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The contractor’s quality obligations: Different concepts under English and German contract law

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ABSTRACT

This law comparison examines differences between common law and civil law as they relate to construction contracts. The examples used are of English and German contract law in relation to the quality obligations of the contractor under the general contracting procurement method. Those obligations lie at the heart of the contractor’s liability for defects. The differences between the respective English and German concepts are striking. In terms of the general contract law, the contractor’s obligations as to quality are contained in the German Civil Code (Bürgerliches Gesetzbuch, BGB). In 2001, this code saw its most significant reform in over a hundred years. While this led to changes regarding the legal grounds of civil liability for defects, the quality obligations themselves remained unchanged. In s. 633 of the BGB, the term Mangel (defect) is defined in detail. The wording supports the concept that the contractor has to comply with the specifications as agreed in the construction contract. However, if no quality obligations are agreed, the statute also requires the contractor to provide a completed building which is fit for its purpose. German courts interpret this fitness for purpose obligation to apply in every case, even those where the expressed standards fall below the fitness for purpose standard. This means the contractor of a leaking roof is liable for that defect even if the leak is caused by a design defect on the part of the architect. This seems strange to those familiar with English contract law, where contractors are definitely not under an obligation of fitness for purpose. In general, they only have to use materials of satisfactory quality and use the appropriate care and skill. In others words, they are not liable for the design of the architect. The most surprising thing, though, is that the practical results are often similar. This has to do with other aspects of the contractor’s liability for defects, such as the duty to warn.

KEYWORDS: Law comparison, quality obligations, JCT SBC 05, VOB/B 06, fitness for purpose.

1 Introduction

Building defects are considered as inevitable in construction projects (Constable and Lamont 2006, p viii), and if one examines the civil liability of a building contractor for defects, the single most important issue is the contractor's quality obligations. The comparison of these obligations under English and German law in particular is likely to yield interesting results because these systems of law constitute models of the law families of Common Law and Civil Law.

The analysis focuses to the procurement method of general contracting, i.e. contracts in which the employer specifies the design and the contractor is engaged in order to materialize this design. Quality obligations in other procurement methods, in particular in design and build contracts, will not be considered.

1.1 Background: the legal grounds of civil liability under English and German law

The contractor's quality obligations play a decisive role in any defects-related dispute because no defect can exist without a breach of such an obligation and thus there is no defects liability. This becomes clear if one bears in mind the respective legal grounds of civil liability for defects under English and German law.

Under English law, subject to the express terms of the contract, the only legal ground in defects-related disputes is the common law claim 'breach of contract.' If a contractor breaches a contractual obligation as to quality, he or she is liable for the defect and has to pay damages. Other remedies such as termination are subject to additional preconditions, but they are also based on the legal ground 'breach of contract.' Depending on the express terms agreed upon by the parties, the employer may have additional[1] rights regarding defects, so-called 'claims under the contract.' Such claims require that the contractor has breached a contractual quality obligation. For example, under the standard-form contract JCT SBC 05 clause 2.38, the contract administrator can require the contractor to make good any defect which appears during the rectification period.

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[1] 'Claims under the contract' are normally considered as additional to 'claims for breach of contract;' see *Pearce & High Ltd v Baxter & Anor* [1999] C.L.C. 749; *William Tomkinson & Sons Ltd v Parochial Church Council of St Michael* (1990) 6 Const. L.J. 319 (both regarding clause 2.5 of JCT Standard Form Agreement for Minor Works 1980).

Under German law, the legal grounds of civil liability for defects require a breach of a quality obligation as well. However, the conceptual framework that applies to building defects is very different from, and more complicated than, the English concept. The 2001 reform of the German law of obligations (Schuldrechtsreform) has modernised this area of law to a great extent and it has put an end to a number of peculiarities which had developed since the German Civil Code (Bürgerliches Gesetzbuch, BGB) came into force in 1900 (Heldrich/Rehm 2005). As was the case before the reform, the German law of obligation is still characterised by the existence of general rules and specific rules. While the general rules apply to all relationships under the law of obligations (i.e. contract and tort), the specific ones set out provisions for different types of contracts, for example sale (ss. 433 to 479 BGB) and works (Werkvertrag, ss. 631 to 651 BGB). Construction contracts fall into the latter category and thus, in the context of building defects, one can find the legal grounds available to the employer in ss. 634 to 638 BGB, organised by the kinds of remedies sought by the employer: specific performance (ss. 634, 635 BGB), substitute performance (ss. 634, 637 BGB), termination (ss. 634, 636, 323, 326 BGB), reduction in price (ss. 634, 638 BGB), damages (ss. 634, 636, 280, 281, 283, 311a BGB) and reimbursement of expenses (ss. 634, 284 BGB). All of these legal grounds require that the contractor has breached a quality obligation. If this is the case, the employer can demand, without any further preconditions, specific performance (ss. 634, 635 BGB) and damages for the loss relating to property other than the defective building (ss. 634, 280 BGB). The other remedies require that additional preconditions are satisfied. To conclude the situation under the BGB, one final point shall be touched upon: all the legal grounds listed above are actually sub-categories of the legal ground 'breach of obligation' (Pflichtverletzung) in section 280 BGB which constitutes a "unitary notion of breach" (Markesinis et al 2006, p387) that did not exist before the 2001 reform. If the parties enter into the German standard-form contract VOB/B 06, the statutory grounds of civil liability for defects are replaced by the contractual grounds set out in s. 13 VOB/B 06. These legal grounds also require a breach of a contractual quality obligation as their primary precondition.

In comparing the two systems of law, it is apparent that there is only one ground of civil liability for defects under English law (breach of contract) but several under German law. Although this is true, each of the legal grounds under German law requires the same principal precondition, namely a breach of a quality obligation. Thus, although English and German law are characterised by different conceptual frameworks, the primary precondition of the respective legal grounds is identical (namely a breach of a contractual quality obligation). The remaining differences concern the additional preconditions that are necessary for certain remedies, an issue that lies outside the scope of this analysis. Another difference pertains to the fact that the legal grounds of JCT SBC 05 are considered as additional to claims for breach of contract whereas the legal grounds of the German form VOB/B 06 replace the statutory grounds of civil liability.

Recapping the results as to the legal grounds of civil liability for building defects under English and German law, it can be concluded that a breach of a quality obligation is necessary (and sufficient) to create a liability of the contractor. This also means that it is not necessary under these laws to establish whether the obligation can still be performed or whether it cannot (impossibility). Thus, the standards of the quality obligations that apply under English and German law are crucial for the outcome of any defects-related dispute in these jurisdictions.

1.2 Analysis overview

In order to compare the contractor's quality obligations under English and German law, it is beneficial to differentiate between the sources from which such obligations can arise:

- First source: contractual agreement
- Second source: custom
- Third source: statute law and precedents

One could argue for a fourth source of quality obligations, namely instructions of the employer or contract administrator (Jansen 1998, p229). However, in order to be valid, an instruction has to be based on one of the three sources listed above. Therefore it seems to be better not to treat instructions as a separate source .

The paper is divided into six sections. Following this introduction (section one) the second section deals with quality obligations in non-standard-form contracts. Different kinds of construction contracts are considered as part of this category, from lengthily written contracts (completely bespoke, without a standard form) to handshake contracts (i.e. contracts without any written contract documents). Such contracts will be called CL construction contracts and BGB construction contracts since the relevant obligations as to quality in these contracts arise from English Common Law (CL) or the German Civil Code (BGB) respectively (subject to express terms to the contrary and express terms containing additional quality obligations). In the third section, it will be analysed which quality obligations are at stake when the parties enter into a particular standard form. For the English side of this comparison, JCT's Standard Building Contract With Quantities in its 2005 edition (JCT SBC 05) will be examined because this form is considered as "the industry standard against which all the others are measured" (Murdoch and Hughes 2000, p99, with regard to the predecessor form JCT 98). Its German counterpart is the VOB/B 06, the tender and contracting rules for construction works (Vergabe- und Vertragsordnung für Bauleistungen, Teil B, version 2006). In the second and the third section of this paper, the three sources of quality obligations outlined above will serve as a structure for the analysis. In section four it will be evaluated whether the satisfaction of the contract administrator can be considered as a quality obligation. In the fifth section the focus will turn

to the matter of discrepancies between quality obligations. Section six contains the conclusions of this analysis.

2 QUALITY OBLIGATIONS IN NON-STANDARD-FORM CONTRACTS

2.1 First source: contractual agreement

In the absence of data the quality obligations which are typically agreed upon in bespoken CL and BGB construction contracts cannot be identified and compared. This issue must be left open.

2.2 Second source: custom

An interesting situation exists regarding the second source, custom (also referred to as customary law or local usages). In German construction contract law, this category has a broad scope of application: The ‘anerkannte Regeln der Technik’ (recognised technical rules) are an ever developing set of rules which contain objective standards of construction technology. These rules are, by definition, not definitively recorded in any documents. They pertain to every trade of the construction industry. Although there can never be a final account of these rules since they are constantly in development, it is important to know that courts, when investigating the extent of the anerkannte Regeln der Technik regarding a particular technical issue, always start off by looking into the catalogue of the VOB/C (Vergabe- und Vertragsordnung für Bauleistungen, part C: Allgemeine Technische Vertragsbedingungen für Bauleistungen). This is a large compilation of technical rules, sometimes referred to as ‘Kodifikation’ (codification) of the anerkannte Regeln der Technik (Locher and Locher 2005, marginal note 140). These rules are also known under the term ‘DIN standards’ because they are published by the German Standards Institute (Deutsches Institut für Normung, DIN). Only in special cases, e.g. if the validity of the standard set out in the VOB/C is contested by either party, will expert witnesses be invited to give evidence about the actual standard of the anerkannte Regeln der Technik in question. Owing to the fact that the anerkannte Regeln der Technik are considered as customary law, every contractor of a BGB construction contract has to adhere to this set of rules. Recently, in 2001, this position has been confirmed by the legislator who pointed out it would not be necessary to include a reference to this set of rules into the BGB because the application of these rules was not in doubt (“nicht zweifelhaft”) (Bundestagsdrucksache 14/6040, p261). In English law, in contrast, it seems that objective technical rules do not automatically apply to every CL construction contract. This finding can partly be explained with the English law system: Each time that courts have based their judgments on local usages in the past, they have created a

precedent. Accordingly, after the first decision on a quality standard based on custom, judges apply the precedent and not the customary rule in subsequent cases (Atiyah 1995, p211; Jansen 1998, p237). Hence, custom has no practical role to play in English law.

Against the backdrop of the broad scope of application of customary law in German construction law, and bearing in mind the described mechanism of English law (transformation of customs into precedents) one would assume that there are many precedents that stipulate technical standards. However, as will be shown in the following section, this is not the case. It is suggested that further research should discover the reasons for this unexpected situation.

2.3 Third source: statute law and precedents

Before turning to the third source of quality obligations it is worthwhile to compare the means by which quality obligations are implied into a construction contract. In English law, the relevant legal tools are 'implied terms in law.' Such terms, devised either by the courts or by Parliament, form part of the contract as long as no contrary express term is agreed. In contrast, implied terms do not exist in German law. However, as Tonner rightfully points out, the function of implied terms is carried out by the provisions of the German Civil Code (BGB) (Tonner 2006, p161). The difference is primarily one of theoretical nature and the legal frameworks are similar in their practical results. To give an example of one entirely theoretical difference: the terms of the German Civil Code *apply to* construction contracts whereas English implied terms are considered to be (implied) *terms of the contract*. A more important difference, however, pertains to the fact that English implied terms can stem from judge-made law. In Germany, in contrast, judges are not considered as lawmakers and judge-made law is regarded as an alien idea.

In English law, three terms are usually implied in construction contracts. Although they were originally developed by courts they all became statute law since the adoption of the Supply of Goods and Services Act 1982 (SOGSA 1982). The first term obliges the contractor to use goods that are of satisfactory quality, s. 4 (2) of the Act. The second term states that the materials used have to be fit for their intended purpose, s. 4 (5) of the Act. According to s. 4 (6), this term will only be implied when the employer relies on the skill or judgment of the contractor (and if this reliance is reasonable given the circumstances of the case). Thus, this term will not be implied into contracts when the employer specifies the materials.[2] The third term states that contractors have to carry out their services with reasonable care and skill, s. 13 of the Act. This term will be breached if the contractor acts negligently. An interesting issue concerns the relationship between the first and third implied terms. Both can be relevant if poor materials are used. If contractors use poor materials and

[2] *Young & Marten v McManus Childs* [1968] 2 All E.R. 1169.

the quality problem was patent, they are in breach of the term of reasonable care and skill (s. 13 SOGSA 1982) but not in breach of the implied obligation to use materials of satisfactory quality.[3] In contrast, if the poor quality only comes to light afterwards (i.e. in cases of latent defects of the materials used), the contractor is liable to be in breach of s. 4 (2) SOGSA, i.e. of the duty to use materials of satisfactory quality (Furst/Ramsey 2006, marginal note 3-058). The distinction is important because the latter liability is independent of any fault of the contractor (strict liability).

Following the consideration of the terms that are actually implied in CL construction contracts, it is also interesting to note those obligations which are not implied. Three obligations are of particular relevance. Firstly, there is no implied term of fitness for purpose of completed works. Such a term is only implied into contracts in which the contractor assumes the design responsibility, i.e. in design and build contracts.[4] Thus, a contractor who is engaged on a general contract is not automatically liable for breach of contract if the completed building is unfit for its purpose, for example if water leaks through the roof. Secondly, there is no implied term which entitles the employer (or contract administrator) to give an instruction. Thirdly, there is no implied term obliging the contractor to adhere to statutory requirements.

In German law, s. 633 (2) of the BGB states that the contractor is under an obligation of fitness for purpose of completed works. Regarding the matter of purpose, the code also states that the works have to be fit for the purpose agreed in the contract or, if there is no express agreement, that they have to be fit for the usual use. An interesting situation concerns instructions: the good faith section of the German Civil Code, s. 242 BGB, is interpreted to provide a legal basis for employers of construction contracts to issue instructions during the course of the building process. However, this right of the employer only exists under exceptional circumstances. A final point is that the BGB does not stipulate a contractual duty for the contractor to comply with statutory requirements.

Moving on to the comparison of the third source of quality obligations, the following results can be established. Above all, a duty of fitness for purpose of the completed works only exists under German law (s. 633 (2) BGB). This is a striking theoretical difference. As a result German employers do not have to point out why a building is unfit for its intended purpose if they want to sue the contractor. To give an example, a contractor who builds a house with a leaking roof will always be liable under German law, even if the unfitness of the building stems from a defective design. Under English law, in contrast, employers have to investigate and then prove *why* a building is unfit for its purpose since they have to establish a breach of one of the three implied terms referred to above. Returning to the example of the leaking roof, if employers want to

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[3] *Young & Marten v McManus Childs* [1968] 2 All E.R. 1169, 1174.

[4] See Lynch v Thorne [1956] 1 W.L.R. 303; *Greaves v Baynham Meikle* [1975] 1 W.L.R. 1095, 1098.

sue a contractor for damages, they have to prove a breach of the implied term either as to the quality of materials or as to the use of reasonable care and skill. If the unfitness stems from a design defect, the contractor is not liable. Consequently, German contractors carry a higher risk than their English counterparts. This result, however, is not necessarily the final outcome. (This line of thought will be continued in Section 6 of this paper.)

It is also interesting that German quality obligations usually refer to the completed building whereas the English ones usually address the steps that are necessary in order to produce a building: according to English law, the contractor has to use materials of satisfactory quality, the materials have to be fit for their purpose, and the contractor has to use reasonable care and skill. In contrast, under German law the completed building has to be fit for its purpose. Also the German set of rules 'anerkannte Regeln der Technik' (see above: second source of obligations) relate to the completed building.

Regarding the entitlement of the employer to change the quality obligations through instructions, only German law contains a legal basis for such instructions (s. 242 BGB), although one has to keep in mind that this basis is confined to exceptional cases.

Finally, there is a similarity regarding the fact that neither English nor German law contains a provision to (contractually) oblige contractors to comply with the respective statutory requirements.

3 QUALITY OBLIGATIONS IMPOSED BY STANDARD FORMS

3.1 First source: contractual agreement

When parties enter into a standard-form construction contract, such a contract usually contains quality obligations. In addition to such standardised terms, there may be individually agreed quality obligations, e.g. design specifications. These specifications are usually contained in the bills of quantities (called 'contract bills' in JCT contracts) or, in German contracts, in the 'Leistungsbeschreibung' (description of performance). Again, owing to the absence of available data, the quality obligations of this type cannot be identified and compared here. The quality obligations stemming from standardised terms, however, are susceptible to comparison. As already outlined above, the forms JCT SBC 05 and VOB/B 06 will be examined.

JCT SBC 05 contains three quality obligations. First, according to cl. 2.3.3, the quality of materials and goods and the standards of workmanship shall, subject to contrary express terms, "be of a standard appropriate to the Works." This provision makes express the three implied terms of ss. 4 (2), (5), 13 SOGSA 1982 (Williamson 2006, marginal note 19-042/3). As pointed out by Lupton, this is a new provision since the equivalent clause in JCT 98 (clause 8.1.2) was confined to making express the implied term as to workmanship (Lupton 2006, p94/95). Second, cll. 3.10 and 3.19.1 of JCT

SBC 05 oblige the contractor to comply with instructions of the contract administrator (variations). Third, cl. 2.1 of JCT SBC 05 stipulates that the contractor is contractually bound to any statutory requirements. Regarding this obligation, however, one has to bear in mind clause 2.17.3 of JCT SBC 05 since this clause exempts contractors from their liability if the non-compliance (with statutory requirements) is a consequence of the design which was provided by the employer. This is an important limitation of cl. 2.1 of JCT SBC 05.

The German standard form VOB/B 06 contains four quality obligations. First, the works have to comply with the objective standard 'anerkannte Regeln der Technik' (which is described in Section 2.2 of this paper), cl. 13 Nr. 1 S. 3 of VOB/B 06. Second, the completed works have to be fit for their intended purpose, cl. 13 Nr. 1 S. 3 of VOB/B 06. Third, the contractor is obliged to comply with instructions of the employer, cl. 1 Nr. 3 and cl. 4 Nr. 1 Abs. 3 of VOB/B 06. Fourth, the contractor is contractually obliged to adhere to any statutory requirements, cl. 4 Nr. 2 Abs. 1 S. 2 of VOB/B 06.

Turning to the comparison, two differences and two similarities can be identified. First, only the German standard form requires the contractor to deliver a building that is fit for its intended use. Second, only the German standard form stipulates a set of rules with objective technical standards (anerkannte Regeln der Technik). These differences between JCT SBC 05 and VOB/B 06 mirror the situation which has been described regarding CL and BGB construction contracts. One similarity between the standard forms relates to the obligation of the contractor to comply with instructions. However, while the entitlement to issue instructions is similar, a slight difference concerns the person who is entitled to issue instructions: JCT SBC 05 gives this right to the contract administrator, while VOB/B 06 renders it to the employer. The second similarity concerns the fact that both standard forms oblige the contractor to comply with any statutory requirements. In this connection, however, one has to bear in mind that the respective statutory requirements are different.

3.2 Second source: custom

Quality obligations from customary law do not play a role if the parties enter into standard-form contracts. Regarding German law, this is because the 'anerkannte Regeln der Technik' are made express by cl. 13 Nr. 1 S. 3 of VOB/B 06. Regarding English law, as described above, there are no quality obligations stemming from custom.

3.3 Third source: statute law and precedents

Regarding the quality obligations which stem from statute law and precedents, the reader can refer to Section 2.3 of this paper where these obligations are described. In the context of JCT SBC 05 and VOB/B 06,

there is only one peculiarity, and this concerns the conceptual status of those obligations. While those statutory quality obligations are implied into (or apply to) CL and BGB construction contracts, they are made express in the respective standard forms. Thus the obligations apply for two reasons: first because they are stipulated in legislation and second because they are part of the standardised contractual agreement.

4 SATISFACTION OF THE CONTRACT ADMINISTRATOR

In this section it will be analysed whether the works have to be to the satisfaction of the contract administrator. If so, one would have to regard the satisfaction of the contract administrator as a quality obligation. The first sentence of clause 2.3.3 of JCT SBC 05 elaborates on the satisfaction of the contract administrator. According to the clause, this satisfaction has to be reasonable. However, the clause itself does not oblige the contractor to deliver the works in accordance with the contract administrator's satisfaction. Such an obligation would only come into play through an individual agreement; it is not part of the standardised terms of the JCT form. Thus, although the notion of the contract adminstrator's satisfaction is part of JCT SBC 05, it is not specified as a quality obligation. In German construction contracts, the idea to connect the standard of the contractor's quality obligations with the satisfaction of the contract administrator is not common at all. Thus, the standard form VOB/B 06 does not contain any reference to the contract administrator's satisfaction.

Thus it can be concluded that the contract administrator's satisfaction is not a quality obligation either under English or under German law unless the parties agree upon this standard individually.

5 PRIORITY RELATIONSHIP BETWEEN OBLIGATIONS

If two conflicting quality obligations apply to one contract, it is necessary to know which obligation has priority. Regarding CL construction contracts, the answer is that express terms have priority over the implied terms (which are specified by SOGSA 1982). This is expressly stated in s. 11 (1) and s. 16 SOGSA 1982. The same result is valid for JCT SBC 05 contracts.

Regarding BGB construction contracts, the situation is more complicated. According to the wording of s. 633 (2) BGB (and also according to the wording of cl. 13 Nr. 1 of VOB/B 06), express terms have priority over the obligation of fitness for purpose. However, it is the long-established opinion of the courts that the fitness for purpose obligation (which is set out s. 633 (2) BGB) applies *in addition* to the express terms of the contract. Even if a contract contains a quality specification that, if materialised in the works would render the building unfit for its purpose, the

fitness obligation applies. [5] The reasoning behind this established case law is the fact that German construction contracts fall into the category of contract for works (Werkvertrag, ss. 631 to 651 BGB). It is crucial for this category that the contractor is obliged to achieve a particular result ('Erfolgsbezogenheit des Werkvertrags'). This category is in stark contrast to the category 'contract to render services' (Dienstvertrag, ss. 611 to 630 BGB) which does not oblige the contractor to achieve a particular result. The only way for the parties of a German construction contract to exempt the contractor from the fitness for purpose obligation is by a clearly formulated exemption clause (Langen and Schiffers 2005, marginal note 1900). The same result is valid for VOB/B 06 construction contracts.

The comparison reveals an important difference: in English law, if there is a conflict between express terms and implied terms, the express terms prevail. In contrast, clear words are necessary in German law to exempt the contractor from the obligation of fitness for purpose of the completed works. In the absence of such clear words, the express and implied terms (to use the terminology of English law) both apply, and the contractor has to construct the works in accordance with the higher standard.

6 CONCLUSIONS

The most striking difference regarding the quality obligations under English and German law relates to the fitness for purpose obligation that applies only to German construction contracts (both BGB and VOB/B 06). The difference stems from two very different concepts, i.e. the 'cooking recipe' concept of English law and the 'only the result matters' concept of German law. An English contractor is not liable for shortcomings of a building provided that all the specifications of the design (i.e. the 'cooking recipe') are complied with. A defect in the design, leading to a crack in a wall or even to the collapse of the whole building, does not trigger a civil liability of the contractor. Under German law, in contrast, 'only the result matters.' Hence, a contractor is responsible for any shortcomings of the building even if they have been caused by a defective design. This result implies very different risk allocations. However, as already indicated in Section 2.3, one would not do justice to the two systems of law if one concluded the analysis with this result. There is a second level of liability in play. This can be illustrated with the example of a roof which leaks because of a design defect. Although, at first sight, English contractors are not liable for such a defect, they can, in some situations, nevertheless be held accountable for this shortcoming, namely if they are in breach of their duty to warn[6]. Similarly, German contractors who are prima facie liable for such defects

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[5] BGH, NZBau 2003, 33, 34; BGH, NZBNau 2002, 611, 612, BGH, BauR 2000, 41; BGH, BauR 1995, 230.

[6] *Plant Construction Plc v Clive Adams Associates, JMH Construction Services Ltd* [2000] B.L.R. 137.

(because a leaking roof is always a reason to render a building unfit for its purpose) and who make good the defect, can in particular circumstances claim back some or even all of their costs from the employer. Legal grounds to be considered in this respect are, in particular, first, the German duty to warn (cl. 4 Nr. 3 and cl. 13 Nr. 3 of VOB/B 06) which can, if complied with, serve as an exemption from liability, second, the principle of Mitverschulden (mitigation) and third, the category Sowieso-Kosten ('anyway costs'). The latter category concerns costs which would have been necessary in order to make the building fit for its purpose. Against this backdrop, one of the main differences between the systems of law seems to pertain to the burden of proof regarding defects (see Jansen 1998, p273, 274): from the structure of the laws one can conclude that this burden lies with the employer in English law, but with the contractor in German law. Another important issue is the respective duty to warn. The German duty to warn, it should be noted, extends much more widely than its English counterpart which only applies if the defect is considered to be dangerous.[7]

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