
BLUFFING IN BUSINESS-TO-BUSINESS CONTRACT NEGOTIATIONS

THE RELATIONSHIP BETWEEN MORAL INTUITION,
RECHTSGEFÜHL, AND THE LAW IN THE UNITED STATES AND
GERMANY

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INTRODUCTION

Bluffing, deceptions, lies and misrepresentations¹ are ubiquitous parts of business-to-business (“B2B”) contract negotiations.² The literature on negotiations even explicitly proposes corresponding negotiation tactics and considers bluffing an essential skill of a good negotiator.³ This Article investigates the relationship between the following four topics with regard to lies in B2B contract negotiations:⁴

- (1) the ideas of traditional moral philosophers;

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1. All four terms will be used synonymously in this Article. Accordingly, a lie (or a bluff, deception, or misrepresentation) is given when an intentionally false statement is made. More precisely, this encompasses all scenarios where a statement does not correspond with the actual situation and the deceiver deliberately intends to deceive the opposite party. For a corresponding definition, see SISSELA BOK, LYING 13–14 (2d ed. 1999).

2. Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359 *passim* (2007) (describing deceptions in very different areas and their common denominations).

3. See, e.g., STEPHEN R. GUTH, THE CONTRACT NEGOTIATION HANDBOOK, at iii (2008); James H. Michelman, *Deception in Commercial Negotiation*, 2 J. BUS. ETHICS 255, 255 (1983); G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGMT. REV. 93, 93 (1991).

4. This Article does not address lies based on silence and omissions of information.

(2) people's actual moral intuition;

(3) people's sense of how the law should be, or, in German the "*Rechtsgefühl*."⁵ More specifically, this concerns people's belief regarding the question of whether legal consequences should be ordered. This then reveals their "*Rechtsgefühl*" since there are only legal consequences for unlawful behavior; and lastly

(4) the law—the actual legal situation—in the United States and Germany.

Put simply, the relationship between the aforementioned four aspects is as follows: Many traditional moral philosophers—from Aristotle to St. Augustine and from Thomas Aquinas to Immanuel Kant—strictly reject almost any forms of lies. However, the results of an internationally conducted survey⁶ on people's actual moral intuition demonstrate that the survey participants from Germany and the United States do not share the same ideas as these philosophers. In fact, the respondents in both countries are more lenient with respect to bluffs and lies in negotiations. The latter is confirmed by the fact that the majority of the respondents classify several lies as morally acceptable. To a certain extent, participants do not even condemn so-called "harmful lies." Hence, the moral intuition of people living in the United States and Germany in this day and age differs significantly from the ideas of traditional moral philosophers.

Most importantly, the study also investigates people's *Rechtsgefühl* (sense of how the law should be) and reveals clearly detectable differences between the participant's moral intuition and their *Rechtsgefühl*. People who assess a certain behavior as immoral do not necessarily also believe that this behavior should be unlawful. In fact, in only a few cases do the majority of U.S. and German respondents favor having legal consequences. Altogether, this Article promotes the idea that closer attention should be placed on the *Rechtsgefühl*. Likewise, the *Rechtsgefühl* should be clearly distinguished from people's individual moral intuition as the two aspects do not necessarily go hand-in-hand. In this Article, it is presumed that, instead of only

5. The English terms "sense of justice" and "sense of unlawfulness" are not exact translations of the German term, which is why I will use "*Rechtsgefühl*" throughout this Article. German literature distinguishes different forms of the "*Rechtsgefühl*." E.g., ERWIN RIEZLER, DAS RECHTSGEFÜHL: RECHTSPSYCHOLOGISCHE BETRACHTUNGEN 7–8 (1946) (distinguishing between: (1) the sense of what is lawful, (2) the sense of how the law should be, and (3) the sense of respect towards the legal order). This Article refers to the second meaning: the sense of how the law should be. See Franz-Xaver Kaufmann, *Rechtsgefühl, Verrechtlichung und Wandel des Rechts*, in LAMPE 185, 185–99, 197 n.4 (1985).

6. For further explanation on this topic, see *infra* Section I.A.

emphasizing the relationship between morality (in the form of moral-philosophical ideas and people's moral intuition) and the law, it is worthwhile to put more emphasis on the relationship between people's *Rechtsgefühl* and the law. In general, both aspects should not drift too far apart. Hence, this Article defends the idea that the *Rechtsgefühl* should have a stronger effect on the law dealing with bluffs in contract negotiations compared to moral-philosophical concepts and people's moral intuition. Moral intuition and moral-philosophical concepts regularly go beyond the *Rechtsgefühl*, and the study shows that people do not believe that those stricter concepts and intuition should be translated one-to-one into law.

According to the ideas put forward here, the law in Germany and the law in the United States should be alike, as the *Rechtsgefühl* is similar in both countries. Surprisingly, however, German and U.S. law show significant differences. In fact, only U.S. law largely corresponds with the *Rechtsgefühl* and is therefore in line with the theory put forward here. German law, in contrast, neither corresponds with people's prevalent moral intuition nor with their stated *Rechtsgefühl* but goes beyond both of these concepts. German law rather reflects the ideas of traditional moral philosophers as it deems almost all lies unlawful. This conclusion is also astonishing from a legal-historical perspective because German law is rooted in Roman law, which distinguished lawful from unlawful forms of deception. But what caused German law to develop away from the initial Roman legal approach and to diverge from U.S. law, even though the moral intuition and the *Rechtsgefühl* are similar in the two countries? Different general values and legal differences in related areas in the United States and Germany partly explain the current legal divergence of German law from Roman and U.S. law. In addition, this Article argues that the German legislature was influenced by the concepts of moral philosophy.⁷ In particular, this Article promotes the idea that Kant's moral-philosophical ideas played a significant role in shaping German law, since they influenced important legal scholars like Friedrich Carl von Savigny. Moreover, the current legal interpretation in Germany has its origins in the fact that a differentiation of lies is renounced while a discussion on lies that do not concern the subject matter of the contract ("*Leistungsgegenstand*") has not been initiated.

In conclusion, this Article encourages a thorough reflection of the relationship between the *Rechtsgefühl* and the law. In particular, it is explored whether German law should leave room to consider at least some

7. See *infra* Part III.

bluffs in contract negotiations as lawful in order to better reflect people's *Rechtsgefühl*.

I. MORAL INTUITION AND *RECHTSGEFÜHL* IN THE UNITED STATES AND GERMANY

A. INTERNATIONAL STUDY ON LIES IN CONTRACT NEGOTIATIONS

The international study on lies in contract negotiations referred to in this Article was conducted with the cooperation of Professor Peter Krebs of the University of Siegen. As of now, 1,896 participants from thirteen different countries,⁸ including Germany and the United States, have filled out a questionnaire on the topic, each in their mother tongue. The study distinguishes between four different target groups: judges, lawyers, professional negotiators, and students. In Germany, answers from all four groups were gathered.⁹ In the United States, lawyers and students participated.¹⁰ An extensive analysis of the data will be published soon. As a preliminary overview, this Article only presents a few initial findings of the analyzed data gathered from the United States and Germany.

The questionnaire describes nine different scenarios in which one party of a business-to-business negotiation deceives the other party.¹¹ The lies range from simple bluffs (in other words, bluffs about a better offer, product availability, internal company policies, deadlines, personal preferences, and reservation price) to more severe deceptions (namely, deceptions about the subject matter of the contract itself and the legal situation).¹² All scenarios in the questionnaire are constructed in such a way that one side deliberately deceives the other party. Further, the other party is actually deceived and demonstrably relies on the information provided in the lie. Lastly, there is also a definite causal link between the deception and the conclusion of the contract.¹³ The participants are then asked whether they consider the behavior of the lying party to be either morally acceptable or morally unacceptable (moral intuition). In a second step, the respondents are invited

8. The United States, Germany, China, Russia, England, Ireland, Austria, Spain, Argentina, Italy, Poland, Ukraine and Turkey participated in the survey. See SIEGEN STUDY ON BLUFFS IN B2B CONTRACT NEGOTIATIONS, UNIV. OF SIEGEN [hereinafter SIEGEN STUDY], <https://www.wiwi.uni-siegen.de/contract-governance/survey/?lang=de> (last accessed June 18, 2019).

9. See *id.* (surveying 907 students, 78 professional negotiators, 31 lawyers, and 26 judges).

10. *Id.* (surveying 104 students and 21 lawyers).

11. The terms “deception” or “lie” are not used at all in the questionnaire. *Id.*

12. *Id.*

13. The term “causal” refers to the fact that the lie actually induced the deceived party to enter into the contract.

to state their individual opinion on whether the deceived business partner should be entitled to rescind the contract or not.¹⁴ In this regard, the second question is not directed towards inquiring the factual legal situation, but which consequence the participants would personally favor. They are thus supposed to state their own beliefs about an entitlement to rescind the contract, specifically assessing whether a rescission should be among the available options to legally address deceptions. At the same time, this questioning method is designed to reveal their *Rechtsgefühl* because legal consequences only exist for unlawful behavior. The study deliberately refrains from directly inquiring about the *Rechtsgefühl* (for instance, there are no questions such as “Do you think this behavior should be lawful or unlawful?”) as this would be too abstract. Instead, the chosen type of question intends to exclude the possibility that the respondents confuse unlawfulness with morality. Most respondents find it easier to form an opinion on a somewhat more specific aspect. Explicitly differentiating the questions about morality and the *Rechtsgefühl* allows the participants to draw clear lines between these two terms. In order to avoid distorted results, the survey’s design enables the respondents to take on the role of a neutral observer.¹⁵

B. PRELIMINARY RESULTS WITH REGARD TO THE UNITED STATES AND GERMANY

First of all, the study’s results emphasize that the moral assessment of the participants is not in accord with the ideas of many traditional philosophers.¹⁶ For example, Aristotle, St. Augustine, Thomas Aquinas, and Kant condemn almost all forms of lies.¹⁷ Their views on deception are also

14. SIEGEN STUDY, *supra* note 8. For the sake of simplification, the study only inquired the sense of justice with regard to rescission and not to damages. *Id.*

15. For a discussion of the influence of the identification of participants on moral assessments, see Shirin Kronzon & John Darley, *Is This Tactic Ethical? Biased Judgments of Ethics in Negotiation*, 21 *BASIC & APPLIED SOC. PSYCHOL.* 49, 49–58 (1999).

16. See SIEGEN STUDY, *supra* note 8. The answers of German students to an additional questionnaire reveal that they generally responded by taking into consideration their personal moral intuition, at least in some capacity.

17. ARISTOTLE, *NICOMACHEAN ETHICS* bk. IV, at 105 (Martin Ostwald trans., Macmillan Publ’g Co. 1962) (c. 384 B.C.E.); Saint Augustine, *Against Lying*, in 16 *TREATISES ON VARIOUS SUBJECTS* 125 et seq. (Roy J. Deferrari ed., Harold B. Jaffee et al. trans., 1952) (c. 420); THOMAS AQUINAS, 41 *SUMMA THEOLOGIAE: VIRTUES OF JUSTICE IN THE HUMAN COMMUNITY* 157–59 (T. C. O’Brien trans., Hartford Seminary Found. 1971) (1274); IMMANUEL KANT, *ON A SUPPOSED RIGHT TO TELL LIES FROM BENEVOLENT MOTIVES* (1797), reprinted in *KANT’S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS* 361–65 (Thomas Kingsmill Abbott trans., 6th ed. 1909) [hereinafter KANT, *SUPPOSED RIGHT*]; IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 429 (Mary Gregor ed. & trans., 1996) (1797) [hereinafter KANT, *METAPHYSICS*] (briefly discussing the immorality of even well-

shared by some modern thinkers.¹⁸ However, the participants of the study are more permissive when it came to lying. Even when regarding a lie about the subject matter of the contract, the seemingly “most reprehensible” form of deception the survey has investigated, some participants state that they would assess this behavior as morally acceptable.¹⁹ In four out of the nine scenarios in the survey, a majority of U.S. lawyers and students and German students consider the presented lies to be moral. A majority of German judges deem five out of the nine scenarios to be “morally acceptable” deceptions. German lawyers and professional negotiators even state this view in seven out of nine cases. As a matter of fact, the study illustrates that people, to a certain extent, accept so-called “harmful lies,”²⁰ or in other words, lies that cannot be excused or justified on the grounds that they are somehow favorable, or at least neutral, from the point of view of the deceived party.²¹

The moral assessment varies depending on the viewed group (judges, lawyers, professional negotiators, or students). In a direct comparison of German and U.S. lawyers, the results indicate that, on average, U.S. lawyers appear to hold higher moral standards. This may be due to ethics courses which are commonly offered at American universities²² and may also be a

intentioned lies). For a general discussion, see BOK, *supra* note 1, at 33–46; Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 *LAW & PHIL.* 393, 395–97 (2003). Other influential thinkers are less strict and consider at least some lies to be justifiable. *See, e.g.*, 1 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 105 (John Bowring ed., Russell & Russell, Inc. 1962) (1838–1843) (“Falsehood, take it by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offence at all.”); 2 HUGO GROTIUS, *ON THE RIGHTS OF WAR AND PEACE* 892 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1583–1645) (“As also he that procures a Contract or Promise by Force, Fraud, or unjust Terror, is bound to release the Person who made the Contract or Promise, from any Obligation of Performance . . .”); JOHN STUART MILL, *UTILITARIANISM* 33–34 (Longmans, Green & Co. 1901) (1863) (permitting lying in only a few narrow circumstances).

18. *See, e.g.*, SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 3 (2014).

19. Participants who state that lying about the subject matter of a contract was morally acceptable included 16.5% of German students, 21.8% of U.S. students, 22% of German professional negotiators, 13% of German lawyers, 12% of U.S. lawyers, and 4% of German judges. SIEGEN STUDY, *supra* note 8. It should be noted that the survey deals with an exaggeration and not with a completely invented fact.

20. *Id.* With regard to their responses to harmful lies, differences between the U.S. and German test groups can be noted.

21. On excuses and justifications of lies and white lies, see, for example, BOK, *supra* note 1, at 57–106; Richard Epstein, *Smart Consequentialism: Kantian Moral Theory and the (Qualified) Defense of Capitalism*, in *ARE MARKETS MORAL?* 32, 43–49 (Arthur M. Melzer & Steven J. Kautz eds., 2018).

22. The American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools requires that a class on professional responsibility be taught to all students for a law school to receive accreditation. *STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* r. 303(a)(1) (AM. BAR ASS’N 2018). In Germany, courses on business ethics are not part of the standard

consequence of the Model Rules of Professional Conduct that U.S. lawyers must study and follow.²³ Moreover, this may be linked to the clear differentiation of “good” and “bad” moral behavior in the everyday lives of U.S. citizens. With regard to the *Rechtsgefühl*, the observed differences between U.S. and German lawyers were overall less pronounced.

The study also shows that distinguishing between moral intuition and the *Rechtsgefühl* is indispensable, because the answers vary significantly in that respect. This applies to all surveyed groups in Germany and the United States as well as equally to all other studied countries. With regard to clear-cut examples, such as lies about the subject matter of a contract and the reservation price, the moral assessment and the *Rechtsgefühl* still go hand-in-hand.²⁴ However, in some cases, people assess a lie as immoral, yet simultaneously do not favor ordering legal consequences. For example, such a distinction is made with regard to bluffs about product availability. In this case, 85% of American lawyers consider such a lie to be immoral, but only 15% favor ordering legal consequences. Similarly, moral intuition and the *Rechtsgefühl* also do not go hand-in-hand with regard to lies concerning another offer.

An initial analysis of the data also demonstrates that the given answers on the moral assessment can only partly explain the *Rechtsgefühl*. However, if respondents consider a behavior morally acceptable, they generally do not favor ordering any legal consequences. In contrast, the fact that the participants assess a certain behavior as immoral does not directly allow one to draw conclusions on their *Rechtsgefühl*. Hence, people do not believe that everything that is immoral should necessarily also be unlawful. They rather opt for differentiating between morality and law. People generally favor law provisions that set a standard below the standard of appropriate moral behavior. Viewing morality and the legal situation should thus be complemented by viewing the *Rechtsgefühl*.²⁵ This applies all the more, since opinions on how the law should be (*Rechtsgefühl*) vary less between the groups than is the case for people’s moral intuition.

curriculum of law and business programs. See, e.g., Juristenausbildungsgesetz [Legal Education Act] Nordrhein-Westfalen [JAG NRW], Apr. 11, 2019; Ausbildungs- und Prüfungsordnung für Juristen [JAPO] [Training and Examination Regulation for Lawyers], Bavaria, March 1, 2018.

23. The Model Rules of Professional Conduct serve as the models for the ethics rules in most U.S. jurisdictions. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (AM. BAR ASS’N 1983).

24. For example, if the lie was morally acceptable there would be no legal consequences and vice versa.

25. On the effects of the sense of legal consequences on other legal questions, no general statements shall be made.

With regard to the different deceptions, the preliminary results draw the following picture: bluffs about personal preference (for example, bluffs about a party's favorite football or soccer team) are seen as morally acceptable by the majority of the participants. In line with that assessment, the participants do not favor legal consequences for those lies. The same applies for bluffs about deadlines and budget limitations. In the case of such bluffs, moral intuition and the *Rechtsgefühl* go hand-in-hand. In contrast, lies about the subject matter of the contract are seen as morally unacceptable by the majority of respondents. In such cases the respondents advocate for legal consequences. The survey also includes a question, setting a scenario, where one party presents a lawful behavior as illegal in order to block demands by the other side. Besides the lie about the subject matter of the contract, this is the only deception scenario, where across all surveyed groups a majority favors a right of the deceived party to rescind the contract. In line with this, a majority in all surveyed groups also assesses these kinds of lies as immoral.

Regarding bluffs on internal company policies and guidelines, opinions vary. More than half of the questioned German students (59.4%), American students (52.9%), and U.S. lawyers (56%) assess the behavior as immoral as opposed to the German professional negotiators, where only 13% classify this behavior as immoral. Similarly, German lawyers and judges do not view these kinds of lies as particularly problematic.²⁶ For the German students, the results allow the assumption that the moral assessment also influences the *Rechtsgefühl*, since almost 47% support the option of challenging the contract. For U.S. students, the percentage is a bit smaller (35.6%). The same is true for U.S. lawyers (33%). Among the professional negotiators, lawyers, and judges from Germany, there is a near-consensus about the fact that this kind of deception should not entitle the deceived party to challenge the contract.²⁷

Lying about another offer that is in fact non-existent is also assessed diversely by the participants. The majority of the students from both countries (71.2% from the United States and 60.1% from Germany) as well as a majority of the German judges (69%) and U.S. lawyers (80%) assess the tactic as immoral. Among German lawyers and professional negotiators, however, only a minority of the participants classify the behavior as morally unacceptable (48% of German lawyers, 36% of German professional

26. Only 31% of German lawyers and 26% of German judges view bluffs on internal company requirements as immoral. SIEGEN STUDY, *supra* note 8.

27. Among the Germans who participated in the study, only 9% of professional negotiators, 6% of lawyers, and 8% of judges favor entitling the deceived party to challenge the contract based on a bluff about an internal company policy. SIEGEN STUDY, *supra* note 8.

negotiators). Regarding the *Rechtsgefühl*, the observed discrepancies are smaller. In none of the questioned groups does a majority favor the option of challenging the contract. The proponents of legal consequences fluctuate between 14% (German professional negotiators) and round about 44% (U.S. students).

Regarding lies on the availability of a product, the results are similar. In all groups, the majority of questioned participants view this kind of deception as immoral (for example, 54% of German judges and 85% of U.S. lawyers), with the exception of German professional negotiators (24%) and German lawyers (45%). In no group does a majority support the right to rescind the contract.

Overall, the results illustrate that there are different views about the *Rechtsgefühl* depending on a person's profession or nationality. In contrast to the variations of the moral assessment, variations regarding the *Rechtsgefühl* do not, however, change the overall majority (in other words, as for the result for a specific question, the majority in all groups either favors or objects to legal consequences). This further indicates the importance of the *Rechtsgefühl* regarding law. The *Rechtsgefühl* in the context of lies in contract negotiations also derives its importance from the fact that all business participants can generally put themselves in the position of both sides (either the party experiencing the bluff or the party that conducts the bluff). Thus, the evaluation is carried out from a rather neutral perspective, which probably leads to a "balanced" view. German negotiators, especially, seem to consider that they occasionally use bluffs during negotiations, which leads them to hold a more "generous" view on this matter.

Above all, it should be noted that the international study confirms that Germany and the United States are relatively similar as to their results regarding moral intuition and the *Rechtsgefühl*. The differences with regard to results from other countries are generally greater.²⁸ The following table ranks the U.S. and German students' responses to the nine scenarios of the questionnaire. The answers are ranked from most immoral to least immoral and high results in favor of rescission to low results in favor of rescission:

28. It should be noted that the answers of participants from other countries have not yet been analyzed fully. Nonetheless, the first results strongly point in this direction.

TABLE 1. Moral Intuition and *Rechtsgefühl*

	German Students		U.S. Students	
	Moral Intuition: Immoral	<i>Rechtsgefühl</i> : Pro Rescission	Moral Intuition: Immoral	<i>Rechtsgefühl</i> : Pro Rescission
Immoral/legal consequence	Subject matter of the contract (83.5%)	Subject matter of the contract (85.4%)	Legal situation (86%)	Subject matter of the contract (79%)
	Legal situation (80%)	Legal situation (72.6%)	Subject matter of the contract (78%)	Legal situation (72%)
Immoral/no legal consequences (over 30% but less than 50% in favor of legal consequences)	Other offer (60.1%)	Internal company policy (46.8%)	Product availability (74%)	Other offer (44%)
	Internal company policy (59.4%)	Other offer (37%)	Other offer (71%)	Product availability (39%)
	Product availability (53.2%)	Product availability (30.4%)	Internal company policy (53%)	Internal company policy (36%)
Moral/no legal consequences (less than 25% in favor of legal consequences)	Better offer (31.8%)	Better offer (23.1%)	Better offer (31%)	Better offer (20%)
	Deadline (24.6%)	Deadline (15.6%)	Personal preferences (16%)	Personal preferences (6%)
	Personal preferences (19.6%)	Reservation price (8.6%)	Reservation price (9%)	Deadline (5%)
	Reservation price (11.3%)	Personal preferences (6%)	Deadline (7%)	Reservation price (4%)

If the *Rechtsgefühl* is similar in both countries and the actual usage of such lies is approximately equal as well (as it can be initially assumed at this instance), it seems apt to infer a similar legal situation because it is difficult for any legal order to set rules contrary to a consistent *Rechtsgefühl* (and the actual practice).²⁹ Hence, it is

29. In the case of changes to the *Rechtsgefühl*, the adaptation of the law can take some time due to

interesting to discuss whether the observed similarities between Germany and the United States, as well as the distinction between moral intuition and *Rechtsgefühl*, are reflected in the actual legal situation.

II. THE LEGAL SITUATION IN THE UNITED STATES AND GERMANY

A. THE UNITED STATES

1. Applicable Law

Lies in contract negotiations have diverse facets and are regulated by different sets of rules. In B2B contract negotiations, however, the concept of misrepresentation is essential.³⁰ The following part primarily analyzes the Restatement of Contracts' view of misrepresentations since the Restatement attempts to illustrate the legal state with all of its essential elements in simple terms. In addition, the basic differences to the Restatement of Torts on misrepresentation are outlined, and relevant case law will be discussed.

2. Misrepresentation According to the Restatement of Contracts and the Restatement of Torts

In general, the rescission of a contract is subject to four prerequisites.³¹ First and foremost, a misrepresentation must be given. A misrepresentation requires "an assertion that is not in accord with the facts."³² Rescissions based on misrepresentations of opinion, matters of law, or intentions are subject to major restrictions.³³

In addition, the misrepresentation has to be either fraudulent or material to grant the deceived party the right to rescind the contract.³⁴ This Article only addresses deceptions that are to be classified as fraudulent misrepresentations.³⁵ According to the Restatement of Contracts, the

path dependencies.

30. Hence, rules on warranties, professional conduct, criminal law, the Uniform Commercial Code, as well as on the terms of consumer contracts and transactions in securities are not part of the analysis. The same is true for the concepts of "mistake" and "bargaining in good faith." Possible contractual clauses (like non-reliance clauses) that deviate from the rules on misrepresentations are not taken into account either. Also, the parol evidence rule will not be discussed.

31. See RESTATEMENT (SECOND) OF CONTRACTS §§ 159–73 (AM. LAW INST. 1981).

32. *Id.* § 159. Situations in which a party lies in the course of the negotiation, but the true fact is mentioned in the concluded contract, are excluded here. In this case, it is usually not possible to challenge the contract. Shell, *supra* note 3, at 97.

33. RESTATEMENT (SECOND) OF CONTRACTS §§ 168–71 (AM. LAW INST. 1981).

34. *Id.* § 162.

35. In this context, usually the term "requirement of scienter" is applied. *E.g., id.* § 162; Robert W.

misrepresentation does not necessarily have to be “material.”³⁶ However, in practice, courts often demand fulfilment of this condition³⁷ or indirectly require “materiality” by means of the prerequisite of “justified reliance” or “inducement” (for both see further below).³⁸ This aspect is one of the main differences in comparison with damage claims for the tort of deceit, which the Restatement of Torts addresses, as in that respect a misrepresentation must be fraudulent as well as material.³⁹ Materiality is a difficult term to define. Thus, in practice, the possible interpretations vary.⁴⁰ Generally, a matter is material according to section 538 of the Restatement of Torts if “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.”⁴¹

Another prerequisite is “inducement.”⁴² Based on the lie, the deceived party needs to have been induced to assent to the contract.⁴³ Nevertheless, it is not necessary that the deception was the main or only reason to enter into the contract. However, the lie must have been “substantial” for the decisionmaking process.⁴⁴ In this respect, in the course of the rescission, the claim is indirectly based upon the requirement of materiality.⁴⁵ With regard to the tort of deceit, “causation” is also discussed intensively.⁴⁶

Moreover, the reliance must be justified.⁴⁷ In essence, the deceived party must have relied on the false statement and the established reliance must have been legitimate.⁴⁸ Circumstances under which a justified reliance is rejected are inter alia, misrepresentations “of only peripheral importance to the transaction” or false statements that are not expected to be taken

Miller, *Scienter in Deceit and Estoppel*, 6 IND. L.J. 152, 152 (1930).

36. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981).

37. See, e.g., *Crooker v. White*, 50 So. 227, 228 (Ala. 1909); *Melvin v. Stevens*, 458 P.2d 977, 980 (Ariz. Ct. App. 1969); *Grane v. Grane*, 473 N.E.2d 1366, 1373 (Ill. App. Ct. 1985); Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 130 & n.94 (2014).

38. Hoffer, *supra* note 37, at 130; see also Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1020–21 (2003) (analyzing the complex relationship between materiality and justified reliance).

39. RESTATEMENT (SECOND) OF TORTS § 538(1) (AM. LAW INST. 1979); see also Sherwin, *supra* note 38, at 1021–25.

40. See Hoffer, *supra* note 37, at 130.

41. RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (AM. LAW INST. 1979).

42. See RESTATEMENT (SECOND) OF CONTRACTS § 167 (AM. LAW INST. 1981).

43. *Id.* § 167.

44. *Id.* § 167 cmt. a.

45. See *id.* § 167 cmt. b (explaining that the “materiality of the misrepresentation is a particularly significant factor” in determining whether a misrepresentation induced assent).

46. RESTATEMENT (SECOND) OF TORTS §§ 546–48A (AM. LAW INST. 1979).

47. RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

48. *Id.*

seriously.⁴⁹ In this respect, the customary practice of market participants is also taken into account.⁵⁰ Hence, the prerequisite of “justified reliance” imposes a certain degree of individual responsibility on the deceived party.⁵¹ Irrational behavior can serve as an indicator to determine that the deceived party did not actually rely on the lie.⁵² If it can, however, be proven that the deceived party did place trust in the statement made, neither stupidity nor irrationality is harmful.⁵³ Only “a failure to act in good faith and in accordance with reasonable standards of fair dealing”⁵⁴ can cause a different assessment. The element of self-responsibility gains even more importance when looking at the tort of deceit.⁵⁵

If all requirements are fulfilled, the deceived party can challenge the contract or enforce damage claims.⁵⁶ In the course of damage claims based on the tort of deceit, the deceived party also has to prove a pecuniary loss.⁵⁷ This requirement is not explicitly stated as a prerequisite for rescission.⁵⁸ Yet, in practice, some courts seem to view pecuniary loss as a prerequisite.⁵⁹

Section 549 of the Restatement of Torts defines what is to be regarded as “pecuniary loss” in the context of the tort of deceit. There are several forms of pecuniary losses. One relevant loss is described by the out-of-pocket rule. According to this rule, it is only important whether the misrepresentation causes a situation in which the value of the purchased object is lower than its purchase price.⁶⁰ This also includes indirect or consequential damages.⁶¹ Yet, both cases are not relevant for deceptions outside the scope of the subject matter of the contracts, which are mainly analyzed in this Article. Nevertheless, there is the option to replace the advantage the deceived party would have gained from entering into the

49. *Id.* § 164 cmt. d.

50. Fleming James, Jr. & Oscar S. Gray, *Misrepresentation – Part II*, 37 MD. L. REV. 488, 488 (1978).

51. Alexander & Sherwin, *supra* note 17, at 411.

52. James & Gray, *supra* note 50, at 518.

53. *Id.*; see also Chamberlin v. Fuller, 9 A. 832, 836 (Vt. 1886) (“No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.”).

54. RESTATEMENT (SECOND) OF CONTRACTS § 172 (AM. LAW INST. 1981).

55. See RESTATEMENT (SECOND) OF TORTS §§ 541–541A (AM. LAW INST. 1979).

56. *Id.* § 525; RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

57. RESTATEMENT (SECOND) OF TORTS § 549 (AM. LAW INST. 1979).

58. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.15 (6th ed. 2009).

59. Alexander & Sherwin, *supra* note 17, at 409; see, e.g., Leibowitz v. Great Am. Grp., Inc., 559 F.3d 644, 648–49 (7th Cir. 2009); Wootan & Saunders v. Diaz, No. 2017-0820, 2018 La. App. LEXIS 575, at *20–21 (La. Ct. App. Mar. 28, 2018).

60. RESTATEMENT (SECOND) OF TORTS § 549 cmt. b (AM. LAW INST. 1979).

61. *Id.* § 549 cmt. d.

contract. This approach refers to the so-called “benefit of the bargain.”⁶² Yet, this possibility is restrained by the burden of proof. According to the latter, the deceived person has to prove his or her loss “in accordance with the usual rules of certainty in damages.”⁶³ The question arises, whether damages based on lies about aspects other than the actual subject matter of the contract are included.

3. Case Law

Though the relevant case law on misrepresentations will not be illustrated in great detail here, it is clear that in most—though not in all—cases concerning deceptions about the subject matter of the contract, a rescission is possible. If, however, a seller makes statements about the quality of his or her product with the help of general adjectives, like it is “a good car,” usually, an assertion of opinion is assumed,⁶⁴ and the rescission of the contract is therefore granted only in exceptional circumstances. The same rationale applies to statements on the value of an object (for example, “the goods are worth \$10,000”⁶⁵).⁶⁶ Remarks on the price, such as “this is a good price” and so forth, are generally also regarded as opinions.⁶⁷ More specific deceptions that concern the nature of the price (for example, deceptions regarding the cost or stock market price), may, however, support a claim for rescission.⁶⁸ Neither U.S. literature nor traceable case law addresses how statements such as, “this is a friendship price,” shall be treated. Yet, the discussion on misrepresentations of value and price indicates that such a bluff would probably not justify a rescission.⁶⁹ As for now, there also seems to be no case law on lies about the reservation price.⁷⁰

An “assertion as to matters of law” can take two forms: (1) a statement of fact or (2) a statement of opinion.⁷¹ If, for instance, the deception concerns whether a particular law is in force or not, the deception regards a fact. This

62. *Id.* § 549 cmt. l.

63. *Id.* § 549 cmt. h.

64. RESTATEMENT (SECOND) OF CONTRACTS § 168 cmt. b (AM. LAW INST. 1981).

65. *Id.* § 168 cmt. c, illus. 2.

66. *Id.* § 168 cmt. c.

67. This can be deduced from the Restatement of Contracts’ explanation that similar remarks, for example, that an automobile is a “good car,” should be regarded as opinions. *See id.* § 168 cmt. b.

68. *Id.* § 168 cmt. d, illus. 6; *see also* Voorhees v. Cragan, 112 N.E. 826, 828–29 (Ind. App. 1916); Stewart v. Salisbury Realty & Ins. Co., 74 S.E. 736, 737 (N.C. 1912).

69. On that discussion, see RESTATEMENT (SECOND) OF CONTRACTS § 168 cmts. b–c, illus. 2. (AM. LAW INST. 1981).

70. Shell, *supra* note 3, at 95 (rejecting the notion that lies about the reservation price are material and therefore grounds for rescission).

71. RESTATEMENT (SECOND) OF CONTRACTS § 170 cmts. a–b (AM. LAW INST. 1981).

situation is then treated equally as other misrepresentations of facts⁷² and may therefore grant the deceived party the remedy of rescission.⁷³ Likewise, this rule also covers lies about a statutory maximum price.⁷⁴ Many deceptions about legal matters do, however, concern lies about probable outcomes of court proceedings. Such statements are classified as statements of opinion⁷⁵ and only in very exceptional cases entitle a rescission.⁷⁶ In practice, it is also relevant whether the lie concerns national or foreign law.⁷⁷

The deception of the negotiation partner with regard to another better offer is not discussed in the Restatement of Contracts' explanations. But occasionally case law on the topic can be found.⁷⁸ For instance, in *Kabatchnick v. Hanover-Elm Building Corp.* (a tort of deceit case) the court ruled in favor of a plaintiff who was deceived by a false claim of another offer.⁷⁹ Another case similarly granted tort damages for false statements of another offer (combined with time pressure).⁸⁰ However, neither of these judgments addressed the extent to which damages can or should be taken into account.⁸¹ The judgments rather stated that damages have occurred and that it is not harmful that the deceived party cannot prove an exact amount of damages.⁸²

On many other practically relevant misrepresentations in contract negotiations, such as lies about the availability of a product,⁸³ deadlines,⁸⁴ reservation prices, and internal company policies, almost none or only very few

72. *Id.* § 170 cmt. a.

73. *Id.* § 164.

74. *Id.* § 170 cmt. a, illus. 1.

75. *Id.* § 170 cmt. b.

76. *Id.* §§ 168–69.

77. *Id.* § 170 cmt. c (“The rule stated in this Section applies to statement of foreign as well as domestic law. Some courts have refused to recognize that statements of the law of a state or country where the recipient neither resides nor habitually does business are mere statements of opinion, even though they purport to cover only the legal consequences of facts known to both parties.”).

78. See *Hayes v. Equine Equities, Inc.*, 480 N.W.2d 178, 182 (Neb. 1992) (stating that a seller’s false assertion that he had a “ready, willing and able purchaser” was not mere “sales talk or puffing” but rather “positive representations of fact upon which [a purchaser] could rely.”); see also *Barron G. Collier, Inc. v. Braunig & Sons Baking Co.*, 202 N.W. 442, 443 (Minn. 1925) (describing a bluff about a “waiting list” of customers).

79. *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 103 N.E.2d 692, 692–95 (Mass. 1952).

80. *Beavers v. Lamplighters Realty, Inc.*, 556 P.2d 1328, 1329, 1333 (Okla. Civ. App. 1976).

81. *Id.* at 1333; *Kabatchnick*, 103 N.E.2d at 692–95.

82. *Kabatchnick*, 103 N.E.2d at 695. Note, however, that this is a business-to-consumer case rather than a business-to-business case.

83. There are, however, cases that deal with the availability of mortgage financing in connection with the purchase and sale of real estate. See, e.g., *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1070 (Del. 1983).

84. There are, however, cases of false ultimatums concerning payments. See, e.g., *Lawton v.*

cases could be found. Of the few cases, some are based on special provisions not relevant to the general concept of “misrepresentation.”⁸⁵

B. GERMANY

1. Applicable Law

In Germany, there is also more than one legal concept that deals with the legal consequences of lies in contract negotiations. The main rule is, however, section 123 paragraph 1, first alternative of the German Civil Code (“BGB”),⁸⁶ which addresses the right to rescind a contract due to fraudulent misrepresentation. Besides this, there may be entitlement to damages according to *culpa in contrahendo*,⁸⁷ that means negligence in contracting (“*Verschulden bei Vertragsschluss*”). If a case of criminal fraud (section 263 of the German Penal Code (“StGB”)) is brought, section 823 of the BGB (dealing with the tortious liability in civil law) is also applicable. In this way, in conjunction with the aforementioned criminal law rule, tortious claims can be brought forward. Moreover, lies about the subject matter of the contract are addressed by warranty law.⁸⁸ The following part will focus on section 123 of the BGB as the main rule and in this respect only addresses the very basic structure.

2. Section 123 of the BGB (German Civil Code)

A rescission according to section 123 of the BGB requires a willful deception.⁸⁹ The relevant term used in law, “fraudulent” (“*arglistig*”), has now for a long time been equated with the term “willful” or “intentional.”⁹⁰

Nyman, 327 F.3d 30, 34–35 (1st Cir. 2003) (dealing with a false deadline concerning a bank’s waiver); *Koepplinger v. Seterus, Inc.*, No. 1:17cv995, 2018 U.S. Dist. LEXIS 144270, at *6–9 (M.D.N.C. Aug. 24, 2018); *see also* *Ohlson v. Cadle Co.*, No. 04 Civ. 318 (DRH), 2008 U.S. Dist. LEXIS 77328, at *3–7 (E.D.N.Y. Sept. 30, 2008) (discussing a false deadline of payment).

85. *See, e.g., Koepplinger*, 2018 U.S. Dist. LEXIS 144270, at *6–9.

86. Translation at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

87. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 280, para. 1, § 241, para. 2, § 311, para. 2.

88. Moreover, demarcation questions with breach of public morals may arise. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 138 (“*Sittenwidrigkeit*”). Besides this, the German Law Against Unfair Competition should be taken into account. GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [UWG], §§ 5, 5a (discussing misleading commercial practices and omissions), *translation at* https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.pdf. Furthermore, sections 267 and 187 of the German Criminal Code may play a role. STRAFGESETZBUCH [STGB] [PENAL CODE], § 267 (penalizing document forgery), *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf; STRAFGESETZBUCH [STGB] [PENAL CODE], § 187 (penalizing defamation).

89. Holger Wendtland, *in* BECK’SCHER ONLINE KOMMENTAR ZUM BGB [BECK COMMENTARY ON THE CIVIL CODE] § 123, para. 17 (50th ed. 2019).

90. *See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] June 13, 2007, NEUE*

Moreover, a causal link has to be proven, namely in two respects.⁹¹ First, the act of deceit must induce the occurrence or maintenance of an error for the other party. Secondly, the error must have led the deceived party to have made a declaration of intent with the corresponding content.⁹² In this respect, it is irrelevant whether the deceived party would not have agreed to the contract without the deception (“*dolus causam dans*”) or whether he or she would have just desired a contract with different terms (“*dolus incidens*”).⁹³ Viewing the deception, it is also sufficient if the deceived party would otherwise not have agreed to the contract at that exact time (but, for example, at a later point).⁹⁴

Section 123 of the BGB establishes no further requirements for the misrepresentation such as a “reprehensible attitude”⁹⁵ (“*verwerfliche Gesinnung*”), intention to harm the deceived party, actual financial loss for the deceived party,⁹⁶ intention of the deceiving party to enrich him- or herself or a third party,⁹⁷ materiality, or justified reliance. The fact that the negotiating partner could have been more attentive and would consequently have been able to recognize the deception beforehand does not exclude a rescission of the contract.⁹⁸

Section 123 of the BGB only applies in cases of deceptions about facts (objectively comprehensible statements).⁹⁹ Expressions of opinion and value

JURISTISCHE WOCHENSCHRIFT [NJW] 3057 (3059), 2007; *see also* Christian Armbrüster, in 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH [MUNICH COMMENTARY ON THE CIVIL CODE] § 123, para. 18 (8th ed. 2018).

91. *See, e.g.*, REINHARD BORK, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES para. 871 (4th ed. 2016); Andreas Feuerborn, in 1 NOMOS KOMMENTAR BGB: ALLGEMEINER TEIL § 123, para. 41 (3d ed. 2016).

92. Armbrüster, *supra* note 90, § 123, para. 21; Feuerborn, *supra* note 91, § 123, paras. 41–43.

93. BORK, *supra* note 91, para. 871; Jürgen Ellenberger, in PALANDT: BÜRGERLICHES GESETZBUCH § 123, para. 24 (78th ed. 2019). *Contra* Martin Josef Schermaier, in 1 HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB §§ 116–24, para. 119 (Mathias Schmoeckel, et al. eds., 2018). *See* Andreas Wacke, *Circumscribere, gerechter Preis und die Arten der List*, 94 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE [ZRG] 184, 236–45 (1977) (discussing *dolus causam dans* and *dolus incidens*).

94. Feuerborn, *supra* note 91, § 123, para. 43; Ellenberger, *supra* note 93, § 123, para. 24.

95. Armbrüster, *supra* note 90, § 123, para. 18; Wendtland, *supra* note 89, § 123, para. 19.

96. Bundesgerichtshof [BGH] [Federal Court of Justice] June 21, 1974, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1505 (1506); Oberlandesgericht Stuttgart [OLG] [Higher Regional Court] December 7, 2011, 3 U 135/11, BeckRS 01235, 2012 (discussing the issue in paragraphs 47–50); Armbrüster, *supra* note 90, § 123, para. 19.

97. BORK, *supra* note 91, para. 874.

98. OLG Düsseldorf, July 3, 2017, 4 U 146/14, BeckRS 130307, 2017 (discussing the issue in paragraph 163); BORK, *supra* note 91, para. 870; Armbrüster, *supra* note 90, § 123, para. 23.

99. Bundesgerichtshof [BGH] [Federal Court of Justice] September 19, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 357, (358) 2007; Armbrüster, *supra* note 90, § 123, para. 29; Wendtland, *supra*

judgments are not included in the scope of the rule.¹⁰⁰ In this regard it must, however, be assessed whether the expression of “opinion” does actually contain a statement of fact at its core (“*Tatsachekern*”).¹⁰¹ If this occurs, the fact at the core of the opinion can give rise to a rescission claim. Accordingly, mere sales talk or puffery (“*marktschreierische Anpreisungen*”) does not justify a rescission based on the conduct of fraudulent deception¹⁰² if the statement concerned has no “factual content”¹⁰³ and thus comprises no deception of fact.

Concerning fraudulent deception, unlawfulness is not an explicit prerequisite.¹⁰⁴ The legislative materials evince that the legislature has deliberately decided against requiring unlawfulness.¹⁰⁵ This is due to the fact that the legislature assumed a fraudulent deception to be unlawful in all circumstances.¹⁰⁶ Nonetheless, there is, in particular, one case group in which the aspect of unlawfulness is discussed: lies in response to unlawful, or, more precisely, discriminatory questions. For example, questions asked by an employer regarding whether a job applicant is pregnant¹⁰⁷ or questions about the applicant’s ethnic origin¹⁰⁸ are inadmissible (discriminatory). For this reason, these questions may also be answered untruthfully by the applicant without legal consequences.¹⁰⁹ Some authors hold the view that “unlawfulness” should generally be recognized as a requirement of the law.¹¹⁰

note 89, § 123, para. 8.

100. Bundesgerichtshof [BGH] [Federal Court of Justice] September 19, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 357, (358) 2007; Armbrüster, *supra* note 90, § 123, para. 29; Wendtland, *supra* note 89, § 123, para. 8.

101. OLG Stuttgart, December 7, 2011, 3 U 135/11, BeckRS 1235, 2012, paras. 47–50; Ellenberger, *supra* note 93, § 123, para. 3.

102. Bundesgerichtshof [BGH] [Federal Court of Justice] September 19, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 357 (358), 2007; Ellenberger, *supra* note 93, § 123, para. 3; Wendtland, *supra* note 89, § 123, paras. 8–9.

103. Armbrüster, *supra* note 90, § 123, para. 29.

104. *Id.* § 123, para. 19.

105. BERICHT DER XII. KOM. V. 12. JUNI 1896 [REPORT OF THE XII. COMMISSION ON THE GENERAL CHAPTER OF THE GERMAN CIVIL CODE] (1896), *reprinted in* 1 DIE GESAMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH 965 (Benno Mugdan ed., 1899).

106. *Id.*

107. Armbrüster, *supra* note 90, § 123, para. 48 (describing pregnancy-related questions in job interviews); Feuerborn, *supra* note 91, § 123, para. 56.

108. Feuerborn, *supra* note 91, § 123, para. 54.

109. See HOLGER FLEISCHER, INFORMATIONASYMMETRIE IM VERTRAGSRECHT 254–56 (2001).

110. Armbrüster, *supra* note 90, § 123, para. 19 (defending a teleological reduction of section 123 of the BGB). However, the methodological solution is still discussed.

3. Case Law

The legal situation in Germany seems to be very clear with respect to section 123 of the BGB; it entitles a deceived party to a far-reaching right of rescission. Regarding lies about the subject matter of a contract, this is also—almost without exception—reflected in the corresponding case law.¹¹¹ For deceptions outside the subject matter of a contract, however, there is practically no relevant case law within the area of B2B transactions. For example, only one case addressing a misrepresentation about a better alternative offer could be found. This single judgement by a district court (“*Amtsgericht*”), however, dates back to 1933 and has not even been published fully by the district court in Berlin.¹¹² In this case, the right of rescission was confirmed.¹¹³ Nonetheless, not enough details of the circumstances of the case are publicly accessible to draw clear conclusions. There are no other known cases on this aspect, despite the prominence of this deception tactic.¹¹⁴ Nonetheless, there are certain similarities to court rulings in the field of labor law, in which, for example, an applicant states a false (in this case, too high) salary previously paid. However, in this respect the legal landscape does not provide any clear conclusions either.¹¹⁵

Oftentimes, lies about the price can justify a rescission even in a B2B context. Examples include misrepresentations about purchase prices and profit margins,¹¹⁶ as well as the incorrect indication of a “friend’s price” or “mate’s rate,” “reasonable price,” “especially favorable price,” “special

111. At this point, many judgements could be mentioned. Below, a few concise examples are illustrated.

112. *Amtsgericht Berlin* [AG] [District Court], Mar. 22, 1933, 171 C 130/33 (published incompletely in *DEUTSCHE JUSTIZ: RECHTSPFLEGE UND RECHTSPOLITIK; AMTL. BLATT D. DEUTSCHEN RECHTSPFLEGE*, 823–24 (1933)).

113. *Id.*

114. Paul Bockelmann, *Kriminelle Gefährdung und strafrechtlicher Schutz des Kreditgewerbes* 17 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* [ZStW] 28, 33 (1967) (favoring some room to maneuver in this respect with regard to fraud); Gerhard Wagner, *Lügen im Vertragsrecht, in STÖRUNG DER WILLENSBILDUNG BEI VERTRAGSSCHLUSS* 70, 70–71, 95–97 (Reinhard Zimmermann ed., 2007) (favoring a right to lie with regard to statements on reservation prices).

115. *Bundesarbeitsgericht* [BAG] [Federal Labor Court] May 19, 1983, *ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* [ZIP] 210 (213), 1984 (rejecting the possibility to rescind the contract); see also FLEISCHER, *supra* note 109, at 256–60. *Contra* *Arbeitsgericht Bad Oldesloe* [ArbG] [Labor Court], July 15, 1969, 1 C 128/69, *FHZivR* 16 Nr. 126. It should be noted that the quoted case law cannot be transferred one-to-one to B2B situations, as a special relationship of trust is often assumed between employees and employers.

116. *Bundesgerichtshof* [BGH] [Federal Court of Justice] Jan. 22, 1964, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 811, (811) 1964 (describing the margin of earnings); FLEISCHER, *supra* note 109, at 261 (describing the right to challenge the contract in those cases); Benjamin Junglas, *Bankenhaftung bei der Finanzierung von Schrottimmobilien*, *NEUE JURISTISCHE ONLINE ZEITSCHRIFT* [NJOZ] 49, 62 (2013); Wendtland, *supra* note 89, § 123, para. 9.

price,” or falsely stating a “non-binding recommended retail price.”¹¹⁷ In principle, it is also possible to claim a rescission of the contract if a deception about the legal situation is provable.¹¹⁸ Alas, there is (almost) no available case law on this subject.¹¹⁹ Moreover, the existing cases show that the demarcation of lies about the legal situation and of bluffs about legal views may prove very difficult.¹²⁰

In Germany, there are almost no cases dealing with deceptions outside the actual subject matter of the contract and the contractual partner (for example, on misrepresentations of personal preferences, deadlines,¹²¹ internal company policies, or the availability of a product).¹²²

C. OVERVIEW OF THE LEGAL DIFFERENCES BETWEEN THE UNITED STATES AND GERMANY

German law provides an abstract, general rule, while U.S. law leaves significant leeway for interpretation.¹²³ Even the Restatements of Contracts and Torts, with their primary purpose of simplifying the law, indicate the actual complexity of the legal concept of “misrepresentation” in the United States.¹²⁴ Apart from the prerequisites of an intentional misrepresentation and causality, other U.S. legal requirements are unknown to German law. This implies that German law is less flexible and does not allow for any kind of lawful lies.

Both jurisdictions are similar with regard to having very few relevant

117. AG Düsseldorf, Sep. 10, 2008, 32 C 6293/08, BeckRS 5960, 2009. *See also* Oberlandesgericht Hamm [OLG] [Higher Regional Court] June 12, 1992, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGSREPORT ZIVILRECHT [NJW-RR] 628 (628–29), 1993; OLG Jena Dec. 6, 2005, 8 U 338/05, BeckRS 18097, 2011 (denying the causality in a case concerning the calculation of rent); OLG Frankfurt May 12, 1982, 17 U 273/81, DAR 1982, 294.

118. Kammergericht [KG], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1219 (1220), 1971; Armbrüster, *supra* note 90, § 123, para. 30.

119. For two examples of cases rejecting a rescission, see Kammergericht [KG], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1219 (1220), 1971; OLG Karlsruhe, Dec. 6, 2005, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 557, 558–59, 2006.

120. OLG Karlsruhe, Dec. 6, 2005, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 557, (558–59) 2006.

121. STEPHAN LORENZ, DER SCHUTZ VOR DEM UNERWÜNSCHTEN VERTRAG 483 n.1525 (1997) (assuming liability according to the rules of the c.i.c. (*culpa in contrahendo*) in a case dealing with faked time pressure and “unique opportunities”).

122. However, an online fashion store, Zalando, was sued in 2015 by the competition authorities based on a corresponding misrepresentation. Press release, Peter Brammen, Zentrale zur Bekämpfung unlauteren Wettbewerbs, Wettbewerbszentrale erhebt Klage gegen Zalando wegen irreführender Werbung (Nov. 11, 2015), https://www.wettbewerbszentrale.de/de/_pressemitteilungen/?id=268.

123. PERILLO, *supra* note 58, § 9.24.

124. *Id.*

cases about deceptions outside the subject matter of a contract. This may be due to the fact that, in the majority of cases, such lies are not uncovered. However, even in cases where the deceived party exposes such lies, there are often major difficulties in presenting sufficiently substantiated evidence for an effective claim. Due to the cost of a lawsuit, lodging a claim is oftentimes not economically feasible. Moreover, for B2B relationships, there is a general tendency to resolve problems in the course of extrajudicial arrangements. Furthermore, in the United States, not only the faint chances of winning such a case but also the party's *Rechtsgefühl* will probably prevent the deceived party from claiming rescission of the contract or enforcing compensation of damages. However, the faint chances of winning do not explain the low number of such cases in Germany, where the law provides (at least according to its wording) a remedy for all kinds of lies. Still, in Germany, it also runs contrary to the *Rechtsgefühl* to challenge a contract in many of these situations, which is probably why many people refrain from pursuing this path.

The relevant case law in both countries reveals that deceptions concerning the subject matter of a contract itself are generally covered, even though, unlike in Germany, this is not always the case in the United States. At the same time, the jurisprudence, or rather the lack of jurisprudence, in the United States shows that most deceptions outside the subject matter of the negotiation normally do not entitle the deceived party to rescind the contract. The two aforementioned cases, involving bluffing about a better offer, seem to be the exception rather than the rule. The previously illustrated prerequisites also offer the leeway to disallow any rescission for the corresponding lies. With regard to German law, the lack of jurisprudence does not necessarily indicate that the rescission is not granted in cases of deceptions outside the scope of the subject matter of the contract. Viewing only the law as it stands, it could be assumed that in most of these cases there is a possibility to rescind the contract.

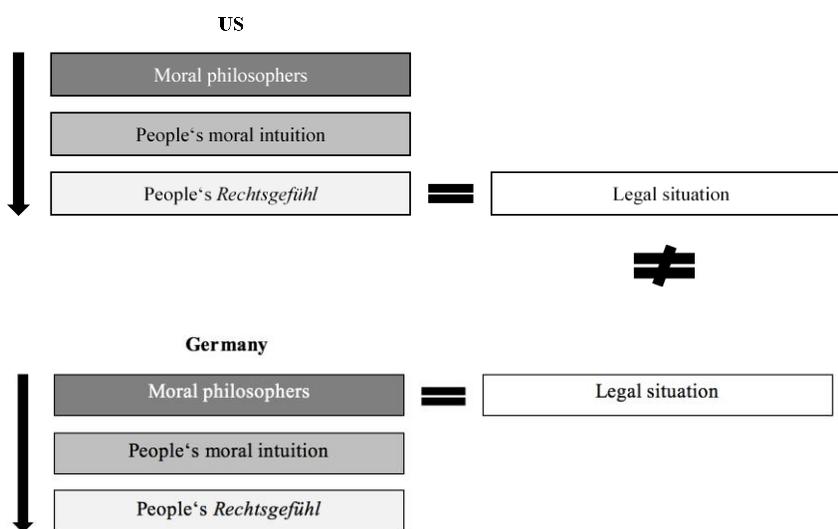
D. SUMMARY

There are considerable differences between the law in Germany and the law in the United States. Yet, it can be noted that both legal systems are equal in that their law by no means reflects widely held moral intuitions. In the United States, both a majority of students and lawyers consider not only deceptions about the subject matter of the contract and the legal situation to be immoral, but also assess lies about better offers, the availability of a product, and internal company policies to be morally unacceptable. However, American law, in general, does not allow the deceived party to

rescind the contract in all of these circumstances. At least U.S. law, mainly due to its high degree of flexibility, more or less reflects the prevalent *Rechtsgefühl*. This corresponds with the expectation postulated above that the general *Rechtsgefühl* affects or should affect the abstract law (not the individual case) in the long-term. On the contrary, in Germany, section 123 of the BGB neither reflects people's moral intuition nor their *Rechtsgefühl* because it exceeds both of these concepts. In fact, it rather mirrors the ideas of traditional moral philosophers who generally condemn lies to a great extent.

The following graph depicts the relationship between (1) the ideas of traditional moral philosophers, (2) people's actual moral intuition, (3) people's *Rechtsgefühl* (sense of how the law should be), and (4) the law in the United States and Germany:

FIGURE 1. Relationship Between Moral Intuition, *Rechtsgefühl* and the Law in the United States and Germany



III. REASONS FOR THE LEGAL DIFFERENCES BETWEEN THE UNITED STATES AND GERMANY

Since in both countries' moral intuition and *Rechtsgefühl* were assessed very similarly by the respondents of the survey, the legal differences can

hardly be explained by focusing on these two specific aspects. However, different general values in the United States and Germany certainly play a role in explaining the legal divergences in both countries. U.S. law, for instance, puts much more emphasis on the individual's personal responsibility and freedom of action than does German law.¹²⁵ German law, in turn, focuses more on preserving the deceived party's autonomy and freedom of decision.¹²⁶ Moreover, legal differences regarding related concepts, for instance the law of warranties, certainly influence the concept of misrepresentation and therefore might have contributed to the occurring divergences. Yet, this alone does not sufficiently explain why German law sets out legal consequences for virtually all lies even though the *Rechtsgefühl*—even that of German judges—deems a more differentiated provision appropriate.

In this respect, legal history may provide further insights. German law has its roots in Roman law.¹²⁷ However, in contrast to section 123 of the BGB, Roman law was open to differentiations regarding deliberate deceptions of an individual in the course of a negotiation.¹²⁸ Roman law distinguished between *dolus bonus* and *dolus malus*¹²⁹ and did not include certain lies that fell within the scope of *sollertia*¹³⁰—a term that stands for “skill, shrewdness, quickness of mind, ingenuity, dexterity, adroitness,

125. Especially regarding the right of rescission, personal responsibility is virtually irrelevant in Germany.

126. See, e.g., Armbrüster, *supra* note 90, § 123, para. 1. In this context, the German discussion about the theory of will, the theory of expression and the theory of trust (“*Willens-, Erklärungs- und Vertrauens- theorie*”) is to be taken into consideration. See Schermaier, *supra* note 93, §§ 116–24, paras. 4–6.

127. Initially the Roman legal rules in the form of the so-called “*Ius Commune*” (literally “common law,” but at that time referred to as *Ius Commune* throughout Europe), were applied in Italy, but later also in Germany. For more on this development, see 1 HELMUT COING, *EUROPÄISCHES PRIVATRECHT* 13–14 (1985); FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 114–24 (1967).

128. ANTONIO CARCATERA, *DOLUS BONUS / DOLUS MALUS passim* (1970); SEBASTIAN MARTENS, *DURCH DRITTE VERURSACHTE WILLENSMÄNGEL* 45–54 (2007) (describing Roman Law and its differentiation with respect to these forms of deception); REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 664–70 (1990); Ralph Backhaus, *Ethik und Recht in Cicero: de officiis 3.12.50 ff.*, in *HUMANIORA: MEDIZIN—RECHT—GESCHICHTE* (FESTSCHRIFT FÜR ADOLF LAUFS) 3, 3–13 (Bernd-Rüdiger Kern et al. eds., 2006); Wacke, *supra* note 93, at 221.

129. In the classical period, the term *dolus* was used instead of *dolus malus*. See MARTENS, *supra* note 128, at 49 n.191; see also Wacke, *supra* note 93, at 227.

130. Wacke, *supra* note 93, at 229 (pointing out that *dolus bonus* had a small scope of application). The Romans, to a large extent, tolerated deception during negotiations within the framework of *sollertia*. The distinction between *dolus bonus* and *sollertia* is not important for the purposes of the present argument. The decisive factor is that there was a certain amount of leeway; see also ZIMMERMANN, *supra* note 128, 669–70 (describing *dolus* and *sollertia*).

expertness.”¹³¹ Overall, the concept was not clearly defined. Hence, casuistic case law was very important. Even if the concept of the *dolus* suggests a relatively broad scope, its central area of application was not the protection of misleading information regarding certain characteristics of the sales object. It is even questionable whether such cases were covered at all.¹³² The analysis of various sources, rather, points to a wide scope for deceptive actions in contract negotiations. Usual commercial practices were probably the point of reference for distinguishing between lawful and unlawful lies.¹³³ Moreover, as for the Romans, the act of deception was, at least to a certain extent, part of everyday business practice.¹³⁴ With regard to pricing, Paulus is often quoted as saying that “[n]aturally it is allowed to buy what is worth more for less, to sell what is worth less for more, and thus to over-benefit each other. This also applies to contracts of rent and services.”¹³⁵ In the following, it will be examined when and how German law has lost the differentiated view, which was immanent in Roman law.¹³⁶

Inspired by rationalism, the seventeenth and eighteenth centuries brought forth the quest for basic values and principles as opposed to a case by case decision practice.¹³⁷ Yet, this so-called *usus modernus* left the core of the law, in the form of the *Ius Commune*, relatively unaffected.¹³⁸ With regard to the rescission of the contract by reason of deception, the question was less about which misrepresentations should be affected but rather about determining legal consequences for this conduct.¹³⁹ The ideas promoted by the movements of the Enlightenment and natural law, in form of the so-called “law of reason,” particularly flourished in the eighteenth century.¹⁴⁰ In parts

131. CHARLTON T. LEWIS & CHARLES SHORT, A LATIN DICTIONARY 1721 (E.A. Andrews ed., 2d ed. 1891) (defining *sollertia*).

132. MARTENS, *supra* note 128, at 52; Backhaus, *supra* note 128, at 8 (listing examples).

133. MARTENS, *supra* note 128, at 52.

134. *Id.* at 53.

135. This quote is a translation of “naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conditionibus iuris est.” DIG 19.2.22.3 (Alan Watson ed. & trans., 1985).

136. The Glossators then introduced the terminological distinction between *dolus causam dans* and *dolus incidens*, whereby unlawful deceptions are classified according to their severity. See MARTENS, *supra* note 128, at 87; Sprenger, *Ueber dolus causam dans und incidens*, 88 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 359, 361 (1898). Yet, according to the vast majority of opinions, German law does not include this differentiating approach. See BORK, *supra* note 91, para. 871; Feuerborn, *supra* note 91, § 123, para. 43.

137. COING, *supra* note 127, at 69–72; WIEACKER, *supra* note 127, at 217–24 (explaining the practices in the seventeenth and eighteenth centuries).

138. WIEACKER, *supra* note 127, at 243.

139. MARTENS, *supra* note 128, at 138–39.

140. WIEACKER, *supra* note 127, at 249–80, 312 (describing the right to reason as part of natural law and the relationship between the Law of Reason and Enlightenment); see also JAMES GORDLEY, THE

of what is today Germany, the General State Laws of Prussia (*Allgemeines Landrecht*, or *ALR*) of 1794, and the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, or *ABGB*) of 1811 (until 1866 Austria was part of the German community of states), as well as the French *Code Civil* of 1804 (which was applied in Germany in the Rhineland and in Baden until 1900), were significantly influenced by the principles of natural law.¹⁴¹ Linked to the establishment of these laws, a “charging of law” with ethical considerations occurred.¹⁴² In this sense, the independence of social ethics from moral theology is decisive.¹⁴³

Under the influence of the teachings of Savigny and his successors, the German Historical School of Law of the nineteenth century formally distanced itself from the Enlightenment and natural law movements.¹⁴⁴ The German Historical School of Law dedicated itself to the systematization and modernization of Roman law according to the “*Volkgeist*” (verbatim, “spirit of the people”).¹⁴⁵ This systematization was valued so highly that sometimes simplifications and a neglect of the search for interest-oriented results were the outcome.¹⁴⁶ Moreover, Savigny’s writings were in the tradition of Kant’s.¹⁴⁷ In turn, Kant, in a particularly radical way, rejected a right to lie, even in circumstances of emergency.¹⁴⁸ Savigny himself, however, still mentions the distinction between *dolus malus* and *dolus bonus*.¹⁴⁹ Nonetheless, at the same time, one can also read the high value that Savigny attaches to truth: “[t]he necessary condition of all community, however, is

PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 85–111 (1991).

141. WIEACKER, *supra* note 127, at 265, 327–47 (“The profane Law of Reason of the modern age, after the Corpus Iuris the strongest potency of the newer legal development at all”). This is a translation of “[d]as profane Vernunftrecht der Neuzeit, nach dem Corpus Iuris die stärkste Potenz der neueren Rechtsentwicklung überhaupt” *Id.*

142. A famous example of this is the French general clause in tort. THE CODE NAPOLEON; OR, THE FRENCH CIVIL CODE art. 1382–83, at 378 (A Barrister of the Inner Temple trans., 1827), http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf (providing a translation the French Civil Code of 1804).

143. WIEACKER, *supra* note 127, at 266.

144. *Id.* at 352–53 (explaining Kant’s role in the “destruction of uncritical older natural law”).

145. 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 14–18, 39–44 (1840). See also WIEACKER, *supra* note 127, at 353–77 (“Hervorbringung des Volksgeistes”).

146. MARTENS, *supra* note 128, at 183.

147. WIEACKER, *supra* note 127, at 360, 370, 385.

148. Compare KANT, METAPHYSICS, *supra* note 17, at 429 (discussing briefly the immorality of even well-intentioned lies), with KANT, SUPPOSED RIGHT, *supra* note 17, *passim* (providing a more concrete and sharp analysis).

149. 3 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 118–19 (1840); 1 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 211 n.4 (5th ed. 1879) (referring to the meaning of the term fraud in the sense of *dolus malus*).

truthfulness and the trust that it establishes.”¹⁵⁰ His remarks demonstrate that he attributed the element of an ethical perspective to the *dolus malus*.¹⁵¹ At the same time, the idea of the “independent existence”¹⁵² of law, established by the German Historical School of Law, “which should not force but enable autonomous morality,”¹⁵³ must be taken into consideration. The subsequent generation of lawyers, the so-called Pandectists,¹⁵⁴ based their works on legal positivism, assuming that regulations could be derived solely “from system, concepts and doctrines” and without the external influence of religious, social, or scientific considerations.¹⁵⁵ A “clearly contoured law” without much scope for interpretation was therefore rather aligned with the tendencies of the Pandectists.¹⁵⁶

In the context of the establishment of the German Civil Code (“BGB”), the legislature did not discuss misrepresentations outside the subject matter of the contract, which are explored in this Article.¹⁵⁷ However, the initially introduced BGB left some leeway for interpretation. Above all, the pre-contractual phase was less regulated. Only over time, did this area increasingly become the subject of different rules. Moreover, even though the Roman dichotomy between *dolus malus* and *dolus bonus* is not explicitly discussed in the documentation of the legislative process of creating the BGB, a distinction between lawful and unlawful lies still seemed to be included¹⁵⁸ in the wording of the provision: “*arglistige Täuschung*,” which literally translates to “malicious deception.”¹⁵⁹ “Arg” was originally an old swearword¹⁶⁰ that the Brothers Grimm even used as a synonym for the Latin term *malus*.¹⁶¹ While in this context “*arglistig*” has a negative connotation,

150. SAVIGNY, *supra* note 149, at 115.

151. *Id.*

152. This is a translation of “selbständigen Daseyn.” WIEACKER, *supra* note 127, at 397; *see also* SAVIGNY, *supra* note 149, at 331–32.

153. This quote is a translation of “welches die autonome Sittlichkeit nicht erzwingen, sondern ermöglichen soll.” WIEACKER, *supra* note 127, at 397.

154. *See* JOHN. P. DAWSON, THE ORACLES OF THE LAW 450–59 (1968) (describing the Pandectists).

155. This quote is a translation of “aus System, Begriffen und Lehrsätzen.” WIEACKER, *supra* note 127, at 431.

156. MARTENS, *supra* note 128, at 185 (focusing on the clearly contoured facts of the case).

157. *Id.* at 195–96 (demonstrating how the legislature particularly viewed technical matters).

158. *See* MICHAEL JÜTTNER, DIE ZURECHNUNG DER ARGLISTIGEN TÄUSCHUNG DRITTER IM RECHTSGESCHÄFTLICHEN BEREICH UNTER BESONDERER BERÜCKSICHTIGUNG DES PROBLEMS DER “GESPALTENEN” ARGLIST 8 (1998) (describing the impression of the wording).

159. FLEISCHER, *supra* note 109, at 333 (drawing the connection to *dolus malus* and therefore considering the term “not fitting”).

160. *See* FRIEDRICH KLUGE, ETYMOLOGISCHES WÖRTERBUCH DER DEUTSCHEN SPRACHE 29 (24th ed. 2002) (defining the keyword “arg”).

161. 1 JACOB GRIMM & WILHELM GRIMM, DEUTSCHES WÖRTERBUCH cols. 546–47 (1854).

“*listig*” (“cunning”) is not necessarily negatively connoted and likewise derives its meaning from from “*klug*” or “*schlau*” (“clever”).¹⁶² The documentation of the legislative process leading to section 123 of the BGB also states that “[i]n general, any malicious offense against the principles of good faith (“*Treu und Glaube*”) to the detriment of another presents itself as fraud.”¹⁶³ Hence, in the early years of the German Civil Code, the required malicious deception (“*arglistige Täuschung*”) was often interpreted as malicious, immoral deception.¹⁶⁴ Yet, soon, in jurisprudence and literature, the opinion that malice was equated with intent prevailed.¹⁶⁵ The focus was rather on promoting the idea that the deceiving parties’ actual attitude is not relevant. The provision was not supposed to have a sanctioning character. Moralizing deliberations should not be significant for the interpretation of the rule.¹⁶⁶ The “free self-determination in the field of legal transactions,”¹⁶⁷ as already the motives state, came to the fore¹⁶⁸ and left less room for distinguishing between lawful and unlawful lies.

In theory, there is still the recognition of trade customs, which is recognized in a general manner within the German Civil Code¹⁶⁹ and is in particular also applicable with regard to commercial transactions.¹⁷⁰ One of the leading representatives of an intensified liability for negligence in contracting, Walter Erman, admitted, still back in 1934, that commercial customs create a leeway, according to which certain untrue expressions are

162. See KLUGE, *supra* note 160, at 443 (defining the keyword “List”); see also GRIMM & GRIMM, *supra* note 161, cols. 1070–73.

163. The quoted language is a translation of “Im Allgemeinen stellt sich jeder arglistige Verstoß gegen die Grundsätze von Treu und Glauben zum Nachtheil eines Anderen als Betrug dar.” The wording “by fraud” (“*durch Betrug*”) in the first draft had been changed to “fraudulent deception” in the second draft. *Motive zum allgemeinen Theile des BGB*, reprinted in 1 DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH 467 (Benno Mugdan ed., 1899) (describing motives concerning section 103).

164. E.g., Reichsgericht [RG] [Supreme Court of the German Reich] July 11, 1888, 23 ENTSCHIEDUNGEN DES REICHSGERICHTS ZIVILSACHEN [RGZ] 130 (137), 2008 (requiring malicious intent, or “*bösliche Absicht*”); 1 CARL CROME, SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS 429 (1900) (describing malicious, or “*böswillig*,” deception); 1 HUGO REHBEIN, DAS BÜRGERLICHE GESETZBUCH MIT ERLÄUTERUNGEN FÜR DAS STUDIUM UND DIE PRAXIS 148 (Verlag von Müller 1899) (using the term “*böslicher Absicht*”).

165. FLEISCHER, *supra* note 109, at 334.

166. JÜTTNER, *supra* note 158, at 22–29.

167. *Motive zum allgemeinen Theile des BGB*, *supra* note 163, at 465 (describing motives concerning section 103). The quoted language is a translation of “freie Selbstbestimmung auf rechtsgeschäftlichem Gebiete.”

168. FLEISCHER, *supra* note 109, at 244 (explaining the protective content of the provision).

169. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242, translation at https://www.gesetze-im-internet.de/englisch_bgb.

170. See HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 346, translation at http://www.gesetze-im-internet.de/englisch_hgb; see also *id.*, § 310, para. 1, sentence 2.

to be tolerated in the negotiations.¹⁷¹ According to the present status of German law, in contrast to the original ideas of the German Civil Code legislature, common trade customs became almost insignificant.¹⁷² Hence, nowadays, trade customs do not represent a practical possibility to exclude certain intentional deceptions from the scope of section 123 of the BGB. The abolition of the possibility to differentiate by means of the “fraudulent intent” or “trade customs” was the main reason for the comprehensive scope of section 123 of the BGB. The rediscovery of the unwritten element of “unlawfulness” in this way constitutes a (small) counter-movement, since it permits the exclusion of “lawful” misrepresentations from the comprehensive scope of application. Yet, up until now this possibility has only been exercised for undoubtedly unlawful (in particular, discriminatory) questions (for example, asking job applicants about an existing pregnancy). There are no further exceptions established in judgments.¹⁷³

In summary, it can be stated that the German legal system never conducted a separate in-depth discussion on deceptions outside the subject matter of the contract. Originally, these kinds of deceptions were presumably not included by section 123 of the BGB either, but the progressive legislative coverage of cases concerning pre-contractual actions de facto led to a comprehensive coverage. Eliminating the possibility of evaluation within the provision, up to this day had the effect that exceptions can be granted only to a nearly insignificant extent. Compared to the United States, this has caused a divergence of the two legal systems.

IV. POSSIBLE FUTURE DEVELOPMENTS

The theoretically complete unlawfulness of deceptions in contract negotiations in Germany neither corresponds with people’s prevalent *Rechtsgefühl* nor with their moral intuition. This can serve as a strong indication that one should reconsider a different interpretation of German law or even implement adaptations. In the spirit of bringing German law back on the path “to its roots,” specifically back to its Roman foundations, German law should reintroduce a differentiation between lawful and unlawful lies. Naturally, the question arises where exactly the German legal order should draw a distinct line between lawful and unlawful lies. This specific question

171. Walter Erman, *Beiträge zur Haftung für das Verhalten bei Vertragsverhandlungen*, 139 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 273, 282–83 (1934).

172. See NADIA AL-SHAMARI, *DIE VERKEHRSSITTE IM § 242 BGB: KONZEPTION UND ANWENDUNG SEIT 1900*, at 143 (2006) (describing a study of the BGH’s decisions in volumes 1 through 151).

173. See *supra* Section II.B.3.

will be discussed in a separate paper, solely dedicated to examining this topic in depth.

However, this Article promotes the idea, that, next to other arguments, people's *Rechtsgefühl* should be taken into account regarding this question. In contrast, people's moral intuition is considered to be less crucial for finding a legal solution. These claims are limited to bluffs and lies in business-to-business contract negotiations. The discussion on the more general relationship between moral intuition, the *Rechtsgefühl*, and the legal situation deserves a more in-depth analysis.

Besides economic aspects also have to be considered with regard to distinguishing lawful from unlawful lies.¹⁷⁴ In this respect, it will be important to ensure that the parties involved in transactions will not lose their faith in the market and its regulating forces. In addition, the proposed rule should be formulated as unambiguously as possible and align with the existing laws, especially with regard to the rules on disclosure. Even though this paper does not address misrepresentations based on omissions, the presented findings certainly have an influence on the following aspect: if a party is legally allowed to bluff about a certain aspect in a negotiation, it will also be allowed to not disclose any information on that issue. In return, if the law requires disclosure, the given information has to be correct.

However, German law should not just copy respective concepts from U.S. law because, even though U.S. law reflects people's *Rechtsgefühl* more or less, it leaves a lot of room for interpretation due to the broad concepts like "materiality," which complicate predicting the likely outcome of certain cases. Hence, it could be considered trying to achieve the same result by means of both clearer and more precise rules. In that way, people who wish to act lawfully would have a better sense for differentiating lawful from unlawful lies.

174. FLEISCHER, *supra* note 109, at 263; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 119, 121–22 (9th ed. 2014) (rejecting a right to lie based on economic reasons); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15 n.42, 18–19 n.49 (1978); see also Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 137–42 (1982) (explaining optimal dishonesty). See generally Ariel Porat & Omri Yadlin, *A Welfarist Perspective on Lies*, 91 IND. L.J. 617 (2016) (supporting the lawfulness of some lies based on economic reasons).

