

Why you need written agreements

Clear contractual foundations matter especially in times of financial crisis.

Selected legal insight for the sporting goods and consumer goods sector.

DR. JOCHEN M. SCHAEFER · CONTRACTS / INSOLVENCY

“It is very worthwhile to invest in the establishment of a solid contractual framework by implementing adequate securities.”

ORIGINALLY PUBLISHED
SGI Europe · 08 January 2024

Dr. Jochen M. Schaefer, a practicing attorney based in Munich, represents both the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI). With an experienced eye on both the legal and sporting goods industry world, he shares with us one valuable piece of advice that companies should not overlook in fragile economic times or at any time. Note: Statements made in this interview are only of a general nature and should by no means constitute or replace comprehensive individual legal advice, which is required in such critical and complex scenarios as insolvency proceedings. It is also important to emphasize that the legal framework for such proceedings is different at a national level within the EU and the European Economic Area.

SGI: 2023 saw the collapse of several sporting goods retailers, including SportScheck and InternetStores. As our legal expert and with your background in the sporting goods industry, what is your long-term risk assessment for the industry? What developments will we see in 2024? JMS: With a certain focus on Germany, one has to regrettably say that the economic situation of quite a number of brick-and-mortar and hybrid retailers, as well as that of pure online players, is somewhat fragile. Looking at the two examples you quoted, it is certainly true that the collapse of the whole Benko “empire” is not exemplary of the current situation for all sports retailers. But, it does demonstrate that even stores or chains with a long tradition and a “shiny” name, such as SportScheck, are not spared from insolvency.

SGI: If we talk about the specific experiences you have had as a legal advisor to sporting goods brands in the context of (preliminary) insolvency proceedings, what can you tell us about those? JMS: Throughout my years accompanying corporate clients in the course of their operational activities, I have always been a strong advocate of having clear and state-of-the-art written agreements in place with all marketing partners, be it at wholesale or retail level. SGI: Why are these written agreements so important, especially when it comes to insolvency proceedings? For me, they represent a valuable risk management tool. Not only in the event of disputes among contract partners but also in scenarios where the financial situation of a business partner may very rapidly deteriorate. The supplier may then be exposed to considerable financial risks, such as open payment claims. In cases such as these, open payment claims may no longer be fulfilled by the B2B purchaser of the respective products, or the seller can only hope to recover a minimal fraction thereof. Outstanding payment claims are – from a German insolvency law perspective at least – not privileged. SGI: How can a written agreement, which a supplier and a retailer entered into, be of concrete help in this situation? JMS: First, one has to differentiate here between individual written agreements and general sales terms and conditions (“GTCs”) at the B2B level.

If individual agreements – negotiated and entered into by the contract parties – are in place and such agreements also cover scenarios of a financial crisis, these could then be of practical value (I will come to that in a second). However, GTCs also play an important role, provided, of course, the terms and conditions contained therein are legally valid, undisputed, and have a legally binding effect upon the other party. It would generally, for example, be insufficient to simply forward these GTCs to the buyer of a sports product together with the respective invoice pertaining to a certain order placed. Furthermore, I very recently handled a case where I represented a certain wellknown sporting goods brand in the course of German insolvency proceedings. It proved to be very helpful when

legally valid specific retention of title rights (Eigentumvorbehaltsrechte) formed a part of the individual agreements or the GTCs. The chances of a creditor recuperating at least a sizable part of its outstanding receivables deriving from such rights are considerably higher than in the event such rights do not exist. My conclusion is that it is very worthwhile to invest in the establishment of a solid contractual framework by implementing adequate securities, which in unstable economic times might well mitigate some financial risks at least.

Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. For several years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He also chairs the WFSGI's legal committee and co-chairs the FESI's digital working group. At the individual client level, he represents a significant number of well-known brands within and beyond the bicycle/sporting goods sector. He is a specialist in national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts at the operational level, in particular in the area of European selective distribution schemes. If you have any questions about this article (or in general), he can be reached at sj@sjlegal.de and +49 151 1640 7932.