



NEWSLETTER – ENERGY & INFRASTRUCTURE

KNOCK-FOR-KNOCK LIABILITY – DOES IT WORK IN THE GERMAN MARKET

Due to the large number of offshore windfarm projects having already been completed or under construction in the German Exclusive Economic Zone, we have seen that German courts and arbitral tribunals have had to deal with a number of disputes relating to the underlying contracts in the past years. We expect this to be ongoing in the next years.

Many of these contracts are based on standard forms such as the BIMCO SUPPLYTIME 2005 or 2017 form, the BIMCO WINDTIME or LOGIC contracts, all of which have been developed against the background of English law. All of the above standard forms contain so called “knock-for-knock” clauses, which set out a liability regime for all dealings between the contractual parties. Under this liability regime, damages and losses are not covered by the party at fault but rather by each party incurring the

respective loss, irrespective of the nature or cause of the damage. This is based on the assumption that any such losses and damages can and will be insured and thus attempts to make the execution of the contract more cost and time effective. Accordingly, the parties ‘let the losses lie where they fall’.

While this risk allocation has long been well established in offshore industry contracts and jurisdictions governed by English law, German courts and arbitral tribunals are still developing a consistent approach towards knock-for-knock regimes under German law. Accordingly, there are a number of issues, which need to be taken into consideration by the parties during the negotiations and before signing the contract on the basis of BIMCO SUPPLYTIME 2005 or 2017 (in the following referred to as “BIMCO SUPPLYTIME”) or other industry

standard forms with German law applicable to the contract.

Compared with English law, there is still only limited German case law and practical court experience concerning the interpretation of BIMCO SUPPLYTIME clauses. In addition, although the German statutory regime on time charter parties (secs. 557 et seq. HGB), introduced in 2013, is no longer new, reported case law specifically addressing these provisions remains comparatively limited. Many practical issues are still primarily addressed on the basis of standard form contracts such as the NYPE form, arbitral awards and English case law. Consequently, German courts will stick to the established legal concepts to determine the validity of a knock-for-knock clause under German law. For that purpose, a German court will evaluate whether the clause

is part of general terms and conditions (I.) and if yes, whether the clause can be considered reasonable (II.). And finally, the court will check whether the clause contains liability exclusions that are not allowed under German law, irrespective of whether the clause is part of general terms and conditions (III.).

I. Are knock-for-knock clauses General Terms and Conditions?

German rules on general terms of business in the sense of Sec. 305 et seqq. of the German Civil Code ("**BGB**") may jeopardize the entire structure of the rights and obligations under the Charter Party. Standard forms such as the BIMCO SUPPLYTIME, regardless of the actual frequency of its use, will be considered as general terms and conditions under German law, unless the particular clause in question has been individually negotiated between the parties.

According to the German Federal Supreme Court "negotiating" in the sense of Sec. 305 (1) sent. 3 of the German Civil Code requires more than simply debating or disputing the terms of a contract. In fact, the user of general terms and conditions has to allow the contractual partner to actively protect its own interests and demonstrate its willingness to negotiate terms in principle.

In the past, parties have sometimes inserted a rider clause, stating that both parties considered the entire agreement as being in line with common industry standard and as a reasonable and fair allocation of rights and duties and highlighting that each and every clause was known and part of the indi-

vidual negotiations ("Rider Clause"). The German Federal Supreme Court, however, made very clear that such a Rider Clause does not automatically prevent a contract from still being regarded as general terms and conditions, because whether a contract is agreed on the basis of general terms and conditions or individually is a question of fact, which cannot be contractually regulated by the parties. In fact, the Rider Clause itself may be considered to be part of the general terms and conditions.



II. The reasonableness test by German courts.

Since Sec. 305 et seqq. will most likely be applied to these contracts and knock-for-knock clauses in particular, we need

to look at the test applied to the clauses accordingly. These provisions intend to ensure fairness and appropriateness between the parties, which must be complied with in order to avoid that particular clauses are considered to be invalid by German courts. While this supervision predominantly intends to protect consumers from unreasonable and surprising clauses, most of these rules also apply to business contracts.

German courts will for that reason examine whether any of these clauses are considered to be unfair or to the detriment of one of the parties. As far as particular clauses of the general terms and conditions do not comply with the regulations set out in sec. 305 et seqq. of the German Civil Code, the relevant clause will be deemed invalid. Since courts will take the practices and customs that apply in business dealings into reasonable account, a German court would have to consider the offshore wind industry's customs and practices. Although the German offshore wind industry has matured significantly over recent years, it remains uncertain to what extent German courts will recognise international offshore industry practices and knock-for-knock structures as sufficiently established commercial customs.

Although there is now some case law available on knock-for-knock clauses under German law, it is still quite difficult to foresee if German courts and arbitral tribunals would consider a particular knock-for-knock clause to be invalid. This largely depends on the individual circumstances of the matter, the wording of the particular clause and the

surrounding circumstances at the time of contract formation. German courts need to resolve the conflict between the offshore wind industry's customs and practices on the one hand and the guidance taken from the general principles contained in sec. 305 et seqq. of the German Civil Code on the other, when ruling on whether a knock-for-knock clause is considered to be unreasonably disadvantageous pursuant to sec. 307 of the German Civil Code and thus invalid or not. As pointed out before, the liability regime of a knock-for-knock clause is contrary to any German civil liability regime and thus considered foreign by many courts. This will often lead to hesitation in accepting such contractual provisions, particularly for courts with less experience in matters concerning the offshore wind business.

Under German law, exclusions or limitations of liability for gross negligence are subject to strict scrutiny, particularly where the clause forms part of general terms and conditions. Whether such provisions are enforceable depends on the specific wording of the clause, the overall contractual risk allocation, the sophistication of the parties involved and the extent to which the clause reflects established industry practice. If the knock-for-knock clause is worded in such a way that it is invalid, a court or arbitral tribunal may not only consider the knock-for-knock clause, but rather the entire clause to be invalid, even if only a part of such clause is affected. This means – in case of any damage or loss – that the German statutory liability regime of the German Civil

Code, which is generally a fault-based liability regime, would apply and the party claiming damages would be entitled to damages without any limitation, provided the other party was at fault.

III. Liability exclusions that are general “no-go’s” under German law

Regardless of whether a particular knock-for-knock clause is deemed to be part of general terms and conditions or not, certain restrictions apply to any clause providing for civil liabilities under German law. Most importantly, it is not possible to exclude liability for damages resulting from wilful or intentional misconduct, even if the clause has been individually negotiated. In this case a knock-for-knock clause will be invalid. Hence, a valid knock-for-knock clause under German law must always contain a “carve-out” for this particular type of damage.

IV. Our recommendations

Where possible, parties should avoid relying exclusively on unamended standard form wording and should instead ensure that the knock-for-knock regime is specifically reviewed, negotiated and adapted to the particular project and risk allocation. In order to do that, we recommend to:

- (i) never refer to standard contracts only and always customise the contract for the specific purpose;
- (ii) before entering into a contract under German law, consider allowing the other party to propose and negotiate the

wording of the knock-for-knock clause, because that way it is more likely that an individual agreement will be assumed by the courts; at the same time during contract negotiations the parties should always express their willingness to really negotiate, i.e. no clause to the contract should be set in stone from the beginning and throughout the subsequent negotiations;

(iii) ensure that it can be proven that negotiations took place, ideally by way of clear written correspondence between the parties; and

(iv) most importantly, amend the knock-for-knock clause to be compatible with German law, inter alia, do not exclude the liability for wilful or intentional misconduct.

Please note that these recommendations will not automatically make a knock-for-knock clause contained in standard terms valid under German law and when in doubt, you should always consult a German lawyer with sufficient experience in this particular area. However, adhering to these basic steps should ensure that your chosen liability regime is not invalid from the outset and strengthen your position when arguing that an individual contract was entered into and that for this reason the strict rules of the German Civil Code should not apply.

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