

Construction - Germany

Partial Termination of Contract under Standard Building Contract Terms

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The first sentence of Part B of Section 8(3)(2) of the Standard Building Contract Terms (VOB/B) envisages the possibility of a notice of partial termination for a self-contained part of a contractual performance. In a ruling of August 20 2009 (Decision VII ZR 212/07), the Federal Court of Justice gave a more detailed definition of the requirements for such a right of partial termination by providing an interpretation of the term 'self-contained'. Thus, the court established the principle whereby a right of partial termination does not apply to individual parts of a performance which have been undertaken by the same trade.

Previous Requirements

Deciding whether a partial performance is self-contained is often fraught with difficulty. The decisive question is whether the contractor can determine what areas of performance it remains obliged to render following partial termination. Hitherto, the following indicators have been used to determine this:

- Can the partial performance be functionally separated?
- Can the partial performance be used independently?
- Is the performance to be rendered separately without any temporal connection to the rest of the performance?;
- Is the performance to be rendered separately without any spatial connection to the rest of the performance?;
- Is the performance to be rendered separately without any actual connection to the production process?

Thus, it was not possible to make a global assessment regarding the existence of a right of partial termination. Rather, the question of whether the critical partial performance could be deemed to be self-contained was dealt with on a case-by-case basis.

No Delineation Based on Trade

The above-mentioned indicators were decisive in distinguishing between individual areas of partial performance. It was not important whether the partial performance was undertaken by a particular trade, provided that the parts of the performance were self contained. No generally valid definition of the concept of a trade exists, especially since there is no clear-cut dividing line between the trades. However, in the building industry, a 'trade' is taken to mean the combination of the areas of work carried out by contractors in a specific craft or trade. According to the General Technical Terms of Contract for Building Works which are included in Part C of the Standard Building Contract Terms (VOB/C), building work is sub-divided into categories such as earthworks, bricklaying and glazing. All work that is connected with these areas is classified under the heading of these trades. For example, all of a building's windows, irrespective of their location, are included in the glazing category.

Principle Defined by Federal Court of Justice

The Federal Court of Justice has now decided that individual parts of a performance carried out within a trade definitely cannot be considered to constitute a self-contained part of a performance. This means that partial termination within a trade is not possible. With this ruling, the court confirmed the case law established by the Munich Higher District Court on November 13 2007 (Decision 9 U 2947/07), which was previously

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regarded merely as a decision in an individual case.

In its ruling, the court initially stated that where the same terms are used within general terms of business, these terms must be interpreted in the same way. Where it is agreed in the contract that the Standard Building Contract Terms are applicable, these standard terms are therefore equivalent to the general terms of business of the relevant building contract. This means that the concept of self-containment, which is used both for the right of partial termination under Section 8 (3)(1), Sentence 2 of the Standard Building Contract Terms and for partial acceptance under Section 12(2), can be understood with one meaning only.

The finding that the self-contained nature of a performance must be understood in the same way both for partial acceptance and for partial termination led the court to conclude that the term must be interpreted narrowly. The court argued that this is because partial acceptance is of benefit only to the contractor – for example, because it means that different warranty periods can be established. In order to avoid disadvantaging parties which order performance, the court stated that a narrow interpretation is necessary.

The court then argued that this narrow interpretation must also apply to the right of partial termination. This led it to the conclusion that individual parts of a performance of a single trade can never be regarded as self-contained, since these parts of the performance are not independent and separate. Thus, the separate evaluation of a partial performance is not possible.

However, the Federal Court of Justice did not wish to define this principle as rigid dogma. This is demonstrated by the court's clarification that another assessment is still possible if there is a separation in the time or place of the parts of performance of a trade. According to the court, a sufficient spatial separation can be assumed, for example, if the parts of the performance are to be rendered in different buildings.

Comment

With this ruling the Federal Court of Justice have fundamentally rejected the possibility of the right of partial termination within a single trade. However, the decisive question will continue to be whether a performance is to be considered to be self-contained. Thus, cases involving this issue will continue to require assessment on an individual basis. However, the ruling establishes a new obstacle in that the criteria which have been decisive in the past will henceforth need to be even more clearly fulfilled where the areas of partial performance are within a single trade. In practice, it will now be important to consider the extent to which this case law ruling needs to be taken into account in the contract drafting process.

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