

**2007**

Position: 20. March 2007

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**Conditions of Business  
Arbitration Rules  
Rules for Experts**

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**Waren-Verein der Hamburger Börse e.V.**





## **Waren-Verein der Hamburger Börse e.V.**

**Große Bäckerstraße 4 D - 20095 Hamburg**

**Tel. 0049 40 - 37 47 19 0 Fax 37 47 19 19**

**internet <http://www.waren-verein.de>**

**E-Mail [info@waren-verein.de](mailto:info@waren-verein.de)**

**Association of the Foreign and Wholesale Trade**

in canned and deep frozen goods, dried fruit, edible nuts,  
dehydrated vegetables, spices, honey and similar products

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The German text of these Conditions and Rules shall be the sole authoritative text.



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## **Conditions of Business**

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# **Part One**

## **General Provisions**

### **§ 1**

#### **Applicability of the General Provisions**

The provisions of Part One apply to all transactions insofar as no special regulations for specific types of business transactions are contained in Part Two.

### **§ 2**

#### **Applicability of German Law and Incoterms**

The laws currently in force in the Federal Republic of Germany are applicable so as to supplement these provisions.

The Uniform Law on the International Sale of Goods, dated 17.7.1973 (BGBl. [Federal law journal] 1973 Part I p. 856), and the Uniform Law on the Formation of Contracts for the International Sale of Goods, dated 17.7.1973 (BGBl. 1973 Part I p. 868) as well as the law, dated 5.7.1989 (BGBl. 1989 Part II p. 586), concerning the United Nations Convention on Contracts for the International Sale of Goods, dated 11.4.1980, are not applicable.

Incoterms currently in force are applicable so as to supplement these provisions.

### **§ 3**

#### **Business Days**

Business days as defined in these Conditions of Business are Monday, Tuesday, Wednesday, Thursday and Friday insofar as these do not fall on 24th or 31st of December and are not officially recognised holidays at the place of performance or the place where the contractual declaration is made.

## § 4

### **Calculation of and Adherence to Stipulations as to Time**

(1) Stipulated periods of time which are calculated on the basis of business days or other days or longer periods end at 4 p.m. on their last day. Should the last day of such a stipulated period fall on a non-business day the next business day is to be regarded as the last day. If the commencement of such a stipulated period is determined by the occurrence of some event, the day on which the event occurs is not to be included in the calculation of the period of time. If the event occurs on a non-business day or after 4 p.m. on a business day, it is deemed to have occurred on the next business day. If a period of time is set in motion by a declaration, the communication thereof is the determining event.

(2) A stipulated time for making a declaration is adhered to only if the declaration reaches the addressee within the time stipulated. This applies also to a complaint that the commodities do not correspond to the contract description if the time for lodging a complaint is measured in days.

(3) The provisions of para. 1 sentences 1 and 2 do not apply to the calculation and observance of periods for shipment or dispatch or collection.

## § 5

### **Formation of the Contract.**

#### **Obligations and Rights of the Intermediaries**

(1) Brokers and agents who take a part in the negotiation or conclusion of a contract are under a duty to use the utmost care on behalf of both contracting parties. All declarations by one party relating to the conclusion of the contract, especially objections by one party to the contents of a contract-note, a confirmation of sale or other written acknowledgement, shall be passed on immediately by the broker or agent to the other party by the fastest possible means.

(2) The basis of the agent's commission or the broker's brokerage is the gross sales price, even where it has been agreed that the buyer shall pay the carriage costs for the seller's account and deduct this amount from the invoice total.



## § 6

### **Formation of the Contrast.**

#### **Reservation of the Designation of one Contrasting Party**

(1) If an intermediary (agent or broker) has reserved the right to designate the name of one party to the contract, the other party is bound by the contract even where it raises well-founded objections against the party which is subsequently designated; in this case the intermediary is regarded as the contracting party. Beyond this § 95 HGB (German Code of Commercial Law) \*) remains unaffected.

(2) Where no designation is effected, the intermediary is to be treated as a party to the contract even if it is he himself, and not the other party, who wishes to uphold the contract.

## § 7

### **Kind and Quality of the Commodities to be Delivered**

The seller shall deliver commodities of the kind and quality described in the contract. Where the contract stipulates the crop from which the commodities are to be supplied the seller shall supply fair average quality from this crop. If the contract for the sale of dried fruits or shell fruits does not stipulate the crop, the seller shall supply from a new crop. Where a contract for the sale of commodities of varying kind and quality, in particular different grades of the same produce, contains no terms as to the proportionate quantities the seller may determine the proportions as he pleases.

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\*) see p. 65

## § 8

### **Quantities**

(1) The word "about" in front of a contractual statement of quantity entitles the seller to deliver up to 5 % more or less.

(2) The seller is allowed to deliver part-consignment of an economically reasonable size, except where a specific parcel, which at the time of the contract is already at the place of performance, is sold and the buyer is to take delivery there. If it is stipulated that the commodities are to be transported by containers, at least one full container shall be delivered as part-consignment.

(3) If the buyer has to take delivery of the commodities at the place of performance he may, within the time for accepting delivery, elect to demand delivery by part-consignments of an economically reasonable size.

(4) The delivery receipt given by the buyer is conclusive evidence of the delivery of the quantity stated therein. This provision does not apply to spices.

## § 8 a

### **Certificates Proving Customs Tariff Preferences**

If according to regulations agreed by the European Community or otherwise made the utilization of preferential customs tariffs may come into question, the seller shall deliver to the buyer the certificates which are required for proving the right to this preference; certificates shall be delivered by the printed form provided for in the respective regulation.

## § 9

### **Place of Performance of the Seller's Obligations**

(1) The place of performance for the delivery of commodities is the seller's domicile, unless the circumstances indicate a different place of performance. Where a specific parcel is sold the place of performance is, in case of doubt, the place the parcel is situated when the contract is concluded. For contracts with documents for marine transport (Abladegeschäfte) and import transactions by land-dispatch, ex-quay and ex-warehouse transactions the special provisions of Part Two alone apply (§§ 35, 54, 76, 90).

(2) The place of performance for the delivery and presentation of documents is the buyer's domicile. The seller shall bring the documents to the buyer's business premises.

## § 10

### **Time of Performance of the Seller's Obligations**

(1) Where a time for the delivery of commodities or documents is neither agreed upon nor to be inferred from the circumstances the buyer may demand delivery immediately. Where no time for accepting delivery is agreed upon or to be inferred from the circumstances the seller may deliver immediately.

(2) Where "prompt" dispatch has been agreed upon for forwarding from one inland place to another inland place the seller shall dispatch the commodities within one week if they are to be carried by road, and within two weeks if they are to be forwarded by inland waterway. For contracts with documents for marine transport (Abladegeschäfte) and import transactions by land-dispatch only the respective special provisions of Part Two (§§ 39, 57) apply. In all other cases the word "prompt" denotes a period of three business days.

## § 11

### **Amount of the Purchase Price**

(1) The buyer shall pay the seller the agreed purchase price without discount. Furthermore the buyer shall pay the seller the value added tax arising on the consignment.

(2) If after the conclusion of a contract of sale

1. a statute or statutory instrument is passed under which the import duties are altered with effect for the agreed time for delivery or a part of this time, or
2. the freight for the agreed carriage of the commodities is altered, or
3. the fees for the agreed waste management of the packing of the commodities is altered

and in consequence thereof the seller's demonstrable expenses alter, the purchase price shall be adjusted by the amount of this difference. Included in the import duties in the sense of this article are customs duties, skimmed off duties and excise duties. The provision in 1. supra applies mutatis mutandis if the seller's demonstrable expenses alter in consequence of such other regulations as a market organisation or common organisation of agricultural markets may make.

## § 12

### **Due Date for Payment of the Purchase Price**

Where a time for payment of the purchase price is neither agreed upon nor to be inferred from the circumstances the seller may demand payment immediately. As long as an agreed time for taking delivery has not expired the seller may not demand payment of the purchase price until the buyer demands delivery of the commodities.

## § 13

### **Cash against Documents. Other Cash Clauses. Payment from Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the agreed purchase price without delay upon delivery by the seller of all the contractual documents duly constituted in accordance with the contract. The buyer may neither set off nor withhold the purchase price. He has no right to refuse performance. In particular he may not make payment dependent on prior inspection of the commodities not even in the event that the commodities have already arrived at their destination. The buyer's obligation to pay is not affected by any claims, objections or pleas on the grounds that the commodities do not correspond to the contract description. Any claims, objections or pleas of the buyer are only to be considered if particular circumstances make the seller's demand for payment appear to be abusive; seller's demand for payment especially is to be regarded as being abusive if and as far as the buyer has set off a claim which is undisputed or has become *res judicata*.

(2) If the buyer has contracted on "cash against documents" terms, he shall at the seller's request accept in trust contractual documents in good order, unless the seller makes the permission he gives to the buyer to dispose of or to use the documents dependent on conditions to the fulfilment of which the contract gives him no claim.

(3) Para. 1 is also applicable in cases where payment is to be made from a letter of credit against delivery of documents or if the word "cash" is used in any combination with the agreement on manner of payment.

## § 14

### **Documents Held in Trust**

The buyer must return documents received in trust by 4 p.m. on the business day following their tender if he has not by that time fulfilled the conditions on which the seller had permitted him to dispose of or use them. Documents not in conformity with the contract are to be regarded as approved if the buyer does not return them in time. Where the buyer makes use of a document without first fulfilling the conditions on which the seller permitted him to dispose of or use it, these conditions are to be regarded as approved.

## § 15

### **Force Majeure**

Both contracting parties are released from their obligation to perform where one party is prevented from performing by an unforeseeable, unavoidable event (force majeure) for which it is not responsible and which occurs after the contract is concluded. The party prevented from performing shall immediately inform the other party of the force majeure; if it fails to fulfil this obligation it will be liable in damages for non-performance of the contract.

## § 16

### **Delay in Performance**

A party who by failing to perform on time causes a loss to another contracting party shall reimburse him for such loss. Money debts shall bear interest of at least 2 percentage points above the current Base Rate (§ 247 German Civil Code) per year (p.a.) from the date payment was due.

## § 17

### **Delay in Effecting a Principal Performance**

(1) Principal performances in the sense of this Article are: delivery of the commodities, delivery of documents, payment of the purchase price, call for delivery and such performances as are designated as principal in other Articles of these Conditions of Business.

(2) An obligee may grant an obligor a reasonable period of grace in which to effect an already due principal performance or to declare his readiness to perform the same. If the time has expired, he may elect to withdraw from the contract or to demand damages for non-performance, unless performance has been effected in time or the declaration of readiness to perform, for which declaration the period of grace was granted, has been made; the claim for performance is excluded. The consequences set out in sentence 2 do not follow where the obligee declares at the time that he reserves the right to claim performance. § 376 HGB (German Code of Commercial Law) \*) remains unaffected.

(3) The respite must amount to at least three business days; it shall be notified in writing, by telegram, by telex or by telefax.

(4) As damages for non-performance the obligee may claim the difference to his disadvantage between the market price on the relevant date and the contract price. The relevant date is the first business day after expiry of the respite. When calculating damages in such a case any agreed "about" clause is not to be taken into account.

(5) The obligee may choose to effect a covering transaction in order to ascertain damages. This covering transaction is to be for the obligor's account if the following conditions are observed:

- a) The covering transaction is to be negotiated by an impartial, expert broker.
- b) The broker shall first of all invite firms other than the contracting parties, which in his considered opinion come into consideration as business competitors, to make bids. He shall inform the obligor of the most favourable bid and invite him also to make a bid; the

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\*) see p. 66

obligor shall not be heard if the covering transaction is being effected in order to ascertain damages for non-performance of another covering transaction in which the obligor was as such already a party. The broker shall then inform the obligee of the overall most favourable bid and invite him also to make a bid. A written note is to be made by the broker of the firms consulted and their bids. The covering transaction is to be concluded with the bidder who made the most favourable bid. In the case of a covering purchase the obligee's bid is not to be considered if no other bids have been made.

- c) The covering transaction is to be commenced and carried out without delay.
  - d) In the case of a covering purchase any agreed "about" clause is not to be taken into account.
- (6) Other calculations of damages are not excluded by paras. 4 and 5.

## § 18

### **Unjustified Refusal of a Principal Performance**

(1) This Article concerns principal performances in the sense of § 17 para. 1.

(2) Where one contracting party has without justification declared to the other party that it cannot or will not perform, the other party may elect between withdrawing from the contract or claiming damages for non-performance. In calculating damages paras. 4 to 6 of § 17 are to be applied. The relevant date in the sense of § 17 para. 4 is the first business day after the declaration as described in sentence 1 reaches the addressee.



## § 19 \*)

### **Commodities not in Conformity with the Contract. Rights of the Buyer**

(1) If the commodities do not correspond to the contract description at the time when the risk passes to the buyer, he may avail himself, at his option, of the rights contained in paras. 2 to 6, insofar as the further necessary preconditions are satisfied. Concerning a sale of consumer goods of a consumer within the European Union a lack of conformity which becomes apparent within six months of passing of the risk to the consumer shall be presumed to have existed at the time of passing of the risk unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

(2) The buyer may demand compensation from the seller amounting to the difference in value on the relevant date between the commodities which do not correspond to the contract description and commodities which do correspond to the contract description (depreciation).

(3) The buyer may demand rescission of the contract where the depreciation amounts to more than 10 % of the market price in force on the relevant date for commodities conforming with the contract description. The commodities not conforming with the contract description are to be invoiced back to the seller at this market price. § 346 para 3 no. 3 BGB (German Civil Code \*\*) apply mutatis mutandis. Moreover the buyer may demand compensation for necessary expenses.

(3a) The buyer may demand, at his option, the removal of the defect by the seller or delivery of commodities free from defects as supplementary performance subject to § 439 BGB (German Civil Code \*\*\*) where the depreciation amounts to more than 10 % of the market price in force on the relevant date for commodities conforming with the contract description. The buyer may grant a seller a reasonable period of grace in which to supplementary perform. If the time has expired he may demand rescission of the contract subject to para 3 unless supplementary performance has been effected in time.

(4) The relevant date in the sense of paras. 2 and 3 is the day on which the buyer notified the seller that the commodities did not turn

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\*) To apply to contracts which will be concluded from 01.05.2004.

\*\*) see p. 64

\*\*\*) see p. 65

out to be in conformity with the contract description. If it comes to the making of a survey report in accordance with the Rules for Experts, the relevant date is that on which the experts drew up the survey report.

(5) The buyer may declare that he will not accept as performance, or permit to be treated as performance, delivery of commodities not conforming with the contract description if these commodities are not of the kind stipulated in the contract (generic defect) .

(6) More extensive legal claims for damages are excluded unless the seller maliciously kept silence with respect to the defect or guaranteed that the commodities are in conformity with the contract description. Concerning a sale of consumer goods of a consumer within the European Union legal claims remain unaffected.

(7) If the seller offers to rescind or to supplementary perform the contract, or if a survey report in accordance with the Rules for Experts has established a depreciation of more than 10 %, the seller may request the buyer to declare within three business days after receiving the request whether he elects to rescind or to supplementary perform the contract. If the buyer does not declare his intention within this time he loses his right to rescind or to supplementary perform the contract. Such of the buyer's rights as are contained in para. 5 remain unaffected.

(8) Each lot tendered in effectuation of a permissible part delivery is to be judged independently. In this sense part deliveries also take place when in fulfilment of a contractual obligation several lots are tendered simultaneously.

(9) Each lot is to be judged as a whole. But where less than 10 % of the lot is not in conformity with the contract and this part can be separated without difficulty from the rest the separated part is to be judged independently.

(10) The provisions of paras. 1 to 4 and 6 to 9 apply also where the contract of sale includes the clause "Payment after approval of the commodities".

(11) The rights contained in paras. 2 – 5 are subject to a limitation period of six months beginning to run from delivery of the commodities unless the seller concealed fraudulently the defect or it concerns a sale of consumer goods of a consumer within the European Union.

## § 19 \*)

### **Commodities not in Conformity with the Contract. Rights of the Buyer**

(1) If the commodities do not correspond to the contract description at the time when the risk passes to the buyer, he may avail himself at his choice of the rights contained in paras. 2 to 5, insofar as the further necessary preconditions are satisfied. Concerning a sale of consumer goods of a consumer within the European Union a lack of conformity which becomes apparent within six months of passing of the risk to the consumer shall be presumed to have existed at the time of passing of the risk unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

(2) The buyer may demand compensation from the seller amounting to the difference in value on the relevant date between the commodities which do not correspond to the contract description and commodities which do correspond to the contract description (depreciation).

(3) The buyer may demand rescission of the contract where the depreciation amounts to more than 10 % of the market price in force on the relevant date for commodities conforming with the contract description. The commodities not conforming with the contract description are to be invoiced back to the seller at this market price.

(4) The relevant date in the sense of paras. 2 and 3 is the day on which the buyer notified the seller that the commodities did not turn out to be in conformity with the contract description. If it comes to the making of a survey report in accordance with the Rules for Experts, the relevant date is that on which the experts drew up the survey report.

(5) The buyer may declare that he will not accept as performance, or permit to be treated as performance, delivery of commodities not conforming with the contract description if these commodities are not of the kind stipulated in the contract (generic defect) .

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\*) To apply to contracts which have been concluded before 01.05.2004.

The General Assembly of the Waren-Verein decided on 27.06.001: alterations which are necessary by reason of the Law modernizing the law of obligations dated 26.11.2001 (Federal law journal 2001 Part I p. 3138), are to be made in the nearest sense to the conditions so far.

(6) The more extensive claim for damages contained in § 463 sent. 1 BGB and § 494 BGB is excluded. Furthermore, the more extensive claim for damages contained in § 480 para. 2 BGB for the event that the goods lack a promised quality is also excluded. The seller is not bound to make supplementary delivery as laid down in § 480 para. 1 BGB; para. 5 remains unaffected.

(7) If the seller offers to rescind the contract, or if a survey report in accordance with the Rules for Experts has established a depreciation of more than 10 %, the seller may request the buyer to declare within three business days after receiving the request whether he elects to rescind the contract. If the buyer does not declare his intention within this time he loses his right to rescind the contract. Such of the buyer's rights as are contained in para. 5 remain unaffected.

(8) Each lot tendered in effectuation of a permissible part delivery is to be judged independently. In this sense part deliveries also take place when in fulfilment of a contractual obligation several lots are tendered simultaneously.

(9) Each lot is to be judged as a whole. But where less than 10 % of the lot is not in conformity with the contract and this part can be separated without difficulty from the rest the separated part is to be judged independently.

(10) The provisions of paras. 1 to 4 and 6 to 9 apply also where the contract of sale includes the clause "Payment after approval of the commodities".

(11) The rights contained in paras. 2 – 5 are subject to a limitation period of six months beginning to run from delivery of the commodities unless the seller concealed fraudulently the defect or it concerns a sale of consumer goods of a consumer within the European Union.

## § 20

### **Commodities not in Conformity with the Contract. The Buyer's Duties**

(1) The buyer shall inspect the commodities without delay after delivery by the seller, insofar as this is feasible in the orderly course of business. If the commodities were delivered by container and if the consignee forthwith dispatches the same container including the commodities remaining therein to another place, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded; if the consignee did not forthwith dispatch the container including the commodities remaining therein to another place, the buyer shall inspect the commodities without delay after they could have been unloaded and taken in stock in the orderly course of business at the place of delivery.

(2) If it is apparent that the commodities do not correspond to the contract description, he shall notify the seller without delay that the commodities have not turned out to be in conformity with the contract. Where the buyer takes delivery of the commodities at a factory he need not commence his investigation until they have arrived at their destination. The special provisions contained in Part Two of these Conditions of Business apply to contracts with documents for marine transport (Abladegeschäfte), import transactions by land-dispatch, import transactions by land-collections, ex-quay and ex-warehouse transactions. If the buyer fails to notify the seller in time the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection.

(3) If it is apparent that the commodities are not in conformity with the contract description, the buyer may not remove them, nor have them removed, from the place of inspection before their kind and quality have been established conclusively in a survey report drawn up in accordance with the Rules for Experts or by some other means; the place where the buyer inspected and established the kind and quality of the commodities before lodging a complaint, or otherwise the place where the buyer should at the latest have inspected them, is to be regarded as the place of inspection. If and insofar as the buyer acts contrary to this prohibition the commodities shall be regarded as having been approved.

(4) If the buyer has resold the commodities and moved them accordingly they are treated as having been approved, unless the non-conformity with the contract description was not noticeable in the course of a proper inspection.

## § 21

### **Shortages**

A shortage need not be notified within the time laid down in § 377 HGB (German Code of Commercial Law) \*) if the buyer is not claiming supplementary delivery of the shortage but only a reduction in the purchase price. The claim for restitution of the excess purchase price paid becomes time-barred six months after delivery.

## § 22

### **Documents not in Conformity with the Contract. The Buyer's Duties**

(1) The buyer shall return documents not in conformity with the contract, together with a statement of the reasons for their return, at the latest on the third business day after their delivery; the buyer may avail himself of reasons notified after the expiry of this time only where a reason given at first was well-founded and the defect was then corrected by the seller. If the buyer fails to return the documents properly and in time they are treated as having been approved, unless they are so defective or so incomplete that the seller must have considered approval out of the question.

(2) Documents not in conformity with the contract are also treated as having been approved where the buyer makes use of them. If the buyer makes use of the documents solely for the purpose of inspecting the commodities, they shall be treated as having been approved only where the sale was made on "cash against documents" terms.

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\*) see p. 66

## § 23

### **Purchase Subject to Examination**

- (1) A contract of purchase subject to examination is concluded on the condition that the contract shall not take effect if the buyer declares to the seller that he does not wish to take the commodities.
- (2) The buyer must make this declaration at the latest on the first business day after tender. If the declaration is not made in time, the contract is regarded as having been concluded unconditionally and the commodities as having been approved.
- (3) The seller is bound to tender to the buyer commodities of the kind agreed upon. The tendering of such commodities is a principal performance in the sense of §§ 17, 18; damages are to be calculated by reference to commodities of average quality.

## § 24

### **Purchase after Approval of Sample**

- (1) A purchase after approval of sample is concluded on condition that the buyer shall approve the sample.
- (2) The seller shall tender to the buyer a sample of commodities of the kind which were sold. The tendering of such a sample is a principal performance in the sense of §§ 17, 18; damages are to be calculated by reference to commodities of average quality.
- (3) The buyer must approve the sample if it conforms with the contract description. Approving the sample is a principal performance in the sense of §§ 17, 18.

## § 25

### **Inspection Costs**

In every case the buyer shall bear the costs of the inspection which he is obliged to make and shall pay the seller for the samples which he draws.

## § 26

### **Transfer of Inspected Commodities from one Warehouse to Another**

If the seller has not given the buyer sufficiently in advance the opportunity to supervise the transportation and re-storage he may not, without the buyer's prior approval, transfer or have transferred to another warehouse commodities which the buyer has already inspected. If the seller is guilty of contravening this regulation, the buyer may elect between withdrawing from the contract and claiming damages for non-performance. § 17 paras. 4 to 7 apply mutatis mutandis.

## § 27

### **Suspension of Payments**

Where a party suspends its payments the other party may, within three business days of learning of the suspension of payments, resolve that pending transactions shall be settled immediately at the price which was in force for an equivalent transaction on the day payments were suspended.



## § 28

### **Reservation of Title**

The seller retains the title to commodities which he has delivered as well as to products processed from them until payment of his individual claims and until settlement of any balance in his favour on a running account, even where the commodities are to be processed (§§ 947, 948, 950, 951 BGB [German Civil Code]). The buyer may sell commodities delivered to him and objects produced by working on them only in the orderly course of business. On concluding the contract of sale the buyer assigns as security to the seller all claims which he has under the sale or on any other legal basis. The buyer is entitled to collect the payments that he has assigned to the seller as long as he fulfils his contractual obligation to pay the seller. Where the total of the claims assigned exceeds the nominal value of the claim to be secured by more than 20% the seller shall select claims totalling the amount of the excess and reassign them to the buyer. If besides assigned claims other kinds of securities have been assigned, the total of all securities assigned has to be taken into account for the arising of a claim for release.

## § 29

### **Sale on Condition that the Seller Receives Delivery**

(1) A party which has contracted to sell subject to its receiving correct and punctual delivery, or subject to a similar reservation, is released from its obligation to deliver or to guarantee delivery if it has previously concluded a corresponding contract of purchase and if under this contract it receives an incorrect or late delivery or no delivery at all. A contract of purchase meets this requirement if upon careful consideration the expectation of a correct, complete and punctual delivery was justified, and if the seller, concurrently with the sale, definitely and verifiably intended it to be for the purpose of obtaining the commodities to be delivered by himself. Where the seller entered a contract of purchase for the purpose of obtaining commodities to be delivered by himself under several contracts of sale he is released from his obligations to all the buyers only to the extent that he has not received correct, complete or punctual delivery; where the seller, concurrently with the contract of sale, definitely and verifiably settled an order of succession for the fulfilment of his obligation to deliver, each contract of sale is to be regarded independently.

(2) Insofar as the buyer recognises that the seller is released from his obligation to perform he may demand that the seller assigns to him all the rights under the contract of purchase if he undertakes to perform the corresponding obligations of the seller.

(3) The seller is under a duty to inform the buyer without delay of any circumstance which puts in doubt the correct, complete or punctual delivery to himself. If the seller fails to do this without delay he will not be released from his obligations.

## § 30

### **Arbitration**

(1) All disputes arising out of a contract concluded subject to these Conditions of Business or with a "Waren-Verein Arbitration" clause shall be decided by a Arbitral Tribunal; no action may be brought in a court of law. This arbitration clause also binds the personally liable partners of the contracting parties. The Arbitral Tribunal alone is competent to determine the validity of the main contract; it is also competent to determine the applicability of the arbitration clause. The Arbitration Rules drawn up by the Members' Assembly of the Waren-Verein der Hamburger Börse e.V. shall govern the organisation of this Arbitral Tribunal, the procedure to be observed by it, the costs of the proceedings, the competence of ordinary courts (§ 1062 ZPO [German Code of Civil Procedure]) and the responsibility of the Waren-Verein der Hamburger Börse e.V., its bodies and its staff including its advisor; for each act of the procedure the latest edition is applicable.

(2) If an arbitration award is annulled or an application for a declaration of enforceability of an award is rejected by the ordinary court for reasons other than the lack of a valid arbitration agreement, the arbitration agreement shall not be exhausted.

(3) Paras. 1 and 2 apply also to the relationship between one contracting party and a broker who has negotiated the contract or an agent who has negotiated or concluded the contract, as well as to the relationship between several participating brokers or agents.

## § 31

### **Experts**

(1) In cases of dispute the real facts regarding kind and quality of commodities or of a sample or the depreciation of the commodities or the market price of commodities or a weight deficiency in sales by delivered weight (§ 35 para. 4) may be verified by a survey report made in accordance with the Rules for Experts. The Rules are drawn up by the Members' Assembly of the Waren-Verein der Hamburger Börse e.V. For each act of the procedure the latest edition is applicable. The survey report is binding on the Court of Arbitration unless it is obviously wrong or is based on an incorrect procedure. A survey report made for preparations of vegetables, fruit, fish, crustacees and molluscs as well as provisionally preserved vegetables and fruit can not be questioned, if a party aggrieved by the survey report does not give notice, setting forth the reasons, if being resident outside Europe, the Mediterranean countries or the Black Sea countries within 7 business days, otherwise within 3 business days after receipt of the survey report, of the obvious incorrectness or the incorrect procedure to the other party.

(2) The disputed condition and quality of commodities or of a sample can only be verified by a survey report drawn up in accordance with para. 1.

(3) Paras. 1 and 2 apply also where Waren-Verein Arbitration was agreed upon.

## **Part Two**

### **Additional Provisions for Specific Types of Transactions**

#### **I. CONTRACTS WITH DOCUMENTS FOR MARINE TRANSPORT**

**(Abladegeschäfte)**

##### **§ 32**

##### **Definition. Applicable Provisions**

(1) Where commodities are sold which are to be, or were, shipped for carriage by sea (Abladegeschäft) the provisions of §§ 32 to 51 apply. Such transactions are in particular those concluded on FAS, FOB, CFR and CIF basis.

(2) Where "ex-quay", "ex-warehouse", "ex-quay/warehouse", fot, FCA or DEQ terms have been agreed at the same time, the provisions of §§ 75 to 94 apply first.

##### **§ 33**

##### **Shipping by the Seller or by a Third Party**

The seller may also deliver commodities which were shipped by a third party.

## § 34

### **Not Genuine FOB Transaction**

A party which has sold dried fruits and shell fruits on FOB terms shall itself fix the ship; it may select it himself.

## § 35

### **Place of Performance. Passing of the Risk**

(1) The place of performance for the delivery of commodities is the port of shipment.

(2) The risk passes to the buyer as soon as the commodities

- in the case of CIF, CFR, FOB and FAS transactions have crossed the ship's rail in the port of shipment,
- in the case of FAS transactions have actually been accepted by the carrier,

and the seller's intention that the commodities are destined for the buyer has become quite clear.

(3) In case of dried fruits and shell fruits the buyer bears the risk of a natural loss in weight occurring during the voyage of only up to 1 % of the shipped weight. Where dried fruits or shell fruits have been sold on "delivered weight" terms the seller bears the full risk of a natural loss in weight until the commodities are discharged onto the quay.

(4) Where commodities sold on "delivered weight" terms are lost during the voyage the loss in weight which would, according to past experience, have taken place during the voyage shall be deducted from the shipped weight, and the purchase price shall be calculated on the basis of the remaining weight; the same applies where the commodities are damaged and gain in weight during the voyage.

## § 36

### **Inspection Forbidden**

After shipping the commodities the seller may no longer inspect or alter them. Nor may he make it possible for a third party to inspect or alter them after they have been shipped.

## § 37

### **Quantities. Weighing Fees**

(1) It shall be presumed that the quantities certified in the bill of lading are correct. Where the weight of dried fruits or shell fruits has decreased during the voyage it shall be presumed that the total loss in weight is due to natural causes.

(2) The buyer can prove a weight deficiency only by presenting a weight list which the wharfinger has issued at his request, which must be made at the latest five business days after completion of discharge of the ship; if experts have received within these five business days a request to determine the kind and quality of the commodities, the period is extended to ten business days. This rule of evidence does not apply if the commodities had been transported by container and the consignee has dispatched the same container from the port of destination to another place forthwith after discharge.

(3) The weighing fee (§ 5 of the Hamburg Wharves Tariff) or the corresponding fees in other ports are to be borne by the buyer.

## § 38

### **Reservation of the Right to Designate the Port of Destination**

(1) Where the buyer has by contract reserved to himself the right to designate the port of destination the commodities may only be shipped in accordance with his instructions on this point. The buyer is under a duty to send his instructions two weeks before commencement of the time for shipment, but no sooner than on the third business day after the contract is concluded. The sending of these instructions is a principal performance in the sense of §§ 17, 18.

(2) The seller's agent and the broker who negotiated the transaction are authorized to receive such instructions.

## § 39

### **Time for Shipment**

(1) Where a period of time has been stipulated for "Abladung", "Verladung" or "Verschiffung" (time for shipment) the commodities must be taken on board ship within this time. It is at the seller's option when he ships the commodities within the time for shipment.

(2) Where "prompt" delivery for shipment, loading or shipment has been agreed the following time stipulations in the sense of para. 1, beginning at the conclusion of the contract, shall be observed:

- 15 days for taking aboard commodities in European ports on the Baltic Seas the North Sea and the Atlantic Ocean with the exception of those in Spain and Portugal,
- 21 days for taking aboard commodities in ports in Spain and Portugal, on the Mediterranean and Black Seas, as well as on the east coast of North America including the Great Lakes,
- 30 days for taking aboard commodities in other ports.

(3) Where commodities are sold "afloat" they must be on board ship at the time the contract is concluded.

(4) Shipment is a principal performance in the sense of §§ 17, 18. Where the time for shipment has not been observed the buyer may avail himself of the rights set out in § 17, without first having granted the seller a period of grace in accordance with § 17 paras. 2 and 3.



## § 40

### **Carriage**

(1) Unless expressly agreed otherwise the commodities may be carried directly or indirectly. Where direct carriage has been expressly agreed the ship may not, during the voyage from the port of shipment to the port of destination, call at any port which is further from the port of destination than is the port of shipment; the ship may only call at other intermediate ports which lie on a route that the ship would reasonably be expected to take, having regard to the shipping conditions prevailing when the contract was concluded.

(2) Transshipments are permissible if the shipper had already destined the commodities for the contractual port of destination on the first shipment.

(3) The commodities may and must be carried by container only if this has been specially stipulated. Such agreement may be implied from the circumstances, especially from the quantity of packages sold. In case of doubt the commodities are not to be shipped by a container intended for and appropriate to on-carriage from the port of destination. As far as dried fruits or shell fruits are concerned, the contents of each container must be specially marked.

## § 41

### **Advice of Shipment**

(1) The seller shall inform the buyer of the name of the ship on which the commodities to be delivered under the contract have been shipped (advice of shipment); if the commodities are carried by container, the seller shall at the same time inform the buyer of the number of the container. In the case of spices the seller shall also inform the buyer of the date of the bill of lading and the marking of the commodities.

(2) In case of a taking-over of commodities in European ports on the Baltic Sea, the North Sea and the Atlantic Ocean, in ports on the Mediterranean and Black Seas as well as on the east coast of North America including the Great Lakes the seller shall send the advice of shipment at the latest on the third business day after the shipment. If the advice is sent after expiry of this time and in consequence thereof the buyer is demonstrably damaged, the seller has to compensate for the damage. The obligation for the sending of the advice of shipment falls due at the latest on the third business day after expiry of the time for shipment.

(3) In case of a taking-over of commodities in other ports the seller shall send the advice of shipment at the latest on the third business day after expiry of the time for shipment. Where commodities are sold afloat time begins with the expiry of the day on which the contract was concluded.

(4) On the sending of the advice of shipment the purchase is limited to the commodities designated therein. The seller may only deliver such commodities as have been shipped according to the advice. Minor errors in the advice impose no liability on the seller.

(5) The rendering of the advice of shipment is a principal performance in the sense of §§ 17, 18.

(6) The seller's agent and the broker who negotiated the transaction are authorized to render and to receive the advice of shipment.

## § 42

### Documents

(1) The seller shall deliver to the buyer one of the following documents:

- a bill of lading,
- a shipping certificate,
- a quay receipt or
- a delivery order of the shipping company.

The shipping document must designate the port of loading, the day of shipment, the name of the vessel, the port of destination, and the kind and quantity of the commodities; if Carriage by Container was stipulated, the shipping document must designate the number of the container and indicate whether the container is intended for on-carriage from the port of destination. The seller shall also deliver an invoice and if necessary the certificates mentioned in § 8 a. In the case of CIF contracts the

insurance policy

is to be attached; this shall show coverage for the commodities to the purchase price plus 10 % anticipated profits in accordance with the German General Rules of Marine insurance (M.I.R.) together with Supplementary Clauses in the latest current edition or some equivalent coverage and shall contain damage without franchise and with war risks clauses; to the extent that the premium for war risks exceeds 1/2 % the seller shall be reimbursed by the buyer. The contents of all documents must conform with the contract of sale. In the case of spices, bills of lading, shipping certificates and delivery orders may not bear a delivery stamp of the shipping company. In other cases, bills of lading shipping certificates and delivery orders may be tendered even Where they bear the shipping company's delivery stamp.

(2) Documents which indicate that a delivery for shipment, a carriage, or the kind and quality or quantity of commodities was not in conformity with the contract (incorrect documents), and those documents which in some other respect fail to meet the requirements of para. 1, or those to which not all documents to be delivered in accordance with paras. 1 and 4 or some special agreement have been attached (incomplete documents) need not be accepted by the buyer as performance. In the case of spices, bills of lading, shipping

certificates and delivery orders bearing a delivery stamp of the shipping company are regarded as incorrect documents.

(3) The seller shall deliver the documents to the buyer without delay after the rendering of the advice of shipment. As far as dried fruits or shell fruits are concerned, this obligation falls due at the latest on the first business day following the day on which the discharge of the vessel in the port of destination was completed. As far as other commodities are concerned, this obligation falls due at the latest when the vessel reaches the port of destination.

(4) If the documents are not tendered until the vessel has been discharged in the port of destination for longer than one business day, they must be accompanied by a certificate from the seller and each previous seller showing how long each has had the documents in his possession after completion of discharge. During this time no seller may hold the documents in his possession for longer than one business day; each seller shall pass them on to his buyer as quickly as possible and by the fastest means which can be expected of him.

(5) If the documents are not tendered until the vessel has been discharged in the port of destination for longer than one business day, the following provisions apply instead of para. 4 as far as dried fruits and shell fruits are concerned: on request declared by the buyer before documents according to contract having been tendered, the said documents must be accompanied by a certificate of the seller and each previous seller who has passed on the documents later than the first business day after completion of discharge and after receiving the respective request, showing how long each has had the documents in his possession after completion of discharge. This obligation of the seller ceases if he has already passed the contractual documents to the buyer before receiving the request and notified the buyer of this without delay. During this time no seller may hold the documents in his possession for longer than one business day. Each seller may pass the documents at his choice to his buyer by mail or through mediation of a bank; the duration of this forwarding is not to be considered as possession of a seller.

(6) The delivery of the documents and the delivery of the certificates described in paras. 4 and 5 are principal performances in the sense of § 17, § 18.

## § 43

### **Call**

(1) Where delivery on call has been agreed upon the quantity called for is to be shipped within 14 days of call; if no cargo space is available within the second half of this period, shipment on the next departing vessel suffices. The buyer may call for instalments of an economically reasonable size. Where no time for the call has been stipulated the buyer must call for delivery within a reasonable time. The call is a principal performance in the sense of §§ 17, 18.

(2) Where delivery on call has been agreed and at the same time a time for shipment has been stipulated the buyer may, at his option, call for the whole quantity or instalments of an economically reasonable size at any time between the commencement of the time for shipment and 14 days before the end of this period. The buyer shall call for the whole quantity not later than 14 days before the expiry of the time for shipment; if a call is not made within this period, the seller is entitled to ship the goods without a call.

(3) If carriage by container is stipulated, at least one full container is to be called as an instalment.

## § 44

### **Shipment not in Conformity with the Contract. Carriage not in Conformity with the Contract**

(1) Where the advice of shipment shows that the commodities described therein were not shipped or are not being carried in time, or that the shipment or carriage fails in some other respect to conform with the contract, the buyer may, at his option, withdraw without further ado from the contract or claim damages for non-performance, or accept the commodities as performance and in addition claim those damages resulting from the breach of the contract. After the advice of shipment has been received the seller can set the buyer a time limit for choosing one of these rights. If the buyer does not inform the seller of his choice in time, he is only entitled to claim damages for non-performance. The time must amount to at least three business days.

(2) If damages for non-performance are claimed, paras. 4 to 6 of § 17 are applicable in calculating them. The relevant date is the first day after the receipt of the buyer's declaration that he chooses to claim damages for non-performance, and at the latest the first business day after expiry of a time set by the seller in accordance with para. 1.

## § 45

### **Documents not in Conformity with the Contract**

(1) Where the seller of spices has offered incorrect documents the buyer may, at his option, without further ado withdraw from the contract or claim damages for non-performance. Further attempts to perform by the seller (second tenders) are excluded. In calculating the damages paras. 4 to 6 of § 17 are applicable. The relevant date is the first business day after the rejection of the incorrect documents. Instead of rescinding and claiming damages for non-performance the buyer may demand delivery of correct documents if he notifies the seller of this within three business days after tender of the documents. Insofar as the seller of spices has offered incomplete documents he may and must complete these or supplement them by means of further documents.

(2) Where the seller of other commodities has offered incorrect or incomplete documents and the buyer has refused to accept such documents, second tenders by the seller are not excluded. The buyer can set the seller a reasonable time for tendering correct and complete documents. If the time has expired he may, at his option, withdraw from the contract or claim damages for non-performance unless performance has been effected in time. The time must amount to at least three business days, and is to be stipulated in writing, by telegram, by telex or by telefax. In calculating the damages paras. 4 to 6 of § 17 are applicable.

## § 46

### **Inspected Parcels**

A parcel which, contrary to § 36, has been inspected need not be accepted by the buyer as performance. Where the seller has tendered such a parcel the buyer can to that extent, at his option, without further ado withdraw from the contract or claim damages for non-performance. In calculating the damages paras. 4 to 6 of § 17 are applicable. The relevant date is the first business day after the rejection of the documents.

## § 47

### **Delay in the Forwarding of Documents**

Where the seller does not observe the time limit set out in § 42 para. 4 sentence 2 or para. 5 sentence 4, he shall indemnify his buyer for any loss which can be shown to have been caused by the delay. A seller in a chain shall also reimburse his buyer for the loss that the latter can be shown to have suffered through the default of a previous seller.



## § 48

### **Commodities not in Conformity with the Contract. The Buyer's Rights**

- (1) If the commodities do not correspond to the contract description at the time the risk passes to the buyer, the provisions of § 19 apply.
- (2) Insofar as the commodities are not of the kind described in the contract the buyer may, at his option, without granting a period of grace withdraw from the contract or claim damages for non-performance. In calculating the damages paras. 4 to 6 of § 17 are applicable. The relevant date is the day on which the buyer notifies the seller that the commodities have not turned out to be in conformity with the contract.
- (3) If the buyer has rejected the commodities with regard to a generic defect (§ 19 para. 5) or if he had demanded rescission of the contract (§ 19 para 3), he shall return the commodities to the seller at the place of the port of destination. This provision applies even if the consignee had transferred the commodities before their inspection (§ 49) from the port of destination to another place.

## § 49

### **Commodities not in Conformity with the Contract. The Buyer's Duties**

- (1) If the commodities were carried by container and the consignee dispatches the same container including the commodities remaining therein forthwith after the discharge from the port of destination to another place, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded.
- (2) If the commodities were carried by container and the consignee did not dispatch the container including the commodities remaining therein forthwith after the discharge from the port of destination to another place, the buyer shall inspect the commodities without delay after they could have been unloaded on the quay of the port of destination or in a warehouse at the place of the port of destination in the orderly course of business.
- (3) In all other cases the buyer shall inspect the commodities without delay as soon as the discharge of the vessel is completed and insofar

as this is feasible in the orderly course of business. Where the seller already notifies the buyer before the commodities have been discharged, the time for inspection begins on receipt of this notification. Under no circumstances does the time for the inspection of the commodities begin before the buyer has received the documents.

(4) If it is apparent that the commodities do not correspond to the contract description, the buyer shall without delay notify the seller that the commodities have not turned out to be in accordance with the contract. This time limit is regarded in any event as having been observed if the complaint is received by the seller within three business days after the beginning of the time for inspection. If the buyer fails to notify the seller in time, the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection. If the buyer has sold the commodities to a third party and has forwarded the documents accordingly, it suffices to preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible to the seller for the punctual sending of the notification by his buyer and subsequent buyers.

(5) Where in the case of para. 1 the carrier charged with the on-carriage has delivered the commodities to the final consignee, the commodities are deemed to have been approved if the buyer or a subsequent buyer transfers the commodities to a place outside the destination before a survey report in accordance with the Rules for Experts has been drawn up; the commodities are not deemed to have been approved if their non-conformity with the contract description was not noticeable in the course of a proper inspection. The same provision applies in the case of para. 2 if the buyer or a subsequent buyer has removed the commodities from the place at which they were unloaded before a survey report in accordance with the Rules for Experts has been drawn up. The same provision applies in the case of para. 3 if a buyer or a subsequent buyer has removed the commodities from the quay before a survey report in accordance with the Rules for Experts has been drawn up.

(6) Should circumstances for which the buyer is not responsible prevent him from inspecting the commodities or sending notification, he shall without delay inform the seller of this fact. If the buyer fails to inform the seller in time he may not invoke these circumstances. If the seller was responsible for such a circumstance, the buyer need do nothing to fulfil the obligations laid out in paras. 1 to 4, unless and until the seller notifies him that this obstacle has been removed.

## § 50

### **Shortages. The Buyer's Duties**

The last buyer shall forward the weight list to his seller within ten business days of its date. The other buyers in the chain shall forward the weight list without delay to their respective sellers. If the times for forwarding the weight list are not observed, the weight stated in the bill of lading is treated as accepted; each buyer is responsible for the punctual forwarding of the weight list by his buyer and subsequent buyers. The claim for compensation for shortages is time-barred six months after completion of discharge of the vessel.

## § 51

### **Letter of Credit**

- (1) Where the parties have agreed upon a letter of credit arrangement for the payment of the purchase price the buyer is responsible for the bank's notifying the seller of the availability of the money ten days before commencement of the period for shipment; where the contract is concluded later than on the eleventh day before the commencement of this period the buyer is responsible for the bank's notifying the seller immediately of the availability of the money.
- (2) Ensuring that the notification is received in time is a principal performance in the sense of §§ 17, 18.

## II. IMPORT TRANSACTIONS BY LAND. DISPATCH

### § 52

#### **Concept. Applicable Provisions**

Where it is agreed that the seller shall dispatch the commodities by rail over a national frontier (railway import transaction) or where it is agreed that the seller shall dispatch the commodities by road over a national frontier (truck import transaction), the provisions of §§ 52 to 65 apply.

### § 52a

#### **Carriage**

The commodities may and must be carried by container only if this has been specially stipulated. Such agreement may be implied from the circumstances, especially from the quantity of packages sold. As far as dried fruits or shell fruits are concerned, the contents of each container must be specially marked.

### § 53

#### **Export Duties. Customs Duties. Unloading Costs**

(1 ) The duties connected with the export from the supplying country are to be borne by the seller, even where such duties are levied in transit. This applies in particular to duties levied on export from Italy ("doganali italiani").

(2) The costs for unloading are invariably to be borne by the buyer.

## § 54

### **Place of Performance. Passing of the Risk**

(1) The place of performance of the obligation to deliver is the place of loading. For railway import transactions the risk passes over to the buyer as soon as the railway authority has accepted the commodities for carriage with the waybill. For truck import transactions the risk passes over to the buyer as soon as the carrier has accepted the commodities for carriage. In either case the risk does not pass over to the buyer until in addition the seller's intention that the commodities accepted for transport are destined for the buyer has become evident. In the case of dried fruits and shell fruits the buyer bears the risk of a natural weight depreciation occurring during transit of only up to 1 % of the loaded weight; transit is at an end when the waggon or the truck arrives at the place where the final consignee intends to have the commodities unloaded.

(2) § 9 para. 1, sentence 3, remains unaffected.

## § 55

### **Weight. Burden of Proof**

The loaded weight declared by the consignor on the waybill or on the consignment note is presumed to be correct. Where the weight of dried fruits or shell fruits has decreased during transit it shall be presumed in the buyer's favour that the total weight depreciation is due to natural causes; transit is at an end when the waggon or the truck has arrived at the place where the final consignee intends to have the commodities unloaded.

## § 56

### **Reservation of the Right to Designate the Destination**

(1) Where the buyer has by contract reserved to himself the right to designate the place of destination or the name of the consignee or both (destination) the seller may only dispatch the commodities in accordance with the buyer's instructions on this point. The buyer is under a duty to send such instructions two weeks before commencement of the time for dispatch or the time for delivery but not earlier than on the third business day after conclusion of the contract. The sending of these instructions is a principal performance in the sense of §§ 17, 18.

(2) The seller's agent and the broker who negotiated the transaction are treated as authorised to accept the buyer's instructions as to the destination.

## § 57

### **Time for Dispatch. Time for Delivery**

(1) in the case of railway import transactions, where a period of time for dispatch has been agreed upon, the commodities must have been accepted for carriage with the waybill by the railway authority Within this period; the relevant date is the one stamped on the waybill with the date-stamp of the forwarding station. In the case of truck import transactions, where a period of time for dispatch has been agreed upon, the commodities must have been accepted for carriage by the carrier and have been loaded on to the truck by this time. It is at the seller's option when he has the corn modifies accepted for carriage within this time. Dispatch is a principal performance in the sense of §§ 17, 18. Where the period of time for dispatch is not observed the buyer may avail himself of the rights contained in § 17 without first granting the seller a period of grace in accordance with § 17 paras. 2 and 3.

(2) if "prompt" dispatch has been agreed upon, the seller shall dispatch the commodities within ten days of the conclusion of the contract of sale.

(3) if the seller has undertaken the obligation of delivering the commodities within a certain period of time, he is under a duty to place the commodities at the disposal of the buyer at the place of destination within this period.

## § 58

### **Advice of Dispatch. Appropriation**

(1) The seller shall notify the buyer of the particulars of loading (advice of dispatch). That is to say

- in the case of railway import transactions: the quantity loaded, the date stamped on the waybill with the date-stamp of the forwarding station, the number of the waggon on which the commodities were loaded and if applicable the number of the container.
- in the case of truck import transactions: the quantity loaded, the date of loading, the name of the carrier, the official registration number of the truck on which the commodities were loaded and if applicable the number of the container.

(2) In case of dispatches in Europe and the Black Sea countries the seller shall render the advice of dispatch at the latest on the third business day after the loading. If the advice is rendered after expiry of this time and in consequence thereof the buyer is demonstrably damaged, the seller has to compensate for the damage. The obligation for the rendering of the advice of dispatch falls due at the latest on the third business day after expiry of the time for dispatch.

(3) In case of other dispatches the seller shall render the advice of dispatch at the latest on the third business day after expiry of the time for dispatch.

(4) Rendering of the advice of dispatch is a principal performance in the sense of §§ 17, 18.

(5) The purchase is confined by the advice of dispatch to the commodities designated therein. The seller may only deliver such commodities as have been forwarded according to the advice of dispatch. Minor errors in the advice of dispatch impose no liability on the seller.

(6) The seller's agent and the broker who negotiated the transaction are treated as authorised to accept and render the advice of dispatch.

(7) The seller is under a duty to render the advice of dispatch stipulated in para. 1 to the buyer even if in accordance with an assignment or instructions of the buyer the commodities are dispatched directly to a third party.

## § 59

### **Delivery for Carriage by the Seller or by a Third Party**

The seller may also deliver commodities which were delivered for carriage by a third party.

## § 60

### **Delivery on Call**

(1) Where delivery on call has been agreed upon the seller shall dispatch the quantity called for within two weeks of call. The buyer may call for instalments of an economically reasonable size. If no time limit has been agreed upon for the call, the buyer must call for delivery of the commodities within a reasonable time.

(2) Where delivery on call has been agreed upon and in combination with this a time for dispatch has been stipulated the buyer may, at his option, call for the whole quantity or instalments of an economically reasonable size at any time between the commencement of the time for dispatch and two weeks before the end of this period. The buyer is under a duty to call for the whole quantity at the latest two weeks before expiry of the time for dispatch; if the call has not been made in time the seller may dispatch without call.

(3) If carriage by container is stipulated, at least one full container is to be called as an instalment.

(4) The call is a principal performance in the sense of §§ 17, 18.



## § 61

### **Cash against Documents. Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the contractual purchase price upon delivery of the following documents:

- in the case of all import transactions against delivery of the certificates mentioned in § 8 a if necessary,
- in the case of railway import transactions against delivery of the duplicate of the waybill and the seller's invoice,
- in the case of truck import transactions against delivery of the first copy of the consignment note (Article 5 CMR) and the seller's invoice; the consignment note must contain an entry by the sender to the effect that from the time when the consignment note is drawn up, the consignee shall have the right of disposal (Article 12, para. 3 CMR). In the case of dispatch in countries not adhering to the Convention on the Contract for the International Carriage of Goods by Road (CMR), payment is to be effected against delivery of equivalent documents.

Where letter of credit terms have been agreed upon, payment from this letter of credit is to be made upon delivery of the same documents.

(2) The buyer has no actionable claim for the delivery of the waybill duplicate or of the first copy of the consignment note (Article 5 CMR) or of an equivalent document. The delivery of these documents is merely a precondition of the buyer's obligation to perform first contained in para. 1.

## § 62

### **Commodities not in Conformity with the Contract. The Buyer's Duties**

(1) As soon as the waggon or the truck or if applicable the container has arrived at the place where the final consignee intends to have the commodities unloaded, the buyer shall inspect them without delay, insofar as this is feasible in the orderly course of business. If it is apparent that they do not accord with the contract description, the buyer shall notify the seller without delay that the commodities have not turned out to be in conformity with the contract. If the buyer fails to notify the seller in time, the commodities are deemed to have been approved, unless their non-conformity with the contract description could not be observed on proper inspection. Where the buyer has resold the commodities on terms that his buyer shall take delivery of them from the railway authority or from the carrier, it is sufficient to preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible for the sending in due time of the notification from his buyer and subsequent buyers.

(2) Where the railway authority or the carrier has delivered the commodities to the consignee they are deemed to have been approved if the buyer or a subsequent buyer in the sense of para. 1 transfers them to a place outside the place of destination before a survey report in accordance with the Rules for Experts has been drawn up. The commodities are not deemed to have been approved if their non-conformity with the contract description could not be observed in proper inspection.

## § 63

### **Shortages. The Buyer's Duties**

Where the seller delivers less than he has invoiced to the buyer, the latter must lodge a complaint about the short-delivery as soon as the waggon or the truck or if applicable the container has arrived at the place where the final consignee intends to have the commodities unloaded. If the buyer fails to lodge a complaint without delay, the quantity stated in the invoice is deemed to have been accepted. Where the buyer has resold the commodities on terms that his buyer shall take delivery of them from the railway authority or from the carrier, it is sufficient to preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible for the sending in due time of the notification from his buyer and subsequent buyers.

## § 64

### **Import Duties on Rescission of the Contract**

Import duties paid by the buyer are only to be included in the expenses which he may recover from the seller on rescission of the contract if the non-conformity of the commodities with the contract description could not be observed on proper inspection.

## § 65

### **Demurrage**

Each buyer may demand that the seller arranges matters so that the buyer will not be charged with demurrage for the period of time including the first business day after the tendering of the goods.

### **III. IMPORT TRANSACTIONS BY LAND. COLLECTION**

#### **§ 66**

##### **Concept. Applicable Provisions**

Where it is agreed that the buyer shall collect the commodities and where it is envisaged by the parties that the commodities are then to be forwarded over a national frontier the provisions of §§ 66 to 74 shall apply.

#### **§ 67**

##### **Export Duties. Customs Duties**

The duties connected with export from the supplying country are to be borne by the seller, even where such duties are levied in transit.

#### **§ 68**

##### **Carriage**

(1) The seller may and must keep the commodities in a container ready for collection only if this has been specially stipulated. Such agreement may be implied from the circumstances, especially from the quantity of packages sold. As far as dried fruits or shell fruits are concerned, the contents of each container must be specially marked.

(2) In case of doubt the buyer is to have the commodities collected from the seller by motor vehicle.

#### **§ 69**

##### **Time of Performance for Obligations of the Seller**

Where a period for taking delivery is agreed the buyer can demand delivery of the commodities at any time within this period at his option. However, he must notify the seller of the collection in reasonable time; a notification period of three business days is deemed under all circumstances to be sufficient.

## § 70

### **Delivery on Call**

(1) Where delivery on call has been agreed upon the seller shall hold ready for collection the quantity called for within two weeks of call. The buyer may call for instalments of economically reasonable size. If no time limit has been agreed upon for the call, the buyer must call for delivery of the commodities within a reasonable time.

(2) Where delivery on call in combination with a period for taking delivery or for delivery has been agreed upon the buyer may, at his option, call for the whole quantity or instalments of an economically reasonable size at any time between the commencement of this period and two weeks before the end of this period. The buyer shall call for the whole quantity at the latest two weeks before the end of the period for taking delivery or for delivery.

(3) If carriage by container is stipulated, at least one full container is to be called as an instalment.

(4) The call is a principal performance in the sense of §§ 17, 18.

## § 71

### **Cash against Documents. Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the contractual purchase price upon delivery of a seller's invoice and a certificate of receipt duly issued by the railway authority or the carrier or a forwarding agent authorized by the buyer. The certificate of receipt must contain clear indication of the railway authority or the carrier or a forwarding agent; it must bear the stamp or the signature of the railway authority or the carrier or a forwarding agent. Where letter of credit terms have been agreed upon, payment from this letter of credit is to be made upon delivery of the same documents.

(2) The buyer has no actionable claim for the delivery of the certificate of receipt mentioned in para. 1. The delivery of this document is merely a precondition of the buyer's obligation to perform first contained in para. 1.

## § 72

### **Commodities not in Conformity with the Contract. The Buyer's Duties**

The provisions of § 62 shall apply analogously.

## § 73

### **Shortages. The Buyer's Duties**

The provisions of § 63 shall apply analogously.

## § 74

### **Import Duties on Rescission of the Contract**

Import duties paid by the buyer are only to be included in the expenses which he may recover from the seller on rescission of the contract if the non-conformity of the commodities with the contract description could not be observed on proper inspection.

## IV. EX-QUAY TRANSACTIONS

### § 75

#### **Applicable Provisions**

- (1) Where it is agreed that the seller shall deliver the commodities ex-quay the provisions of §§ 75 to 88 shall apply.
- (2) These provisions apply also where commodities are sold with a stipulation as to the time, place or other circumstances of the shipping (shipping clause).

### § 76

#### **Place of Performance. Passing of the Risk**

The place of performance of the obligation to deliver is the place in the port where the quay from which the commodities were sold is situated. The risk passes to the buyer on taking delivery of the commodities, at the latest on expiry of the time for taking delivery. The buyer bears the risk of removing the commodities.

### § 77

#### **Tender**

- (1) The seller shall tender the commodities to the buyer by forwarding to him one of the following documents:
- a) a stamped bill of lading,
  - b) a delivery order stamped by the shipping company or the shipping company's representative,
  - c) a dock warrant with the acceptance stamp of the dock authority,
  - d) a warehouse receipt or an irrevocable delivery order of the quay warehouse concern,

moreover an invoice and if necessary the certificates mentioned in § 8a.

Where no "cash against documents" or other prepayment terms were agreed the seller may forward a delivery order signed only by himself

instead of the documents designated in a) to d). If the tender of separated commodities was agreed, the seller shall also send the buyer the documentary proof of separation.

(2) Where commodities are sold ex-quay with a shipping clause the buyer may demand the presentation of a bill of lading or other document to prove correct and punctual shipment.

(3) Where the commodities are in a free port and they are sold "duty free" or it is agreed in a similar manner that the buyer shall not be liable for import duties the seller shall at the same time forward to him a customs clearance form. In the clearance form, the seller or a prior seller shall name a customs declarant or other firm and instruct them to effect customs clearance and to pay import duties. If the customs clearance form is issued by the seller he shall date it with the date of tender. The date of an entry form issued by a prior seller may not lie longer than five weeks in the past.

(4) The seller may tender only such commodities as are available on the quay in the ordinary course of trade at the time of tender. If the contract contains the shipping clause that the commodities are to be shipped by a container intended for and appropriate to on-carriage from the port of destination, the seller is not obliged to unload the commodities from the container. If at conclusion of the contract an intermediary (agent or broker) had reserved the right to designate the seller, the buyer may immediately after such designation of the seller but before tender of the commodities opt to have the commodities separated; if this option is effectively exercised, the seller is only allowed to tender separated commodities, in return for which the buyer shall reimburse him for the cost of separation.

(5) If the seller offered incorrect or incomplete documents and if the buyer refused to accept such documents, further attempts to perform by the seller (second tender) are not excluded. Second tenders are not excluded even where the sale is ex-quay with a shipping clause.

(6) The tender is a principal performance in the sense of §§ 17, 18.



## § 78

### **Appropriation**

The purchase is confined by the tender to the commodities designated therein. The seller may deliver only such commodities as correspond to the tender. Where commodities are sold with a shipping clause this appropriation also takes effect on dispatch of the advice of shipment.

## § 79

### **Concept of the Quay**

(1) The seller may tender the commodities from any quay in the stipulated port.

(2) Where the sale is ex-quay Hamburg the seller may tender the commodities from any quay situated within the area of the port of Hamburg (§ 1 of the Port of Hamburg Act of 21.12.1954). Such a quay need not be a suitable berth for seagoing vessels. It must, however, be equipped with loading and unloading installations for vehicles and craft, and it must be accessible by road, a fully enclosed warehouse and weighing equipment must be available.

## § 80

### **Period for Taking Delivery**

(1) The buyer shall take delivery of the commodities within two weeks of tender (period for taking delivery). Taking delivery is a principal performance in the sense of §§ 17, 18.

(2) Until expiry of the third business day after tender, the commodities are stored at the seller's expense; where cash against documents has been agreed this period runs until the fourth business day after tender. On expiry of this period the commodities are stored at the buyer's expense; where the sale is ex-quay Hamburg the seller shall arrange matters so that the buyer need only pay the simple warehousing costs (§ 4 para. 1 of the Hamburg Wharves Tariff) for the duration of two weeks after expiry of the period.

## § 81

### **Quay Dues**

The seller and the buyer shall each bear half of the cargo dock dues (§ 2 of the Hamburg Wharves Tariff) or corresponding dues in other ports. Weighing fees (§ 5 of the Hamburg Wharves Tariff) or corresponding dues in other ports are to be borne by the seller. If the buyer has the commodities weighed in a manner differing from the usual one on the quay, the additional costs caused thereby are for his account.

## § 82

### **Damage in Transit**

(1) Commodities which have been damaged in transit and whose value has in consequence depreciated by more than 5 % need not be accepted by the buyer as performance if the seller could have detected this damage on proper inspection. If a parcel was partially damaged in transit, the buyer must accept the undamaged part as performance if the seller pointed out the damage to him at the time of tender. If the seller has failed to point out the damage, the buyer may reject the whole parcel and demand performance whereby the seller tenders to him the undamaged part after sorting it. The buyer may, at his option, accept the commodities as performance and claim to recover the value depreciation.

(2) Where the value of the commodities damaged in transit has depreciated by not more than 5 % the buyer may claim to recover the value depreciation.

(3) In both cases the buyer may, at his option, accept the damaged commodities as performance against payment of the full purchase price, and demand at the same time that the seller assign to him the claims against the marine insurer and transfer to him the insurance policy.

## § 83

### **Commodities not in Conformity with the Contract. The Buyer's Duties**

(1) The buyer shall inspect the commodities on the quay, insofar as this is feasible in the orderly course of business. If it is apparent that they do not conform with the contract description, the buyer shall notify the seller within three business days after tender that the commodities have not turned out to be in accordance with the contract. A longer period does not apply even if the sale is on "cash against documents" terms. In the case of spices the time for lodging a complaint amounts to seven business days.

(2) If the commodities were tendered by container and the consignee dispatches the same container including the commodities remaining therein to another place within the period for taking delivery, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded. If the commodities were tendered by container and the consignee did not dispatch the same container including the commodities remaining therein to another place within the period for taking delivery, the buyer shall inspect the commodities without delay as soon as they could have been unloaded after expiration of the period for taking delivery on the quay or on a warehouse at the place of the quay in the orderly course of business.

(3) If the buyer fails to notify the seller in times the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection.

(4) If force majeure or circumstances for which the seller is responsible prevent the buyer from inspecting the commodities or making the declaration, the buyer shall notify the seller of this without delay. In such a case the period laid down in para. 1 commences when the seller notifies the buyer that the obstacle has been removed.

## § 84

### **Short Weights and other Shortages**

- (1) The delivery receipt given by the buyer is conclusive evidence of delivery of the quantities stated therein. This provision does not apply to spices.
- (2) The buyer may only prove a weight deficiency by presenting a weight list supplied by the wharfinger. This does not apply if the commodities were tendered by container and were not unloaded from the container on the quay.

## § 85

### **"Duty Paid"**

- (1) Where commodities are sold on "duty paid" or similar terms the seller shall pay all import duties if the buyer or a subsequent buyer requested the firm specified in the customs clearance form within six weeks of the date of that form to clear the commodities. If this time limit is not observed, the seller need only pay those import duties which he would have had to pay if the commodities had been cleared on the last day of the six week period. § 11 para. 2 is applicable provided that the time stipulated therein under No. 1 does not end before expiry of the six week period contained in sentence 1.
- (2) The seller is responsible for obtaining an import licence, the need for which was known at the time the contract was concluded X for the six week period laid out in para. 1. Furthermore the seller is bound to bear the costs of the customs clearance. Where the quantity sold by him is not cleared all at once he shall only bear the costs up to the third clearance.
- (3) The subsequent buyer who identifies himself as the possessor of the seller's customs clearance form acquires directly the right to demand that the seller perform his obligations set out in paras. 1 and 2. The contracting parties are not entitled to cancel or vary the right of the subsequent buyer without his agreement.

## § 86

### **Ex-Quay Transactions with a Shipping Clause**

Where commodities are sold ex quay with a shipping clause the provisions of §§ 44, 45 apply also. The seller is released from his obligation to deliver if the commodities are lost after the advice of shipment has been sent; the seller may not in such event claim the purchase price, but the buyer may, at his options demand that the seller, against payment of the full purchase price, assign to him claims against the marine insurer and transfer to him the insurance policy.

## § 87

### **Time for Delivery**

(1) The agreement of a time for delivery does not, in case of doubt, make the purchase a time-bargain. If the time for delivery is agreed to be "without period of grace" a time-bargain is, in case of doubt, presumed.

(2) The agreement of a time for delivery does not mean that only such commodities may be delivered as were set on the quay within the time for delivery.

## § 88

### **Ex-Quay/Warehouse**

Where commodities are sold "ex-quay/warehouse" or on similar terms, the seller may tender them at his option ex-quay or ex-warehouse. If he elects to tender ex-quay the provisions of §§ 75 to 88 apply.

## V. EX-WAREHOUSE TRANSACTIONS

### § 89

#### **Applicable Provisions**

(1) Where it is agreed that the seller shall deliver the commodities ex-warehouse, the provisions of §§ 89 to 94 apply. The provisions of §§ 75 to 88 for ex-quay transactions are to apply analogously and supplementarily thereto.

(2) The same provisions are similarly applicable where commodities are sold "ex-quay/warehouse" or on similar terms and the seller tenders ex-warehouse.

### § 90

#### **Place of Performance. Passing of the Risk**

The place of performance of the seller's obligation to deliver is the place where the warehouse is situated. The risk passes to the buyer when he takes delivery of the commodities, or at the latest at expiry of the time for taking delivery. The buyer bears the risk of removing the commodities.

### § 91

#### **"Ex-Warehouse Hamburg"**

Where commodities are sold "ex-warehouse Hamburg" without the place being designated more precisely, delivery may be effected from any warehouse situated within the area of the Free and Hanseatic City of Hamburg.

## § 92

### **Tender**

The seller shall tender the commodities to the buyer by delivering a warehouse receipt or an irrevocable delivery order of the warehouse keeper. Where "cash against documents" or other prepayment terms are not agreed, a delivery order signed only by the seller himself suffices instead of the documents specified in sentence 1. Where cash against documents is agreed, or where the tender is from a warehouse situated in the free port, an invoice is to be attached.

## § 93

### **Period for Taking Delivery**

(1) The buyer shall take delivery of the commodities within two weeks of tender (period for taking delivery). Taking delivery is a principal performance in the sense of § 17, § 18.

(2) The commodities are stored at the seller's expense for the duration of the period for taking delivery.

## § 94

### **Costs of Removing the Commodities**

The buyer bears the costs of removing the commodities.

**The Conditions of Business of the Waren-Verein refer at several points - §§ 6 (1), 17 (2), 19 (3) and (3a) and 21 - to certain provisions of the German Civil Code (Bürgerliches Gesetzbuch [BGB]) or of the German Code of Commercial Law (Handelsgesetzbuch [HGB]). For better understanding of the text of the Conditions of Business these provisions are printed below:**

**§ 275 BGB** Exclusion of the obligation to perform

(2) The obligor may refuse to perform in so far as performance requires expenditure which, having regard to the subject matter of the obligation and the principle of good faith, is manifestly disproportionate to the obligee's interest in performance. When determining what may reasonably be required of the obligor, regard must also be had to whether he is responsible for the impediment.

(3) Moreover, the obligor may refuse to perform if he is to effect the performance in person and, after weighing up the obligee's interest in performance and the impediment to performance, performance cannot be reasonably required of the obligor.

**§ 346 para. 3 no. 3 BGB**

There is no duty to pay compensation for value if, in the case of a statutory right of termination, the deterioration or destruction has occurred in the hands of the person entitled even though he has taken the care which he usually takes in his own affairs.



## **§ 439 BGB** Supplementary performance

(1) As supplementary performance, the buyer may, at his option, demand the removal of the defect or supply of a thing free from defects.

(2) The seller must bear all expenditure required for the purposes of supplementary performance, in particular carriage, transport, labour and material costs.

(3) Without prejudice to § 275 (2) and (3), the seller may refuse the form of supplementary performance chosen by the buyer if such performance is possible only with unreasonable expense. In that connection, it is necessary to have regard in particular to the value of the thing when free from defects, the significance of the defect and the question whether the defect could be remedied by the other form of supplementary performance without material detriment to the buyer. The buyer's claim is restricted in this case to the other form of supplementary performance; the seller's right to refuse also that supplementary performance under the conditions laid out in sentence 1 above is unaffected.

If the seller delivers a thing free from defects for the purpose of supplementary performance, he may demand the return of the defective thing in accordance with §§ 346 to 348.

## **§ 95 HGB**

(1) Where a party accepts a contract note in which the broker has reserved the right to designate the name of the other party, the party accepting is bound to the contract with the other party which is subsequently designated except where well-founded objections can be raised against the latter.

(2) The designation of the other party has to be effected within the locally customary period of time, in the absence of which it must be effected within a reasonable period of time with due consideration to the circumstances.

(3) Where designation is effected or if well-founded objections can be raised against the designated person or firm, the party is entitled to claim fulfilment of the contract from the broker. If the party does not declare its intentions without delay as to whether it demands fulfilment after having been called upon to do so by the broker, then this claim is excluded.

## **§ 376 HGB**

(1) Where it is stipulated that the performance by one of the parties to the contract is to be effected at a fixed date or within a fixed period of time, then, in case the performance does not take place at the fixed date or within the fixed period of time, the other party to the contract may withdraw from the contract or, if the obligor is in delay, instead of performance it can claim damages because of non-performance. It is entitled to claim fulfilment only if it declares to the other party immediately after the fixed date or expiry of the fixed period that it insists on performance.

## **§ 377 HGB**

(1) Where the purchase is a commercial act for both parties, the purchaser shall inspect the commodities without delay after delivery by the seller, insofar as this is feasible in the orderly course of business, and he shall notify the seller without delay if a defect is apparent.

(2) If the buyer fails to notify the seller, the commodities are deemed to have been approved, unless the defect could not be observed on inspection.

(3) Where such defect becomes apparent at a later date, the notification must be made without delay after its discovery; otherwise the commodities are deemed to have been approved also in respect of this defect.

(4) It is sufficient to preserve the rights of the buyer if he forwards the notification in time.

(5) Where the seller maliciously kept silence with respect to the defect he cannot invoke these provisions.

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## **Arbitration Rules**



# Part One

## Organisation

### § 1

#### **The Arbitral Institutions**

(1) The institution termed as Arbitral Tribunal in these Arbitration Rules is that Arbitral Tribunal whose competence is foreseen by § 30 of the "Conditions of Business of the Waren-Verein der Hamburger Börse e.V." (WVB) or otherwise agreed by the parties.

(2) The Higher Arbitral Tribunal dealt with in these Arbitration Rules is competent for trials and decisions on appeal against awards of the Arbitral Tribunal.

### § 2

#### **Place of the Arbitral Institutions**

The Arbitral Tribunal and the Higher Arbitral Tribunal have their place in Hamburg.

### § 3

#### **Office**

(1) The office of the Waren-Verein der Hamburger Börse e.V. shall conjointly be the office of the Arbitral Tribunal and the office of the Higher Arbitral Tribunal.

(2) Outside the oral hearings the office shall mediate in

- all communication between the members of the Tribunal on the one hand and the parties on the other hand; in particular the office shall send copies of the plaint and all further arriving memorandums or documents to the members of the Tribunal.
- all communication between the parties on the one hand and the other institutions contributing to the arbitral procedure (§§ 7 to 10) on the other hand, except the competent Ordinary Court (§ 11).
- the correspondence between the parties.

Furthermore the office shall act in all other matters assigned to it by these Arbitration Rules.

## § 4

### **Composition of the Arbitral Tribunal**

(1) The Arbitral Tribunal shall consist of one Presiding Arbitrator and two other Arbitrators. The Presiding Arbitrator is dispensable if the decision is restricted to the costs and the two Arbitrators agree upon the decision. Insofar as Arbitrators are mentioned in the following provisions, in case of doubt the Arbitrators nominated by the parties or for the parties and the Presiding Arbitrator are meant. Companies or legal entities cannot be Arbitrators.

(2) Each party may appoint one Arbitrator. If a party fails to notify an Arbitrator (§§ 13, 17), an Arbitrator shall be appointed on behalf of this party according to the provisions of §§ 9, 10.

Only proprietors, directors, managers, personally liable partners, authorized signatories or executives of firms whose subject matter is the commerce with goods or the mediation or the closing of merchandise-contracts and which should be registered in a German commercial register or cooperative register may be appointed by a party or on behalf of a party. If the parties have chosen other rules of law than the German law as applicable to the substance of the dispute, a registration of the firm in a German register is not required.

If at least one Arbitrator belongs to a firm which is not registered in a German commercial or cooperative register, the Presiding Arbitrator must be qualified for the judgeship in Germany. If the parties have chosen other rules of law than the German law as applicable to the substance of the dispute, the qualification of the Presiding Arbitrator for the judgeship in Germany is not required.

If a party has appointed an Arbitrator resident outside Hamburg, the office may specify a period of time within which such party shall have to advance the additional costs thereby incurred. If the party does not pay such advance of costs in due time, an Arbitrator shall be appointed on behalf of the defaulting party according to the provisions of §§ 9, 10.

(3) The Arbitrators appointed according to para. 2 shall elect the Presiding Arbitrator. If the Arbitrators cannot agree, the Presiding

Arbitrator shall be appointed according to §§ 9, 10. If an Arbitrator lapses after having taken part in the election of the Presiding Arbitrator, the latter maintains his competence.

(4) The following are excluded from the office of Arbitrator:

1. Anyone who has been engaged or is still engaged as an Expert in the same case,
2. anyone who has mediated in a transaction underlying the dispute or a coherent covering transaction or anyone who belongs to an enterprise which mediated in one of these transactions, or at least temporarily belonged to that enterprise since mediation of the respective transaction,
3. anyone who is married to or has been married to a party or to the legal representative of a party,
4. anyone who is, in the sense of § 41 of the German Code of Civil Procedure (Zivilprozeßordnung [ZPO]), related to, an in-law of, or bound by adoption to a party or to the legal representative of a party.

(5) In proceedings between member firms and non-member firms the Arbitral Tribunal shall not be composed only of persons belonging to member firms; this must be ensured at the latest on the election or appointment of the Presiding Arbitrator.

## § 5

### **Composition of the Higher Arbitral Tribunal**

(1) The Higher Arbitral Tribunal shall consist of a Presiding Appeal Arbitrator and two additional Appeal Arbitrators. No one who has already participated in the same case at the Arbitral Tribunal may participate as a Presiding Appeal Arbitrator or as another Appeal Arbitrator.

(2) The provisions of § 4 shall in other respects be analogously applicable.

## § 6

### **Voting**

Arbitral Tribunal and Higher Arbitral Tribunal shall decide by majority of votes.



## § 7

### **Participation of a Legal Advisor**

(1) A Permanent Legal Advisor of the Association shall assist at the Arbitral Tribunal:

1. He shall participate as Advisor in all negotiations which take place within the Arbitral Tribunal, before the Arbitral Tribunal or before a member of the Arbitral Tribunal. On his motion he is to be given the floor. On his motion the Arbitrators shall retire for secret consultations from negotiations which take place before the Arbitral Tribunal.
2. On his sole responsibility, he shall record the essential contents of the negotiations taking place before the Arbitral Tribunal or before a member of the Arbitral Tribunal in a written report to be signed by him. This record of proceedings need not be written down during the hearings.
3. Outside the negotiations taking place before the Arbitral Tribunal or before a member of the Arbitral Tribunal, he may also make such suggestions to the parties as are in his opinion conducive to the acceleration and concentration of the proceedings; he may also make such other arrangements as he deems conducive to the proceedings. The Arbitral Tribunal is not bound by these preliminary enactments of the Permanent Legal Advisor.

(2) The provisions of para. 1 shall be analogously applicable to the proceedings before the Higher Arbitral Tribunal. No Permanent Legal Advisor who has already participated in the same case at the Arbitral Tribunal may participate at the Higher Arbitral Tribunal.

(3) Should the Permanent Legal Advisor who is competent according to the official schedule allocating the specified categories of cases be incapacitated, the Chairman of the Association may appoint a representative for him; this representative must be qualified for the judgeship.

## § 8

### **Board of the Association. Functions**

(1) If a member of the Arbitral Tribunal or of the Higher Arbitral Tribunal has been challenged (§ 16), first of all the Board of the Association is competent to decide upon the challenging motion. Further procedure is regulated by § 16.

(2) The Board of the Association is empowered to publish the awards provided that the names of the parties concerned are omitted.

## § 9

### **Chairman of the Association. Functions**

(1) The Chairman of the Association shall appoint

1. the Arbitrator and the Appeal Arbitrator for a dilatory party (§ 4 para. 2, §§ 5 para. 2, 17 para. 2, 32),
2. the Presiding Arbitrator or the Presiding Appeal Arbitrator if the other Arbitrators or the other Appeal Arbitrators cannot agree (§§ 4 para. 3, 5),

insofar as these competences have not been allocated to the Hamburg Chamber of Commerce according to § 10.

(2) If the Chairman does not deem it appropriate that the Arbitral Tribunal passes an award, he may reject the application for an award; no reasons need be given. The arbitration agreement thereby expires.

(3) The Chairman shall appoint the substitute of a Permanent Legal Advisor in case of inability to attend (§ 7 para. 3).

(4) The Chairman shall also act in all other matters assigned to him by these Arbitration Rules.

(5) Another member of the Board is authorized to act instead of the Chairman. The Chairman and the other members of the Board shall be called by the office according to the rules of procedure to be adopted by the Board.

## § 10

### **Chamber of Commerce Hamburg. Functions**

In proceedings between member firms and non-members the Chamber of Commerce Hamburg has the following competences:

1. In the cases of §§ 4 para. 2, 5 para. 2, 17 para. 2, 32 it shall appoint the Arbitrator and the Appeal Arbitrator for dilatory parties which are non-members.
2. It shall appoint the Presiding Arbitrator and the Presiding Appeal Arbitrator if the other Arbitrators or Appeal Arbitrators cannot agree (§§ 4 para. 3, 5).

## § 11

### **The Competent Ordinary Court**

(1) The Hanseatic Higher Regional Court ("Oberlandesgericht") of Hamburg is competent for decisions in the sense of § 1062 para. 1 German Code of Civil Procedure (Zivilprozeßordnung [ZPO]).

(2) For assistance in the taking of evidence and other judicial acts (§ 1050 ZPO), the Local Court ("Amtsgericht"), in whose district the judicial act is to be carried out, is competent.

## § 12

### **Language used in Arbitration**

The Arbitral Tribunal may determine at its discretion the language which is to be used in the proceedings. As a rule the German language is to be used. The Arbitral Tribunal may also order or admit the use of a foreign language for single acts of procedure, especially for the examination of a witness who is not conversant with German, furthermore for the statement of claim, for other written pleadings and the presentation of any other documents formulated in a foreign language.

## **Part Two**

### **Procedure**

#### **I. PROCEDURE BEFORE THE ARBITRAL TRIBUNAL**

##### **§ 13**

##### **Constitution of the Arbitral Tribunal**

(1) Each party shall appoint one of the Arbitrators. The claimant shall notify the respondent of its Arbitrator with the request that the respondent also nominates an Arbitrator within a specified time. Such period of time must be at least seven business days. If the time specified by the claimant is too short, the minimum time is considered to be granted. If the respondent does not nominate its Arbitrator within sufficient time, an Arbitrator shall be appointed according to §§ 9, 10 at the claimant's written suit to be filed to the office.

(2) A person who does not fulfil the requirements of § 4 para. 2 or who is excluded from the office of Arbitrator according to § 4 para. 4, shall be regarded as not having been nominated.

## § 14

### **Conjoined Decision**

(1) If a party asserts that it has a right of recourse against a third party in case of being defeated, the Arbitral Tribunal at this party's application shall conjointly decide upon the claim of recourse, provided that the Arbitral Tribunal of the Waren-Verein der Hamburger Börse e.V. is also competent for the relationship between the applicant and the third party.

(2) in this case the Arbitral Tribunal shall be constituted in such a way that the applicant cedes the power of appointment to the third party. § 13 is analogously applicable to the third party. Furthermore the third party is entitled to the rights based on §§ 16, 17.

(3) The third party having been invited to intervene is likewise entitled to the right of application according to para. 1. This provision shall be applied analogously to further third parties.

(4) The claimant may preserve the right to a conjoined decision by first calling upon the third party to nominate to him an Arbitrator within a specified time. Such period of time must be at least seven business days. If the time specified by the claimant is too short, the minimum time is considered to be granted. The period of time will be extended to 14 business days if within three business days after receipt of the request the third party declares to the claimant that it intends to invite a further party to intervene. At any party's application the office may reasonably extend the period of 14 business days if in consequence of the notification of a further party no time of at least seven business days would remain for the person who ultimately has to appoint the Arbitrator. — The claimant shall nominate to the respondent the Arbitrator appointed by the third party according to § 13.

(5) The respondent may preserve the right to a conjoined decision by passing on the declarations received from the claimant according to § 13 to the third party on the third business day after receipt at the latest, with the request to nominate his Arbitrator to him within a specified time, and - if applicable - by nominating to the claimant according to § 13 the Arbitrator nominated to him in time by the third party. The period of time fixed for the respondent according to § 13 will be extended to 14 business days if within three business days

after receipt of the request the respondent declares to the claimant that he intends to invite a third party to intervene. At any party's application the office may reasonably extend the period of 14 business days if in consequence of the notification of a further party no time of at least seven business days would remain for the person who ultimately has to appoint the Arbitrator.

## § 15

### **Cross-Action**

The Arbitral Tribunal in the same composition as it had been constituted according to § 13 is also competent for the decision upon a cross-action if the competence of the Arbitral Tribunal of the Waren-Verein der Hamburger Börse e.V. had been agreed upon for the claim asserted or refused by the cross-action. The cross-action shall be admitted if it is connected with the action.

## § 16

### **Challenge of an Arbitrator**

(1) An Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. Both parties in any case are entitled to the right of challenge.

(2) After the circumstance in terms of para. 1 has become known to the party, the challenging petition is to be addressed without delay to the office. If a party fails to do so, it gives up its right of challenge.

(3) The office shall pass the petition and the other files of the proceedings on to the Board of the Association. The Board shall decide according to § 8 after having heard the participating parties and persons. After the conclusion of such proceedings, the course of action provided for in §§ 1037, 1062 German Code of Civil Procedure (Zivilprozeßordnung [ZPO]) remains open to the parties; the application for a decision by a Court of Law is to be made within two weeks after the disclosure of the decision of the Board of the Association.

## § 17

### **Termination of the Mandate of an Arbitrator**

(1) If an Arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. If the Arbitrator does not withdraw from his office or if the parties cannot agree on the termination, any party may request the ordinary court to decide on the termination of the mandate.

(2) Where the mandate of an Arbitrator terminates under para. 1 or § 16 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties, a substitute Arbitrator shall be appointed according to the rules that were applicable to the appointment of the Arbitrator being replaced.

## § 17 a

### **Interim Measures of Protection**

(1) The Presiding Arbitrator may, at the request of a party, order such interim measures of protection as he may consider necessary in respect of the subject matter of the dispute. He may require any party to provide appropriate security in connection with such measure.

(2) It is not incompatible with an arbitration agreement for an ordinary court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject matter of the arbitration upon request of a party.

## § 18

### **Statement of Claim and other Written Pleadings**

(1) The plaintiff lodges the application for an award from the Arbitral Tribunal by submitting the statement of claim to the office. The statement of claim must contain:

1. The names of the parties and the names of the Arbitrators appointed by or for the parties.
2. A statement describing the nature of the dispute and a definite request.
3. A reference to the arbitration agreement.

The statement of claim should contain reasons for the competence of the Arbitral Tribunal. Furthermore the statement of claim should mention the value of the object in dispute, insofar as this cannot be readily determined from the request or the statement of the facts of the case.

(2) The statement of claim and other written pleadings and declarations of a party must be submitted to the office together with copies in such number as are required for their distribution. The documents referred to in the written pleadings and being in the hands of the pleading party are to be attached as originals or as copies. The written pleadings and the documents attached shall be submitted at least in quintuplicate.

(3) The office shall pass on one copy each of the statement of claim and of all documents which may be further submitted by the parties to the respective adversary and - if applicable - to the third parties participating according to § 14.

## § 19

### **Further Pleading**

The respondent and if applicable the third parties participating in the proceedings (§ 14) must file written pleadings in answer to the statement of claim within a suitable period of time to be specified by the office.



## § 20

### **Withdrawal of an Action**

The action may be withdrawn unless the respondent and the third parties participating in the proceedings object thereto and the Arbitral Tribunal recognises a legitimate interest on their part in obtaining a final settlement of the dispute.

## § 21

### **Oral Hearing**

Before the Arbitral Tribunal makes the award, the parties are to be given one opportunity to participate in oral hearing.

## § 22

### **Evidence**

(1) The Arbitral Tribunal may take such evidence as it deems to be necessary. It decides according to its absolute discretion on whether and under what circumstances evidence is to be taken. It is not bound by any rules of evidence.

(2) The Arbitral Tribunal may examine witnesses and experts who voluntarily appear before it or have such witnesses and experts examined by a commissioned Arbitrator or by a Permanent Legal Advisor of the Association. It may also admit written testimonies and information.

## § 23

### **Form and Contents of the Award**

(1) The award shall be signed by the arbitrators. The signatures of the majority of all members of the Arbitral Tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms. The award shall state its date and the place of arbitration.

(3) If the appeal is admissible under § 28, the Arbitral Tribunal shall in the award specify a period of time for appealing to run from the day of receipt of the award.

## § 24

### **Delivery of the Award**

The award will be delivered to the parties by intermediary of the office. The Arbitrators shall authorize the competent Permanent Legal Advisor of the Association in writing regarding the delivery.

## § 25

### **Correction and Interpretation of the Award; Additional Award**

- (1) Any party may request the Arbitral Tribunal
  1. to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature,
  2. to give an interpretation of specific parts of the award,
  3. to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
- (2) The request shall be made within one month of receipt of the award.
- (3) The Arbitral Tribunal may make a correction of the award on its own initiative.
- (4) §§ 23 and 24 shall apply to a correction or interpretation of the award or to an additional award.

## § 26

### **Setting Aside an Award**

Setting aside the arbitral award by an ordinary court will result in the arbitration agreement becoming operative again in respect of the subject matter of the dispute (§ 30 para. 2 Conditions of Business). The Arbitral Tribunal will be reconstituted unless the court has remitted the case to the Arbitral Tribunal.

## § 27

### **Rejection by the Arbitral Tribunal of an Application for Award**

Before the delivery of the award the Arbitral Tribunal may refuse to pass a decision; no reasons need be given. With this refusal the arbitration agreement will expire.

## II. PROCEDURE BEFORE THE HIGHER ARBITRAL TRIBUNAL

### § 28

#### **Admissibility of Appeal**

(1) An appeal against the award in the first instance may be lodged to the Higher Arbitral Tribunal if the amount in dispute on appeal exceeds 50,000.-- Euro or, in the case of claims for commission or brokerage in the meaning of § 5 para. 2 of the Conditions of Business of the Waren-Verein der Hamburger Börse e.V., exceeds 5,000.-- Euro.

(2) In all other cases the appeal may be lodged if all parties have agreed that the award may be challenged by appeal. Such declaration can only be made prior to the conclusion of the oral hearing.

## § 29

### **Time Limit and Formalities for Appealing**

(1) The appeal shall be lodged in writing or by telex or by telefax or by telegram at the office of the Higher Arbitral Tribunal within the period of time specified in the award against which the appeal is directed. The notice of appeal must contain

1. the description of the award against which the appeal is directed,
2. the declaration that an appeal is lodged against this award,
3. the notification of the Appeal Arbitrator appointed by the appellant according to §§ 4, 5.

(2) The Higher Arbitral Tribunal shall consider ex officio whether the appeal is admissible of itself and whether it is lodged according to the formalities and within the period of time prescribed by para. 1. Failing one of these requirements, the appeal shall be dismissed as barred. If the Higher Arbitral Tribunal has not yet been constituted, the Permanent Legal Advisor who would be competent for giving advice to the Higher Arbitral Tribunal may under the said preconditions pass this decision in lieu of the Higher Arbitral Tribunal. The decision may be passed without an oral hearing having taken place.

(3) The statement of grounds for appeal shall be submitted to the office within 2 weeks upon expiry of the time limit set pursuant to § 30.

## § 30

### **Advance of Costs and Deposit of a Security**

- (1) The office shall set the appellant a time limit by which he
1. shall deposit the advance of costs for the Higher Arbitral Tribunal and
  2. shall, insofar as he has been adjudged by the award in first instance to effect any payment, deposit the relevant amount with the Association.
- (2) If the appellant is ordered in the proceedings at first instance not to effect a payment but to perform some other act, the office shall set him a time limit within which he shall deposit an amount corresponding to the value of the performance and according to the further instructions of the office.
- (3) If a time limit is not adhered to, the appeal is deemed to be withdrawn.

## § 31

### **Counter-Appeal**

- (1) The appellee is entitled to lodge a counter-appeal even if he had waived the right of appeal or if the appeal time limit had expired. If the appeal is withdrawn or dismissed as barred, the counter-appeal shall lose its validity. A counter-appeal lodged within the appeal time limit is deemed to be an independent appeal.
- (2) The counter-appeal shall be lodged in writing or by telex or by telefax or by telegram at the office of the Higher Arbitral Tribunal.
- (3) §§ 29, 30 are to be applied analogously.

## § 32

### **Appointment of an Appeal Arbitrator by the Appellee**

The office shall pass on a copy of the notice of appeal to the appellee with the request to nominate an Appeal Arbitrator within a specified time. Such period of time must be at least seven business days. If the appellee has not nominated an Appeal Arbitrator to the office within sufficient time, the office shall undertake the appointment according to §§ 9,10. If in case of conjoined

decisions (§ 14) several parties participate as appellees, the request for nominating an Appeal Arbitrator shall be directed to that appellee to whom the power of appointment had been ceded for the first instance.

## § 33

### **Analogous Application of Procedural Rules of First Instance**

The provisions of Part I (§§ 13 to 27) ruling the procedure before the Arbitral Tribunal are to be applied analogously insofar as no derogations result from the prior provisions of Part II (§§ 28 to 32).

# Part Three

## Costs

### § 34

#### Calculation of the Costs of Arbitration

(1) For each legal process of every proceeding the Association shall charge a fee and disbursements:

1. The fee shall be determined according to the value of the subject matter of the dispute. If a party precautionarily asserts the set-off of a claim which itself is in dispute, the value of the claim used for set-off shall be added to the subject matter of the dispute insofar as a final decision is passed regarding this claim.

The charges for the first instance shall be as follows:

- for to and including 50,000.-- Euro\*) .....6 %\*\*)
- for a value in excess of 50,000.-- Euro\*) .....4 %\*\*)
- for a value in excess of 500,000.-- Euro\*) .....1.5 %\*\*)
- for a value in excess of 1,500,000.-- Euro\*) .....0.5 %

For the appeal instance these rates shall be increased by one half.

The minimum fee shall be 1,500.-- Euro\*\*\*) each for the first instance and for the appeal instance.

2. A suitable lump sum shall be charged in respect of clerical fees, postage, service costs, value added tax and other disbursements.

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\*) "DM 100,000.--" resp. "DM 1,000,000.--" resp. "DM 3,000,000.--" concerning statements of claim which have been lodged before 01.01.2002.

\*\*\*) "5 %" resp. "3 %" resp. "1 %" concerning statements of claim which have been lodged before 01.08.2001.

\*\*\*) "DM 2.000,--" concerning statements of claim which have been lodged before 01.08.2001 respectively "DM 3.000,--" concerning statements of claim which have been lodged from 01.08. until 31.12.2001.



(2) If the matter demands an above average expenditure of time or labour, the Arbitral Tribunal may raise the fees up to the double amount.

(2 a) If it is applied to decree an interim measure of protection (§ 17 a), the fees increase by a suitable percentage.

(3) If the proceedings are settled by compromise, acknowledgement or withdrawal of the action or by withdrawal of the appeal or by dismissal of an inadmissible appeal or by rejection of the application for an award (§ 27), the Arbitral Tribunal may reduce the costs by up to one half of the amount which would otherwise be charged; if in the appeal instance the Higher Arbitral Tribunal has not yet been constituted, the Chairman of the Association shall decide in its place. If the proceedings are settled in such a way before the statement of claim or the notice of appeal has been passed on to the Arbitrators appointed by or for the parties, the Chairman of the Association may reduce the costs by a greater amount; in this case the Arbitrators are not competent for determining the costs.

(4) A proceeding which leads to a conjoined decision (§ 14) is deemed to be a separate proceeding regarding the calculation of costs; the value of the claim depends on the definite request, on which the decision will be made.

(5) The office may determine that continuation of the proceedings is dependent upon a reasonable advance of costs being paid by the applicant. The office may further determine that the consideration of a set-off which had been asserted precautionarily should depend upon a reasonable advance of costs being paid by the party which had pleaded the defence of set-off.

(6) The Association may charge 150.-- Euro\*) as a fee for the appointment of an Arbitrator or of an Appeal Arbitrator or of a Presiding Arbitrator (§§ 9, 10). A suitable lump sum shall be charged in respect of postage, value added tax and other disbursements. The Association may determine that its cooperation depends upon prepayment of these costs.

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\*) "DM 200.--" concerning applications which have been lodged before

01.08.2001 resp. "DM 300.--" concerning applications which have been lodged from 01.08. until 31.12.2001.

§ 35

**Apportionment of Costs**

(1) The amount of the arbitration costs and how they shall be apportioned between the parties shall be fixed in the award. If the decision in this regard is restricted to the costs and does not contain an order to the effect that one party shall have to refund costs to the other party, this decision shall be made by an order in writing; no oral hearing shall be necessary.

(2) Each party shall itself bear its own costs, in particular any lawyer's charges if the parties have not agreed anything to the contrary.

§ 36

**Distribution of Costs Received**

(1) Of the fees which are received, 51 %\*) at each instance shall be paid to the participating Arbitrators in equal shares as remuneration.

(2) The Arbitrators shall not receive any remuneration if they did not receive via the office at least the statement of claim at first instance or the notice of appeal at the appeal instance.

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\*) "60 %" concerning statements of claim which have been lodged before 01.08.2001.

## **Part Four**

### **Liability**

#### **§ 37**

##### **Liability of the Association, its Executive Organs and its Servants**

If by any cause in law the Association or its executive organs or servants - the Legal Advisor included - should be responsible to a party for any damages, this liability shall be limited

- basically to cases of gross guilt (intent or gross negligence) and
- to a total amount of 127,823.-- Euro for all liable persons together.

#### **§ 38**

##### **Liability of the Arbitrators**

The liability of the Arbitrators - the Presiding Arbitrator included - shall be left to the prescription of the law.



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## **Rules for Experts**



# Part One

## General Provisions

### § 1

#### Scope

These Rules are the Rules for Experts ("Verfahrensordnung für Sachverständige") which are foreseen by § 31 of the Conditions of Business of the Waren-Verein der Hamburger Börse e.V. (WVB). Within this scope the following provisions are to be applied in cases of dispute

- regarding kind and quality or the depreciation of commodities or
- regarding kind and quality of a sample or
- regarding the market price of commodities or
- regarding the weight deficiency, which according to past experience would have taken place during a voyage (§ 35 para. 4 WVB).

### § 2

#### Functions of the Experts

A Committee of Experts shall decide on the questions propounded by the parties or one party by drawing up a written expert opinion.

## § 3

### **Composition of the Committee**

(1) The Committee shall consist of at least two Experts, who are to be appointed by the parties or for the parties according to the provisions of §§ 7, 10.

(2) A Third Expert shall participate if the other Experts do not reach a consensus of opinion or if at least one party when nominating the Expert or in the application to be directed to the Experts asks for such participation.

The Experts appointed according to para. 1 shall elect the Third Expert. If they cannot agree, the Third Expert shall be appointed according to § 5.

(3) As far as Experts are mentioned in the following provisions, in case of doubt this means the Experts appointed by the parties or for the parties and the Third Expert.

(4) Only proprietors, directors, managers, personally liable partners, authorized signatories or other executives of firms whose subject matter is the commerce with goods or the mediation or the closing of merchandise-contracts may be appointed as Experts.

(5) The following are excluded from the office of Expert without being challenged:

1. anyone who has been engaged as an Expert in the same case before his appointment,
2. anyone who has mediated in a transaction underlying the dispute or a coherent covering transaction or whoever belongs to an enterprise which mediated in one of these transactions, or at least temporarily belonged to that enterprise since mediation in the respective transaction,
3. anyone who is married to or has been married to a party or to the legal representative of a party,
4. anyone who is, in the sense of § 41 of the German Code of Civil Procedure (Zivilprozeßordnung [ZPO]), related to, an in-law of, or bound by adoption to a party or to the legal representative of a party.

(6) Companies or legal entities cannot be Experts.



## § 4

### **Voting**

The Committee of Experts shall decide by majority of votes after joint deliberation.

## § 5

### **Chairman of the Association. Functions**

- (1) The Chairman of the Association shall appoint
1. the Expert for dilatory parties (§§ 7, 10),
  2. the Third Expert if the other Experts cannot agree (§ 3 para. 2, § 10).
- (2) Another member of the Board of the Association is authorized to act instead of the Chairman. The Chairman and the other members of the Board of the Association shall be called by the office according to the rules of procedure to be adopted by the Board of the Association.

## § 6

### **Board of the Association. Functions**

The Board of the Association shall decide upon challenging motions which are brought in because of fear of prejudice (§ 9).

## § 7

### **Constitution of the Committee**

(1) Each party shall appoint one Expert. The applicant shall notify the respondent of its Expert with the request that the respondent also nominates an Expert within a specified time. Such period of time must be at least four business days, if one party or both are resident outside Europe, the Mediterranean countries or the Black Sea countries; otherwise the period shall be at least three business days. If the time specified by the applicant is too short, the corresponding minimum time prescribed in the foregoing sentence is deemed to be specified. If the respondent does not nominate its Expert within sufficient time, the Chairman of the Association shall on the written suit of the applicant appoint an Expert for the respondent; this suit shall be filed to the office of the Association.

(2) A person who does not fulfil the requirements of § 3 para. 4 or who is excluded from the office of Expert according to § 3 para. 5 shall be regarded as not having been nominated.

## § 8

### **Conjoined Valuation ("Durcharbitrage")**

(1) If a party asserts that it has a right of recourse against a third party in case of being defeated, the Experts at that party's application shall conjointly give their opinion binding on all parties, provided that § 31 WVB applies also for the relationship between the applicant and the third party.

(2) In this case the Committee of Experts shall be constituted in such a way that the applicant cedes the power of appointment to the third party. § 7 is analogously applicable to the third party.

(3) The third party having been invited to intervene is likewise entitled to the right of application according to para. 1. This provision shall be applied analogously to further third parties.

(4) The applicant may preserve the right to a conjoined valuation by first calling upon the third party to nominate to it an Expert within a specified time. § 7 para. 1 sentence 3 and 4 shall be applied analogously. The period of time will be extended to 14 business days if within three business days after receipt of the request the third party declares to the applicant that it intends to involve a further party in the valuation; if the kind and quality of dried fruits or shell fruits is to be ascertained, the period of time will only be extended to seven business days. - The respondent shall nominate to the applicant the Expert appointed by the third party according to § 7 para. 1.

(5) The respondent may preserve the right to a conjoined valuation by passing on the declaration received from the applicant according to § 7 para. 1 to the third party on the third business day after receipt at the latest, with the request to nominate its Expert to him within a specified time, and - if applicable - by nominating to the applicant according to § 7 para. 1 the Expert nominated to him in time by the third party. The period of time fixed for the respondent according to § 7 para. 1 will be extended to 14 business days if within three business days after receipt of the request the respondent declares to the applicant that he intends to involve a third party in the valuation; if the kind and quality of dried fruits or shell fruits is to be ascertained, the period of time will only be extended to seven business days.

## § 9

### **Challenge of an Expert**

An Expert may be challenged because of fear of prejudice if there is a reason which might justify suspicion against his impartiality. Both parties are in any case entitled to the right of challenge. The challenging petition is to be addressed without delay to the Board of the Association. The Board shall decide according to § 6 after having heard the participating parties and persons.

## § 10

### **Lapse of an Expert**

If an Expert deceases or refuses to assume or to exercise his office or if he is prevented from exercising this office or improperly delays in performing his duties or if he has been challenged successfully or if he ceases by another reason, the following shall be applied:

1. If the Expert had been appointed by a party, this party shall nominate another Expert. To this effect the adverse party may fix to it a time limit pursuant to § 7 para. 1. After fruitless expiry of this period the Expert shall upon application be appointed by the Chairman of the Association.
2. If the Expert had been appointed for a party by the Chairman of the Association according to §§ 7 para. 1, 10 no. 1, the Chairman of the Association shall upon an application appoint another Expert.
3. If a Third Expert is concerned, the other Experts shall elect a new Third Expert without waiting for an application of the parties.

## § 11

### **Application for an Expert Opinion**

- (1) The application for an Expert Opinion shall be in writing and shall be sent directly to the Experts. It shall contain a precise statement of the questions which are to be answered by the Experts.
- (2) The application shall in any case be signed by the applicant. The respondent may join the application by jointly signing the written application and he may supplement the application by adding further questions to the written application.
- (3) Every applying party must advise its opponent of the essential content of the written application in due time, so that the opponent is enabled to put own questions to the Experts before they give their Opinion. This notification is dispensable if the opponent did not nominate an Expert within a time limit which had been fixed to him according to §§ 7, 8, 10.
- (4) Any persons who have already been engaged as Experts in the same case may be named in the written application.

## § 12

### **Rule of Prompt Settlement**

If possible the application shall be settled by the Experts within three business days after arrival.

## § 13

### **Formalities and Contents of the Opinion**

- (1) The Opinion must be signed by all Experts and must contain the date of composition. One original of the Opinion is to be given to each party.
- (2) The Opinion shall contain verifiable reasons. Insofar as the Experts estimate a quantity, a value or a price, the factual basis of the estimate and the evaluation of these basic facts shall be specified in the Opinion.

## § 14

### **Amendment and Rectification of the Opinion**

The Opinion can no longer be modified after it has been distributed even to only one party. At the most it may be amended or rectified according to §§ 319, 320 and 321 German Code of Civil Procedure (Zivilprozeßordnung [ZPO]).

## § 15

### **Duties of the Experts. Liability**

(1) The Experts shall give the Opinion by acting impartially, to the best of their knowledge and belief and with the exercise of proper care. Furthermore they shall co-operate in amending or rectifying the Opinion if admissible (§ 14).

(2) The Experts are liable to the parties and to the third parties involved in the procedure according to § 8 for possible faults of the written Opinion or of the other procedure, however, only in case of gross guilt (intent or gross negligence); they are jointly and severally liable. Insofar as there is no intent, this liability of the Experts is limited to the amount of all their costs, expenses included. If more than one party - including third parties who had been involved in the procedure - suffered damage, then these creditors shall participate in the object of performance of each Expert proportionally to their total claim.

(3) If by any cause in law the Association or its executive organs or its servants should be responsible to a party or a third party for any damage,

this liability shall be limited

— basically to cases of gross guilt and

— to a total amount of 15,339.-- Euro for all liable persons together.

## **Part Two**

### **Special Provisions Referring to the Ascertainment of Kind and Quality or the Depreciation of Commodities or a Sample**

(Quality Arbitration)

#### § 16

##### **Application for Quality Arbitration**

(1) An application for Quality Arbitration shall comply with the requirements provided in § 11. Furthermore the applicant shall substantiate in the written application which defects are complained of and are to be ascertained by the Experts.

(2) It is advisable that the application should furthermore contain

- details of the goods to be inspected according to kind, type, nature and quantity; where appropriate further distinguishing features (marks, brands etc.) are to be specified,
- details of the place where the goods are stored or if applicable of the vessel from which they are to be discharged,
- a statement as to whether the Experts are to inspect the goods in whole or whether the Experts are to give their Opinion on the basis of samples,
- a statement of how the goods to be delivered were designated in the contract of sale.

## § 17

### **Further Procedure. Third Expert**

(1) If both parties apply for the examination of the goods in whole or for giving the Opinion on the basis of samples, then the Experts shall proceed accordingly. If the parties differ on this matter, the Experts shall decide which procedure is to be followed in giving the Opinion. In case the Experts decide on giving the Opinion on the basis of samples, then they shall determine by whom and otherwise in what way the samples are to be drawn. If both parties apply for the Opinion to be given on the basis of a sample which they had submitted, then the Experts shall proceed accordingly.

(2) If the Opinion is to be given on the basis of an inspection of the goods in whole and the Experts who had been appointed by the parties or for the parties have already inspected the goods, they can determine whether the Third Expert called in subsequently for his part shall inspect the goods in whole alone or jointly with them or whether the Third Expert may desist from inspecting the goods in whole and the three Experts shall give their Opinion on the basis of samples drawn in connection with the previous inspection of the goods in whole by the Experts who had been engaged therein. If the Experts who had been appointed by the parties or for the parties disagree in these questions of procedure, then the three Experts shall jointly inspect the goods in whole and give their Opinion on this basis.

## § 18

### **Contents of the Opinion**

(1) The contents of the Opinion shall comply with the requirements provided in § 13 para. 2.

(2) If the Experts come to the Opinion that the depreciation exceeds 10 % of the market price prevailing on the day of the composition of the Opinion, they shall state in their Opinion the market price prevailing on the said day even without this having been expressly applied for.



## Part Three

### Costs

#### § 19

##### **Fees of the Association**

The Association may charge 150.-- Euro\*) as a fee for the appointment of an Expert. A suitable lump sum shall be charged in respect of postage, value added tax and other disbursements. The Association may determine that its cooperation depends upon prepayment of these costs.

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\*) "DM 100.--" concerning applications which have been lodged before

01.08.2001 resp. "DM 300.--" concerning applications which have been lodged from 01.08. until 31.12.2001.

## § 20

### **Fees of the Expert in Quality Arbitration**

(1) In the case that the Opinion has been given regarding goods, the fees for each Expert shall be as follows:

- If the Expert has inspected the goods in whole: 3/8 % of the value, but at least 250.-- Euro\*) and at most 500.-- Euro\*), resp. for dried fruits, shell fruits and seeds at least 150.-- Euro\*) and at most 250.-- Euro\*) .

The calculation of the fee is to be based on the value of the goods in the condition in which they are submitted for inspection. If however, the goods are damaged and it is necessary to ascertain the value in an undamaged state, such value shall be decisive. In the case of goods damaged to an extraordinary extent, the value shall be set at least at 50 % of the basic value.

- If the Expert has given his Opinion on samples of the goods: one half of the aforementioned rates, but at least 150.-- Euro\*) and at most 250.--Euro \*), resp. for dried fruits, shell fruits and seeds at least 75.-- Euro\*) and at most 125.-- Euro\*).

(2) If an Opinion has been given regarding kind and quality of a sample, each Expert shall receive a fee amounting to at least 75.-- Euro\*) and at most 125.-- Euro\*).

—  
\*) Concerning applications which have been lodged before 01.01.2002:

"DM 150.--" instead of "Euro 75.--"

"DM 250.--" instead of "Euro 125.--"

"DM 300.--" instead of "Euro 150.--"

"DM 500.--" instead of "Euro 250.--"

"DM 1,000.--" instead of "Euro 500.--"

## § 21

### **Fees of the Experts for Ascertainments of Prices**

In case of ascertainments of prices, the fees for each Expert shall amount to 3/8 % of the value, but at least 250.-- Euro\*) and at most 500.-- Euro\*), resp. for dried fruits, shell fruits and seeds at least 100.- Euro\*) and at most 250.-- Euro \*).

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- \*) Concerning applications which have been lodged before 01.01.2002:  
"DM 200.--" instead of "Euro 100.--"  
"DM 500.--" instead of "Euro 250.--"  
"DM 1.000.--" instead of "Euro 500.--"

## § 22

### **Raising of the Regular Fees**

If the matter demands an above average expenditure of time or labour, the Experts may raise the fees to a maximum of three times the standard fees (§§ 20, 21).

## § 23

### **Expenses of the Experts**

If for the purpose of discharging their duties the Experts incur expenses which they may for reasonable grounds consider to be necessary, they shall have a claim to reimbursement. Especially expenses caused by consulting a commercial chemist shall be refunded, insofar as such consultation is reasonable under the circumstances. In case of doubt the commissioning of a commercial chemist is not to be considered as necessary for measurements and other determinations which ordinary commercial undertakings belonging to the trade usually effect by their own instruments and personnel in the normal course of business. The Committee of Experts may charge a suitable lump sum as clerical fees. Travel expenses shall not be refunded, insofar as the Experts move within the town of their activities.

## § 24

### **Value Added Tax**

The Association and the Experts are entitled to claim from the applicant reimbursement of the value added tax to be paid for their services.

## § 25

### **Apportionment of Costs**

Regarding their fees and expenses the Association and the Experts can only hold the applicant responsible. As between the parties the unsuccessful party shall pay the costs. The Arbitral Tribunal is competent to decide which party according to this shall reimburse costs to another party; the Arbitral Tribunal is likewise competent to determine the amount of the costs to be reimbursed.

## § 26

### **Arbitration Clause**

Any dispute between the Experts and the parties regarding the amount of the payable fees or regarding the expenses to be refunded shall be decided by the Arbitral Tribunal of the Association.