditor's right to rescind the contract. The reason is that the right of rescission is linked to the contract of sale with the exchange of goods for remuneration resulting in a return of the goods. Services, however, cannot be returned by their very nature. A right of rescission would therefore, under German law, regularly result in a reduction of price since the service debtor would have to return the received remuneration to the service creditor while the service creditor would have to pay the service debtor a compensation for the services rendered which is to be calculated according to the rules for reduction of price. Hence, the right to rescind the contract would have no separate meaning. As regards liability for non-conformity of the services in case of a *Dienstvertrag*, the status quo is modified in so far as there are for the first time special rules identical to those for a *Werkvertrag*. In the uniform regime, remedies would be identical for obligations of skill and care and obligations to achieve a result. The concept of non-conformity of the services would differ only to the extent that in instances where an obligation of skill and care exists, non-conformity would not be related to a result but to the service activity rendered as such. Furthermore, the divergence between fault-based and non-fault-based remedies would be rather irrelevant with regard to an obligation of skill and care.

With regard to risk and passing of risk, i.e. the question whether remuneration is owed even if performance of the services becomes impossible after the conclusion of the contract, the law of *Werkvertrag* requires major changes. Its rules on risk have to be detached from the rules on risk in sales law and instead be approximated to the existing rules on risk for a *Dienstvertrag* since the latter reflect the nature of a service contract quite accurately if one adds a few minor modifications to it. Accordingly, the service debtor has a right to full remuneration, with deductions for saved expenses and income by alternative use of the free workforce or potential income not realized in bad faith, as long as he is – but for the availability of the object of the services where it has been destroyed or is no longer available – ready to perform. In a nutshell: The service debtor can claim the full contract price (with the deductions mentioned above) if the reason for the impossibility to perform the services does not originate in his sphere but in the service creditor's sphere or in a neutral sphere, e.g. in cases of *force majeure*. This allocation of risk according to risk spheres reinstalls a system that was in place over centuries dating back to Roman law until it was abandoned by the drafters of the BGB due to their misplaced conception of the *Werkvertrag* as a sales-like exchange contract. By applying such an allocation of risk to a *Werkvertrag*, the major change lies in the allocation of the risk in cases where the object of the services is destroyed, damaged or otherwise no longer available for performance of the services due to an event not

originating in the sphere of one of the parties but rather in a neutral sphere such as *force majeure*. This risk is no longer borne by the service debtor but by the service creditor, which appears to be the only solution which takes due account of the nature of both a Dienstvertrag and a Werkvertrag as service contracts. The obligation to achieve a result does not transform a Werkvertrag into an exchange contract similar to a sales contract merely because the result is finally exchanged for remuneration. Rather, a Werkvertrag is a service contract since the core obligation is rendering services. The additional element lies in the fact that it is not only the service activity that is owed but also the result envisaged by the service activity. An exception to the general rule on risk is only required with regard to cases where the service debtor is personally ready to perform but performance of the services is still impossible due to an event originating in the service debtor's sphere. In that case the risk should be borne by the service debtor. Hence, the rule on risk based on § 615 of the German Civil Code has to be supplemented by a corresponding exception. When applying the uniform rule on risk, again one has to differentiate between an obligation to achieve a result and an obligation of skill and care. In cases involving an obligation of skill and care, the readiness to perform the services refers to the personal availability and capability of the service debtor whereas in case of an obligation to achieve a result, the readiness to perform the services refers not only to personal availability and capability but also to the risks inherent in the achievement of the result, e.g. the suitability of the chosen means to achieve the result. Allocating to the service debtor the risks inherent in achieving the result reflects the obligation to achieve the result owed by him. Hence, the reference point of the service debtor's readiness to perform the services differs depending on the type of obligation owed while the underlying principle is the same for every service contract. Taking account of project-related services which are regularly not time-linked so that temporary denial of a required act of cooperation by the creditor does not result in an impossibility to perform the services, a rule is required that provides for compensation of any loss incurred due to the temporary denial of cooperation. This rule may largely build upon § 642 of the German Civil Code while the extraordinary right of termination of contract (§ 643 of the German Civil Code) may be abrogated since *de lege ferenda* each party has a right to freely terminate the contract without cause.

With regard to unilateral termination rights the focus lies on termination without notice. Under the uniform regime both parties have a right to terminate for good cause and to freely terminate the contract without notice. These wide-ranging opportunities for both parties to terminate the contract are counter-balanced by the rule on the financial consequences of such a termination and by a prohibition preventing the service debtor from terminating in an untimely fashion so that the creditor will not be able to arrange for a substitute service provider. The rule on the financial consequences builds upon existing elements in the rules of both Dienstvertrag and Werkvertrag. But instead of distinguishing between a Dienstvertrag and a Werkvertrag or between a free termination and a termination for good cause, the financial consequences rule distinguishes between a termination caused by the other party and a termination which was not caused by the other party but which was exercised freely, supplemented by a damages claim. Since the differentiating system of the rules on the financial consequences of termination follows the initiator principle, it achieves a synchronization of the rules on termination and impossibility to perform. In a nutshell, the financial consequences regime provides for full financial compensation for the party that has not caused the termination of the contract (with deductions depending on the individual circumstances of each case) unless (and to the extent that) the other party has an interest in the

services rendered up until termination which appears to be a fair and well-balanced solution for the interests involved.

In addition to the analysis of legislation, case law and scholarship, the Habilitation thesis also looks at post-codification developments in private-law setting. For that purpose, a number of standard contract terms are analyzed with regard to the key aspects of liability for non-conformity of the services, passing of risk and unilateral termination rights. Furthermore, the selected standard contract terms are screened for provisions which are lacking in the legislative regimes of the existing service contract types (Dienstvertrag, Werkvertrag and Auftrag) in order to determine whether they are capable of being generalized so as to apply to any service contract. The selected standard contract terms range from complex IT service contracts to an everyday dry cleaning contract. The result of the analysis is twofold. On the one hand, a number of standard contract terms stemming from smaller businesses or even business associations concerning businesses offering less complex services is rather short and contains a number of gaps. In many cases, businesses and business associations refused to provide their standard contract terms even for research purposes. Hence, it seems that many smaller businesses and many branches offering rather simple services manage their contracts within the existing legislative framework as well as they can. The lack of existing standard contract terms and the gaps found in those that do exist are not proof of a satisfactory status quo but rather of those parties' unawareness and lacking professionalism. They do not rely on the statutory framework because they are convinced of its quality but because they do not have the means and the know-how to tailor it to their needs. On the other hand, there are the standard contract terms for construction contracts (VOB/B), IT contracts (EVB-IT) and general service contracts (VOL/B) with public authorities and also those for IT contracts between private players originating from professionally organized business associations (BITKOM) which are very detailed and contain several modifications and additions to the legal framework.

Overall, the standard contract terms analyzed underline the conclusions drawn from the analysis of legislature, case law and scholarship as well as the uniform regime created by the author. Most standard contract terms build on the existing system with different contract types in order to distinguish the obligation to achieve a result from a mere obligation of care and skill whereas the rules with regard to liability for non-conformity of the services, passing of risk and unilateral termination rights converge. Furthermore, most of the more detailed standard contract terms contain a unilateral right of the creditor to amend the contract subsequent to its conclusion. Since such a right is also contained in the German government's draft (dating from March 2016) of a new construction contract type, building mainly on the existing regime of Werkvertrag, it seems reasonable to extend such a right to any service contract. Drawing from the existing regimes which differ in several respects, a new regime for unilateral contract amendments is being developed. It consists of two consecutive levels. On the first level, the parties have to try to reach an agreement on the requested amendment. If such agreement cannot be reached, the creditor has a unilateral right to demand the requested amendment on the second level. If there is an extension of the services contracted for, this extension has to be remunerated by the creditor. If there is a reduction of the services, the service debtor still has the right to full remuneration with deductions for saved expenses and income by alternative use of the free workforce or potential income not realized in bad faith.

The defective system of gratuitous mandate with the transfer of its rules to service contracts via the vague concept of “Geschäftsbesorgung” (managing another’s affairs) in § 675 of the German Civil Code should be abandoned. Instead, the mandate provisions should form part of the uniform regime governing all service contracts. They are not specifically designed so as to take account of the gratuity of the contract but are rather applicable to most service contracts – gratuitous or non-gratuitous – promising to achieve a result or merely promising a duty of skill and care. Accordingly, the German Federal Labour Court (Bundesarbeitsgericht) has applied several mandate provisions to employment contracts. Likewise, one can find mandate provisions in the code of conduct of many business associations relating to self-employed services. Moreover, the mandate provisions linked to representation determine their substantive scope of application on their own since the issues addressed by them will become relevant only in a representation scenario whereas they will be rather irrelevant in the event of all other service contracts. Their function for *negotiorum gestio* and other legal relationships in the German Civil Code by way of reference to them can still be performed even if they are integrated into a uniform service contract law. Finally, with regard to gratuitous services one should not create a separate contract type but rather provide for the application of the service contract law provisions apart from those linked to remuneration, and one might consider restrictions on liability for non-conformity of the services as is the case in most other gratuitous sub-types such as donation and loan.

The already existing and increasing dichotomy of the law of self-employed service contracts and employment contracts is intensified by the proposed service contract law which is designed as a regime for self-employed service contracts. Neither full liability for non-conformity of the services nor a free termination right for both parties fits into an employment contract law. Solely the provisions envisaged for passing of risk might also fit for employment contracts when subjecting them to the special employment contract law concept of the so-called “Betriebsrisikolehre” which has allocated the risk in employment contracts since the 1920s in a specific way close to, but not identical with the one suggested here for self-employed service contracts. Considering in addition the increasing differences between many other aspects of contract law which are created by a large number of special employment (contract) law statutes, there seems to be no alternative to excluding employment contracts from the substantive scope of the general uniform service contract law suggested here. The ongoing proposals for an employment service contract law are amenable to integrating employment contracts even though their main purpose lies in consolidating the increasing number of special employment law statutes. It would then have to be considered in the context of such an integration process how far and to what extent the general service contract law and other provisions of the German Civil Code apply to employment contracts.

Considering the current and proposed structure of German service contract law, one can see a tendency to create special regimes for certain sub-types of service contracts while the general law of service contracts with its basic contract types remains untouched in its late-19th century appearance. The aim of this thesis is to renew and redesign the general law of service contracts, which could then be complemented by those special regimes. In that respect, there is some similarity to the “Services” Part of the Draft Common Frame of Reference. In addition to providing the basis for the special regimes, the general law of service contracts would also replace those provisions of the general contract law which do not fit for service contracts since they are – as with many provisions of the general law of obligations – tailored to sales contracts. This results in a three-tier norm hierarchy: On the first tier, the rules of the

special regime for the sub-type in question apply. On the second tier, the newly developed general law of service contracts applies in so far as the special regime lacks a provision. On the third tier, general contract law has only a gap filling function. Looking at the special regimes already in force and at those still in the legislative process, one can see that liability for non-conformity of the services, passing of risk and termination rights will still be governed by the general law of service contracts. With the integration of mandate into service contract law, even more aspects may be regulated by the general law of service contracts. The special regimes supplement rather than modify the general law of service contracts with regard to a few special aspects which are only relevant for the sub-type in question.