Selected German Civil Code Reforms

relating to the Law on Sales Contracts and the Law on Contracts for Work and Services taking effect on 01.01.2018

Materials defect liability
Fictitious acceptance of work
Termination for good cause

including German Civil Code synopsis

Building Contract Law Reform
Modification of materials defect liability under the Law on Sales Contracts

English translation of the German document

Imprint

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Selected German Civil Code Reforms relating to the Law on Sales Contracts and the Law on Contracts for Work and Services taking effect on 01.01.2018 – Materials defect liability, Fictitious acceptance of work and termination for good cause including German Civil Code synopsis. Building Contract Law Reform Modification of materials defect liability under Law on Sales Contracts

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1. Introduction

At the first reading on 09.03.2017 the German parliament adopted the "Act on the Reform of the Building Contract Law and on the Modification of the Materials Defect Liability under the Law on Sales Contracts". In doing so the legislator responds to proposals by experts (Baugerichtstag - *German Court Conference on Construction*, in particular) for a regulation of the construction law and the architect's law in the German Civil Code by way of special laws and a number of modifications[1]. The legislator also made a number of changes to the "classical" Law on Contracts for Work and Services as reflected in Chapter 1 of the German Civil Code, and the reform was used to implement some major parts of the judicial decisions on the law on sales contracts by the European Court of Justice (ECJ).

On 31.03.2017, the German Bundesrat consented thereto. The reforms of the German Civil Code will, therefore, take effect on 01.01.2018.

Dealing with all reforms would go beyond the scope of this publication. We will focus on a few significant modifications that could be of relevance to the specialist public's day-to-day business.

This reform mainly refers to the materials defect liability under the Law on Sales Contracts and the fictitious acceptance of work under the Law on Contracts for Work and Services as well as a termination for good cause.

- **Materials defect liability under the Law on Sales Contracts: extension of supplier recourse to costs of removal and fitting**

A supplier from which a reseller / work contractor bought defective goods is obligated to repair defective goods or re-deliver non-defective goods and to bear a reseller's / work contractors costs of removal and fitting. A supplier can assert claims for these costs against its sub-supplier, etc. (**Section 439, German Civil Code, in conjunction with Section 445a, in particular**).

- **Law on Contracts for Work and Services: fictitious acceptance of work**

According to the legislator **Section 640, German Civil** Code, provides for a genuine "fictitious acceptance of work" for the first time. An acceptance is assumed, if an entrepreneur grants the ordering party a reasonable period of time for acceptance after completion of the work and if within this time limit the ordering party does not refuse acceptance on grounds of defects.

- **Law on Contracts for Work and Services: termination for good cause**

By putting the previous judicial decision in more concrete terms a right of termination for good cause for all contracts for work and services is added to **Section 648 a, German Civil Code**. So far this has been inferred analogously from other provisions. This also provides for the parties' claim for a joint establishment of the performance status in order to avoid future disputes over the work status upon terminations.

[1] The legislator divided subtitle 1 „Contract for Work and Services" of Title 9 of the German Civil Code („Contracts for Work and Services and similar Contracts" into four chapters to wit Chapter 1 „General provisions", Chapter 2 "Construction contracts", Chapter 3 "Consumer construction contract" and Chapter 4 "Mandatory provisions".

2. Materials defect liability

Considering the ECJ decisions and claims by professional associations and practitioners the legislator strengthened the work contractor's position in relation to the supplier, changing Section 439 and Section 440 of the German Civil Code, and adding the new Sections 445a an 445b to the Act. The justification of the law reads as follows

"In its judgment dated June 16, 2011 (C 65/09 and C 87/09) and as submitted, among others, by the German Court of Justice (Judgment dated December 21, 2011 - VIII ZR 70/08) the European Court of Justice (ECJ) ruled that in the course of a subsequent performance a seller of a movable object could be under an obligation towards a consumer to remove a defective purchased item already installed in another object and to install a substitute item or to bear the costs of both. Following this ruling the German Court of Justice interpreted Section 439, para. 1, alternative 2, German Civil Code, in conformity with the Directive, saying that when buying consumables ***(B2C business)*** *a subsequent performance under the Law on Sales Contracts also includes the costs of removal and fitting in case of a delivery of defective items. According to the judicial decisions by the German Court of Justice this does* ***not*** *apply to sales contracts concluded between entrepreneurs* ***(B2B business)*** *(see Federal Court of Justice, judgment dated October 17, 2012 - VIII ZR 226/11; judgment dated April 16, 2013 - VIII ZR 375/11); judgment dated April 2, 2014 - VIII ZR 46/13). For a work contractor having bought building material and used it for a third party this means that under this contract for work and services concluded a work contractor is under an obligation to remove the defective building material and to use non-defective building material. As the law stands a work contractor can only demand from a supplier that the new building material needed in this respect be supplied. Except for a supplier's culpable conduct a work contractor has to bear the costs of removal and fitting. The coalition agreement of CDU, CSU and SPD for the 18th legislative period provides for a strengthening of a work contractor's position in this respect. We want to make sure that a craftsman and other entrepreneurs are not lumbered with the subsequent costs of defective products a supplier or manufacturer is responsible for.*

(**Note:** Texts highlighted by the author)

Against this background the wording of **Sections 439 and 440, German Civil Code**, is as follows:

(previous version)	***(version effective from 01.01.2018 (new text in red)***
Section 439 Subsequent performance	
(1) As subsequent performance the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied.	(1) As subsequent performance the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied.
(2) The seller must bear all expenses required for the purpose of subsequent performance, in particular transport, workmen's travel, work and materials costs.	(2) The seller must bear all expenses required for the purpose of subsequent performance, in particular transport, workmen's travel, work and materials costs.

(3) Without prejudice to Section 275 (2) and (3), the seller may refuse to provide the kind of subsequent performance chosen by the buyer, if this subsequent performance is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects, the importance of the defect and the question as to whether recourse could be had to the alternative kind of subsequent performance without substantial detriment to the buyer. The claim of the buyer is restricted in this case to the alternative kind of subsequent performance; the right of the seller to refuse the alternative kind of subsequent performance too, subject to the requirements of sentence 1 above, is unaffected.	(3) If the buyer has installed the defective thing in another object or fitted it to another thing according to its nature and its destination, the seller shall in the course of a subsequent performance refund the necessary expenses incurred in connection with the removal and fitting or the installation of the improved or non-defective thing delivered to the buyer. Section 442, para. 1, shall be applicable subject to the proviso that the installation or fitting of the defective thing by the buyer shall be deemed to replace the conclusion of the contract with respect to the buyer's knowledge.
(4) If the seller supplies a thing free of defects for the purpose of subsequent performance, he may demand the return of the defective thing in accordance with sections 346 to 348.	(4) The seller may refuse the chosen subsequent performance notwithstanding Section 275, para. 2 and 3, if such subsequent performance involves disproportionate costs. The value of the non-defective thing, the relevance of the defect and the question whether the other kind of subsequent performance could be resorted to without putting the buyer at a significant disadvantage shall be taken into account. In such case the buyer’s claim shall be limited to the other subsequent performance; the seller’s right to refuse such subsequent performance, too, as provided for in the preceding sentence, shall remain unaffected. (5) If the seller supplies a non-defective thing for the purpose of a subsequent performance, the seller may demand the return of the defective thing in accordance with Sections 346 to 348.

Section 440 Special provisions on revocation and damages

Except in the cases set out in section 281 (2) and section 323 (2), it is also not necessary to specify a period of time if the seller has refused to carry out both kinds of subsequent performance under section 439 (3) or if the kind of subsequent performance that the buyer is entitled to receive has failed or cannot reasonably be expected of him. A repair is deemed to have failed after the second unsuccessful attempt, unless in particular the nature of the thing or of the defect or the other circumstances leads to a different conclusion.	Except in the cases set out in section 281 (2) and section 323 (2), it is also not necessary to specify a period of time if the seller has refused to carry out both kinds of subsequent performance under section 439 (3) or if the kind of subsequent performance that the buyer is entitled to receive is refused pursuant to Section 439, para. 4 or if the kind of subsequent performance that the buyer is entitled to has failed or cannot reasonably be expected of him. A repair is deemed to have failed after the second unsuccessful attempt, unless in particular the nature of the thing or of the defect or the other circumstances leads to a different conclusion.

The justification of the law that is used to interpret the legal provisions goes on as follows:

*"Pursuant to Section 439, para. 3, sentence 1, German Civil Code (Draft) the buyer's entitlement to a subsequent performance pursuant to Section 439, para. 1, also includes the removal of a defective thing bought and the installation of the thing to be repaired or delivered as a replacement, if the buyer has installed the thing bought in another thing according to its nature and destination. By way of this ECJ ruling the expanding application of the claim for subsequent performance is implemented for all contracts of sale and both types of subsequent performance (**remedying a defect** and **delivery of a non-defective item).***

The currently restrictive use of the claim for subsequent performance on the basis of the applicable legislation is mainly to the disadvantage of craftsmen and building contractors. As part of the subsequent performance under a contract for work and services they owe the removal of defective building material and the installation of non-defective replacement material. This could involve enormous costs. As the law stands a work contractor can demand the delivery of a new purchased item from the seller of the building material. The costs involved in a removal or a new installation of a non-defective item must be borne by the work contractor, if the conditions of a claim for damages do not exist due to a fault on the part of the seller. Costs of removal and installation can exceed the remuneration payable to a craftsman by far. Excessive costs of removal and installation can be incurred, if materials were installed in areas that are very difficult to access or if small items of low value have to be exchanged on grounds of defects. In such cases and similar cases the provisions of Section 439, para. 3, German Civil Code (Draft) and their applicability to all contracts of sale (i.e. going beyond consumables) this means a relief for craftsmen and other entrepreneurs. They can make a claim against a seller of defective materials for removal and installation services, even if the seller is not responsible for the defectiveness and if, therefore, there is no claim for damages pursuant to Section 280, German Civil Code.

There can be no difference whether a defective purchased item a buyer has installed according to its nature and destination prior to the occurrence of a defect must be removed in order to install a new non-defective item that was delivered or whether such item must be removed in order to remedy the defect and re-installed properly. In both cases of a subsequent performance a buyer would incur additional costs of installation and removal already incurred and which would not be incurred once again in case of a non-defective performance of the contract."

(**Note:** Texts highlighted by the author)

Wording of new **Sections 445 a** and **445 b**

(previous version)	*(version effective from 01.01.2018 (new text in red)*
	Section 445a, Seller recourse
	(1) When selling a new item the seller may claim a refund of those expenses from the seller selling the item to it (supplier) that the seller incurred in relation to the buyer pursuant to Section 439, para. 2 and 3, and Section 475, para. 4 and 6, if the claim asserted by the buyer already existed upon passing of the risk by the seller.
	(2) The seller's rights against its supplier referred to in Section 437, do not require a time limit in regard to the defect claimed by the buyer, if the seller had to take the sold new item back due to the defectiveness thereof or if the buyer reduced the purchase price.
	(3) Para. 1 and para. 2 shall apply mutatis mutandis to claims asserted by the supplier and the other buyers in the supply chain against the respective seller, if the debtors are entrepreneurs.
	(4) Section 377, German Commercial Code, shall remain unaffected.
	Section 445 b Statute of limitations of claims for recourse
	(1) The claims for refund of expenses referred to in Section 445 a, para. 1, become statute-barred within two years from the delivery of the item.
	(2) The claims specified in Section 437 and Section 445 a, para. 1, asserted by the seller against its supplier on grounds of the new item are statute-barred two months after the date at the earliest at which the seller satisfied the buyer's claims. This suspension of expiry shall expire max. five years after the date at which the supplier supplied the item to the seller.
	(3) Para. 1 and para. 2 shall apply mutatis mutandis to claims asserted by the supplier and the other buyers in the supply chain against the respective seller, if the debtors are entrepreneurs.

The justification of the law goes on as follows:

*In terms of content **Section 445a**, para. 1, German Civil Code (Draft) corresponds with the previous law applicable to the purchase of consumables pursuant to Section 478, para. 2. The definition of the term supplier previously included in Section 478, para. 1, was amended. The provision of Section 445 a, para. 1, German Civil Code (Draft) entitles the (last) seller against which a claim is made by a buyer to a refund of the subsequent performance expenses the (last) seller had to pay pursuant to Section 439, para. 2 and 3, and Section 475, para. 5 and 6 in relation to the seller, if the defect claimed by the buyer already existed upon passing of the risk to the seller. This is a separate basis for claim, i.e. a separate recourse claim. The applicability of Section 478, para. 2 previously limited to the right of consumer goods purchases now covers all contracts of sale the subject matter of which is a new item. A direct recourse claim for a refund of expenses (irrespective of the priority of subsequent performance) exists, even if the last contract in the supply chain is a contract concluded between two entrepreneurs."*

(**Note:** Texts highlighted by the author)

3. Questions and answers - materials defect liability

(a) What is the essence of the major reform as to the supplier recourse?

In the Law on Sales Contracts the legislator strengthened the position of a work contractor in relation to its suppliers considering the decisions by the European Court of Justice and claims by professional organizations and practitioners.

In case of a materials defect liability for a sold product a work contractor being a re-seller was lumbered with the removal costs of a defective item and the re-installation costs of new or repaired goods.

According to the new provisions a supplier from which a re-seller bought defective goods is required to bear a re-seller's removal costs and the installation costs in addition to the obligation to repair or a to effect new delivery.

If a supplier is not the manufacturer of a defective product, a supplier is entitled to a recourse to its sub-supplier. Eventually, the legislator using the method outlined here makes the manufacturer of a defective product discharge its duty to bear the removal costs and the installation costs on a causative basis as part of the subsequent performance in terms of Section 439, German Civil Code.

(b) What does the term "removal and installation cost" mean?

Section 439, para. 2, German Civil Code, reads as follows: "The seller must bear all expenses required for the purpose of subsequent performance, in particular transport, workmen's travel, work and materials costs."

This is supplemented by Section 439, para. 3, German Civil Code, saying that if a buyer has installed a defective item in another object or fitted it to another object according to its nature and its destination, a seller shall as part of a subsequent performance be obligated to compensate a buyer for all necessary expenses incurred in the removal of a defective item and the installation of a repaired or a new non-defective item.

In the light of the decisions by the European Court of Justice (C 65/09 and C 87/09) and the legislator's motifs resulting in this modification and reflected in the official reasoning (see above) this means the following: All necessary expenses to wit all removal costs and installation costs that are deemed necessary and reasonable to ensure a status of non-defectiveness are compensable and must, therefore, be compensated. In legal practice an expert opinion in legal proceedings will be required from time to time to see whether costs claimed in individual cases can be compensated.

(c) Is the expenditure involved in error search (e.g. in software) part of the removal costs?

In the author's opinion it is true that basically the expenditure a seller incurs when searching an error (e.g. in an ITK system or in a software) is deemed to be a part of the subsequent performance expenses but only if such error is a material defect and if the efforts made were actually necessary.

In general business practice and in the absence of additional specifications coinciding with the criterion of necessity there could be the risk that the parties could have different opinions on the time and the special qualifications needed to find the error(s).

In order to prevent a controversy that can hardly be solved or solely by engaging an expert subsuppliers and resellers are advised to make suitable and preferably specific arrangements in conformity with the law in advance.

(d) Is a reseller required to grant a sub-supplier an option prior to a removal or a reinstallation?

No! The seller's / sub-supplier's option provided for in the bill to perform a removal and installation itself (or to cause a third party to do so) instead of a refund the corresponding costs to a buyer was abstained from after the committee hearing and due to reservations by the Bundesrat.

An end user could not be expected to allow a third party having nothing at all to do with the prior installation and the selection of which could not be influenced by an end user and/or seller / work contractor to encroach upon the contracts of the parties that are directly involved.

In doing so the seller's / work contractor's warranty obligation towards an end user would be encroached upon as this would mean: An end user could confront a seller / work contractor with poor work carried out by a third party in the course of remedying the original defect .

(e) General terms and conditions: What is permissible in terms of shortening a time limit in case of a materials defect liability?

It is widely known that in case of a delivery of new items or the performance of work or services pursuant to Section 309, para. 8, et. seq., in conjunction with Section 310, para. 1, sentence 2, German Civil Code, concerning transactions between companies **(B2B)** the time limit for a subsequent performance in connection with a materials defect liability in a seller's general terms and conditions cannot operatively be shortened to fall below 12 months; in transactions with consumers **(B2C)** it cannot be shortened to fall below 24 months (Section 475, German Civil Code).

Accordingly, the respective sub-supplier definitely cannot operatively specify in its general terms and conditions that the sub-supplier only wants to be liable for a part of its subsequent performance obligation (here "removal and installation costs") towards its buyer by way of a reduced time limit (see new provisions of Section 445a) within the scope the rights of recourse.

It should be noted that in **B2B** deviating arrangements could be made in individual agreements. In this respect it is pointed out that terms / clauses or conditions used for a majority of buyers and which a seller does not offer for negotiation are not classified by courts as individual agreement but as general terms and conditions irrespective of their position in contracts or the title of the conditions.

(f) Is there a statutory difference between hardware and software in terms of a materials defect liability?

A seller's obligation to supply non-defective goods to a buyer as well as the subsequent performance obligation related to the delivery of a defective item applies to both physical goods (hardware) and non-physical goods (including software). The author does not want to judge whether the general statement "There is no error-free software" is correct or not or whether such statement could be guided by interests, and it is not relevant to the issues of a materials defect liability under the Law on Sales Contracts. According to legal experts this would imply "defectiveness" anyway. Hence such statement should be avoided.

4. Fictitious acceptance of work

There are two noteworthy amendments to the Law on Contracts for Work and Services (Chapter 1) dealing with the **acceptance of a service** and a **termination for good cause**.

According to the legislator a genuine fictitious acceptance of work is regulated in **Section 640, German Civil Code**, for the first time. An acceptance is assumed, if an entrepreneur grants an ordering party a reasonable period of time until acceptance following the completion of a work and if an ordering party doe not refuse such acceptance with this time limit on grounds of defects.

Wording of **Section 640, German Civil Code**

(previous version)	*(version effective from 01.01.2018 (new text in red)*
Section 640 Acceptance	
(1) The customer is obliged to accept the work produced in conformity with the contract, except to the extent that, in view of the quality of the work, acceptance is excluded. Acceptance may not be refused by reason of trivial defects. It is equivalent to acceptance if the customer does not accept the work within a reasonable period of time specified for him by the contractor, although he is under a duty to do so.	(1) The customer is obliged to accept the work produced in conformity with the contract, except to the extent that, in view of the quality of the work, acceptance is excluded. Acceptance may not be refused by reason of trivial defects. It is equivalent to acceptance if the customer does not accept the work within a reasonable period of time specified for him by the contractor, although he is under a duty to do so.
(2) If the customer accepts a defective work under subsection (1) sentence 1, even though he knows of the defect, he only has the rights designated in section 634 nos. 1 to 3 if he reserves his rights with regard to the defect when he accepts the work.	(2) A work is deemed to have been accepted, if an entrepreneur has granted a customer a reasonable period of time for acceptance and if within this time limit a customer does not refuse acceptance on grounds of min. one defect . If a customer is a consumer, the legal consequences of the first sentence will only apply, if an entrepreneur notifies a customer of the request for acceptance and the consequences of an undeclared acceptance or an acceptance that is refused without specifying any defects. Such notice shall be given in writing. (3) If the customer accepts a defective work under subsection (1) sentence 1, even though he knows of the defect, he only has the rights designated in section 634 nos. 1 to 3 if he reserves his rights with regard to the defect when he accepts the work.

The justification of the law in terms of **Section 640, German Civil Code**, reads as follows:

"It is true that the provisions of the Law on Contracts of Work and Services have basically stood the test, but the provision on a fictitious acceptance of work inserted into Section 640, para. 1, sentence 3 by way of the Law on Accelerated Payments dated March 30, 2000 (Federal Law Gazette I, page 330) is deemed inadequate. Accordingly, it is tantamount to an acceptance, if a customer does not accept a work within the time limit specified by an entrepreneur although a customer is under an obligation to do so. This provision aimed at accelerating acceptance procedures by enabling an entrepreneur to ensure legal clarity about an acceptance thus creating a prerequisite for the maturity of a payment pursuant to Section 640, para. 1. In practice, this provision has proved to be imperfect. If a customer refuses acceptance following a time limit set by an entrepreneur without specifying the defects complained about, the fictitious acceptance of work defined in para. 1, sentence 3, does not apply for the time being thereby postponing the entrepreneur's maturity of the claim for compensation. In many cases there will be court proceedings involving a longer period of time in order to find out whether there were actual defects at the time of the request for acceptance entitling a buyer to refuse acceptance or whether this was not the case thus requiring a buyer to accept a work.

*A fictitious acceptance of work shall be maintained as it is a major tool used to bring about the acceptance effects in case of an unjustified refusal of acceptance by a customer. However, it should become more effective, sharing the interests, risks and burdens of the parties. An improper refusal of acceptance is intended to be excluded to a large extent. In order to destroy a fictitious acceptance of work simply refusing acceptance will not be enough. On the contrary, a customer will have to specify defects. No distinction between significant and **in**significant defects will be made as such distinction could be difficult in a particular case and such distinction could be made by a court. This would mean uncertainty as regards the occurrence of a fictitious acceptance of work. If a customer only specifies non existing or definitely insignificant defects this could be an abuse of law.*

According to para. 2, sentence 1, a fictitious acceptance of work applies if an entrepreneur has granted a customer a reasonable time limit for acceptance upon completion of the work and if a customer does not refuse acceptance on grounds of defects. Hence a fictitious acceptance of work applies of a customer does not make any statement at all on the request for acceptance or if a customer refuses acceptance without specifying any defects..

In case of a refusal of acceptance a customer is not required to specify all defects or give details of the defects. A customer can notify an entrepreneur of those portions of the work that from the customer's point of view does not have the quality agreed upon. Anyhow, additional defects not originally specified by a customer could be taken into account during a subsequent evaluation.

In contrast to the current legislation silentness or a failure to specify defects results in a fictitious acceptance of work even if there are major defects. Balancing the interests of both parties this legal consequence would be justified as this consequence could be avoided by a customer at any time, specifying the defects. According to this provision the parties are required to discuss the reasons in case of a refusal of acceptance. An entrepreneur is given the opportunity to remedy a defect in good time.

The completion of the work as a prerequisite for a fictitious acceptance of work is expressly added to the law. By introducing this new criterion a premature offer of the work and thus a misuse of the tool of a fictitious acceptance of work in case of consumers, in particular, are intended to be prevented. Completion in terms of the provision means that based on the agreement concluded between the parties the work is deemed to be complete. This is the case if the services agreed upon in the contract have been provided irrespective of whether there are defects or not. Insofar the term "completion" in Section 640, para. 2, sentence 1, German Civil Code (Draft) is different from a total completion in Section 3, para. 2, sentence 2, subpara. 2, German Real Estate Agent and Commercial Construction Industry Ordinance - MaBV) presupposing that all works have been carried out and all major defects have been remedied thus presupposing that the service or work can be accepted (see Mareks, MaBV, Volume 9 2014, Section 3, marginal note 42; Federal Court of Justice dated April 30, 1998, VII ZR, 47/97, NJW 1998, 2967). According to para. 2, sentence 2, an entrepreneur shall inform customers that are consumers about a fictitious acceptance of work. A consumer cannot be expected to know the legal consequences if he/she does not respond to the time limit set by an entrepreneur thereby intending a fictitious acceptance of work or if an acceptance is refused without specifying any defects. According to the new para. 2, sentence 2 an entrepreneur is required to inform a consumer about the time limit set for acceptance according to para. 2, sentence 1 in writing and to advise a consumer that an acceptance which is refused without specifying any reasons or silentness brings about a fictitious acceptance of work. If an entrepreneur does not inform a consumer correspondingly, there will be no fictitious acceptance of work. By way of Section 650n, German Civil Code, (Draft) this provision is drafted stringently.

(**Note:** Texts highlighted by the author)

In the author's opinion the effects of this reform are clearly overestimated by the legislator. Experience has shown that customers being under an acceptance obligation do not keep silent but tend to specify any possibly existing, alleged or wilfully claimed defect in order to evade acceptance, the payment obligation involved and the beginning of the statute of limitations. If so, it is up to an entrepreneur to prove that the defects claimed are insignificant and obtain expert opinions in this respect.

5. Termination for good cause

By putting previous legislation into more concrete terms a right of termination for good cause for all **contracts of work and services** is added to **Section 648a**, German Civil Code. So far this has been analogously deduced from other provisions (e.g. contracting rules for award of public works). The parties' entitlement to a joint establishment of the performance status in order to avoid future disputes over the status of the works upon termination is also provided for.

Wording of new **Section 648a**, German Civil Code:

(previous version)	*(version effective from 01.01.2018 (new text in red)*
	Section 648 a Termination for good cause
	(1) Both parties can terminate a contract for good cause without adhering to a notice period. Good cause means that considering all aspects of a particular case and balancing the parties' mutual interests the party giving notice cannot reasonably be expected to continue the contractual relationship until completion of the work.
	(2) There can be a partial termination. Such termination shall only refer to the delimitable portion of the work owed.
	(3) Section 314, para. 2 and 3 shall apply mutatis mutandis.
	(4) After a termination either party can require the other party to cooperate in the establishment of the performance status. If a party refuses such cooperation or if it fails to be present at the agreed date or a date otherwise agreed by the parties for the purpose of establishing the performance status the burden of proof regarding the performance status upon termination lies with that party. This provision shall be inapplicable, if a party is absent due to circumstances this party is not responsible for and which this party shall communicate to the other party without delay.
	(5) In case of a termination for good cause by a party an entrepreneur shall only claim the remuneration relating to the portion of the work produced until termination.
	(6) The entitlement to claim damages shall not be precluded by a termination.

The law now provides for a right of termination for good cause for contracts of work and services, too.

The problem is - as usual in a case of the right of termination for good cause - if, when and why such right can be exercised. The legislator here, too,, uses so-called indeterminate legal concepts by associating a good cause with the fact that the party giving notice "*considering all aspects of a particular case and balancing the parties' mutual interests*" cannot reasonably be expected to continue the contractual relationship until completion of the work. Three **cheers** for all legal laymen who given an already difficult situation can judge objectively and in a legally conclusive way whether the respective prerequisites exist.

So **be careful** with terminations for good cause. Insofar it would be helpful, if a few reasons were defined in the underlying contract of this contractual relationship.

It would have made sense, if for the sake of clarity the legislator had indicated whether or not an extraordinary termination by an employer / customer implies a so-called "free" termination if no good cause is shown. This could have set an end to the disputes between the senates of the Federal Court of Justice dragging for years and years to the detriment of all litigants.

In case of a **free termination** it would have been desirable if the parties had been granted a mutual right of establishment of the performance status, as there could be disputes that are identical with a termination for good cause, i.e. if the work has not been completed and if in case of a (detailed) flat-rate contract a distinction must be made between the billing of the services already provided and the services not yet provided, with both having to be delimited.

The details of the justification for the law and a legally differentiated discussion are dispensed with in this publication that is intended for legal practitioners.

6. Reference to sources

German Civil Code

The version of the German Civil that is still in force during the final editing of this document in April 2017 can be found on the site of the German Ministry of Justice (www.gesetze-im-internet.de). An updated version of the German Civil Code taking effect on 01.01.2018 is expected. The author does not know when the site will be updated.

The German Civil Code reform taking effect on 01.01.2018 and which is dealt with in this publication is based on the “Law on the Reform of the Building Contract Law and a Modification of the Materials Defect Liability under the Law on Contracts of Sale and Services” adopted by the German parliament on 09.03.2017 (see also Bundestag document 18/8486.). The Bundesrat consented thereto on 31.03.2017 (see also plenary protocol 956 and Bundesrat document 199/17).

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