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Construction contracts in the system of German Civil law

—

Archetype or special case for the attribution of risks? An introduction with special regard to the recent amendment of the German Civil Code relating to the law of construction contracts

Jochen Glöckner

FDUL Curso Intensivo

April 2023



Structure of the Intensive Course

- I. Part One – Introduction: Development and Legal Structures**
- II. Part Two – The Risk of Completion**
- III. Part Three – The Risk arising from the Lapse of Time**
- IV. Part Four – The Risk arising from the Need of Co-ordination**



Where to find the course material?

- Syllabus
- Law excerpts
- PowerPoint presentations





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Part I. Introduction: Development and Legal Structures

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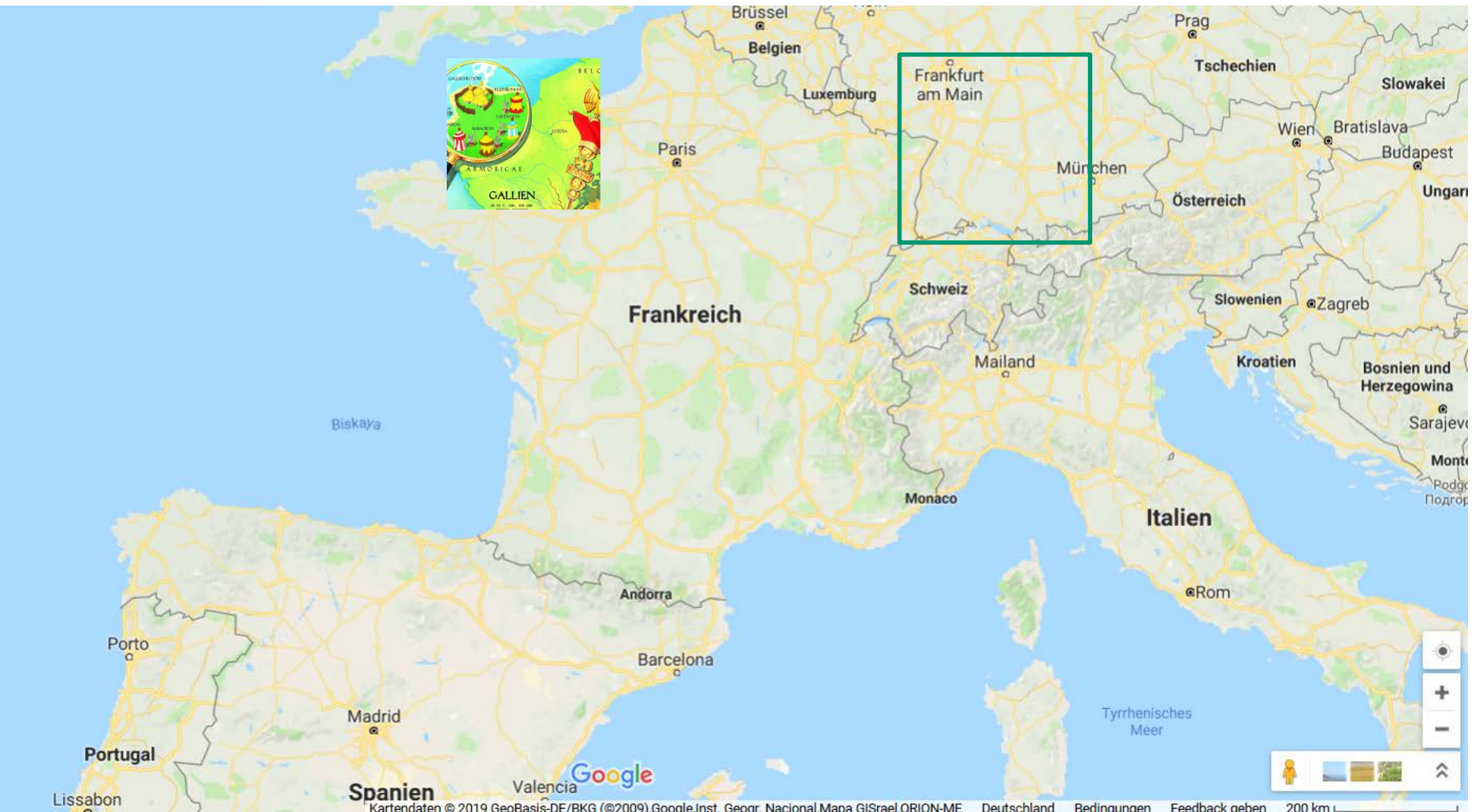


Agenda

- I. Historical development from ancient Roman law to the recent amendments of the Civil Code**
- II. Construction contracts in legal practice**
 1. Established types of construction contracts
 2. “Players”
- III. Construction contracts and public policy**
- IV. Protection of competition and consumers**



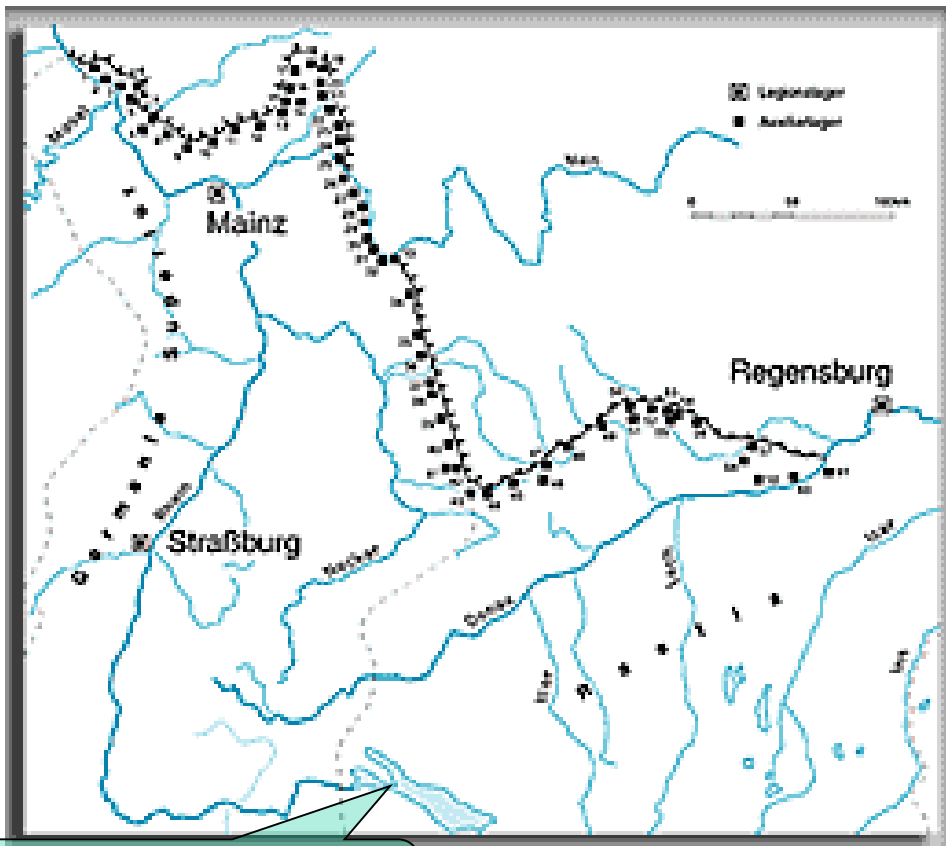
Historical development





Historical development

I. From the Romans to the Enactment of the Civil Code

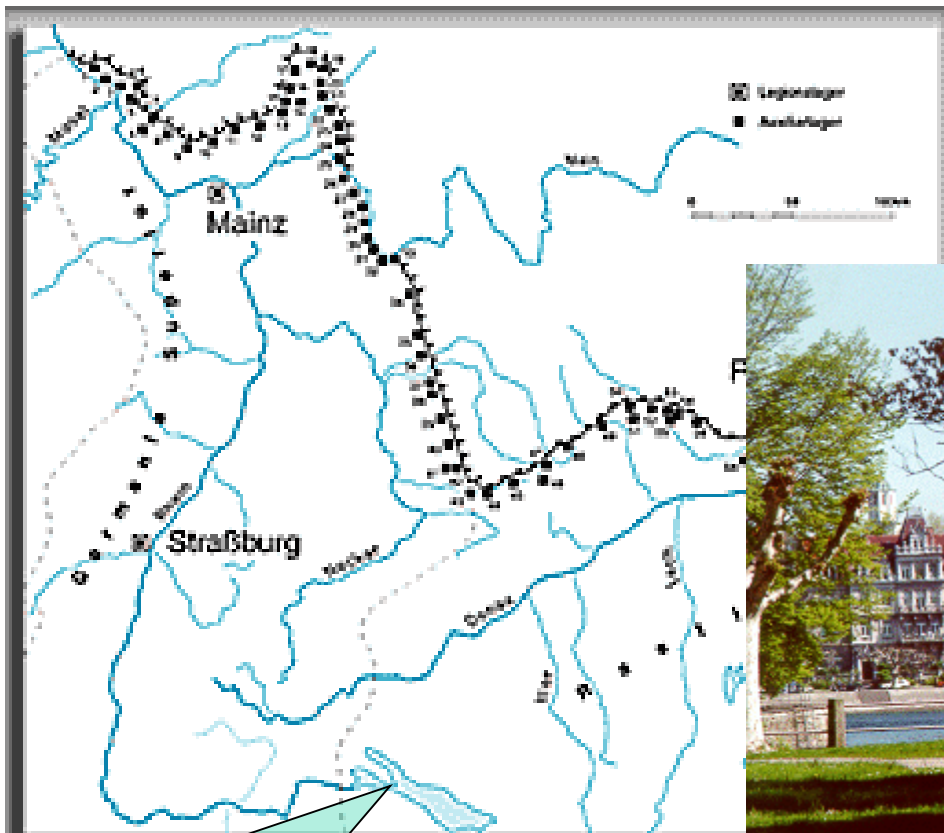


Constantia



Historical development

I. From the Romans to the Enactment of the Civil Code



Constantia

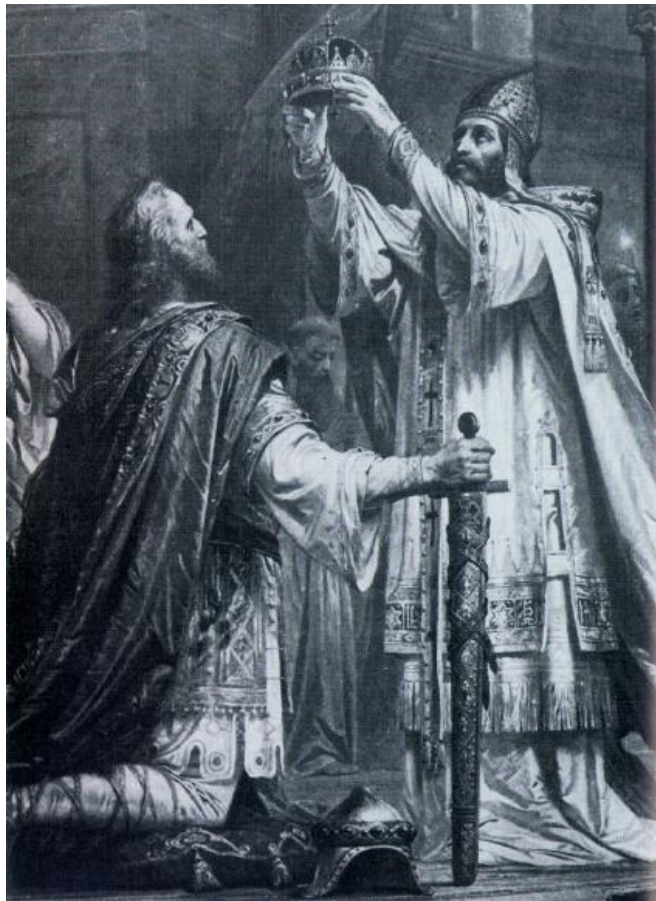


Glöckner



Historical development

I. From the Romans to the Enactment of the Civil Code



Following the collapse of the Roman Empire the franconian King Charles is coronated emperor of the new „Holy Roman Empire“ in 800



Historical development

I. From the Romans to the Enactment of the Civil Code





Historical development

- I. **From the Romans to the Enactment of the Civil Code**
 - “Holy Roman Empire of German Nation” (10th century)
 - 12th century re-discovery of the Digests
 - Restitution of Roman scientific law
 - Foundation of universities and legal faculties
 - Strong influence of classic Roman law on German scholars
- => “Reception” of Roman law



Historical development

I. From the Romans to the Enactment of the Civil Code

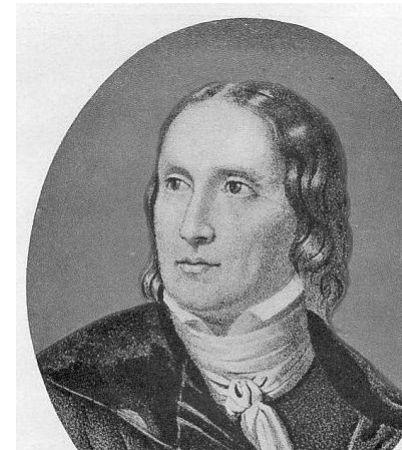
- “Holy Roman Empire of German Nation”
 - Formal continuity until 1806; end of the Empire
 - P! Legitimacy of the “Common law”
 - “Common Law” as customary law



Historical development

I. From the Romans to the Enactment of the Civil Code

- “Holy Roman Empire of German Nation”
- Age of codifications
 - The dispute about a codification
 - Anton Friedrich Justus Thibaut (1772 – 1840)
 - since 1805 professor in Heidelberg
 - 1814: “*On the necessity of a general civil law for Germany*”
 - Friedrich Carl v. Savigny (1779 – 1861)
 - since 1810 professor in Berlin
 - 1814: “*The call upon legislation and jurisprudence in our times*”





Historical development

I. From the Romans to the Enactment of the Civil Code

- “Holy Roman Empire of German Nation”
- Age of codifications
 - The dispute about a codification ...
 - Following the foundation of the German Empire in 1870 the diversity of laws appeared intolerable
 - Preparatory work
 - First commission instituted in 1874
 - First draft with reasoning 1888 („Motives“)
 - Second commission instituted in 1890
 - Redaction work until 1895, documented in „Protocols“
 - Reading in parliament



Historical development

I. From the Romans to the Enactment of the Civil Code

- “Holy Roman Empire of German Nation”
- Age of codifications
 - The dispute about a codification ...
 - Following the foundation of the German Empire in 1870 the diversity of laws appeared intolerable
 - Preparatory work
 - Enacted 1896, in force since January 1st, 1900 as “Bürgerliches Gesetzbuch” (Civil Code; hereinafter: “German Civil Code”; “GCC”)



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

1. Under Roman law construction contracts as

a) *Locatio conductio operis*

b) *Mandatus* (seldom)



Historical development

- I. From the Romans to the Enactment of the Civil Code**
- II. Construction contracts under the Civil Code**
 1. Under Roman law
 2. Prussian Common Law of the Land (“Allgemeines Landrecht”; 1794), secs. 923 ff. and specific provisions in secs. 966 ff.



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

1. Under Roman law
2. Prussian Common Law of the Land (1794)
3. Under the Civil Code 1900
 - a) No specific set of rules; provisions on contracts to produce a work, secs. 631 ff. GCC, deemed applicable
 - b) Special provisions on
 - (1) limitation period of remedies for material defects (5 years), sec. 638 GCC o.v.
 - (2) Mortgage of a building contractor, sec. 648 GCC



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

1. Under Roman law
2. Prussian Common Law of the Land (1794)
3. Under the Civil Code 1900
4. 1900 – 2017
 - a) Act on the Protection of Construction Claims (“Gesetz zur Sicherung von Bauforderungen” 1909
 - b) (Order Relating to Tendering and Contracting for Construction Works; “Verdingungsordnung für Bauleistungen” 1926; hereinafter: “VOB”)



Historical d

- I. From the Romans to
- II. Construction contract law
 1. Under Roman law
 2. Prussian Common Law
 3. Under the Civil Code
 4. 1900 – 2017
 - a) Act on the Protection of Construction Work
 - b) (Order Relating to Construction Work) Bauleistungen –

Verdingungsordnung für Bauleistungen VOB

Aufgestellt vom
Reichs-Verdingungs-Ausschuß
mit einem Vorwort
von Oberregierungsbaurat Voss

Vollständige Ausgabe

- A Allgemeine Bestimmungen für die Vergebung von Bauleistungen (DIN 1960) Seite 9—25
- B Allgemeine Vertragsbedingungen für die Ausführung von Bauleistungen (DIN 1961) Seite 27—44
- C Technische Vorschriften für Bauleistungen (DIN 1962—85) Seite 45—220

Mai 1926

BAUWELT-VERLAG BERLIN SW 68
BEUTH-VERLAG GMBH BERLIN SW 19





Historical development

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Historical development

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II. Construction contracts under the Civil Code

1. Under Roman law
2. Prussian Common Law of the Land (1794)
3. Under the Civil Code 1900
4. 1900 – 2017
 - a) Act on the Protection of Construction Claims 1909
 - b) (Order Relating to Tendering and Contracting for Construction Works 1926)
 - c) Regulation on Realtors and Developers (“Makler- und Bauträgerverordnung”) 1974
 - d) Implementation of the Late Payment Directive Glöckner 2001



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

a) End of Order Relating to Tendering and Contracting for Construction Works (VOB) as a fall back solution

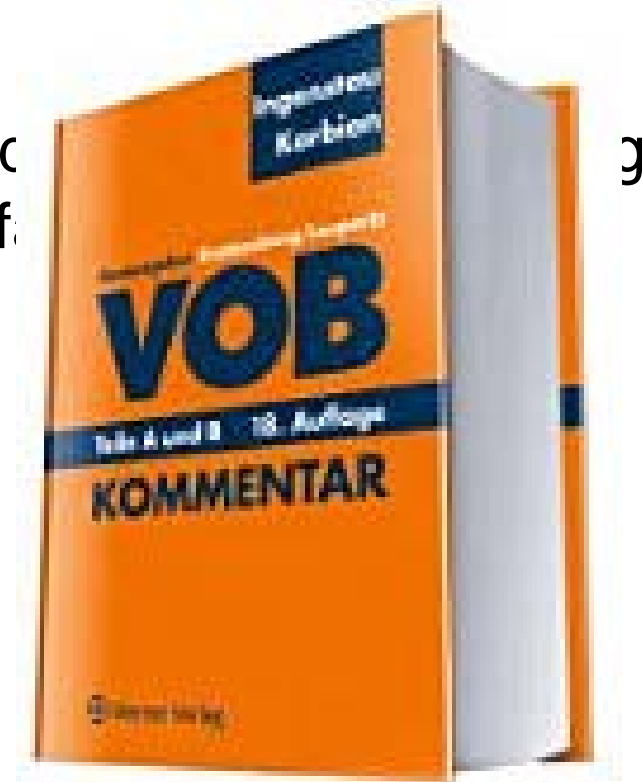


Historical development

- I. From the Romans to the Enactment of the Civil Code
- II. Construction contracts under the Civil Code
- III. Time for change!

1. Why?

- a) End of Order Relating to Tender for Construction Works as a formalized and highly sophisticated system





Historical development

- I. From the Romans to the Enactment of the Civil Code**
- II. Construction contracts under the Civil Code**
- III. Time for change!**
 1. Why?
 - a) End of Order Relating to Tendering and Contracting for Construction Works (VOB) as a fall back solution
 - (1) Created by representatives of public employers and construction industry, but no consumers
 - (2) Conceived of as standard terms and conditions, privileged with regard to control of content from 1976 on



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

- a) End of Order Relating to Tendering and Contracting for Construction Works (VOB) as a fall back solution
 - (1) Created by representatives of public employers and construction industry, but no consumers
 - (2) Conceived of as standard terms and conditions, privileged with regard to control of content from 1976 on
 - (3) End of privilege from 2004 on for consumer contracts – risk of liability trap!



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

- a) End of Order Relating to Tendering and Contracting for Construction Works (VOB) as a fall back solution
- b) Increasing competition in the course of public tenders leading to lack of trust and co-operation – “I spy with my little eye ...”
 - (1) “Get the contract first, get the money later ...”
 - (2) Made possible by unit-price contracts
 - (3) And incomplete specifications



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

- a) End of Order Relating to Tendering and Contracting for Construction Works (VOB) as a fall back solution
- b) Increasing competition in the course of public tenders leading to lack of trust and co-operation – “I spy with my little eye ...”
- c) Gap in consumer protection
 - (1) No consumers represented in VOB Commission
 - (2) No explicit consumer protection



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

2. How?

a) Draft on Construction law, Institut für Baurecht
Freiburg 2001

https://www.ifbf.de/sites/default/files/media_upload/arbeitskreis.pdf



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

2. How?

a) Draft on Construction law, IfBF 2001

b) Creation of German Construction Law Diet in 2006;
biennial congress with permanent working groups and
large scale votings on recommendations

<http://www.baugerichtstag.de/index.php?pageid=3>



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

2. How?

a) Draft on Construction law, IfBF 2001

b) Creation of German Construction Law Diet in 2006

c) Mandate to examine adequacy of statutory provisions for construction contracts in government's coalition agreement 2009

https://www.kas.de/c/document_library/get_file?uuid=83dbb842-b2f7-bf99-6180-e65b2de7b4d4&groupId=252038



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

2. How?

a) Draft on Construction law, IfBF 2001

b) Creation of German Construction Law Diet in 2006

c) Coalition agreement 2009

d) Working group at the Federal Ministry of Justice 2010 – 2013; Final Report issued 2013

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Abschlussbericht_AG_Baivertrag_srecht.pdf?__blob=publicationFile&v=1



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?

2. How?

3. When?

a) Ministerial proposal 2015

b) Government's proposal 2016, BT-Drs. 18/8486

c) Political compromise and adoption in March 2017

d) In effect as of January 2018



Historical development

I. From the Romans to the Enactment of the Civil Code

II. Construction contracts under the Civil Code

III. Time for change!

1. Why?
2. How?
3. When?
4. What? New provisions in the Civil Code
 - a) On construction contracts
 - b) On consumer construction contracts
 - c) On architects contracts
 - d) On developers contracts



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts, e.g.

- To excavate the foundation for a building
- To erect the structure of an office building
- To install the heating and ventilation for a hotel
- To cover the roof of a farm building



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts

- were traditionally qualified as contracts to produce a work (“works contracts”), sec. 631 GCC
- now still the case, but additionally secs. 650a ff. on construction contracts apply



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts, e.g.
 - To build an entire hotel building from the excavation of the underground garage to the installation of the hotel room furniture
 - To build a one-family home with four bedrooms



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts
 - are qualified as works contracts, sec. 631 GCC, even if contractor (exclusively) employs sub-contractors; likewise secs. 650a ff. GCC apply



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
3. Architect’s contracts, e.g.



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
3. Architect’s contracts, e.g.
 - To design and make the plans for a multi-purpose building
 - To supervise the erection of such a building
 - To design, plan and supervise the erection



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
3. Architect’s contracts and structural engineer’s or specialized planer’s contracts
 - Were qualified as works contracts, sec. 631 GCC
 - are now qualified as contracts similar to works contracts, sec. 650p GCC
 - a) General provisions on works contracts apply by analogy, sec. 650q(1) GCC
 - b) Special provisions in secs. 650p ff. GCC apply



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
3. Architect’s contracts and structural engineer’s or specialized planner’s contracts: contracts similar to works contracts, secs. 650p ff. GCC
4. “Sales contracts” for newly built apartments:
 - Were qualified as mixed contracts: sales contract for plot of land + works contract for building to be erected on it



Construction contracts in legal practice

I. Established types of construction contracts

1. “Simple” construction contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
2. “General contractor” contracts: works contracts, secs. 631 GCC + secs. 650a ff. GCC
3. Architect’s contracts and structural engineer’s or specialized planner’s contracts: contracts similar to works contracts, secs. 650p ff. GCC
4. “Sales contracts” for newly built apartments:
 - Now confirmed in secs. 650u, 650v GCC



Construction contracts in legal practice

I. Established types of construction contracts

II. “Players”

1. Specialized practice groups in large law firms
“commercial real estate”
2. Highly specialized large scale construction law
boutiques
3. VII. Senate at the Bundesgerichtshof (Federal Supreme
Court) specialized in Construction law
4. Since beginning of 2018: specialized chambers at
Regional Courts (Landgerichte) and specialized senates
at Higher Regional Courts (Oberlandesgerichte)



Construction contracts and public policy

- I. Independence of Administrative law and Private law**
 1. Employer has to provide necessary building permits
 2. In the course of the permission proceedings and building surveillance public law authorities take care of public interests, e.g. structural safety, but not of contractual rights and duties



Construction contracts and public policy

I. Independence of Administrative law and Private law

II. Interdependencies

1. If construction does not comply with Administrative law requirements, work is not in conformity with the contract, sec. 633(2) no. 2 GCC
2. Contractors are not obliged to follow employers directions, if they risk personal liability for breach of Administrative law requirements
3. Contract violating a statutory provision is void, sec. 134 GCC, e.g. “black labour”
4. Contract contrary to bonos mores is void, sec. 138 GCC



Protection of competition and consumers

I. Competition

1. Competition law

- a) Joint ventures for the purpose of participating in public tenders by making a single offer are not considered anti-competitive covenants
- b) Bid-rigging is both an infringement of Competition law and criminal fraud under secs. 263, 298 Criminal Code
- c) Law of public tenders in Act against Restraints of Competition, completely revised in 2016, secs. 97 ff. ARC
- d) Unilateral conduct may constitute an abuse of a dominant position, sec. 18 ff. ARC



Protection of competition and consumers

I. Competition

1. Competition law
2. Unfair Competition law
 - a) Misleading advertising or omission of essential information constitutes unfair competition under secs. 5, 5a Act on Unfair Competition
 - b) Use of unfair standard terms will constitute unfair competition under sec. 3a AUC
 - c) Standing to sue for competitors, industrial or consumers' associations, chambers of commerce
 - d) Remedies: injunctive relief, cost of cease-and-desist notice, damages



Protection of competition and consumers

I. Competition

II. Consumers

1. By Competition law

2. By Contract law

a) Universal elements of protection

(1) Structure of works contract, secs. 631, 633 ff., 641
GCC

i. Strict obligation to produce result

ii. Detailed definition of material defects

iii. Payment due only upon acceptance



Protection of competition and consumers

I. Competition

II. Consumers

1. By Competition law

2. By Contract law

a) Universal elements of protection

(1) Structure of works contract, secs. 631, 633 ff., 641
GCC

(2) Control of standard business terms, secs. 305
GCC

(3) Regulation on Realtors and Developers 1974

i. Protection against Developers' insolvency

ii. Limitation of payment schedules



Protection of competition and consumers

I. Competition

II. Consumers

1. By Competition law

2. By Contract law

a) Universal elements of protection

b) Specific consumer protection

(1) Employer's right to change work, sec. 650b GCC

(2) Compulsory description of the building, secs.
650j, 650k GCC

(3) Consumer's right of withdrawal, sec. 650l GCC

(4) Consumer's right to documentation, sec. 650n
GCC

