Exclusion Clauses in Light of the New Section 309 No. 13 German Civil Code

INTRODUCTION

The German legislator has recently passed the Act Amending Consumer Protection Law, which provides for a reformation of Sec. 309 No. 13 German Civil Code, a provision regulating contractual standard terms and conditions. This can have an effect on the validity of exclusion clauses agreed to in employment contracts and should be taken as an opportunity to review employment contract templates for their compliance.

LEGAL SITUATION UNTIL NOW

Section 309 No. 13 German Civil Code in the version still in effect declares that clauses in standard terms and conditions - these will always be the clauses in standard employment contracts – will be invalid if notices or declarations to be given to the user - that is, the employer - or a third party must comply with a form that is stricter than written form.

However, it is particularly commonplace in the case of exclusion periods in employment contracts that the assertion of claims under these clauses must be made in written form within a certain period to avoid a forfeiture of claims, even if the parties may have a more lax approach to issues of form when dealing with one another. It therefore comes as no surprise that the Federal Labor Court had already ruled with respect to exclusion periods in collective bargaining agreements that a "written claim" does not mean the formal written form under Sec. 126 German Civil Code, and that a claim in text form under Sec. 126b German Civil Code is also permitted (Federal Labor Court, judgment of July 7, 2010 – 4 AZR 549/08). In particular, text form means that claims can also be effectively asserted by email or even merely by fax if the person making the declaration is still identifiable. Whether the requirement of a "written" assertion of claims in an employment contract means the written form under Sec. 126 German Civil Code has not yet been addressed by the Federal Labor Court (Federal Labor Court, judgment of May 25, 2005 – 5 AZR 572/04).

NEW RULES AS OF OCTOBER 1, 2016

Following the reformation of Sec. 309 No. 13 German Civil Code, it will be official that employment contracts may not stipulate a form for unilateral declarations that is stricter than the text form of Sec. 126b German Civil Code. The transitional rule provides, however, that this only applies for contractual relationships that are formed after September 30, 2016. The primary reasoning for the new rule is based on consumer protection arguments.

CONSEQUENCES FOR THE HANDLING OF EMPLOYMENT CONTRACTS

Because Sec. 309 No. 13 German Civil Code in the old version only covers unilateral declarations by the employee, but not the contractual agreements between the employee and the employer, the reform of the statute does not have any influence on the legal situation for simple or double written form clauses.

As stated, however, the new rule is of considerable significance for exclusion periods under employment contracts. Given the unequivocal wording of Sec. 309 No. 13 German Civil Code in the new version, it is uncertain if exclusion clauses that demand a "written" assertion of claims within a defined period will continue to be valid in the future. This will certainly not be the case if "written form" is explicitly required to assert a claim.

In the case of standard terms and conditions, the principle of the so-called prohibition of the "interpretive reduction to warrant validity" applies. In the present context, this means that the assertion of a claim "in written form" cannot be interpreted to mean that the more lenient text form is sufficient, which would also have as a consequence that the clause would nevertheless remain valid despite the application of the stricter standard. There is good reason to assume, with a view to Sec. 309 No. 13 German Civil Code as revised that exclusion periods in employment contracts that are entered into after September 30, 2016 will be completely invalid if they demand the assertion of claims in written form. Of course, this would be unfortunate from the standpoint of the employer, as exclusion clauses are an effective means of limiting risk, particularly in the context of terminations.

Although there are those who hold the view that a violation of Sec. 309 No. 13 German Civil Code will only result in the invalidity of the written form requirement and not in the invalidity of the exclusion clause as a whole (so-called blue pencil test), it remains to be seen if this view will prevail.

To the extent old contracts that were made prior to October 1, 2016 are excluded from the new rule, it remains to be seen whether this will also apply over the further course of the employment relationship if changes to the employment contract are negotiated after September 30, 2016, and moreover, even if this

is only the implicit, unilateral increase of a salary. There is thus the risk that the exclusion periods in already existing contracts could be invalid in such cases because of a violation of Sec. 309 No. 13 German Civil Code as revised.

Exclusion periods in collective bargaining agreements are not affected by the change in the law, as no formal review under the law of standard terms and conditions takes place (Sec. 310 (4) Sentence 1 German Civil Code). A different rule can apply, however, if an employment contract refers to clauses in a collective bargaining agreement.

In light of the extraordinary significance of exclusion periods for employment law practitioners, we recommend that existing standard employment contract templates be reviewed and amended, if necessary, to comply with the new legal situation. Special attention should also be awarded to this topic when older contracts are amended.

YOUR CONTACTS

Dr. Jens Jensen
j.jensen@justem.de

Dr. Henning Reitz
h.reitz@justem.de

www.justem.de