Addressing the challenges of the Corona crisis

The Corona crisis poses a variety of challenges for companies active in the construction industry. In particular, the question of how to deal with construction delays resulting from this crisis is relevant for the construction sector. Below is a brief overview of the most important questions for the construction industry with regard to the corona crisis.

a) COVID-19 - a case of force majeure

COVID-19 or more the Corona crisis can be classified as a case of force majeure. Force majeure is understood by the case law in Germany as an event that cannot be assigned to any sphere of one of the contracting parties, but that affects the living conditions of the general public or an undetermined number of people from outside and is objectively inevitable and unpredictable (see BGH, judgment of 22 April 2004 – III ZR 108/03). Diseases and epidemics are basically also included under this term (see BGH, judgment of 16 May 2017 – X ZR 142/15). Although the current developments can still be observed, the classification of the corona crisis as a pandemic by the WHO on March 11, 2020 should provide clarity and force majeure can be assumed.

b) Legal consequences of force majeure: interruptions to construction progress

The legal consequences of a case of force majeure are diverse and must therefore be examined in
each individual case taking into account the respective contractual agreements. In this respect, cases of quarantine measures against the personnel, confinement in different countries, and in particular restrictions on travel of personnel, construction sites in risk areas, restrictions on movement of goods, etc. could be considered. Because these consequences of the Corona crisis can have an impact on the construction process and thus ultimately on the contractual obligation to fulfil agreed deadlines.

c) Principle: Interruption of execution and postponement of deadlines

In principle, the contracting party concerned is temporarily released from its contractual performance obligations in the event of force majeure, without the other contracting party being able to derive any claims for this. The occurrence of force majeure can mean that there is no need to perform for a certain time. That means, contractual obligations - as performance of services, delivery of material, etc. - are suspended for the time being and reinstated after the extraordinary event has ended. This is the case if force majeure has unreasonably disturbed – rendered impossible – the provision of services (see Palandt-Grüneberg BGB Commentary, 79th edition 2020, § 313 BGB, paragraph 32). Such an interruption is conceivable above all in the event of difficulties in delivering materials or in the event of a loss of labour due to quarantine measures. However, so that a contractor can rely on this, he must - especially under the regime of the VOB/B contract - comply with his warning and notification obligation and report disabilities. In accordance with Section 6 Paragraph 2 No. 1 c) VOB / B, a case of force majeure will result the execution deadlines being extended, under the condition of the contract involving the VOB/B. As a result, deadlines are postponed and, in case of doubt, have to be arranged entirely new. Even if a case of force majeure basically only leads to a (temporary) release from the performance obligations and not to the creation of financial claims, when protective measures are ordered, they are not generally excluded insofar as they are legally justified on an individual basis.

d) Exception: Cancellation of the contract

In exceptional cases, the ultima ratio may even include the complete termination of the contractual relationship. According to the principles of the expiry of the business basis in accordance with § 313 BGB, serious special situations can lead to adherence to the contract no longer being reasonable and appropriate (see Palandt-Grüneberg BGB-Commentary, 79th edition 2020, § 313 BGB, marginal no. 42). However, this major consequence only occurs if even a contract adjustment, such as a change in benefits or postponements, does not restore the distribution of original risks. In addition, Section 6 (7) sentence 1 VOB / B includes a right of termination for both parties, provided that the interruption in construction lasts longer than three months or if it is certain that an interruption of more than three months is unavoidable (Leinemann-Leinemann / Kues VOB / B-commentary, 7th edition 2019, § 6 VOB / B, marginal 275).

e) Remote effect of COVID-19: official orders

Regardless of the actual existence of a case of force majeure official orders are also suitable, bring about the consequences outlined above. In view of the situation in Italy, Austria, the Czech Republic, Poland and France where confinement has already been put in place and also government measures taken in Germany and by the EU, additional restrictions which would have an impact on the progress of the construction sites are possible The official options for averting the dangers to individuals or the general public according to the Infection Protection Act (IfSG) are also extensive. This includes, in particular, the aforementioned quarantine measures against
personnel, which can be ordered by the authorities in accordance with Section 30 IfSG. The implementation of such measures justifies a right to extend the construction period.

f) Practical advice

Due to the continuing spread of COVID-19, the consequences of the crisis cannot be estimated. However, the effects are also likely to affect the construction industry and, in addition to their own performance, also affect any subcontractors and supply chains. In order to reduce far-reaching adverse economic consequences, the occurrence or existence of impairments due to COVID-19 should be notified to the business partner at an early stage. This should be done in good order by means of a “classic” disability notification (“Behinderungsanzeige”), as not to make yourself unnecessarily vulnerable. The legal information on force majeure or any specific quarantine measures ordered by the authorities should be used as a basis for argumentation. However, it should not remain purely abstract. Rather, it has to be concretely explained.
1. **Is your jurisdiction a common law or civil law jurisdiction?**

   Germany is a code-based civil law jurisdiction. Its civil law has been subject to a wide array of influences from Roman law (Corpus Juris Civilis), the Prussian Civil Code (Allgemeines Preußisches Landrecht, 1794) to Napoleonic law (Code civil, 1804). Germany’s most important body of civil laws is the German Civil Code (“Bürgerliches Gesetzbuch” – BGB) which was in development since 1881 and became effective on January 1, 1900. The German Civil Code contains five books (general part/ law of obligations/ law of property/ family law/ law of succession) with roughly 2,450 articles (“Paragrafen”).

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

   German construction and engineering projects are governed by a large number of legislative provisions such as the German Federal Building Code (Baugesetzbuch), the building regulations of the federal states of Germany (Landesbauordnungen), the German Civil Code (Bürgerliches Gesetzbuch – BGB) and the Standard Building Contract Terms (Part B) (Vergabe- und Vertragsordnung für Bauleistungen – VOB/B), to name just a few. This is a highly regulated area of law.

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.

   (a) health and safety;

   Most German health and safety laws apply to the employment sector (e.g. Labor Protection Law (Arbeitsschutzgesetz), social security code (Sozialgesetzbuch – SGB) and workplaces ordinance (Arbeitsstättenverordnung, Occupational Safety Act (Arbeitssicherheitsgesetz), Ordinance on Hazardous Substances (Gefahrstoffverordnung) Safety regulations of the professional associations (Sicherheitsvorschriften der Berufsgenossenschaften) Construction Site Ordinance (Baustellenverordnung)).

   (b) environmental issues;

   The protection of the environment is anchored in German constitutional law (Article 20a of the German constitution). However, there is no central body for environmental law. Legislative provisions concerning environmental issues are widely scattered across many laws. A central provision of German environmental law is the Federal Nature Conservation Act (Bundesnaturschutzgesetz – BNatSchG), another the Federal Pollution Control Act (Bundesimmissionsschutzgesetz – BImSchG).

   (c) planning;
Planning law in Germany consists of the technical planning and construction planning law. In accordance with special regulations (Federal Highway Act – FStrG, General Railway Act – AEG, Air Traffic Act – LuftVG, Energy Industry Act – EnWG), a plan approval procedure must be carried out regularly. Otherwise, the regulations of the Building Code (BauGB) apply to “normal” construction projects. Architect and engineers may claim a minimum remuneration according to a fee ordinance binding for this industry: the HOAI. However, fees may be freely negotiated for large projects.

(d) employment;

The employment sector is highly regulated in Germany. Many German employment laws are based on European legislation. German employment law is codified in the German Civil Code (Bürgerliches Gesetzbuch – BGB), in the German Protection Against Dismissal Act (Kündigungsschutzgesetz – KSchG), in the German Labor Protection Act (Arbeitsschutzgesetz) and in many other laws and regulations.

(e) Anti-corruption and bribery.

The most relevant anti-corruption provisions are laid down in the paragraphs 331 seqq. of the German Criminal Code (Strafgesetzbuch – StGB). However, there are anti-corruption provisions in other laws like the law on combating international corruption (Gesetz zur Bekämpfung internationaler Bestechung).

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?

Non-EU citizens need a residence permit before starting work in Germany. Other permits may be needed depending on the type of work (e.g. health certificate in medical or in gastronomy professions). Penalties for non-compliance can be severe.

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

The German equivalent to tort law is “Deliktsrecht” which is incorporated in the German Civil Code (Bürgerliches Gesetzbuch” – BGB). The German equivalent to law of extra contractual obligations is called “culpa in contrahendo”. It is codified since 2002 in section 311 (2) 2, section 280 (1) and section 241 (2) German Civil Code (BGB)

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

On the client side of large infrastructural projects like federal highways, state highways, port facilities or power train paths you will often find the Federal Republic of Germany or a federal state of Germany. Airport and Port authorities and public-owned SPV’s also act as principals of building contracts. Deutsche Bahn (German Railways) is a major player in the
field of railroad construction.

Contractors of construction and engineering projects are usually large and mid-sized privately owned construction companies. There are no publicly owned contractors.

7. **What are the most popular methods of procurement?**

Procurement by private parties is only bound by the general principles of civil law, notably the BGB. Procurement by public authorities usually is generally guided by the rules of the European directive 2014/24/EU, which was transformed into German law. To name just the most important rules: German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB), German Regulation on the Award of Public Contracts (Vergabeverordnung – VgV), Sector Ordinance (Sektorenverordnung – SektVO), Procurement Regulation for Contracts related to Issues of Defense and Security (Vergabeverordnung für die Bereiche Verteidigung und Sicherheit (VSVgV), Standard Building Contract Terms Part A (Vergabe- und Vertragsordnung für Bauleistungen, VOB/A). The contracting authorities must apply these rules if they wish to award construction works. As a rule, a public invitation to tender must be carried out.

Private clients can also use the tendering method to select the contracting party.

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

Any construction project is unique. So standard forms can not sufficiently address the particular situations occurring in the course of a construction project. However, experienced legal advisers have a great deal of experience in contract drafting and in finding adequate contractual solutions for their client’s construction projects.

Due to the fact that many construction contracts incorporate the Standard Building Contract Terms (Vergabe- und Vertragsordnung für Bauleistungen – VOB/B), there is some standardization in German construction contracts.

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

The procurement process is highly regulated and quite formalised. For laws that apply to procurements see answer to question 7.

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

In Germany parties usually engage law firms that are highly specialized in public procurement law.
11. **Is subcontracting permitted?**

Subcontracting is a widely used practice in the construction industry. However, most public contracts require the customer’s agreement beforehand. In case a subcontractor is hired, the project’s general contractor continues to have full responsibility for project completion within the parameters and deadlines stipulated in the main agreement. Many contracts contain subcontracting clauses that define precisely the requirements a subcontractor has to fulfil.

12. **How are projects typically financed?**

Building projects are often financed by medium-term and long-term loans. Projects commissioned by public sector entities (“Öffentliche Hand”) are usually funded by the public treasury. In some cases building projects are also financed by public-private- partnerships (PPP).

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?**

Customers usually retain 5-10 percent of the agreed contract price until the project is completed or the contractor has to provide a performance bond that secures the same amount. Bank guarantees are also widely used. After completion of the project the customer usually withholds around 3-5 percent of the agreed contract price until the end of the warranty period, which usually lasts 4-5 years. Instead, the customers warranty claims can also be secured by a warranty bond (“Gewährleistungsbürgschaft”).

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

Payment obligations depend on the respective contract. According to VOB/B-conditions, installment payments are to be granted in the shortest possible time intervals or at the agreed points in time to the amount of the value of the respectively proven contractual services. The claim for final payment will be due soon after examination and determination, at the latest within 30 days after receipt of the final invoice.

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?**

While pay-when-paid clauses are not illegal under German law, they are not commonly used in building contracts. They are deemed to be invalid if used in standard business terms (section 305 ff. BGB).

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

Retention provisions are very common in German building contracts. Usually the customer
withholds 5-10 percent of the agreed contract price until the project is completed. After completion of the project the amount retained is reduced to 5 percent of the agreed contract price. The last portion of the retained amount is paid to the contractor after the warranty period expired (usually 4-5 years after completion of the project).

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

Delay liquidated damages provisions are quite common in German construction contracts. Under a standard delay liquidated damages provision, the client can recover a specified sum as soon as the work completion date has been missed, without having to prove actual losses. In most cases the client will be able to deduct or offset the liquidated damages against sums owed to the contractor. Delay liquidated damages provisions are usually upheld by the courts. However, if delay liquidation damages provisions are part of general terms and conditions (Allgemeine Geschäftsbedingungen – AGB) they may be declared void if the grossly and unfairly disadvantage the contracting party. Hence, delay liquidation damages provisions that are incorporated into general terms and conditions may not award damages exceeding 5% of the contract value to the customer.

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

Liability for damages caused by wilful acts cannot be limited according to sec. 276, subsec. 3 BGB. By general conditions of contract, liability for gross negligence also may not be excluded, sec 309 No. 7b BGB. If the construction project is carried out under the conditions of the standard building contract Terms (VOB/B), liability for construction defects can be limited only in exceptional cases (see sec. 13 subsec. 7 (5) VOB/B).

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

Under a construction contract governed by the provisions of the German Civil Code (BGB) the customer may terminate the contract any time until completion of the work even in the absence of any breach of contract on the contractor’s side (sec. 648 BGB). However, if he does so, he has to pay the contractual remuneration to the contractor minus expenses saved (see section 650q subsection 2 BGB and section 648 BGB). The same applies to construction contracts governed by the Standard Building Contract Terms (see sec. 8 subsec. 1 VOB/B).

Both parties may terminate the contract if the other party does not fulfil its contractual obligations. However, the party willing to terminate the contract usually must grant the contractual partner an appropriate period of grace.

The termination needs to be made in writing (written form – see section 650h BGB).
20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

In general rights granted to third parties depend on the individual contract between the third party and the contractual party.

A contract situation that is typical of building law is the so called building promoter contract (Bauträgervertrag, sections 650u and 650v BGB). There, a construction company erects a building with its own funds and at its own risk and then sells the property (single apartments or as a whole). Subsequently, the purchaser is provided with both the ownership of the property and the building on it. The money of the buyer is usually secured by bank guarantee. This contains a clear regulation for dealing with already paid instalments in case of insolvency of the building promoter.

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?

Under construction contracts governed by the Standard Building Contract Terms (VOB/B) the contractor has to notify the customer as soon as he becomes aware of circumstances that may lead to higher costs or which may delay the progress of the project. If he fails to do so, no extra remuneration can be claimed in most cases. Nevertheless, the contractor is obliged to complete the project as contractually agreed. However, several exemptions to this rule apply.

With effect from 2018-1-1 new legal regulations concerning alteration of contract have entered into force (see sections 650b, 650c BGB). Those rules are relevant for changes of the construction works; they are not relevant for changes solely in time for completion. If the customer – for example after a notification of higher costs made by the contractor – wants to get a modified construction and places a change order, the contractor is entitled to receive 80 % of the additional costs as an installment. If the customer does not pay he can file an action for an injunction (see section 650d BGB).

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

The public liability insurance (Betriebshaftpflichtversicherung) covers the liability risks of traders and industrial companies, freelancers and craftsmen. Such insurance is required by most clients and made a condition of a contract. It is common to have a construction all risk insurance (Bauleistungsversicherung) on large projects, provided for by the customer.

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

Some disputes can be settled by out of court negations. Most disputes will go to the state courts. However, over the last several years, arbitration has become increasingly popular and arbitration provisions appear in more and more construction agreements. Like in the United States or in Great Britain, also in Germany arbitration can be compelled only by agreement. Some construction contracts contain arbitration clauses that compel one or both parties to submit disputes to arbitration. In the absence of a contract clause, arbitration is available only by the agreement of both sides.

Litigation is always an available method to resolve a dispute, unless there is a binding arbitration clause or a mandatory administrative proceeding. Though slow and costly, the process of the trial best eases the fleshing-out of complex issues, ensuring they are thoroughly dealt with.

Public authorities unusually reject arbitration clauses. This is also - but not only - due to the fact that the German Federal Government, German federal states (“Bundesländer”) and some other public bodies are exempted from court fees in civil litigation (sec. 2 Court Fees Act – “Gerichtskostengesetz”). Since public authorities often can get legal protection from public courts free of charge, they are usually not willing to engage in arbitration procedures or other ADR-proceedings such as adjudication, which is therefore still uncommon in Germany.

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

In Germany, arbitration tribunals are formed on the basis of contractual agreements. The German code of civil procedure (ZPO, sec. 1025 et subseq.) is arbitration friendly and state courts usually accept arbitral awards also of international arbitration tribunals. An arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement (sec. 1040 ZPO).

The duration of arbitration depends on the subject matter and the scope of the dispute. Procedures usually last between 6 to 18 months. However, due to the current virulent corona crisis, procedures can currently take considerably longer.

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

The standard limitation period concerning financial claims is three years (section 195 of the German Civil Code (BGB)). Unless another date for the beginning of a limitation period is prescribed, the standard limitation period begins to run at the close of the year in which the claim arose and in which the creditor obtained or, in the absence of gross negligence, had to have obtained knowledge of the facts supporting the claim and knowledge of the identity of the debtor.
However, the German Civil Code (BGB) as well as the Standard Building Contract Terms (VOB/B) provide for special statutes of limitations for rights for defects on buildings: According to section 634a, subsection 1.2 BGB, rights for defects on buildings become time-barred five years after completion of the building. In case the Standard Building Contract Terms (VOB/B) apply to the building contract, rights for defects become time-barred four years after completion of the building (see section 13 subsection 4 No. 1 VOB/B). Exemptions may apply, so the question when rights for defects become time-barred should be checked by a lawyer in due consideration of the individual contract. Ongoing Negotiations may suspend the period of limitation.

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?**

- Disputes between several parties are common before the state courts. There is the legal institution of the so called „Streitverkündung“ (third-party notice). According to sec. 72 ZPO, any party believing that it will be able to assert a warranty claim or a claim to indemnification against a third party should the legal dispute’s outcome not be in its favour, or any party concerned that such a claim may be brought against it by a third party, may file third-party notice to that third party with the court until a final and binding judgment has been handed down in the legal dispute. There is no special division of liability in Germany. Liability is divided by discretion of the court according to the level of individual responsibility. Net contribution provisions are not common in Germany. However, contractual clauses to limit the responsibility of consequential damages do occur.

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

One of the biggest challenges in the construction sector is the legal handling of construction delays, which are especially commonplace in large public construction projects. Many disputes between employers and contractors revolve around the question of who bears the additional costs for the delays. German courts are very strict about how to prove extra costs due to delays. As a result, the willingness of customers to pay for delay costs is very low. In particular, public authorities tend to accept only those claims that would most likely be approved by a court.

Another challenge is a serious labour shortage in German construction industry: The booming German economy is boosting spending from consumers and businesses who have more cash on hand for expansions and improvements. But it’s also exacerbating the industry’s growing inability to fill jobs. Offering higher pay, better benefits and on-the-job training and reaching out to groups of people who don’t fit the traditional mold of a construction worker are just a few of the ways construction companies are dealing with an acute labour shortage.
A third challenge is dealing with the consequences of the corona crisis, which hit Germany hard in March 2020. More details on this are given in Note 30 below.

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

The coalition agreement of the federal government envisages investing heavily in social housing construction. Investments in transport infrastructure will continue to be very high. Commercial construction is currently benefiting strongly from rising demand for office workplaces and an investment offensive by Deutsche Bahn who announced to invest 10.6 billion Euros into the German rail network, in digital systems, in bridges and in train stations in 2019/2020.

Housing construction has reached a record high of 300,000 units in 2018. The last time his number was reached back in 2001. Housing construction will stay strong in 2020 since demand for housing will remain high for the foreseeable future.

Another field that attracts heavy investment in Germany is the energy industry which already is the largest energy production pool in Europe. Major investments in the expansion of the transmission and distribution networks are planned as Germany has committed itself to a very challenging switching strategy from nuclear and fossil fuels to renewable sources (so called “Energiewende”).

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

As in almost every other industry, digitization is also progressing in the construction and engineering industry. An example is the development of the so called Building Information Modeling (BIM), which describes the integrated digitization of all planning and building information that are relevant for realization as a virtual building model. The responsible federal ministry has developed a phased plan according to which BIM will be applied to infrastructure projects from 2020 onwards. In particular, the new form of joint processing of the model by several participants will lead to new legal issues in the area of liability, remuneration and copyright. However, the implementation of BIM seems to be way behind the political plans.