TIME AND ACCELERATION ISSUES AFFECTING INTERNATIONAL CONSTRUCTION CONTRACTS: THE GERMAN APPROACH

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Construction projects are—especially in times of pricing pressure—frequently delayed by contractors, architects, experts or building advisers; nevertheless, the employer can also be responsible for a building delay. The reasons are many. Either contractually stipulated due dates are not attained or adequate deadlines are not met or are delayed or incorrect pre-contract activities lead to building delays. It is in the nature of things that delays cause considerable damage (e.g., increased interest charges, labour costs, loss of rent), which nobody wants to bear.

With regard to construction projects in Germany, but also with regard to international construction projects in which German contractors or employers are involved and which are governed by German law, the parties regularly agree on the application of the "*Allgemeinen Vertragsbedingungen für die Ausführung von Bauleistungen*" (VOB/B) (General contract Terms for the Execution of Construction works (VOB/B).[1] The terms of the VOB/B, in addition to other contractual issues, regulate in particular any issues regarding challenges and building time delays and hence the rights of both parties.

The VOB/B is a pre-formulated set of clauses which was designed for the addition and partial modification of German law applicable to works and services in construction contracts. It especially serves to balance the multiple specific regulations for construction contract law in German civil law.

The VOB/B was established by the German "*Vergabe- und Vertragsausschuss für Bauleistungen*" (DVA). Within the DVA the public authorities and head organisations of the construction industry participate in the development of the VOB/B, with the aim of establishing regulations for construction contracts that will achieve a fair balance between the interests of employer and contractor.

The VOB/B is not a law, but has the character of General Terms and Conditions. As such it only becomes an integral part of the contract if its application is explicitly required by the contract. This usually happens by one contracting party arranging for the application of the VOB/B in its own

[1] The full text of the VOB/B can be found in the internet under: http://www.bmvbs.de/Anlage/original_981860/VOB-B_-Ausgabe-2006.pdf

contract or in its General Terms and Conditions and (as far as this is possible for a contractor) by providing the other party with the knowledge of its content by delivery of a copy or by giving the other party an opportunity to be acquainted with its content in a reasonable manner, whereby the contracting party will be bound by the VOB/B by concluding the construction contract.

Section 6 of the VOB/B is relevant for hindrances and delay resulting from hindrances and reads as follows:

> "1. If the contractor believes himself to be hindered from carrying out the work, he must inform the employer immediately. If the contractor fails to do so he may only rely on these hindering circumstances for claims if the employer was obviously aware of the circumstances anyway and the fact that they represented a hindrance.
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> 2. (1) Deadlines for works may be extended if the hindrance is caused by:
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> (a) a circumstance in the sphere of risk of the employer,
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> (b) strike or other lock-out out in the contractor's business or a business directly working for him and which was ordered by the employer's trade association,
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> (c) *force majeure* or other circumstances unavoidable for the contractor.
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> (2) Weather conditions arising during the works which would normally have been foreseeable at the time of tendering are not deemed a hindrance.
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> 3. The contractor must do everything in his power and which can reasonably be expected of him to enable the work to continue. As soon as the hindering circumstances have passed, he must immediately start up work again and inform the employer of this.
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> 4. The amount of deadline extension is based on the length of the hindrance with an additional period for starting up work again and the possibility that the work has now been extended into a less favourable season of the year.
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> 5. If it can be foreseen that the work will be interrupted for a long time but has not become permanently impossible, the work undertaken up to that time is subject to payment at the contractual prices; also those costs are to be paid which the contractor has already incurred but which involve work not yet carried out but which is part of the contractual price.
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> 6. If the hindering circumstances are the fault of one of the parties, the other party may claim compensation for those damages it can prove, including loss of profit, the latter however only in cases of intention or gross negligence. The contractor may claim reasonable damage compensation under §642 of the German Civil Code if he has made the notification described under clause 1, sentence 1, above, or if the employer was obviously aware of the circumstances, as described under clause 1, sentence 2, above.
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> 7. If work is interrupted for more than three months, each party may terminate the contract in writing at the end of this period. Settlement of fees is then regulated in accordance with clauses 5 and 6; if the contractor is not at fault for the interruption, the costs of vacating the construction site will also be compensated, if this is not already contained in the compensation for the works."

As one can see from clauses 2 and 6 of the section set out above, the VOB/B distinguishes between two legal consequences of a hindrance: the extension for deadlines for works on the one hand and the payment of damages on the other hand.

1. Extension of deadlines

With regard to the extension of deadlines there are two relevant aspects which should be observed in connection with hindrances.

(a) Notifying a hindrance

The first is the quality and accuracy that a contractor should exhibit when notifying a hindrance to the employer. In this regard the German Federal High Court set out the determining factors in its judgment dated 21 March 2002[2] as follows:

> "... It must be concurred with the Appeals Court that, as a rule, construction is deemed to be hindered if approved plans are not supplied on time. This principle based on experience does however not release the contractor from his obligation to provide proof of the hindrance ... Although this burden of proof is not subject to very strict requirements (German Federal Court, Judgment of 20 February 1986—VII ZR 286/84, BGHZ 97, 163, 166), this still does not mean that it is sufficient to simply submit to the court that the approved plans were supplied late. Rather, as a rule it is necessary to set out the concrete hindrance which refers to the planned process of the construction project. This must take into account all those undisputed circumstances which might speak against there having been a hindrance, for instance, that preliminary copies of plans had already been made available and work carried out according to them, or that the contractor used the time to advance and carry out other sections of the work. Only when the hindrance has been set out as specifically as possible, is it possible for a court to judge to what extent a notification of hindrance was necessary or whether it was unnecessary because the hindrance was already obvious to the principal, as well as to what extent the agent incurred damages attributable to the hindrance.
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> The Civil Court of Appeal has previously noted that this requirement to specify the hindrance is not too much to ask even for large construction projects, since it is in the very case in which the contractor believes himself to be hindered that it can be expected of him to document the hindrance, its length and its extent (German Federal Court, Judgment of February 20, 1986—VII ZR 286/84). If the agent cannot provide sufficient documentation on the hindering circumstance and the delays caused by it, to a degree sufficient for the court, this should not be to the disadvantage of the employer."

These requirements should be a first approach for parties and tribunals when verifying the "quality" of a hindrance or its causative potency. This approach could also help to sort out one of two concurrent delays.

(b) Definition of "relevant" or "dominant" events

The second interesting aspect with regard to the extension of deadlines is that clause 2 of the VOB/B section cited above clearly defines the "relevant" or "dominant" events, which could lead to an extension of deadlines.

Regarding clause 2 concerning the extension of deadlines it has further to be noted that the question of default is not relevant when deciding

[2] File No: VII ZR 224/00.

whether a deadline must be extended or not. According to clause 6 the question of default is only relevant with regard to damages.

2. Damages due to a hindrance

According to clause 6 of VOB/B, section 6, cited above, a party may claim compensation for the damages it can prove, if the hindering circumstances are the fault of the other party.

(a) Claim by the employer

According to this an employer only has rights for a delay, if one of the following preconditions is met:

- The contractor delays the start of the building construction. This is allowed whenever the contractor does not have a contractual deadline or—despite request—does not start the building construction in due time.
- The contractor defaults on the completion of the building construction. He then bears the burden of proof that he is not responsible for the delay, whereas the employer has to establish the consequences of the delay. Thereby the contractor cannot be in default, if the employer has not fulfilled his duty to pay in advance or pay the agreed down payments, respectively; the existence of a right to refuse performance does in any case bar the default, even if the contractor did not invoke it.
- The contractor despite request does not overcome an insufficiency of manpower, equipment, scaffolding, materials or building elements so that the construction deadlines can obviously not be held.

In these cases the employer has the following opportunities:

- He can once—under the construction contract—claim compensation pursuant to section 6, clause 6, VOB/B. In this respect he can—but only if the other party has intentionally also been guilty of gross negligence—claim for verifiable damages that arose and his loss of profit.
- In addition to the claim for damages the VOB/B also grants the employer the option of cancellation.

(b) Claim by the contractor

Building construction delays for which the employer is responsible can be for various reasons:

- Lack of public building authorisation.

- No, incomplete or delayed handover or respectively release of execution plans, assembly and workshop drawings or detailed drawings.
- Change of drawings by the employer.
- No or delayed allocation of a property that is ripe for development or of a respective access road or of certain already delivered building materials or provided pre-constructions.
- Inadequate co-ordination of the construction site and the building project as a whole.
- Building stopped by neighbour's objections.
- Not duly, or only belatedly, provided supplementary building permission during the building construction.
- No or delayed compliance with co-operation obligations of the employer (e.g., delayed setting-out of the main axis of the building or not duly making a decision regarding the sampling).
- Additional orders.
- No (but necessary) instruction of contractual execution.

Many impeding circumstances, especially on big construction sites, can be mitigated or balanced by the contractor by adjustment of the construction process—as demanded by section 6, clause 3, of the VOB/B—so that the hindrance in consequence does not effectively cause a delay in the construction process and generally also no additional costs.

Thus, if a plastering company is held up on one floor of a multi-storeyed building but is able easily to switch to a different storey, the undisputed hindrance will not have any consequences for the contractor. The German Federal High Court correctly says that, especially on big construction sites where other possible applications for manpower and equipment often exist, not every hindrance inevitably results in loss.

(c) Parallel hindrances caused by both parties

With regard to situations, where both parties caused hindrances which led to damage due to the delay, the German Federal High Court in its decision dated 14 January 1993[3] has stated the following:

> "In cases where both, the contractor and the employer set causes for the hindrances, and where both are responsible for each hindrance, a damage due to the occurred delay has to be shared according to the respective degree of default and causation. The question, whether and to what extent in such cases the conduct of the contractor on the one hand or the conduct of the employer on the other hand caused the damage, can be decided by the court on the basis of 'free belief' according to §287, German Civil Procedure Code."

Section 287 of the German Civil Procedure Code has the following wording:

[3] File No VII ZR 185/91.

> "If there is a dispute between the parties whether there is a damage and to what extent a damage or an interest to be compensated exists, the court will decide this question under appreciation of all circumstances and free conviction. Whether and to what extent hearing of an authorised expert, for which a party filed, or *ex officio*, must take place at the discretion of the court."

Therefore, the German Federal High Court gives no coherent guidance with regard to the handling of parallel hindrances. Untypically for civil law systems there are no established rules or provisions to handle these situations. Rather, the German Federal High Court grants the courts in Germany the "freedom" to decide such cases on the basis of discretion.