CHAPTER 4

German Unfair Competition Law

4.1 INTRODUCTION

Unfair competition law has had, for over more than a hundred years now, a strong presence in the German legal landscape. From its codification onwards, first in the UWG 1896, followed by the UWG 1909, unfair competition law has developed extensively and has become an indispensable asset to traders who want to be protected against the unfair trading practices of their (dishonest) competitors. Plaintiffs will usually not only invoke protection under unfair competition law as an alternative contention to the infringement of an intellectual property right, but they will also in many cases base their actions purely and solely on unfair competition law. Unfair
competition law therefore adopts an independent position in German law. In recent years, unfair competition law has undergone a process of modernisation that has clearly manifested itself in a more liberal policy towards competition and the inclusion, to a higher degree, of consumer protection in the new UWG 2004. The (German) law of unfair competition is often depicted as featuring a highly complex and non-transparent subject-matter. This is for a great part due to the fact that it covers a substantive field of different cases and has generated a great deal of case law as well as writing in the literature. What makes German unfair competition law particularly interesting is the fact that unlike other fields of German law, it is for a large part judge-made law. This attribute demonstrates that, despite the criticism coming in particular from common-law systems that German unfair competition law is inflexible because it is based on written law, it is capable of showing remarkable elasticity to adapt to new circumstances.3

In the following sections I will present an overview of German unfair competition law. I will start by drawing an outline of the development of the law of unfair competition over the years. Next, I will address the scope of protection provided under the law of unfair competition in Germany, followed by an outline of the classifications used in the literature for this subject-matter, and a discussion of the famous general clause. After that, I will look at a group of unfair trading practices that are dealt with under German law in the field of misleading advertising, the discrediting of competitors and protection of achievements including know-how. At the end, I will summarise my findings.

4.2 LEGISLATIVE DEVELOPMENT OF UNFAIR COMPETITION

4.2.1 The outset

The legislation against unfair competition in Germany dates from the end of the 19th century.4 The liberalistic movement in France after the French Revolution, that resulted in the ending of the guild system, brought about the concept of freedom of trade: ‘Laissez faire, laissez aller, le monde va de lui-même’.5 It was not until 1869 that in Germany the freedom of trade was officially proclaimed by a specific Act on Business Licences.6 The implementation of this Act started a relentless rat race not restricted by any case law, since in view of the liberal way of thinking of that time, the judges were not prepared to provide for protection against unfair competition on the basis of ordi-

3 See for example the turn in the case law from protecting the ‘hasty, inattentive and uncritical consumer’ against misleading advertising, to protecting the ‘average’ consumer. See sub 4.6 and in particular footnote 145.