Newsletter Commercial

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unyer GLOBAL ADVISORS

Inhalt

Dear Readers,

The third quarter of 2025 demonstrated how quickly economic realities can change, requiring companies and institutions to adapt flexibly to new conditions. While many sectors continue to deal with the aftermath of international trade conflicts and supply chain disruptions, the importance of technological development and transformation is growing. Digitalization, sustainable value creation, and innovative business models are at the heart of current discussions and offer opportunities to succeed in the global marketplace.

These dynamic developments bring numerous legal and strategic requirements. New regulations, changes in tax policy, and pressure to adapt to day-to-day business demand practical solutions and forward-looking planning. The labor market is changing as much as the demands for compliance and risk management.

This edition of our newsletter summarizes key innovations resulting from the EU AI Act, which applies to providers and operators of AI systems in the European Union as of February 2, 2025. Additionally, our authors examine the EU's 18th package of sanctions against Russia, which imposes numerous restrictions on exporting companies. Our newsletter for the third quarter of 2025 also includes tips on contract negotiations for non-lawyers and exciting case reviews in the field of insolvency law.

Our brief analyses provide practical support for implementing strategic and legal measures and decisions. We also invite you to use our interactive web formats to discuss new developments directly with experts. Further information can be found in our Luther events calendar (Events | Luther Lawfirm mbH).

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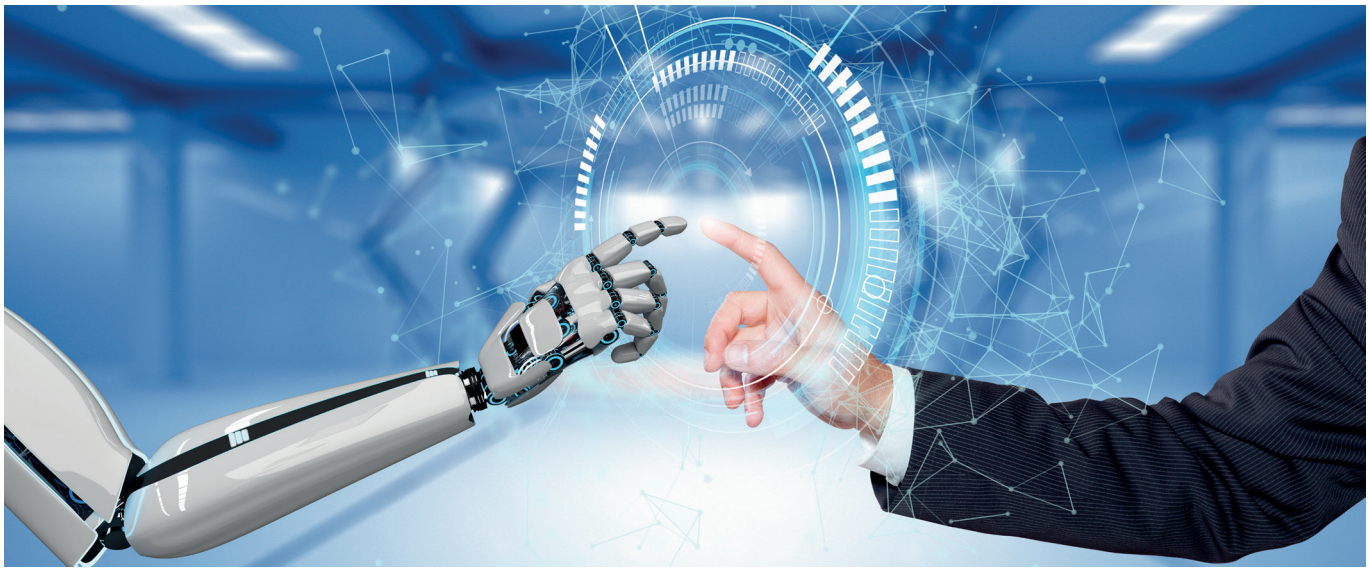
EU AI Act brings important changes!



With the entry into force of the new EU AI Act, providers and deployers of AI systems in the European Union have been obliged since 2 February 2025, under Article 4 EU AI Act, to take measures to ensure a sufficient level of AI literacy of their staff and other persons dealing with the operation and use of AI systems. This obligation requires the implementation of far-reaching measures which go beyond mere technical knowledge and concern the fulfilment of complex compliance requirements.

Article 3(56) EU AI Act defines "AI literacy" within the meaning of Article 4 EU AI Act as skills, knowledge and understanding that make it possible to make an informed deployment of AI systems, as well as being able to identify the opportunities and risks of AI and possible harm.

The creation of clear internal guidelines for best practices, ethical principles and compliance requirements specifically tailored to the deployment of AI will be of relevance in future with regard to mandatory internal organisation and the appropriate measures. In addition to this, continuous training and further education will be needed to be able to maintain the AI strategy. Providers and deployers of AI systems who do not take adequate measures risk committing compliance violations, which may also lead to consequences under liability law.

The requirements stipulated in Article 4 EU AI Act necessitate new corporate structures and a sense of responsibility in dealing with AI systems. This is why we have developed and now offer special training to become an "AI Officer / KI-Beauftragter" according to Article 4 EU AI Act, including the award of a certificate, as part of our basic two-day training on "AI & Compliance", which is held every two months. As proven experts, we provide compact, practical and scientifically sound training that equips participants with the knowledge to understand the requirements of the EU AI Act and implement them efficiently in their companies. By combining theoretical and practical aspects in our training we ensure that participants can implement their newly gained knowledge immediately in their everyday work activities. Our training course thus enables companies to implement the statutory requirements in the best possible manner while minimising risks and seizing opportunities.

The next training is scheduled to be held in Cologne from 30 September – 1 October 2025. Further planned training dates:

- 25 – 26 November 2025, Hanover
- 27 – 28 January 2026, Frankfurt
- 17 – 18 March 2026, Cologne
- 19 – 20 May 2026, Hanover
- 7 – 8 July 2026, Frankfurt

We have also already started with the preparations for other specialised events, including on topics such as "Contract Design & AI", "Cybersecurity & AI" and "AI for Decision Makers". More details will follow.

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Frankfurt Higher Regional Court: Legal consequences of violating the obligation to preserve assets in D&O insurance

Interpretation of the judgement of March 5, 2025 – 7 U 134/23

On March 5, 2025 (7 U 134/23), the Higher Regional Court of Frankfurt am Main ("OLG Frankfurt") passed a significant judgement regarding D&O insurance coverage for executives in the event of post-insolvency payments pursuant to section 15b of the German Insolvency Code (section 64 of the German Limited Liability Companies Act ["GmbHG"], old version). The D&O insurer's obligation to indemnify is limited by the Senate through the introduction of additional evidence relief. This can have significant implications for the personal liability of the managing director in the event of a claim for so-called insolvency delay liability. Despite not yet being legally binding, the ruling provides valuable insights into various liability and evidence issues in the context of claims against D&O insurers.

Background

The liability provisions in section 15b of the Insolvency Code ("InsO") are based on a simple system: as soon as a company becomes insolvent or overindebted, managing directors are generally no longer allowed to dispose of the company's assets in order to protect creditors. If payments are nevertheless made, they must be reimbursed to the company in entirety. For liability under section 15b InsO, negligent conduct on the part of the manager is sufficient, i.e., intentional or knowing conduct is not required by the liability standard.

In practice, both the manager and the D&O insurer are usually held liable. However, according to the standard "General Insurance Conditions" for the industry, the insurer is exempt from its obligation to indemnify if the managing director knowingly violates his duties. According to established jurisprudence, in the event of a violation of so-called cardinal duties, i.e., the violation of essential primary duties of the managing director, prima facie evidence indicates that the managing director intentionally violated these obligations. In this context, the Federal Court of Justice requires a substantial presentation of the underlying circumstances that indicate a deliberate breach of duties by the managing director.

Facts

The managing director of the insolvent A-GmbH, who was insured for his employment with a D&O insurance policy, made prohibited payments within the meaning of section 15b InsO (section 64 GmbHG, old version) prior to the opening of insolvency proceedings. The insurance contract contained the standard industry clause under which the insurer is under no obligation to indemnify if it proves that the insured party knowingly or intentionally breached their obligations. The insolvency administrator of A-GmbH asserted a claim against the D&O insurance company based on managing director liability. The D&O insurer rejected its obligation to indemnify, pointing to a violation of cardinal duties and thus knowingly acting on the part of the managing director.

At first instance, the Regional Court Frankfurt am Main ruled against the D&O insurer. In the court´s view, the D&O insurer did not provide sufficient evidence for a willful breach of duty by the managing director.

The OLG Frankfurt, however, ruled in favor of the D&O insurer's appeal on the grounds summarized below.

Key point of the decision and criticism

The Senate of the OLG Frankfurt upheld the principle of prima facie evidence for knowing misconduct by the managing director in the event of a breach of cardinal duties, which was consistent with previous rulings.

Given the importance of the prohibition on payments under section 15b InsO for the protection of creditors, it was unsurprising that the OLG Frankfurt deemed payments made after the company became insolvent to constitute a breach of cardinal obligations. However, in contrast to previous Federal Court case law, the OLG Frankfurt ruled that any payment made by the managing director after the company became insolvent was prima facie evidence of an intentional violation. Therefore, in the court's view, the insurer was not required to prove additional circumstances that would otherwise be necessary to prove intentional conduct.

Consequently, when it comes to payments made after reaching insolvency, the managing director would be presumed to be aware of the insolvency. This assessment is questionable, especially considering the complex examination of the conditions for over-indebtedness under section 19 InsO. Without legal advice on insolvency law, managing directors are often unable to evaluate whether insolvency has been reached.

Practical consequences

If the Federal Court upholds the decision of the OLG Frankfurt, the insolvency administrator will have to prove that the managing director was unaware of the company's insolvency in order to successfully claim against the D&O insurer. In practice, providing this evidence will likely be challenging.

According to the decision of the OLG Frankfurt, it would be much harder to file a claim against the D&O insurer. This would worsen the legal position of the managing director, who would have less insurance coverage and consequently have to use personal assets to cover incurred damages. Additionally, the legal position of the insolvency creditors would deteriorate because, typically, only D&O insurance has the financial resources to settle such claims.

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“Silence means defeat” – On the secondary burden of demonstration in contestation proceedings

Judgement of the Federal Court of Justice of 6 March 2025 – IX ZR 209/23

Overview

In its judgement of 6 March 2025 – IX ZR 209/23, the German Federal Court of Justice ruled on the secondary burden of demonstration in contestation proceedings. In the final analysis, it was especially suspicious that the parties opposing the contestation – as persons with a close relationship to the debtor – did not make detailed submissions on purchase price payments. As those payments were not clarified, the claimants’ (creditors’) submissions in this respect had to be regarded as acknowledged in the proceedings. As a consequence, the Federal Court of Justice quashed the next lower court’s judgement.

Facts

The claimants sought an order requiring the defendants to tolerate execution against their respective co-ownership interests in two properties located in Baden-Baden, Germany. The claimants had two enforceable claims against the debtor, in the approximate amounts of EUR 1.76 million and EUR 700,000. These claims were based on guarantees that have been furnished by the debtor as security for claims arising from leasing transactions.

The debtor was the first defendant’s mother and the mother-in-law of the second defendant. In October 2016, the debtor sold the defendants a property that was being let, for co-ownership in equal shares, at the price of EUR 650,000. In 2017, she additionally sold the first defendant a residential building that was being used by the debtor herself, at the price of EUR 600,000, following which the first defendant assigned a 50% co-ownership interest to the second defendant.

In the claimants’ opinion, the defendants obtained their respective co-ownership interests in the properties in a contestable manner. The claimants disputed that the purchase prices agreed in the notarial deeds had been paid.

The lower courts, however, denied the contestability of the transfers of ownership under the German Contestation Act. The main reason given for the dismissal of the action was that the claimants had failed to prove that at the time ownership was transferred, the defendants had been aware of the debtor’s intent to place her creditors at a disadvantage. The lower courts held that even though the defendants’ close personal relationship to the debtor might be an important indication that they were aware of the debtor’s intent to place her creditors at a disadvantage, especially if the performance owed was out of proportion with the consideration, the defendants had complied with their secondary burden of demonstration regarding the circumstances behind the purchase of the two properties. According to the lower courts, the defendants could not be expected to make further submissions – for example, with regard to the purchase price

payments – as part of the secondary burden of demonstration. The Federal Court of Justice took a different view.

General information about being a "person with a close relationship to the debtor" (including legal persons)

The term "person with a close relationship to the debtor" is defined in Section 138 German Insolvency Code and means any person who, for personal, corporate or similar reasons, has special access to information about the debtor's financial circumstances. If the debtor is a legal entity (for example, a limited liability company, limited partnership, stock corporation or SE), not only the members of the representative and supervisory bodies, but also general partners, shareholders holding more than 25% of the shares and intermediaries, if any, fall within the scope of the provision. Persons with a close relationship to the debtor within the meaning of Section 138 German Insolvency Code are subject to special rules regarding the burden of proof that make it significantly more difficult (but not impossible) for them from a procedural perspective to defend against rights to contest.

The judgment

The defendants should have made more detailed submissions on the payment of the purchase prices that had been agreed in the notarised purchase agreements. By contrast, they were not obliged to furnish proof of payment.

According to the Federal Court of Justice, the party opposing the party that bears the primary burden of demonstration is subject to a secondary burden of demonstration if the party bearing the primary burden of demonstration has no detailed knowledge of the relevant circumstances and no opportunity to further clarify the facts while the disputing party knows all the relevant facts and can easily provide more detailed information and this is not unreasonable for it. The disputing party is obliged to make inquiries as part of its secondary burden of demonstration, except where this would be unreasonable. However, the secondary burden of demonstration leads neither to a reversal of the burden of proof nor to an obligation incumbent upon the party against whom a claim is being made, beyond the procedural obligation to tell the truth and the burden of demonstration, to provide the claimant with all the information needed to win the lawsuit. If the party against whom a claim is being made does not comply with its secondary burden of demonstration, the claimant's submissions must be deemed acknowledged, according to Section 138 German Code of Civil Procedure.

A secondary burden of demonstration regarding occurrences outside the other party's sphere of knowledge may be imposed if the party with whom the burdens of demonstration and proof lie provides concrete evidence indicating that its statement is correct. This was the case in the matter at issue.

The claimants had claimed that the defendants had not actually paid the purchase prices agreed in the purchase agreements, and they had made submissions containing sufficiently concrete evidence to this effect, including, for example, that the debtor had declared in another lawsuit in 2021 that she no longer owned any significant assets, which raises doubts about whether the properties were actually sold for a valuable consideration only a few years before. The claimants thus claimed, in substance, that there had been a gratuitous transfer, which – in particular from the point of view of a sham transaction between different parties – could be an indication that the subjective requirements for contestation under Section 3 (1) German Contestation Act are fulfilled. Where contracts are entered into between the debtor and a person with a close relationship to the debtor, there is a particular risk that these contracts constitute mere sham transactions carried out to protect assets from creditors. Against this background, it would not have been unreasonable to require the defendants to provide more detailed information on the payments actually made and to demonstrate whether and to what extent the agreed purchase prices had been paid.

Conclusion

Asset transfers to persons with a close relationship to the debtor are always "especially suspicious". There are high standards under substantive and procedural law for the defence against rights to contest.

In a corporate context, people often fail to see that (even indirect) shareholders and acting members of corporate bodies can be subject to a risk of contestation, as "persons with a close relationship to the debtor". This risk can, however, be reduced by strict compliance with the requirements for cash transactions. This means that the exchange must be at arms' length and take place within a short period of time. This must be demonstrated and proven in the event of a dispute.

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News from export control: Russia/Belarus embargo – 18th EU sanctions package of July 18, 2025

For a good year, things appeared relatively calm for importing and exporting companies: While the 14th package of sanctions tightening the embargo on Russia and Belarus on June 24 and 29, 2024, still included such “exotic” and far-reaching innovations as a “best efforts obligation” and a “due diligence obligation” or provided for extensions to the “no-Russia clause” and introduced a “no-Belarus clause” for the first time, the following sanctions packages Nos. 15, 16, and 17 contained no major surprises or significant innovations, at least for trade: As expected, the lists of names and goods were expanded, the best efforts and due diligence obligations and the already familiar service and software bans were extended once again, and the Belarus embargo was brought even more into line with the Russia embargo. However, the focus of the embargo tightening was more on the “shadow fleet,” further restrictions on access to airports, ports, and locks, and measures against Russian oil and gas exploration and production.

What changes does the 18th package of sanctions of July 18, 2025, bring for importing and exporting companies?

Announcement: “Strength is the only language Russia will understand.”

The 18th package of sanctions announced by the EU at the beginning of June 2025 was described in the relevant media as a particularly drastic and harsh measure, if not the harshest since February 2022. Essentially, the aim will be to target two areas in particular: the Russian energy sector and the banking sector. The new EU sanctions package will provide for measures to prevent the recommissioning of Nord Stream 1 and 2, as well as an import ban on Russian gas; the oil price cap will be lowered; additional ships in the shadow fleet will be listed; and an import ban on products refined from Russian crude oil will be imposed. Furthermore, banks involved in circumventing existing sanctions will be sanctioned; the ban on the use of the SWIFT system will be extended to include additional Russian banks; and sanctions will be imposed on the Russian Direct Investment Fund. Fearing a complete halt to supplies of gas, oil, and nuclear fuel from Russia, Slovakia then threatened to veto the prepared sanctions package, and Malta, Greece, and Cyprus also raised concerns, as they

feared disadvantages for domestic shipping companies if the oil price cap were lowered too much.

In light of these announcements, trading and distribution companies maybe have felt that they will not be significantly affected by the 18th package of sanctions. However, the discussion surrounding the energy sector has overshadowed the fact that the EU had also announced further export bans on dual-use goods, critical technologies, and industrial goods, with a focus on machinery, metals, plastics, and chemicals worth more than €2.5 billion, as well as supplementary measures to prevent the circumvention of sanctions, which were then actually implemented with the 18th sanctions package of July 18, 2025 (which came into force on July 20, 2025).

Russia: Regulation (EU) No. 833/2014

Amendments to Regulation (EU) No. 833/2014, and in particular to the goods-related measures, were made by Regulation (EU) 2025/1494 of July 18, 2025:

Export bans: Amendment to goods lists

Article 2a(1) and Article 3k(1) of Regulation (EU) No 833/2014 prohibit the sale, export, supply, or other transfer of the goods and technology listed in Annex VII and Annex XXIII, respectively, directly or indirectly, to natural or legal persons, organizations, or entities in Russia or for use in Russia. Both annexes have now been expanded again. In Annex VII, Part A, Category VIII, a new section X.C.VIII.005 has been added, which contains various chemical components for fuels. In Part B, Table 5 "Machine tools, equipment for additive manufacturing and related goods" has been revised and supplemented with goods falling under CN codes 8456 30 and 8456 50. No exceptions are provided for contracts that have already been concluded.

Annex XXIII has been completely revised. The newly added goods are listed in the new Annexes XXIIIE and XXIIIF. In accordance with Article 3k(3ah) and (3ai), these new goods are subject to temporary exceptions for contracts concluded before July 20, 2025, until October 21 and January 21, 2026. For goods falling under CN code 3402 90, an authorization may also be granted in accordance with Article 3k(5i) if the goods are necessary for the fulfillment of contracts concluded before January 1, 2025. Furthermore, pursuant to Article 3k(5h), an authorization may be granted in respect of goods falling under CN code 8422 30 if the goods are necessary for the packaging of food, beverages, and pharmaceuticals.

Article 3k(1a) of Regulation (EU) No. 833/2014 prohibits the transit through Russian territory of goods and technologies listed in Annex XXXVII that are exported from the Union. This annex has also been revised. New additions include goods falling under CN codes 7308 90, 8419 50, 8419 89, 8419 90, 8479 82, 8701 21, 8716 39, and 8716 90.

Export bans: Other

Recital (7) of Regulation (EU) 2025/1494 of July 18, 2025 clarifies that the prohibition on indirect exports specifically and in particular also covers deliveries via third countries. In order to counteract circumvention of the embargo measures in such cases, a "catch-all mechanism" already known from the Dual-Use Regulation has been introduced (new Article 2a(1aa) of Regulation (EU) No. 833/2014), initially only in relation to the goods listed in Annex VII: With immediate effect, the export of goods and technologies listed in Annex VII to third countries other than Russia requires an authorisation if the exporter has been informed by the competent authority that the goods and technologies are or may be intended, in whole or in part, for natural or legal persons, organisations or institutions in Russia or for use in Russia. Unlike in Article 4(2) of the Dual-Use Regulation, however, no obligation has been included for the exporter to inform the authority if he has otherwise become aware of end use in Russia. Such a provision is, however, not necessary because, on the one hand, it has been clarified that the prohibition on indirect exports remains unaffected, i.e., the exporter remains responsible (even without notification by the authority) for preventing re-exports to Russia. On the other hand, according to Article 6b of Regulation (EU) No. 833/2014, there is in any case a "duty on everyone" to provide the authorities with all information that facilitates the implementation of the embargo measures and to cooperate with the authorities in verifying such information.

Import bans

With the 18th package of sanctions, a new Article 3ma was added to Regulation (EU) No. 833/2014. According to this, from January 21, 2026, it will be prohibited to directly or indirectly purchase petroleum products falling under CN code 2710 (various oils and oil preparations, e.g. also lubricating oils, motor oils, fuels) directly or indirectly, if they were obtained in a third country from crude oil falling under CN code 2709 00 originating in Russia. In addition, the usual prohibition on the provision of technical assistance, brokering services, financing or financial assistance, as well as insurance and reinsurance in connection with the import ban, applies. Importers must also provide proof of the country of origin of the crude oil used

to refine the product in a third country at the time of import, unless the product is imported from a partner country listed in Annex LI (Canada, Norway, UK, USA, Switzerland).

Military goods

Article 4 of Regulation (EU) No. 833/2014 has also been amended. Previously, it "only" prohibited the provision of technical assistance, brokerage services, financing, or financial assistance in connection with the goods and technologies listed in the Common Military List, while the actual export ban on military equipment is regulated at the national level, in Germany in Section 74 of the Foreign Trade and Payments Ordinance (AWV), and the corresponding import ban is found in Section 77 AWV. Article 4 has now been revised and paragraph 1(a) now also contains on a European level an export ban (sale, delivery, transfer, export) and paragraph 1(c) an import ban (purchase, import, transport) with regard to goods on the Common Military List.

Russia: Regulation (EU) No. 269/2014

With regard to the person-related sanctions, Implementing Regulation (EU) 2025/1476 of July 18, 2025, expanded Annex I to Regulation (EU) No. 269/2014 to include 14 natural persons and 41 legal entities, organizations, and institutions. These include (not for the first time) several companies from China and Hong Kong, as well as from the United Arab Emirates, but also from India and Singapore, for example. Since, pursuant to Article 2(2) of Regulation (EU) No. 269/2014, no funds or economic resources (in particular commercial goods) may be made available, either directly or indirectly, to any of these sanctioned natural and legal persons, organizations, and entities, the sanctions are by no means limited to business relationships with a connection to Russia. Prior screening of potential business partners is required in all cases.

Belarus: Regulation (EC) No. 765/2006 (Part I)

Amendments relating to goods-related measures under Regulation (EC) No. 765/2006 were made by Regulation (EU) 2025/1472 of July 18, 2025:

Similar to the stricter measures against Russia, an import ban was imposed on goods and technologies included in the Common Military List with the new Article 1aa added to Regulation (EC) No. 765/2006, and an export ban was imposed with the new Article 1ab. The national export and import bans on military equipment (in Germany pursuant to Sections 74 and 77 AWV) remain in force.

Annex XVIII has been expanded to include various goods whose sale, delivery, transfer, or export to Belarus or for use in Belarus is now prohibited under Article 1bb of Regulation (EC) No. 765/2006. Exceptions for existing contracts can be found in Article 1bb(3a) and (3b) and a revised licensing requirement (in the case of personal use of certain goods in the household by natural persons in Belarus) in Article 1bb(13) of the Regulation.

Annex Va has also been expanded and, as with the measures for Russia, a catch-all clause in the form of an authorization requirement has been introduced in the new Article 1f(1aa) of Regulation (EC) No. 765/2006 for cases where the exporter has been informed by the authorities that the goods intended for export to third countries could be used in whole or in part for natural or legal persons, organizations, or entities in Belarus or for use in Belarus.

Annex XIVa contains a list of goods whose transit through Belarus is prohibited in accordance with Article 1s(1a) of Regulation (EC) No. 765/2006. Goods falling under CN code 8479 82 have been newly added to this annex. In addition, Annex XIX, i.e. the list of goods whose transit through Belarus is prohibited under Article 1bb(2) of Regulation (EC) No. 765/2006, has been revised.

Belarus: Regulation (EC) No. 765/2006 (Part II)

Unlike in the case of the Russian embargo, the person-related sanctions against Belarus are not contained in a separate regulation, but are part of the Regulation (EC) No. 765/2006, which also includes goods- and sector-related as well as other embargo measures. Article 2(2) of Regulation (EC) No. 765/2006 prohibits the direct or indirect provision of funds or economic resources to the natural and legal persons, organizations, and entities listed in Annex I. Implementing Regulation (EU) 2025/1469 of July 18, 2025 added eight companies from Belarus to Annex I of the Regulation.

Outlook: After the package is before the package...

After the "summit meeting" in Alaska on August 15, 2025, remained unsuccessful, as expected, and Russia instead continued its war of aggression against Ukraine not only unabated but harder than ever, the EU immediately announced

further measures and asked member states for proposals. It is doubtful that the 19th package of sanctions, which is expected shortly, will already include the complete renunciation of Russian energy demanded by President Trump or the imposition of high tariffs on Russia-friendly countries such as China. EU Commission President von der Leyen recently spoke only of accelerating the phase-out of Russian fossil fuel imports and (once again) focused the 19th package of sanctions on the banking sector in addition to the energy sector, as well as on preventing the use of cryptocurrencies to circumvent sanctions. However, as the 18th package of sanctions has shown, this should not obscure the fact that importing and exporting trading companies may also be affected by the new measures, even if the media tends to focus more on the energy and financial sectors.

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Tips on contract negotiation for non-lawyers (Part 2)

This is the second part of a series of three articles designed to help non-legal staff negotiate and conclude business deals. The information is aimed particularly at employees in purchasing and sales departments who regularly negotiate the conditions of long-term or short-term cooperation with suppliers or customers. However, the same principles also apply to contract negotiations and conclusions with all other partners of your company.

Option: Consciously foregoing a written framework agreement?

The first part of the series dealt with the strategic importance and legal scope associated with the submission of an initial written contract offer and provided some simple tips on how to best handle it. In this second part, we discuss when it may make sense, in exceptional cases, to deliberately not subject a long-term supply relationship to a detailed written framework agreement that regulates the details of the cooperation, but instead to work on the basis of offer, order/call-off and order confirmation.

Usually, it should be in the interest of both parties to a business relationship to regulate a long-term supply relationship in a legally secure manner by means of a written framework agreement. In addition to the legal certainty this provides for both sides (e.g. regarding term, termination, delivery/order obligations, prices, quantities), it also allows a number of standard legal provisions (e.g. regarding warranty period) to be adapted to their own advantage and the details of the practical implementation of the supply relationship to be regulated precisely (e.g. regarding ordering and logistics). In the absence of a contractual arrangement, uncertainties will almost always remain between the parties with regard to various aspects.

Regardless of the fact that, as a rule, the advantages of concluding a framework agreement will outweigh the disadvantages for both sides, neither side should lose sight of the fact that this may sometimes be accompanied by a deterioration in their own legal position in certain respects compared to the supposedly “contract-free” situation (which is in fact only regulated in detail by law). Depending on the situation, it may therefore actually be preferable to enter into or continue a supply relationship without a framework agreement if the disadvantages associated with concluding a framework agreement are exceptionally serious.

Since the decision for or against (negotiating) a framework agreement always depends on the circumstances of the individual case, it is difficult to make a general assessment. Nevertheless, every employee in purchasing and sales can

sharpen their awareness by using the following list of examples, which highlights some common aspects. We assume the typical case that, when concluding individual contracts/individual orders, both the supplier and the customer refer to their own terms and conditions, which are favorable to their respective positions, and that these terms and conditions exclude the validity of the other party's terms and conditions by means of a typical defense clause.

Arguments from the customer's perspective

The biggest advantage for the customer in a scenario without a written framework agreement will almost always be that in that case the supplier's liability is not limited, i.e. it is unlimited as provided for by law and also covers the customer's loss of profit due to production downtime. While the supplier will almost always insist on a limitation of liability (e.g. to a maximum amount and/or an exclusion of liability depending on the form of fault, e.g. in cases of slight negligence) when negotiating a framework agreement, without such a contractual agreement, the supplier is generally liable without limitation: This is because while the supplier's general terms and conditions included in an order process will regularly provide for a limitation of liability, the customer's general terms and conditions, which will also be included, will regularly contain a deviating clause on this point, so that there will generally be no agreement between the general terms and conditions of both parties on this point. Legally, this means that neither of the two provisions in the respective terms and conditions is agreed upon and the supplier's unlimited liability as provided for by law applies.

The second important advantage from the customer's point of view is that, without a framework agreement, there will generally be no obligation on the part of the customer to place orders. While the supplier will regularly insist on agreeing certain minimum order quantities per month/year or other purchase obligations when negotiating a framework agreement, without such an agreement the customer is generally comparatively flexible in terminating the supply relationship (with the exception of already binding individual contracts/individual orders) and switching to another (cheaper) supplier with short notice. (This may differ depending on the specific circumstances, e.g. if the customer provides the supplier with a rolling preview for a certain period of time, possibly with a "frozen zone", and/or material release. Depending on the exact circumstances, this may be seen as an obligation on the part of the customer to purchase for this time period. In addition, in exceptional cases a notice period may also have to be granted when terminating a long-term supply relationship that is not documented by a written framework agreement).

Arguments from the supplier's perspective

From the supplier's point of view, a decisive argument against concluding a framework agreement will often be that framework agreements usually contain an obligation on the part of the supplier to accept the customer's orders/call-offs and to supply him with the goods, but at the same time also provide for a mechanism for price fixing and adjustment that restricts the supplier in its pricing. As a result, suppliers are often unable to adjust the prices agreed in a framework agreement in the event of an increase in their own production/material costs, or can only do so with difficulty or (too) late. If, on the other hand, there is no framework agreement, the supplier is usually free to set its own prices. And even if this will often be a question of the individual case, in particular how the parties have conducted their supply relationship, the supplier will not normally be subject to any obligation to accept orders outside of cases of particularly close cooperation. As a result, the customer is generally not legally entitled to demand that the supplier continue to deliver at the previous prices in the future, but must either accept the supplier's price adjustments for the future or find another supplier at short notice.

In addition, the law provides for further provisions that are generally favorable to the supplier but are regularly adjusted in a framework agreement, whereas in a "contract-free" situation they cannot be overcome by the customer's general terms and conditions alone (provided that the supplier refers to its own general terms and conditions when concluding the contract and that these contain a defense clause, see above). These include, among other things, the fact that the customer is obliged by law to inspect the products immediately upon receipt and to report any defects (buyer's obligation to inspect and notify). Otherwise, the customer loses its warranty rights with regard to defects that it could have detected through careful and immediate inspection. Since case law does not allow the customer much time for this (although it depends on the individual case, 1 – 3 days are generally considered a reasonable timeframe) and the customer's inspection of incoming goods may not meet the requirements of case law for inspection, the supplier often has good arguments, despite defective delivery, for not having to provide a warranty or be liable due to formal omissions on the part of the customer when inspecting the goods. If, on the other hand, the parties

conclude a framework agreement with a supplementary quality assurance agreement, this will usually contain a provision that is more favorable to the customer.

Conclusion: Raising awareness to improve negotiating position

Even if the reasons in favor of a framework agreement generally outweigh the reasons outlined in this article for refraining from a framework agreement in exceptional cases, every negotiator should be aware of what they are giving up with certain provisions compared to a "contract-free" situation and how good their own legal position (without a framework agreement) would be regarding certain aspects. In many cases, a precise knowledge of one's own starting position makes negotiations on a framework agreement considerably easier. This applies, of course, to the particularly important aspects outlined in detail above. But it also applies to many other points not even discussed here. It is not necessarily the task of commercial negotiators to analyze their own legal position with and without a framework agreement in detail at the outset. Rather, it is to recognize that such an analysis will improve their own negotiating position and improve their own decision-making. To this end, sound legal advice should be sought from outside legal counsel or the legal department.

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■ GENERAL INFORMATION

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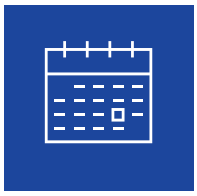
Events, publications and blog



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