NOERR

Update Commercial 2024

Preface

Noerr's Commercial team is pleased to present you with its Update Commercial 2024.

We will be reviewing interesting developments in numerous aspects of sales and distribution law such as commercial agency, authorised dealership and franchise law, online sales, logistics and factoring. We will also discuss the current status of important principles of sales and distribution law in practice such as requirements for general contract drafting, consumer protection law and antitrust law restrictions on structuring distribution systems under new European legislation.

Considering the most recent developments in law and practice and especially due to the continuing digitalisation, many companies are currently rethinking their distribution systems and contracts. This Update is meant to give you an overview of the most important, recent developments in case law and law practice. We look forward to hearing your comments and suggestions.

Your Noerr Commercial Team

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1. Current case law and its impact on contract drafting

This overview includes case law since mid-2022 and provides an overview of legal amendments that have a practical impact on national and international contracts.

Insolvency-based rescission clauses

The German Federal Court of Justice (Bundesgerichtshof) (FCJ) (judgment dated 27 October 2022 – IX ZR 213/21) has clarified its case law on insolvency-based rescission clauses. An insolvency-based rescission clause is a clause that entitles a contracting party to rescind the contract based solely on the other party's inability to pay or insolvency. The dispute regarding the validity of such clauses arises from the delicate balance between contractual freedom on the one hand and the protection of insolvency assets under section 103 and following of the German Insolvency Code (Insolvenzordnung), especially insolvency administrators' right to choose to continue contracts, on the other.

The FCJ's decision was in regard to a case in which a transportation contract was terminated with immediate effect for cause based on an insolvency-based termination clause after a preliminary insolvency administrator had been appointed. The lower court had assumed that the insolvency- based termination clause was invalid because the clause was not covered by any rescission option found in the applicable law. The FCJ did not concur with this reasoning but instead clarified that such rescission clauses may be valid if they pursue a legitimate goal under insolvency law.

This decision has established a guideline that a rescission clause is invalid if it entitles a party to rescind a contract based solely on the insolvency of the other party and differs from the options to rescind provided by law although no justified grounds for these differences existed when the contract was signed. As a result, the FCJ has consistently ruled that insolvency-based rescission clauses in favour of the party to which payment is owed are invalid because the payment recipient has sufficient possibilities to protect itself in the form of rights of retention provided by law.

Thus, conversely, this opens up options for recipients of goods and services to draft valid rescission clauses in their favour. Because the FCJ has not made any sweeping statements in this regard, this will depend on the circumstances of the specific case, particularly whether the purpose of the termination right agreed is to pursue a legitimate goal under insolvency law or whether the risks associated with insolvency constitute cause in any case within the meaning of the termination right provided by law (e.g. section 314 of the German Civil Code (Bürgerliches Gesetzbuch) or section 89a of the German Commercial Code (Handelsgesetzbuch)). For this reason, it may be advisable to state in the contract itself the reasons for including an insolvency- based rescission clause and to draft the clause to cover all circumstances.

Including a place of jurisdiction clause using a hyperlink

The European Court of Justice (ECJ) (judgment dated 24 November 2022 – C-358/21) considered the issue of whether a jurisdiction clause included in standard terms and conditions of business (T&C) is valid if it is only included in the written contract by reference to an embedded hyperlink. The main issue in the proceedings was whether such a clause that can be accessed online can be deemed to be a durable record equivalent to "writing". According to the Brussels I Regulation (recast) 1215/2012 (and the parallel provision in the Lugano Convention), compliance with this formal requirement is necessary in order for a valid agreement on the international standing of a court to hear a case to come about.

This decision is consistent with the ECJ's history of technology-friendly case law. In 2015, when ruling on entering into contracts online, it decided that it is sufficient if the T&C are accessible via a hyperlink and their validity has been accepted by clicking on a button displayed for that purpose. In this current decision, the ECJ has expanded the option of using a hyperlink to include contracts signed in writing.

Using a hyperlink to include T&C opens up opportunities but also new challenges. For example, the company that issues the T&C must document the availability and the version provided. For the other contracting party, this means increased due diligence because they will need to review and comply with linked documents.

Subsequent exclusion of the UN Convention on the International Sale of Goods (CISG)

Munich Higher Regional Court (OLG München) has held (guidance order dated 12 December 2022 – 7 U 4810/21) that the applicability of the CISG can be excluded either expressly or implicitly not only when a contract is entered into but also subsequently if it is sufficiently clear that both parties intended this. The background to the order was a dispute between a dealer in the Netherlands and a dealer domiciled in Germany regarding the effectiveness of the rescission of a purchase contract for electric vehicles. Without a contractual clause to the contrary, the rules of the CISG would have been automatically applicable to this cross-border case. Munich Higher Regional Court discerned a tacit exclusion of the CISG from the fact that the parties based their arguments during the court proceedings solely on the German Civil Code.

This case shows that, in the absence of a contractual clause, the courts were able to assume throughout the entire oral hearing that the CISG had been excluded. Consequently, parties to such contracts are well advised to consider the opportunities and risks of the CISG either when entering into the contract or, at the latest, in the context of a court case.

No-fault B2B vendor liability

The FCJ (judgment dated 21 June 2023 – VIII ZR 105/22) reached a decision on a purchaser's right to claim no-fault reimbursement of its expenses in the context of supplementary performance. The dispute regarded reimbursement of the expenses incurred for prefabricating and connecting defective stainless steel pipes. This means that the subject in dispute was not the installation of the defective item per se. The FCJ awarded the purchaser the reimbursement claimed, noting that reimbursement of expenses was to be interpreted in a purchaser-friendly manner and that the right to claim it already existed when a defect in the purchased item became apparent during the prefabrication process and thus prevented the installation process from being completed. As long as the purchased item was not inseparably connected to another item, the claim was not defeated by the fact that a new item was created during the installation process, the court stated. In accordance with the express legislative intent, the FCJ made no distinction between B2B and B2C transactions.

The broad interpretation of the term "installation" of an item leads to a high risk of a seller of materials from which new products are manufactured at great expense being exposed to no-fault liability. This makes it necessary when drafting contracts to carefully consider the extent to which contractual rights to claim reimbursement of expenses can be restricted and how recourse and indemnity options can be secured within (international) supply chains.

Outlook

At the European and national levels, there are several legislative initiatives that will influence contract drafting and dispute resolution.

The German federal government plans to make Germany more attractive as a place of jurisdiction by **establishing commercial courts** (Bill to strengthen Germany as a place of jurisdiction, Parliamentary Publication 20/8649 (Entwurf über ein Justizstandort-Stärkungsgesetz) (only in German)). The commercial courts are to be able to rule on first-instance civil commercial cases with claim values starting at €1 million if the parties have agreed to this. It will be permissible to conduct the proceedings in English or German. This bill aims to create quick, efficient and attractive court proceedings to strengthen Germany as a place of jurisdiction and commerce and further develop its civil law. Additional advantages are intended to be specialised judges, comprehensive protection of business secrets and litigation costs that are lower than those for conventional civil proceedings due to the option of bypassing the first instance.

The German Federal Ministry of Justice has also drafted a bill that would make **video proceedings** in civil cases more flexible and easily accessible. In the future, a court is to be able to not only allow digital proceedings but also to order them on its own initiative (for example to expedite the proceedings). In addition, the requirements for rejecting an application for video proceedings are to be increased. After the Bundestag (lower house) passed the draft, the Bundesrat (upper house) referred the bill to the mediation committee, making it unclear whether and, if it is passed, when the law will enter into force (Bill to promote the use of video conference technology in the civil and specialised court systems (Entwurf über ein Gesetz zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten), Parliamentary Publication 20/8095).

At the European level, the European Commission is planning to combat l**ate payment in commercial transactions**. It has published a proposal for a new late payment regulation to protect companies from the negative effects of late payments (European Commission, Proposal for a regulation of the European Parliament and of the Council on combating late payment in commercial transactions). The key aims of the current proposal are to limit periods for payment and acceptance and inspection periods to a maximum of 30 days and to make default interest fall due automatically.

2. Competition rules in the field of sales and distribution

Sales and distribution contracts between suppliers and purchasers (but also unilateral conduct in the context of sales and distribution, such as dictating terms and conditions) are also subject to restrictions under antitrust and competition law. These are sales and distribution-related antitrust and competition law issues that should always be taken into consideration when establishing or revamping distribution systems.

A major role in this is played by the Block Exemption Regulation on Vertical Agreements (VBER), which was updated in May of 2022, along with the associated guidelines of the European Commission (more details can be found in our Competition Outlook 2023). Vertical agreements between companies at different stages of the production or distribution chain are exempted from the prohibition of cartels found in Article 101(1) TFEU under the conditions of the Vertical Block Exemption Regulation (safe harbour).

The VBER exemption does not apply if a distribution agreement contains “hardcore restrictions”. These are in particular agreements whose object is to achieve resale price maintenance, restrictions on customers or territories and, as explicitly emphasised since May 2022, restriction of the effective use of the internet.

In this context, the ECJ’s “Super Bock Bebidas decision” dated 29 June 2023 (ECJ, judgment dated 29 June 2023 – C-211/22 – Super Bock Bebidas) is to be highlighted. The case concerned the question of whether a supplier fixing a minimum price for resale by its buyers should always be regarded as a restriction of competition by object. Such price fixing is a “hardcore restriction” within the meaning of the VBER, and therefore such an agreement is excluded from the safe harbour of the block exemption. The ECJ has now clarified that the category of “hardcore restriction” cannot simply be equated with the category of “restriction of competition by object” according to Article 101(1) of the TFEU. The ECJ emphasises in this context the principle that if there has not even been a restriction of competition within the meaning of Article 101(1) TFEU, an exemption according to Article 101(3) TFEU is irrelevant. Consequently, the burden of proof has increased for the authorities because they must investigate each breach of Article 101(1) TFEU in more depth. However, this decision is by no means an open invitation to engage in vertical price fixing.

The VBER brings with it in particular innovations in online sales and distribution, online trading platforms and hybrid platforms. Specific requirements have also been included as to when exchange of information relevant to competition between suppliers and buyers in dual distribution systems is exempted and when it is not (“vertical exchange of information”). These must always be taken into consideration when a supplier distributes or is considering distributing goods or services not only directly, e.g. via its own premises or online, but also indirectly via independent buyers such as dealers.

In other distribution systems, for example those that involve companies manufacturing their own contractual products, there is also often a legitimate interest in cooperating with other companies. Those other companies can include competitors, with the result that competition law is an important component of due diligence. Thus, it is to be emphasised that the European Commission’s new block exemption regulations on specialisation agreements (Specialisation Block Exemption Regulation) and research and development agreements (R&D Regulation) have been in effect since 1 July 2023. They apply until 30 June 2035. The regulations constitute a safe harbour for certain agreements between companies covering specialised or joint production and joint research and development, including use of the results.

Agreements and any contact with (future) competitors are subject to strict restrictions, primarily with regard to the exchange of information as covered by antitrust law. It is advisable to note the European Commission’s new guidelines, likewise published in summer 2023, on horizontal co- operation agreements (Horizontal Guidelines), which include broad clarifications that take into account more recent legal precedents. These comprise a newly structured and expanded chapter on the exchange of information that now explains the concept of commercially sensitive information and describes how to avoid a breach of competition law in more depth.

Moreover, there are completely new explanations on “sustainability agreements” that can create room for manoeuvre in collaborations to pursue sustainability goals.

It is also to be emphasised that the ECJ set out more precisely its practices when identifying exclusivity clauses by companies with a dominant market position last year (ECJ, judgment dated 19 January 2023 – C-680/20 – Unilever). A consequence of the decision is that competition authorities will have to work harder to prove that a company has used an exclusivity clause to abuse its dominant position if that company can defend itself. In everyday practice, this means that even exclusivity clauses imposed in distribution agreements are not abusive per se and thus not necessarily inadmissible, although it goes without saying that they continue to be risky.

It can be important here whether the exclusivity clause excludes equally efficient competitors ("as efficient competitor" (AEC) test). The ECJ had previously increased the requirements to be met by competition authorities in regard to exclusivity rebates in a similar way.

It is also particularly interesting for vehicle manufacturers that the period of application of the Motor Vehicle Block Exemption Regulation on vertical agreements and concerted practices in the motor vehicle sector in its current version has been extended to 31 May 2028. This means that the previous legal situation regarding aftersales distribution agreements will remain largely the same. There have been changes to the European Commission's supplementary guidelines regarding motor vehicles (Motor Vehicle Guidelines, EUR-Lex - 52010XC0528(01) - EN - EUR-Lex (europa.eu)).

These include additional guidelines regarding vehicle repair and maintenance information (RMI) to be observed by vehicle manufacturers, for example when distributing or marketing such RMI or other vehicle data and include the warning that unilaterally withholding vehicle-generated data may constitute abuse under Article 102 of the TFEU. The legislative context here is fraught with legal uncertainty because under laws such as the Type Approval Regulation (EU) 2018/858 vehicle manufacturers must provide "independent operators" access to RMI, on-board diagnostics (OBD) and other information and services. The ECJ repeatedly dealt with this topic in 2022 and 2023 in cases in which we have been able to ensure that our clients are permitted to continue to derive profit from this RMI (ECJ, judgment dated 27 October 2022 – C-390/21) and are not obliged to provide an automated RMI databank interface (ECJ, judgment dated 9 November 2023 – C-319/22).

3. Consumer protection and e-commerce

Contrary to intentions to cut red tape that have been expressed at national and European level, digital consumer protection law is becoming more and more complex. Mandatory consumer rights, extensive notification and transparency obligations and detailed requirements for standard terms and conditions (T&C) are increasingly challenging for businesses. Designing compliant digital business models requires expertise, diligence and continual updating. Failure to comply with legal requirements can result not only in the loss of a right and/or collective redress (such as class actions), but also potentially in heavy fines (only in German).

Recent developments in the law on withdrawal

When navigating the jungle of national and European consumer protection law, it is all the more important to be up to date on all relevant issues and follow the latest case law in every detail. One of the most important issues is and remains the statutory right to cancel distance and off-premises contracts (right of withdrawal). Only last year, the German legislator revised the requirements for withdrawal information (only in German) and published new model withdrawal information; now, it is only possible to limit the withdrawal period to 14 days by using withdrawal information based on this model (“presumed legality” (Gesetzlichkeitsfiktion) or “protection by model” (Musterschutz)).

In December 2022, the German Federal Court of Justice (Bundesgerichtshof) (FCJ) again made it clear that even the slightest deviations from the statutory model withdrawal information negate this presumed legality (FCJ, judgment dated 1 December 2022 – I ZR 28/22 (only in German)). The disputed information provided two options as to the parties to whom the withdrawal should be addressed. This made the information contradictory and generally unclear, as first the name and contact details of only one recipient were given in order to validly exercise the right of withdrawal (“You must contact us”), but later (“Please address your withdrawal to [...] or [...]”) the contact details of an additional recipient were given. The practical consequence of this is a clear recommendation not to deviate from the model wording, as even the slightest deviation poses a risk to the presumed legality of the instructions.

In October 2023, the European Court of Justice (ECJ) ruled that no new right of withdrawal arises when a distance subscription contract is automatically renewed after a free trial period (ECJ, judgment dated 5 October 2023 – C-565/22). This establishes the general principle that a consumer has only one right of withdrawal. However, when the contract is concluded, the business must inform the consumer in a clear, comprehensible and explicit manner that payment for the subscription will be due after the free trial period (“trial subscription”). The ECJ’s decision provides more legal certainty for businesses offering such subscription models.

EU consensus on withdrawal button

A change with far-reaching practical consequences is already looming on the horizon. In the future, the exercise of a right of withdrawal is to be simplified by a withdrawal function or button (only in German) on the user interface (website) of the provider. The European Council and the European Parliament have reached a consensus on this in their proposal for a Directive concerning financial services contracts concluded at a distance. It adds a new Article 11a to the Directive 2011/83/EU on Consumer Rights which, contrary to previous intentions, makes the new provision applicable to all online consumer transactions. In addition, according to Article 6, paragraph 1, point (h) of the Consumer Rights Directive, a new precontractual information obligation is to apply in relation to “the existence and placement of the withdrawal function”. However, the Directive does not provide for sanctions in the event of failure to provide this information or its incorrect provision.

Buttons have become a standard tool in digital consumer protection. The first one was the “order button” mentioned in Section 312j of the German Civil Code (Bürgerliches Gesetzbuch), which was designed to ensure that consumers understood that they were about to enter into a contract by using unmistakable labels such as “Order and Pay (zahlungspflichtig bestellen)”. At the national level, the German legislator went a step further in 2022 with its Act on Fair Consumer Contracts (only in German) (Gesetz über faire Verbraucherverträge) by introducing the “termination button” in Section 312k of the German Civil Code (Bürgerliches Gesetzbuch) (only in German). Many businesses still have problems with the implementation. In January 2023, a study by the Federation of German Consumer Organisations (only in German) (Verbraucherzentrale Bundesverband) concluded that 72% of the nearly 3,000 websites they surveyed had not implemented the termination button as required by law.

The situation is similar for the new requirements for termination clauses. In a comprehensive “market check” (only in German), Consumer Organisations and Bavaria’s Consumer Service Centre (Verbraucherservice Bayern) checked more than 800 companies and found a total of 167 violations at 116 companies, which were subsequently warned.

The scope of the future “withdrawal function” goes far beyond that of the termination button, as it covers not only recurring payment obligations, but also all consumer contracts concluded via online user interfaces, and thus also in particular all purchase contracts in electronic B2C transactions. Therefore, the importance of the practical implementation of this amendment should not be underestimated. It is advisable to start planning the technical implementation at an early stage.

Since the Council approved the European Parliament’s position on 23 October 2023, the Directive has been adopted. After being signed by the President of the European Parliament and the President of the Council, the Directive will be published in the Official Journal of the European Union and will enter into force on the 20th day following its publication. This is the start of the 24-month implementation period for the Member States. National laws will become applicable 30 months after the Directive enters into force. This means that businesses will likely have to provide consumers with compliant withdrawal buttons sometime in 2026.

Other current issues in consumer protection law

Directive (EU) 2020/1828 on representative actions has just recently been implemented. As of 13 October 2023, certain consumer protection associations have been entitled to assert the claims of a number of consumers against a company in collective actions (collective action for redress). However, the practical significance of the new representative action is not yet clear, as many questions remain unanswered.

Another European legislative proposal concerns the repair of goods. On 22 March 2023, the European Commission presented a Proposal for a Directive on common rules promoting the repair of goods, which in particular provides for a “right to repair” throughout the entire lifetime of certain products. According to the standard legislative procedure, the proposal has to be approved by the European Parliament and the Council. The Committee on the Internal Market gave its green light on 25 October 2023.

In addition, Directive (EU) 2019/882 on the accessibility requirements for products and services sets out specific requirements for making certain products and services accessible to people with disabilities. In order to comply with this Directive, the German legislator has passed the German Act to Strengthen Accessibility for People with Disabilities (Barrierefreiheitsstärkungsgesetz) (only in German), which will, among other things, ensure that websites and services are accessible in online transactions as of 25 June 2025.

Finally, consumer protection also plays an important role in the EU’s new Digital Services Act (DSA). As of 17 February 2024, Article 6, paragraph 3 of the DSA establishes the liability of online platforms towards consumers, even if the platforms themselves do not offer any products or services for sale, but an average consumer may assume that the platform is the other contracting party or at least supervises the company in question. In addition, Articles 30 to 32 of the DSA contain specific due diligence obligations for online platforms that enable consumers to enter into distance contracts with businesses.

4. Franchise law

Introduction

In Germany, judgments focusing on franchise law are few and far between. However, three rulings related to franchise law were handed down in 2023. Firstly, interim injunction proceedings involving a well-known fast food chain were again brought before Munich Higher Regional Court (OLG München). The litigation centred on whether the franchisee's heiress had to allow card payments in fast food restaurants. In the case, the court considered whether system adjustment clauses were valid in franchise contracts. Secondly, Berlin Higher Regional Court (KG Berlin) was tasked with ruling on the validity of an agreement on jurisdiction with a franchisee who was a new entrepreneur. And thirdly, a ruling by Darmstadt Regional Court (LG Darmstadt) focused on an arbitration clause in a franchise agreement.

Judgment by Munich Higher Regional Court dated 8 February 2023 – 7 U 8606/21 on the validity of a system adjustment clause

The franchisor operates a chain of fast food restaurants and applied for an interim injunction against the heiress of a franchisee who operated several fast food restaurants. The parties were in dispute about who was entitled to manage the restaurants. The heiress had taken on the de facto management of the restaurants. To ensure the revenues came directly to her, she had removed the card readers from most cash registers and self-service terminals in the restaurants or prevented their use by blocking the card slot. The franchisor made an application to force the heiress to allow customers to pay by card in the fast food restaurants.

Munich Higher Regional Court ruled in the franchisor's favour, as follows:

- Firstly, Munich Higher Regional Court clarified the legal relationship between the parties. Despite the franchisee's death, the franchise contracts were still in place. However, the heiress did not become a franchisee because to enter into the franchise contract she needed the consent of the franchisor, who refused to give it. The legal relationship was therefore in limbo. Munich Higher Regional Court likened the limbo to a precontractual obligation (section 311(2) of the German Civil Code (Bürgerliches Gesetzbuch), to which the provisions of franchise contracts were applicable.
- Next, Munich Higher Regional Court pointed out that the heiress was required by the provisions of the franchise contract to allow non-cash payment in the fast food restaurants without any restrictions, in other words at all cash registers and self-service terminals. It maintained that otherwise the franchisor's reputation would be damaged. Younger customers in particular counted on being able to pay by card, the court said.
- All franchise contracts contained system adjustment clauses stating that the franchisee's heiress had to "apply the M system as amended from time to time as laid down and written in the operating manuals, documentation materials, written policies, plans, etc. which are updated from time to time and observe the corresponding principles and policies." The franchisor had to "take reasonable account of the reasonable interests of the franchisee according to the principles of good faith" in the event of changes.
- The franchisor was entitled, via this system adjustment clause, to define the system standards of the fast food restaurant chain and require cashless payment systems to be available.
- The system adjustment clause was also valid and did not unreasonably disadvantage the franchisee's heiress (section 307 of the German Civil Code). Binding the franchisee to the system standard is a material element of the franchise system, without which the system could not work. That also included the possibility of system changes. The franchisor's planning of changes to the standards thus corresponded to the key underlying philosophy of franchise law (section 307(2)(1) of the German Civil Code). The fact that the franchisor was only allowed to exercise this unilateral right to specify performance only at its reasonable discretion (section 315 of the German Civil Code) was sufficiently expressed in the contractual clause by reference to the interests of the franchisee and to the principles of good faith, the court said.

Judgment by Berlin Higher Regional Court dated 24 May 2023 – 26 U 78/21 on the validity of a jurisdiction agreement with a start-up founder

Berlin Higher Regional Court ruled on whether jurisdiction agreements with franchisees who were new entrepreneurs were valid. The franchise agreement contained the following jurisdiction agreement: *"The parties agree that the Regional Court at the location of the franchisor's head office will have sole jurisdiction for all disputes arising from or in connection with this franchise contract."* Berlin Higher Regional Court affirmed the validity of the above jurisdiction agreement, thus setting aside the decision of the lower court (Berlin Regional Court (LG Berlin), judgment dated 31 May 2021 – 10 O 107/19) and joined the apparently prevailing view in the legal literature.

Berlin Higher Regional Court explained the validity as follows:

- A jurisdiction agreement within the meaning of section 38 of the German Code of Civil Procedure (Zivilprozessordnung) which actually establishes the required status as a merchant can also be entered into effectively in the agreement. It is not necessary for the party to already be a merchant upon entering into the jurisdiction agreement. Section 38 of the German Code of Civil Procedure is also applicable to merchants during the startup phase.

- No other interpretation is possible from the wording of the procedural standard (section 38 of the German Code of Civil Procedure). This mentions "merchants". As this term is not defined in procedural law, the term "merchant" as defined in commercial law (section 1 of the German Commercial Code (Handelsgesetzbuch)) is to be used. Both uses of the term are to be interpreted identically.

- Section 1(1) of the German Commercial Code reads: "A merchant within the meaning of this Code is a person who carries on a commercial business." Entering into the relevant contract establishing the commercial activity, in this case the franchise agreement, is always to be regarded as "carrying on" a commercial business. By doing so, the franchisee expresses to a third party in civil law legal relations that it wishes to start running a commercial business. It would make no sense to view the decisive entrepreneurial act of founding a business as a private-law matter, but then view every subsequent action as unquestionably commercial.

- Consumer protection does not offer any relief either. Those who pick a certain commercial or self-employed occupation and enter into transactions aimed at starting a commercial operation are choosing to face the harsh winds of entrepreneurial commerce. They cannot also rely on consumer protection in their dealings with future business partners and possibly competitors as well. Especially those who buy a company or enter into a commercial agent or franchise agreement in order to start doing business on that basis in the future cannot draw on consumer protection for this startup business.

Judgment by Darmstadt Regional Court dated 25 May 2023 – 7 O 8/22 on an arbitration clause

Darmstadt Regional Court dismissed an action by a franchisor against a franchisee partly for payment of outstanding franchise fees as inadmissible. As grounds, Darmstadt Regional Court referred to the arbitration clause in the franchise agreement, which read:

"Article 22 Arbitration

In the event of disputes, the parties agree to seriously attempt to reach an agreement for two months (arbitration) before referring the matter to a court. This period will begin upon written request by the first party to the second party to conduct the arbitration. The arbitration will be deemed ended if this period has expired without agreement on the relevant disputed issues, if the second party expressly rejects the arbitration or if the second party fails to respond to the written request within 14 days. It is inadmissible to refer the matter to the court before conducting and ending the arbitration. That does not apply to interim relief or to assertion of the franchisor's contractual payment claims."

The court reasoned that according to this, arbitration should have been carried out before referring the matter to the court. It believed that the concept and significance of arbitration required the involvement of a neutral third party. Besides this, according to the contract the parties merely holding advance negotiations or talks was not sufficient. An explicit preprocedural request by the franchisor was also required before arbitration, the court said.

It continued that the franchisor cannot invoke the contractual exclusion clause, which states that the arbitration clause does not apply to the assertion of the franchisor's contractual payment claims. The exclusion clause harms the parties' equality of arms because only the franchisee is given an additional hurdle to asserting its claims in court. The court stated that it could not see any legitimate interest in this exception on the part of the franchisor and that the clause was therefore invalid under the first sentence of section 307(1) of the German Civil Code.

Outlook

The judgment by Munich Higher Regional Court confirms the validity of system adjustment clauses in franchise contracts and shows that franchisors can set binding system standards as long as the interests of franchisees remain adequately taken into account.

By contrast, the decisions by Berlin Higher Regional Court and Darmstadt Regional Court show that caution is advisable when agreeing on jurisdiction and arbitration clauses in franchise contracts. The ruling by Berlin Higher Regional Court now creates clarity on jurisdiction agreements with startup founders specifying that Berlin Regional Court is competent locally. But since we are still waiting for a decision by the FCJ, caution still needs to be exercised in jurisdiction agreements with franchisees who are startup founders.

5. Authorised dealer contracts

In 2023, important clarifications were made by higher courts in cases regarding the law governing authorised dealers. The rulings are very relevant to drafting dealer contracts and also give important tips on terminating contracts with authorised dealers and service partners.

Setting basic discounts and bonuses outside the dealer agreement is admissible

In 2021, a ruling by Frankfurt Regional Court (LG Frankfurt) dated 16 December 2021 – 2- 03 O 410/20 caused a stir by stating the contractually agreed right of a manufacturer to set basic discounts (margins) unilaterally in circulars, each valid for one year, was to be classified as being in breach of antitrust law. The appeal judgment caused just as great a stir (Frankfurt Higher Regional Court (OLG Frankfurt), judgment dated 14 February 2023 – 11 U 9/22 (Kart)), setting aside the decision of the lower court and instead ruling it admissible to set basic discounts and bonuses outside of an authorised dealer agreement and change them on a regular basis. In particular, the court said, the manufacturer reserving the right to unliterally set these does not constitute unreasonable discrimination against the authorised dealer. With consistent application of the related high court and higher court case law, Frankfurt Higher Regional Court provides more certainty in future contract drafting, especially in a principal's drafting of a margin and bonus system. The ruling is not yet final and non-appealable.

Termination pending a change of contract: old and new contracts permitted to exist side by side

In other proceedings, Frankfurt Higher Regional Court (judgment dated 13 June 2023 – 11 U 14/23 (Kart)) also considered terms and conditions in an authorised dealer relationship, but this time in the context of a termination for variation of contract. In this case, the importer had issued its authorised dealer notice of termination pending a change of contract, with the terms structure of the new proposed contract differing from the terminated "old" dealer agreement; the deadline for the authorised dealer to accept the new dealer contract was 2 1/2 months. In the event that the dealer accepted the new proposed contract, the new dealer agreement would replace the old dealer agreement during the notice period for termination of the old dealer agreement. The court found that the sued importer had not committed a breach of antitrust law or of its fiduciary duty. It said that firstly, the importer had not put inadmissible pressure on the authorised dealer by setting a deadline for acceptance of the new dealer agreement. Secondly, it was not a breach of antitrust law or fiduciary duty by the importer if old and new contracts coexisted in the principal's distribution system until the expiry of the standard notice period for termination of the old contract. The ruling by Frankfurt Higher Regional Court gives key starting points for validly introducing new authorised dealer contracts into an existing dealer network.

Terminating a service partner agreement

Dusseldorf Higher Regional Court's (OLG Düsseldorf) judgment dated 28 September 2023 – VI-6 U 7/22 (Kart) (not published) examined a termination on structural grounds. In the case leading to the ruling, the importer first terminated the distribution agent agreement and then the service partner agreement with due notice. The importer justified terminating the service partner agreement by saying it was necessary to adapt the size and structure of the service partner network to ensure it was fit for the future. The dealer bringing the action was not offered any new contracts and has therefore been operating as an independent repair garage since the expiry of the termination notice periods. The dealer referred to a company-related dependency and considered itself unreasonably disadvantaged by the loss of the service partner agreement. Dusseldorf Higher Regional Court, however, confirmed the lower court's ruling which found the claimant had no claim to the continuation of the old service partner agreement nor a claim to entering into a new service partner agreement. The claimant could perform all work on vehicles of the make in question in an economically viable manner even without a service partner agreement, the court added. Dusseldorf Higher Regional Court emphasised in its decision that specialising in one manufacturer's vehicles based on the company's own decision cannot establish a company-related dependency without additional circumstances. Ultimately, Dusseldorf Higher Regional Court rejected the existence of a company-related dependency given the special facts and individual opportunities for the former service partner to switch to other makes.

It is clear that traditional topics such as the termination of authorised dealer and service partner contracts as well as the design of margin and bonus systems have played a key role in the case law of the higher courts in 2023. Even though manufacturers and importers have been putting new distribution models into place for some time now, authorised dealer law remains topical. Developments in case law in this area will thus continue to be worth watching.

6. Commercial agency contracts

ECJ judgment dated 13 October 2022 – C-64/21 on the exclusion of repeat-business commission

The ECJ confirmed that Article 7(1)(b) of the Commercial Agents Directive does not forbid a principal from excluding its commercial agent's claim to payment of commission on repeat transactions. Commission on repeat transactions means commissions for a transaction concluded during the period covered by the contract with a third party whom the commercial agent has previously acquired as a customer for transactions of the same kind. While the ECJ pointed out, firstly, that the Commercial Agents Directive is intended to protect commercial agents, that protective purpose did not rule out excluding commission on repeat transactions. It maintained that if paying commission on repeat transactions were mandatory, it could not be ruled out that company owners would make up for the cost of commission on repeat transactions by reducing the basic commission rate, limiting or excluding the costs previously reimbursed or other elements of the remuneration or even forgo entering into a contractual relationship with a commercial agent. The ECJ thus confirmed the commonly held view in Germany.

FCJ judgment dated 19 January 2023 – VII ZR 787/21 on impediment to termination

The German Federal Court of Justice (Bundesgerichtshof) (FCJ) has fleshed out its previous case law with regard to inadmissible impediments to the termination of commercial agency contracts pursuant to the second sentence of section 89a(1) of the German Commercial Code (Handelsgesetzbuch) to the effect that the question of whether the disadvantages attached to the termination of the contract are of such weight that an invalid impediment to termination within the meaning of the second sentence of section 89a(1) of the German Commercial Code exists must always be assessed according to the circumstances of the individual case on the basis of an economic assessment. The FCJ thus effectively rejected a cookie-cutter assessment according to case groups, as previously applied in case law, and further clarified that the degree to which any disadvantages are linked to the right to summary termination is not decisive. Therefore, even indirect disadvantages which are a mere "reflex reaction to a termination" cannot be excluded from the outset from the test of applying the standards of the second sentence of section 89a(1) of the German Commercial Code and in individual cases constitute an inadmissible impediment to termination. According to the FCJ, based on an economic view regardless of the contractual structure, it must be determined whether there is an agreement within the meaning of the second sentence of section 89a(1) of the German Commercial Code which harms the commercial agent's right of termination. In this particular case this meant that the principal could no longer demand repayment of a loan given to the commercial agent, not even by applying the law on unjust enrichment.

Judgment by Hamm Higher Regional Court dated 14 November 2022 – 18 U 191/21 on the existence of a commercial agency contract

Hamm Higher Regional Court (OLG Hamm) considered whether a distribution contract which defines how distribution activities are to be carried out, but not whether distribution activities are to be carried out, can be classified as a commercial agency contract within the meaning of sections 84 and following of the German Commercial Code. Specifically, the issue was whether the distribution partner bringing the action was a commercial agent within the meaning of section 84 of the German Commercial Code and could therefore demand to see an extract from the books under section 87c(2) of the German Commercial Code. Hamm Higher Regional Court found that the claimant was not required to broker transactions based on the distribution contract at issue. It reasoned that the claimant was therefore not constantly tasked with negotiating transactions within the meaning of section 84 of the German Commercial Code and was therefore not a commercial agent. It was not enough, the court said, for a distribution partner to simply negotiate transactions now and then. Instead, what was necessary was a contractual obligation to make efforts to achieve sales. As a result, the claimant could not demand to see an extract from the books under section 87c(2) of the German Commercial Code, the court concluded.

Judgment by Cologne Higher Regional Court dated 9 December 2022 – 19 U 21/22 on the definition of the necessary documentation

Cologne Higher Regional Court (OLG Köln) considered the interpretation of the term "documentation" in section 86a of the German Commercial Code. According to that statute, the principal must provide the commercial agent with all the documentation necessary to perform their work free of charge. Cologne Higher Regional Court has now ruled that even freely available standard software can count as "documentation" within the meaning of section 86a of the German Commercial Code if the commercial agent is obliged to use that software based on the contractual arrangement because it is impossible to negotiate transactions for the principal without that software. That applied in the case to be decided by Cologne Higher Regional Court partly because the principal had forbidden its commercial agent from using other software.

Judgment by Rhineland-Palatinate Higher Employment Court dated 27 June 2023 – 6 Sa 237/22 on the obligation to pay commission

Rhineland-Palatinate Higher Labour Court (LAG Rheinland-Pfalz) ruled that an agreement on commission in the terms and conditions which, in the event that several commercial agents conclude a transaction, awards the entitlement to commission to the commercial agent who entered the order into the principal's system, may be validly agreed. Under the first sentence of section 87(1) of the German Commercial Code, any contributory cause is sufficient to trigger the obligation to pay commission. However, the Higher Labour Court found that a provision deviating from the first sentence of section 87(1) of the German Commercial Code, which specifies the entitlement to commission in cases in which several commercial agents are involved in concluding the transaction, is admissible because this can prevent the risk of a dual obligation to pay commission. The Higher Labour Court thus agreed with the prevailing opinion in the legal literature.

7. Logistics

FCJ judgment dated 27 October 2022 – I ZR 139/21 on interpreting German Standard Shipping Terms and Conditions (ADSp) 2017 for multimodal transport

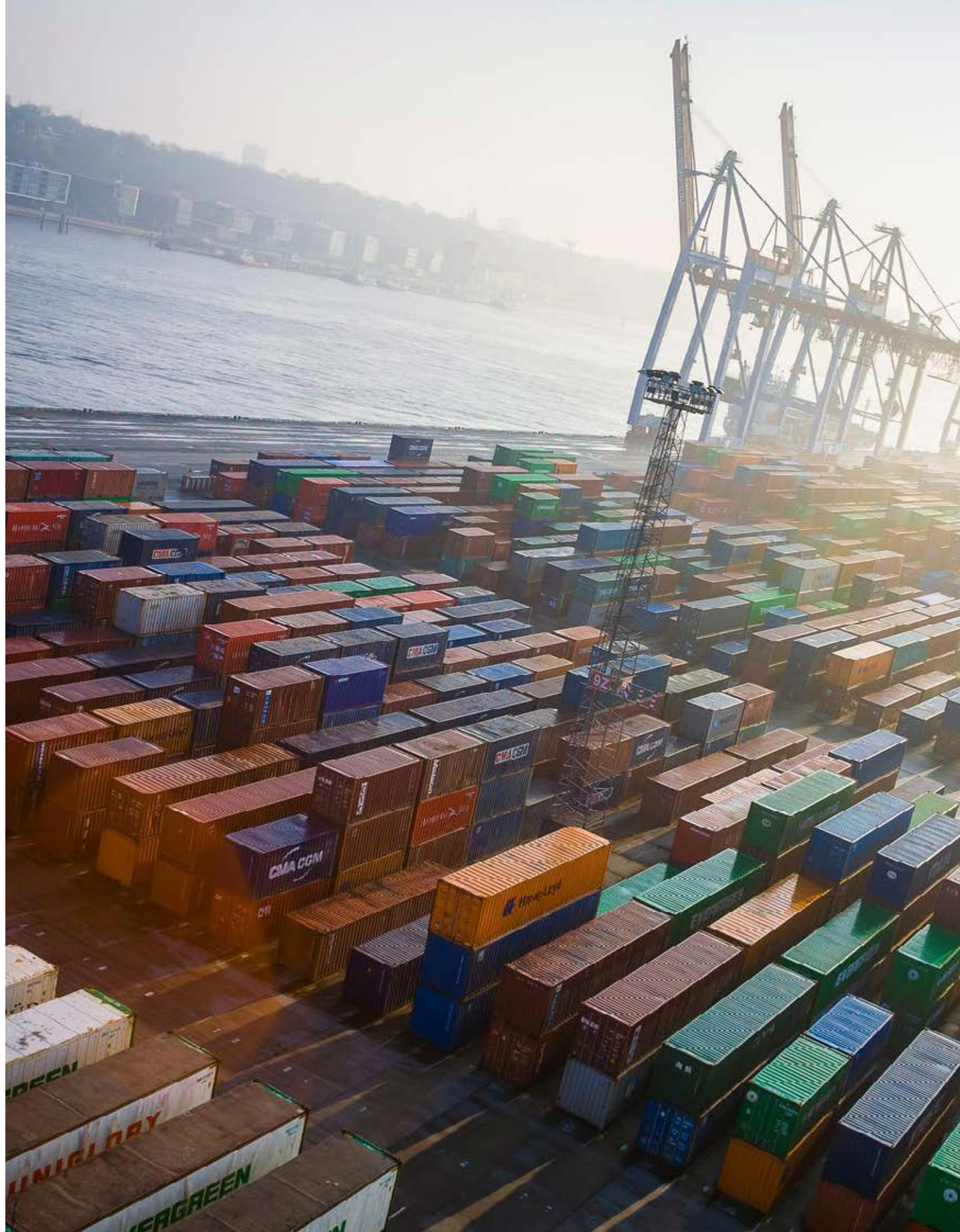
The German Federal Court of Justice (FCJ) considered the interpretation of the currently valid ADSp 2017 (German Standard Shipping Terms and Conditions 2017) and clarified the relationship between the first sentence of No 23.1.2 of ADSp 2017 and the first sentence, case 2, of No 23.2 of ADSp 2017, which was previously disputed in the literature. In this case, one of several snow groomers was damaged during multimodal transport from Germany to the USA and the location of the damage remained unknown.

In a textbook-like examination, the FCJ initially determined the applicability of German substantive law on the basis of the first sentence of Article 5(1) Rome I Regulation in the absence of a choice of law by the parties in the transport contract. Due to the multimodal transport, the FCJ affirmed the applicability of sections 407 to 450 of the German Commercial Code via the provisions of sections 452 et seq. of the German Commercial Code with regard to the specific transport contract. The maximum liability amount of the indemnification obligation, which is regulated in sections 425 and 429 of the German Commercial Code was stipulated in deviation from section 431(1) of the German Commercial Code by the inclusion of ADSp 2017 in the contract.

According to their wording, both the first sentence of No 23.1.2 of ADSp 2017 and the first sentence, case 2, of No 23.2 of ADSp 2017 cover the case of cross-border multimodal transport including a sea route with an unknown location of damage. However, the first sentence, case 2, of No 23.2 refers to the statutory maximum liability amount, whereas the first sentence of No 23.1.2 limits the liability to 2 instead of 8.33 special drawing rights for each kilogramme, i.e. considerably restricts it. Since ADSp 2017 are model terms and conditions, the FCJ has interpreted them as standard terms and conditions of business. In doing so, the FCJ comes to the conclusion that the first sentence of No 23.1.2 ADSp 2017 is the more tailored provision which thus takes precedence in multimodal transport partly by sea with an unknown location of damage over the provision in the first sentence, case 2, of No 23.2. The FCJ particularly justified this by considering the opposite possibility: If the first sentence, case 2 of No. 23.2 was an exception to the exception to the first sentence of No. 23.1.2, it would additionally limit the already small scope of application, rendering the first sentence of No 23.1.2 practically useless.

Judgement by Karlsruhe Higher Regional Court, dated 17 Februrary 2023 – 15 U 4/22 on the presumption of loss and unlimited liability under the CMR

Karlsruhe Higher Regional Court (OLG Karlsruhe) considered the presumption of loss in Article 20 of the CMR (Convention on the Contract for the International Carriage of Goods by Road) in the event of refusal of acceptance and unlimited liability under Article 29 of the CMR. In the case in question, the carrier was to transport jewellery and watches from a sender to a consignee abroad. The carrier used a sub-carrier for the leg abroad. When the sub-carrier wanted to deliver the goods to the consignee, the latter refused to accept them. The sub-carrier then took the goods to its warehouse and waited for further instructions from the carrier.



The whereabouts of the goods remained unknown for a long time; only during the trial, around two years later, did it emerge that the goods were still in the sub-carrier's warehouse, whereupon they were returned to the sender.

The Higher Regional Court affirmed the carrier's unlimited liability under Article 17(1) and Article 29 of the CMR. There was no delivery to the consignee and the consignee's refusal to accept the goods did not lead to the assumption of delivery, the court said. Instead, in this case the carrier should have asked the sender for instructions in accordance with Article 15 of the CMR, which it failed to do. It added that even though the goods were recovered, the sender could consider the goods lost without having to provide further evidence, as they had not been delivered within 60 days of takeover and that insofar the presumption of Article 20(1) of the CMR is an irrefutable presumption. The Higher Regional Court rejected an exclusion of the carrier's liability and instead assumed unlimited liability according to Article 29 of the CMR, because the presumption of loss is based on whether the circumstances that were decisive for the non-delivery constitute a special breach of duty. Because the goods were not properly recorded and handled in the sub-carrier's warehouse and were therefore untraceable for approximately two years, the Higher Regional Court found a serious lack of organisation on the part of the carrier and thus a serious breach of duty justifying the accusation of reckless trading. The sub-carrier's conduct in this respect was therefore attributable to the carrier under Article 29(2) of the CMR.

FCJ, order dated 23 March 2023 – I ZR 180/22 on the start of the limitation period regarding a storage contract

In this order on an appeal against denial of leave to appeal, the FCJ addressed the commencement of the limitation period for a storage contract. The claimant initially commissioned the defendant, a moving company, to carry out a private move. However, as the move ultimately did not take place, the parties agreed that the claimant's items would be stored at the defendant's premises. Due to a flood, all of the claimant's items were temporarily flooded. It was not stated when the claimant got her items back, but she asserted her claims against the defendant in a letter shortly after the damage occurred. In particular, the limitation period for the claims was questionable during the following lawsuit.

According to the first sentence of section 475a of the German Commercial Code, the provision in section 439 of the German Commercial Code applies to the limitation of claims from storage. According to subsection 2 of section 439, the limitation period begins running at midnight of the day on which the goods ought to have been delivered. According to the case law of the FCJ, delivery is to be assumed when the carrier relinquishes custody of the transported goods and enables the consignee to exercise actual control over the goods with the consignee's will and consent. In this case, the Higher Regional Court assumed the claimant was in a position to exercise actual control over the property again at the latest when the claims for damages were asserted. The FCJ has now firmly rejected this assumption.

Judgement by Hamburg Regional Court, dated 15 June 2023 – 407 HKO 20/22 on passing on the costs of shipping container demurrage

This is an interesting ruling by Hamburg Regional Court (LG Hamburg), representing a classic issue in day-to-day logistics. In the case, a freight forwarder took legal action against its customer for reimbursement of demurrage, detention, and storage costs as well as a low water surcharge. The claimant operated as a fixed-cost forwarder under section 459 of the German Commercial Code. The costs were incurred during the transport of sea freight shipments from the Far East, including on-carriage, and were invoiced to the freight forwarder by shipping companies. The claimant argued that the costs were caused by unforeseeable circumstances such as delays at the seaport of Rotterdam and technical defects on the railway line, for which neither it nor the shipping company were responsible. It invoked the 2017 German Standard Shipping Terms and Conditions (ADSp 2017) and the German Commercial Code to claim reimbursement of the costs. The defendant disputed the claims and argued the costs could have been avoided with reasonable care and were therefore not refundable.

The court ruled that the freight forwarder was not entitled to the costs it sought. The defendant company had concluded a forwarding agreement with the claimant freight forwarder at a fixed cost for multimodal transports with the consequence that according to the first sentence of section 459 of the German Commercial Code, the agreed freight forwarder's remuneration covered all expenses associated with the transport.

The claimant was unable to base its claim on the second sentence of section 420(1) of the German Commercial Code. Although in the case of a fixed-cost shipping company transporting goods, the provision in freight law generally applies which states that the freight forwarder has a claim to reimbursement of expenses beyond the freight. However, demurrage and detention costs as well as the other claimed costs (storage costs, low water surcharge) are not covered by this provision because the second sentence of section 420(1) of the German Commercial Code explicitly covers only costs which are refundable expenses incurred for the goods. The aforementioned costs however, are not goods-related but transport-related costs.

In addition, No 17.1 ADSp 2017 does not give rise to a claim to reimbursement of expenses since it only applies to expenses which are outside of the carrier's sphere of risk and responsibility. The court clarified that the claimant itself had to bear the responsibility for the risks, obstacles and incidents leading to the additional costs. This covers errors and inadequacies of any agents acting on its behalf and unpredictable technical defects or failures in the public transportation infrastructure. In relation to the circumstances at hand such as the cancellation of slots at Rotterdam port and the closure of a train line, the court dismissed the claimant's arguments that those circumstances were out of its control and thus refundable. The claim for reimbursement of the low water surcharge and storage costs was also rejected as those costs fell within the claimant's sphere of risk and were covered by the fixed-cost agreement with the defendant.

In summary, the court found that as a fixed-cost freight forwarder, the claimant bore responsibility for the costs incurred and could not pass them on to the defendant.

Judgement by Frankfurt Higher Regional Court, dated 28 March 2023 – 14 U 84/22 on a freight forwarder's liability for damage as a result of migrants entering the loading area

The judgment by Frankfurt Higher Regional Court (OLG Frankfurt) concerns litigation over claims for damages in connection with a food shipment during which migrants entered the loading area of a refrigerated train, which led to the cargo being destroyed.

The claimant was tasked with transporting 33 pallets of products containing chocolate and cocoa from Stadtallendorf to Ternat in Belgium. Upon delivery on 30 March 2021 at least 29 stowaways were encountered in the refrigerated train.

The goods were refused by the defendant consignee and destroyed due to the suspicion of damage, as some of the packaging had traces of urine and some packages had been ripped open. The defendant, the consignee of the goods, claimed damages of €47,943.96. The claimant disputed the damage and argued the driver could not have prevented the migrants from entering the train and therefore the claim for damages was void under Article 17(2) of the CMR. The claimant also alleged that the vast majority of the goods were still useable.

The Regional Court upheld the claimant's arguments. However, the defendant's appeal was largely successful. The Higher Regional Court ruled that the claimant had to pay damages for the entire cargo. It contended that the carrier did not take every reasonable effort to prevent the migrants from entering and therefore could not invoke Article 17(2) of the CMR. It was also acknowledged that the damage to some boxes made the entire cargo unusable, which represented a devaluation of the entire cargo. Suspicion of damage alone was enough to assume damage, since that reduced the value of the goods on the market and the goods could no longer be properly placed on the market, the court said.

The judgment highlights the importance of carriers' duties of care in international transportation law and the consequences of failure to fulfil those duties. It also shows that a legitimate suspicion of damage can be sufficient to establish an impairment of the value of goods and thus a claim for damages.

ECJ (7th Chamber), judgment dated 14 September 2023 – C-246/22 on cabotage regulations

The judgment by the European Court of Justice (ECJ) following a request by Cologne Local Court (AG Köln) for a preliminary ruling involved the interpretation of Directive 92/106/EEC and Regulation 1072/2009/EC, especially regarding the transportation of empty shipping containers in combined transport and their exemption from cabotage regulations. The case arose from litigation between the managing director of a transport company, BW, and the then Federal Office for Goods Transportation in Germany (Bundesamt für Gütervekehr, BAG) (now the Federal Office for Logistics and Mobility (Bundesamt für Logistik und Mobilität)).

The Office imposed a fine for breach of cabotage regulations, which stipulate that a transport company from an EU Member State may only carry out a limited number of intra-state transport journeys in another EU Member State. The dispute focused on whether the carriage of empty shipping containers could be considered part of a combined transport and was thus exempt from the cabotage restrictions.

The ECJ specified that a combined transport is to be understood as the carriage of goods partly by road but with the majority of the route completed by rail, inland waterway or sea, with the road transport part having to be below a certain route length. The court ruled that the carriage of empty shipping containers between a container terminal and the location of loading or unloading of the goods counts as part of a combined transport. This also applies if this transport takes place immediately before or after the carriage of goods.

The ECJ also found that the carriage of empty shipping containers as part of combined transports was exempt from the cabotage provisions of Regulation 1072/2009. Accordingly, such transport is not subject to the strict restrictions that usually apply to cabotage transport. The court emphasised the importance of combined transports as a way to reduce road congestion, protect the environment and improve road safety. The inclusion of empty shipping containers in combined transport contributes to the promotion of this form of transport. Although the EU transport market is not yet fully harmonised, the judgment highlights the objectives of the EU's common transport policy. This policy aims to remove barriers to the free movement of goods and services while ensuring that this is done in a way that takes account of public safety, environmental protection and the efficiency of the transport system.

In summary, the ECJ ruled that the carriage of empty shipping containers can be part of a combined transport and can therefore be exempt from cabotage restrictions, setting an important precedent for similar cases in the future.

8. Factoring

Only a few decisions in 2023 were significant for factoring in practice.

Attributing knowledge when challenging payments by debtors in an insolvency situation

Factoring contracts often include extensive duties on the part of the client to inform and support the factor, which specify section 402 of the German Civil Code (Bürgerliches Gesetzbuch). According to a decision by Schleswig-Holstein Higher Regional Court (Schleswig-Holsteinisches OLG) (see Schleswig-Holstein Higher Regional Court, judgment dated 23 June 2021 – 9 U 109/20), when an insolvency is challenged, if a client knows that a debtor is unable to pay, then payments made by the debtor to the factor could give rise to the question of whether the factor must allow the client's knowledge to be attributed to it in analogous application of section 166 of the German Civil Code due to the client's duty to inform. The German Federal Court of Justice (Bundesgerichtshof) (FCJ) (judgment dated 25 May 2023 – IX ZR 116/21 = BB 2023, 2256) has rejected this argument and emphasised that a client's duty to inform and support alone cannot form the basis for attributing such knowledge to the factor.

Standard-form assignment clauses

In two decisions, the sixth civil panel of the FCJ addressed a breach of section 307(1) of the German Civil Code by standard-form assignment clauses. The two decisions have no direct link to factoring, but reveal the guidelines that are to be observed when wording assignment provisions, including in factoring:

In the first decision (FCJ, judgment dated 10 October 2023 – VI ZR 257/22), the court addressed the validity of a standard-form assignment of claims by an injured party against the injuring party in a contract for an expert opinion on estimating repair costs. The expert opinion contract included a clause according to which the assignee was entitled but not obliged to assert the assigned claim against the injuring party. The FCJ held that the clause was invalid due to a breach of section 307(1) of the German Civil Code because it did not include a provision regarding the occurrence of the event of loss or damage; in particular the wording that entitled but did not oblige the assignee to assert the claim permitted the interpretation that asserting the claim was intended to be independent of the occurrence of the event of loss or damage. The decision is significant, primarily for recourse factoring, in which the assignment is similar to an assignment for security and the loan granted by the factor is usually repaid by collecting the assigned receivable by way of performance.

In some cases, the requirements for an assignment for security established by the FCJ could necessitate a corresponding adjustment of the assignment mechanism where recourse factoring takes place. Even in contracts involving non-recourse factoring, there may be situations in which it is necessary to make a clearer distinction between collecting claims assigned as security for the purpose of realising them and collecting them as a service (collection agency claims).

The second decision (FCJ, judgment dated 17 October 2023 – VI ZR 27/23) deals with the invalidity of a standard-form assignment clause with which a person who had rented a vehicle assigned his damages claim for reimbursement of the costs of renting the car against the injuring party to the car rental company by way of performance. The FCJ was of the opinion that, under the transparency imperative found in the second sentence of section 307(1) of the German Civil Code, the assignment clause must make it clearly recognisable when the assignor would receive the claim back upon fulfilment of the claim to payment of the renting fee. In many factoring models there are situations in which the factor reassigns an individual claim to a client (e.g. if the purchase of the receivable is reversed or refused in a final manner). The FCJ decision shows that, under certain circumstances, a non-transparent contractual clause on reassigning receivables can invalidate the previous assignment to the factor itself. The decision also provides an example of a valid option for wording such a clause.

Clients' no-fault guarantee of validity of receivables

No-fault guarantees of the validity of the receivables in receivables purchase agreements are very common. If the factor asserts a claim against the client based on the breach of such a clause, the client's line of defence can be to question the validity of the clause because no-fault guarantee liability tends to constitute a breach of section 307 of the German Civil Code. This situation was presented to Frankfurt Higher Regional Court (OLG Frankfurt) for adjudication (Frankfurt Higher Regional Court, order dated 21 June 2023 – 10 U 85/22 = BKR 2023, 873). The Tenth Civil Senate emphasised that no-fault guarantee liability within the meaning of the first sentence of section 276(1) of the German Civil Code cannot necessarily be deemed to have been tacitly agreed. However, it made it just as clear that an expressly agreed no-fault guarantee of the validity of receivables does not breach section 307 of the German Civil Code. Its reasoning included the fact that a client is in a much better position than a factor to evaluate the validity of the receivable it is assigning. The Senate also referred to the FCJ's case law that a no-fault guarantee of a receivable's validity issued by a client's managing director is effective. This viewpoint expressed by Frankfurt Higher Regional Court concurs with the prevailing opinion regarding no-fault guarantees of the validity of purchased receivables.

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