Germany

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1. Current highlights

Several construction projects in Germany have been attracting regular media attention – especially where public alarm has been raised due to questions about whether they are in fact necessary, due to environmental issues or, mostly, due to cost concerns. Such projects can create all kinds of problems and disputes which need to be resolved.

1.1 Berlin-Schönefeld Airport

The reconstruction of Berlin-Schönefeld Airport was originally budgeted at €1.7 billion, with the opening scheduled for 2007. However, due to numerous problems both in the design phase and during construction, several delays were incurred. The latest postponement came just three months prior to proposed completion, when severe deficiencies in the fire protection system came to light. According to current estimates, completion is now expected in 2014 or even 2015. So far, costs have soared to €4.3 billion and are likely to rise further still.

In July 2012 the airport company filed an action against the architects, claiming that the delays were caused by their poor planning. Air Berlin also filed suit against the airport company in November 2012, alleging losses of several million euros due to the delays. Both disputes are pending. Lufthansa is additionally considering legal action.

1.2 Stuttgart 21

The railway terminal in Stuttgart is being replaced by an underground through station. Costs were initially estimated at €2.5 billion, to be shared among the federal government, the state of Baden-Württemberg and Deutsche Bahn. The project has proved highly controversial from the outset.

Since the commencement of construction works in 2010, opponents have demonstrated almost continuously in the square in front of the station. When their protests became increasingly violent in September 2010, it was decided to appoint a former minister to mediate between both sides and prevent future violence.

After eight sessions, the mediation ended with a recommendation from the mediator that the project continue, but with revisions to reflect some important concerns. Half a year later, having conducted studies to investigate possible compromises, the mediator submitted a proposal to amend the project and build a small new underground station while keeping part of the old station. However, Deutsche Bahn rejected this proposal.

Following further unforeseen complications which led to cost increases and delays, it now appears that the federal government might well have a claim against Deutsche Bahn. Costs have thus far amounted to €4.3 billion; an estimation of total costs suggests there are more likely to reach €5.3 billion. However, the federal government and the state of Baden-Württemberg have agreed to a cap of €4.5 billion, with Deutsche Bahn having to bear any additional costs by itself.

1.3 *Elbphilharmonie*

In 2001 the City of Hamburg, through a special purpose vehicle, contracted a joint venture between construction company Hochtief and finance company CommerzLeasing to build the city's new concert hall, the *Elbphilharmonie*. According to calculations, the project would cost €186 million and be completed by 2010. However, after several problems arose, leading to delays and massive cost hikes, it began to look as though Hochtief was not taking the city council seriously. In 2011 the city council applied for a declaration that Hochtief was not entitled to delay the project any longer than February 2012, and was liable for any damages arising from the delay. The court dismissed the first application as inadmissible. Regarding damages, the parties reached a settlement in December 2012. Hochtief will bear all future costs itself, while the City of Hamburg will remain principal of the project. However, the city must still meet the existing costs of €575 million. Takeover is now scheduled for late 2016.

1.4 Freight vehicle toll system

A company called Toll-Collect was appointed to launch a highly technical and complicated new freight vehicle toll system in 2003. The commissioning date was pushed back several times. The system was eventually launched at the beginning of 2005, but it took another year before it was operating flawlessly. The federal government commenced arbitration against Toll-Collect due to lost toll earnings, claiming damages amounting to €3.5 billion as well as a €1.6 billion contractual penalty, along with interest at a rate of 9%. Toll-Collect counterclaimed to recover the 15% of its contractual annual payment that the government had decided to retain. Together, both claims are worth some €7 billion. Toll-Collect denies any blame for the delay, alleging that this was down to the usual 'innovation risk' of any new system. The government claims that Toll-Collect was grossly negligent due to defective risk management.

Proceedings were adjourned when the chairman of the arbitral tribunal resigned due to illness in March 2012, and resumed only in the following December. The government has recently considered waiving a major part of its claim. As at July 2013, a conclusion to the proceedings remains eagerly awaited.

1.5 Conclusion

What the above large-scale projects have in common is that in each case a public body acted as principal, and in each case the project ended disastrously – at least from a financial perspective. That said, in recent years Germany has seen similar problems arise in the private sector, where delays and changes in the scope of

projects have caused huge cost overruns. In most cases deficiencies in the planning phase were the cause of the problem, rather than sloppy performance by the contractors. However, the insolvency of contractors or subcontractors can also be a contributing factor.

Such problematic projects invariably end up with disputes between the principal and contractor, and/or between the main contractor and subcontractors, most of which can be resolved only after lengthy proceedings (often by way of more or less 'forced' settlements).

2. Dispute resolution methods in common use

2.1 Litigation

In the German construction industry, disputes are often finally resolved by litigation before the ordinary courts.

For those who are unfamiliar with the German legal system, it may be helpful to highlight some features of German civil litigation:

- No pre-trial discovery – unlike in other jurisdictions, German law does not provide for pre-trial discovery. Litigation in Germany relies on an elaborate system of allocating the burden to submit and to prove the facts, in which the parties have very limited rights to request information from the other side and confidential information is extensively protected.
- Comprehensive pleading – unlike in other jurisdictions, where a statement of claim might only outline the dispute, in Germany litigation begins with a detailed statement of claim which provides a complete and concise description of the relevant facts, including the evidence on which the plaintiff relies and an exact specification of the relief it seeks. If the court finds the statement of claim insufficient, the case may be dismissed even before the defendant has submitted its statement of defence.
- Costs – in Germany, the costs of litigation (ie, court fees and statutory attorneys' fees) are borne by the losing party. As long as the attorney representing the winning party charges based on the statutory fees, there will be full reimbursement of costs to the winning party. Contingency fees and fee agreements are generally not allowed.

Besides some fundamental procedural guarantees enshrined in the German Constitution – such as the right to be heard by the court, the right to legal recourse, the right to be heard by a lawful judge, the right to a fair trial according to the rule of law, the right to be treated equally by the court and the commitment of the courts to follow the law – the main statute governing German civil litigation is the Civil Procedure Code.[1]

The Civil Procedure Code sets out some basic principles, including:

- the principle of party control of the subject matter of the lawsuit;

1 An English translation of the German Civil Procedure Code is available at www.gesetze-im-internet.de/englisch_zpo/index.html.

- the principle of party control of allegations and proof;
- the principle of oral procedure – that is, the court decision may be based only on statements made by the parties or reiterated orally;
- the principle of publicity;
- the principle of immediacy – that is, the proceedings must be conducted before the court;
- the principle of expediting proceedings; and
- the right to be heard by the court.

The German court structure is as follows:

- Courts of first instance – these are local (lower district) courts that hear claims for up to €5,000 or regional (district) courts, which would be the normal entry level for construction disputes. The regional courts are organised in chambers, usually consisting of three professional judges (although it has become common practice for a single judge to hear and decide the case). A number of regional (district) courts have chambers which also regularly deal with construction disputes and which may be regarded as more specialised.
- Courts of second instance (appellate level) – appeals against regional court decisions are handled by the higher regional (district) courts, usually before a panel consisting of three professional judges. Again, some of the higher regional courts have specific panels experienced in construction disputes.
- Further appeal – under certain circumstances, judgments on first appeal may be further appealed to the Federal Court of Justice, which is organised in panels of five professional judges.

Unless otherwise agreed by the parties, jurisdiction of the courts is determined either by the seat of the defendant or by the location where the defendant has assets. Construction contracts in Germany normally contain a jurisdiction clause.

The length of proceedings is commonly cited as an argument against litigation. However, the German court system is quite efficient: the average time frame between commencement and conclusion of first-instance proceedings is usually less than one year, subject to the complexity of the matter and, in particular, any need for expert opinion, which is often required in construction cases. Consequently, it cannot be ruled out that first-instance proceedings in some cases can take up to six or even eight years, particularly where preliminary proceedings to preserve evidence are initiated before the actual litigation. When deciding whether to litigate or arbitrate, the potential for appeal must also be considered.

Arguments relating to expert knowledge often used in favour of arbitration over litigation do not necessarily apply where courts with experienced chambers or panels have jurisdiction.

The Civil Procedure Code contains specific provisions relating to independent evidentiary proceedings.[2] Such proceedings are widely used in the construction industry in order to preserve evidence and to enlist an expert to determine the status

2 2nd Book, Title 12, Sections 485 and following.

of the construction site, in particular with regard to alleged defects at an early stage (ie, before evidence might be destroyed by further ongoing activities). Once a corresponding petition has been filed, the court may direct (in the course of litigation or outside the proceedings) that visual evidence be taken onsite, that witnesses be examined or that an expert prepare a report, provided that the opponent consents or there is concern that evidence might be lost or become difficult to use.[3] These independent evidentiary proceedings might also drag on for a long time (sometimes several years) if the issues are complex and the expert must render one or several reports, which might be contested by the parties in hearings at which the parties bring along their own experts. Preserved evidence can be used in subsequent litigation.

Overall, litigation is a viable option for parties to resolve domestic construction disputes, particularly when the court with jurisdiction has a chamber or a panel with judges experienced in construction cases. Where there is a foreign element, litigation might be less favourable – particularly if, for example, correspondence and documentation are primarily in a foreign language, since in principle all documents presented to the German courts must be translated into German (commercial courts may exceptionally allow submissions in English, albeit that judgments are still delivered in German).

One advantage of litigation is the relative efficiency of the German court system, given its limited discovery and the fact that the parties can rely to a certain extent on precedents set by other courts.

The disadvantages include that parties might end up before judges who have limited technical understanding and the fact that ordinary court proceedings are not confidential.

2.2 Arbitration

Arbitration is a major form of alternative dispute resolution (ADR) in Germany.

German arbitration law in its current form came into force on January 1 1998, after a lengthy reform process in the late 1980s and early 1990s, when the regime was modernised to ensure compatibility with the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985.

German arbitration law is set out in the Civil Procedure Code.[4] In principle, the provisions of the 10th Book apply to both *ad hoc* arbitration and institutional arbitration, as long as the seat of arbitration is in Germany, irrespective of whether the dispute is international or domestic. Only a few provisions of German arbitration law will apply to arbitrations where the place of arbitration is in a different country; these basically concern the enforcement of arbitration agreements and awards, as well as judicial support.

German arbitration law recognises and supports party autonomy as a general principle, with few exceptions. It affords the tribunal wide discretion in the conduct of the proceedings and allows only limited court intervention.

Of major importance in German arbitration proceedings (as in litigation in the

3 Section 485, para. 1.
4 10th Book, Sections 1025 to 1066.

ordinary courts) is the promotion of amicable solutions with the help of the arbitrators, who play an active role in this process.

It has been estimated that approximately two-thirds of domestic arbitrations in Germany result in an amicable settlement. Such settlements may be recorded in the form of an arbitral award on agreed terms, which has the same effect as any other award on the merits of the case and is thus enforceable to the same extent.

Arbitration proceedings are subject to a valid and binding arbitration agreement between the parties, which under German law needs to satisfy relatively few formal requirements.

The arbitral tribunal is constituted in accordance with the agreement between the parties, which are free to determine the number of arbitrators and the procedures for their appointment. In the absence of agreement, three arbitrators will be appointed, with each party appointing one arbitrator and the third appointed by the higher regional court in the jurisdiction of the seat of the arbitration. German arbitration law allows limited scope for challenging and substituting the appointment of arbitrators, but arbitrators must disclose all circumstances that could give rise to justifiable doubts as to their impartiality or independence.

In *ad hoc* arbitrations, a separate arbitrators' agreement must be concluded between the parties and the arbitrators, in particular with regard to payment of the arbitrators' fees and reimbursement of their expenses. This is not necessary in institutional arbitration, where such issues are already dealt with in the rules of the relevant institutional arbitration.

Of course, as a German concept, the principle of *Kompetenz-Kompetenz* applies, meaning that the arbitral tribunal is permitted to rule on its own jurisdiction. A relatively new feature of German arbitration is the tribunal's authority to order protective interim measures, although these might require enforcement to be granted by the courts.

The conduct of the proceedings is relatively flexible. Section 1042 of the Civil Procedure Code expressly states that, subject to mandatory provisions of the law, the arbitral tribunal shall conduct the proceedings according to the rules determined by the parties; in the absence of such agreed rules, the arbitral tribunal shall conduct the proceedings in a manner that it considers appropriate. German arbitration law *per se* does not dictate that continental European-style proceedings be chosen over Anglo-American-style proceedings, but leaves this to the parties' autonomy.

Nevertheless, discovery in German arbitration proceedings will normally be limited in line with the Civil Procedure Code, which allows the court to order the production of documents which are in the possession of a party or a third party only if one party has made specific reference to them or has given a specific reason for the need to disclose such documents. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (2010) are often used as a guideline, particularly in cases where foreign parties are involved.

The advantage of arbitration compared with litigation before the ordinary courts is the freedom of the parties to agree on the appointment of the arbitrators, the seat of arbitration and the language of the proceedings.

Difficulties arise, however, with regard to multi-party issues. German law has no

explicit provisions on the appointment of arbitrators where multiple parties are involved. However, the arbitration rules of the Deutsche Institution für Schiedsgerichtsbarkeit eV (DIS) – the most widely recognised arbitration institute in Germany – do contain relevant provisions (as do the International Chamber of Commerce Rules).[5]

The taking of evidence and the appointment of experts are also subject to the parties' agreement or to the wide discretion of the tribunal.

With regard to the confidentiality of proceedings, German arbitration law does not expressly impose a confidentiality obligation on the parties, although this is usually expected as one of the key advantages of arbitration proceedings. In fact, arbitration proceedings are held in confidence and awards are normally not published and do not become public knowledge, except in subsequent court proceedings.

Where arbitration is chosen by the parties, this will usually be institutional arbitration, in which case the institution will also provide a model arbitration clause/agreement.

For *ad hoc* arbitration, careful drafting of the arbitration clause/agreement is necessary. It will almost always be executed in writing. At a minimum, the agreement should determine: the seat of the arbitration; the number of arbitrators (which sometimes depends on the sum in dispute); the appointment procedure; the qualifications of the arbitrator(s) (eg, at least one lawyer); and, if a foreign element is present, the choice of law and language of the proceedings.

With regard to available institutional arbitration in the construction industry, three organisations and their rules should be mentioned.

(a) Deutscher Beton- und Bautechnik-Verein eV/Deutsche Gesellschaft für Baurecht eV

The *Deutscher Beton- und Bautechnik-Verein eV/Deutsche Gesellschaft für Baurecht eV* recently issued a completely new set of rules, the ADR Rules for the Construction Industry, which allow disputing parties to choose between four different dispute resolution proceedings. These proceedings may be selected individually or cumulatively.[6]

(b) ARGE Baurecht

The Working Group for Construction and Real Estate Law of the German Lawyers' Association has issued rules which basically cover a sort of mediation, as well as arbitration proceedings. The rulebook also has a chapter on isolated proceedings for the purpose of securing evidence. The rules are not available in English.[7]

5 The DIS website is very informative, with all of its institutional rules also available in English: www.dis-arb.de.

6 The objective of mediation is to support the disputing parties through the help of a mediator to reach a mutually amicable solution. Conciliation may result in an award, whose effectiveness is subject to the acceptance of the disputing parties. Arbitration decisions regarding disputes are legally binding. Arbitration now provides for and decides upon third-party notices and the intervention of third parties, and upon the nature of this intervention. Adjudication was introduced after a call from the construction industry to make available assertive, temporarily binding resolutions of disputes during the planning and construction stages. The rules are available in English at http://dg-baurecht.de/fileadmin/user_upload/ downloads/sl_bau_englisch.pdf.

7 The German version can be obtained at www.arge-baurecht.com/rechtsuchende/sobau/schiedsordnung.

(c) ***Deutsche Institution für Schiedsgerichtsbarkeit***[8]

The DIS covers the entire range of commercial arbitration (including, most recently, sports arbitration), and is not specifically relevant only to the construction industry. Accordingly, no qualification requirements for arbitrators are specified. The DIS now also offers rules on conciliation, conflict management, mediation, expert determination and adjudication.

3. Mediation

While mediation has had a comparatively short history in Germany, its use as a dispute resolution mechanism in the commercial context is growing. Indeed, disputes in the construction industry are considered particularly well-suited to ADR.[9] Awareness and understanding of mediation, especially in the construction industry, have been steadily increasing since 2002.[10] In construction disputes in particular, the advantages are evident: even with Germany's relatively time- and cost-effective judicial system, litigation before the state courts often leads to protracted procedures with significant costs – not forgetting the indirect costs incurred in the conduct of ordinary proceedings.[11]

In Germany, two recent developments can be considered 'German specialities': the implementation of court-associated mediation and mediation by judges.

3.1 *Gerichtsnahe* mediation

The concept of *gerichtsnahe* mediation enables the parties to refer a dispute to mediation even once a claim has been filed. Mediators are appointed from among a pool of local registered and properly qualified mediators. The *Projekt Anwaltsmediation* proceedings in the Higher Regional Court of Cologne represent a good example;[12] in that case, the court proceedings were interrupted and the official court file was submitted to the mediators, who called a meeting between the parties and their counsel in a timely manner. Mediation always foresees co-mediation, matching different levels of experience and – if possible – different genders of the mediators. The mediators themselves commit to fixed fees for the first four hours, which encourages the parties to choose mediation. Once these four hours have elapsed, the parties can continue on the basis of an individual agreement with the mediators. Once a settlement has been reached, this settlement can be recorded by the court and then becomes enforceable between the parties. The advantage of this process is that it allows for the appointment of experienced practitioners in the field of construction law. If mediation fails, the court file is resubmitted to the court and the court proceedings continue as if the mediation had never taken place.

3.2 Richter mediation

In other regions of Germany, the civil courts themselves are trying to incorporate

8 See n5.
9 See Frickell, ZKM 2000, 158.
10 See Wagner, Mediation im Privaten Baurecht: Eine Alternative zum Bauprozess, BauR 2004, 221 and following.
11 See Wagner, BauR 2004, 222, 223.
12 See http://projekt.anwaltmediation.de.