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Any liability excluded – point

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File number KMU_today_005: The column by André Brunschweiler, partner at the law firm Lalive in Zurich, provides answers to legal questions that can or should concern Swiss SMEs.

André Brunschweiler, partner at the law firm Lalive in Zurich. (Photo: PD)

Limitations of liability are often the bone of contention in contract negotiations. The service provider wants to limit its liability as much as possible - the other party does not.

Any liability can be excluded, ...

Based on the principle of freedom of contract, the parties are largely free to agree on contractual liability. Swiss law provides only a few limitations, but these are mandatory.

... except for gross negligence and intent

An exclusion of liability for bodily injury and death is not permitted. In the consumer sector, the product manufacturer can then only limit its (product) liability to a very limited extent. Liability for intentional (mis)conduct or grossly negligent conduct cannot be limited either.

When such intentional behavior occurs, i.e. intent, is (usually) clear: intent is the will to violate the law or at least knowingly to accept this. Such cases are rare in practice.

However, the difficult question often arises as to whether a behavior is already grossly negligent or "only" (slightly or moderately) negligent. The Federal Court affirms gross negligence when a party disregards fundamental (duty of care) obligations that any reasonable and conscientious person would have observed in the same situation. Gross negligence occurs when something is ignored that should have been obvious to any reasonable person in the same situation and under the same circumstances. The general question is: How could they have done that?

Whether gross negligence exists depends on the individual case and is assessed based on the applicable standards of care: an accountant who causes obvious incorrect entries or a building contractor who disregards the most basic safety regulations during construction, for example by

not securing scaffolding, are both basically acting with gross negligence. So it takes a lot for gross negligence to exist.

The burden of proof of gross negligence rests with the party who is defending themselves against the limitation of liability, i.e. the injured party. In the event of a dispute, they must convince the judge of gross negligence. This will often be a question for technical experts. What makes matters worse is that the injured party, who must provide proof, is typically in a situation of information and evidence difficulties. They must consider whether and how they can obtain the relevant information to prove the other party's gross negligence. It is therefore important to negotiate extensive contractual information rights.

exclusion of consequential damages

Within the limits mentioned above, liability can be freely limited or excluded. Amount limits are often set - for example, depending on the economic interest (20 percent of the price of the work) - or certain types of damage are excluded entirely.

It is usual to exclude "indirect and/or consequential damages". However, because these are not clearly defined legal terms, they must be interpreted in the event of a dispute (see reference KMU_today_002). To avoid misunderstandings, it is advisable to create clear conditions when limiting liability. It should be written down specifically which damages are excluded ("lost profits", "damage to reputation", etc.) or - conversely - which damages are the sole liability.

But is there actually a breach of contract that gives rise to liability?

When discussing liability limitations, it is often forgotten that only the violation of contractual obligations gives rise to liability. Whether this is the case depends on what a party has committed to. Therefore, the obligations (i.e. the actions or omissions) should be clearly defined and the respective responsibilities clearly delimited.

It is also important to check carefully whether a contract provides for special notification obligations and (short) deadlines in the event of breaches of contract, such as: “Breaches of contract must be reported in writing within seven days.” Failure to comply with such formal requirements can lead to the claim being forfeited before the question of limitation of liability even arises.

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