



**Prof. Dr. Jochen Glöckner, LL.M. (USA)**

Lehrstuhl für deutsches und europäisches  
Privat- und Wirtschaftsrecht

Universität Konstanz

Richter am Oberlandesgericht Karlsruhe

<jochen.gloeckner@uni-konstanz.de>

## Construction contracts in the system of German Civil law

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Part IV. The risk arising from the need of co-ordination:  
Construction contracts as contracts involving  
performances of multiple parties

*Jochen Glöckner*

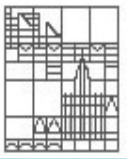
FDUL Curso Intensivo

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## Agenda

- I. Types of relations (linear, parallel, circular)**
- II. Privity of contract and interdependent contracts; the need for coordination**
- III. Legal instruments**



# Types of relations





## Types of relations





## Types of relations

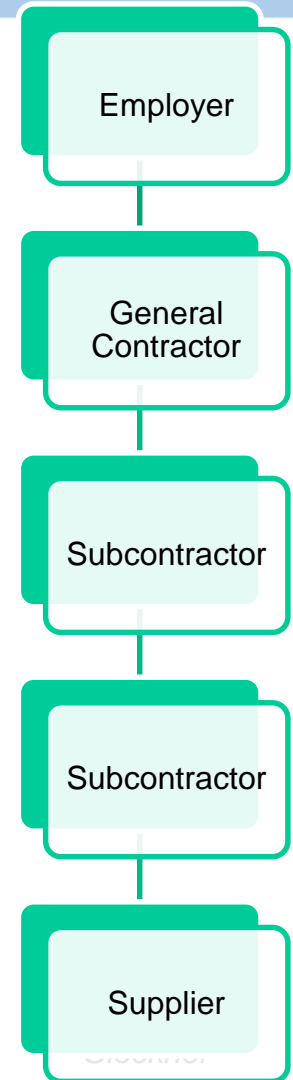
### I. Multiplicity of participants in building projects

1. Architect
2. Special planners, engineers (stability, specific technical equipment)
3. General contractor
4. Sub-contractors
5. Specialized contractors
6. Suppliers of building material



## Types of relations

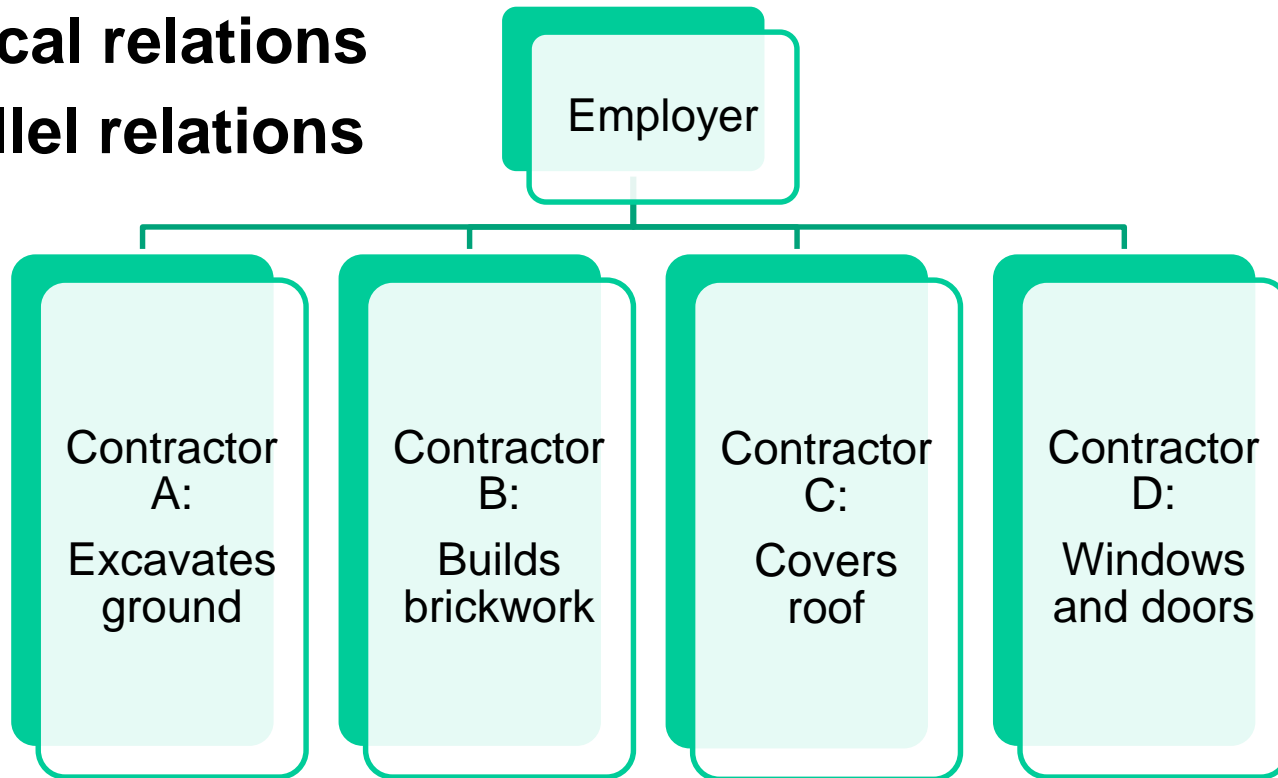
- I. Multiplicity of participants in building projects
- II. Vertical relations





## Types of relations

- I. Multiplicity of participants in building projects
- II. Vertical relations
- III. Parallel relations

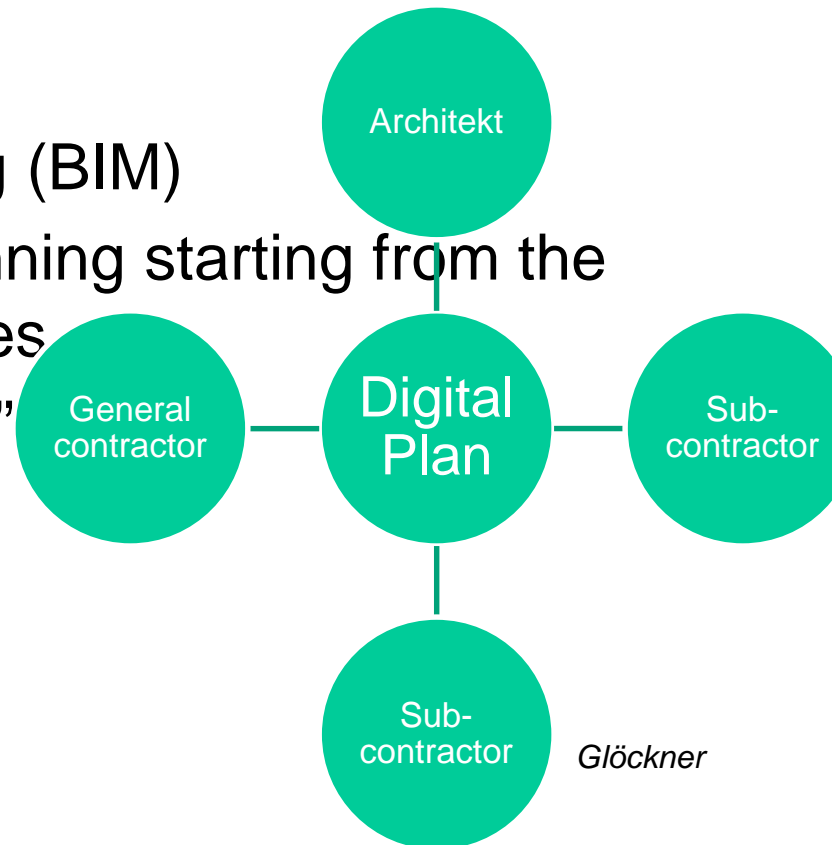




## Types of relations

- I. Multiplicity of participants in building projects
- II. Vertical relations
- III. Parallel relations
- IV. “Circular” relations

1. Building Information Modelling (BIM)
2. Three-dimensional digital planning starting from the product and involving all parties
3. “Common Data Environments”







## Types of relations

- I. Multiplicity of participants in building projects**
- II. Vertical relations**
- III. Parallel relations**
- IV. “Circular” relations**
- V. “Initiative Team Building”**
  1. “Smarter” contracts
  2. Multi-party contracts
    - a) Alliance contracts
    - b) Integrated Project Delivery (IPD)



## Privity of contract and interdependent contracts

### I. Privity of contracts

1. Contracts produce binding effects only on the parties
2. Both with regard to rights and duties



## Privity of contract and interdependent contracts

### I. Privity of contracts

### II. Yet, contracts are interdependent

1. In vertical relationships: Necessity to co-ordinate the contents of the contracts to avoid liability traps, in particular for vertical relations
  - a) Consumer contract in the end?
  - b) Sales contract adapted? Cf. sec. 438(1) no. 2 GCC with regard to the limitation period



## Privity of contract and interdependent contracts

### I. Privity of contracts

### II. Yet, contracts are interdependent

1. In vertical relationships
2. In parallel relationships: all participants contribute to the creation of one building, produce their work on same construction site
  - a) Particular duty to co-operate of all participants, under sec. 241(2) GCC
  - b) Employer's contribution to co-ordinate



# Privity of contract and interdependent contracts

## I. Privity of contracts

## II. Yet, contracts are interdependent

## III. Need for co-ordination

### 1. Pre-contractual

#### a) Different contracts have to be co-ordinated

##### (1) In vertical relations

##### i. What is owed?

**Ex.:** The employer advises the general contractor that he intends to use heavy machinery in an industrial dwelling. The general contractor employs a sub-contractor, but does not pass on this information



## Privity of contract and interdependent contracts

### I. Privity of contracts

### II. Yet, contracts are interdependent

### III. Need for co-ordination

#### 1. Pre-contractual

#### a) Different contracts have to be co-ordinated

##### (1) In vertical relations

i. What is owed?

ii. Limitation terms start with acceptance

iii. Possibility to exclude liability may differ (B2B vs. B2C)



# Privity of contract and interdependent contracts

## I. Privity of contracts

## II. Yet, contracts are interdependent

## III. Need for co-ordination

### 1. Pre-contractual

#### a) Different contracts have to be co-ordinated

(1) In vertical relations

(2) In parallel relations

i. Mostly logistic (when, where, how?)

ii. Rights to cross-use facilities, e.g. scaffold

iii. Access to the construction site



# Privity of contract and interdependent contracts

## I. Privity of contracts

## II. Yet, contracts are interdependent

## III. Need for co-ordination

### 1. Pre-contractual

#### a) Different contracts have to be co-ordinated

(1) In vertical relations

(2) In parallel relations

(3) Schedule





## Privity of contract and interdependent contracts

### I. Privity of contracts

### II. Yet, contracts are interdependent

### III. Need for co-ordination

#### 1. Pre-contractual

#### 2. During performance: need for co-operation

##### a) Flow of information

(1) Updating plans

(2) Giving notice of problems arising

b) If necessary, re-scheduling, but no right of employer to order acceleration unilaterally



## Privity of contract and interdependent contracts

**I. Privity of contracts**

**II. Yet, contracts are interdependent**

**III. Need for co-ordination**

1. Pre-contractual
2. During performance: need for co-operation
3. After performance, cure of defects



## Legal instruments

### I. Complementary duties

1. Parties have to perform as promised under the contract,  
sec. 241(1) GCC

2. Beyond this

(2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.



## Legal instruments

### I. Complementary duties

1. Parties have to perform as promised under the contract, sec. 241(1) GCC
2. Beyond this sec. 241(2) GCC gives rise to a variety of complimentary duties, e.g.
  - a) to examine the employer's plans (for contractor)
  - b) to examine the works produced by other contractors on which the own work is building on (for contractors)
  - c) To give notice in cases of concern (for contractors)
  - d) To inform on specific (known) risks to be expected (for employers)



## Legal instruments

### Section 831 Liability for vicarious agents

(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.



## Legal instruments

### **I. Complementary duties**

### **II. Responsibility for third parties**

1. No strict liability for representatives' actions in the extra-contractual sphere under German law, sec. 831 GCC: as there is no third party reliance on existence of principal



## Legal instruments

### Section 278 Responsibility of the obligor for third parties

The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation, to the same extent as for fault on his own part. The provision of section 276(3) does not apply.



## Legal instruments

### I. Complementary duties

### II. Responsibility for third parties

1. No strict liability for representatives' actions in the extra-contractual sphere, sec. 831 GCC: no third party reliance
2. But strict liability for representatives' actions under contractual relations, sec. 278 GCC
  - Use of sub-contractors does not prejudice employer's rights





## Legal instruments

- I. Complementary duties**
- II. Responsibility for third parties**
- III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**



## Legal instruments

- I. Complementary duties**
- II. Responsibility for third parties**
- III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**
- IV. Joint and several liability, secs. 421 ff. GCC**
  1. Typically not in vertical relations, as there are no direct actions of the employer against the sub-contractor



## Legal instruments

### I. Complementary duties

### II. Responsibility for third parties

### III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC

### IV. Joint and several liability, secs. 421 ff. GCC

1. Typically not in vertical relations

2. In parallel relations

a) Contractor – contractor

**Ex.:** Contractor A had to lay the screed floor, but failed to install expansion joints. Contractor B had to tile the floor, but didn't care about expansion joints either. Later the tiles broke due to the expansion of screed and tiles.



## Legal instruments

**I. Complementary duties**

**II. Responsibility for third parties**

**III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**

**IV. Joint and several liability, secs. 421 ff. GCC**

1. Typically not in vertical relations

2. In parallel relations

a) Contractor – contractor

b) Contractor – planning architect

**Ex.:** Contractor executes the architect's plan without double-checking. The plans are wrong though.



## Legal instruments

### **I. Complementary duties**

### **II. Responsibility for third parties**

### **III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**

### **IV. Joint and several liability, secs. 421 ff. GCC**

1. Typically not in vertical relations

2. In parallel relations

a) Contractor – contractor

b) Contractor – planning architect

(1) Joint and several liability for material defects, even though parties owe different performances and architect is not liable for cure



## Legal instruments

**I. Complementary duties**

**II. Responsibility for third parties**

**III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**

**IV. Joint and several liability, secs. 421 ff. GCC**

1. Typically not in vertical relations

2. In parallel relations

a) Contractor – contractor

b) Contractor – planning architect

(1) Joint and several liability accepted

(2) Contractor's liability reduced, secs. 254, 278 GCC



## Legal instruments

- I. Complementary duties**
- II. Responsibility for third parties**
- III. Responsibility for third parties also with respect to contributory negligence, sec. 254(2)2 GCC**
- IV. Joint and several liability, secs. 421 ff. GCC**
  1. Typically not in vertical relations
  2. In parallel relations
    - a) Contractor – contractor
    - b) Contractor – planning architect
    - c) Contractor – supervising architect
      - (1) Joint and several liability for material defects
      - (2) Limited by sec. 650t GCC

