

The Miraculous Schoemaker's Wife

Classification of the guest performance contract; implications of a breach of health and safety obligations within the contractual relationship

Court	<i>Bühnenoberschiedsgericht (Higher Stage arbitration tribunal)</i>
Date	<i>21 March 1994</i>
Code number	<i>BOSch 12/94</i>
Reference	<i>NJW 1994, 903</i>
Finality	<i>Final</i>
Vorschriften	<i>Sections 275 para. 3, 320, 324 para. 1, 326 para. 2, § 616, 618 para. 1 German Civil Code (BGB)</i>

Unofficial Headnotes

- 1. Guest performance contracts between an opera house and a singer are reciprocal contracts within the meaning of Sections 320 et seq. BGB.*
- 2. By failing to provide a staircase leading to the auditorium, the operator of an opera house breaches its obligation to provide and maintain the premises, facilities and equipment necessary for its employees to perform their duties in such a way that the employee is protected against danger to life and health to the extent permitted by the nature of the service (Section 618 para. 1 BGB).*
- 3. The contractually agreed claims for performance are not excluded by Section 636 of the RVO (former Reich Social Insurance Code).*

Operative Part

The appeal by [the defendant] against the award of the District Arbitration Tribunal for the Theatres of the State of North Rhine-Westphalia [at Cologne] dated 1 December 1993 – BSchG 1/92 – is dismissed.

The [defendant] shall bear the costs of the appeal proceedings.

The value in dispute is set at DM 16,122.30.

Facts of the Case

- 1 The parties are in dispute over the defendant's obligation to pay the claimant performance fees.*

- 2 The parties concluded guest performance contracts in February 1988 and January 1989, under which the claimant was engaged by the [defendant's] opera house as a guest artist for the role of the 'Black Neighbour' in 'The Miraculous Shoemaker's Wife' for an estimated 8 performances in the period from ... to ..., and furthermore as a guest artist for the roles of 'Old Madelon' and the 'Countess of Coigny' in 'A. Chenier' for an estimated 6 performances in the period from ... to ... 1990. Rehearsals for the first engagement began on [Day A], and for the second engagement on [Day B]. The performance fee for both guest engagement contracts was DM 2,500. Furthermore, a flat-rate rehearsal fee of DM 1,250 per week of rehearsals, or DM 3,000, was agreed.
- 3 Pursuant to Clause 8 of these guest performance contracts, the parties agreed that, to the exclusion of ordinary legal proceedings, the arbitration tribunals established by the Deutscher Bühnenverein and the Genossenschaft Deutscher Bühnenangehörigen shall have exclusive jurisdiction over all disputes concerning claims arising from this contract, in accordance with the rules of arbitration issued by those bodies.
- 4 During an evening rehearsal for the opera 'Die wundersame Schustersfrau' [after Day A and before Day B], the claimant suffered a serious accident when she fell from the top of the steep staircase leading to the stage house. As a result, she sustained a spinal contusion with a compression fracture of the second lumbar vertebra and a fracture of the coccyx. These injuries required the claimant to be hospitalised for an extended period. She was on sick leave, unable to work, until ... as a result of these injuries.
- 5 In previous proceedings, the claimant brought a claim against the defendant before the District Arbitration Tribunal for the Theatres of the State of North Rhine-Westphalia ... seeking damages totalling DM 71,082 for lost fees from the defendant and other obligations. She withdrew this claim on ...
- 6 In the present legal dispute, the claimant has asserted claims for performance arising from the two guest performance contracts concluded with the defendant, totalling DM 38,000, in accordance with Section 324 of the German Civil Code (BGB), based on the following calculation:
- | | |
|---|-----------|
| 1. Contract for 'The Wondrous Shoemaker's Wife' | |
| (8 performances × DM 2,500) | DM 20,000 |
| 2. Contract for 'A. Chenier' | |
| (flat-rate rehearsal fee of DM 3,000 and | |
| 6 performances × DM 2,500) | DM 18,000 |
| | DM 38,000 |
- 7 She requests that the injury benefit she received for the period during which the performances and rehearsals specified in the contracts took place be set off against the claim in the amount of DM 14,877.70.
- 8 In support of her claim, the claimant argued that her injuries were caused by a negligent breach of the duty to ensure public safety on the part of the [defendant] or its agents. The accident occurred because the claimant fell from a height of 3 metres down an extremely steep and high flight of stairs with narrow steps that were not adequately secured; she was unable to find a foothold whilst trying to stand up due to the lack of appropriate safety features and consequently lost her balance. At the

time of the accident, neither a handrail nor any other suitable safety features had been fitted to the stairs.

- 9 Her claims are not excluded by Section 636(1) of the RVO, as this provision covers only claims for damages. However, she has asserted exclusively claims for specific performance, which are not covered by the limitation of liability under Section 636 of the RVO.
- 10 Nor are the claims she has brought in court time-barred. The claims arising from the guest performance contracts had not become due until the beginning of 1990 at the earliest. The two-year limitation period had therefore only begun to run on 1 January 1991. As she had brought her action for payment at the beginning of 1992, the limitation period had been interrupted before it had expired.
- 11 The claimant has applied

that the defendant be ordered to pay the claimant DM 38,000, less the injury benefit of DM 14,877.70 already received, together with 4 per cent interest from 2 May 1990.
- 12 The defendant has applied for

that the claim be dismissed.
- 13 In support of its application, it argued that the claimant's claims were precluded by Section 636 of the RVO.
- 14 In the alternative, it argued that a handrail was already in place on the staircase at the time of the accident on ... This had not been fitted subsequently. Furthermore, the staircase was in a proper condition at the time of the accident.
- 15 Furthermore, it should be pointed out to the claimant that, following the accident, she stated that she could no longer remember whether she had slipped on the stairs or whether she had felt dizzy. If that were the case, however, the absence of any stair safety measures would not have been the cause of the accident.
- 16 In a written submission dated 14 September 1993, the [defendant] raised the defence of limitation.
- 17 On 1 December 1993, the District Arbitration Tribunal for the Theatres of the State of North Rhine-Westphalia delivered the following award:
 1. The [defendant] is ordered to pay the claimant DM 38,000 gross, less DM 14,877.70 net, plus 4 per cent interest from 2 May 1990.
 2. The [defendant] shall bear the costs of the proceedings — court costs: DM 644.90.
 3. The value of the claim is set at DM 16,122.30.
- 18 With regard to the grounds for this award, reference is made to the reasons for the decision (...).
- 19 The defendant lodged an appeal against this arbitral award, which was served on her on ..., on 24 February 1994 and immediately set out the grounds for her appeal.

- 20 *In support of its appeal, the [defendant] submits, in particular, that the contested award is based on a breach of Section 636 of the RVO as interpreted in the case-law of the Federal Labour Court and the Federal Constitutional Court, in particular with regard to Decision AP No. 6 on Section 636 of the RVO.*
- 21 *The arbitral tribunal of first instance took the view that Section 636 of the RVO does not cover claims for specific performance. However, the claimant has no claims for specific performance simply because it has not performed its contractual obligations.*
- 22 *Furthermore, the employee's claims for performance in the event of illness are limited to a period of six weeks under Section 616 para. 2 BGB.*
- 23 *In the alternative, her defence of limitation applies. In this regard, she reiterates her submissions made at first instance.*
- 24 *The [defendant] requests that*
that the contested arbitral award be amended and the claim dismissed.
- 25 *The claimant requests that*
that the defendant's appeal be dismissed.
- 26 *It defends the contested arbitral award with legal arguments.*
- 27 *With regard to the parties' further submissions on the facts, their offers of evidence and the documents they have submitted, as well as their legal arguments in general, reference is made to the entire contents of the file.*

Reasons for the decisions

I.

- 28 *The appeal by the [defendant] is admissible under Section 30 para. 1 of the BSchGO and, as it was lodged and substantiated in due form and within the prescribed time limit in accordance with Sections 31, 32 para. 1 and 3 of the BSchGO, is also valid.*

II.

- 29 *On the merits of the case, the [defendant's] appeal had to be dismissed.*
- 30 *The District Arbitration Court for the Theatres of the State of North Rhine-Westphalia was correct in granting the claimant the claims she had brought for the contractually agreed fee under the guest performance contracts dated... and ... for 14 performances, amounting to DM 35,000, as well as the flat-rate rehearsal fee of DM 3,000 – totalling DM 38,000 – and based its decision on Section 324 para. 1 BGB.*
- 31 *According to this provision, one contracting party retains the right to the consideration if the performance incumbent upon it under a reciprocal contract becomes impossible as a result of a circumstance for which the other party is responsible. The guest performance contracts concluded*

between the parties on ... and ... are undoubtedly reciprocal contracts within the meaning of Sections 320 et seq. BGB. This is because each party to the guest performance contract has undertaken its obligation to perform precisely in order to receive the other party's performance in return. The performance incumbent upon the claimant, namely singing in the agreed 14 performances, including the agreed rehearsals, has become impossible for her as a result of the serious accident at work she suffered [between Day A and Day B].

- 32 As the defendant is liable for this accident at work, the claimant retained the right to the agreed 14 audition fees as well as the lump-sum fee for singing on the rehearsal days, even though she was unable to perform her services. As the District Theatre Arbitration Tribunal convincingly stated, the accident at work [between Day A and Day B] and, consequently, the impossibility of her performing her duties on the agreed dates, was due to circumstances for which the defendant or its vicarious agents were responsible (Sections 276, 278 BGB). In this context, it correctly found – following a detailed examination of the evidence – that the staircase leading to the stage house was not adequately secured at the time of the accident on 21 November 1989. The defendant thereby breached its obligation to arrange and maintain the premises, installations and equipment necessary for its employees to perform their duties in such a way that the employee is protected against danger to life and health to the extent permitted by the nature of the service (Section 618 para. 1 BGB).
- 33 For further details in this regard, reference is made, by way of analogous application of Section 543 para. 1 of the Code of Civil Procedure (ZPO), to the convincing arbitral award (...). On appeal, the defendant did not contest the contested arbitral award on this point.
- 34 Contrary to the defendant's view, the plaintiff's counterclaims are not precluded by Section 636 RVO. It is true that, insofar as compensation for personal injury caused by an accident at work is concerned, the employer is in principle exempt from liability under this provision; however, liability remains in force without exception if the employer caused the accident at work intentionally or if it occurred whilst the injured party was participating in general traffic. Accordingly, this provision generally excludes only claims for damages by the person injured in an accident at work.
- 35 However, in the present case, the claimant has not brought a claim for damages, but rather the claims for fees agreed with the defendant – that is, claims for performance – for the performances which she was unable to sing as a result of the accident at work she suffered. The contractually agreed claims for performance are not, however, excluded by Section 636 RVO (Neumann-Duesberg, DB 1969 pp. 306, 307, 308; Federal Court of Justice (BGH), judgment of 13 March 1984 – VI ZR 204/82 – NJW 1985 pp. 2133/2134).
- 36 The decision of the Federal Labour Court judgment of 28 February 1991 – 8 AZR 521/89 – AP No. 21 on Section 637 of the RVO, to which the defendant referred in support of its legal position, concerned a different set of facts in which no claim for specific performance was brought, but rather a claim for damages in respect of compensation for pain and suffering and personal injury sustained as a result of an accident at work. Similarly, the decision of the Federal Constitutional Court of 7 November 1972 in AP No. 6 on Section 636 of the RVO did not rule on contractual claims for performance, but rather on claims for damages for pain and suffering. These decisions of the Federal Labour Court and the Federal Constitutional Court therefore cannot provide any grounds that would militate against the decision reached in the present case.

- 37 *Contrary to the defendant's view, the claimant's contractual claims for performance, arising from Section 324 para. 1 BGB, are not limited in time to a period of six weeks. This limitation cannot be inferred from Section 324 para. 1 BGB. According to this provision, a party whose performance is rendered impossible by circumstances for which the other party is responsible retains the right to claim the consideration for as long as the bilateral contract remains in force and the state of impossibility, for which the other party is responsible, persists.*
- 38 *Nor can a time limit of six weeks on the claim for performance be derived from Section 616 para. 2 BGB, as this provision does not apply alongside Section 324 para. 1 BGB. In the case of incapacity for work for which the employer is responsible, only Section 324 para. 1 BGB applies, but not Section 616 para. 1 and 2 BGB (see Neumann-Duesberg, op. cit., p. 308).*
- 39 *Nor are the claimant's claims time-barred. The two-year limitation period under Section 196(1)(8) of the German Civil Code (BGB) only began to run at the end of the year in which the claimant's claim to the agreed fees arose (Section 201 BGB). This was 31 December 1990. Since, pursuant to Section 614, first sentence, of the BGB, the claimant's claims to the agreed remuneration were payable only after performance of her services, and since the guest performance contracts did not specify remuneration by time periods, in particular by months, the remuneration was payable only upon termination of the respective guest performance contracts. Accordingly, the defendant did not pay the claimant the first flat-rate rehearsal fee on a pro rata basis until the end of January 1990. As the limitation period did not begin to run until 1 January 1991, it was interrupted by the claimant's action of 13 January 1992 before it had expired.*
- 40 *The decision on costs is based on Sections 13 para. 2 and 39 of the Stage Arbitration Rules (Bühnenschiedsgerichtsordnung - (BSchGO) and Section 97 para. 1 ZPO.*

Notes of the editors

This case has been decided under the old contract law having been in force unto 31st December 2001. Under the new contract law the result would be the same, but easier to justify.