The "Reasonable Man" in United States and German Commercial Law

Willi Joachim
Attorney-at-Law
Introduction

In the United States and Germany, lawyers use an objective and rational phrase when evaluating human legal conduct. As a striking example for the statement, we refer to an ordinance published in Eltamont Springs, Florida, in the summer of 1983, prohibiting whistling, singing, or hooting on public streets late at night, if done in a "loud and raucous" manner.

According to the Associated Press, on the first reading of the ordinance, the phrase "loud and raucous", was questioned, and it was asked who would decide when that was taking place. The City Attorney said, "The Supreme Court has ruled that a reasonable man will be able to determine what loud and raucous" is. In reality, the "reasonable man" does not exist. He is rather a fiction, a pattern for an objective and rational approach to law in order to achieve a satisfactory, adequate, and in short, reasonable result, by applying a statute or by settling a lawsuit.

The reasonable man appears as a modern means of applying the "Golden Rule", both in the Common Law and the Civil Law systems, not to expect too much or too little from human beings regarding their relevant legal behavior.

The reasonable man can be described as a fictional person possessing and exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of its own interests and the interests of others. This useful test has played a very important role in the emergence of tort law, as a separate and distinct branch of law in England, and later in the United States more than a hundred years ago.

Anglo-American courts needed a standard against which they could measure the alleged negligence of a person charged with financial responsibility for injuring a person or property of another through his carelessness. The reasonable-man test still has its applications in United States and German tort law, as well as commercial law. This article examines the reasonable man in American and German commercial law.

United States Civil and Commercial Law

Defining "Reasonable"

Being "reasonable" means having the faculty of reason, acting rationally governed by reason. The behavior can be called "reasonable" if the activities can be valued as fair, just, or equitable. The person must be honest, moderate, sane, sensible, and tolerable. "Reasonable" implies a certain standard of valuation. It is a standard for guiding conduct.

The person or his acts can be characterized as reasonable if he possesses the just-mentioned virtues. A fictitious standard is set up to evaluate human behavior.

Reasonable Man

This phrase is a personification of the description of "reasonable". Thus, the "reasonable man" can be understood as a phrase used to denote a hypothetical person who exercises those mentioned qualities of attention, knowledge, intelligence, and judgment which society demands from its members for the protection of their own interests and the interests of others.

Applying the Reasonable-Man Standard

The reasonable man does not always appear in the Process of evaluating human behavior. There are several judicial patterns demanding a judgment of reasonableness without expressly mentioning the reasonable man as a personification, such as: reasonable aids, care, diligence, doubt, compensation, (market) value, notice, skill, time, manner, opportunity, extent, efforts, and so on.
"Reasonable certainty" appears in the law of damages. It permits recovery of damages only for such future pain and suffering as it seems reasonably certain to result from the injury received.\textsuperscript{10} To authorize recovery under such a rule for permanent injury, permanency of injury must be shown with reasonable certainty, which is not mere conjecture or likelihood or even a probability of such injury.\textsuperscript{11}

Many lawsuits deal with the question of whether someone received "reasonable notice" of a decisive event. "Did plaintiff give reasonable notice to defendant?" Obviously, this term is relative,\textsuperscript{12} depending largely upon the circumstances of each individual case.

We come across countless contracts asking for performance within a certain time. When the contract does not fix a time for performance, the law allows "reasonable time" for performance. This term can be defined as such time as is convenient and necessary to do what the contract requires to be done as soon as the circumstances will permit\textsuperscript{13} Taking into account that quite a number of provisions of the Uniform Commercial Code (UCC) require "reasonable time", it is regarded as one of the key-phrases of modern commercial law, especially in contract law.

The term "reasonable use" can be explained in a vivid way by referring to the Common Law "reasonable use theory". This rule means that a riparian owner may make reasonable use of his water for either natural or artificial wants. However, he is not entitled to use his right so as to affect the quantity or quality of water available to a lower riparian owner.\textsuperscript{14}

This theory illustrates several elements dealing with reasonableness. There occurs a conflict of interests of several riparian owners. The judge has to weigh the various interests. "Reasonable use" of a right stands for moderate, sensible usage.

Reviewing several Court decisions concerning commercial law, especially the law of contract and a number of sections of the Uniform Commercial Code (UCC), one comes across other terms of reasonableness without an expressed personification. The observer finds the "reasonable" amount, value, skill, use, manner, opportunity, extent, and efforts. All these terms confer a considerable amount of discretion to the judge.

Aspects of United States Civil and Commercial Law

In unfair trade cases, the courts distinguish legal from illegal contracts restraining trade by whether the restraint imposed is reasonable. Variations of reasonableness occur in the law of securities regulations. Section 11 of the 1933 Securities Act deals with materially defective (i.e., by way of inaccuracy, untruth, or omission) registration statements that have become "effective".

Section 11(a) provides that all signators of the registration statement, all directors of the issuer, experts, and underwriters have liability to any person acquiring (presumably directly or indirectly) the covered security for an effective registration statement that "contain(s) an untrue statement of a material fact or omit(s) to state a material fact required to be stated therein or necessary to make the statement therein not misleading ...".

There exists no statutory definition of materiality; although the prevailing view is that, for the purposes of both the 1933 and 1934 Act, the standard of "materiality" involved focuses on whether there is "a substantial likelihood that a reasonable investor" would consider the inaccuracy or omission important in making his investment decision, that is, whether there is a substantial likelihood that the relevant misstated or omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.\textsuperscript{15}

Apart from this, the courts apply the "objective, reasonable man test" in lawsuits under Section 10(b) of the Securities Exchange Act of 1934.\textsuperscript{16}

The reasonable man concept can also be traced in United States antitrust law. The prohibition of the Sherman Act against any contract, combination, or conspiracy in restraint of trade pertains only to those restraints which are unreasonable.\textsuperscript{17}


The UCC contains a large number of provisions dealing with reasonableness. We restrict ourselves to the general provisions of Article 1 and the sales provisions of Article 2.
Article 1, General Provisions

Applying the provisions containing terms of reasonableness, one has to bear in mind that the UCC and, therefore, the relevant Sections ought to be liberally construed and applied to promote its underlying purposes and policies (Section 1-102(1), UCC). Some of the underlying purposes and principles are to simplify, clarify, and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties (Section 1-102(2)(a), (b)).

This "rationale-oriented" approach calls especially for reasonable - man phrases. According to Section 1-102(3), the effect of provisions of the UCC may be varied by agreement, except as otherwise provided and except that the obligations of good faith, diligence, reasonableness, and care prescribed may not be disclaimed by agreement; the parties may, by agreement, determine the standards by which the performance of such obligations is to be measured, if such standards are not manifestly unreasonable. Thus, new developments in society, expressly social changes in trade; can be transformed into law.

The principles of law and equity supplement the UCC provisions (Section 1-103). Equitable principles function as "gap-fillers". The judge is authorized to resort to general equitable principles when code provisions are silent or when a word like "reasonable" appears that would invite him to construe and give contents to the word.

When a transaction bears a reasonable relation to a certain state and also to another state or nation, the parties may agree that the law, either of a certain state or of such other state or nation, shall govern their rights and duties (Section 1-105(1)). The crucial question of what constitutes a reasonable relation will be an essential judicial issue, depending upon the facts of each case.

Article 1, General Definitions and Principles of Interpretation

According to Section 1-201(10), a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. The jurist has to apply this test when deciding on a conspicuous term or clause.

A person notifies by taking such steps as may be reasonably required to inform the other in ordinary course (Section 1-201(26)). An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines (Section 1-201(27)). Apart from the various forms of reasonableness, other broad phrases, such as "ordinary course", "due diligence", and "significant information" reveal the considerable amount of discretion in applying these Sections. The phrase "reasonable under the circumstances" underlines the close link between reasonableness and the relevant fact situation.

Section 1-204(1) contains a "definition" of "reasonable time": Any time which is not manifestly unreasonable is a reasonable time. This Section intends to prohibit negative extremes. The huge amount of discretion which is left to the lawyer and judge is strengthened when reading Section 1-204(2): What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action.

The reasonable time phrase occurs in numerous sections within the UCC sales article. The reader notices the variety of matters of law requiring the "reasonable time" within the Sales Section. Particularly between merchants, the time factor frequently turns out to be dominant in their contractual relationship.

Article 2, Sales

The prerequisite of good faith serves as a basic overriding principle in United States law, especially in the UCC. It is essentially equitable in character. The UCC enables the jurist on several occasions to apply that equitable principle. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in trade (Section 2-103(1)(b)). If not especially related to merchants, good faith means honesty in the conduct or transaction concerned (Section 1-201(19)).
The UCC uses the term "good faith" in two different senses. The first group of UCC Sections refers to "good faith purchase". In this context, "good faith" is used to describe a state of mind. Whether the purchaser of goods takes good title from a seller whose own title is voidable because of fraud depends, under Section 2-403(1), on whether he purchased in good faith.

In a second group of sections, "good faith" is used to describe performance or enforcement, rather than purchase. Here, the inquiry refers to decency, fairness, or reasonableness in performance or enforcement. If the parties to a sales contract leave price or performance terms open to be fixed by either buyer or seller, the party is to fix them in good faith (Section 2-305(2) and Section 2-311(1)). This second group of provisions requires the application of reasonableness when interpreting "good faith". Section 2-306(1) serves as another suitable example. If the parties describe the quantity as seller's output or buyer's requirements, their obligations are defined in terms of such output or requirements as may occur in good faith.

The formal requirements of the so-called "Statute of Frauds" can even nowadays be regarded as one of the basic elements of contract law. With regard to merchants, if a writing in confirmation of the contract is received in reasonable time and the party receiving it has no reason to know its contents, it satisfies the requirements of the Statute of Frauds (Section 2-201(2)). The concept of reasonableness can also enforce a contract under circumstances which reasonably indicate that the goods are for the buyer (Section 2-201(3)(a)). The UCC expressly provides for clauses to imply the reasonable man's judgment to overcome the formal requirement of a written contract.

Offer and acceptance are the main important prerequisites in Formation of contract. The process of forming a contract shall be construed as inviting acceptance in any name and by any medium reasonable in the circumstances (Section 2-206(1)(a)). When the beginning of a requested performance is a reasonable mode of acceptance within a reasonable time, an offeror may treat the offer as having lapsed before acceptance (Section 2-206(2)). The flexible concept of reasonableness is to be implied in both ways, whether there is a contract or not.

Cases

The task of collecting and explaining cases, in which the reasonable man concept occurs, is to be fulfilled as follows: A first group of cases deals with general contract law, i.e., the formation of a contract, including offer, acceptance, and consideration. A second group contains recent cases laying special stress on damages.

The Formation of Contracts

Agreement Process - Intent to Contract

In *Lucy vs. Zehmer*, plaintiff buyer orally agreed with defendant seller on the purchase of a farm. Their oral agreement was reduced to writing and signed by plaintiff, defendant, and defendant's wife. Plaintiff picked the written and signed memorandum off the bar and offered $5 to bind the agreement, which defendant refused. Dealing with the question whether there is a contract, the court formulated the general rule that an offer which the offeree reasonably is entitled to believe serious makes a binding contract, if accepted regardless of whether the offeror is jesting or serious. The court applies a reasonable man standard to decide the question whether a contract has been formed.

Offer: Indefiniteness, Parties’ Intent

The main facts of *Haines vs. City of New York* are as follows: In 1924, the City of New York, defendant, contracted with the Town of Hunter to create a sewage system. Later, defendant refused plaintiff Haines permission to subdivide his land in order to develop into residential lots, for the reason that the sewage plant could not cope with the increased load.

The court analyzes the parties' intent and then adds the lacking contract term:

"In the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the
parties and supply the missing term, if a duration may be fairly and reasonably fixed; by the surrounding circumstances and the parties' intent .... It is generally agreed that where a duration may be fairly and reasonably supplied by implication, a contract is not terminable at will. The weight of authority supports the related rule that where the parties have not clearly expressed the duration of a contract, the courts will imply that they intended performance to continue for a reasonable time.

The court calls on the reasonable man to decide the duration of a contract.

**Acceptance**

In *Ross vs. Lebermann*, plaintiff Ross agreed to contribute additional capital needed to operate the Edgar and Co. corporation if defendants Lebermanns also contributed. Plaintiff was not informed about defendants' actual payment. The judges held that no notice of acceptance is required in a unilateral contract when the offeror could reasonably find out about the performance of the requested act:

"... if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act of forbearance has been given, and the offeree should know this, the contract is discharged unless, within a reasonable time after performance of the act of forbearance, the offeree exercises reasonable diligence to notify the offeror thereof."

In *International Filter Co. vs. Conroe Gin, Ice and Light Co.*, plaintiff International Filter offered a water purification system to defendant Conroe, via letter, stating that there would be a contract when defendant's acceptance was approved by plaintiff's executive officer. The judge refers to the endorsement of the letter and then interprets it by calling on the reasonable man: "And this letter we think, would clearly indicate to a reasonable prudent person, situated as was the defendant in error, the fact of previous approval by the filter company."

The relevant facts of *Swift and Co. vs. Smigel* are as follows: Joseph Smigel, who was subsequently adjudicated incompetent, formed a continuing guaranty with plaintiff Swift concerning goods to be delivered to the Pine Haven Rest Home. Plaintiff had no knowledge of Smigel's incompetency during the period of delivering goods. Plaintiff sued Erwin Smigel, executor of the estate of deceased Joseph Smigel. The court focuses on the issue:

"... the decisive consideration should be the presence or absence of knowledge by plaintiff, actually or reasonably to be imputed, of defendant's incompetency."

**Consideration**

In this area of law, the question of reasonableness is increasingly considered. In *Fiege vs. Boehm*, defendant Fiege promised to pay if plaintiff Boehm would abstain from a suit in bastardy. After blood tests, showing that defendant was not the father, he refused payment. The court expressly refers to the "test of reasonableness":

"... the claim forborne must be neither observed in fact from the standpoint of a reasonable man in the position of the claimant, nor, obviously unfounded in law to one who has an elementary knowledge of legal principles. We agree that while stress is placed upon the honesty and good faith of the claimant, forbearance to prosecute a Claim is insufficient consideration, if the claim forborne is so lacking in foundation ... and a reasonable degree of intelligence."

There are many contract law cases dealing with the reasonable man concept; Courts refer to "unreasonable
expectations", "reasonable value", "reasonable time", "good faith", "reasonable business", "fair play", "reasonable manner", "reasonable effort", "fair dealing and good faith", "a reasonable discretion", "reasonable extent", "reasonably foreseeable figure", "reasonable diligence", "reasonable businessman", "reasonable interpretation of the document", "reasonable time", "reasonable notice", and "reasonable relation".

In a recent decision concerning consideration, the basic contract element, the United States Court of Appeals refers to "reasonable notice", "reasonable time", and "reasonable duration". Apart from that, the court defines "reasonableness", as that notice which, under all the circumstances of the case, would be regarded as a fair and reasonable period of notice to sever the relationships between the parties.

Cases Dealing with Damages

In Auto Owners Insurance Company vs. Wayne Jensen and Charles A. Butz Jr., the United States Court of Appeals for the Eight Circuit deals with an appeal from the judgment of the United States District Court, declaring that the appellant, Auto Owners Insurance Company, had a duty to defend the appellee, Charles A. Butz Jr., under the terms of its comprehensive commercial policy for all claims arising out of the painting of a highway bridge and that the appellant could not apply a deduction to such claims.

The Court considers whether the damages were expected:

applied is an objective one, i.e., whether a reasonable man in the position of the insured would have expected the damage to occur.

The judge then discusses "reasonable precautions" from the standpoint of the insured. The main issue is whether the damages are "a result reasonably foreseeable". Again, the reasonable man comes into play:

"A result is reasonably foreseeable, if there are indications which would lead a prudent man to conclude that particular results could follow from his actions."

The court concluded that "... the insured's reasonable expectations of coverage should be given effect". Judges in various jurisdictions use this doctrine of reasonable expectation as a basic rule of construction.

Jurists apply the reasonable man scheme to evaluate human behavior in numerous areas of law, in particular in commercial law. The reasonable man test is employed to construe contracts, to measure damages, and to decide upon the mitigation of damages. This test appears in the form of the reasonable man or prudent person.

German Civil and Commercial Law

To provide a sound basis concerning the reasonable man test in German Civil and Commercial law, we must set out general definitions. First, special mention must be made of the basic difficulties in defining German law terms in an appropriate English language for comparative purposes. Within a realistic approach, we can only achieve an approximate translation of the German juristic expression.

Reasonable Man: Der verständige Rechtsgenosse

Taking this initial restriction into account, we use the German phrase Der verständige Rechtsgenosse for the reasonable man. Without changing the sense, one could also say Der vemünftige Rechtsgenosse.

From a survey of German law courts using the reasonable man concept, we learn that this phrase frequently occurs in a specific sense. We meet the reasonable man in various kinds of roles or professions:
as the reasonable consumer, who would not interpret the advertisement of a certain product as a producer's warrant; as the reasonable car driver, whose actions and opinion serve the purpose to judge which expenses as a result of a traffic accident are reasonable; as the reasonable house owner, who would not have a bombed house rebuilt; as the reasonable traveller, who carefully looks after his insured belongings.

German jurists seem to employ the reasonable man as frequently as their colleagues in the United States. There are two differences: First, the reasonable man appears in specified roles, in a business-type situation. Second, German jurists do not always expressly refer to the reasonable man. Sometimes, they use other, similar phrases to evaluate relevant human legal behavior.

Characteristic Functions of the Reasonable Man Test

In various kinds of situations in German civil and commercial law, the judge has to evaluate human legal conduct, especially in the sense of whether it is to be qualified as reasonable or not. Section 276(1) of the German Civil Code (BGB) states that someone acts negligently if he disregards due care. To decide whether parties in a contractual or tortious situation acted with due care or not, the judge often calls on the hypothetical behavior of a reasonable man to obtain a sound platform for that decision.

The judge has to set up a basis which applies to all participants in contractual relationship or trade. The prerequisite of an objective standard in civil and commercial law is the basic difference in determination of negligence in German criminal law, which merely looks upon the individual culprit. To achieve the objective standard, the judge implies the hypothetical behavior of a reasonable man, how he would have behaved to exercise the care.

After comparing the parties' conduct with this hypothetical standard, the judge may qualify the parties' behavior as negligent because of lack of due care. The reasonable man test functions as a personified device for the evaluation of relevant legal behavior (personifizierter Sorgfaltsmassstab).

The reasonable man cannot serve as a premise with a certain, static meaning. Therefore, it is impossible to draw direct conclusions from it. As a juristic term, it does not apply as a premise in a syllogism. A German jurist cannot immediately subsume and draw a conclusion; first, he has to construe this subtle term. This judicial process is called ausfüllen in German, which means "to fill up" this flexible term.

As time goes by, the reasonable consumer -- to come back to our introductory example -- might look at advertisements in a different way. To transfer such changes of attitude into law, the judge requires such a flexible vehicle. Esser, a well-known German scholar, has elaborated a description of the judge's task to express social changes into law. According to Esser, the judge acts as a transmitter between developments in society and its transformation into law.

The notion of reasonableness implies a reasonable use of rights. The reasonable man would not carry a legal interest to an extreme. The reasonable man test is, therefore, employed by judges as a means against abuse of rights. This thought relates to the "doctrine of reasonable use" in the United States. Generally, in German civil and commercial law, the protection against abuse of rights is legally based on the so-called "general clauses" or Generalklauseln, such as Sections 138, 226, 242, and 826, BGB.

The reasonable man concept can be employed as a means to correct certain rights. The notion of the abuse of rights frequently refers to extreme situations. Suppose a long term contract turns out to be too burdensome for one party. The reasonable man test could be used to adjust the contract. Again, this basic task of adjustment of contract is usually fulfilled in German contract law by referring to a long list of Supreme Court cases, based on the general clause of Section 242, BGB.

The German Civil Code

The German Civil Code contains several clauses which can be construed by standards of reasonableness.

Section 242, BGB: Treu und Glauben (Good Faith)
"The obligor is bound to perform the obligation in such a way as is required by the principle of *bona fides* -- good faith with due regard to existing usage*. Apart from the plain meanings of its words, this Section has become a basic and overriding principle in German law. The principle of good faith governs everybody’s rights and duties under German law. As far as its application is concerned, we can generally distinguish among four functions.

First, the function of appropriation is used to govern the Performance of a contract. Section 242, BGB, helps to define the duties of a contract more precisely.

Second, there is the function of supplementation. With the good faith clause, a German jurist can create additional duties of a contract.

Third, the function of restriction has to be mentioned. Based on Section 242, BGB, the courts frequently prevent a certain right from being abused or carried to an extreme.

Finally, existing rights need to be corrected due to unforeseen changes. In particular, long-term-contracts sometimes require an adjustment, if not a complete repeal. Investigating the presumed intentions of the parties of a contract (hypothetischer Parteiwille), the judge implies an objective standard. How would the reasonable man have acted or reacted in the parties' position? This Section serves as a technique by which social and technological changes can be accommodated in a codified legal system.

In addition, Section 242, BGB, functions as a platform for the applicability of the German constitution, the so-called "Basic-Law" (Grundgesetz), into private law. The "constitutional approach" to interpreting the general clauses, especially Section 242, BGB, is generally accepted.

Sections 133 and 157, BGB, Interpretation of Contracts

Section 157, BGB, states that contracts have to be interpreted in good faith with due regard to existing usage. Section 133, BGB, deals with the construction of expressions of someone's intent to have legal consequences. Together with Section 242, BGB, the two Sections form the legal basis for interpretation.

If a given contract is not precise enough or gaps appear, the presumed intentions of the parties have to be considered. The concept of reasonableness is required to settle possible disputes.

Section 276, BGB, Standard of Reasonable Care

According to Section 276(1), BGB, one acts negligently if he does not have regard to reasonable care. To handle this objective standard, applicable in contract and in tort law, one has to refer to the judgment of a prudent, diligent participant.

Section 254, BGB, Mitigation of Damages

Section 254, BGB, containing basic notions of comparative negligence, represents a special expression of the good-faith principle. In applying that norm, we focus on the prudent creditor and question -- as in the United States case law -- whether he reasonably could have minimized the damages.

Section 138(1), BGB, Boni Mores

Another basic general clause is laid down under Section 138(1), BGB. A legal transaction, violating the principles of *boni mores*, is void. A legal transaction is regarded as void if it violates the standards of those being sensible of justice and equity.

To find out about the violation of boni mores, courts and scholars refer to those persons whose views are just and equitable and ask if these prudent persons deem an act as morally objectionable. Finally, the judge applies his own standard of reasonableness.
Angemessene Zeit - "Reasonable Time"

Like the UCC provisions referring to "reasonable time", there exist various BGB sections claiming the angemessene Zeit. Section 250(1), BGB, requires the fixing of a reasonable time before the creditor is entitled to money damages. According to Section 299, BGB, the creditor's delay in accepting performance has to be assumed if the debtor has announced his performance within a reasonable time. Section 496(1), BGB, provides a reasonable time for a sale on approval.

Handelsgesetzbuch, HGB, German Commercial Code

Section 347, HGB, Duty of Care of a Prudent Merchant

Section 347(1), HGB, provides:

"A person who, in respect of a transaction which is, as to himself, a commercial transaction, is under a duty of care to another person, must exercise the care of a prudent merchant". 79

This provision serves as a supplement to Section 276, BGB, the basic duty-of-care rule.80 Section 347, HGB, refers to an ideal type of merchant, who is not described any further in the commercial code. The commentators prescribe a general tendency: The prudent merchant has to pay closer attention than the ordinary reasonable man.81

Similar Provisions

Similar provisions in the Commercial Code impose the standard of care of a reasonable merchant.82 "The commission agent is obliged to carry out the business transactions he undertakes with the care of a prudent merchant; in doing so, he shall protect the interests of the principal and follow his instructions" (Section 384(1), HGB).

Section 408(1), HGB, states a similar duty for a prudent merchant. We quote Section 429(1), HGB:83

"The carrier is liable for damage, which is caused by the loss of, or injury to, the goods between the time of taking over and delivery, or by non-observance of the time fixed for delivery, unless the loss, the injury, or the delay is caused by circumstances which could not be prevented by the application of care required of a prudent carrier".

This Section reveals two striking features concerning the use of the reasonable man test in German law. First, the reasonable man is described as the prudent carrier. As mentioned before, German law lays stress on the characteristic business-type role. Second, the legislator tells the judge to take a close look at the circumstances of the individual case when determining the prudent carrier's behavior. The Commercial Code provides similar provisions for the commission agent and -- by express statutory analogy -- for the warehouse keeper (Sections 390 and 417, HGB).84

Aktiengesetz, German Stock Corporation Act

The Stock Corporation Act expressly provides, in Section 116, for liability of the directors of the supervisory board. Section 116 refers to Section 93, stating that this provision concerning the business manag-

ers' liability also applies to directors. It establishes the legal basis and the standards for the performance of duties and, in the breach thereof, for liability of both executive managers and directors.85 The law applies a standard of care and performance of duties of a diligent and prudent businessman or supervisory board member. Again, the reasonable man test becomes applicable in a specific business situation.86

German Supreme Court Cases

The German Supreme Court for Civil Matters (Bundesgerichtshof, BGH) deals with the reasonable man test and similar phrases.

Standard Business Conditions
The Supreme Court has construed standard business conditions of a commercial builder who sells a completed dwelling. The defendant, a building constructor, set up and sold several condominiums to plaintiff. The contracts contained defendant's standard business conditions. Among other things, they stated that the defendant seller's legal responsibility, to see that the goods were of proper quality and fit for the contractual use, was precluded.

In lieu of that, defendant assigned his own warranty claims against the various architects, builders, and suppliers to plaintiff. The court construed this "boiler plate clause" concerning the seller's preclusion of his own warranty.

"This clause is to be interpreted according to the intent of reasonable contracting parties, based on a fair balancing of their interests". This judgment serves as an excellent example in describing the manner how German judges use the reasonable man scheme. It is employed as a flexible mechanism to evaluate legal conduct, here the validity of a standard contract term.

In another recent Supreme Court decision concerning standard business terms of retention of ownership, the judges applied the reasonable man test in construing various clauses. Based on "reasonable valuation" of plaintiff's business clauses, the judges decided that the plaintiff, a paper wholesaler, reserved its ownership of the various papers at issue.

Product Liability: Reliance in Advertisements

The Supreme Court elaborated the basic prerequisites for product liability in the "chicken plague case". Many of the plaintiff's chickens died because of a defective vaccine. Its producer was sued for money damages. The court discussed whether the producer was liable because the consumer relied on the product, especially because of its extensive promotion in several advertisements.

The reasonable consumer's understanding of modern advertising techniques were found to be relevant. "As from an economic standpoint advertisements have become more important in modern times; this, however, does not imply that they can be interpreted as general admissions of liability. A reasonable consumer does not understand advertisements in that sense".

Unfair Competition, Reasonable Publisher

The Supreme Court had to decide whether the gratuitous distribution of newspapers, mainly containing advertisements, violates basic principles of unfair trade. The Court reflected on the consequences of such an act as far as the future competition of the press is concerned. The court based its decision on the opinion of professional groups: "According to the judgment of reasonable publishers, should a gratuitous distribution be regarded as unethical, then such a professional misconduct would be important for the valuation of the law of unfair competition".

Reasonable Owner of Real Property

According to German law concerning private property, there must be adequate compensation in the case of expropriation. In another Supreme Court case, plaintiff wanted to reconstruct his warehouse, which had burned down. Due to changed zoning laws, local authorities refused the building permit. Plaintiff claimed an adequate compensation, stating that the changed zoning laws resulted in an expropriation. The court referred to the reasonable owner of real property:

be realistic possibility of economic use of the real property in the eyes of a reasonable owner.

Expropriation, Interpretation of Contracts, and Reasonable Owner

To avoid expropriation, the plaintiff sold real estate to a public authority which was going to enlarge the railroad system. Among several disputes between the parties, one issue was whether plaintiff was contractually bound to sell additional pieces of real estate required for the same public purposes. In a similar lawsuit concerning expropriation, plaintiffs also sold real estate to a public authority, this time to realize the building of a street. The main issue in the second case was whether plaintiffs could claim their property back after the purpose for the previous transaction could not be realized.

The court used quite a number of flexible terms: reasonable contracting parties, adequacy, weighing up interests, and
good faith; these expressions formed a broad platform on which to place the fair result of these two complicated lawsuits.

**Conclusion**

There are no basic differences in the United States and German civil and commercial law as far as the characterization and the application of the reasonable man are concerned. The reasonable man test contains various legal aspects and serves legal purposes; in particular this unique scheme functions:

1. As a discretionary, necessary, and helpful fiction or an artifice or instrumental idea in the evaluation of human legal conduct;
2. As a pool for juristic argumentation;
3. As a necessary device in both legal systems;
4. As a means to finding the "golden middle" for the judicial evaluation of human behavior;
5. As a general and flexible pattern used by the legislator to provide for adequate application of law;
6. As a general and flexible pattern used by lawyers, especially judges to achieve the adequate result in a lawsuit;
7. As a means to apply the present law; and
8. As a means to express social developments and changes into law.

The reasonable man test serves as a flexible concept, which needs to be interpreted by a constant shifting of the viewpoint between law and facts. The United States and the German legal systems face the same eternal and insoluble conflict between two tendencies.

On the one hand, the law must be certain and predictable, so that people living within the system can arrange their affairs relying on the legal effect; on the other hand, the law must adopt itself to the changing social and economic kaleidoscope of the society which it serves; otherwise people might disregard the law, evade it, and eventually break it.100

2 We do not use the phrase "reasonable man" in the sense that only men appear to be reasonable. There is, and should be, no sex discrimination to be read in this term. Instead of the "reasonable man", we might use the phrase "reasonable person". Wherever the term "reasonable man" appears in this text, it includes men and women.
3 As far as the application of the reasonable man in the modern sense of literature is concerned, see Landsbury, The Reasonable Man: Trollope's Legal Fiction, Princeton, N.J., 1981.
4 Most recently, the German Supreme Court for Civil Matters, Bundesgerichtshof (BGH), in cases concerning the tort liability of a hospital: First, because of an Aids infection, BGH, 44 Neue Juristische Wochenschrift (NJW)1948,1949 (1991); second, because of a nurse's wrongful conduct, BGH, 44 NJW 1540,1541(1991).
8 See Black's Law Dictionary, 5th Edition, for several examples.
10 Prettyman vs. Topkis, Sel., 3 A 2d 708, 710.
11 State ex rel, Kansas City Public Service Co. vs. Shain, 350 MO. 316,165 S. W. 2d, 428, 430.
12 State vs. Boles, 5 Conn. Cir. 22, 240 A.2d 920.
17 For further details, see The Rath Packing Company vs. Joseph W. Jones, United States Court of Appeals for the Ninth Circuit, 530 F. 2d 1295 (1975).
18 Cited Sections without further explanation are UCC provisions.

A sound discussion of equitable principles is published by Summers, "General Equitable Principles under Section 1.103 of the UCC", 72 NW. LRev. 906 (1978).

White, Summers, supra n. 19.


The two senses of good faith are discussed by Summers, 30 U. Chi. L. Rev. 666, 667-671 (1963).


White, Summers, supra n. 19.

*Calamari, Perillo, *supra* n. 28, p. 138.

*Commission of Appeals of Texas*, 277 S.W. 631 (1925).

*Supreme Court of Pennsylvania*, 298 Pa. 574, 148 A. 858 (1930).


A sound discussion of equitable principles is published by Summers, "General Equitable Principles under Section 1.103 of the UCC", 72 NW. LRev. 906 (1978).

"Brazener, "What Constitutes 'Reasonable' or 'Appropriate' Relation to a Transaction within the Meaning of UCC 1-105(1)",* 63 ALR 3d 341, 345, 346 (1975).

"Id.

"A sound discussion of equitable principles is published by Summers, "General Equitable Principles under Section 1.103 of the UCC", 72 NW. LRev. 906 (1978).

"Id.


"A sound discussion of equitable principles is published by Summers, "General Equitable Principles under Section 1.103 of the UCC", 72 NW. LRev. 906 (1978).

"The doctrine of reasonable expectations is to be expressed as follows: When ambiguities exist in an insurance policy they are to be resolved in accordance with the reasonable expectations of the insured. *Wilson vs. Insurance Company of..."

For a detailed discussion of Der verständige Rechtsgenosse, see Limbach, Der verständige Rechtsgenosse (Berlin, 1977).

57German Supreme Court for Civil Matters = BGH, 51 BGHZ 91, 100 (1968); the latest judgment concerning a reasonable entrepreneur and his company name, BGH 44 NJW 2023, 2024 (1991); regarding a reasonable consumer and free advertisements, BGH 44 NJW 2151, 2152 (1991).

58BGHZ 82, 85 (1970); BGHZ 346, 349 (1973); BGH 38 NJW 2637, 2638 (1985); with regard to a reasonable car buyer, BGH 44 NJW 1882, 1883 (1991).

59BGH 28 NJW 555, 256 (1975); most recently, BGH 44 NJW 2011, 2012 (1991), concerning a reasonable real estate owner.

60BGH 38 NJW 2831, 2832 (1985).


65One of his basic essays, concerning the relevance of sociological observations to be applied in law, is Vorverständnis und Methodenwahl in der Rechtsfindung (Frankfurt 1970).

66Esser, Vorverständnis, p. 137; see also Limbach, supra n. 56, p. 99.


68Translation taken from: Schlesinger, supra n. 67, P. 528.

69In detail: Roth, 242, Nr. 1 et seq., 12 et seq.; Palandt-Heinrichs, 242 anno. 1 a) a); Jauernig-Vollkommer, 242 anno. 1 a); Larenz, Methodenlehre der Rechtswissenschaft, pp. 169,170,177,178.

70For further details, see Roth, 242, Nr. 106 et seq., 224 et seq., 465 et seq.; Palandt-Heinrichs, 242 anno. 4; Jauernig-Vollkommer, 242 anno. 2.

71For a detailed discussion of that complex and complicated process, see Schlesinger, supra n. 67, pp. 522 et seq.; 530-534, 579-602; Roth, 242, Nr. 22 et seq.

72Roth, 242, Nr. 36; Palandt-Heinrichs, 242 anno. 1 d); Jauernig-Vollkommer, 242 anno 1 c); 4 German Supreme Court for Constitutional Matters, BVerfGE 269, 26 NJW 1221(1973); a detailed analysis of the Soraya case is given by Schlesinger, supra n. 67, pp. 579-592.

73Mayer-Maly, 133, Nr. 19 et seq. and 157, Nr. 1, 3; Roth, 242, Nr. 16; Palandt-Heinrichs, 133 anno.1, 157 anno.2, 242 anno. 2; Jauernig-Vollkommer,133 anno 1, 242 anno. 4; Joachim, "Abschluß, Ausgestaltung und Stornierung des Hotelaufnahmevertrages", 43 Der Betrieb (DB),1601,1602 (1990).

74Recently, the German Supreme Court for Civil Matters, Bundesgerichtshof (BGH) in a case concerning the reasonable care with firework, BGH 39 NJW 52, 53 (1986); most recently, BGH 44 DB 1617, 1618 (1991); furthermore, Hanau, 276, Nr. 79; Palandt-Heinrichs, 276 anno.4 B; Limbach, 85.

75BGH 38 NJW 2639 (1985); Grunsky, 254, Nr. 2, 3; Palandt-Heinrichs, 254 anno.1; Jauernig-Teichman, 254 anno. 1 c).

76The former German Supreme Court for Civil Matters, Reichsgericht = RG, 80 RGZ, 221(1927); 10 BGHZ, 228, 232 (1953); 69 BGHZ 295, 297 (1977), recently: BGH, 34 NJW (1982) 1455; Jauernig, 138 anno. 2; Palandt-Heinrichs, 138 anno. 1 b); Mayer-Maly, 138, Nr. 12.

77See Schlesinger, supra n. 67, p. 659; from the viewpoint of a German scholar, see Limbach, supra n. 56, p. 49.

78Esser, supra n. 56, pp. 21, 22, 133 et seq.; Roth, 242, Nr. 6; Limbach, supra n. 56, p. 49.


The "reasonable merchant" or similar phrases occur in: 253(1) S. 2, 253(3) S. 3, 286(2), (3) Nr. 2, 340 f (1), 340 g (1) German Commercial Code, HGB; the new accounting law forms part of the HGB, 238-339 HGB; so-called Bilanzrichtlinien-Gesetz of 19. December 1985. The latest article concerning the terms of "reasonable merchant" in accounting law: Imbeck, "Umfang und Grenzen kaufmännischer Abschreibungsentscheidung nach 253 Abs." 4 HGB, 46 Betriebsberater (BB) 1598-1605 (1991). With regard to a proper translation of 384 (1) and 408 (1) HGB, see Goren and Forrester, supra n. 79, pp. 66 and 71.

Goren and Forrester, supra n. 79, p. 75.

For the exact translation, see Goren and Forrester, supra n. 79, pp. 67, 72.


For further details concerning, the liability of supervisory-board directors in Germany, see Joachim, "The Liability of Supervisory Board Directors in Germany", 25 The International Lawyer, 41 et seq. (1991).


BGHZ, ibid.

BGH 38 NJW 1836, 1837, 1838 (1985); the latest judgment concerning standard business terms of a credit card company, BGH 44 NJW 1886, 1887 et seq. (1991).

51 BGHZ 91, 100 (1968).

Id.

51 BGHZ 236, 246 (1968); the latest court of appeals' judgment: Kammergericht (KG), 44 NJW 1490, 1491 (1991).

Id.

64 BGHZ 366, 380, 381 (1975).


BGH 35 NJW 2184, 2185 (1982).

Id.

BGH 34 NJW 219, 220 (1981); 35 NJW 2184, 2185 (1982).

This conflict is pointed out by Schmitthoff, Publication in honor of Helmut Coing, Volume II, 469 (Munich 1982). On a more abstract and philosophical level, this conflict represents the ever-lasting struggle between the different principles of justice: the aspect of general justice, as expressed by the written statutes, and the aspect of individual case, which might be contrary to the existing written law; as to this basic conflict, see the essay of Tsatsos, "Zum Verhältnis von Gerechtigkeit und positivem Recht", Larenz Festschrift zum 80. Geburtstag, publication in honor of Karl Larenz, pp. 649, 656 et seq. (Munich 1983); see also Joachim, Anwendungsbereiche, Argumentationsstrukturen und Inhalte der Billigkeit im deutschen Privatrecht (Bielefeld 1984).

Referring Principles:

I.2.1 - Standard of reasonableness