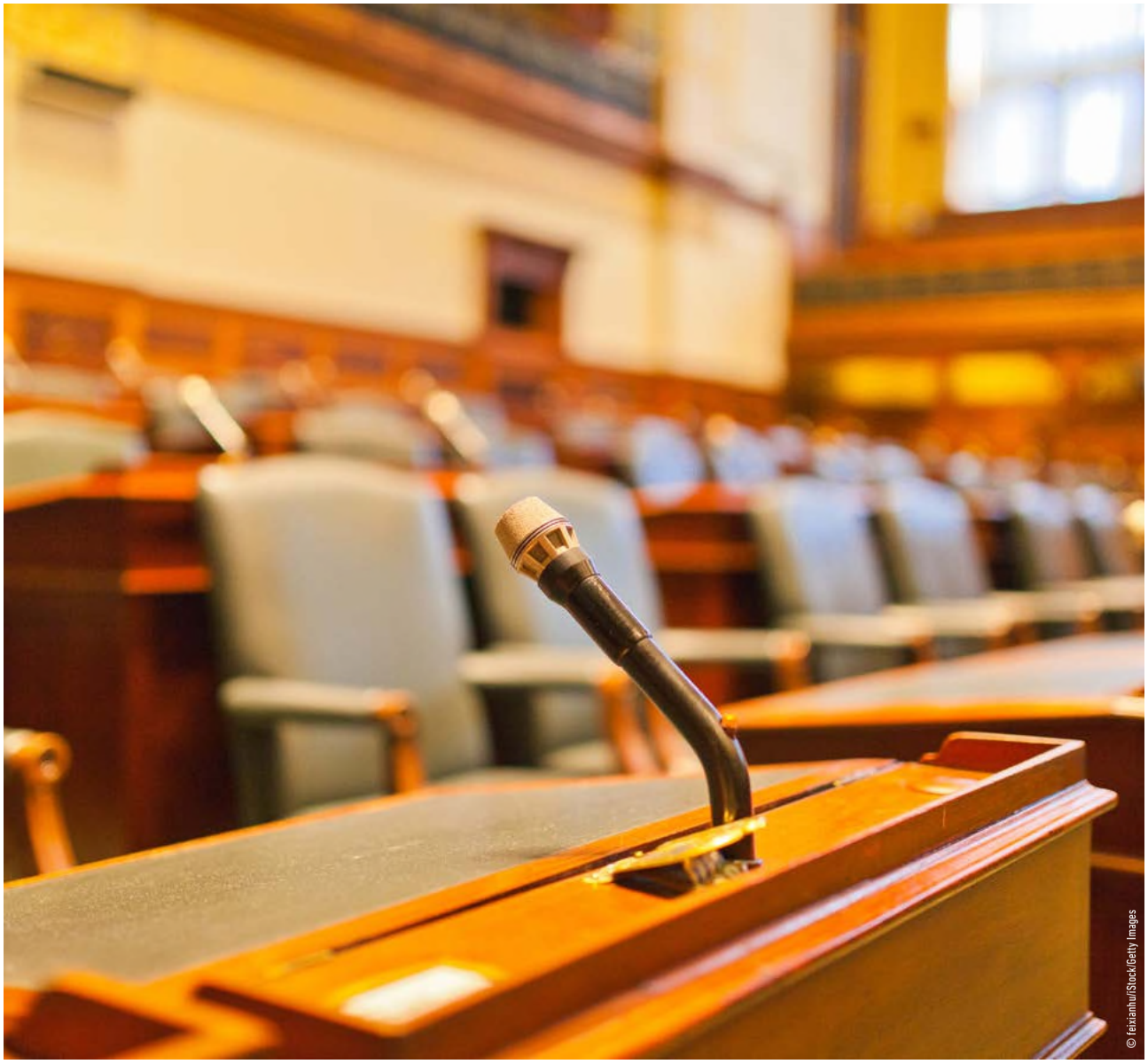

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Forfeiture clauses in employment contracts

New guidance from the Federal Labor Court

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Forfeiture clauses are commonly used in German employment agreements. While under statutory law, claims will only become time-barred three years after the end of the year of their due date, forfeiture clauses are popular to limit the ability to exercise claims, in most cases to three months after the due date. They are therefore essential for avoiding long periods of legal uncertainty for both parties. Oftentimes, changes in case law pertaining to forfeiture clauses go unnoticed by employers. If forfeiture clauses are not updated regularly, they are considered null and void, often causing significant financial risks for employers.

Rationale of forfeiture clauses

In the vast majority of cases, forfeiture clauses in employment contracts are considered "general terms and conditions" and thus fall under statutory law which restricts their permissible content and wording. The validity of forfeiture clauses is therefore assessed in accordance with Sec. 305c and 307 to 310 of the German Civil Code (*BGB*) and falls within the scope of a so-called "content control". One important element of the content control is the transparency requirement, which requires clauses to be formulated clearly, unambiguously and comprehensibly. The transparency requirement has been subject to many court decisions in the past years. Most recently, two new decisions have now further delineated the permissible content and wording for forfeiture clauses and require employers to review their standard employment agreement.

Clear instructions for the employee required

In the first decision (Federal Labor Court, decision of 3 December 2019 – Case No. 9 AZR 44/19), the employer used a forfeiture clause which required that a claim must be asserted in court within three months unless the other party *"rejects the claim or does not oppose it"*. The clause therefore also required immediate court action in case the other party remained silent, promised to fulfil the claim or did not oppose it. As a result, the claimant had to take legal court action immediately to prevent the claim from being excluded – irrespective of how the employer reacted to his claim. While the wording of the clause itself was clear and comprehensible, the obligation to take immediate legal action is not in line with what the law expects from an employee, in particular when the employer does not oppose the claim. Taking legal court action would seem inconsistent in such a case. Consequently, the Federal Labor Court ruled that the clause is invalid because it incorrectly reflects the legal situation. The court clarified that forfeiture clauses must provide clear instructions to the employee insofar as he does not have to assert his claim at court if the employer does not oppose it.

Exclusion of indispensable rights

Certain indispensable rights, such as the minimum wage right, must be expressly excluded from a forfeiture clause. Otherwise the entire clause is considered null and void. A special statutory regulation on minimum wages, namely an Ordinance on Mandatory Working Conditions for the Nursing Care Sector (hereafter *"Care Regulation"*) was the subject of another recent decision of the Federal Labor Court on 22 October 2019 (Case No. 9 AZR 532/18). In this case, the employee did not assert his wage claim to the defendant employer in due time. The employer then argued, amongst other things, that the claim was now forfeited due to the forfeiture clause. The employee raised the argument that the forfeiture clause in his employment agreement did not exclude claims to minimum wage under the Care Regulation. Interestingly, the respective employee was not even working in the care sector but worked as a salesperson in the automotive industry. In view of that, the Federal Labor Court found that that the disputed clause was valid. It can therefore be concluded that it is not necessary to explicitly exempt each and every law providing for indispensable rights if the relevant law is not applicable to the present case.

> The transparency requirement has been subject to many court decisions in the past years.

Nevertheless, for reasons of precaution, employers are best advised to either explicitly list indispensable rights by means of a non-exhaustive list (for example *"This forfeiture clause shall not apply to claims for minimum wages pursuant to the Minimum Wage Law Act, the Posting Workers Act, the Temporary Employment Act or other mandatory minimum working conditions under national law…"*) or include a blanket exception (for example *"This forfeiture clause shall not apply to claims which by law are excluded*

from this forfeiture clause."). According to case law of the Federal Labor Court, such an approach satisfies the transparency requirement (decision dated 18 September 2018 – Case No. 9 AZR 162/18 para. 51).

How to avoid non-transparent clauses

Forfeiture clauses must be comprehensible to the average employee. First and foremost, this means that clear and preferably simple language should be used. The language must be consistent and should enable the employee to understand what is expected of him in order to prevent the claims from being forfeited. This also means that statements must not be contradictory in content, as well as that the clause does not impose a conduct on the employee which seems contradictory to common behavior.

Regular review of employment agreements necessary

Due to the fast-moving development of the Federal Labor Court's case law, a regular review of forfeiture clauses in standard employment agreements is recommended. Particular caution must be exercised if older agreements are changed at some point during the ongoing employment. According to the Federal Labor Court, changes in the law can also become relevant for employment agreements that were concluded (long) before a change in case law. If, for example, the employment agreement is amended in connection with a promotion or a salary increase, it is usually agreed that "*the remaining provisions of the employment agreement shall remain unaffected by this change*". By doing so, the parties have referred to the original contract in its entirety and the old agreement is transformed into a new one. However, new agreements have to comply with the most recent legal situation with the effect that there is a considerable risk that the forfeiture clause will be rendered invalid.

Employers are, therefore, well advised to conduct regular (annual) reviews of their standard employment and standard amendment agreements to ensure that all required changes are properly implemented. ←