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Germany

CONSTRUCTION

Contributing firm

Breyer Rechtsanwalte

Dr. Wolfgang Breyer

Attorney, Managing Partner | breyer@breyer-rechtsanwaelte.de

Dr. Christian Kruska

Attorney, Head of Real Estate | kruska@breyer-rechtsanwaelte.de

Erlmest E. Burns, III, J.D.

Attorney, International Construction | burns@breyer-rechtsanwaelte.de

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 jusridiction with its main roots in the tradition of Roman law. Today, it takes the form of the German codified law including the transposition of EU directives. The German Civil Code (*Bürgerliches Gesetzbuch – BGB*) represents the most significant source of private law in Germany, and regulates the legal relationships between private individuals and is thus distinct from public law (*Öffentliches Recht*), which primarily regulates the legal relationship between the state and the individual.

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

Up until recently the BGB addressed construction as it was in the early 20th century. The new construction contract law, which came into effect on 01 January 2018 sought to make the law relating to construction more relevant and appropriate for modern and complex construction projects as well. The new construction law is codified in the BGB, in particular in the general provisions on the law of contracts for work and services (§§ 631-650 BGB) and the following articles, specifically relating to construction contracts (§§ 650a-650h BGB), consumer construction contracts (§§ 650i-650o BGB), architect and engineer contracts (§§ 650p-650t BGB) and developer contracts (§§ 650u and § 650v BGB). Furthermore, under German law there is a special catalogue for the calculation of the fee for architects and engineers (HOAI).

In the vast majority of (domestic) construction contracts, especially in the B2B context, the regulations of the German Construction Contract Procedures (*Vergabe- und Vertragsordnung für Bauleistungen – VOB/B*) are also agreed. It is important to note that these are not a law but general terms and conditions and are jointly developed and continuously updated by client and contractor associations.

In addition to the (private) construction law regulations (referred to above), public-law regulations concerning construction projects must also be observed. These can be found in particular in the German Building Code (BauGB) and in the building regulations of the various individual federal states in Germany (see also section 3(c) “planning” below).

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;

In Germany, occupational safety and health protections during construction work are mainly regulated by the Occupational Safety Act (*Arbeitssicherheitsgesetz*), the accident prevention regulations of the various professional associations (*Unfallverhütungsvorschriften der Berufsgenossenschaften*) and the Construction Site Ordinance (*Baustellenverordnung*). In addition, there are other general occupational health and safety laws and regulations that apply to all contractors, in particular the Labor Protection Law (*Arbeitsschutzgesetz*).

(b) environmental issues;

Environmental protection is regulated in the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) and also in the Federal Immission Control Act (*Bundesimmissionsschutzgesetz)*. These laws primarily concern the issuance of the building permit. In construction law, contaminated sites and harmful soil changes are of particular importance. Regulations relating to this can be also be found in the Federal Soil Protection Act (*Bundesbodenschutzgesetz*), which primarily addresses what contamination is, and what measures, in particular the type of investigations and specific steps in relation to contamination, must to be taken.

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(c) planning;

When planning a building, certain general conditions must be observed, which can be found in the Building Code (*Baugesetzbuch* – BauGB), in the Building Use Ordinance (*Baunutzungsverordnung* – BauNVO), in the building codes of the various federal states (*Landesbauordnungen*) and in special regulations,for example, water law regulations or the law on the protection of historical monuments (Denkmalschutzgesetz – DSchG). The provisions of the Building Code and the Building Use Ordinance essentially regulate the buildability of land (*building planning law*) and establish rules for the preparation of urban land use plans. The provisions of the building codes of the various federal states regulate in detail how buildings may be constructed (building regulations law). These are primarily intended to prevent risks and ensure healthy living and working conditions (such as fire protection; distance; sufficient aeration; lighting). According to this, the subject matter of building regulations law includes regulations on the erection, alteration and demolition of building structures, insofar as the demolition does not require a permit or can be carried out in an formal notification procedure (*Kenntnisgabeverfahren, e.g. for building classes 1 through 3*). The demolition of a building listed as a historical building (*Denkmal*) usually requires a special permit in accordance with the law on the protection of historical monuments.

(d) employment;

Labour law is generally regulated in the German Civil Code (§§ 611 et. seq. BGB), in the German Labour Protection Act (*Arbeitsschutzgesetz – ArbSchG*) and in the German Employment Protection Act (*Kündigungsschutzgesetz – KschG*). Among these, there are a large number of laws and directives as well as rules and regulations of the professional associations that regulate the labour law.

Laborers in construction companies are entitled to a minimum wage that is higher than the general statutory minimum wage. The legal basis for this is the Employee Posting Act (*Arbeitnehmer-Entsendegesetz – AEntG*). The minimum wage is determined by the Federal Framework Agreement for the Construction Industry. There is a so-called seasonal unemployment benefit (*Saison-Kurzarbeitergeld*), which is a wage replacement benefit provided by the German unemployment insurance system with the aim of promoting year-round employment in the construction industry and other sectors of the economy (§ 101 SGB III). Furthermore, in the construction industry, the regulations on temporary employment agencies must be observed. In Germany, companies wishing to hire out employees require a permit from the Federal Employment Agency (§ 1 AÜG). The supply of temporary workers to companies in the construction industry for work that is usually performed by employees is generally not permitted (§ 1b AÜG). Furthermore, construction companies are obliged to pay contributions to the social security funds of the construction industry to ensure continued payment of wages in the event of vacation, pensions, etc.

(e) anti-corruption and bribery.

Anti-corruption and bribery is largely addressed in the German Criminal Code (*Strafgesetzbuch* – StGB). A few of the relevant laws include: Corruption offences and in particular bribery offences such as fraud (§ 263 StGB), subsidy fraud (§ 264 StGB), embezzlement (§ 266 StGB), forgery of documents (§ 267 StGB), agreements restricting competition in tenders (§ 298 StGB), acceptance of an advantage (§ 331 StGB), corruptibility (§ 332 StGB), granting an advantage (§ 333 StGB), bribery (§ 334 StGB), omission of an official act (§ 336 StGB), false certification in office (§ 348 StGB), inducing a subordinate to commit a criminal offence (§ 357 StGB), violation of business secrets (§ 23 Business Secrets Protection Act).

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?

In most construction projects, a building permit (*Baugenehmigung*) must be issued before construction work can be started. During the execution of the works, for example, a site manager (*verantwortlicher Bauleiter*) must be named, who has the authority to supervise the professional execution of the works according to the approved design of the responsible construction authority, i.e. the building permit, and is responsible, under public law, to the building supervisory authority. After completion of the work and before the property can be used, acceptance by the authority is required (Amtliche Abnahme). In addition, there are a large number of permits for the construction company itself (e.g. Business registration; licensing as a property developer (*Bauträgererlaubnis*) as well as for the workers employed (e.g. for non EU-citizens, residence permit; work permit). In most cases, non-compliance with the legal requirements results in a legal sanction, which can vary in amount depending on the violation.

5. Is tort law or a law of extra contractual

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obligations recognised in your jurisdiction?

There is both, tort law and extra-contractual obligations, in Germany. German tort law (*Deliktsrecht or Recht der unerlaubten Handlungen*), is regulated in §§ 823-853 BGB. Tort law in Germany establishes extra-contractual claims for damages, in the event that there is no contractual relationship between the parties involved or in addition to any contractual claims that the parties may have. The culpable breach of extra-contractual obligations (e.g. unjustified termination of contractual negotiations) can also trigger claims for damages (§§ 311 (2), § 242 (2), § 280 (1) BGB). Extra-contractual obligations can arise with the commencement of contract negotiations, the initiation of a contract, or similar business contacts (§ 311 (2) BGB), however, this must be evaluatedon a case-by-case basis.

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

These are naturally the owner/employer (principal), in the case of individual procurement (*Einzelvergabe*) each contractor; in the case of procurement of the overall performance (*Gesamtvergabe*) a general contractor (*Generalunternehmer* – GU) will be engaged. Other parties involved are the architects and specialist planners as well as experts. In the case of large-scale projects, a project manager is usually also involved. For the financing and insurance of the construction project, banks and insurers are also involved to a certain extent.

7. What are the most popular methods of procurement?

In Germany, a distinction must be made between private and public owners/employers. Private contracting parties can generally award contracts without restriction, as long as they have not subjected themselves to special obligations, regardless of whether the award is for the entire project to a general contractor, each work to individual contractors or to put together logical packages of work for a contractor. Public authorities, on the other hand, must observe a wide range of legal requirements when contracting out services if the contract sum exceeds certain thresholds, depending on the respective sector. As a rule, public authorities must contract out work to individual contractors on the basis of a well-balanced competition. In certain individual cases, this may be deviated from, but requires a compelling justification.

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

Almost every B2B construction contract in the German construction industry incorporates the provisions of the VOB/B, mostly in a modified version. As mentioned above, the VOB/B is not a law, but rather widely used and accepted general terms and conditions. Insofar as the parties do not agree to the VOB/B, or the BGB is not deviated from by the VOB/B or other contract terms, the legal framework remains the BGB. Particularly relevant is the law on contracts for work and services (§§ 631-650 BGB) and the law on construction contracts (§§ 650a-650h).

In the B2C context, construction contracts under the German Civil Code are almost exclusively used, due to the special protective provisions for consumers found therein (§§ 650i-n BGB and §§ 650u-v BGB, see also the regulations of the Real Estate Agent and Developer Ordinance (*Makler and Bauträgerverordnung* – MaBV), which provide important protective provisions concerning consumer payments).

So-called partnering contracts are also being used more and more frequently in Germany, especially with regard to large-scale construction projects. A wide variety of partnering models are commonly used based on a variety of models, such as: Long-term and project partnering, one- and two-stage partnering models, GMP models, construction management at agency / at risk, and alliance contracting. It is also possible, and in fact common, to combine elements of the various models in conjunction with other project delivery approaches. Most recently, several IPD-based pilot projects have been introduced, and in March 2020, the official German adaptation of FAC-1 was released for use in the German market (available here: https://shop.reguvis.de/bau-und-architektenrecht-hoai/fac-1-e-book/).

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

As previously addressed at question 7, public procurement is subject to a large number of legal regulations (e.g. part 4 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB, the Public Procurement Ordinance (*Vergabeverordnung* – VgV), the Subthreshold Procurement Ordinance (*Unterschwellenvergabeordnung* – UVgO)), non-compliance with which usually leads to a dispute and cancellation of the bid by the disadvantaged bidder;

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claims for damages may arise in the event of an award contrary to public procurement law. Otherwise, freedom of contract applies to the greatest extent, which is limited by immorality, usury or other grounds for nullity. In the case of standard form contracts, the Germany General Terms and Conditions Act (*AGB-Recht*) plays an important role.

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

Private procurement of construction services is typically carried out through a call to tender either by the architect or the project owner. However, the construction contract is then concluded between the owner and the contractor. The public procurement is carried out by the relevant procurement authorities (*Vergabestellen*), who are advised by architects, and in the case of larger scale construction projects, also by lawyers who specialize in the field of public procurement law.

11. Is subcontracting permitted?

According to the law on contracts for work and services of the German Civil Code, subcontracts are generally permitted; according to the regulations of the VOB/B (§ 17 (8)), these require the written consent of the client, unless the contractor cannot perform the required services within the scope of its own business. Other contractual arrangements are of course also permissible. In the case of public contracts, procurement law explicitly permits the use of subcontractors (§ 36 VgV), However, various disclosure requirements may then apply. The client can demand the replacement of a subcontractor, if the subcontractor has met one of the so-called optional conditions for exclusion (*fakulatative Ausschlussgründe)* and is obligated to demand the replacement, if the subcontractor meets one of the mandatory conditions for exclusion (*zwingende Ausschlussgründe* – see § 36 (5) VgV).

12. How are projects typically financed?

Typical financing also consists of equity and debt. Larger construction projects are usually financed through loans. In the case of construction of residential or commercial properties, these are often counter-financed by rental income and/or the full sale of the completed project ("forward sale") or the sale of individual/condominium units within the property. Complete financing via individual capital investment, on the other hand, is rather rare. In the case of a public sector building project, the construction and project costs are paid with state funds.

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?

In Germany, three types of guarantees are typical: 1. the advance payment guarantee (*Vorauszahlungsbürgschaft*), which secures building materials that have already been paid for in advance. This must usually be returned when the total amount of the advance payment has been repaid, usually through deductions from the amounts due to the contractor under his invoices; 2. the performance guarantee (*Vertragserfüllungsbürgschaft*), which secures claims for performance of the construction contract and for damages. This is to be returned upon acceptance (*Abnahme*) of the construction project. The total amount of the security is usually limited to 10% of the contract sum. 3. the warranty (defects) guarantee (*Gewährleistungsbürgschaft*), which secures the client's claims for defects including damages. The warranty security is to be returned upon expiry of the warranty periods, if necessary the guarantee may be reduced on a pro rata basis if warranty periods of different lengths have been agreed in the construction contract. The total amount of the warranty (defects) guarantee is limited to 5% of the final invoice amount. The above guarantees can be issued as parent company guarantees instead of bank guarantees as well, however this is less common.

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

Generally, payment is regulated between the parties by the contract. To the extent that this is not the case or the contract is insufficient, then pursuant to § 633 (1) of the Civil Code, remuneration shall be deemed to have been tacitly agreed if, according to the circumstances, the work can only be expected to be carried out in return for remuneration. If the amount of the remuneration is not determined, the usual and customary remuneration is to be regarded as having been agreed pursuant to § 633 (2) BGB. Pursuant to § 641 (1) BGB, the remuneration is to be paid upon acceptance of the work.

In the case of a construction contract, as a prerequisite to the final payment becoming due, the contractor must also submit a verifiable final invoice (§ 650g (4) no. 2 BGB). The final invoice is verifiable if it contains a clear list of the services rendered and is comprehensible to the client. Pursuant to § 632a (1) BGB, the contractor may nevertheless demand a payment from the owner in the amount of the value of the work performed by him

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and in accordance with the contract.

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 are generally not prohibited under German law. Such clauses may be permissible in individually agreed bespoke agreements between the parties. If such clauses are found to be general terms and conditions, they will regularly be held invalid, as they deviate from fundamental legal regulations. If the subcontractor's services are ready for acceptance and a final invoice has been issued, the subcontractor is entitled to payment for its services, irrespective of the contractual relationship between the general contractor and the owner.

German law also recognizes a kind of "reversed" pay-when-paid clause in § 641 (2) BGB, which states that, the remuneration of a sub-contractor becomes due once the contractor has received his remuneration from a third-party (the owner) or once the work has been accepted by the third-party. The contractor cannot then object that the work of the sub-contractor is not ready for acceptance, and therefore not ripe for payment.

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

The right to withhold payment in the event of performance not in accordance with the contract is permitted by law. This applies both to interim payments and to the final payment. Pursuant to § 632a (1) BGB, the owner may withhold an appropriate amount of the interim payment if the services rendered are not in accordance with the contract. The burden of proof that the performance was rendered in accordance with the contract remains with the contractor until acceptance (*Abnahme*). The same shall apply with regard to the date upon which the final payment becomes due upon acceptance. If the Employer can demand the remedying of a defect, he may withhold an appropriate amount of the remuneration after the date it becomes due in accordance with § 641 (3) BGB. As a rule, an appropriate amount is double the costs required to remedy the defect. In addition, there is a general statutory right to refuse payment (*Zurückbehaltungsrecht* – § 273 BGB and Einrede des nicht erfüllten *Vertrages* – § 320 BGB) if the agreed performance has not yet been rendered.

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

There are two related types of clauses common in Germany designed to ensure compliance with contractual, specifically contractual penalty and liquidated damages clauses. Contractual penalties (*Vertragsstrafen*) are addressed in §§ 339 to 345 BGB. The entitlement to recover contractual penalties is unrelated to the amount of actual damages (if any), which may have been incurred by the owner and generally serves two purposes. First, it seeks to create additional motivation for the contractor to fulfil his primary contractual obligations (leverage). Additionally, it serves to reimburse the owner for any damages, which it may have suffered as a result of the delay (compensation). Since contractual penalties do not require a showing of any damage, it is particularly useful in cases where it would be difficult or impossible to establish the amount of damage.

Liquidated damages clauses (*Pauschalierter Schadensersatz*), on the other hand, are actually intended to represent a genuine pre-estimate of the damage, which is likely to be suffered upon the happening of the triggering event. Since liquidated damages presuppose an existing claim, the burden of proof regarding the amount is simply reversed. The breaching party may still prove that the actual damages incurred by the owner are less than what was recovered under the liquidated damages clause. In order for both contractual penalty and liquidated damages clauses to be effective, a large number of requirements are imposed by statute and case law, which must be evaluated on a case-by-case basis. The general rule is that neither type of clause may be unreasonably high. For example, with regard to delay damages, if the amount of the claim is determined by days of delay, it must be stated as a fixed amount per day, with a maximum amount (i.e. 0.1% of the contract price per day up to a maximum of 5% of the contract price).

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

Parties may by agreement limit their liability, however this is not without restriction. Generally speaking, and unless otherwise agreed, the parties are liable for their wilful conduct and any negligent acts (§ 276 (1) BGB). Liability for simple negligence may be excluded. Gross negligence, on the other hand, is generally only excludable, where the excluding clause does not fall within the scope of the General Terms and Conditions Act. Liability for wilful (mis-)conduct is not limitable or

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excludable (§ 276 (3) BGB). The same applies to liability for fraudulent intent. In the case of general terms and conditions of businesses, limitations or exclusions of liability must contain carve outs for liability for damages arising from death, bodily injury or health and for compensation for other damages based on an intentional (mis-)conduct or grossly negligent conduct in order for the exclusion/limitation of liability to be effective.

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

The law on contracts for work and services and the provisions of the VOB/B recognize a variety of grounds for termination. Furthermore, the parties may contractually agree on further grounds for termination. In general, a distinction must be made between termination by the owner and termination by the contractor.

In principle, the owner may terminate a contract for work and services/construction contract for his convenience at any time without having to provide any additional justification (§ 648 BGB). However, in the case of owner termination for convenience according to this provision, the contractor is entitled to the full contractually agreed remuneration, less any savings for not having to complete the works including through the re-appropriation of his labor (or amounts he would have saved, but for his culpable failure to re-appropriate his labor) and less any additional income he received by accepting additional work, which would have been otherwise unavailable to him. It is generally presumed that the contractor is entitled to 5% of the agreed remuneration for the part of the work not yet performed. This is a rebuttable presumption and can amount to a much higher remuneration in individual cases.

§ 648a BGB regulates termination for cause by either party. Cause for termination exists if the terminating party cannot reasonably be expected to continue the contractual relationship until completion of the work, taking into account all of the circumstances surrounding the individual case and weighing the interests of both parties. In this case, the contractor shall only be entitled to remuneration for the work performed. Termination for cause may give rise to further claims for damages, however. Furthermore, the contractor has the right to terminate the contract if the owner fails to cooperate/act (§ 642 BGB). This situation may arise, for example, if the owner does not provide the plans or design required for the execution of the construction project despite being requested to do so and having been given a reasonable deadline with which to comply.

If the provisions of the VOB/B have been agreed to in the construction contract, the owner also has a right of termination during the construction, if the contractor fails to remedy the defects despite having been given a reasonable deadline to do so and having been previously notified in writing of the owner's intent to terminate the construction contract if the deadlines are not complied with (§ 4 (7), § 8 (3) VOB/B). The contractor may in turn terminate the contract pursuant to § 9 (1) No. 2 VOB/B if the client defaults on his payment obligations. These represent just a few of the many permissible grounds for termination provisions.

Force Majeure (*Höhere Gewalt*) does not automatically constitute grounds for termination under German law. The Parties are free to, and often do, contractually agree to special provisions regarding Force Majeure, which regularly include rights of termination. A statutory right to terminate will only arise from a Force Majeure event in the event that performance is rendered impossible for a protracted period of time (*Längerfristige Leistungsstörung*) such that the contractual relationship is so seriously affected that it can no longer reasonably be continued (§ 648a BGB) or a continuation would be impossible (§ 275 BGB). An alternative to termination would be a revision of the contract, to the extent that such revision would be reasonable (§ 313 BGB). There are typically no claims for damages in the case of Force Majeure, due to the fact that it not possible to assign blame to either of the parties.

If the parties have incorporated the terms of the VOB/B, then in accordance with § 6 (7) VOB/B, each party has a right to terminate, in writing, in the case of a disruption lasting longer than three months.

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

The rights granted to third-parties depends very much on the project and the individual contractual agreements. For example:

- A land charge (*Grundschuld*) may be granted on the property in favour of the financing bank to secure the funds provided for the project.
- If a third-party contractor has built the property, the purchaser is usually assigned the right to claim for defects against the third-party contractor as security.
- A renter may, for example, be granted the right to make special request for the furnishings (*Sonderwünsche*) which the

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landlord has to pass on to the contractor.

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?

In principle, an agreement between the parties is required in order to give rise to a claim for additional remuneration, namely in the form of a new offer and acceptance for the additional service(s) and the additional remuneration. Aside from this, the question remains, whether additional remuneration for additional services has to be notified in advance in order to be effectively asserted. In the case of a construction contract concluded according to the provisions of the BGB, as stated above, an agreement on an additional service and consequently also for the additional remuneration is required. The contractor is obliged to prepare an offer for the additional or reduced costs (§ 650b (1) BGB). If there is no agreement on the amount of the remuneration (but there is agreement on the expectation of remuneration), the contractor is entitled to at least 80% of the additional remuneration from his offer. The remaining 20% of the remuneration, so as not to hinder the construction progress, is then negotiated or disputed in the final invoice (§ 650c (3) BGB).

In the case of a VOB/B construction contract, prior notification of additional remuneration is a prerequisite for the creation of the additional remuneration claim for additional services according to § 1 (4), § 2 (6) No. 1 VOB / B, unless this is the notification would be superfluous because the payment obligation for work is obvious.

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

An overwhelming majority of building contractors take out third-party liability insurance, despite there being no statutory requirement to do so. The same is not true, however, for architects and engineers, who are required to have professional liability insurance and to be adequately insured against such third-party claims. In the case of large scale and complex construction projects with high risks, customized insurance policies are generally taken out to cover those multifaceted risk profiles. The exact scope of coverage depends entirely on the individual project and the associated risks.

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

By far, most construction-related disputes in Germany, particularly those concerning the payment for variations or the remedying of defects, do not make it to court and are settled by agreement. To the extent a settlement cannot be achieved, the parties may under most circumstances have their dispute heard in court.

In Germany, the court may order an expert to evaluate the alleged defect(s) and provide the court with an independent report as to his opinion of the nature of the defect(s). This procedure for gathering evidence is called the independent evidentiary procedure (*Selbständiges Beweisverfahren*). The key advantage to the independent evidentiary procedure is that it is often less complex and expensive for the claimant than it would be if the claimant were to bring suit. After the presentation of the expert's report, the parties are more often than not able to settle their dispute and avoid a protracted and costly trial.

In the case of large construction projects, the parties often agree to have disputes settled by binding arbitration (*Schiedsverfahren*) in the construction contract. The solicitation of expert opinions with regard to defects (*Schiedsgutachten*), comparable to the independent evidentiary procedure discussed above, is also regularly practiced in arbitration in Germany.

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

Arbitration proceedings are set forth in the German Code of Civil Procedure, §§ 1025 et. seq. ZPO (including introduction, appointment of arbitrators, taking of evidence and oral proceedings, arbitral award, appeal against arbitral award, enforcement). Institutional arbitral rules, such as those of the ICC, may provide for a slightly different procedure. In addition, the parties are free to, and often do, modify the rules or the procedure to meet their own needs.

The average duration of an arbitral proceeding is around 6-12 months for straightforward cases. For large and very complex proceedings, 2 years and longer are not unheard of.

Arbitral awards, including international arbitral awards,

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are generally binding on the parties and directly enforceable in Germany and generally speaking have the character of a valid and final court judgment (§ 1055 ZPO). However, in the case of non-payment, the beneficiary of the award must have the award declared enforceable by the courts (§ 1060 ZPO). The recognition and enforcement of international arbitral awards is governed by § 1061 ZPO and accordingly the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The time it takes to enforce an arbitral award in Germany varies from case to case, but once the beneficiary has obtained a judgement to enforce the award (Vollstreckungstitel – § 794(1) No. 4a ZPO), the time for enforcement would likely be a few months, provided there are no further objections.

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

Construction contract claims, e.g. due to disputes surrounding remuneration, defects or compensation for damages, are subject to the statute of limitations for contractual claims. Furthermore, if a party feels that the claim is statute barred, this must be raised as an affirmative defense to the claim. The court will not, sua sponte, examine whether the statute of limitations for a given claim has run.

The limitations period under German law for contractual claims is three years beginning with the last day of the year in which the right to bring the claim arose and the aggrieved party knew, or should have known, of the existence of that right. For example, a contractor's claim for remuneration shall become statute-barred three years from the end of the year in which acceptance was declared and the final invoice was issued.

With regard to claims for defects, the owner may bring claims for defects up to 5 years after acceptance (*Abnahme*) in the case of a construction contract under the BGB and up to 4 years after acceptance (*Abnahme*) in the case of a VOB/B contract. Longer or shorter periods are permissible by agreement, whereby such longer or shorter periods may be subject to the limitations of the General Terms and Conditions Act.

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?

In the case of construction disputes, it is quite common that multiple parties are involved and there is overlapping liability of two or more parties. A typical example would be, the architect's liability for negligent supervision and at the the contractor's concurrent liability for defective performance. Both the architect and contractor are jointly and severally liable to the owner. The claimant can claim the full amount from either one or both of the liable parties. The recovery will of course be limited to amount damage actually incurred (see § 421 BGB). The breaching parties may then seek contribution (*Regressanspruch*) from the other based on their relative fault (see § 426 BGB).

For contribution claims, the parties regularly engage in interpleader and/or impleader in order to resolve the question of liability between each other and/or third parties as far as possible in one action (*Streitverkündung* – §§ 72 sub. eq. ZPO). As a result, the judicial findings also apply in subsequent proceedings when it comes to additional contribution claims. Net contribution provisions are rare, because each party is only liable for its faults and is by law entitled to seek contribution for the damage in excess of the party's own relative fault (see above).

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

The traditional bi-lateral contracting model between the owners and architects and individual contractors remain common in the construction industry, especially for smaller and mid-sized construction projects. A significant move away from this will not likely be on the horizon for quite some time to come. As a result, the specialist knowledge of the construction companies only comes into play after the contract has been awarded and construction has begun, and then usually only after essential planning and design have been completed. In many cases, this goes hand in hand with higher planning and execution costs as well as deadline uncertainties.

The situation is different for large construction projects. Here there is a clear trend towards collaborative delivery methods based on multi-party contracts. Even the public sector client has taken a keen interest in these methods and, in a remarkably short period of time, decided to launch a pilot project at the federal construction level integrating elements of Integrated Project Delivery ("IPD").

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These models are far superior to traditional approaches with a multitude of bilateral contracts. They offer improved quality in both the design and execution of the project and greater time and cost certainty. This IPD approach aligns the interests of the parties so that if the project is successful, everyone is successful. Furthermore, as compared to the traditional bi-lateral contracting model, disputes are virtually non-existent. Multi-party contracts are certainly the wave of the future and will very likely be the standard for major construction projects in the coming years.

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

For small to mid-sized projects (up to approx. € 100 million), residential projects are in great demand due to the housing shortage and also due to the Corona pandemic, especially by way of urban development. In many German cities, vacant lots are currently being sought or existing buildings are being demolished in order to realise larger, urban residential projects. Demand for mixed-use commercial and residential buildings in major German cities also remains high. Supermarkets and logistics centers are also attracting significant investment. For mid-sized projects (up to approx. € 500 million) we have noted an increase in public projects, such as the extension of the German Parliament (Bundestag) in Berlin, the construction of the Museum of the 21st Century in Berlin, as well as the expansion of the airports in Stuttgart and Frankfurt and for securing the water supply. Large-scale projects (contract value > € 500 million) primarily concern major infrastructure projects, such as the Stuttgart 21 railway project (underground station), with additional bridge, tunnel and railway line construction projects.

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

Digitalisation will become even more important in the construction industry in the next five years. The technology and the legal basis for its use have been available for a quite some time and are being used more and more. More than half of German construction companies have experience with Building Information Modelling (BIM). This is in no small part due to the fact that BIM has been mandatory for all new public infrastructure projects and infrastructure-related building construction in Germany since 31.12.2020. The benefits are obvious: planning reliability through earlier fault detection and avoidance; reliable exchange of information between the parties; efficiency and optimization; better cost control and schedule reliability; and quality assurance and enhancement. In the future, construction companies will no longer want to build without digital construction in Germany. However, an expansion of the digital infrastructure in Germany is essential for this, which is something that has still not yet been sufficiently achieved everywhere. BIM also needs evolve in order to become more attractive for smaller construction companies and projects, since digital construction requires a good amount of extra work at first, however this usually pays off later on.

In the “environmental” sector, renewable energy will play a major role, in particular the solar industry will continue to strengthen as a large number of solar farms will emerge, especially on unused, unattractive land, such as along motorways. In addition, an increase in the development of hydrogen energy can also be expected. Hydrogen energy will play an important role in the next few years, especially for commercial vehicles on construction sites (for excavators, trucks).

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

The construction industry on the whole came through the pandemic in 2020 very well, as construction projects are designed for a longer period of time and react to external market influences with a time lag. In 2021, too, the impact on the construction industry has thus far not been as significant as expected. In 2022 there will likely be a further shift in the construction sector, seeing less commercial/office, retail, and hotel construction, and more residential. However, once the pandemic has been brought largely under control, a counter-trend can be expected as new commercial/office, retail spaces have opened up due to closures, etc. Infrastructure projects have been largely pandemic resistant, as these are public sector projects and the budget has already been approved and is available for use. This mainly concerns the digitalisation and modernisation of existing infrastructure.

COVID-19 related disputes will also play a major role going forward, as we have seen already in the past year. The extent to which contractors may be entitled to additional time or compensation relating to the pandemic will largely be determined by the contracts and to what extent it takes into account the circumstances surrounding COVID-19, be it relating to changes in law, or the pandemic itself.

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Contributors

Dr. Wolfgang Breyer
Attorney, Managing Partner

breyer@breyer-rechtsanwaelte.de

Dr. Christian Kruska
Attorney, Head of Real Estate

kruska@breyer-rechtsanwaelte.de

Erlmest E. Burns, III, J.D.
Attorney, International Construction

burns@breyer-rechtsanwaelte.de

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