

Contractual Restrictions Of Liability Under German Law In The Context Of R&D, IP Licenses And IP Transfer Agreements

By Marco Stief

A. Introduction

I. Relevance of Germany and German Law in R&D and Licensing

Germany counts among the most important jurisdictions worldwide for research and development (R&D). According to the latest figures published by the German Federal Statistics Office for 2022, R&D spending amounted to 121.4 billion euros, or 3.1 percent of the country's gross domestic product (GDP).¹ This puts Germany just slightly behind the United States, with a percentage of 3.46 percent² and, measured in terms of GDP, Germany is among the top five worldwide—ahead of the USA—for patent applications for inventions made in Germany.³

The German R&D landscape is internationally networked. Against this background, the U.S. pharmaceutical company Eli Lilly, for example, is planning to invest up to 100 million U.S. dollars in the start-up ecosystem of Germany's life science and biotech industry.⁴ A corresponding number of international R&D, cooperation, licensing and technology transfer agreements frequently involve Germany. To this extent, standard-form contracts drafted in English and based on Anglo-American models have become widely established in practice.⁵ While their general structure and individual clauses correspond to Anglo-American models, it is not uncommon for German law to be applied to the performance of these contracts, since German companies and, in particular, German universities and research institutions are resistant to the application of foreign law. In other cases, a contractual stipulation of the choice of law is simply overlooked, or the parties are unable to

reach an agreement. In such cases, German law may apply by virtue of the general rules of private international law.⁶

The choice of German law and the concomitant choice of German courts that regularly goes hand in hand with it⁷ offers the contracting parties significant advantages in terms of enforcement of their rights, not least because of the internationally recognized high quality, speed and (cost) efficiency of the German courts. This applies in particular to IP contracts in view of the leading position—also internationally—of German patent courts. The possibility that so-called commercial courts or commercial chambers for international commercial disputes will be introduced in the future⁸ will also make court proceedings in English a possibility, which will further increase the attractiveness of Germany as a forum selection.⁹ In this respect, Germany has already achieved a leading position in a European comparison, for example, as regards the enforcement of judgments, confidence in the courts, and the use of digital technologies in court proceedings.¹⁰ Court proceedings in Germany thus continue to be fast and inexpensive compared to other jurisdictions such as the UK or the U.S.,¹¹ making the contractual selection of German law as well as German

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1. https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bildung-Forschung-Kultur/Forschung-Entwicklung/_inhalt.html.

2. https://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS?end=2021&locations=US-DE&name_desc=false&start=1996&view=chart, Retrieved on 27.9.24 12:29.

3. World Intellectual Property Organization (2023). IP Facts and Figures 2023. Geneva: WIPO. DOI: 10.34667/tind.48648.

4. Press release Eli Lilly (PP-TR-DE-1023) (<https://www.lilly.com/de/presse/aktuell>, retrieved on 13.11.2024).

5. McGuire/Tochtermann, GRUR-Prax 2016, 427 (428); BeckOK BGB/Spickhoff 71. Ed. 1.8.2024, VO (EG) 593/2008 Art. 4, margin number 73.

6. McGuire/Tochtermann, GRUR-Prax 2016, 427 (428); BeckOK BGB/Spickhoff 71. Ed. 1.8.2024, VO (EG) 593/2008 Art. 4 Rn. 73.

7. Cf. also: McGuire/Tochtermann, GRUR-Prax 2016, 427 (428); BeckOK BGB/Spickhoff 71. Ed. 1.8.2024, VO (EG) 593/2008 Art. 4 Margin No. 73.

8. German Act to Strengthen Germany as a Location for Justice by Introducing Commercial Courts and English as the Language of the Court in Civil Jurisdiction (Justizstandort-Stärkungsgesetz), BGBl. 2024 I No. 302 of October 10, 2024.

9. <https://www.lto.de/recht/justiz/j/commercial-courts-wirtschaftsstandort-justizstandort-prozess-englische-sprache>.

10. European Union, The 2024 EU Justice Scoreboard, Figures 44, 47, 51, 56.

11. General information on the advantages of German law/German jurisdiction: Federal Chamber of Notaries (BNotK), u.a. (Hrsg.), Law made in Germany.

courts rather an attractive choice even for the non-German contractual parties.

German law is, in principle, characterized by extensive private autonomy, which allows the parties to contractually define their rights and obligations in accordance with their respective interests in each individual case. However, at the same time, German law and the relevant case law set highly relevant limits in this respect, which must be observed when drafting the contract to avoid the risk of certain provisions or possibly even the entire contract being later deemed invalid. This applies in particular to the important contractual provisions of warranty and liability, limitation of liability and indemnification provisions. In this respect, limits set by German legislation and case law on the validity of standard business terms, which also apply in the B2B sector, must be observed and will be discussed in more detail in this article because of their important implications. The resulting restrictions often come as a surprise to foreign contractual partners since in their legal systems the judicial scrutiny of standard business terms is confined to the consumer sector.

II. Liability Under German Law

Which statutory liability and warranty provisions apply in a specific case depends on the particular type of contract. In the field of intellectual property, it is not always possible to classify technology transfer, R&D and license agreements as one or other of the statutory types of contract provided for by German law, as this depends on the specifics of the contractual obligations in each individual case. For example, R&D contracts may have the character of a contract for work and services if they involve the creation of an agreed deliverable. A technology purchase agreement, on the other hand, may be classified as a purchase agreement in accordance with Sections 433 *et seq.* of the German Civil Code (BGB).¹² The same applies to license agreements if they are limited to a single act of transfer.¹³ However, if the license agreement involves more than a single act of transfer, it is considered to be a mixed contract *sui generis*.¹⁴ In this case, the legal norms applicable are those that apply to the respective service.¹⁵ In the case of a service contract, the service provider does not promise a specific result, but only to make every effort to achieve it.

12. Groß/Strunk, *Lizenzgebühren*, 5. Aufl. 2021, Teil A I. Rn. 92 ff.

13. Haedicke, in: Haedicke/Timmann, *Hdb PatR* (2020), § 11 Rn. 178.

14. Haedicke, in: Haedicke/Timmann, *Hdb PatR*, 2nd ed. 2020, Section 11 para. 179; Mes, 5th ed. 2020, PatG Section 15 para. 36; Klein/von Busse/von Jeinsen, in: Metzger/Zech, 1st ed. 2016, SortG Art. 27 para. 127, Osterrieth, in: Osterrieth *PatR*, 6th ed. 2021, para. 649.

15. Mes, 5th ed. 2020, PatG § 15 para. 36.

Decisive for the distribution of responsibilities and liability of the parties is thus the performance specification. This lays down the criteria for the classification of the respective contractual relationship and, thus, ultimately, the limits for the possibility of a limitation of liability and warranty by the parties. This must be taken into account when drafting the contract. This applies all the more, since the English-language description of a contract, for example, as a service agreement, does not necessarily have a corresponding designation under German law.

B. Contractual Limitations of Liability

As mentioned, within the framework of private autonomy, also pursuant to German law, the contractual parties can, in principle, modify their liability and warranty in deviation from the statutory model to suit the needs of the individual case. Although the chosen restrictions differ in individual contracts, some typical clauses have emerged, which will be briefly outlined below. Essentially, there are two different approaches: On the one hand, qualifying the standard of care required in a contractual project can reduce or possibly exclude liability, or the parties may agree to limit the consequences of liability.

I. Qualifying the Applicable Standard of Care

By defining the standard of care in deviation from the statutory model, liability can be made more manageable for the parties and, thus, ultimately, better adapted to the actual economic circumstances. With a risk distribution appropriate to the individual case, the respective profit expectations can ultimately also be taken into consideration.

In principle, statutory liability under German law requires fault, with some exceptions. Section 276 (1) of the German Civil Code (BGB) mentions the two degrees of fault: intent and negligence. Negligence is deemed to exist if (i) in the case of simple negligence, the customary care has been disregarded or (ii) in the case of gross negligence, there is an objectively serious and subjectively inexcusable breach of the requirements of the care required in the ordinary course of business.¹⁶ Wilful intent is the knowledge and desire to carry out the act.¹⁷ At the same time, German law provides for the possibility of contractually further defining and modifying the standard of liability. It may make sense to further concretize the standard of care for simple negligence by referring to standards in certain industries or company sizes. At the same time, statements in the preamble to the contract regarding the abilities of the individual contractual partners can become important

16. BeckOK BGB/Lorenz, 71. Ed. 1.8.2024, BGB § 276 Rn. 19; BGH, NJW 2003, 1118 (1119).

17. BeckOK BGB/Lorenz, 71. Ed. 1.8.2024, BGB § 276 Rn. 10.

when determining the standard of care to be observed. More can be expected from a specialized international Fortune 500 company with many years of experience than from a young start-up.

II. Limiting the Contractual Consequences

At least in principle, the contractual parties can also limit their respective liability to certain types of damage, specific remedies and redress measures or a maximum amount.

1. Type of Damage

In the event of a breach of duty, German law requires compensation for the resulting consequential damage. A contractual limitation to certain types of damage not only helps to mitigate and confine the financial consequences, but also helps the parties to better anticipate them in advance. Thus, indirect damage, lost profit, third-party damage and pure financial loss are typically excluded in order to ensure that the amount of damages to be paid remains at least predictable and that there is no liability for any consequential costs.¹⁸ This is particularly appropriate if a contractual partner could claim damages from an unsuccessful market entry or withdrawal from a market due to IP infringement claims by third parties.

2. Contractual Remedies

The parties can further expressly regulate legal consequences in the event of default, non-fulfilment, defective performance or breach of duty in order to agree on appropriate remedies for each individual case. This applies, for example, to license agreements in the event of IP infringement claims by third parties against the licensee and related potential claims against the licensor.

Under German law, the licensor must provide the licensee with a right to use the licensed technology free from third-party rights. The U.S. Uniform Commercial Code (UCC) provides for a similar construct, whereby sales contracts always contain implied warranties that also provide for freedom from third-party rights without any contractual modification.

To limit this broad liability, an exclusion of knowledge is often agreed in IP contracts. In this case, the licensor only guarantees that, to his best or actual knowledge, he is not aware of any conflicting third-party IP rights.¹⁹ In this respect, the group of persons who have this knowledge can also be precisely defined in order to exclude a far-reaching attribution of knowledge within a legal entity.²⁰ An additional requirement for disclosure of all relevant information (disclosure schedule) may apply.²¹

On the legal consequences side, it is also conceivable to include provisions whereby the licensor is to replace the infringing technology, or the licensee is entitled to a reduction in license fees if and to the extent that the licensor cannot remove conflicting third-party rights.²² Similarly, license agreements alternatively offer the licensor an obligation to in-license the infringed third-party IP rights or to develop a workaround. In addition, it makes sense to agree on rights of withdrawal/termination and escape clauses for the parties. This can go so far as to allow the licensee, in the event of a serious breach by the licensor, to terminate the agreement and therewith any obligations to pay royalties while granting the licensee a fully paid up and unlimited right to continue using the licensed technology and the intellectual property rights after termination.

3. Maximum Amount

To better calculate the liability risk, the parties to an agreement may also agree upon the stipulation of a maximum liability amount by including an absolute or dynamic maximum liability limit (liability cap). Such maximum liability limits are particularly useful in the case of a high liability risk, for example, in the case of a development collaboration, where there is a comparatively low financial consideration. In addition to a fixed amount, the contract volume can be used as a basis, *e.g.*, the contract value, or the license fees already paid or to be paid annually.²³

4. Provision that the Contractual Liability Provisions are Exhaustive

In contrast to Anglo-American common law, German law does not recognize the principle that contracts are normally to be interpreted on their own terms. Rather, in the absence of a contractual provision, the relevant statutory law applies. This must be taken into account when drafting the contract. Therefore, it must be expressly stipulated that the contractual restrictions, modifications and limitations to the statutory law are conclusive. Otherwise, there is a risk that the statutory liability regime could still apply in addition to the contractual liability consequences, which would effectively render the contractual provisions meaningless.²⁴

Furthermore, it must be ensured that the restrictions and limitations, often stipulated in the context of the contractual warranty clauses, also apply to the indemnification clauses. Indemnification clauses, while rather atypical for German contracts, are increasingly found in international contracts and provide the parties

18. Stief, PharmR 2022, 261 (265).

19. Bisle, DStR 2013, 364 (365).

20. Schmitz, RNotZ 2006, 561 (592).

21. Hanke/Socher, NJW 2010, 1576.

22. Stief, PharmR 2022, 261 (265).

23. Stief, PharmR 2022, 261 (265).

24. Stief, PharmR 2022, 261 (265).

with additional contractual remedies. Such indemnity clauses are used to cover known or typical risks whose extent or time of realization is still unknown.²⁵ In such cases, the indemnifying party undertakes to eliminate a contractual partner's obligation towards a third party.²⁶ This may be particularly more advantageous in the case of high monetary claims than to pay the amount due and then seek recourse from the contractual partner.²⁷ However, it is regularly limited to a specific damage event as defined in the indemnity clause, and its scope of application is, therefore, more limited than in the case of a guarantee.²⁸ Nevertheless, a contractual indemnification obligation may result in serious liability consequences, potentially even exceeding the consequences provided for in the warranty clauses. Like the independent guarantee, it establishes a separate and (at least in the absence of contractual provisions to the contrary) strict liability. It is, accordingly, very important to mirror the restrictions stipulated in the warranty clause or to ensure that the limitation and restriction of liability do apply to the contractual warranties as well as the indemnification obligation.

C. Legal Limits of Restrictions Pursuant to German Statutory and Case Law

Limitations of liability ultimately serve to concretize and appropriately distribute risks in individual cases. German law allows this, in principle, within the framework of private autonomy. Nevertheless, there are limits to be observed, the violation of which can lead to the invalidity of the agreed liability rules. In this respect, contracts are regularly subject, on the one hand, to mandatory statutory law, and, on the other hand, the law governing standard business terms may restrict the use of certain contractual provisions. This far-reaching applicability of legislation and case law on standard business terms, also in the B2B area, is particularly surprising, especially since it can also have an impact on contracts negotiated by the parties in individual cases. Knowledge of the applicable principles is, therefore, particularly important to avoid the invalidity of the agreed-upon limitations and restriction of liability and consequently being exposed to unforeseen and potentially unrestricted liability risks.

I. General German Law Statutory Provisions

The private autonomy of the parties in the design of their contractual arrangements is, under German law, limited by both the general moral law and the mandatory law.

1. General Moral Law

Section 138 (1) of the German Civil Code (BGB) serves as a catch-all provision, according to which an immoral commercial transaction is void. The provision serves to protect against unjustifiable contractual agreements and is intended to prevent a contractual party from defrauding the other party in a reprehensible manner.²⁹ An act is always deemed to be immoral if it violates the sense of decency of fair-minded people.³⁰ A total invalidity of the contract in accordance with Section 138 (1) of the German Civil Code (BGB) only occurs if the contract as a whole has been drafted so one-sidedly from a morally reprehensible standpoint that only one party to the contract can enforce its rights, while the essential and legitimate concerns of the other party are disregarded.³¹

2. German Mandatory Law

A highly relevant example for German mandatory law in the context of contractual limitation of liability is Section 276 (3) of the German Civil Code (BGB). Pursuant to this provision, a contractual release in advance from liability for intent is not possible. The provision is mandatory and cannot be waived (even) by private agreement.³² A circumvention, *e.g.*, by means of a corresponding statute of limitations agreement regarding liability for intent before the claim arises, is also not permitted under Section 202 (1) of the German Civil Code (BGB).³³ The consequences of this (amongst others) is that any contractual limitation of liability clauses must specifically provide that the limitation shall not apply in cases of intent. Without such a specification, the entire restriction is considered in violation of German mandatory law and, accordingly, invalid. The consequence is that the restriction of liability does not only not apply in cases of intent, but since the entire clause is considered invalid, the agreed upon liability restriction also does not apply in a case of slight negligence.

An important application of the principle of moral law is contractual penalties. Since it is often difficult to prove damage resulting from a breach of duty, a contractual penalty is often the most effective protection, especially for torts of omission.³⁴ Accordingly, penalty clauses are enjoying particular popularity in all kinds

25. Hilgard, BB 2016, 1218.

26. BGH NJW 1991, 634 (635).

27. Schütt, NJW 2016, 980.

28. Hilgard, BB 2016, 1218 (1221).

29. MüKoBGB/Armbrüster, 9th ed. 2021, BGB § 138 Rn. 1 ff.

30. BGH NJW 2004, 268 (2670).

31. BGH NJW 2001, 2466 (2468).

32. MüKoBGB/Grundmann 9th ed. 2022, BGB § 276 Rn. 182.

33. MüKoBGB/Grothe, 9th ed. 2021, BGB § 202 Rn. 7; BT-Drs. 14/6040, 110.

34. Higher Regional Court Munich NJW-RR 1993, 1334; Ostendorf, JuS 2015, 977.

of IP agreements. In principle, contractual penalties can be agreed either in the form of liquidated damages or as a classic contractual penalty according to Section 339 *et seq.* of the German Civil Code (BGB).³⁵ The distinction depends on the will of the parties: either the simplification of an existing claim for damages is at the forefront (liquidated damages) or the securing of the proper performance of the service by means of the most effective pressure possible on the contractual partner (contractual penalty).³⁶

Pursuant to German law, liquidated damages are allowed, provided that the amount does not exceed the damage that would normally be expected in the ordinary course of events.³⁷ Then again, a contractual penalty may be inadmissible if it unfairly disadvantages the other party in bad faith.³⁸ This is the case if the amount of the contractual penalty is unreasonable, *i.e.*, if the penalty is disproportionate to the gravity of the breach and its consequences.³⁹ A contractual penalty that does not differentiate according to the severity of the breach is, therefore, inadmissible.⁴⁰

It is also often difficult to distinguish this from punitive damages, which are equally inadmissible. The BGH, the highest German civil court, has declared punitive damages to be manifestly incompatible with the fundamental principles of German law.⁴¹ Corresponding enforcement, therefore, regularly fails due to public policy in Sections 723 (2) sentence 2, 328 (1) no. 4 of the German Code of Civil Procedure (ZPO).⁴² Likewise, the fault requirement cannot simply be waived.⁴³

II. German Law on Standard Business Terms

The most significant restrictions in German law arise from the statutory provisions on standard business terms in Sections 305-310 of the German Civil Code (BGB).

1. Individualized Clauses and Standard Business Terms

The first important distinction to be made is between individualized clauses and standard business terms. It is only the latter that are subject to the strict restrictions. However, German courts generally readily classify contractual clauses as standard business terms

unless the parties can show that the specific wording of a clause has indeed been negotiated and specifically agreed upon by the parties of the agreement. The incorporation of standard international clauses into a contract that is subject to German law must, therefore, be viewed in the light of the German legal provisions on standard business terms and the strict German case law. This poses a considerable challenge when drafting international contracts under German law.

Section 305 (1) of the German Civil Code (BGB) defines when a clause is considered a standard business term. Accordingly, standard business terms exist if one party unilaterally sets the contractual conditions, and these are pre-formulated for a large number of contracts. German case law thus qualifies contractual clauses as standard business terms when they are based on a template and/or have been used in previous agreements. But even if a wording is used the first time in a contract, it may be considered as a standard business term if it appears likely that the clause is meant to be used also in future agreements.

In contrast, an individualized contractual agreement exists if the parties have negotiated the relevant clause in detail. To this extent, the parties to the contract must have seriously discussed the content of the clause, *i.e.*, made it the subject of negotiation.⁴⁴ In this respect, it is not sufficient for the parties to have discussed the relevant clause only once. Rather, their content must have been thoroughly discussed, and the contractual partner must be convinced of the factual necessity of the clause.⁴⁵ Only if this is the case can an unmodified adoption of the pre-formulated text be classified as an individualized agreement.⁴⁶ However, here, case law applies an extremely restrictive standard.⁴⁷ Thus, in the case of liability limitation clauses, a standard business terms provision should also be assumed if the parties have negotiated this without this ultimately leading to an adjustment of the original wording of the clause, otherwise a clause will most likely be qualified as standard term by a German court.⁴⁸ This outcome can also not be avoided by a clause in which the contracting parties specifically acknowledge that all clauses were negotiated individually and do not constitute a standard

35. *Ostendorf*, JuS 2015, 977.

36. *BGH NJW* 1992, 2625; *Ostendorf*, JuS 2015, 977 (978).

37. *BGH NJW-RR* 2000, 719 (720).

38. *Federal Court of Justice NJW* 2017, 3145, para. 15.

39. *BGH NJW* 2016, 1230, para. 34.

40. *Higher Regional Court of Munich BeckRS* 2010, 20437; *Ostendorf*, JuS 2015, 977 (980).

41. *BGH NJW* 1992, 3096 (3104).

42. *BGH NJW* 1992, 3096 (3103).

43. *BGH NJW-RR* 2003, 1056 (1059).

44. *vWestphalen/Thüsing, VertragsR u. AGB/Graf von Westphalen*, 50th EL, *VertragsR, Individualvereinbarung*, I., 3. a) para. 36 with further references.

45. *BGH NJW* 1998, 2600 (2601).

46. *vWestphalen/Thüsing, VertragsR u. AGB/Graf von Westphalen*, 50th EL, *VertragsR, Individualvereinbarung*, I., 3. a) para. 36 with further references.

47. *MüKoBGB/Basedow*, 8th ed., § 305 para. 39 with further references.

48. *vWestphalen/Thüsing, VertragsR u. AGB/Graf von Westphalen*, 50th EL, *VertragsR, Individualvereinbarung*, I., 3. f) para. 47.

business terms contract. The requirement of “serious discussion” is not really an option in commercial practice, especially in the case of limitations of liability, as the other party would alternatively have to be presented with the option of unlimited liability.⁴⁹ However, the individuals involved could then be accused of acting in breach of duty of care required in business dealings.⁵⁰ As a result, the existence of standard business terms must practically always be assumed.

2. Hidden or So-called Surprise Clauses (“Überraschende Klauseln”), Section 305c (1) of the German Civil Code (BGB)

Section 305c (1) of the German Civil Code (BGB) provides that clauses that are objectively unusual and subjectively surprising are excluded from a contract and, accordingly, invalid.⁵¹ According to German case law, this is the case if the contractual partner need not reasonably expect the clause and it deviates significantly from his (reasonable) expectations.⁵² The decisive factor for the surprise effect is the contractual context, so that, for example, a disclaimer under the heading “set-off/retention” is inadmissible because placing it under this heading is so unusual that it could not be expected to appear there.⁵³ In contrast, the drafting of limitations of liability in capital letters, which is common in the Anglo-American sphere, is unusual and not considered necessary by German courts. Also, since all clauses in the contract are, in principle, equally important, the positioning at the beginning or end is not important in this respect.⁵⁴

3. Clauses Considered Invalid According to Sections 307, 308 and 309 of the German Civil Code (BGB)

The main purpose of the monitoring of standard business terms is to protect a party from being unreasonably disadvantaged by the party using pre-formulated clauses. This core concern is reflected in Section 307 (1) of the German Civil Code (BGB), according to which clauses are declared invalid if their content unreasonably disadvantages the contractual partner contrary to the principle of good faith. This general clause is followed by two lists in Sections 308 and 309 of the German Civil Code, which regulate the validity of individual clause contents. Section 308 BGB lists clauses that typically violate Section 307 BGB but are not necessarily invalid, as it depends on the formulation of the

individual case.⁵⁵ However, the clauses in Section 309 BGB are always invalid. Sections 308 and 309 BGB do not apply in the B2B area (section 310 (1) sentence 1 BGB), but are limited to consumer protection. However, the value judgments mentioned there are an expression of the requirement of good faith from Section 307 (1) BGB, which is always applicable and, therefore, has an indirect effect in the B2B area. This applies especially to the listing of prohibitions in Section 309 of the German Civil Code.⁵⁶ This also largely applies to Section 308 of the German Civil Code.⁵⁷ In practice, the listing in both sections, Section 308 and Section 309, must, therefore, also be observed in commercial legal transactions.

4. Exclusion of Liability for Injury to Life, Limb or Health

In view of the prohibition under German law as it applies to standard business terms of excluding liability for injury to life, limb or health, liability clauses should stipulate that impairment of the above-mentioned legal interests shall remain unaffected by the remaining limitations on liability. As an absolute prohibition of exemption, a differentiation based on the degree of fault would also be inadmissible.⁵⁸

5. Exclusion for Gross Negligence and Ancillary Persons

A general exclusion of liability for gross negligence is invalid under the German law governing standard business terms. According to the German Federal Court of Justice (BGH), this is because, even in the B2B sector, the contractual partner has the right to expect that the other party will not cause it harm through gross negligence.⁵⁹ The same strict standard applies if the liability is merely restricted rather than being completely excluded.⁶⁰

Furthermore, according to German case law, a general exclusion for breach of duty by ancillary persons involved in the performance of the contract is inadmissible.⁶¹ The legal principle in Section 278 sentence 1 of the German Civil Code rather envisages that the fault of ancillary persons is attributable to and is to be treated as one’s own fault. A corresponding exclusion of liability would, in the view of German courts, be an unreasonable deviation from this legal provision.⁶² The situa-

49. *Leuschner*, NJW 2016, 1222 (1223).

50. *Leuschner*, NJW 2016, 1222 (1223).

51. BeckOK BGB/H. *Schmidt*, 70th ed. 1.5.2024, BGB § 305c marginal no. 13.

52. *Leuschner/Rodi*, AGB-Recht im unternehmerischen Rechtsverkehr, 2021, Part 2 BGB Section 305c para. 29.

53. *BGH* NJW 2010, 3152 (3154).

54. *BGH* NJW 2010, 3152 (3153).

55. *MüKoBGB/Wurmnest* BGB (2022) Section 308 marginal no. 2.

56. *Staudinger/Piekenbrock* (2022), BGB Section 310 para. 28; *BGH*, NJW 2007, 3774 (3775).

57. *BGH* NJW 2008, 1148 (1149).

58. *BGH* NJW 2007, 3774 (3775).

59. *BGH* NJW 2007, 3774 (3775).

60. *Leuschner*, NJW 2016, 1222 (1223).

61. *BGH* NJW-RR 2006, 267 (269 f); *BGH* NJW 1984, 1350.

62. *BGH* NJW-RR 2006, 267 (269).

tion may be different only if the exclusion of attributing the culpable conduct of ancillary persons has been customary in the industry for a long time and is generally excluded from standard business terms having regard to the particularities of the particular type of business.⁶³ However, in its more recent case law, the German Federal Court of Justice (BGH) has also become increasingly critical in this respect.⁶⁴ Therefore, considerable caution is advised even with industry-standard exclusion clauses.

6. Special Features of the Limitation of Liability Regarding Material Contractual Obligations

With regard to so-called cardinal obligations, German case law prohibits an exclusion of liability even in the case of simple negligence on the grounds that otherwise the contract itself would be jeopardized in terms of its content and purpose.⁶⁵ Under German law, cardinal obligations are those obligations whose fulfilment is essential to the proper performance of the contract.⁶⁶ This means that restrictions regarding liability in the case of quality defects, non-performance, default, defective performance, breach of contractual warranties and delays are generally inadmissible and ineffective on the basis of their classification as essential contractual obligations.⁶⁷ However, there is a small workaround to provide the parties with more legal certainty: they can clearly define in the contract what essential contractual obligations are and thus more clearly delineate the scope of liability. Whether this contractual definition will be readily accepted by German courts, or whether the latter will at least reserve the right to undertake a plausibility check, remains to be seen.

Furthermore, according to established case law, an exclusion of liability for slight negligence with regard to the violation of non-essential contractual obligations is also inadmissible if the resulting damage is foreseeable and typical for the type of contract.⁶⁸ Otherwise, this would constitute an unreasonable disadvantage contrary to the principle of good faith.⁶⁹ Consequently, in the case of slight negligence, the only remaining possibility is to exclude liability for non-essential contractual obligations in the case of typically foreseeable damage.⁷⁰

63. BGH NJW-RR 1997, 1253 (1255).

64. Staudinger/Coester-Waltjen (2022), § 309 Nr. 7 Rn. 42a; BGH NJW-RR 2002, 536 (537).

65. BGH NJW-RR 2005, 1496 (1505); Cf. also: Leuschner, ZEuP 2017, 335 (340 f); RGZ RGZ 106, 386 (388).

66. BGH NJW-RR 2005, 1496 (1505).

67. Leuschner, NJW 2016, 1222 (1223).

68. BGH NJW 1985, 2016 (2018); BGH NJW-RR 2006, 267 (269); Graf von Westphalen, NJW 2022, 1409 (1413 f).

69. Federal Court of Justice NJW 1985, 2016 (2018).

70. Leuschner, NJW 2016, 1222 (1223).

7. Exclusion of Statutory Warranty Rights

Also, the customer's statutory warranty rights arising out of poor performance, such as rectification or rescission, cannot be completely and effectively excluded pursuant to Section 309 no. 8 b) aa) of the German Civil Code (BGB). This, at least in principle, also applies in business dealings. Otherwise, according to German case law, the contractual fairness and the buyer's trust that goods are as new may be undermined.⁷¹ However, this does not affect the right to modify the contractually owed warranty in the event of poor performance vis-à-vis the standard set by law, for example, to the effect that the contractual partner must first and foremost have the opportunity to rectify a defect that has occurred before the contract can be rescinded due to a defect and a corresponding claim for reimbursement of payments made can be established.

8. Exclusion of Certain Types of Damage

The exclusion of various types of damage or loss, such as lost profits or consequential damages, is rather common in agreement and often seen as a necessity for the parties to calculate and confine the risk of a particular transaction. Under German law, it is, in principle, possible to exclude indirect, unforeseen, or consequential damages, as well as damage to certain goods.⁷² However, the above-mentioned statutory restrictions, in particular pertaining from Section 308 and Section 309 of the German Civil Code (BGB), must also be observed in this respect. For example, a (comprehensive) exclusion of indirect and consequential damages would at the same time exclude liability for intent, gross negligence and loss of life, limb or health, and the clause would therefore be inadmissible for this reason alone.⁷³ Particular care is therefore required when formulating such a clause in order not to jeopardize the effect of limiting liability and, thus, the calculability of the contractual risk.

9. Restriction to a Fixed Amount (Absolute or Dynamic)

Like most legal systems, German statutory law does not, with a few exceptions, set a cap on damages. Against this background, parties often agreed upon a contractual upper limit for liability, possibly corresponding to an insurance policy or corresponding to the respective party's financial ability to pay damages and/or the allocation of benefits and risks under the agreement as negotiated by the parties. However, when determining the respective maximum liability amount, it should

71. Leuschner/Bach, AGB-Recht im unternehmerischen Rechtsverkehr, 2021, Part 3 Warranty Clauses, para. 27.

72. MüKoBGB/Würmnest (2022), Section 309 No. 7, para. 23.

73. BGH NJW 2002, 2470 (2472); OLG Stuttgart NJW-RR 1988, 1082 (1083).

be noted that, in light of the legal provisions governing standard business terms, it may not be set too low. In this respect, it is recognized by German courts that a maximum amount that is set too low can undermine the rights of the contractual partner to such an extent that the purpose of the contract may be jeopardized and thus constitute an unreasonable disadvantage contrary to the principle of good faith.⁷⁴ Therefore, foreseeable damages typical for the contract must also be factored in by the parties when determining and agreeing upon the maximum amount of liability.⁷⁵

The maximum liability amount does not have to be stated as a specific maximum amount, especially since this will not always be possible depending on the contract.⁷⁶ This also does not contradict the transparency requirement contained in Section 307 para. 1, sentence 2 BGB.⁷⁷ Alternatively, it is not uncommon in contractual practice to link the liability amounts to the sum insured under the existing insurance cover. This applies even more if contractual partners are under an obligation to take out insurance. In the interest of (prompt) claims settlement by a financially strong insurer, contracts often provide for such an obligation in practice, particularly in the case of start-ups, but also for group companies with limited liability. Here, too, care must be taken to ensure that the amount of cover is appropriate in light of the damage scenario.⁷⁸

10. Shortening the Period of Limitation

While the parties can extend limitation periods in individual cases, shortening them is generally not possible under German law, as this would lead to a *de facto* limitation of liability.⁷⁹ Accordingly, a limitation of liability by shortening the statutory limitation periods is inadmissible if this does not exclude damage to life, limb and health as well as gross negligence.⁸⁰ In this respect, the provision codified in section 309 no. 7 a) and b) BGB also applies in commercial dealings due to its indicative effect.⁸¹ Otherwise, the protection of these legal interests and the performance of the contract may be jeopardized.⁸² Section 202, para. 1, BGB already prohibits the shortening of the limitation period in the case of intent.⁸³

74. BGH NJW 1984, 1350 (1351).

75. BGH NJW 2001, 292 (295); BGH NJW 1993, 335 (336).

76. BGH NJW 2013, 291 (295).

77. BGH NJW 2013, 291 (295).

78. OLG Celle, judgment of. 20.11.2001 - 16 U 187/99; BGH, decision of 13.11.2003 - VII. ZR 439/01.

79. BeckOK BGB/Henrich, 71st ed. 1.8.2024, BGB § 202 marginal no. 1.

80. BGH NJW 2013, 2584 (2585).

81. BGH NJW 2007, 3774 (3775).

82. BGH NJW 2014, 211 (213).

83. OLG München BeckRS 2024, 7528.

11. Exclusion “to the Extent Permitted by Law”

Given the far-reaching consequences mentioned above, the drafter of a contract may feel tempted to provide for a clause that liability is restricted only “to the extent permitted by law” in order to benefit from the broadest possible limitation of liability. According to German case law, however, this wording does not sufficiently indicate to the contracting parties how far the exclusion of liability should apply and is therefore qualified as inadmissible and invalid pursuant to Section 307, para. 1, sentence 2 of the German Civil Code (BGB) for not being clear and comprehensible.⁸⁴

D. Consequence of Inadmissibility of Certain Limitation

The particular severity of German law on standard business terms lies not only in the inadmissibility of the clauses as such, but also in the consequences resulting from their inadmissibility. As follows from the respective provision prohibiting it, an inadmissible clause has no effect. However, the rest of the contract and the other standard business terms remain effective pursuant to Section 306 para. 1 BGB.⁸⁵ However, Section 306 para. 3 BGB provides for an important exception to this rule for practical purposes, according to which the rest of the contract or at least the contractual liability provisions as a whole are also invalid if adhering to them would constitute unreasonable hardship for one of the contracting parties.⁸⁶

I. Statutory Provision in Case of Invalidity of Contractual Provision

Pursuant to section 306 para. 2 of the German Code (BGB), the invalid clause shall be replaced by the corresponding provisions of German statutory law.⁸⁷ If there is no statutory provision, the clause is generally deleted without being replaced.⁸⁸ The usual severability clause, according to which invalid clauses are to be replaced by a provision that comes closest to the economic purpose of the original clauses, is not permissible as a circumvention of section 306 para. 2 BGB.⁸⁹

II. No Reduction of Invalid Provisions to Preserve Validity

Reduction in scope in order to preserve validity, which is regularly provided for in contracts by means of a severability clause, is also not permissible.⁹⁰ In order

84. Leuschner/Leuschner, AGB-Recht im unternehmerischen Rechtsverkehr, 2021, Part 3 Exemption clauses para. 18.

85. MüKoBGB/Fornasier (2022), § 306 marginal no. 1.

86. Ermann BGB/Looschelders (2023) Section 306 para. 16.

87. BeckOK BGB/H. Schmidt, 71st ed. 1.8.2024, BGB § 306 marginal no. 29.

88. Ermann BGB/Looschelders (2023) section 306 para. 6.

89. BGH NJW 2016, 401 (402).

90. BGH NJW 2018, 1811 (1812); MüKoBGB/Fornasier (2022) Section 306 para. 18.

to prevent the deliberate or careless use of ineffective clauses in the belief that a judge will reduce inadmissible provisions to the (barely) permissible level, German case law considers such a reduction to be inadmissible.⁹¹ This means that it is not only prohibited to reduce the clause to the maximum permissible level, but also to an objectively reasonable level.⁹² This even applies if the clause still met the requirements of case law at the time it was used, but no longer meets these requirements following subsequent stricter case law.⁹³

III. Entire Exclusion of Liability Affected

In most cases of effectiveness monitoring, it is not even permitted to divide the clause in question into a permissible and not permissible part. According to the case law of the German Federal Court of Justice (BGH), this is only permissible in exceptional cases if the clause contains independent provisions that can be separated from each other in terms of content (blue-pencil test).⁹⁴ This is the case if the invalid part can be deleted without affecting the meaning of the remaining part.⁹⁵ If this exception does not apply, the entire clause is invalid. In the case of a limitation of liability clause, the clause is therefore void in its entirety, and the statutory liability regime applies. The consequences can be enormous: imagine a clause with a limitation of liability, but which has not provided an exception for bodily injury and is therefore invalid. Now, a financial loss occurs as a result of slight negligence in relation to a non-essential contractual obligation. Although the damage could theoretically have been excluded from liability and also has no connection to the missing addendum regarding bodily injury, the user is faced with the ineffectiveness of his entire liability clause and, thus, a case of unlimited liability, although this was not intended by either of the contracting parties.

IV. No Invoking of Invalidity by Drafter of the Respective Clause

However, according to the generally applicable principle of good faith (Section 242 of the German Civil Code (BGB)), the party using inadmissible standard business terms clauses cannot invoke their ineffectiveness but must also accept restrictions that are inadmissible and, therefore, ineffective.⁹⁶ Monitoring of the content of the standard business terms law serves exclusively

to protect the contractual partner, which is why the party using them may not derive any advantages from their invalidity.⁹⁷ The party using them is, therefore, precluded from retreating to a dispositive law that is more favorable to it, with the result that under certain circumstances, only one of the two contracting parties is bound by the clause.⁹⁸

E. Alternatives to Restriction of Liability

Although the options for structuring contracts are limited in view of the far-reaching legal provisions and German case law, there are nevertheless a number of ways to at least partially allocate risks between the contractual parties. One clear hallmark of contracts is the contracting parties' mutual obligations. Seen in this light, obligations on the respective other contracting party to fully cooperate should be expressly stipulated. This approach can also be used to limit liability. For example, liability can be excluded in the event that the contractual partner is responsible for breaches of duty on its part.⁹⁹ Examples for such provisions are the obligation of the other party, *e.g.*, the licensee, to conduct its own freedom-to-operate analysis before launching the product in a particular market, or to carry out contractually defined receiving inspections regarding any materials or devices for deviations from the agreed-upon specifications.

However, this may only be permitted within the limits of reasonableness.¹⁰⁰ Only if the severity of the breach of duty is in proportion to the consequences of the sanction is there no unreasonable disadvantage within the meaning of Section 307 (1) of the German Civil Code (BGB).¹⁰¹ Moreover, the care required in business dealings can be determined by contract and thus at least influence the degree of negligence under Section 276 of the German Civil Code (BGB).¹⁰² However, it should be noted that an indirect limitation of liability of an objectively existing contractual obligation is also not permissible in standard business terms.¹⁰³

F. Conclusion

Contracts concluded with German partners in the tech sector in an international setting are generally drafted in English and follow Anglo-American models.

91. *Staudinger/Mäsch* (2022) BGB Section 306 para. 23; *BGH NJW* 2017, 3145 (3147).

92. *Staudinger/Mäsch* (2022) BGB Section 306 para. 26.

93. *BGH NJW* 2008, 1438 (1439); *MüKoBGB/Fornasier* (2022) Section 306 para. 19.

94. *BGH NJW* 2020, 1811 (1814).

95. *MüKoBGB/Fornasier* (2022), section 306 para. 23.

96. *MüKoBGB/Schubert* (2022) Section 242 para. 627.

97. *BGH NJW* 2016, 1572 (1574).

98. *Staudinger/Mäsch* (2022) BGB Section 306 para. 18.

99. *BGH NJW-RR* 2004, 1175 (1176).

100. *BGH NJW* 2005, 1174 (1176).

101. *BGH NJW* 1990, 767 (768).

102. BeckOK BGB/Lorenz, 70th ed. 1.5.2024, BGB § 276 marginal no. 23.

103. *MüKoBGB/Wurmnest*, 9th ed. 2022, BGB Section 309 No. 7 para. 23.

At the same time, the contracts are often subject to German law and German jurisdiction. While German law allows for extensive private autonomy, especially in the B2B sector, it also contains equally practically relevant and significant restrictions which need to be adhered to in order not to risk the validity of certain clauses or possibly even the entire agreement. This is particularly true as regards contractual limitations of liability, which in many cases need to be adjusted in accordance with German statutory and case law in order to ensure their admissibility and validity. Other-

wise, such restriction of limitations will only be effective to the benefit of the other party, but the drafter of the clauses will be prevented from evoking said limitations in their own interest. For foreign contractual partners, the complex limitations on admissibility and effectiveness resulting out of the law on standard business terms and the extensive relevant German case law are often surprising. It is, therefore, not advisable to just blindly adopt internationally accepted contractual clauses. Instead, professional advice should be sought at an early stage. ■