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Construction Law

Germany
Thomas Nebel and Matthias Hadding
Dentons

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GERMANY

Law and Practice

Contributed by:
Thomas Nebel and Matthias Hadding
Dentons see p.16

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Contributed by: *Thomas Nebel and Matthias Hadding,* ***Dentons***

1. GENERAL

1.1 Governing Law

Civil Law

Construction contracts under German law are governed by the German Civil Code (*Bürgerliches Gesetzbuch* – BGB). Until 2018, German law merely distinguished between contracts for services and contracts for works. Construction contracts, including engineering and design, are deemed contracts for works, covered by sections 631 et seqq of the Civil Code.

In 2018, the German legislator added the following new types of contract in connection with construction into the Civil Code:

- construction contract;
- consumer construction contract;
- architect and engineering contract; and
- developer contract.

All those contracts are deemed sub-types of a contract for works. The additional provisions for each type of contract include the relevant rights and obligations of the parties, such as variations and claims for time and cost.

If the contract is limited to the construction/manufacturing of a tangible good (eg, a large component for installation in a heavy plant), the law on purchase contracts applies (sections 433 et seqq of the Civil Code). If the contract has a cross-border element, the United Nations Convention on Contracts for the International Sale of Goods (CISG) applies as well, unless explicitly excluded in the contract.

An official English translation of the Civil Code, provided by the German Federal Ministry of Justice, is available at www.gesetze-im-internet.de/englisch_bgb. However, the 2018 amendments to construction contracts have not yet been translated, meaning that the translation is not fully in line with the currently applicable law.

Administrative Law

The construction of buildings or plants usually requires a public permit, depending on the building or plant.

Buildings, or changes to a building, usually require a construction permit, which is issued under public construction laws legislated by each German federal state.

Heavy plants usually require a permit under the Federal Immission Control Act (*Bundesimmissionsschutzgesetz* – BImschG).

Additional Relevant Provisions and Regulations

Apart from civil and administrative law, further statutory provisions may apply, depending on the type of contract and services, including the following:

- if expressly agreed in the contract, part B of the "Contract and Procurement Rules for Construction Services" (*Vertrags- und Vergabeordnung für Bauleistungen* – VOB/B) is the most common set of rules for construction contracts in Germany and provides for a detailed set of clauses, including several opt-outs and opt-ins;
- health and safety regulations, particularly the "Construction Site Ordinance" (*Baustellenverordnung* – BaustellV);
- "Fee Regulation for Architects and Engineers" (*Honorarordnung für Architekten und Ingenieure* – HOAI), providing for specific phases of engineering and construction services and corresponding compensation schedules for engineering and design services;
- "Broker and Property Developer Ordinance" (*Makler- und Bauträgerverordnung* – MaBV)

imposes certain additional obligations on property developers;
- EU regulations; and
- generally accepted engineering and construction standards as well as various DIN, EN and ISO standards; in a construction contract under the VOB/B, several construction-related DIN standards listed in part C of the VOB (VOB/C) are automatically included.

General Terms and Conditions

A particularity of German (case) law is the broad application on the laws of general terms and conditions to B2B contracts. If a party uses a template contract, all provisions not expressly negotiated between the parties are deemed general terms and conditions. If provisions deviate from the statutory concept of risk and liability distribution in a way that makes them unreasonably beneficial for the template-using party and unreasonably burdensome to the other party, such provisions may be deemed invalid and unenforceable.

1.2 Standard Contracts

German construction contracts are commonly based on the VOB/B, which is a specific set of standard clauses for construction services, developed by a special committee consisting of members from employers and contractors. Therefore, the clauses of the VOB/B are considered fair and balanced. The VOB/B was first published in 1926, and has been amended several times since; the current VOB/B was published in 2016.

The VOB/B is similar to the internationally known FIDIC rules. However, contracts based on FIDIC or other international standards are rarely used; only major EPC contracts for heavy plants and the like are sometimes based on FIDIC rules.

In a VOB/B contract, several technical standards (DIN standards) listed in VOB/C are also included. These technical standards are relevant as they may further define the scope and quality of the works.

1.3 COVID-19

Contrary to what was expected, the German construction industry hasnot experienced any significant impacts due to the COVID-19 pandemic, with the total turnover of the construction industry actually rising in 2020. However, due to increased health and safety obligations, contractors have had to exercise additional efforts, with corresponding price rises.

2. PARTIES

2.1 The Employer

There is no “typical employer” in Germany. The range of employers includes everything from consumers, small and medium-sized entities (SMEs) or big corporates to the public sector and private equity.

Large commercial properties are often owned by special purpose vehicles (SPVs), mainly for tax reasons and easier transfer of title. These SPVs might also act as an employer in the case of a new development.

The employer is entitled to receive the works free of defects. If the contract provides additional rights for the employer, such as a specific documentation or a fixed completion date, those rights will be enforceable as well.

In turn, the employer is usually responsible for the design and obtaining the relevant permits, and bears the soil risk. In addition, the employer can be obliged to provide material and/or other works to the contractor. This applies in particular to larger projects where the employer opts against instructing a general contractor, and

therefore bears the interface risks between the various contractors.

The typical relationship between employer and contractor is transactional rather than co-operative. To maintain their respective rights against the other party, the employer and contractor issue notices from time to time. The employer usually issues notices of delay or defect notices if the contractor's performance is not in accordance with the contract. After the issuance of such notices, the employer gets additional rights to remedy defects at the contractor's cost, to retain a portion of the compensation, to claim delay damages and/or to terminate the contract.

2.2 The Contractor

The German construction industry has few large contractors, with most contractors being SMEs or even self-employed craftspeople. Large construction projects typically see joint ventures of two or more contractors. Usually, contractors team up to combine their specialist expertise and share the general contractor's risk. Those joint ventures are often in the form of a construction partnership (ARGE), which is basically a civil partnership formed solely for the purpose of a particular construction contract.

The contractor is entitled to the agreed compensation, which can be split into milestones. If the employer breaches co-operation obligations or does not provide the required materials and/or other works, and if as a result the contractor cannot perform the works, the contractor can claim time and costs and/or ultimately terminate the contract.

If the design, material or other works provided by the employer are faulty or if the contractor cannot continue for reasons beyond the contractor's control, the contractor is obliged to notify the employer immediately in order to to retain rights for time and costs.

2.3 The Subcontractors

Subcontractors are the same kind of entity as contractors, and the relationship between contractor and subcontractor is basically the same as between employer and contractor. However, a contractor working with subcontractors requires strong contract and risk management during the construction phase. Otherwise, the contractor may "fall between chairs" – eg, due to delays on the employer side and/or delays or performance issues on the subcontractor side.

It is common in Germany, and provided for in the VOB/B, that the employer can pay subcontractors directly if the contractor defaults on payment obligations towards the subcontractor, if the subcontractor ceases to work and if the payment from the employer to the subcontractor causes the subcontractor to continue working.

2.4 The Financiers

Private construction projects in Germany are generally debt funded by banks, private investment funds or other lenders. The financing agreements are usually entered into between the lender and the employer, but may provide for direct payments from the lender to the contractor(s).

The standard collateral for the lender is a directly enforceable land charge (*Grundschuld*), which is an instrument similar to a mortgage. If the employer defaults on financing obligations, the lender may enforce the land charge, usually by a forced asset sale.

Apart from reviewing compliance with the financing obligations, lenders usually do not interfere with the construction.

3. WORKS

3.1 Scope

The level of detail of the scope of works depends on the type of construction contract:

- in a unit price contract or rate-based contract, the scope of work – including provisions on requirements and specifications – is very detailed;
- in lump-sum contracts, on the other hand, employers tend to limit the scope to indicating solely the result of the works or to providing solely a functional scope of works, meaning that the contractor is obliged to do everything required to arrive at the requested result. Such "global lump-sum contracts" pose the biggest risk for the contractor as claims for additional costs in case of miscalculations, wrong assumptions or potentially foreseeable issues during construction are widely excluded.

In addition to the expressly agreed scope of work in the contract, further requirements on specifications, quality, etc, may be applicable under various technical standards (DIN, EN, ISO).

3.2 Variations

If there are change/variation requests by the employer, the parties usually negotiate on additional or reduced compensation and time for the contractor, and then enter into an amendment to the construction contract. The contractor is obliged to issue a proposal.

If the employer and the contractor cannot agree on an amendment, and unless provided otherwise in the contract, the employer can issue the variation order to the extent that execution of the variation is reasonably possible for the contractor. The contractor can claim corresponding compensation, determined on the basis of actual costs and with reasonable allowances for general business expenses, risk and profit. The employer and contractor can seek a preliminary injunction on the right to instruct a variation order and the corresponding compensation claims.

3.3 Design

The parties are free to agree on any design obligations and the design process in the contract, as follows:

- in a standard construction contract, the employer is usually responsible for the design, but the contractor is obliged to review the provided design for potential flaws before commencing the works;
- in an engineering/EPC/EPCM/turnkey contract, the employer often provides the basic design, and the contractor then has to develop detailed design and/or approval planning; and
- in a design-only contract (typically an engineering or architect contract), the contractor has to develop the basic and detailed design and approval planning.

Detailed design and approval planning includes that the contractor is responsible for developing a design that is fit for the required purpose (as indicated in the contract or the scope of works) and meets regulatory prerequisites to obtain the required permits.

Unlike under common law, fitness for purpose does not increase the contractor's obligations but is used to determine whether the works are defective.

3.4 Construction

The parties are free to agree on any construction obligations and the process or programme in the contract.

In general, German construction projects are very transactional. Collaborative contracting or

similar forms are not common. The employer usually instructs either a general contractor or a package of contractors for the various parts of the project, and often instructs an additional construction manager to manage the various interfaces.

The main obligation of a contractor is to perform the agreed works, free of defects, in the agreed time. In addition, the contractor has comprehensive obligations to provide information and notifications to – and to co-operate with – the employer, and has to notify the employer of any defects in materials or other works provided by the employer or third parties.

The employer is responsible for health and safety, and has to provide a health and safety co-ordinator (SiGeKo) for the site. The employer also has the right to supervise the works on site, and usually contracts supervision to the architect or construction manager.

3.5 Site Access

Site access may require consents under civil laws (eg, for access to adjacent private property) and/or permits under administrative laws (eg, public construction laws, water laws or road traffic laws). Unless otherwise agreed in the contract, the employer is generally responsible for obtaining these consents and permits.

The soil risk, including soil condition, obstacles or archaeological finds, lies with the employer as the property owner. However, construction contracts for large developments (in particular EPC contracts) often shift the soil risk partially to the contractor – eg, in a way that the employer provides (limited) soil investigation reports combined with a clause that the contractor has to bear all soil risks that are apparent from the reports provided.

3.6 Permits

The permits required depend on the type of construction.

The construction of a building, or a (substantial) change of a building, generally requires a construction permit from the relevant local authority. Each German federal state has its own public construction laws, meaning that the scope of a construction permit may differ from state to state. However, in most federal states the construction permit is a comprehensive permit that is granted only if the project is in line with all applicable regulations.

Heavy plants may require a permit under the BImschG. This permit then includes the construction permit and other potentially required permits – eg, under water laws or environment protection laws.

Since the employer has to obtain the permits, the ultimate responsibility for permits always remains with the employer. However, if the contractor is instructed with the detailed design and/or approval planning, this usually includes drafting and pulling together the complete set of documentation to be filed with the authority. In case of flaws in the design or the documentation, the contractor is liable.

3.7 Maintenance

Until acceptance and takeover by the employer, the contractor is responsible for maintenance of the works and bears the risk of accidental loss or damage. Upon acceptance and takeover, these risks shift to the employer. The contractor remains responsible for replacement and repair in case of defects.

In large projects, particularly heavy plants, employers often enter into a separate maintenance contract with the contractor for a specific period following acceptance. Such period can

be up to 30 years. Entering into a separate maintenance contract is often a prerequisite for availability guarantees or extended warranty periods.

3.8 Other Functions

In general, it is not common to delegate other functions to the contractor.

A notable exception is in smaller renewables projects (wind and solar farms) for private employers, in which the employer and contractor often enter into separate operation and maintenance (O&M) contracts.

3.9 Tests

German construction law does not have specific provisions on testing. After finishing the works, the contractor notifies the employer that the works are ready for acceptance and takeover by the employer. The contractor and the employer, together with the construction manager if one has been instructed by the employer, jointly inspect the works to see if they are free of defects.

However, in the construction of heavy plants, plant components or other technical installations (EPC/EPCI contracts) in particular, it is standard to have contractual provisions on the commissioning and testing of the works prior to acceptance and takeover. The relevant contract clauses usually contain detailed testing procedures. Testing is typically part of the scope of work and, in lump-sum contracts, is included in the agreed price.

3.10 Completion, Takeover, Delivery

German law on construction and other works is based on the concept of acceptance, which means that the contractor has finished the works and the employer accepts (and takes over) the works as being "generally in line with the contract and free of any material defects."

The employer is obliged to accept the works if the agreed acceptance prerequisites are met. The works are deemed accepted if the contractor requests the employer to declare acceptance within a reasonable period and if the employer does not refuse acceptance by referring to an existing defect.

Acceptance is key to the following occurring:

- triggering the (final) payment;
- shifting the risk for accidental loss/damage to the employer;
- shifting the burden of proof for defects to the employer; and
- commencing the warranty period.

The parties can agree on different procedures for completion and acceptance in the contract.

If the works are manufacturing of a tangible good (eg, a plant component), the contractor may also be responsible for shipment and delivery. Incoterms are frequently used. In the case of shipment, and unless agreed otherwise by the parties, there is no acceptance and takeover of the works; instead, the relevant event is delivery of the works to the designated place.

3.11 Defects and Defects Liability Period

The standard warranty period is five years from acceptance for buildings, or else two years from acceptance (or delivery). In VOB/B contracts, the standard warranty period is four years from acceptance.

Until acceptance, the contractor is fully liable for completing the works. In the case of non-performance, the employer can terminate the contract and claim damages, particularly for additional costs required to instruct third parties to finish the works.

After acceptance, the primary remedy of the employer is replacement and/or repair by the contractor at the contractor's cost.

If the contractor defaults on its replacement/repair obligation, the employer may:

- replace and/or repair at the contractor's cost (so-called self-remedy);
- unwind the contract (not available under a VOB/B contract);
- reduce the compensation; and/or
- claim damages.

However, the parties are free to agree on a different set of remedies available to the employer and/or the relevant warranty periods.

4. PRICE

4.1 Contract Price

The most common forms for pricing are unit price, lump-sum or hourly rates, and combinations of those.

EPC/turnkey contracts usually have lump-sum prices and milestone payments based on progress. Smaller construction contracts usually provide for a down payment and a final payment after acceptance.

4.2 Payment

Late payment is subject to default interest; the current statutory rate is 8.12% p.a. In addition, the contractor may suspend the works, and ultimately terminate the contract.

It is common to secure advance payments from the employer to the contractor through a bank guarantee (to be provided by the contractor at its own cost), which the employer can call on if the contractor does not perform the works.

In turn, the contractor can request security for the entire unpaid compensation at any time, plus a 10% lump-sum mark-up. This is a statutory right of the contractor and cannot be excluded in the contract. However, the contractor is required to pay the costs of such security, usually a bank guarantee.

4.3 Invoicing

The contractor has to invoice all payments in a formal invoice. Invoices have to be verifiable and all line items have to be in the same order as set out in the contract. After acceptance, the contractor has to issue a final invoice.

The common payment term is 30 days from receipt of the verifiable invoice.

5. TIME

5.1 Planning

Construction projects are usually subject to construction schedules agreed by the employer and the contractor. Those schedules may include a critical path with penalised milestones. It is common to have at least a fixed completion date by which the works have to be finished and free of defects so that acceptance and takeover can take place.

The construction schedule is usually supervised by the employer or an architect or construction manager retained by the employer.

5.2 Delays

If the contractor is delayed in performance, the employer first has to issue a warning notice, giving the contractor a reasonable period of time in which to remedy the delay. In such notice, the employer has to notify the contractor about the legal consequences of non-compliance with the remedy period, such as termination and damages.

Without such warning notice and expiry of a reasonable remedy period, the employer is usually not entitled to exercise further rights.

5.3 Remedies in the Event of Delays

Unless the contract sets out specific rights and obligations, the employer can terminate the contract in full or in part and/or claim damages, after giving a reasonable notice period in which to remedy the delay. Damages may include additional costs to instruct a third party to complete the works.

It is common in German construction contracts to agree on contractual penalties – typically up to 5% of the total compensation – that will become due and payable by the contractor if a penalised deadline is not met, usually a milestone or the agreed completion date. Unlike liquidated damages, contractual penalties become due if the contractor is in delay and responsible for the delay, irrespective of any damages incurred by the employer. If the employer claims damages for delay, the contractual penalty will be taken into account, meaning that the penalty is the minimum amount the employer can claim.

After acceptance, if the contractor is delayed in replacement and repair, the employer is typically entitled to carry out replacement and repair on its own, or to instruct a third party, at the contractor's cost. In addition, the employer can claim damages.

5.4 Extension of Time

Requests for extensions of time are made in a formal notice to the employer, indicating the reason and required extension. Usually, the request is made in the context of discussions on change requests of the employer or if the contractor is hindered in continuing the works for reasons beyond its control.

5.5 Force Majeure

German law does not provide for the concept of force majeure but construction contracts usually include force majeure clauses that define relevant force majeure events.

However, German law acknowledges the principle of impossibility. The contactor's obligation to perform ceases if performance is impossible for anyone (objective impossibility) or just for the contractor (subjective impossibility). The same applies if the obligation to perform is economically unreasonable, taking into account all circumstances and the principle of good faith. Impossibility requires a permanent impediment, whereas temporary impediments are generally subject to the provisions for non-performance and delay.

5.6 Unforeseen Circumstances

German law provides for the concept of "disruption of the basis of the transaction". This concept is somewhat similar to the concepts of frustration and/or unforeseen circumstances. A "disruption of the basis of the transaction" means serious changes of those circumstances that have become the basis of the contract.

The affected party can first demand adjustment of the contract to the extent that adherence to the unchanged contract is unreasonable. The adjustment is neither automatic nor can it be determined unilaterally by the affected party. In exceptional cases, if an adjustment is not possible or is unreasonable for either party (so-called "cessation of the basis of the transaction"), the affected party can terminate the contract.

6. LIABILITY

6.1 Exclusion of Liability

Liability for intent cannot be excluded in the contract, but under mandatory law is limited to the

legal representatives of an entity. An exclusion of liability for intent by employees or subcontractors would be possible, even though employers do not generally accept any limitation of liability for intent within the contractor's sphere.

6.2 Wilful Misconduct and Gross Negligence

Wilful misconduct (intentional breach of contract) and gross negligence are concepts of German law. Intent and gross negligence usually result in increased or – particularly in the case of intent – uncapped liability.

6.3 Limitation of Liability

The parties' liabilities can be limited contractually, with liability caps being very common in medium and large projects. Mostly, the contractor's overall liability is capped at a certain percentage and up to 100% of the compensation. Liability may also be capped in a way that certain forms of damages are excluded, such as lost profits.

The employer's liability can also be capped contractually, although this is less common. Since the main obligation of the employer is to pay the compensation to the contractor, the liability risks of the employer are significantly lower than those of the contractor.

7. RISK, INSURANCE AND SECURITIES

7.1 Indemnities

German law follows the concept that a party in breach of contract is required to indemnify the non-breaching party if the latter incurs any liability towards third parties as a result of that breach.

The VOB/B expressly acknowledges an indemnification obligation, particularly in case of IP infringement or tort claims raised by third parties. Construction contracts not subject to the VOB/B often include boilerplate clauses on indemnity obligations.

7.2 Guarantees

General

Bank guarantees are the standard security in most construction contracts. The common requirements are that the guarantor is an EU-based bank and that the bank is liable as if it was the debtor. This means that the beneficiary can call on the guarantee without first trying to enforce a claim against the actual debtor.

In large projects, particularly in the public sector, employers request a bank guarantee on first demand, meaning the employer can call on the bond at any time and it is then incumbent on the contractor to claim repayment.

Guarantees to Be Provided by the Contractor

Bank guarantees to be provided by the contractor are commonly free of charge to the employer, meaning that the contractor has to factor the costs into the price.

The most common forms of guarantees to be provided by the contractor are:

- performance guarantees to secure performance until acceptance and takeover;
- warranty guarantees to secure the warranty obligations of the contractor after acceptance and takeover; and
- down payment guarantees to secure repayment of advance payments to the contractor in case the contractor does not commence the works.

The contractor has to provide security only if agreed in the contract. In small to medium size projects, the performance guarantee coverage is usually 10% of the contract price, and the warranty guarantee 5%. In large projects, guarantee coverage is typically much higher.

In addition, employers often ask for a parent company guarantee if the contractor is a subsidiary of a group.

Guarantees to Be Provided by the Employer

Payment guarantees to be provided by the employer to secure the contractor's claim for the agreed compensation are usually not provided for in the contract.

However, the contractor has a statutory right to be granted security (either by putting cash in an escrow account or, more relevant, through a bank guarantee) covering the entire agreed compensation, including variations and a 10% lump-sum mark-up for ancillary costs. This statutory right of the contractor cannot be excluded in the contract, except in very limited circumstances. If the employer does not provide the security upon request, the contractor is entitled to suspend the works or to terminate the contract and claim damages. In turn, the contractor is obliged to pay the reasonable fees for such security, of up to 2% per year.

As an alternative to the security, which can be requested even before commencement of the works, the contractor has a statutory right to a mortgage registered on the land plot on which the works were rendered. The contractor can request the mortgage only after completion of the works, or for a portion of the compensation for works already completed.

7.3 Insurance

Most companies carry standard business liability insurance. Engineering firms and architects also carry professional liability insurance.

In small to medium sized projects, most companies' existing coverage under business/professional liability is sufficient. In larger projects, the employer may request a higher coverage, meaning that the contractor would have to take out project-specific insurance and factor the insurance costs into the quoted price.

In very large projects with several contractors working in parallel, it is also common for the employer or general contractor to have project-specific construction or contractors' all risks (CAR) insurance.

7.4 Insolvency

The insolvency of the contractor or the employer does not give rise to an automatic termination right for the other party; rather, the insolvency administrator can choose whether or not to fulfil the contract. If the insolvency administrator opts for fulfilling the contract, the other party becomes a preferred creditor.

Construction contracts often provide for extraordinary termination rights in case of insolvency, even though these provisions are deemed invalid under German insolvency laws. However, in reality, a party that is going insolvent also defaults on its obligations under the contract, and such default usually entitles the other party to terminate for breach of contract.

7.5 Risk Sharing

German law generally does not provide for any risk sharing, but rather follows the concept of contributory negligence resulting in individual or joint liability.

Given the transactional approach of German construction projects, an express sharing of responsibilities for certain risks is uncommon, especially between employer and contractor. Risk sharing might be agreed, if any, with a view to the costs of each party regarding certain permissions that have to be obtained at the very beginning of a project.

Risk sharing is, however, more common on the contractor level, be it between a main contractor

and its subcontractors or between partners of a construction consortium or joint venture.

8. CONTRACT ADMINISTRATION AND CLAIMS

8.1 Personnel

Under German law, there are no specific provisions regarding personnel in construction contracts. Nonetheless, it is not uncommon to either specify certain qualifications for a contractor's personnel or to provide for specific roles that the contractor has to fill out in its project team (key personnel), especially in heavy plant construction projects.

If the contract requires the contractor to provide key personnel, it is also often required that the contractor must not remove or change key personnel without the permission of the employer, and that any unauthorised changes trigger contractual penalties or liquidated damages.

Lastly, in most construction contracts, there are certain health and safety, anti-corruption and compliance provisions that need to be complied with by the respective personnel.

8.2 Subcontracting

German law is generally flexible with respect to the possibilities of subcontracting and there are no general limitations regarding subcontracting, unless specifically agreed by the parties.

Subcontracts can be set up as more or less strict back-to-back contracts or can be drawn up as individual subcontracts. The main risk regarding subcontracts is that, in the case of multiple subcontracts, the individual provisions of each subcontract can easily qualify as general terms and conditions, which may be deemed invalid if they are overly burdensome for the other party.

Usually, the main contract requires the contractor to flow down particular provisions such as audit rights to subcontractors and their further subcontractors – ie, all the way down the supply chain.

In addition, it is common for the main contract to provide either certain requirements that subcontractors need to fulfil or a right of the employer to reject potential subcontractors.

8.3 Intellectual Property

In general, construction contracts – especially heavy plant construction contracts – provide for a confidentiality and non-disclosure agreement regarding intellectual property. Depending on the type of project, construction contracts might also contain provisions with respect to knowledge sharing (know-how) and the use of the intellectual property of one or both parties.

Furthermore, if one party will use the intellectual property of the other party for a project, there will be provisions with respect to licences and royalties.

Intellectual property may also be relevant for design contracts. For instance, the design of a building – particularly a landmark building – may be subject to copyright.

Construction contracts usually also contain indemnity provisions in favour of the employer regarding third party intellectual property used by the contractor for the project.

9. REMEDIES AND DAMAGES

9.1 Remedies

Under German law, a party is generally entitled to performance of all contractual obligations by the other party.

If one party breaches its respective obligations under the contract, the other party is generally entitled to substitute performance and then to claim costs and damages.

For other breaches of construction contracts, depending on the breach and the entitled party, available remedies include the following:

- an extension of time (contractor);
- suspension of the works (contractor);
- rectification of defects – ie, replace and repair (employer);
- retention of money (employer);
- additional costs (all parties);
- damages (all parties); or
- termination (all parties).

9.2 Restricting Remedies

Generally, construction contracts (including VOB/B contracts) contain at least some kind of limitation with respect to remedies available to a party. Remedies can be limited in terms of:

- quantity – ie, a certain amount of money, usually a percentage of the price or compensation; and
- quality – ie, the exclusion of certain types of remedies; for instance, the exclusion of the right of the employer to unwind the contract after acceptance is quite common, and expressly excluded in a VOB/B contract.

9.3 Sole Remedy Clauses

Sole remedy clauses are mostly used in heavy plant construction contracts with a view to agreed liquidated damages for delay or performance issues as well as for defect liabilities. Less frequently, sole remedy clauses are used in other construction contracts. If not contractually agreed, German law does not provide for a general "sole remedy" mechanism.

Any sole remedy clause would be enforced as a means of defence with respect to other remedies asserted by the opposing party.

9.4 Excluded Damages

German law generally accepts any actual monetary impediment caused by the fault of the other party as a refundable damage. The biggest risk for the contractor is a claim for lost profits.

German construction contracts usually provide for an express exclusion of indirect and consequential damages, loss of profit, loss of production and other forms of financial losses. In VOB/B contracts, consequential damages for defects are generally excluded, unless in a case of gross negligence, wilful misconduct or a breach of the generally accepted engineering standards.

It is advisable to specifically list in the contract all forms of damages that the parties wish to be excluded from the contractor's and/or employer's liability.

9.5 Retention and Suspension Rights

Retention and suspension rights are generally excluded neither contractually nor by law.

However, in most construction contracts there are specific provisions that specify the circumstances and formal requirements that have to be fulfilled in order to retain or suspend a contract or certain contractual works. It is also common to exclude retention or suspension rights for certain contractual situations – for example, a dispute regarding an extension of time entitlement.

10. DISPUTE RESOLUTION

10.1 Regular Dispute Resolution

Unless agreed otherwise by the parties, civil courts are generally competent to resolve contractual disputes, including construction

disputes. Disputes relating to amounts under EUR5,000 will be decided by Local Courts (*Amtsgerichte*); all other disputes will be decided by Regional Courts (*Landgerichte*). Decisions of Local Courts can be appealed on grounds of facts and law in Regional Courts, while decisions of Regional Courts can be appealed in Higher Regional Courts (*Oberlandesgerichte*). Ultimately, appellate judgments can be further appealed to the Federal Court of Justice (*Bundesgerichtshof*), on grounds of law only.

There are specialised chambers at the Regional Courts for construction and commercial disputes. The civil courts' local jurisdiction can be determined by different facts, such as the location of the registered office (or branch office) of the defendant or the location where the construction works take place.

10.2 Alternative Dispute Resolution

The most common alternative means of dispute resolution in Germany is arbitration, which is regulated by the German arbitration law (part of the German Code of Civil Procedure) that is based on the UNCITRAL Model law. In fact, the majority of heavy plant construction contracts that do not involve the public sector contain an arbitration agreement. The most commonly used arbitration rules in Germany are the rules of the German Arbitration Institute (DIS).

Other means of alternative dispute resolution (eg, mediation or expert determination) do exist, but are not very common. Special construction adjudication or dispute adjudication boards are a rare exception.

Dentons takes charge of clients' interests in all aspects of contentious and non-contentious construction projects. The construction practice in Germany is fully integrated with the global construction group and has a strong understanding of this dynamic industry, with knowledge and experience ranging from high-rise office buildings to mass transit systems to energy facilities and major infrastructure projects. The construction team is constantly drawn into design, engineering and construction programme issues, and has a good understanding of project administration and risk management of construction projects. The group specialises particularly in construction litigation, arbitration and other forms of dispute resolution, especially in heavy plant construction.

AUTHORS

Thomas Nebel is a partner in Dentons' Düsseldorf office and co-head of the German Dispute Resolution practice. He specialises in domestic and cross-border commercial and civil law disputes, and represents clients in out-of-court settlements, in litigation before state courts and in arbitration. Thomas has a particular focus on construction disputes, corporate disputes and contentious insolvency. Thomas also advises on planning and implementing major projects, and on drafting commercial contracts. He has deep legal and technical expertise in the energy (conventional and renewable energy as well as transmission systems), infrastructure (railways, roads, aviation), construction, automotive and industrial sectors.

Matthias Hadding is a counsel in Dentons' Düsseldorf office and a member of the Litigation and Dispute Resolution practice group. He specialises in international commercial arbitration and has extensive experience in construction, engineering and post-M&A disputes. Another key focus of his work is global commercial disputes, including the representation of clients in mass litigation. Matthias also advises on project development, including the drafting, negotiation and enforcement of commercial contracts, as well as advising on project risk management.

Dentons Europe LLP

Kö-Quartier
Breite Straße 22
40213 Düsseldorf
Germany

Tel: +49 211 74074 290
Fax: +49 211 74074 133
Email: thomas.nebel@dentons.com
Web: www.dentons.com

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