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# Construction contracts in the system of German Civil law

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## Part II. The Risk of Completion: What Does the Contractor Owe?

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FDUL Curso Intensivo

April 2022



## Agenda

- I. Obligation to achieve result**
- II. Scope of defense of impossibility, disproportionality**
- III. Passing of risks**
- IV. Result and quality**
- V. Role of the employer with regard to the contractor's performance**
- VI. Remedies**



## Obligation to achieve result

### Section 631 Typical contractual duties in a contract to produce a work

(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration.

(2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service.



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

#### 1. Traditional qualification of construction contracts

##### a) Contract to produce a work

(1) “production or alteration of a thing” part of a broader concept:

(2) “production of another result”



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

#### 1. Traditional qualification of construction contracts

- a) Contract to produce a work
- b) “Result” as an abstract concept; particular result to be defined by the parties
- c) Qualification of contracts following interpretation of individual contracts:
  - (1) Which are contractual duties as agreed by the parties?
  - (2) Which statutory provisions “fit” to these duties?
  - (3) Mutual influence of parties legitimate expectations and legislator’s action



## Obligation to achieve result

- I. **Construction contracts as contracts to produce a work**
  1. Traditional qualification of construction contracts
    - a) Contract to produce a work
    - b) “Result” as an abstract concept; particular result to be defined by the parties
    - c) Qualification of contracts following interpretation
      - In construction contracts employers expect contractors to achieve result as set out in the contract
      - Construction contracts typically qualified as contracts to produce a work



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendments
  - Construction contracts designed as sub-types of contracts to produce a work
  - All provisions pertinent for works contracts apply, secs. 631 ff. GCC
  - + specific provisions for construction contracts, secs. 650a ff. GCC



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
  - a) Legislator had in mind simple cases of fixed consideration for a determined result

**Ex.:** A man walks into a hairdresser's salon and asks for a hairdo, "like last time". The hairdresser offers a chair, then cuts the man's hair and presents the results to the customer in a mirror. The customer nods, gets up and pays the due price for a man's hairdo.





## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due

**Ex.:** Because his car won't start, the owner asks a car mechanic to repair it. It is unclear whether there is a simple cause like a poor contact at a spark plug, a broken battery or even more serious problems that need to be fixed.



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
  - a) Legislator had in mind simple cases of fixed consideration for a determined result
  - b) Private autonomy leaves room for defining particular results (e.g. either “install new battery” or “make the car operable again”) and remuneration schemes (e.g. time needed, parts costs, expenditure; cost-plus contract; fixed price contract)



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
4. Unit price contracts
  - In construction contracts the result is seldom defined functionally (e.g. “a four-bedroom family home”) => risk for customer to buy “pig in a poke”



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
4. Unit price contracts
  - In construction contracts the result is mostly defined in specifications for tenders made up by the employer or his architect



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
4. Unit price contracts
  - a) Specifications for tenders made up by the employer
    - Full work broken down in individual tasks and needs
    - Tasks and needs make “positions” and are calculated in “units” and “numbers required” (“unit price contracts”)



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
4. Unit price contracts
  - a) Specifications for tenders made up by the employer
    - Full work broken down in individual tasks and needs
    - Tasks and needs make “positions” and are calculated in “units” and “numbers required” (“unit price contracts”)
      - (1) Specifications become part of the contract
      - (2) Insufficiencies of the specifications? *Glöckner*



## Obligation to achieve result

### I. Construction contracts as contracts to produce a work

1. Traditional qualification of construction contracts
2. Qualification following the 2018 amendment
3. Result owed and remuneration due
4. Unit price contracts
  - a) Specifications for tenders detailing “units” and “numbers required”
  - b) The contractor makes his offer
    - (1) May not notice insufficiencies of specifications
    - (2) May notice and exploit (“I spy with my little eye”) expecting extra remuneration or cross-calculation



## Obligation to achieve result

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Not only damages for breach, but injunctive actions for specific performance regularly available (to be enforced via third-party performance and refund of costs, sec. 887 CCP)





## Limited scope of impossibility, disproportionality

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor



## Limited scope of impossibility, disproportionality

### Section 275 Exclusion of the duty of performance

(1) A claim for performance is excluded to the extent that performance is **impossible** for the obligor or for any other person.



## Limited scope of impossibility, disproportionality

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor
    - a) Impossibility, sec. 275(1) GCC
      - (1) Physical impossibility, e.g. unbreakable glass facade
      - (2) Legal impossibility
      - (3) Delay of absolutely fixed terms



## Limited scope of impossibility, disproportionality

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor
    - a) Impossibility, sec. 275(1) GCC
    - b) Impropportionality, sec. 275(2) GCC



## Limited scope of impossibility, disproportionality

(2) The obligor may refuse performance to the extent that performance **requires expense and effort** which, taking into account the subject matter of the obligation and the requirements of good faith, **is grossly disproportionate** to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.



## Limited scope of impossibility, disproportionality

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor
    - a) Impossibility, sec. 275(1) GCC
    - b) Impropportionality, sec. 275(2) GCC
      - (1) High standard due to duty to produce result
      - (2) Duty not limited to personal performance



## Limited scope of impossibility, disproportionality

### Section 635 Cure

(3) The contractor may refuse cure, without prejudice to section 275(2) and (3), if it is only possible at disproportionate cost.



## Limited scope of impossibility, disproportionality

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor
    - a) Impossibility, sec. 275(1) GCC
    - b) Impropportionality, sec. 275(2) GCC
    - c) Impropportionality of cure, sec. 635(3) GCC: extension of impropportionality defence, but narrow limits





## Obligation to achieve result

- I. Construction contracts as contracts to produce a work**
- II. Primary duty to produce the result as agreed upon in the contract**
  1. Action for specific performance
  2. Limited defences of contractor



## Passing of Risks

**Ex.:** Contractor builds house, which is completed, but destroyed by fire the night before the acceptance.

### I. Risk of performance

1. Risk of performance passes only with acceptance
2. Or impossibility; here (-) house can be built again
  - Contractor has to build again



## Passing of Risks

### I. Risk of performance

### II. Risk of remuneration, secs. 326, 644, 645 GCC

1. Contractor bears risk of remuneration until acceptance, secs. 326(1), 644(1)1 GCC
  - a) No remuneration in case of impossibility
  - b) No additional remuneration for additional work



## Passing of Risks

### I. Risk of performance

### II. Risk of remuneration, secs. 326, 644, 645 GCC

1. Contractor bears risk of remuneration until acceptance, secs. 326(1), 644(1)1 GCC
2. Only when additional work is required due to insufficient building material provided by the employer or false directions, risk of remuneration is shifted to employer, sec. 645 GCC



## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC



## Result and quality

### Section 633 Material defects and legal defects

(1) The contractor must procure the work for the customer **free of material defects and legal defects.**



## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC
  2. Conformity defined, sec. 633(2) GCC



## Result and quality

### Section 633 Material defects and legal defects

(2) The work is free of material defects if it is **of the agreed quality**. To the extent that the quality has not been agreed, the work is free from material defects

1. if it is **suitable for the use envisaged in the contract**, or else

2. if it is **suitable for the customary use** and is of a **quality that is customary** in works of the same type and that the customer may expect in view of the type of work.





## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC
  2. Conformity defined, sec. 633(2) GCC
    - a) "Of the agreed quality", e.g. contract specifies use of a particular type of shingles to be used for a roof



## Result and quality

- I. **Primary duty to produce the result as agreed upon in the contract**
- II. **Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC
  2. Conformity defined, sec. 633(2) GCC
    - a) "Of the agreed quality"
    - b) "Suitable for the use envisaged by particular contract"

**Ex.:** If the employer lets his contractor know that an industrial dwelling is to be used for heavy machinery, the concrete floor has to be built solid enough to permit such use



## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC
  2. Conformity defined, sec. 633(2) GCC
    - a) "Of the agreed quality"
    - b) "Suitable for the use envisaged by particular contract"
    - c) "Suitable for customary use" + customary quality



## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
  1. Contractor's duty encompasses that result is fully in conformity with the contract, sec. 633(1) GCC
  2. Conformity defined, sec. 633(2) GCC
  3. All aspects of conformity need to be complied with simultaneously  
=> not sufficient to simply produce work according to specifications



## Result and quality

- I. Primary duty to produce the result as agreed upon in the contract**
- II. Concretized definition of conformity, sec. 633 GCC**
- III. Complimentary duty to examine and give notice**
  1. Contractor is obliged to examine whether suitability for customary use or use as envisaged by particular contract is compromised by specifications given by employer
  2. Contractor is obliged to utter concerns
  3. Failure to do so will support employer's remedial rights for defects



## The contractor's performance and the employer

### I. Employer's contributions typically not owed as duties

1. Frequently, employers have to provide contributions, e.g.
  - The plot of land to build upon
  - Building permits
  - The building material
  - Construction plans
  - Infrastructure, e.g. electric power, water, scaffold
  - The state of works to permit the contractor to produce his work on, e.g. the shell of the building to do the plumbing



## The contractor's performance and the employer

- I. Employer's contributions typically not owed as duties**
  1. Frequently, employers have to provide contributions
  2. As a rule, these contributions are not owed as duties, i.e. are not enforceable by the contractor



## The contractor's performance and the employer

- I. Employer's contributions typically not owed as duties**
  1. Frequently, employers have to provide contributions
  2. As a rule, these contributions are not owed as duties
  3. They are rather conditions precedent to the employer's claims, i.e. failures to comply will result in losses of the employer's own claims
  4. Additionally, there are specific contractor's rights to compensation, sec. 642 GCC, and termination, sec. 643 GCC





## The contractor's performance and the employer

- I. Employer's contributions typically not owed as duties**
- II. Employer's contributions and contractor's performance**
  1. Contractor owes result
  2. Most remedies are independent of contractor's fault
    - a) cure
    - b) self-help
    - c) reduction of the price
    - d) right to revoke the contract



## The contractor's performance and the employer

- I. Employer's contributions typically not owed as duties
- II. Employer's contributions and contractor's performance
  1. Contractor owes result
  2. Most remedies are independent of contractor's fault
  3. Liberation for defects owing to employer's responsibility  
+ compliance with duty to examine and advise

**Ex.:** Employer lets contractor know that an industrial dwelling is to be used for heavy machinery. Specifications for tender, however, only require normal-grade concrete for the floors. The heavy duty concrete needed for the employer's purpose is more expensive.



## The contractor's performance and the employer

- I. Employer's contributions typically not owed as duties
- II. Employer's contributions and contractor's performance
  1. Contractor owes result
  2. Most remedies are independent of contractor's fault
  3. Liberation for defects owing to employer's responsibility + compliance with duty to examine and advise
  4. Possible extension of contractor's duty covered by additional claims for costs that the employer would have had to incur anyway, if the contractor had advised correctly ("anyway costs"), in the case of a respective employer's direction to change covered by sec. 650c (1) GCC



## Remedies

### I. Prior to acceptance

- Action for specific performance, depending on performance being due
- Denial of acceptance because of substantial defects, sec. 640(1) GCC  
=> Pressure on contractor, because remuneration only due upon acceptance, sec. 641(1)1 GCC



## Remedies

### **I. Prior to acceptance**

### **II. Post acceptance, sec. 634 GCC**

#### 1. Cure, secs. 634 no. 1, 635 GCC

a) Repair or, if necessary,

b) Production of a new work



## Remedies

### **I. Prior to acceptance**

### **II. Post acceptance, sec. 634 GCC**

1. Cure, secs. 634 no. 1, 635 GCC
2. Reimbursement of expenses for third party cure, if a notice period set for the cure, has lapsed fruitlessly, secs. 634 no. 2, 637(1) GCC, and advance payment of such expenses, sec. 637(3) GCC



## Remedies

### **I. Prior to acceptance**

### **II. Post acceptance, sec. 634 GCC**

1. Cure, secs. 634 no. 1, 635 GCC
2. Reimbursement of expenses for third party cure, secs. 634 no. 2, 637 GCC
3. Reduction of price, secs. 634 no. 3, 638(1) GCC
  - Under same circumstances as revocation
  - Available also for non-substantial material defects



## Remedies

### I. Prior to acceptance

### II. Post acceptance, sec. 634 GCC

1. Cure, secs. 634 no. 1, 635 GCC
2. Reimbursement of expenses for third party cure, secs. 634 no. 2, 637 GCC
3. Reduction of price, secs. 634 no. 3, 638(1) GCC
4. Revocation, secs. 634 no. 3 in combination with
  - a) sec. 323 GCC
    - if a notice period set for the cure, has lapsed fruitlessly, sec. 323(1) GCC
    - Not available for non-substantial material defects, sec. 323(5) 2 GCC





## Remedies

### I. Prior to acceptance

### II. Post acceptance, sec. 634 GCC

1. Cure, secs. 634 no. 1, 635 GCC
2. Reimbursement of expenses for third party cure, secs. 634 no. 2, 637 GCC
3. Reduction of price, secs. 634 no. 3, 638(1) GCC
4. Revocation, secs. 634 no. 3 in combination with
  - a) sec. 323 GCC
  - b) secs. 326(5), 323 GCC
    - Non-curable material defects, sec. 326(5) GCC
    - Not for non-substantial material defects, sec. 323(5) 2 GCC



## Remedies

### I. Prior to acceptance

### II. Post acceptance, sec. 634 GCC

1. Cure, secs. 634 no. 1, 635 GCC
2. Reimbursement of expenses for third party cure, secs. 634 no. 2, 637 GCC
3. Reduction of price, secs. 634 no. 3, 638(1) GCC
4. Revocation, secs. 634 no. 3, 323, 326(5) GCC
5. Damages, secs. 634 no. 4, 280 ff., 311a GCC
  - a) Require fault, unless qualities have been guaranteed
  - b) Contractor bears burden of proof
  - c) For curable defects, if a notice period set for the cure, has lapsed fruitlessly, sec. 281(1) GCC *Glöckner*



## Remedies

### **I. Prior to acceptance**

### **II. Post acceptance, cf. sec. 634 GCC**

### **III. Limitation period**

1. 5 years from the date of acceptance, sec. 634a(1) no. 2 GCC
2. Up to ten years in cases of fraudulently concealed defects, sec. 634a(3) 1 GCC



## Remedies

**I. Prior to acceptance**

**II. Post acceptance, cf. sec. 634 GCC**

**III. Limitation period**

**IV. Contractual exclusion of liability**

1. Invalid, if defect is fraudulently concealed or contractor assumed guarantee, sec. 639 GCC
2. Invalid in standard terms, in particular under sec. 309 no. 8 let. b GCC



## Remedies

### Section 309 Prohibited clauses without the possibility of evaluation

Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms: ...

8. (Other exclusions of liability for breaches of duty)

b) (**Defects**) a provision by which in **contracts ... relating to the performance of work**

...

