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Germany
CONSTRUCTION

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This country-specific Q&A provides an overview of construction laws and regulations applicable in Germany.

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GERMANY
CONSTRUCTION

1. Is your jurisdiction a common law or civil law jurisdiction?

Germany is a civil law jurisdiction. This means that decisions from the German courts are not considered as a source of law. Such decisions only interpret the law which consists of statutes and (to a small extent) of customary law. Like all civil law jurisdictions, Germany has a civil code, namely the Bürgerliches Gesetzbuch, BGB, which is in force since 1900.

2. What are the key statutory/legislative obligations relevant to construction and engineering projects?

In 2018, a noteworthy reform of the BGB came into force. In particular, the term “construction contract” (Bauvertrag) was defined for the first time (in § 650a BGB) and the German legislator also set out specific new rules for construction contracts and architects contracts. The structure of the BGB’s chapter on works contracts (Werkverträge) is as follows: General provisions on the law of contracts for works (§§ 631-650 BGB), specifically relating to construction contracts (§§ 650a-650h BGB), consumer construction contracts (§§ 650i-650o BGB), architects and engineers contracts (§§ 650p-650t BGB) and developer contracts (§ 650u and § 650v BGB).

Due to the lack of specific sections in the BGB on construction contracts (until 2018), the VOB/B has become the absolute standard on the German market as a set of general terms and conditions.

In professional services agreements with architects and engineers, reference is made to the Fee Regulations for Architects and Engineers (Honorarordnung für Architekten und Ingenieure, HOAI) in almost all cases. The HOAI is only price law, which since 2021 only has the character of a recommendation. However, the so-called service profiles (Leistungsphasen) of the HOAI are often used in professional services agreements to define the architect’s and engineer’s respective scope of services.

3. Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.

Relevant regulations for occupational safety and health protection during construction works result from the Occupational Safety Act (Arbeitssicherheitsgesetz) and the accident prevention regulations of the various professional associations (Unfallverhütungsvorschriften der Berufsgenossenschaften). In addition, the construction site ordinance (Baustellenverordnung), which applies to the individual construction site, regularly provides regulations with a protective purpose.

The very substantial part of the environmental regulations does not directly affect construction contract law. Rather, laws such as the Federal Nature Conservation Act (Bundesnaturschutzgesetz) and the Federal Immission Control Act (Bundesimmissionsschutzgesetz) have an effect when obtaining the building permit under public construction law and must be taken into account by architects and engineers when planning.

A building permit (Baugenehmigung) is generally to be granted by the local building authority if the building project does not conflict with any rule under public law. There are a large number of acts and regulations from which the relevant public law rules derive. Some of the most important ones are the Building Act (Baugesetzbuch – BauGB), the Building Regulations of the 16 federal states (Landesbauordnungen – LBO), the Building Use Ordinance (Baunutzungsverordnung – BauNVO), the development plan (Bebauungsplan), if the property is located within the scope of such a plan, and the Monument Protection Acts (Denkmalschutzgesetze). While building planning law (e.g. BauGB) determines where a building is allowed, the Building Regulations of the 16 federal states (Landesbauordnungen) deal with the question of how a building project is allowed, which includes the prevention of dangers and ensures healthy living and working conditions (such as fire protection;

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distance rules; sufficient aeration; lighting).

The provisions of labour law are derived from various laws. The civil code BGB forms the basis. In addition, the Labour Protection Act (Arbeitsschutzgesetz") and the Protection against Dismissal Act (Kündigungsschutzgesetz) are decisive. At the same time, labour law is also shaped by the regulations of the professionals' associations (Berufsgenossenschaften).

In Germany, regulations on combating corruption and bribery can be found in the German Criminal Code (Strafgesetzbuch). This code only contains sanctions for individual persons. By contrast, the sanctioning of companies is currently carried out via the German administrative offences law (Ordnungswidrigkeitenrecht). This law is generally considered by experts to be insufficient for the purpose of preventing corruption and bribery at company level. Among other things, the maximum possible fine of EUR 10 million is criticized as being too low. Therefore, in 2020, the German government published a draft Association Sanctions Act (Gesetz zur Stärkung der Integrität in der Wirtschaft, in short: Verbandssaktionengesetz). This draft act intended to introduce a proper sanctioning system for companies in Germany for the first time. Among others, it would have enabled fines up to 10% of a company's annual turnover. However, the draft act met with criticism and in mid-2021 the government stopped the legislative process. Since then, there has been no new legislative initiative in in this regard.

Although there is no Association Sanctions Act in force in Germany yet, internationally working German construction and engineering companies are subject to foreign laws, in particular the US Foreign Corruption Practices Act (FCPA). In recent years, several high-profile cases have become known of German companies under US compliance monitorships.

4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

The most important permit is the building permit (Baugenehmigung) which we explained above. This must be obtained before the start of the construction project.

Before the newly constructed object is put into operation, an acceptance by the building authorities may have to take place in accordance with the applicable state building regulations (Bauabnahme nach Landesbauordnung). For the majority of construction projects, only random inspections take place.

Real estate agents, property developers and building supervisors require a trade licence in accordance with § 34c Trade Regulation (Gewerbeordnung) in order to carry out their activities. Workers from outside of the EU require a work permit.

Violations of the permit requirements regularly lead to fines. However, more far-reaching measures may also be taken, such as a demolition order in the case of construction without a building permit.

In practice, employers often conclude agreements with the neighbours of the construction site (Nachbarvereinbarungen). Sometimes, employers and the relevant local authority conclude a development agreement (städtebaulicher Vertrag), e.g. about the development of pavements or parks in the vicinity of the site.

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

Yes, tort law is recognised in Germany. The central rule of German tort law is laid down in the BGB § 823 I, which reads: "A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."

Tortious liability in the field of construction typically becomes relevant when a person who has suffered a loss is not a party to a contract with the person who has caused the loss. For example, claims by a subsequent house owner against the contractor can, in principle, be claimed only in tort. Another example is a claim by the employer directly against a subcontractor, e.g. where the main contractor has become insolvent. Finally, tortious liability may become relevant in defects cases if the contractor's contractual liability is statute barred but the tortious liability is not yet.

An interesting question is whether a building owner can claim damages from the contractor for the cost of rectifying defects under tort law. The general rule is that the owner of a building cannot claim compensation from the contractor for the costs of remedying defects under tort law. Such repair costs are considered as pure economic losses (reine Vermögensschäden): They are not compensable under the BGB § 823 I because they occur independently of a violation of a legal right. A violation of the protected legal right 'property' only occurs if there is damage to property other than the

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(defective) works themselves. However, there are some exceptions, such as BGB § 823 II in connection with the breach of a 'protective law' (Schutzgesetz), or the category of 'defects which eat themselves into the building' (weiterfressende Mängel), but these cases are very rare in practice.

The Product Liability Act (Produkthaftungsgesetz) implemented the EU Directive 85/374/EEC on liability for defective products into German law. Interestingly, this act provides for a strict liability regime. This is an exception in Germany because damages can normally only be sought if there was at least negligence (principle of fault, Verschuldensprinzip).

6. Who are the typical parties to a construction and engineering project?

The employer can contract with one or a number of contractors in order to realise his building project.

It is possible, for example, to commission a general planner (Generalplaner) and a general contractor (Generalunternehmer). The general planner then provides all the architectural and engineering services. The general contractor provides all construction works for the project.

If, on the other hand, the employer commissions a total contractor (Generalübernehmer), the latter provides all works and services, i.e. in particular all architectural and engineering services and all construction works.

In the case of an individual contract award, in addition to architects, engineers and contractors, contract partners such as project managers or project controllers can also take on tasks typical of the employer (e.g. cost control).

In addition, employers, contractors and service providers enter into different insurance contracts. Employers also typically enter into credit agreements with their financing banks.

7. What are the most popular methods of procurement?

There is no clearly preferred method in practice. Everything is seen from the commissioning of a total contractor to single contracting. By contrast, public authority employers are required by public procurement law to tender the construction works in packages, i.e. one package for each element of work (Gewerk). This structure aims at supporting small and medium enterprises, and thus in public procurement there are many individual contract awards.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

The only widespread used standard-form construction contract is the VOB/B. It is incorporated into the majority of construction contracts in Germany. The letters VOB stand for Procurement and Contract Procedure for Building Works (Vergabe- und Vertragsordnung für Bauleistungen). The VOB consists of three parts:

- Part A (VOB/A): General Provisions of Procurement for Building Works (Allgemeine Bestimmungen für die Vergabe von Bauleistungen);
- Part B (VOB/B): General Contract Conditions for Building Works (Allgemeine Vertragsbedingungen für die Ausführung von Bauleistungen);
- Part C (VOB/C): General Technical Conditions for Building Works (Allgemeine Technische Vertragsbedingungen für Bauleistungen).

The VOB/B was first published in 1927 by the Panel on Contracts Awards of the Reich (Reichsverdingungsausschuss, RVA). Its successor organisation, the German Committee for Procurement and Contract Procedures in Building Works (Deutscher Vergabe- und Vertragsausschuss für Bauleistungen, DVA), was founded in 1947. The DVA is an expert panel in the legal form of an unincorporated association (nicht rechtsfähiger Verein). It is dominated by public authority organisations, further members stemming from construction industry organisations and technical organisations, such as the German Institute for Standardisation (Deutsches Institut für Normung, DIN). For administrative purposes, the DVA is associated with the German Federal Ministry for Construction.

In the past 30 years, the VOB/B has been updated every two to six years. The latest version dates from 2016. There is also an official English translation available of the VOB/A, VOB/B and VOB/C, published by Beuth publishing house.

The VOB/B only applies if it is expressly incorporated into the contract by the parties, so it applies neither by law nor by custom. However, German public authorities are obliged to use the VOB/B when they procure a construction project.

The VOB/B has been drafted to apply in conjunction with the civil code BGB. Many of the rules of the BGB are either complemented or amended by the VOB/B. If the VOB/B does not deal with a matter, the relevant provision of the BGB applies.

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There is no standard-form contract in widespread use in Germany for professional services agreements with architects, engineers or project managers. For public authorities, however, there are standard professional services agreements contained in the standard bidding documents published at federal level (namely the Richtlinien für die Durchführung von Bauaufgaben des Bundes, RBBau) and at state level, e.g. in Berlin in the "ABau" contract documents.

9. Are there any restrictions or legislative regimes affecting procurement?

For private employers, the tender process is not mandatory. In the widest sense, only the provisions of the law on general terms and conditions (Allgemeine Geschäftsbedingungen, in short "AGB", §§ 305 et seq. BGB) must be observed, which require that individual clauses of a contract may not violate the core content of a law or significantly disadvantage a party.

A large number of laws must be observed by public authority employers. These include the Regulations for the VOB/A (see answer no. 8), the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB), the Public Procurement Ordinance (Vergabeverordnung, VgV), the Subthreshold Procurement Ordinance (Unterschwellenvergabeordnung, UVgO).

10. Do parties typically engage consultants? What forms are used?

The less know-how a party has internally, the more services he commissions from consultants.

Typically, an architect provides design services and supervision services. When architects supervise (i.e. monitor) the works of the contractor, they work as the employer's agent. Different to common law jurisdictions, supervising architects do not have a neutral role. They must solely represent the interests of the employer. Neither the BGB nor the VOB/B refers to a certification system involving an architect, so it is the employer (and not the architect) who is responsible for deciding about claims and taking over the works. Interestingly, the role of the architect is not even mentioned in the VOB/B.

Project managers (Projektsteuerer) supports the employer by taking over employer tasks (areas of action: organisation and documentation, checks of quality and quantity, costs, deadlines) without decision-making, instruction and enforcement authority. Project management means the performance of all tasks in organisational, legal, technical, economic and scheduling terms that are necessary for the goal-oriented execution of a project. Project management thus includes, in particular, project steering and project control.

11. Is subcontracting permitted?

Construction contracts: The VOB/B § 4 VIII no 1 s 1-3 provide that the contractor generally needs the employer's permission in order to subcontract part or all of a project. By contrast, the BGB provides no rule on this issue. Therefore, if the VOB/B is not incorporated, subcontracting is unconditionally allowed in construction contracts (unless prohibited by express terms).

Professional services agreements: In practice, most German professional services agreements provide that the architect/engineer must request the employer's approval before subcontracting parts of the design. In the absence of such an express term, designers could freely subcontract parts or all of the design services because the BGB does not prohibit it.

12. How are projects typically financed?

The characteristics of the contractor and the project are decisive. A large part of projects is financed by commercial banks and other licensed moneylenders by corporate finance or sometimes non-recourse financing arrangements. This also includes mezzanine financing.

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

Typical securities of the employer include advance payment bonds, retention money and performance bonds during the construction period, as well as retention money and warranty bonds for post-acceptance defects claims.

During the course of the works, employers typically withhold 10% of each interim payment or the contractor provides a 10% performance bond. This security is returned to the contractor after the employer's acceptance of the works respectively it is supplemented by a 5% retention money (Gewährleistungseinbehalt) or a 5% warranty bond provided by the contractor for the employer's post-acceptance defects claims. Whether or not the employer is entitled to keep the retention money until the end of the limitation period depends on agreement between the parties. If the parties do not specify how long the employer is entitled to keep the

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security, § 17 VIII no 2 VOB/B provides that any securities agreed for the employer's post-acceptance defects claims must be returned after two years.

While advance payment bonds can be agreed *on first demand*, the German law on general terms and conditions prohibits employers to request performance bonds and warranty bonds *on first demand*. Such bonds are therefore "only" agreed as conditional bonds.

Parent company bonds are less common in the German construction industry.

14. Is there any specific legislation relating to payment in the industry?

It is common to specify the payment modalities in the contract. In this context, partial payments are based either on the respective actual performance status or on a payment schedule.

Contractors also entitled to issue partial invoices based on Section 632a of the civil code BGB. Pursuant to Section 15 of the Fee Regulations for Architects and Engineers (HOAI), this entitlement also applies to planning contracts.

If the VOB/B has not been agreed, the due date of final invoices is based on Section 650g (4) BGB.

If the VOB/B has been agreed for construction contracts, the payment modalities are governed by § 16 VOB/B.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

Pay-when-paid clauses can only be agreed in individually negotiated contracts; they cannot be agreed in (the employer's) general terms and conditions because such clauses are invalid under German law, namely under BGB § 307. This is because the BGB § 641 I states that the contractor's payment becomes due with the Abnahme, ie acceptance, by the employer. This provision is considered as a 'statutory guidance model' (gesetzliches Leitbild) which cannot be amended by general terms and conditions.

16. Do your contracts contain retention provisions and, if so, how do they operate?

Yes, construction contracts typically contain retention provisions, see already covered in answer 13. By contrast, professional services agreements rarely provide for retention.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

German law allows penalty clauses, subject to certain rules. In German construction practice, penalty clauses are widespread in use for delays.

Penalty clauses are typically agreed as a percentage of the contract sum net of VAT. For example, a typical penalty clause for delay may specify a penalty of 0.2% of the contract sum per calendar day of delay, or, alternatively, a penalty of 1% per week of delay. Alternatively, the contract may provide that the penalty is calculated as a percentage of the contractor's final account (and not as a percentage of the contract sum).

Most penalty clauses contain a cap. This is so because most penalty clauses are agreed in (the employer's) general terms and conditions, and such clauses need to provide a cap in order to be valid. Penalty clauses for delayed completion are only valid if the cap is not higher than 5% of the contract sum.

Actual loss is not required for the employer to be entitled to claim payment of a penalty. Moreover, penalties are not exclusive: if the aggrieved party suffers actual losses which are higher than the agreed penalty, it can claim the penalty plus the difference between the penalty and the actual loss: see the BGB §§ 340 II and 341 II. Of course, it must then prove the amount of the actual loss.

Although the BGB § 343 allows the courts to reduce penalties to a reasonable amount, this provision does not apply to most construction companies. This is so because the German Commercial Code (Handelsgesetzbuch, HGB) § 348 provides that § 343 is not applicable to penalties promised by 'merchants' (Vollkaufleute). Since practically all construction companies are in the commercial register, they are considered as 'merchants', so the courts have no authority to reduce the penalties which they promise. Another reason why penalties are not reduced lies in the fact that judicial control of general terms and conditions does not allow invalid penalties to be reduced: if a penalty is too high (unreasonable), the courts will strike out the clause altogether. They will not reduce the level of the penalty to a reasonable amount (Verbot der geltungserhaltenden Reduktion).

Penalty clauses agreed individually (i.e. not agreed via general terms and conditions) are subject to judicial

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control only under the BGB § 138 which states: “A legal transaction which is contrary to public policy is void”. Hence, even an individually agreed penalty can be void if it is highly unreasonable. However, most penalty clauses derive from general terms and conditions, which are therefore subject to the very rigid control regime of the German law on general terms and conditions (§§ 307 et seq. BGB). There is a vast amount of case law, and often only specialised construction lawyers are able to determine whether a clause is valid or not.

Particularly important for the judicial control of penalty clauses are the BGB §§ 339 et seq. The VOB/B § 11 makes it clear that the same statutory requirements also apply to VOB/B contracts. Examples of unreasonable (and therefore invalid) penalty clauses in general terms and conditions include:

- Penalty clauses which are unreasonably high and do not have an overall cap. The maximum amounts allowed by German courts are about 0.25% per working day and 5% overall.
- Penalty clauses which allow the employer to claim two penalties for the same event. Thus, a valid clause will provide that penalties for failing to meet a milestone and for failing to meet a completion date will not both be payable if one cause of delay leads to both types of delay (non-combination rule, Kumulationsverbot).
- Penalty clauses which do not require ‘fault’ (negligence) of the contractor as a precondition. Thus, based on a principle provided by the BGB § 339 I 1, penalties for delayed completion will be valid only if the delay was caused by the contractor’s negligence. Employers cannot opt out of this rule by using their general terms and conditions.
- Penalty clauses which allow the employer to claim the penalty plus the full amount of the actual loss. That would be an illegal combination (Kumulationsverbot). Thus, a valid penalty clause will make clear that the amount of the penalty will be credited against the actual loss claimed.

18. Are the parties able to exclude or limit liability?

Before we elaborate on the parties’ ability to validly exclude or limit liability, here is a short overview of the “normal” liability situation under German law: The starting point is that the party in breach must compensate all losses attributable to the breach. This principle comes from the BGB §§ 249 et seq. However, it has several limitations. First, the loss must have been caused by the breach (conditio sine qua non test, causation principle). Furthermore, losses whose occurrence is very unlikely are not compensated (Adäquanztheorie); finally, losses which lie outside of the scope of protection of the obligation which has been breached will not be compensated either (Schutzbereichslehre). Further limiting principles are:

- The principle of fault (Verschuldensprinzip), as provided by BGB § 276: Fault is generally a precondition of liability under German law. However, in construction contracts the contractor is under a strict obligation to provide the works which have been agreed. Thus, in case of a defect, the employer is entitled to demand specific performance (rectification) even if the defect was not caused by the contractor’s negligence. This being said, the employer’s right to damages requires fault, i.e. at least negligence.
- The principle that the contractor deserves a second chance (to rectify any defects), which applies to all the employer’s contractual remedies in the event of defects.
- The duty to mitigate losses, as provided by the BGB § 254.
- The principle of betterment (also referred to as ‘new for old’, in German: Vorteilsausgleichung).
- The limiting category of Sowieso-Kosten.
- The principle that the employer must reserve its rights in relation to known defects when accepting the works: without that reservation, acceptance will mean that the employer loses all rights regarding known defects except the right to damages (BGB § 640 III).
- Limitation periods.

Before elaborating on the details of the German law, one observation: A striking difference to English practice relates to the fact that financial caps (such as cap of liability at 20% of the contract sum) are not typically agreed in construction contracts in Germany (with the exception of caps on penalty clauses, see answer 17).

In the context of limitation of liability, several statutory rules must be borne in mind:

- The BGB § 276 III provides: „The obligor may not be released in advance from liability for intention“. This is a mandatory provision of German law, applying to all contracts.
- In general terms and conditions, it is not possible to release the obligor from liability in the case of gross fault, BGB § 309 no 7b. This

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provision applies directly to business to consumer contracts only, but the courts apply it – indirectly – to business to business contracts, too.
- Liability for injury to life, body or health cannot be limited in general terms and conditions (cf. BGB § 309 no 7a). Thus, in the contractor's general terms and conditions, an exclusion of liability for negligence would be invalid if it excludes liability for injury to life, body or health. In such a case the whole limitation of liability clause would be invalid (Verbot geltungserhaltender Reduktion).
- In general terms and conditions, an exclusion of liability for simple negligence is invalid to the extent that it limits the liability for the violation of essential contractual obligations (Kardinalpflichten/Hauptpflichten) that threaten the purpose of the contract (BGB § 307 II no 2). The obligation to construct the project free of defects can generally be considered as such an essential obligation because the contractor promises to achieve a particular result (Erfolg). Thus, limitation of liability clauses which limit the entitlement of the employer to sue the contractor for damages (in relation to defects and their consequences) will generally be invalid if contained in general terms and conditions.
- Moreover, BGB § 639 provides that limitation of liability clauses are invalid "insofar as the contractor fraudulently concealed" a defect or where the contractor "gave a guarantee for the quality of the work."

In summary, it is difficult to draft valid limitation of liability clauses under German law, especially in general terms and conditions.

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

The employer may declare a so-called free termination in accordance with § 648 BGB at any time. Deadlines do not have to be observed.

Both contracting parties may give extraordinary notice of termination in accordance with § 648a BGB if there is good cause. This is usually based on a serious breach by the other contracting party, which makes it unreasonable for the other party to continue with the contract.

In construction contracts in which the VOB/B is included, there are also further, specified extraordinary reasons for termination (§§ 4 VII, 5 IV, 6 VII, 8 III, 9 VOB/B).

In the case of interruptions to the works of more than three months, each party can terminate the construction contract under the VOB/B § 6 VII s 1.

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Direct contracts (also known as collateral warranties) between the contractors and/or designers, on the one hand, and third parties such as funders and purchasers, on the other hand, are very uncommon in Germany.

Sometimes neighbour agreements are concluded before the construction project is implemented. With these, the owner of land is granted certain rights by the neighbour (e.g. right of passage or right of crane overhang). In return, the owner of land often agrees to potential future building projects of the neighbour.

As a matter of principle, neighbourhood agreements are only effective between the respective contracting parties. In order to transfer the legal consequences of an agreement to possible purchasers of land, it is therefore necessary to secure this waiver of claims in rem. A suitable way to do this is to agree on an easement in accordance with BGB § 1018.

Development contracts (Bauträgerverträge) – contracts in which a developer sells an apartment to a purchaser before the apartment is constructed – sometimes contain clauses which entitle the purchaser to request assignments from the seller's / developer's defects rights against the contractors and designers.

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

VOB/B § 6 I s 1 requires the contractor to notify the employer immediately – i.e. without undue delay – if he thinks the employer is hindering him in his performance. This is a condition precedent for an extension of time request. However, it is not as strict as the condition precedent / time-bar clauses typically found in English contracts: This is because a notice by the contractor is not required if the matter (i.e. the delaying event) and its delaying effect were both apparent (offenkundig) to

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the employer, see VOB/B § 6 I s 2. In order to be apparent for the employer, it is sufficient if the delaying event and its delaying effect were apparent for the employer's supervising architect.

Strict time-bar clauses such as clause 20.1 FIDIC Red Book 1999 would not be valid under German law if agreed general terms and conditions provided by the employer. This is due to the rigid control regime of general terms and conditions of the German law.

22. What insurances are the parties required to hold? And how long for?

Contractors often take out liability insurance (Betriebshaftpflichtversicherung); this is an option but is not mandatory by law. By contrast, the contractor's automobile insurance (Kfz-Haftpflichtversicherung) is mandatory. These forms of liability insurance do not exhaustively protect the insured party against claims by third parties. Put simply, they only cover those risks which occur in the course of the works undertaken by a reasonable person. By contrast, they do not provide cover in relation to the consequences of defective performance: 'contractual risks' are not insured under the contractor's liability insurance.

A related issue (to liability insurance) is that all employees of the contractor are automatically insured against accidents through a scheme provided by the German Government (Berufsgenossenschaft), of which construction companies are compulsory members. For this reason, German construction companies do not need to take out employers' liability insurance.

In most German federal states, architects and engineers must take out liability insurance (Betriebshaftpflichtversicherung der Architekten und Ingenieure).

Under German law, there is no mandatory obligation for employers or contractors to take out CAR insurance, i.e. an insurance policy containing both builder's risk property insurance (Bauleistungsversicherung) and liability insurance related to work conducted on the site (Betriebshaftpflichtversicherung). If taken out, typically, CAR insurance covers both the employer and the contractor. The individual construction contract will determine whether CAR insurance must be taken out and by whom.

Liability insurances are typically occurrence policies, meaning that they covers claims resulting from an injury or another event that occurs during the policy term. Thus, such insurances are typically not taken out on a claims' made basis in Germany. That means it is not necessary to renew liability insurance policies in order to keep the insurance alive.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

In Germany, construction and engineering disputes are typically resolved by the courts. The subject matter of the case will determine which court is competent. For contractual issues, the civil courts are competent; for cases involving public construction law issues, such as building permits, the administrative courts are competent; and for public procurement issues, the Procurement Chambers (Vergabekammern) of the civil courts are competent. The procedural rules applicable to the civil courts are contained in the Constitution of Courts Act (Gerichtsverfassungsgesetz, GVG) and the Code of Civil Procedure (Zivilprozessordnung, ZPO). These rules can be accessed in English translation on the internet.

In civil cases, as the court of first instance, the Amtsgericht (AG, local court) decides cases when the value of the case does not exceed € 5,000 (GVG §§ 23 no 1, 71 I). Matters of higher value start at the Landgericht (LG, regional court). The individual steering committee (Präsidium) of the higher courts, i.e. at the Landgericht (Regional Court) and Oberlandesgericht (Higher Regional Court), can establish specialised construction chambers in their courts. Such chambers exist at most courts. They are called Baukammer (construction chamber) at the Landgericht and Bausenat (construction senate) at the Oberlandesgericht.

In relation to judgments by the Amtsgericht (Local Court), there is the possibility of appeal to the Landgericht (Regional Court). For matters of higher value which start at the Landgericht, appeals are possible to the Oberlandesgericht (Higher Regional Court). Under restricted circumstances, a further appeal is permitted to the Bundesgerichtshof (Federal Court of Justice).

In Germany, bailiffs (Gerichtsvollzieher) do not make any determinations having evidential value. They are primarily competent for the execution of court judgments.

Experts (Sachverständige) are often nominated by the court. However, it is also typical in construction law disputes for the claimant to engage an expert in order to support his claim. In the latter case, the expert report will be treated by the court as a qualified statement by a

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party (qualifizierter Parteivortrag) and the judge must therefore consider it. Another common use of judicial experts is the procedure for the independent taking of evidence (Selbständiges Beweisverfahren), as governed by the ZPO §§ 485 et seq. This procedure is run by the courts. It enables an anticipated taking of evidence before the main court proceedings start and is often used in building defect cases. Its evidential value is very high due to the fact that the expert is appointed by the court.

Statutory adjudication – like in the UK – does not exist in Germany.

ADR is still in its infancy in Germany, but mediation in particular is gaining ground; it is probably the most popular mode of ADR. An interesting feature of mediation in Germany is the frequent involvement of the courts. One can differentiate between court-related mediation (gerichtsbezogene Mediation) on the one hand and autonomous mediation (autonome/außergerichtliche Mediation) on the other. In autonomous mediation, the parties turn to mediation on their own initiative. By contrast, court-related mediation is initiated by the judge who hears the case: On the basis of ZPO § 278 V 1, the judge asks the parties whether he shall refer the case to a specifically trained mediation judge. The parties then decide upon that suggestion. Only if both parties agree, the case goes to mediation

Rules for mediation, conciliation, adjudication and arbitration were jointly drafted and published by the German Society of Construction Law (Deutsche Gesellschaft für Baurecht e.V.) and the German Society for Concrete and Construction Technology (Deutscher Beton- und Bautechnik-Verein e.V.). These rules are referred to as the “Alternative Dispute Resolution Rules for the Construction Industry (Streitlösungsordnung für das Bauwesen, for short SL-Bau). Initially published in 2010, the last update of these rules was in 2021.

The German legal system allows for arbitration in construction disputes. The Civil Procedure Code (Zivilprozessordnung, ZPO) §§ 1025-1066 provide arbitration rules. For construction law disputes, arbitration is still much less common than litigation, but it is very slowly gaining ground. The most widely used arbitration procedures concerning commercial disputes are the DIS rules (of Deutsche Institution für Schiedsgerichtsbarkeit). Specifically for the construction sector, the SL-Bau Chapter V provides procedural rules on arbitration. These rules can be adopted by the parties. They operate as valid amendments to the statutory rules of the ZPO §§ 1025-1066.

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

Arbitral awards are binding on the parties (§ 1055 of the Code of Civil Procedure, ZPO). However, in order to enforce an arbitral award, the beneficiary of the award must have the award declared enforceable by the court (section 1060 ZPO).

To enforce a domestic arbitral award, the beneficiary must file an application with the Higher Regional Court of the place where the arbitration proceedings took place (§§ 1060, 1059 II, 1062 I ZPO. Section 1059 II ZPO exhaustively lists the grounds on which the court may refuse a declaration of enforceability. Arbitral awards declared enforceable are enforceable titles (§ 794 I no 4a ZPO).

The procedure for the enforcement of international arbitral awards in Germany is, in essence, identical, to the one outlined above for domestic awards. The procedure is governed by § 1061 ZPO which refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958. The New York Convention contains an exhaustive list of grounds for not enforcing arbitral awards. The beneficiary must file the application with the Higher Regional Court of the judicial district in which enforcement is to be carried out.

The court proceedings to declare an arbitral award enforceable tend to last between 6 months and three years. The required service of process can extend the duration considerably.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

The general rules on limitation are laid down in BGB §§ 195 et seq. The ‘regular limitation period’ is three years from the end of the year in which the claim arose and in which the “obligee obtained knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence”: see BGB § 199 I.

In addition, the BGB contains provisions under which specific kinds of contracts have a regime different from the ‘regular limitation period’. In relation to construction contracts, § 634a provides, in relation to an employer’s claims against a contractor for defects, that the contractor is liable for five years in the case of building works (§ 634a I no 2). If the VOB/B is incorporated, the

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period is four years (§ 13 IV no 1 s 1). However, the parties can amend these periods by agreement; in practice, they usually agree on a period of five years. The limitation period starts when the employer accepts the works: see the BGB § 634a II and the VOB/B § 13 IV no 3. Where sectional completion is possible (as under VOB/B contracts) and the employer has accepted a section of the project, the limitation period starts with acceptance of that section: see VOB/B § 13 IV no 3, second half of the sentence.

Tort claims are governed by the standard limitation period as described above: three years from the end of the year in which the aggrieved party obtains, or could have obtained, knowledge of the circumstances giving rise to the claim. Thus, even though the limitation period of three years is shorter than the five-year limitation period for defects (under the BGB § 634a I no 2 – see above), the right to sue in tort may expire later because the limitation period may start running later.

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the liability of a defaulting party to a "fair and reasonable" proportion of the innocent party's losses), and are these commonly used?

The general rule in the BGB is that two (or more) persons are jointly and severally liable if they are liable for the same loss. Thus, the employer may be able to claim 100% of the loss as compensation from either the contractor or the architect. The party who then pays can then turn to the other(s) for a contribution equal to their share of the liability (under the BGB § 426).

However, there are exceptions to this rule. For example, the negligence of an architect can in some situations reduce the liability of the contractor. In such a case, the employer cannot claim the total loss from the contractor.

If there is a case of a so-called alternative liability, it is still unclear which contracting party is responsible. Here, in a lawsuit against one possible responsible party, the dispute must be announced to the other possible responsible party.

27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

Price developments for wages and materials as well as the volume of new orders due to rising interest rates and the resulting conservative market environment.

Since the COVID 19 pandemic and the war in Ukraine, there have been supply bottlenecks, which have affected a large number of building materials due to, among other things, the lockdown regulations of the individual states, the restrictions on entering the country and the sanctions imposed by the states on each other. This has caused price increases and construction time extensions. Besides the COVID 19 pandemic, there are ongoing supply chain crises due to various global issues. This effect has been reinforced by the war in Ukraine and the sanctions that went along with it. The price of construction materials in particular, which require a lot of energy for their production, has risen significantly. The construction industry must now find ways to fairly divide the additional material costs and the additional costs due to delays among the contract partners.

Furthermore, the conversion of the whole German economy to become climate-neutral will play a major role in the construction sector. This is not only about the production of a building with sustainable materials but also about the production of buildings that can be operated with low CO_2 emissions. In fact, we can expect more laws and regulations that stipulate low-CO_2 output, sustainable building materials and sustainable construction methods.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

Residential projects used to be the backbone of the construction industry in the 'COVID-19 years'. However, due to the increase in both lending costs and construction costs, the demand for housing has significantly slowed down. The previous objective of 400,000 new flats to be built every year, as announced by the German Federal Ministry of Housing, Urban Development and Construction in 2021, can no longer be achieved.

As in the previous year, we still see massive investments in the infrastructure / power sector, in a variety of sub-sectors: National power links are being constructed for the transport of offshore wind energy to the South and East of Germany, the first LNG ports have already been completed (and further are being built) to reduce Germany's dependency on Russian fossil fuels, large industrial plants for new technologies, e.g. in the steel sector, are being built. Moreover, local municipalities all over Germany invest heavily in the water sector. In

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terms of car manufacturing, the construction of the Tesla Gigafactory Berlin-Brandenburg has been completed, and the same is true for several plants for car battery production.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

The digitalisation of all processes will change the industry. The growing power of hardware and software enables the processing of ever larger amounts of data. Digital tools, especially BIM, will play a very important role in the future. This will make it possible to design processes more effectively and to make more complex structures plannable and buildable. This, in turn, will make it possible to address the issue of resource efficiency holistically. The advantages are not only cost optimisation and better schedule control but also an increase in the quality of execution and a minimisation of errors on the construction site. Not only does digitalisation enable the continuous representation of all processes, but it also allows the optimisation of resource consumption. The digital twin will also become standard in order to better record and track the life cycle of building components.

At the same time, the current global emphasis on better climate protection will have its impact on technology. The climate-neutrality of steel construction production will be improved. Robots will make material production more efficient and cheaper. In addition, 3D printers will be used to a great extent. Hybrid construction methods, with wooden elements, and the use of materials and components that can be reused for the next life cycle will be used in a further targeted manner.

30. What do you anticipate to be the impact from the COVID-19 pandemic over the coming year?

As already explained in answer 27, many construction projects suffered from delays triggered by the COVID-19 pandemic and the subsequent global supply chain crisis. That being said, considering the high vaccination rate in Germany, for the future we expect a very low (direct) impact of the pandemic on construction sites. The pandemic appears to be over.

Over the last three years, the COVID-19 pandemic led to a decrease in construction projects related to the hotel, restaurant, retail and commercial/office sectors. At the same time, we have seen an increase in the number of construction projects in other sectors, especially in residential and the logistics sector. This also led to a new trend to convert large shopping malls, suffering from a severe decrease of footfall, into mixed used, such as retail & offices, or retail & residential.

We expect a lower demand in the residential sector due to the increase in construction costs (especially building materials), high inflation and the sudden and significant increase of interest rates for credits. Especially the increase of interest rates from only about 1% to about 4% in the year 2022 made it impossible for most families to afford buying a flat. It is uncertain whether perhaps the real estate prices will decrease which could make investments more attractive.

In terms of legal disputes stemming from COVID 19 (and the global supply chain crisis and the Ukraine war), we already see an increase in cases in which the disadvantaged party, usually the contractor, seeks an extension of time and / or compensation under the contract by invoking so-called force majeure (COVID 19 clauses) and/or the statutory concept of changes circumstances *(clausula rebus sic stantibus)* laid down in § 313 of the German civil code BGB. We expect a further increase of such cases. Difficult legal questions arise in this context, many of them have not yet been decided upon by the German federal court. First, it is uncertain whether COVID 19 is still a force majeure event today because the pandemic is known to everybody; the same uncertainty applies to the global supply chain crisis. Secondly, it is uncertain how the disadvantaged party can prove that a delay is in fact caused by COVID 19 (and/or the global supply chain crisis and/or the Ukraine war) and not just by poor planning, poor project management or a poor quality of works. In order to successfully invoke a COVID 19 defence, it appears to be necessary (from applying the standards set by German courts) that the disadvantaged party has exercised the utmost care that could reasonably be expected in order to avert the consequences. It will be difficult in delay cases to establish whether this standard has been complied with.

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