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Exclusion Clauses in Standard Employment Agreements soon Unenforceable?

The German law on general terms and conditions in Section 309 no. 13 German Civil Code (BGB) will change with effect from October 1, 2016. Pursuant to this new legislation, favorable to employees, for declarations of the employee vis-à-vis the employer a stricter form than text form may no longer be required; so far, written form has been common.

Standard employment agreements commonly include two-tiered exclusion clauses according to which mutual claims arising from the employment relationship shall be forfeited unless raised within certain deadlines. It is typically stated that claims shall be forfeited unless, in a first step, they are raised vis-à-vis the employer in writing within three months after they become due. In a second step, in case of rejection by the other party or lack of response, any legal proceedings must be commenced within another three months after rejection or the time the claim was initially raised. This shall prevent employees from raising claims only at the end of the statutory period of limitation of three years.

Background

The reason for this change of legislation - as part of the law to improve the civil enforcement of consumer protection rules of the data protection law - is that a consumer/employee is not necessarily aware of the requirements of a declaration in written form (i.e., the requirement of a personal wet-ink signature) and, for that reason, may lose an entitlement in light of the way exclusion clauses could be worded so far.

Practical Significance

In practice, a differentiation between employment agreements concluded "before" and "on/after" October 1, 2016 has to be made.

- In employment agreements concluded on or after October 1, 2016 requirements for written form in exclusion clauses are not enforceable. As a consequence, employees could raise claims during the three-year period of limitation. Standard employment contracts should be updated to the new standard at the latest by September 30, 2016.
- Employment agreements concluded before October 1, 2016 containing exclusion clauses requiring the written form remain, in principle, enforceable due to transitional regulation (Art. 229, Section 37 Introductory Act to the Civil Code (EGBGB)). However, there is a risk that the Federal Labour Court will consider "old contracts" as "new contracts" in case of - even slightest - amendments. Therefore, in case of any amendment on or after October 1, 2016, traditional exclusion clauses should be updated to the new standard.

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In light of Section 310 paragraph 4 sentence 1 BGB, exclusion clauses in collective bargaining agreements are not affected by this new legislation. In this context, written form requirements can still be agreed upon. As far as reference clauses in employment contracts are concerned, it has to be differentiated, as before, as to whether reference is made to the entire collective bargaining agreement and only to particular provisions. In the latter case, legislation protecting employees cannot be circumvented. Thus, reference clauses referring only to the exclusion clause of the collective bargaining agreement have to comply with the requirements of Section 309 no. 13 BGB. If the collective bargaining agreement and the employment contract contain different (enforceable) exclusion clauses, the clause more favorable to the employee applies pursuant to section 4 paragraph 3 Collective Bargaining Act (TVG).

Drafting Proposal

An exclusion of claims provision in employment agreements concluded on or after October 1, 2016 could be worded as follows:

"All claims of the Employee and of the Company arising from this Employment Contract and relating to this Employment Contract or its termination shall be forfeited unless they are asserted vis-à-vis the Company or the Employee in writing within three months after they have become due; text form shall suffice for such assertion. In case the asserted claims are rejected by the respective other party, or in case of the respective other party's failure to act on the assertion within two weeks, the claims must be asserted in court within another three months after rejection or the lapse of the two week-period. After the lapse of the specified time limits, the claims shall be forfeited. This shall not apply to nonforfeitable claims and claims resulting from intentional conduct."

The modification of Section 309 no. 13 BGB has not only impact on employment agreements but has to be considered in all general terms and conditions.

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