

German law: §§ 133 and 157 BGB and standard terms

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German law contains two general provisions on interpretation. Section 133 of the Civil Code requires that, in interpreting a declaration of intention, the true intention is to be sought and the literal meaning of the expression is not to be adhered to. Section 157 provides that contracts are to be interpreted as required by good faith, taking customary practice into consideration. German courts combine the two provisions into a method that starts with the wording, considers the circumstances of the conclusion of the contract and the interests of the parties and seeks the objective meaning from the perspective of a reasonable recipient. As in Swiss law, a common understanding of the parties prevails over a divergent wording. German courts also apply the principle of *falsa demonstratio non nocet*.¹

German courts also use supplementary interpretation, the *ergänzende Vertragsauslegung*, to fill gaps in a contract by asking what the parties would have agreed as honest contracting partners if they had considered the point. Section 242 of the Civil Code, which requires the obligor to perform in the manner required by good faith, supplements this method and gives *Treu und Glauben* a role in German law comparable to its role in Swiss law. A foreign party that signs a contract under German law should therefore expect a court to read implied duties of cooperation, information and consideration into the agreement, even where the written text is silent on them.²

The decisive difference between German law and the laws of Switzerland and England lies in the control of standard business terms. Sections 305 to 310 of the Civil Code subject general terms and conditions to a control of incorporation, surprise, ambiguity and content, which applies in modified form between businesses. Under section 305c paragraph 2, doubts in the interpretation of standard business terms are resolved against the user. Under section 307, terms are ineffective if they unreasonably disadvantage the other party contrary to good faith. Section 307 paragraph 1 sentence 2

adds that an unreasonable disadvantage may also arise from a provision that is not clear and comprehensible. This transparency requirement has direct consequences for multilingual contracts because a clause that a party cannot understand in the language in which it is presented may fail the transparency test.³

The breadth of the German concept of standard terms surprises many foreign parties. A clause counts as a standard term if it has been pre-formulated for use in several contracts. According to the courts, an intention to use a clause three times can suffice. A clause is excluded from the control only if it has been individually negotiated, which requires that the user seriously put the clause up for discussion and was willing to change it. Many clauses in English-language templates used by international groups therefore count as standard terms when a German court examines them, including limitation of liability clauses that would be enforceable in England or Switzerland. This is one reason why parties to cross-border contracts sometimes avoid German law, a tendency that has prompted a debate in Germany about reforming the control of standard terms between businesses.⁴

German courts conduct their proceedings in German, as section 184 of the Courts Constitution Act provides. Where documents are in a foreign language, the court may order a translation under the Code of Civil Procedure. The Act to Strengthen Germany as a Location for Justice, which entered into force in 2025, allows the federal states to establish commercial courts and commercial chambers that can conduct proceedings in English in certain business disputes. Baden-Württemberg, the neighbouring state of Basel, has been among the states that took an interest in English-language commercial proceedings. The practical significance of these courts for transactions in the Upper Rhine region remains to be seen.⁵

1 Notes

1. §§ 133 and 157 of the German Civil Code (BGB). On the method of interpretation, see the case law of the Federal Court of Justice (BGH) and the commentaries, for example Palandt/Grüneberg and the Münchener Kommentar. To be verified. ↩
2. § 242 BGB. On ergänzende Vertragsauslegung, see the case law of the BGH and the commentaries on § 157 BGB. To be verified. ↩
3. §§ 305 to 310 BGB, in particular § 305c para. 2 and § 307 para. 1 sentence 2 BGB. On the application to business-to-business contracts, see § 310 para. 1 BGB and the case law of the BGH. To be verified. ↩

4. On the definition of standard business terms and the requirement of individual negotiation under § 305 para. 1 BGB, see the case law of the BGH. On the reform debate concerning business-to-business contracts, see the German legal literature and the positions of business associations. Status to be verified. ↩
5. § 184 of the Courts Constitution Act (GVG). § 142 para. 3 of the German Code of Civil Procedure (ZPO) on ordering translations. On the Justizstandort-Stärkungsgesetz and the commercial courts, see the federal legislation of 2025 and the implementing legislation of the Länder. Status to be verified. ↩

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