



Update Commercial 2025

Foreword

Noerr's Commercial Team is delighted to present our Commercial Update to you once again in 2025.

In this year's Commercial Update we look at the latest trends in various areas of distribution law and its developments in practice, such as in commercial agent law, authorised dealer and franchise law, online sales and distribution, contract drafting, consumer law and distribution antitrust law. We also examine these trends in the related fields of logistics, leasing and factoring.

Our Commercial Update is intended to highlight the key distribution-law trends in case law and practice over the past year as well as legislative initiatives planned for the coming year helping you to stay successful in 2025.

We look forward to your comments and suggestions.

Your Noerr Commercial Team

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1. General contract drafting, including international contracts

Contract law in the spotlight: a Look at current decisions and legal reforms

This year's overview deals with the most important developments in general contract law. We take a look at court rulings regarding WhatsApp messages fulfilling the requirement of written form, price adjustment clauses in standard terms and conditions, individually negotiated contract terms, warranty exclusions and waivers of the need to set time limits before terminating contracts. We also present some upcoming legislative changes such as the EU Data Act and the new EU Product Liability Directive.

“Oops 🙄”: WhatsApp messages and emojis equivalent to written form?

Munich Higher Regional Court (Oberlandesgericht München) (judgment of 11 November 2024 – 19 U 200/24 e) examined the questions of what is necessary for declarations to comply with the requirement of written form and the role of digital communications in the context of contract amendments. The case related to the termination of a purchase contract for a sports car due to delayed delivery. The decision focused on communications using WhatsApp regarding an (alleged) mutual extension of the delivery period, since the claimant responded to a message about the later delivery date in a WhatsApp message by writing “Oops 🙄”.

In this case, the parties had agreed that any changes and additions to the contract had to be in written form (Schriftform). The Higher Regional Court found that digital messages by WhatsApp are in principle suitable for meeting the requirements for transmission by telecommunications (section 127(2) of the German Civil Code (Bürgerliches Gesetzbuch)) and therefore to satisfy an agreement on written form provided that they exist as (written) characters and are reproducible. However, not all types of WhatsApp messages are equally suitable (e.g., voice messages are not). The court also made it clear that, like any other means of communication, emojis are open to interpretation. It said that their meaning depends on the context and cannot be automatically interpreted as consent or refusal. In this case, the “grimacing face” emoji (🙄) together with the expression “Oops” was not viewed as being consent to an extension of the delivery period. The court took a different view of the “thumbs up” emoji (👍), which it said could regularly be interpreted as consent.

The judgment highlights the broad and open-ended scope for interpretation of the legal concept of “transmission by means of telecommunications” where written form has been agreed, making it difficult to distinguish from simple “text form” (Textform), which is also defined in the German Civil Code (sec. 126b). Given this, companies wishing to exclude certain means of communication should ensure that they define exactly what is meant by written form, particularly that any agreements amending a contract are restricted to documents intended for this purpose and to avoid misunderstandings.

Requirements for effective price adjustment clauses

Berlin Higher Regional Court (Kammergericht Berlin) (judgment of 15 November 2023 - 23 U 15/22; appeal pending under Case III ZR 407/23) outlined the requirements for price adjustment clauses in standard terms and conditions of business (“standard terms”). The case involved a video streaming platform whose standard terms included a clause allowing it to unilaterally adjust prices based on changes in costs. The clause did not provide for an explicit duty to pass on price reductions if the costs fell.

The Higher Regional Court emphasised that unilateral price adjustment clauses constitute a deviation from the principle of mutual consent and are only permissible if the party using the standard terms has a legitimate interest. In the present case, such an interest was missing in since the streaming contracts had a short notice period and adjustments in prices could also be achieved by obtaining the customer's consent.

Furthermore, the Higher Regional Court highlighted the requirement of reciprocity, which prevents users of standard terms from profiting from cost reductions without having to pass them on to customers. It stated that it was necessary to prevent only the users of standard terms from benefiting from cost reductions, in line with the “balance principle”. Finally, the court found that the customer's option of terminating the contract did not redress this unfair disadvantage. It reasoned that customers were disadvantaged by either the price increase or the inconvenience of ending the contract, which contradicts the intention of German law on standard terms and conditions.

The decision, which related to the B2C sector, underscores how important it is to make sure that price adjustment clauses in general terms and conditions of business are balanced. Companies should ensure that price adjustments do not place an unfair burden on their business partners and should also consider the possibility of reducing prices. Failure to do so could result in the clauses being contested in a court on the grounds of invalidity.



Requirements for individually negotiated agreements as distinct from unilateral standard terms

Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf) ([judgment of 23 November 2023 – 2 U 99/22](#)) classified contractual penalty clauses in boilerplate cease-and-desist declarations drafted by lawyers as standard terms. It found that a genuine individually negotiated agreement did not exist since the essence of the contractual penalty clause was not put up for discussion and deletions in other clauses were not sufficient to achieve this. The court held that under German law on standard terms and conditions the contractual penalty clause was unreasonably disadvantageous to the other party because it excluded any possibility of combining separate breaches into one breach. The plaintiff's attempt to save the clause by deleting the exclusion of continued breaches being considered as the same breach ("blue pencil test") was assessed as being an inadmissible reduction of an unfair term in order to preserve its validity.

The Higher Regional Court's decision demonstrates that boilerplate provisions drafted by lawyers can be subject to a review to assess the validity of standard terms. For this reason, it is necessary to ensure that evidence of serious negotiations regarding material terms of contract can be provided – in particular as the courts review every clause individually to determine its nature as a standard term. Additionally, considering this strict application of the blue pencil test, it is advisable to exercise cautiously when drafting the wording of standard clauses.

No effective warranty exclusion in agreements on qualities and characteristics

The German Federal Court of Justice (Bundesgerichtshof) (judgment of 10 April 2024 – VIII ZR 161/23) clarified the distinction between agreements on qualities and characteristics and warranty exclusions in sales contracts. In the case at question, the buyer had purchased a car that was almost 40 years old from a private seller, with the air conditioning system was described as being in "full working order". However, an extensive exclusion of material defects was agreed in the sales contract. After the car was handed over, it was discovered that the air conditioning system was defective.

The Federal Court of Justice clarified that an agreement regarding the existence of certain characteristics could not be negated by a general exclusion of warranties. This means that the agreement exists independently from the general exclusion of warranties. The fact that the car was very old and typically susceptible to wear and tear were not sufficient grounds for the Federal Court of Justice to move away from this principle, as otherwise the agreement on qualities and characteristics would be worthless for the buyer.

The judgment confirms the line taken by case law up to now. Sellers should therefore be aware of the legal implications of representations or assurances made by them outside any warranty statements because general exclusions of warranties do not limit liability for characteristics for which express representations have been given. Conversely, buyers should clearly define the properties that are particularly important to them.

No waiver of the requirement of written form when terminating a contract

Cologne Higher Regional Court (Oberlandesgericht Köln) (judgment of 21 June 2024 – 6 U 112/23) ruled that notice of termination without setting a time limit for performance is ineffective, even if the standard terms for a supply contract contain a clause defining delayed delivery as failure to perform the contract at all (i.e., transaction for delivery by a fixed

date where time is absolutely of the essence – "absolutes Fixgeschäft"). The dispute arose from a termination of a purchase agreement for protective masks that were acquired by the German Federal Ministry of Health through an "open-house procedure".

The Higher Regional Court ruled that full release from the obligation to set a time limit for performance was not compatible with the rationale behind the statutory provisions and constituted an unreasonable disadvantage for suppliers. This leads to the clause being ineffective also in b2b transactions under German law on standard terms and conditions. The court held that a delivery date specified in the supply contract ("30 April 2020 at the latest") was also not sufficient to establish a less strict fixed date transaction (i.e., where delivery could still take place later – "relatives Fixgeschäft") in which compliance with the deadline was material for performance of the contract. Instead, such transactions only exist if the on-time delivery is so essential that the entire contract depends on it.

The judgment underlines the strict requirements for designing transactions involving fixed delivery dates – even in exceptional circumstances such as the coronavirus pandemic. When formulating standard terms and conditions of business, companies should make sure that the requirement to set a time limit for performance is not generally waived.

Outlook on legislative reforms

At the European and national levels, the following developments will have an impact on how contracts are drafted:

The Data Act ([Regulation \(EU\) 2023/2854](#)), which is set to come into force in September 2025, aims to set down clear rules for accessing and using personal data and other data generated by connected products ("Internet of things", or IoT) and associated services in the B2B sector. The intention is that Article 13 of the Data Act will provide a framework for reviewing clauses in order to combat unfair contract terms which unreasonably restrict rights to access and use data. In a similar manner to the German law on standard terms and conditions, the Data Act intends to prevent an unreasonable imbalance between contracting parties created by clauses unilaterally provided by one party. Since the provisions also apply retrospectively in certain circumstances, companies will not only have to review new contracts but also check and amend ongoing contracts where necessary.

The new EU Product Liability Directive ([Directive \(EU\) 2024/2853](#)) brings significant changes and obligations for industry. It extends the scope of application to include software (including AI) and digital services. The Directive expands the rights of injured persons, including by identifying more operators as liable parties and waiving the ceilings for liability. The national legislatures have until December 2026 to incorporate the Directive into directly applicable law.

Following on from last year's [Commercial Update](#), in April 2025 the German Act to Strengthen [Germany as a Place of Jurisdiction](#) (Justizstandort-Stärkungsgesetz) will come into force. The Act will enable the establishment of "Commercial Courts" and allow parties to agree on the jurisdiction of these courts, provided that claims amount to a minimum of EUR 500,000. In addition, the Act introduces provisions for all civil proceedings to be conducted in English and measures to protect business secrets. The German Code of Civil Procedure (Zivilprozessordnung) has also been updated with [reforms](#) to facilitate video hearings (section 128a of the German Code of Civil Procedure). [The Regulation on combating late payment in commercial transactions](#) is still in the European legislative process.

At the time our update went to press, it was not clear whether the [German Draft Bill for the Modernisation of Arbitration Law](#) (Gesetzesentwurf zur Modernisierung des Schiedsverfahrensrechts), which contains provisions for arbitration agreements that are not subject to formal requirements, for instance, will be passed before the early elections to the Bundestag.

2. Antitrust rules on sales and distribution

Antitrust rules governing sales and distribution still a hot topic

Like in 2023 (see our [Update Commercial 2024](#)), the antitrust rules on sales and distribution continued to play an important role in administrative and judicial decisions as well as advisory practice again in 2024. When designing and implementing supply and distribution relationships, great importance should always be attached to compliance with the antitrust framework.

This is illustrated by the European Commission's Mondelez decision, for example. The Commission imposed a penalty of €337.5 million on the chocolate and biscuit manufacturer, among other things because it supposedly agreed restrictions regarding territories and customer groups with its wholesalers that were capable of adversely affecting competition. The European Commission emphasised that it was increasingly focusing on maintaining the functioning of the internal market (see: [Noerr Insights](#)).

A [decision of the Court of Justice of the European Union \(CJEU\)](#) dealt with a case in which a car importer was claimed to have agreed warranty terms and conditions with the members of its authorised distribution network that were prohibited under antitrust law and according to the competent competition authority resulted in a restriction of competition. In the request for a preliminary ruling, the CJEU specified in more detail the evidential standards for an accusation of restriction of competition by effect and confirmed that even demonstrating potential effects (i.e., effects that have not occurred yet) on competition is sufficient if these effects are appreciable.

Unlike the German Federal Cartel Office (Bundeskartellamt), Dusseldorf Higher Regional Court (Oberlandesgericht Düsseldorf) found the non-compete obligation imposed by a supplier to be admissible. In its decision, the court developed a guiding principle for assessing non-compete obligations under antitrust law that will be interesting in practice (this decision is discussed in more detail under [5 – Authorised Dealer Contracts](#)).



The limits on sharing information under antitrust law are also relevant, since these also have to be observed in “dual distribution” (for instance where a supplier sells the products covered by a contract alongside its dealers on the market for end customers). For example, in a [decision](#) (in Danish) which is also interesting for the European context, the Danish Maritime and Commercial Court regarded sharing information as being inadmissible in such circumstances despite safeguards being provided for because these safeguards were inadequate in reality. It also remains to be seen whether the ultimately [very strict standard of the CJEU](#) will be adopted in decision-making practice when determining on sharing of information.

Apart from this, 2024 saw the end of the Intel dispute on allegedly abusive rebates, which lasted over 15 years. In the end, the CJEU overturned the €1.06 billion fine imposed on Intel by the European Commission in 2009. Even exclusive rebates given by a dominant company are not generally anticompetitive if an equally efficient competitor was able to use the same rebate system and cover its costs. As a result, the effects on competitors have to be specifically examined (see: [Noerr Insights](#)). However, this is not a free-for-all when it comes to designing bonuses and rebates. Instead, where parties enjoy a dominant market position or in situations involving relative dependence, which often exists between a supplier and its authorised distribution partners, the limits under antitrust law have to be examined in advance (see: [Noerr Insights](#)).

You can find more decisions involving antitrust rules relating to sales and distribution matters in our [Competition Outlook 2025](#).

3. Consumer protection and e-commerce

Key legal changes and judgments in consumer protection law

The regulatory requirements for digital business models are becoming increasingly complex. In 2024, significant changes were introduced, particularly in consumer protection law. Alongside the adoption of new digital regulations, e-commerce businesses face additional challenges from new EU initiatives and court decisions. The Noerr Commercial Update 2025 provides an overview of the current legal issues in consumer protection law, such as accessibility, product safety and the withdrawal button.

Implementing the withdrawal button

A major update in digital consumer protection is the introduction of a mandatory [withdrawal button](#) (in German). According to Directive (EU) 2023/2673, which came into force in December 2023, EU member states must implement regulations requiring businesses to provide a clearly visible “withdrawal function” for consumers by 19 December 2025.

However, the practical implementation presents many challenges. Customising the button to match specific withdrawal periods is technically almost impossible. On the other hand, permanently displaying the button could lead to an increase in unauthorised withdrawals. The Directive lacks detailed guidance, making compliance complex (see: Billing/Vetter, K&R 2024, 387 for details). While it remains unclear whether the withdrawal button will truly benefit consumers, companies will face significant additional challenges. E-commerce businesses should start planning the technical implementation early and closely monitor the implementation process in Germany.

Due diligence obligations for digital services

The Digital Services Act (DSA) has been fully in effect since 17 February 2024. It applies to all intermediaries, such as internet access services, hosting providers, platforms, online marketplaces, and search engines. The DSA introduced extensive due diligence obligations, including measures against illegal content and transparency requirements for algorithms. It also provides for liability of platforms if an average consumer can assume that the platform is the contractual partner or monitors the relevant company.

Very large online platforms are governed by strict compliance requirements. Noncompliance with these requirements can lead to fines of up to 6% of their annual global revenues. Germany’s Federal Networks Agency (Bundesnetzagentur) is the authority responsible for monitoring implementation in Germany. [Early practical experiences](#) (in German) highlight the challenges of adapting existing compliance structures to meet these new rules.

Additionally, on 14 May 2024, the German Digital Services Act (Digitale-Dienste-Gesetz – DDG) came into force, now governing the general obligation to display a legal notice on websites and thus replacing the German Telemedia Act (Telemediengesetz – TMG).

New product safety requirements

The new General Product Safety Regulation (EU) 2023/988 (GPSR) has been in effect across all EU member states since 8 December 2024. This regulation aims to modernise product safety requirements and strengthen consumer protection, particularly in online purchases.

Under the GPSR, manufacturers, importers, and retailers face more extensive safety and information obligations. The expanded labelling requirements are especially relevant: Products have to display details of the manufacturer (name, address, email address). Authorities have more options to conduct random checks. Companies should ensure they are [GPSR compliant](#) (in German) early on, since more official checks are expected in 2025.

Improved accessibility

From 28 June 2025, the new German Accessibility Improvement Act (Barrierefreiheitsstärkungsgesetz – BFSG) will take effect. It requires companies to make their digital offerings accessible to everyone. This includes features like user-friendly interfaces, proper display compatibility, adequate colour contrast, and adjustable text sizes. The scope of application is very broad and generally includes all providers of online shops and platforms.

Non-compliance could lead to fines or official recall or cessation orders. There may also be consequences under competition law if competitors notice infringements. Consumers will have new ways to file complaints. To avoid these risks, [early technical and organisational preparation](#) (in German) is essential.

Introduction of a right of repair

Another European initiative relates to the repair of goods. Directive (EU) 2024/1799, published on 10 July 2024, provides for a “[right of repair](#)” for certain products during their entire lifecycle. Manufacturers of these products (e.g. household appliances and smartphones) must offer consumers repair services either free of charge or at a reasonable cost. The Directive also creates legal incentives to repair goods (remedy rather than replacement when choosing the method of supplementary performance). Germany must implement the new legal rules by 31 July 2026, including penalties for non-compliance.

Cancellation button

The cancellation button, mandated since July 2022 under section 312k of the German Civil Code (Bürgerliches Gesetzbuch – BGB) continued to be a focus of German courts in 2024. For example, courts addressed whether this legally required button must also appear on third-party websites used by providers to sell their products, or start the order process. Both the Celle Higher Regional Court (decision of 11 June 2024 – 13 U 7/24) and the Hamburg Higher Regional Court (judgment of 26 September 2024 – 5 UKI 1/23) confirmed that it does. Another issue was whether the cancellation button only has to be accessible after consumers log into their accounts. The Nuremberg Higher Regional Court ruled that it must be accessible without any login requirements (judgment of 30 July 2024 – 3 U 2214/23). Additionally, the [Dusseldorf Higher Regional Court](#) examined how the confirmation button, which appears after the cancellation button, must be designed (judgment of 23 May 2024 – 20 UKI 3/23).

Price adjustment clauses

The requirements for price adjustment clauses in consumer contracts under the law on standard terms and conditions are also subject of recent court decisions. While these clauses are often discussed in energy supply contracts, two rulings by the Berlin Higher Regional Court on 15 November 2023 (23 U 112/22 and 23 U 15/22) focused on streaming services. The court found that a price adjustment clause is not justified if the contract allows for short notice periods and if it is technically feasible for the service provider to request customer consent for price changes each time the service is used.

Divergent case law on limitation periods in connection with invalid standard terms

Additionally, there were two key rulings in 2024 on limitation periods for consumer claims: The [Court of Justice of the European Union ruled on 25 January 2024](#) that limitation periods for consumer reimbursement claims only begin when consumers are aware of both the facts and their legal implications.

However, on 9 July 2024, the [German Federal Court of Justice ruled differently](#) in a case involving premium-aided savings contracts. The court held that limitation periods begin as soon as consumers know the relevant facts, regardless of whether they understand their legal significance. This divergence creates uncertainty in practice and could lead to new legislative initiatives or further court rulings.

Outlook

Regulation of digital business transactions will continue to become even stricter. Key changes under new laws like the Digital Services Act (DSA) and General Product Safety Regulation (GPSR) will require businesses to make significant adjustments. At the same time, companies should prepare early for upcoming changes such as those related to the withdrawal button or the German Accessibility Improvement Act to ensure compliance and avoid penalties.

To stay ahead, businesses need to engage in proactive planning and closely monitor legal developments. This approach will help to meet regulatory demands while maintaining a competitive edge in an increasingly regulated market.



4. Franchise law

Current challenges in franchise law in 2024

The franchise industry continues to be faced by various legal challenges. Notably, the judgment given by Augsburg Regional Court (Landgericht Augsburg) and key legislative changes have direct impact on the franchise industry.

Liability of franchisors for unfair commercial practices by franchisees

The judgment of the Augsburg Regional Court (judgment of 6 October 2023 – 81 O 1161/23) concerns the responsibility of franchisors for unfair commercial practices by their franchisees.

The case involved a fitness studio franchise system where a franchisee independently attempted to increase the membership fees by falsifying members' consent without the franchisor's knowledge. The franchisee's intention was that by passing through the turnstile at the entrance of the studio, its members were deemed to have consented to an increase in membership fees.

Due to this practice, a consumer association applied for a prohibitory injunction against the franchisor.

The court deemed this practice an unlawful influence that is likely to significantly impair the consumer's freedom of choice (see section 4a(1), first sentence, paragraph 3 of second sentence and third sentence of the German Act against Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb)) and decided that the franchisor was independently liable alongside the franchisee (section 8(2) of the German Act against Unfair Competition Act). The court reasoned that the action took place within the franchisor's business operation. The franchisee acted within a framework established by the franchisor, demonstrating integration into the franchisor's business operations.

Central to liability was that the franchisee's actions ultimately benefited the franchisor. Although the franchisor was unaware of the practices, the franchisor benefited indirectly from the franchisee's actions through higher franchise fees.

Finally, the court argued that the franchisor could have taken steps to prevent unfair behaviour. This responsibility to act was not negated by any antitrust restrictions prohibiting price directives.

Whether the judgment will withstand appeals is yet to be determined. Nevertheless, it illustrates the need for franchisors to do their best to ensure that their franchisees' commercial practices are in line with competition law by drafting contracts appropriately and taking organisational steps.



Legislative amendments and plans

In addition to the judgment of Augsburg Regional Court (judgment of 6 October 2023 – 81 O 1161/23), there are three more significant developments that are important for the franchise industry:

Text form (Textform) instead of written form (Schriftform) for commercial lease agreements

1. Effective 1 January 2025, the Fourth German Bureaucracy Reduction Act will amend the requirements for drafting commercial lease agreements from written form (“Schriftform”, according to Sec. 126b German Commercial Code (BGB)) to text form (“Textform”, according to Sec. 126b German Commercial Code (BGB)). This means these agreements can now be concluded via email, fax, or other digital messages (such as WhatsApp), provided they can be saved permanently and unchanged. This change allows for more flexibility but provides for more prudent contract management. It is crucial for franchisors to adjust administrative processes and clearly define which communication methods are acceptable to avoid legal uncertainties.

Antitrust challenges due to no-poach agreements

2. In its Competition Policy Brief on “Antitrust in Labour Markets”, issued in May 2024, the European Commission indicated that no-poach agreements are to be considered serious competition restrictions, impermissibly limiting competition for the best talent, and are justifiable only in exceptional cases. While the policy brief lacks legal force, it remains to be seen whether no-poach agreements in franchise agreements, which have been common practice, will be deemed unlawful competition restrictions or justified exceptions in the future.

Potential repayment of COVID-19 aid

3. Some investment banks currently argue that franchise systems should be classified as groups of companies in terms of subsidy law. This would mean individual franchisees should not have independently applied for COVID-19 aid. Instead, only the entire franchise system would have been entitled to do so as a group of companies. Since the aid amount per entity was capped, franchise systems could quickly exceed these limits. Any excess aid provided would have to be paid back. For franchisors it is important to check in each case whether their structure fits the definition of a group of companies to protect themselves and their franchisees against possible repayment demands.



5. Authorised dealer contracts

Requirements when designing restrictions of competition

We would like to highlight one court decision on the law governing authorised dealers, namely a decision by Dusseldorf Higher Regional Court that we consider to be highly relevant in practice. In its decision of 28 August 2024 (VI-Kart 4/22 (V)), the court dealt extensively with the conditions to be met for the lawfulness of contractual restrictions of competition in the vertical relationship. With regard to exclusive purchasing agreements and corresponding non-compete clauses, the Higher Regional Court initially confirmed the criteria already established by case law. However, there is also further practical guidance, particularly for companies with market shares above 30%.

Assessment of non-compete agreements in vertical relationships in the case of market shares above 30%

The subject in dispute was a decision by Germany's Federal Cartel Office (Bundeskartellamt) in 2022 in which an exclusive purchase obligation agreed between a chainsaw manufacturer and its dealers was deemed to be in breach of antitrust law. The manufacturer successfully objected to this: The Higher Regional Court set aside the Federal Cartel Office's decision as substantively unlawful. In the grounds for its decision, the Higher Regional Court found that agreeing on a non-compete clause is not inadmissible and therefore invalid simply because the supplier or the customer has exceeded the market share threshold of 30% set out in the Vertical Block Exemption Regulation. In the court's opinion, in this case the specific market circumstances were relevant, particularly any market-foreclosing effects of the non-compete agreement in the market; the Federal Cartel Office had not analysed this adequately, the court said. The court then considers in detail many criteria which play a role in assessing the validity of a non-compete clause if the market share threshold of 30% is exceeded. This way the court gives practitioners useful guidance. Furthermore, the guiding principle that can be derived from the grounds for the decision is that a non-compete clause exceeding two years is generally only capable of significantly influencing market access if the manufacturer or supplier has a market share of over 40% and the level of commitment, in terms of both market share and sales outlets, is above 30%. For further details see our detailed [online](#) analysis of the decision.

Practical recommendations

The decision of Dusseldorf Higher Regional Court makes it clear that non-compete clauses are not to be classified as anti-competitive per se in companies with market shares of more than 30% and are therefore generally possible when drafting contracts. However, it is clear that each case must be considered on its own merits, so the validity of non-compete clauses – especially outside the scope of the exemption provided by the Vertical Block Exemption Regulation – cannot be assessed in a generalised way. In practice, it is advisable that when agreeing on exclusive purchasing clauses and corresponding non-compete clauses in the contractual relationship between a manufacturer and a dealer, particular care should be taken to check whether and to what extent these are permissible in the individual case; the actual market conditions are decisive in this respect.



6. Commercial agent contracts

Commercial agent contracts in the dock: latest decisions and their implications

Over the last few months, Cologne Higher Regional Court in particular had to consider central issues of commercial agent law in several decisions. It provided important practical tips such as on statements of account, compensation claims and the term documentation as defined in section 86a of the German Commercial Code (Handelsgesetzbuch – HGB). Other classic topics of commercial agent law have occupied the courts too.

Cases of doubt

Cologne Higher Regional Court clarified that it is not a “case of doubt” to be included in a statement of account according to section 87c(2) of the German Commercial Code if the parties simply disagree on the legal scope of the commission agreement. In principle, a statement of account must only contain commission-related information – the commercial agent cannot demand more extensive information in a statement of account. In case law, however, it is recognised that a statement of account must also contain information on “cases of doubt” where it is questionable whether there is a right to commission or not (see: Hamm Higher Regional Court, judgment of 13 December 2021 – I-18 U 31/21). Cologne Higher Regional Court has now clarified that a case of doubt does not exist if the existence of a claim to commission in an established factual situation depends solely on the legal assessment. The court must therefore clarify the meaning and scope of the commission agreement at the information stage. The principal does not have to include information in the statement of account about alleged commission claims that do not exist from the outset according to the contractual commission agreement.

One-off commission

In addition, Cologne Higher Regional Court clarified with regard to the judgment of the CJEU on 23 March 2023 in the case C-574/21 that a compensation claim cannot be excluded from the outset when agreeing on one-off commission. However, it also emphasised that the commercial agent’s lack of commission losses must be taken into account at an equity level. If there are no commission losses, according to Cologne Higher Regional Court, further equity reasons must arise that can exceptionally justify a compensation claim by the commercial agent without incurring commission losses.

Definition of documentation

Cologne Higher Regional Court considered the definition of the term “documentation” under section 86a(1) of the German Commercial Code, which states that the principal shall provide the commercial agent with the documentation necessary free of charge. Cologne Higher Regional Court confirmed the case law to date that the term “documentation” is to be interpreted broadly beyond the wording of the legal standard, whereas the term “necessary” is to be interpreted restrictively. The documentation to be provided by the principal (free of charge) according to section 86a(1) of the German Commercial Code therefore includes only the aids from the principal’s sphere which the commercial agent specifically needs to exercise its activity at all. The case to be decided by Cologne Higher Regional Court was about a workplace system consisting of a common standard software which had to be used to connect to the principal’s IT systems. The principal provided this workplace system for a flat fee. However, since the principal had forbidden the commercial agent from using the workplace system for any activities other than brokering new business as an intermediary, in the view of Cologne Higher Regional Court the system was not part of the commercial agent’s general office equipment but necessary documentation to be provided free of charge by the principal within the meaning of section 86a(1) of the German Commercial Code. As a consequence, the fee charged by the principal was to be refunded based on the principle of the law of unjustified enrichment.



Blocking not cancelling; right to commission for de facto contract renewals

Dusseldorf Higher Regional Court considered whether the principal in the event of a breach of duty by the commercial agent can suspend deliveries to the agent rather than terminating the contract without notice. In the case to be decided by Dusseldorf Higher Regional Court there was a suspicion that the commercial agent had misappropriated goods belonging to the principal. The commercial agent did not comply with the principal's demand to explain where the goods were. It did not reply to the principal's questions. Instead of terminating the commercial agent contract without notice pursuant to section 89a(1) of the German Commercial Code, the principal then stopped supplying the commercial agent with the goods. Dusseldorf Higher Regional Court ruled that such an approach may be permissible as a milder alternative to termination without notice (based on suspicion) in certain cases if the principal's interest in its freedom to conduct its business outweighs the privileged concerns of the commercial agent.

In addition, Dusseldorf Higher Regional Court had to consider how commission is to be earned for "contract renewals". The principal had promised its commercial agent commission for contract renewals. However, the interpretation of the commercial agent contract in that case showed that only a follow-on contract for an existing customer procured by the commercial agent was meant, not a de facto contract renewal that comes about because the customer does not terminate the contract procured by the commercial agent at the end of the minimum term. Merely automatic renewal of the term of an existing mobile phone contract because the customer did not terminate it is per se not a commission-earning transaction, the court said. Thus Dusseldorf Higher Regional Court changes its previous legal opinion and follows the case law of the Federal Court of Justice. The Federal Court of Justice ruled back in 2010 that automatic term renewals because the customer did not terminate the contract are not customarily a commission-earning transaction (see Federal Court of Justice, NJW 2010, 298).



Obstacle to termination

Munich Higher Regional Court once again had to deal with a case in which a contractual arrangement led to an unlawful obstacle to termination by the commercial agent according to the first sentence of section 89(2) of the German Commercial Code. Contractual arrangements which make it more difficult for a commercial agent to terminate a commercial agent contract are increasingly being argued in court. In the case now to be decided by Munich Higher Regional Court, the commercial agent was due to lose its right to various commission elements and an office expenses subsidy immediately after giving notice of termination. Munich Higher Regional Court held that the commercial agent thus lost approx. 97% of its income but at the same time was still bound by unrestricted obligations until the end of the contract. Munich Higher Regional Court held this to be unreasonable partly due to a comparatively short notice period of just three months. The arrangement was therefore null and void according to the first sentence of section 89(2) of the German Commercial Code in conjunction with section 134 of the German Civil Code.

7. Factoring

Little news on factoring

In 2024 there were very few significant decisions directly relating to assignment/purchase of receivables which were relevant to factoring practice:

Preformulated assignment clause must be sufficiently definite

The Federal Court of Justice already considered the requirements for standard assignment clauses back in 2023. The decisions often related to the assignment of claims by injured parties in traffic accidents, although the assessments may also be important for global assignment agreements in factoring. Of the decisions handed down by the courts in 2024 in continuation of the case law of the Federal Court of Justice, a decision by Saarbrücken Regional Court (Saarbrücken RC, judgment of 20 June 2024 – 13 S 100/23) is worth mentioning. In this decision, the court had to rule on the claims of a damage assessor arising from the assigned right of the injured party.

The court had to decide, among other things, on the sufficient certainty of the global assignment agreement with regard to all claims arising from a traffic accident. In the court's view, an assignment declaration that is not objectively limited to the claim for reimbursement of the expert's fees, but rather covers all claims for damages resulting from a traffic accident, without breaking them down in terms of amount and order, is not sufficiently certain. Comparable requirements for the global assignment agreement in factoring, in which all claims against debtors of the factoring customer arising from delivery and performance are assigned in advance to the factor, have not yet been established by case law. In particular, it is not necessary to quantify the respective amount of the claim or to name a specific debtor (except in the case of factoring of receivables), nor can this be implemented for future claims.

The decision of Saarbrücken Regional Court is, however, an expression of a development in case law to judge standard assignment clauses more strictly in principle. Furthermore, in the light of the decision of Saarbrücken Regional Court, it may make sense, to examine the wording of assignment blanket clauses in individual cases, which the factor uses in silent factoring to disclose existing claims (with the aim of further specifying the claims concerned).

Lawyer's travel expenses not reimbursable for the collection of purchased claims

According to Dresden Higher Regional Court (Dresden HRC, decision of 27 May 2024 – 12 W 340/24, juris), a factoring provider is normally able to inform a legal counsel at the location of the procedural court in writing or in text format; a lawyer's travel expenses from the headquarters location of the factoring company or from a third place are usually not considered necessary costs of the legal dispute. Factoring providers usually work with lawyers who specialise in factoring to collect receivables from debtors. This is not only more efficient but also helps to identify early on the claims which do not exist or are inaccurate for which the factoring customer (and not the debtor) is liable to the factor. The decision by Dresden Higher Regional Court means that the travel expenses incurred when using a go-to local lawyer at the headquarters location of the factoring company may not be considered eligible for reimbursement. It is thus worth giving detailed grounds in the application for the assessment of costs as to why it was necessary to involve a lawyer not located at the site of the trial court. This applies especially to smaller factoring institutes without their own legal departments.

Centralised oversight of debt collection companies by the Federal Office of Justice (Bundesamt der Justiz)

Many factoring institutions are licensed to provide debt collection services in accordance with the German Legal Services Act (Rechtsdienstleistungsgesetz). Previously, collection service providers were subject to a local regulatory authority. The practices of these local regulatory authorities sometimes varied considerably. Since the start of the year, collection service providers have been subject to central oversight by the Federal Office of Justice. Collection service providers should therefore ensure that the information they provide about their regulatory authority is updated. In addition, a uniform administrative practice is likely to be established.



8. Leasing

New ruling by the Federal Court of Justice on the calculation of residual value in the event of damage to leased vehicles and CJEU clarification of the right of withdrawal in the case of mileage leasing

The Federal Court of Justice has confirmed its previous stance on voluntary representative action in leasing situations and redefined the obligations of the parties involved to determine the extent of damage. With regard to the rights of consumers to withdraw from contracts, the Court of Justice of the European Union has provided clarity on mileage-based leasing contracts without an obligation to purchase.

Residual value under the law on damages in the event of an accident involving a leased vehicle

On 2 July 2024, the Federal Court of Justice handed down a judgment (VI ZR 211/22) that redefined the calculation of the residual value in the event of damage to a leased vehicle.

In a decision, the sixth division for civil matters considered the assertion of third-party property damage in a voluntary representative action relating to leasing. The facts of the case were based on a traffic accident involving a total write-off of the leased car. The defendant's liability for the full accident damage was established. Nevertheless, there were two further key problems.

Firstly, the lawfulness of the voluntary representative action was in question. The Federal Court found that the lease customer could, in principle, assert both its own claims arising from the breach of the right of possession and the claims of the lease provider in a voluntary representative action. However, in order for the claim to be sufficiently specific, the court said it had to be clear which of the claims should be asserted primarily. Otherwise, this would constitute an impermissible alternative aggregation of claims. In this case, the lease customer primarily pursued the lease provider's claims in a voluntary representative action.

As a result, it was hard to determine the residual value of the leased vehicle. The lease customer hired an expert who put the residual value at €13,800 and then he sold the vehicle for that price. The next day the defendant submitted an offer calculated via an online marketplace for €22,999. It was questionable which of the prices were to be deducted from the replacement value of the vehicle to determine the damage. The Federal Court of Justice once again defined the parties' obligations: The injured party would normally not have to perform any further market research and could rely on the expert's opinion. However, if the injured party is a company which also focuses on selling used cars, the obligations for determining damage go further, the court said. At least an online search would then be reasonable. Since the lease customer in this case asserted the rights of the lease provider in a voluntary representative action, the obligations of the lease provider are decisive in this respect.

The Federal Court of Justice therefore used the residual value from the internet marketplace as a basis. In the court's view, the residual value of €22,999 is to be deducted from the replacement value to determine the actual damage.

The decision is overall in line with the case law of the Federal Court of Justice to date on voluntary representative actions, since these are not intended to give the injured party a procedural advantage. However, in court practice to date, lease situations were not examined particularly closely and thus it is likely the judgment will lead to a change or stricter approach in case law.



No right of withdrawal from mileage-based leasing agreements

The Court of Justice of the European Union (CJEU) once again considered individual issues of consumers' rights of withdrawal in a long-awaited judgment (C-38/21, C-47/21 and C-232/21).

The Court of Justice of the European Union clarified that consumers who have entered into a mileage-based leasing agreement without an obligation to purchase have no right of withdrawal as they have not agreed to buy the vehicle at the end of the lease period. This applies even if the contract was entered into as a distance contract or an off-premises contract. As grounds, the Court of Justice of the European Union stated that such a leasing agreement can be equated to a car rental agreement and thus falls within the exception in Article 16I of Directive 2011/83/EU.

The situation is different with credit agreements for the purchase of a motor vehicle. In these, consumers can apply their right of withdrawal under certain conditions if they were not fully and accurately informed of their rights and obligations. However, the Court of Justice of the European Union also found in this context that a right of withdrawal becomes obsolete upon complete fulfilment of the loan agreement and in those cases consumers no longer have a right of withdrawal.

The decisions create clarity once again about the existence and scope of the right of withdrawal from leasing agreements and end the uncertainty about whether, and to what extent, a borrower may still assert rights after complete fulfilment of the agreement.

Leasing during insolvency: challenges in times of crisis

Given the current economic situation and increasing number of insolvencies, we expect this topic to continue to become more important this year too.

During an insolvency the issue of continuing or ending the leasing relationship plays a central role. However, termination of the leasing agreement by the lease provider if the leasing customer is insolvent is not always possible due to the ban on termination under insolvency law. Lease providers thus face the challenge, if the leasing customer becomes insolvent, of getting the leased item back or coming to any other type of contractual solution with the insolvency administrator. There is often the issue of calculating damage that is typical in leasing.

9. Logistics contracts

Case law outlook in logistics and transportation law

In 2024, the courts of various instances also dealt with fascinating issues in logistics and transportation law. Many practically relevant decisions were made on topics including jurisdiction, the applicable liability regime, and the basis and scope of liability for damage.

Expenses saved after cancellation of a transportation agreement

The German Federal Court of Justice ruled (judgment of 1 August 2023 – X ZR 118/22) that an aviation company must accept the deduction of expenses saved when a flight is not taken (in accordance with the second sentence of section 648 of the German Civil Code). This shall apply regardless of whether this was even included in the calculation of the final price or disclosed to the ordering party. According to the Federal Court of Justice, no other interpretation would be possible from the wording or the meaning and purpose of this legal provision. A passenger transportation agreement is governed by the regulations on contracts for work. Thus, an airline passenger can, according to the first sentence of section 648 of the German Civil Code, cancel the transportation agreement at any time – even implicitly, by not taking the flight. No other assessment is possible based on the EU law rules on setting and displaying flight prices for intra-EU flight services (Regulation (EC) No 1008/2008), as this only specifies the price calculation and the disclosure thereof to the passenger but not the mutual rights and obligations after application of the right of withdrawal.

Validity of a jurisdiction clause in the bill of lading

In this decision (judgment of 25 April 2024 – C-345/22, C-346/22, C-347/22), the Court of Justice of the European Union affirmed its case law to date which stated that a jurisdiction agreement effectively agreed between the shipper and freight forwarder in a bill of lading can be invoked against a third-party owner even without its consent if under applicable national law, the third-party owner has taken over all rights and obligations of one of the initial parties by purchasing the bill of lading. If the third-party owner has not effectively taken over the position of the shipper, however, the jurisdiction agreement only applies to the third-party owner if it has consented to it. A national provision stating that a jurisdiction clause in a bill of lading has a third-party effect only under the additional condition that it was individually and separately negotiated with the third party is contrary to EU law, the Court of Justice of the European Union said.

Burden of proof in the case of prematurely destroyed allegedly contaminated food

According to Bückeburg Regional Court (judgment of 19 November 2024 – 3 O 3/22), simply the fact that people (refugees) probably spent a long period inside the truck without authorisation does not in itself directly mean that contamination (such as odours or transmission of pests) can be assumed in packaged food if the mere suspicion could easily have been dispelled but the food was immediately destroyed without prior inspection. This applies even if apparently all parties involved assumed the goods had to be destroyed, the court said.

Classification of liability regime for loading damage during multimodal transport

The Bamberg Higher Regional Court (decision of 2 February 2024 – 3 U 114/23) answered the question of whether the liability regime of the law on the overland carriage of goods or the law of carriage by sea applied in the case of damage which occurred during the transshipment on a port area by stating that the loading and offloading during multimodal transport is in principle always to be allocated to the part of the route of the transport mode which is being loaded or unloaded at that time. This is because the loading and unloading of goods is to be seen as an annex to the previous or subsequent carriage of those goods.



International jurisdiction in the case of carriage according to the CMR

The Hamm Higher Regional Court (judgment of 21 December 2023 – 18 U 127/23) ruled that contracts are to be interpreted according to German law if the parties agree on the application of German law in deviation from Article 5 of the Rome I Regulation. However, if an interpretation under German law leads to the exclusion of the venue according to the CMR, this is a breach of the first sentence of Article 31(1) of the CMR which only permits the international jurisdiction of additional signatory states, the court said. Therefore, the agreement is invalid under the first sentence of Article 41(1) of the CMR and thus the jurisdictions provided for under the CMR are relevant, the court said. The purely legal agreement of a fictitious place of fulfilment does not establish a different jurisdiction, the court added.

Scope of the presumption in the second sentence of section 429 (2) of the German Commercial Code on the cost of reducing damage and remedying damage

In the opinion of Bremen Regional Court (judgment of 9 January 2024 – 11 O 196/20), in addition to repair costs, the costs of organising and carrying out the remedying of damage, including determining the extent of damage, the cost of experts, washing and handling costs under section 429(2) of the German Commercial Code are also to be recognised as reimbursable costs in the case of transportation damage since they are equally necessary to restore goods affected by damage to their original condition.

Liability of a warehouse keeper for deviations in inventory

Bad Kreuznach Regional Court (judgment of 12 September 2024 – 2 O 114/23) found a grossly negligent breach of material contractual obligations in proceedings for damages by a wine merchant against a warehouse keeper. The warehouse keeper handled contractually for the wine merchant the goods-in process, storage and shipping of the goods.

Although unexplained deviations in inventory were found at an initial stocktake and approx. 50 bottles stored by the wine merchant at the warehouse keeper disappeared, the warehouse keeper took no actions to prevent further damage. When some of the stored bottles were missing in a further stocktake, for which the wine merchant demanded damages, the Regional Court affirmed that there was qualified culpability on the part of the warehouse keeper and rejected due to No. 27.2 of the German Freight Forwarders' Standard Terms and Conditions 2017 (ADSp 2017) a liability restriction per No. 24.1 of those terms and conditions, which was in principle effectively included, which is why the warehouse keeper was fully liable for the bottles missing in the second stocktake, the court said.

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