Legal 500
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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?

The law of the Federal Republic of Germany is a civil law system based on the principles of the constitution of Germany, even though many of its most important laws were developed before the constitution of 1949. This system consists of public law, which covers the relationship between a citizen and the state (including criminal law) or two state authorities and private law, which covers the relationship between two individuals or companies. Germany has a civil code, Bürgerliches Gesetzbuch (BGB), which has been in force since 1900.

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

Since January 1st, 2018, the Act on the Reform of Construction Contract Law and the Amendment of Liability for Construction Errors has provided more customer protection and increased transparency in construction projects. The term construction contract was defined for the first time, § 650a BGB, and the legislature has made specific new regulations for the construction contract and the architect contract. The chapter on contracts for work in the BGB regulates the general requirements for work contract law, §§ 631-650 BGB, specifically for construction contracts, §§ 650a-650h BGB, and consumer construction contracts, §§ 650i-650o BGB. Architect and engineer contracts are regulated in §§ 650p-650t BGB.

The VOB/B can also be included in the construction contract. VOB/B regulates contractual conditions for the execution of construction work, such as the standard contractual conditions that apply between the customer and contractor in construction contracts. In contracts for work with architects and engineers, reference is often made to the Fee Regulations for Architects and Engineers (HOAI).

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;

Relevant regulations on health and safety at work during construction work can be found in the Occupational Health and Safety Act and the accident prevention regulations of the employers' liability insurance associations. In addition, the Construction Site Regulations, which apply to the individual construction site, regularly contain regulations with a protective purpose. Construction sites must also be set up in accordance with building regulations in such a way that there are no risks or avoidable disturbances.

(b) environmental issues;

General environmental regulations generally affect building contract law. There are no environmental regulations directly targeting construction law. Rather, laws such as the Federal Nature Conservation Act and the Federal Emission Control Act affect the granting of planning permission under public law and must be considered by architects and engineers during the planning stage.

(c) planning;

A building permission is usually granted by the local building authority if the building project does not conflict with any public law regulations. There are a large number of laws and directives that contain public law regulations that must be followed. The most important of these include the Building Code (BauGB), the State Building Regulations (LBO) and the Land Utilisation Regulations (BauNVO). The building zoning plan of an area must also be considered.

(d) employment; and

German labour law is employee-friendly in this respect, as the employee is not expected to bear the employer's entrepreneurial risk that could result from the sometimes unpredictable duration of a construction project. As a result, termination of employment contracts is very limited. Labour law and case law provide strong protection to employees, especially against unfair dismissal.

Fixed-term employment contracts are possible, but there are a few things to consider: A fixed-term contract cannot be terminated unless contractually agreed. A fixed-term contract can be concluded for up to two years and extended three times without a reason and for fixed-term contracts that run for a longer period of time, the employer must provide a valid reason for the time limit. According to labour law, an important reason may exist if a company has to carry out work on a temporary basis. Invalidity of fixed terms leads to a contract with indefinite duration. Constructors should consider using fixed-term contracts but be aware of risks arising from errors when entering into them.

(e) anti-corruption and bribery.

Although German criminal law does not impose criminal liability upon companies, illegal acts such as bribery can result in high penalties. In addition, the contractor may have to face claims for civil law damages. Further, the criminal court may confiscate profits gained from illegal activities if quantifiable. Another outcome can be the blacklisting of the company by authorities, which will deny the respective company access to awarding processes. However, this barrier is only valid in the state it was issued. Under criminal law, facilitation payments are a form of bribery and are therefore treated equally.

In 2014, the Federal Supreme Court ruled that a purchase agreement was void because of previous bribery. However, the transfer of ownership, which is to be viewed in the abstract and independent of the purchase agreement, was considered to be valid. Whether or not a contract is void because of previous bribery cannot be determined a priori but must be reviewed in each individual case. With regard to privately awarded contracts, competitors affected by illegally obtained contracts may demand compensation or seek injunctive relief, or both. Concerning publicly awarded contracts, competitors may require a new bidding and awarding process.

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 authorisation is the building permission, which must be obtained before the construction project starts. However, the building permission is only granted upon submission of all relevant documents, such as the building application signed by the architect and the client, a construction plan from an architect or civil engineer and a description of the building to be constructed and its technical details. Before the newly constructed building can be put into operation, it may have to be approved by the building authorities in accordance with the applicable state building regulations. Violations of the permit requirement regularly result in fines. However, more extensive measures can also be taken, such as a destruction order in the event of construction without a building permit.

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

Tort law is recognised in Germany. The central rule of German tort law is § 823 I of the German Civil Code (BGB). Liability in tort typically becomes relevant when the injured party is not a party to the contract with the person who caused the damage. Pure financial losses are not eligible for compensation in accordance with § 823 I BGB because they arise independently of a violation of legal rights covered by § 823 BGB. Compensation can only be claimed if there is at least negligence (fault principle). The Product Liability Act transposes EU Directive 85/374/EEC on liability for defective products into German law.

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

The client can assign one or more contractors for the realisation of his construction project. For example, it is possible to commission a general planner and a general contractor. The general planner then provides all architectural and engineering services. The general contractor provides all construction services for the project. If the client commissions a general contractor, the general contractor provides all services. In addition, contractors such as project managers can also take on typical employer tasks.

7. What are the most popular methods of procurement?

In practice, there is no favoured method. Everything is being used, from the commissioning of a total contractor to individual contracts. In contrast, public clients are obliged under public procurement law to tender construction services in packages in order to support small and medium-sized enterprises.

8. What are the most popular standard forms of

contract? Do parties commonly amend these standard forms?

§ 650a–650v of the German Civil Code deal with construction contracts. The non-mandatory general contract terms for the execution of construction works (VOB/B), in turn observing the interests of the parties involved in construction contracts, comprises terms and conditions for these contracts in an impartial manner. The use of the VOB/B is advisable, principally because it has become the most important standard contract form in matters of construction. In addition, even though the validity of terms and conditions is usually subject to a court's revision, the terms of the VOB/B can be implemented as valid terms in a contract without modification owing to its character as a formal legal act or by law.

Bilateral agreements shall be formulated in German and, if the other contracting party uses one or more foreign languages, in this or these languages; German shall thus always be one of the languages of the contract.

Explicit reference to the language to be used, the applicable law and the place of arbitration should be made by the parties when deciding on the German Institute of Arbitration arbitration rules. The parties to an arbitration are free to set the parameters for their proceedings. They can choose the seat, the language and the applicable law, whereas the choice of law lies in reference to substantive law and not to conflict-of-laws rules. Agreements will apply to written statements, hearings, awards and any other communication unless the parties have agreed otherwise. If the parties fail to agree, the arbitral tribunal will decide. If the parties do not agree on the applicable law, the tribunal will apply the law of the state with which the subject matter of the proceedings is most closely connected.

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

For private employers, the provisions of the German Civil Code, such as the provisions on the construction contract and on general terms and conditions, §§ 305 ff. BGB, must be considered. These require that individual contractual clauses must not violate the core content of a law or significantly disadvantage one party. A large number of laws must be observed by public contracting authorities. These include the provisions of VOB/A. The VOB/A regulates the general principles for awarding construction projects and obtaining offers.

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

An architect generally provides planning and supervision services. When architects supervise the contractor's work, they work as an authorised consultant for the employer. Unlike in common law jurisdictions, supervising architects do not have a neutral role. They must exclusively represent the interests of the customer. The project controller supports the client by taking on principal tasks such as organisation and documentation, costs and deadlines, but without the authority to make decisions or instruct. Project management is understood to be the fulfilment of all tasks in organisational, legal and economic terms that are necessary for the targeted implementation of a project.

11. Is subcontracting permitted?

A contractor is obliged to carry out the work assigned to him personally or to have it carried out under his personal direction. However, this only applies if the nature of the business depends on his personal qualities. Otherwise, the contractor may commission a third party (subcontractor) to carry out the work if this is in line with common practice. The involvement of subcontractors may be contractually excluded, but may also be expressly permitted. The client may reserve the right to make suggestions or even have a say in the selection of subcontractors. The use of subcontractors can be beneficial for the employer if, for example, a subcontractor has more experience with individual work services than the main contractor. In any case, it must be ensured that the main contractor is fully liable for the subcontractor's services, even if these were specified by the client. The unauthorised use of subcontractors constitutes a breach of contract. In practice, most German contracts for work and services require the architect to obtain the client's consent before subcontracting parts of the planning. In the absence of such an explicit clause, planners can freely subcontract parts or all of the planning services, as the German Civil Code does not prohibit this.

12. How are projects typically financed?

The characteristics of the contractor and the project are essential. A major part of the projects is financed by commercial banks and other authorised lenders under corporate financing or financing agreements. Construction credits are short-term loans to finance the construction project. Construction loans usually have a shorter repayment term than conventional mortgages. As

they are shorter-term loans, construction loans usually have higher interest rates than longer-term mortgages.

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 provided by the employer include advance payment guarantees, retentions and implementation guarantee during the construction period as well as retentions and warranty guarantees for claims for defects after acceptance. If the parties do not specify how long the client is entitled to retain the guarantee, § 17 VIII No. 2 VOB/B specifies that agreed guarantees for the client's claims for defects must be returned after two years.

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

Payment terms are usually agreed between the parties. If not, the buyer is only required to pay for the goods on receipt. The payments are based either on the actual level of fulfilment or on a payment plan. Payment for work must only be made by acceptance of the work, unless the parties have agreed otherwise. The contractor can, additionally, demand partial payment in an amount of the value of the work performed to date. In a service relationship, remuneration is payable after performance irrespective of success. If the payment is assessed periodically, it is due at the end of each time period. Employees normally receive their net wages at the end of a working month. If the VOB/B has been agreed for construction contracts, the payment modalities are subject to § 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?

'Paid-when-paid' clauses are invalid when being introduced into the contract by general terms and conditions of the general contractor. This also applies to all similar clauses that cause the subcontractor to bear the risk of the owner's non-payment or late payment. These terms are only valid if being specifically negotiated among the parties of the contract and if the subcontractor had a real opportunity to influence the content of the specific clause. In the event of a dispute, the general contractor bears the burden of proof with regard to the negotiations.

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

Construction contracts typically contain retention provisions. Retention of money as security for claims for defects after acceptance within the defect claim period is a special type of security provided by the construction company as contractor for the client.

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

Under German law, contractual penalty clauses are permitted subject to certain rules. Contractual penalty clauses for delays are common in the German construction industry. Contractual penalties are intended to ensure that the contractor actually fulfils the work agreed in the contract to the intended extent and meets intermediate or final production deadlines on time. In most cases, the amount of the contractual penalty is based on the order value and must be paid even if the client has not suffered any damage as a result of the delay. This procedure makes it easier for the client to receive the predetermined amount without having to explain or prove the amount of any claims for damages. Contractual penalties are either specified in the construction contract or in a separate agreement. This can also be done at a later stage. Contractual penalties can be included in both BGB and VOB/B construction contracts.

Contractual penalties that are formulated irrespective of culpability are invalid under general terms and conditions law, as why should a construction company pay a contractual penalty if it is not responsible for the delay. A contractual penalty must also be limited in amount in order to be compliant with general terms and conditions.

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

§ 276 III BGB specifies that the liable party cannot be released from liability for intent in advance. Liability for injury to life, body and health cannot be limited in general terms and conditions, § 309 No. 7a BGB. Therefore, an exclusion of liability for negligence in the contractor's general terms and conditions is also invalid if it excludes liability for injury to life, body or health. In such a case, the

entire limitation of liability clause would be invalid. In general terms and conditions, it is not possible to exempt the liable party from liability in the event of culpable negligence, § 309 No. 7b BGB. This provision only applies directly to contracts between companies and consumers, but the courts also apply it to contracts between companies. In general terms and conditions, an exclusion of liability for simple negligence is invalid if it limits liability for the violation of essential contractual obligations that endanger the purpose of the contract, § 307 II No. 2 BGB. Therefore, liability limitation clauses that restrict the client's right to claim damages from the contractor for defects are generally invalid if they are contained in general terms and conditions.

In addition, § 639 BGB states that liability limitation clauses are invalid if the contractor has intentionally concealed a defect or if the contractor has provided a guarantee for the quality of the work.

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

The employer may terminate the contract at any time in accordance with § 648 BGB. Time limits do not have to be observed. Both contracting parties can terminate the contract for good cause in accordance with § 648a BGB if there is good reason. This is usually based on a serious breach by the other contracting party that makes the continuation of the contract unreasonable. In construction contracts in which the VOB/B is included, there are reasons for termination stated in §§ 4 VII, 5 IV, 6 VII, 8 III, 9 VOB/B.

German law does not define the term ‘force majeure'. The judicature has determined that this is an external event (not necessarily a force of nature), that cannot be foreseen or averted by the person suffering, not even by use of the utmost care. When there is a force majeure, the contractor's non-performance or delay in performing its contractual obligations resulting from the act is excused. If the contractor is already in delay, the contractor carries the legal risk of unforeseen events by him or herself.

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

Contracts between the contractors and third parties such as funders and purchasers are unusual in Germany if the construction project has not yet been completed. Sometimes neighbourhood agreements are signed before the construction project is realised. In these agreements, the neighbour grants certain rights to the site owner. Property purchase agreements in which a property owner sells a flat to a purchaser before the flat has been built sometimes contain clauses that entitle the purchaser to demand the cession of the seller's rights in respect of defects from the construction companies.

When a third party has suffered damage respecting life, physical integrity, freedom or property resulting from a default in the construction of a building, the law of tort entitles the third party to indemnification, regardless of whether or not there is privity of contract. The same risk may result from the contractor's position as the possessor of the land parcel and the building if it collapses or a part of it detaches. In addition, the principal's contractual claims against the contractor are often pledged from the principal to the buyer when selling the object.

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?

According to § 6 I sentence 1 VOB/B, the contractor must inform the client immediately if he believes that he is prevented from properly completing the work. The deadlines for completing the work are then extended. Notification by the contractor is not required if the delaying event and its delaying effect were obvious to the client, § 6 I sentence 2 VOB/B. It is sufficient to be obvious to the client if the delaying event and its delaying effect were recognisable to the client's architect in charge of construction.

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

Contractors will regularly enter into two forms of insurance: indemnity insurance and all-risk insurance. Indemnity insurance covers personal injuries and financial and property damage. Whether or not delay damages are covered depends on the cause for the delay. Coverage might be granted if the delay is based on incorrect instructions from the architect. In this matter, the individual case would have to be reviewed.

All-risk insurance covers the principal's risk. Even though local law does not limit liability for damages, the parties

may insert limits into the contract itself. Naturally, principals will not want to accept limits on the contractor's liability. However, in many contracts there are clauses concerning minimum coverage and the distribution of costs in case of damages.

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

In Germany, disputes in the construction and engineering sector are generally dealt with by the courts. The civil courts are responsible for contract law issues, the public courts are responsible for cases concerning public construction law and the public procurement chambers of the civil courts are responsible for public procurement issues. Authorised experts are often appointed by the court. However, in building law disputes, it is also common for the plaintiff to commission an expert to substantiate their claim. In this case, the expert opinion is treated by the court as a qualified party submission and must therefore be considered by the judge.

Alternative dispute resolution, particularly in the form of mediation, is gaining popularity; it is probably the most popular form of alternative dispute resolution. A differentiation must be made between court-related mediation and independent mediation. In independent mediation, the parties turn to mediation on their own initiative. In contrast, court-based mediation is initiated by the judge in charge of the proceedings. The German legal system authorises the arbitration of construction disputes in §§ 1025-1066 ZPO.

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

Arbitration awards are legally valid for the parties, § 1055 ZPO. However, in order to enforce an arbitration award, the party receiving the award must have the award declared enforceable by the court, § 1060 ZPO. The procedure for enforcing international arbitration awards in Germany is essentially identical to that for domestic arbitration awards. The procedure is governed by § 1061 ZPO, which refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The court proceedings to declare an arbitration award enforceable usually take between six months and three years. The required delivery of the claim can extend the duration considerably.

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

The general limitation regulations are set out in §§ 195 ff. BGB (German Civil Code). The regular limitation period is three years from the end of the year in which the claim occurred and the party entitled to the claim becomes aware of the circumstances justifying the claim and the person of the liable party or should have become aware of them without severe negligence. However, there are also differing regulations: For construction contracts, § 634a BGB provides that the contractor for construction work is liable for claims for defects of the client against the contractor for five years. If the VOB/B is included, the period is four years, § 13 IV No. 1 sentence 1. The parties can amend these periods by means of a corresponding agreement. The limitation period begins with the acceptance of the work by the client, § 634a II BGB and § 13 IV No. 3 VOB/B. The standard limitation period described above applies to tortious claims.

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?

Under the German Civil Code, two or more persons are liable collectively if they are responsible for the same damage. For example, the client can demand compensation for the damage from either the contractor or the architect. The person who then pays can demand the amount of his share of liability from the others, § 426 BGB. An exception to this is, for example, the negligence of an architect, which can reduce the liability of the building contractor. In such a case, the employer cannot claim the entire damage from the contractor. If there is a case of so-called alternative liability, it is still unclear which party is responsible. In this case, in the event of a dispute against a 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?

Legal requirements are constantly increasing in complexity, especially due to digitalisation and the increasing awareness of the environment. This also has

an impact on construction law. Building projects should meet technical advancements as well as the requirements of the constantly changing laws for sustainability. This development will increase in the coming years and require more creative and extensive solutions from construction lawyers.

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

Residential construction projects have been the most frequently built construction project in recent years. However, due to the rise in both credit costs and construction costs, demand for housing has slowed down. Investments continue to be made in infrastructure. This applies primarily to transport and the required resources for the expansion and use of renewable energies. Investments are also being made in industry and automobile production.

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

Technical possibilities lead to ever more accurate planning of construction projects, which can be understood more easily thanks to digital visualisation. The accuracy of these technologies is constantly improving. Nevertheless, the most important legal tool of a construction lawyer is his experience and knowledge, which he can use to advise his clients and solve problems. He must constantly expand this knowledge and make the best possible use of digital resources that will not stop developing.

30. What do you anticipate to be the impact from ongoing supply chain issues and the escalation of material costs over the coming year?

Conditions for the construction industry are barely getting easier. The shortage of materials and ever new government regulations to modernise more buildings are leading to an increased demand for building materials. Although this may seem favourable for the companies at first sight, this is not the case if the resources are not available to provide the necessary services. In addition to the shortage of materials, however, general price increases have also been intensified, leading to higher construction costs. At the same time, property prices are also rising. From the construction perspective, many complex regulations are also a particular problem. This problem can be dealt with by having a qualified lawyer assess whether all the requirements have been met before each construction project in order to avoid delays.

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