



# Direct Claims under German Construction Contract Law

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# Direct Claims

German Law perspective

**Art. 8, para. 4 and 5 (AB 18) -  
Transferable to German conditions?**

# Direct Claims

## German Law perspective

Example:



Fig. 1. Reformert kirke og kirkegård 1762. Stik af W. A. Müller.

# Direct Claims

## German Law perspective



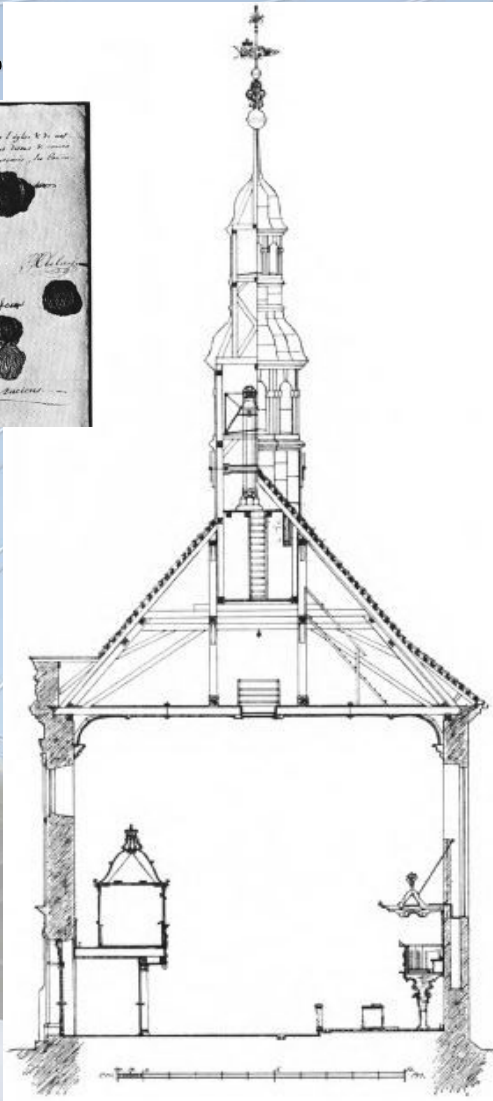
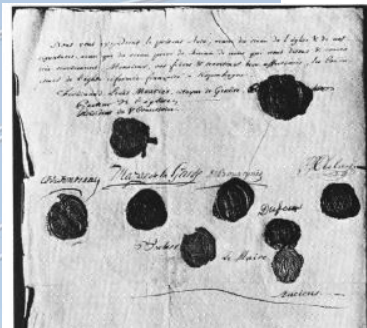
Fig. 1. Reformert kirke og kirkegård 1762. Stik af W. A. Müller.

**Tyske Reformert Kirke**  
Gothersgade 109,  
1123 København

# Direct Claims

## German Law perspective

### Theory ...



**Start of construction:** as from July 1687

**Start of negotiations:** 1688-1

**Contract closed:** 1688-4-4

**Employer:** Reformed Church, CPH

**Contractor:** Gebrüder Frederik & Nicolai Müller

- Church should measure 80 (L) x 50 (W) x 40 (H) feet
- The Müller brothers were originally supposed to receive 12.000 Rdl. for a completely unadorned building ('templum nudum, absque ornamentis atque aliis omnibus');
- Detailed service description
- **Construction period** planned: until **11.12.1688** (Michaelis)

# Direct Claims

## German Law perspective

Practice:

Laying the foundation stone:  
1688-4-20

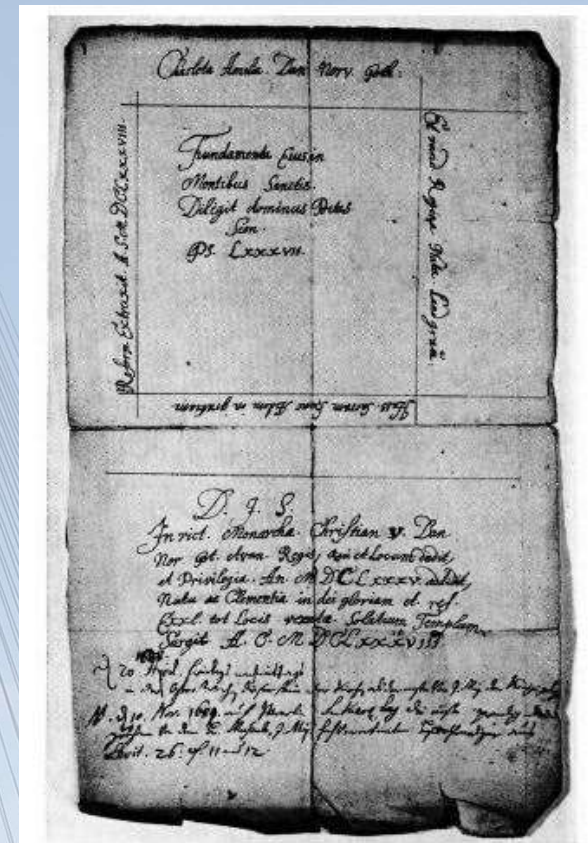
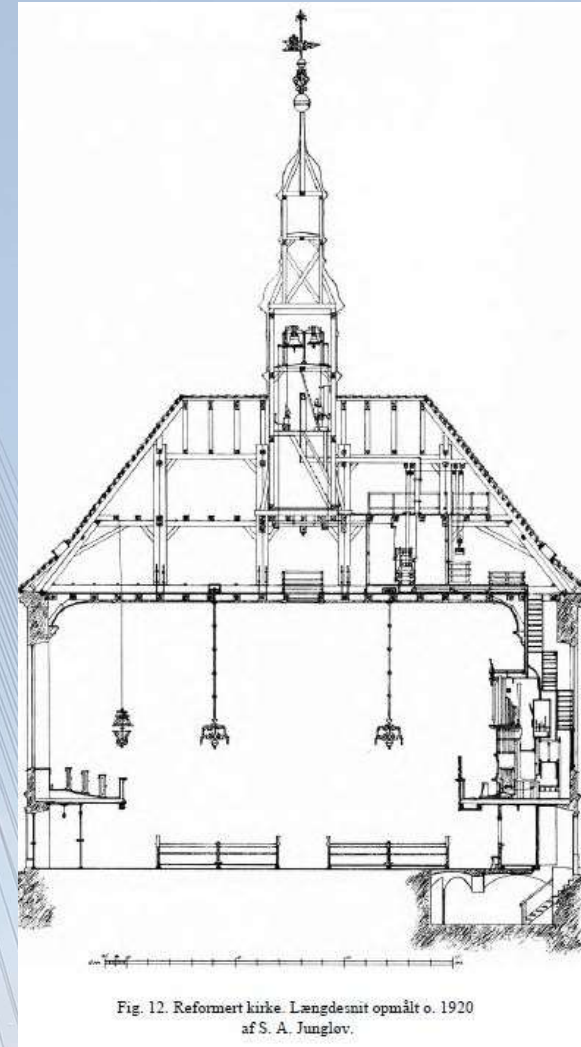


Fig. 10. Reformert kirke. Indskrift på grundstenen.  
Tysk-reformert kirkes arkiv.

# Direct Claims

## German Law perspective

- **As Build Plan:** Highth: 120 Ft.
- Construction costs increased to actually [amount] **13.300 Rdl.**
- Inauguration after completion: **10.11.1689** (Martin Luther's Birthday)



# Direct Claims

## German Law perspective

Queen Charlotte Amalie  
(1640 -1714)

### Third Party 'Rights'

- Church grew much larger and taller
- Use of higher-quality materials
- Construction of a crypt and a royal lodge

The Queen's **requests for changes** led to an increase in construction costs and a construction period, almost extended by one year

No problem: Of the approx. 13,300 Rdl. construction costs, she alone took over 10,000 Rdl. from her personal casket





# Direct Claims

## German Law perspective



Queen Charlotte Amalie  
(1640 -1714)

### Third Party 'Rights'

**Simplified handling of defects** as in the case of Art. 8 para. 4 and 5 (AB 18)?

Would the Queen have been interested in a direct access?

**4 years defects notification period**  
**Personal assumption of liability**  
**including heirs**

**Demolition of the church in the great fire of 1728-10-21**



# Direct Claims

## German Law perspective

### Third Party 'Rights'

### Simplified handling of defects as in the case of Art. 8 para. 4 and 5 (AB 18)?

Would a German Employer nowadays be **interested** in an access to direct claims in the construction supply chain?

If so, what would be the **obstacles** to deal with when trying to stipulate this direct access in construction contracts under German law?

Queen Charlotte Amalie  
(1640 -1714)



# Direct Claims

German Law perspective

## # 1

In German Civil Law

**direct claims of third parties must either be ordered by law or contractually agreed between creditor and debtor.**

# Direct Claims

German Law perspective

German Civil Law is **strictly based on claim norms** :

In addition to the principle defined in § 194 (1) BGB\* , the BGB contains a large number of **claim norms** (“*Anspruchsgrundlagen*”) which, alone or together with other norms, impose the conditions to be met for a claim.

\* (German Civil Code, "**B**ürgerliches **G**esetz**b**uch")

**Note:**

**Without a claim norm, nothing can be titled and enforced!**

# Direct Claims

German Law perspective

**# 2**

German Civil Law is  
**strictly based on a two-person relationship:**

# Direct Claims

German Law perspective

German Civil Law is **strictly based on a two-person relationship:**

**§ 241 (1) s. 1 BGB** therefore prescribes that **(only) the creditor is entitled by virtue of the debt relationship to demand performance from the debtor.**

Thus, a **Third Party** is any person outside the special relationship between the creditor and the debtor.

## **Note:**

**Only in exceptional cases if the law or case law provides for the participation of third parties** in the special relationship between creditor and debtor, direct claims of third parties are conceivable or can be structured in a contract.

# Direct Claims

German Law perspective

**Examples** of third-party participation regulated by law or case law:

Representation	Assignment
Performance by a third party	Assumption of dept
Performance to a third party	Suretyship („Bürgschaft“)
Vicarious agent („Erfüllungsgehilfe“)	Assistant („Verrichtungsgehilfe“)
Genuine/ non-genuine contract in favour of third parties	Contract with protective effect in favour of third parties (“ <i>Vertrag mit Schutzwirkung zugunsten Dritter</i> “)

# Direct Claims

German Law perspective

**Example** of third-party participation regulated by **German construction contract law** (§§ 631, 650a et seq. BGB, a subcategory of the **contract for work and services**):

**§ 650f (2) BGB** contains the **only norm relating to a third party** (contract for the benefit of third parties):

*§ 650f (2) BGB: Security may also be provided by [...] a credit institution or credit insurer. It may only make payments to the Contractor insofar as the Employer acknowledges the Contractor's claim for remuneration or has been ordered to pay the remuneration by a provisionally enforceable judgment and the conditions exist under which enforcement may be commenced.*



# Direct Claims

German Law perspective

## # 3

Drafting contracts in Germany is strongly determined by the law on **General Terms and Conditions (§§305 et seq. BGB)**

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# Direct Claims

## German Law perspective

**General terms and conditions (GTC)** are **pre-formulated contractual conditions** applicable in a large number of cases, which one contracting party (the user) imposes on the other contracting party when concluding a contract (§ 305 para. 1 BGB).

GTC must also **be agreed between the parties** to be included in the contract. They do not apply without further ado like a law.

**§ 309 BGB** contains **clause prohibitions** which, due to their particularly disadvantageous effect on the user's contractual partner, lead to **invalidity "without the possibility of any evaluation"**.

### Note:

GTC clauses are subject to the **GTC-legal content control** according to **§§ 305 ff. BGB**).

# Direct Claims

German Law perspective

## # 4

German construction contracts are  
often shaped by  
the **VOB/B** (*Contract Regulations for Construction Work*)

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# Direct Claims

## German Law perspective

### ***VOB/B (Contract Regulations for Construction Work)***

**VOB/B** have the character of **General Terms and Conditions** (similar to: **Almindelige betingelser** for bygge- og anlægsarbejder og leverancer (AB 18))

Therefore, **VOB/B** must also **be agreed between the parties** to the construction contract to be included in the contract.

The **public sector** is **obliged to agree on the VOB/B** because the VOB/B is designed to balance the interests of the client and contractor.

The **private sector** is **not obligated** to do so. Some users try to work towards agreeing regulations that are more favourable to them by excluding the VOB/B and drafting appropriate clauses.

#### **Note:**

If there is any derogation, the **VOB/B is not included unchanged ‘as a whole’ in the contract** and all clauses are subject to the **GTC-legal content control** according to **§§ 305 ff. BGB).**

# Direct Claims

German Law perspective



## # 5

Taking these obstacles into account – **does it make sense** to strive for giving the Employer access to direct claims in the construction supply chain by drafting contracts/ standard form contracts ?

# Direct Claims

German Law perspective

**Paragraphs 4 and 5 of Art. 8 (AB 18) have absolutely no equivalent**

The German Construction Contract Law assumes a **strict separation of the legal relationships along the contractual chain.**

**Note:**

**Claims for defects - regardless of the circumstances - can also only be asserted against the respective contractual partner, but not by the Employer against the Contractor's subcontractor without the subcontractor's consent.**

# Direct Claims

German Law perspective

## Paragraphs 4 and 5 of Art. 8 (AB 18) have absolutely no equivalent – Why?

### Employer's interest:

Employer presumably has **no interest** in the direct assertion of defect rights against the subcontractor in the case of an otherwise intact contractual relationship between the Employer and the Contractor:

- In the event of a defect, Employer already has **full statutory and contractually negotiated claims against the Contractor** as his contractual partner.
- Employer does not want to refer to the **conditions, exclusions and limitations of liability, etc. agreed between the Contractor and his subcontractor.**
- Employer may have the Contractor '**remove the obstacles**' for him.

# Direct Claims

German Law perspective

**Paragraphs 4 and 5 of Art. 8 (AB 18) have absolutely no equivalent – Why?**

## Contract Law:

Any **intervention by the Employer** in the contractual relationship with the subcontractor could possibly even have a **liability-relieving effect for the Contractor** (e.g., if it is possible for him to invoke a (disadvantageous) execution instruction of the employer). In this case, the Employer would even have lost an opponent for his claim.



# Direct Claims

## German Law perspective

### Differences between German law perspective and Art. 8 (4) and (5) (AB 18):

#### Securities:

**Strictly accessory sureties** are placed as security for defect-free performance of the respective contract.

#### **Note:**

**§ 17 (4) s. 3 VOB/B expressly forbids abstract, assignable bank guarantees**, a fortiori those on **first demand**. The **Federal Court of Justice (BGH)** has **extended** this **prohibition** quite generally on securities backing claims for defects, even in the B2B sector.

#### **Note:**

Particularly in the case underlying Art. 8 (4) and (5) (AB 18), both the contractor's **Guarantor** and the Guarantor of the Subcontractor could successfully **defend** themselves against a claim **due to the lack of accessoriness of a direct** claim of the Employer.

# Direct Claims

German Law perspective

## Differences between German law perspective and Art. 8 (4) and (5) (AB 18):

### Dispute Resolution:

Practical problems could arise if an **arbitration court or other dispute resolution instrument** has been agreed between the Employer and the Contractor, but **not in the relationship between the Contractor and the Subcontractor**.

In the event of a legal dispute before the ordinary courts, however, the **notice of dispute/ concomitant intervention** (“Streitverkündung”/ “Nebenintervention”) helps.

# Direct Claims

German Law perspective



**Paragraphs 4 and 5 of Art. 8 (AB 18) have absolutely no equivalent – experiments ‘contra legem’**

German construction contracts sometimes contain a clause in favour of the Employer following a different approach:

Employer:

At Employer's request Contractors agree that **the Employer should be entitled to 'enter' into the contractual relationship with the subcontractor** under certain conditions. However, this is done with a **different objective** in mind:

# Direct Claims

German Law perspective

The **access of the employer to the subcontractor and to the conditions negotiated** between the Contractor and its subcontractor, if and to the extent that the contractual relationship with the contractor should get into **crisis (insolvency, termination of the contract)**.

# Direct Claims

## German Law perspective

**Paragraphs 4 and 5 of Art. 8 (AB 18) have absolutely no equivalent – experiments ‘contra legem’**

German construction contracts sometimes contain claims in favour of two ‘Third Parties’ with fundamentally different interests:

### Banks:

Entitlement to **inspect** the **costing and verification documents**, to **have a say in the awarding** of subcontractor and supplier contracts (e.g., to involve its own customers), to **inspect construction site operations** of the contractor and its subcontractors, or to **be present at the acceptance procedure**.

### Buyer:

A Buyer – **with the consent of the Contractor and its subcontractor** - shall be able to directly turn to the Contractor or subcontractor for certain rights (e.g., **determination of the performance by material selection, direct assertion of claims for defects** etc.) .



# Direct Claims

## German Law perspective



***Johann Gabriel  
Maurenbrecher,***

*født i Düsseldorf 13. dec.  
1746, død i København 27.  
marts 1801 efter næsten  
17 års (1784 -1801)  
præstegerning her.*

# Direct Claims

German Law perspective

**Thank you for your attention!**

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