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# Bulgaria

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# Bulgaria

## General questions

***QG.1 Is the term 'construction contract' defined in your country, by statute or case law? If it is, what are the legal consequences of a contract falling within this definition?***

In Bulgaria, the term 'construction contract' is not defined as such in the legislation. A construction contract is a kind of contract for services. All contracts for services are generally subject to the rules for 'the contract for work'/'works contract' ('*договор за изработка*'), governed by the Obligations and Contracts Act (OCA), Articles 258-269.[1]

Under a 'works contract', a contractor undertakes, at his own risk, to do work for another party and produce a particular result in accordance with that party's instructions, the latter undertaking to remunerate the contractor.[2]

This broad definition makes it clear that works contracts, and construction contracts in particular, are not limited to building projects but also cover contracts involving the manufacture of goods; not only the realization of *new* projects, but also repair works or works for the maintenance of goods. The price to which the contractor is entitled to does not have to be determined in detail; it is enough that it is clear that the contractor is entitled to payment. A specific requirement of the Spatial Development Act (SDA) is that construction contracts must be concluded in writing.[3]

***QG.2 What standard form construction contracts are in general use? Who publishes them?***

There are no standard forms in general use in Bulgaria.

The international financing institutions (eg EBRD, KfW etc) usually require FIDIC Conditions of Contract to be used. In 2016, at the request of the Bulgarian Construction Chamber, the Bulgarian Society of Construction Law developed Contract Agreements and Particular Conditions for the FIDIC Red and Yellow Books, harmonized with the national legislation. At present, FIDIC forms are used only in 1% of construction contracts.

In December 2016 the Bulgarian State Public Procurement Agency published, for discussion, a set of draft standard forms for construction contracts, intended to become mandatory for public procurement. The proposed forms were criticized by construction law experts and have not entered into force. In June 2017, the same agency published,

1 OCA (1950) 275 SG, last amended (2008) 50 SG.
2 OCA, Article 258.
3 SDA (2001) 1 SG, last amended (2017) 13 SG.

for discussion, draft standard forms for contracts awarded within a public procurement procedure for the design and construction of waste water treatment plants and other water and sewerage infrastructure. The FIDIC Red and Yellow Books (1999 edition) will be used, together with Particular Conditions, harmonized with Bulgarian legislation. These standard forms are currently open for consultation.

### *QG.3 Does an architect have a neutral role when supervising and monitoring the works, or is he solely the employer's agent?*

The Spatial Development Act (SDA) lays down the roles of the participants in construction. In 1999 the State transferred some of its duties as a construction control authority to private sector consulting companies, which were licensed and later registered by the Government. To qualify for licensing, they must have architects, engineers and lawyers in the mandatory 'Lists of qualified staff' who meet the statutory criteria of minimum experience in their profession. The consultant[4] is a participant in the construction process, responsible for ensuring design and construction compliance with the regulations in force. The scope of review of the design and supervision of construction is laid down in the SDA. The employer must sign a contract with a registered consultant for the supervision of all projects which are high and medium risk, as defined by the SDA. The responsibilities of the registered consultant are backed up with serious sanctions for infringement of the requirements. The consultant is the employer's agent: he or she may also act as a project manager or as 'the Engineer' in a FIDIC project, but has a neutral role when checking the design's compliance with mandatory standards and when supervising construction work.

The SDA also provides for mandatory inspections by a designer at key points during construction, so the employer must enter into a contract with the architect and other designers who elaborated the relevant design for 'supervision by designers'[5]. In case of changes in the course of construction, the designer gives his/her instructions via instructions recorded in the 'Order Book',[6] kept on site by the contractor. Such instructions must also be confirmed by the registered consultant.

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4 The consultant performs the following functions, under contract to the employer: (i) assessment of the design for compliance with the legal requirements and supervision of construction works; (ii) inspection and control over construction materials delivered and used in the project, thus ensuring observance of the main requirements about construction sites; (iii) pre-investment investigation, management of the design process and co-ordination of the construction process until the project is commissioned, including control over the quantities, the quality and the compliance of the works with the requirements of the contract (SDA, Article 166, para 1).

5 'Designer's Supervision' is the supervision performed by the employer's designer during construction, connected with his copyright and the precise implementation of the design developed by the designer.

6 The 'Order Book' is a specific document drafted during construction in accordance with a template in Ordinance 3 of 31 July 2003 on Drawing up Acts and Protocols during Construction (Ministry of Regional Development and Public Works) (2003) 72 SG, amended (2004) 37 SG and (2006) 29 SG, amended and supplemented (2012) 98 SG. The 'Order

### *QG.4 Is there legislation which curbs 'unfair' terms (eg exclusions of liability) in standard form construction contracts?*

In Bulgaria, consumers who are parties to a construction contract are protected against unfair terms. The Consumers Protection Act (CPA)[7] provides extensive protection against unfair terms for the benefit of consumers.[8] The protection is not exclusively for consumers in the construction industry, but they benefit from the general protection. The CPA defines unfair terms[9] and sets out a list of terms which may be regarded as unfair.[10] A term which is unfair under the CPA is void unless individually negotiated.[11]

### *QG.5 Is the employer permitted to order variations to the design during the course of the works? What are the usual contractual provisions?*

The employer is permitted to order variations to the design during the course of the works, subject to the particular terms of the contract. It is usual for the contract to lay down the procedure for variations, which may entitle the contractor to compensation and/or an extension of time.

Variations within public procurement contracts are restricted by the Public Procurement Act (PPA),[12] implementing Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

The SDA permits design changes, provided that these comply with relevant zoning and technical requirements. Substantial deviations from the approved design may be permitted during construction but require an approved design and an amendment to the

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Book' for each project is mandatorily registered with the relevant construction supervision authority.

7 Consumers Protection Act (2005) 99 SG, last amended (2017) 8 SG, implementing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

8 A consumer is any natural person who acquires goods or uses services for purposes that do not fall within the sphere of his or her commercial or professional activity, and any natural person who, as a party to a contract under the Consumers Protection Act, acts outside his or her commercial or professional activity (CPA §13).

9 An unfair term in a contract concluded with a consumer means any clause to the detriment of the consumer which is contrary to the requirement of good faith and causes a significant imbalance in the rights and obligations of the trader or supplier and the consumer (CPA Article 14, copying the EU Directive).

10 CPA, Article 143.

11 A term is regarded as not individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The presence of unfair terms in a contract concluded with a consumer does not render the whole contract unenforceable if the contract can be applied without these terms (CPA, Article 146).

12 Public Procurement Act (2016) 13 SG, last amended (2016) 34 SG.

construction permit before being implemented.[13] The designer is free to order non-substantial changes as instructions via the Order Book.[14]

### *QG.6 Are there any proposals to reform construction contract law?*

No.

13 SDA, Article 154.
14 On the Order Book, see note 6.

# Topics

## 1 General obligations of the employer

### *1.1 Traditional procurement*

#### *Q1.1.1 Under this form of procurement, does the employer supply the contractor with the design, obtain the necessary permits and ensure that the contractor can obtain possession of the site?*

The employer, or a person expressly authorized by the employer, is responsible for *everything* necessary for the commencement of construction.[15] This includes, inter alia, ensuring an approved design, all required environmental licences (if needed), and a valid and already in force construction permit: all these are preconditions for the lawful commencement of construction.

The employer is also responsible for commencing construction only after entering into contracts with:

1. A licensed construction supervision consultant (when required);
2. The relevant designer for supervision of implementation of the design; and
3. A contractor duly registered with the Bulgarian Construction Chamber,[16] in accordance with the provisions of the Construction Chamber Act (CCA).[17]

According to Bulgarian law, the employer is the party holding ownership or other rights *in rem* over the relevant property, who thus has ultimate control over possession of the construction site. The employer's obligation to ensure the contractor's access to the construction site could be derived from the general principles of contract law: the parties are obliged to perform their obligations arising from a contract accurately and in good faith, in accordance with all legal requirements, and each must not impede the other from performing its obligations in the same manner. The employer is also responsible for ensuring the observance of requirements under the SDA with regard to commencement of the construction process and handing over of the construction site; both can be done lawfully only after the signing of a special protocol by the parties to the construction contract, in the presence of a representative of the relevant municipal administration.

The civil law principle of freedom of contract freedom allows the parties to agree that responsibility for elaborating and approving the design and securing the necessary permits will be transferred to the contractor. If so, the contractor will act on behalf of the employer in the relevant administrative procedures, but the employer will continue to

15 SDA, Article 161.
16 *http://ksb.bg/en/*.
17 Construction Chamber Act (2006) 108 SG, last amended (2017) 13 SG.

be considered the party responsible for, and required and entitled to participate in, all these administrative procedures. Normally, where responsibility for securing the approval of the design and permits is shifted to the contractor, the contract will require the employer to grant the contractor authority to act on its behalf.

In any case, regardless of which party is contractually responsible for design, its elaboration may be done only by a designer licensed in accordance with the Bulgarian legislation. The designer is also required to perform designer's supervision during the construction process.

The PPA does not provide any specific details for projects awarded under its procedures. Normally, it is the contracting authority, acting as employer, that needs to ensure approval of the design and all necessary permits. It is possible to transfer this responsibility to the contractor, but the contracting authority retains the employer's rights and obligations. Usually, the elaboration of the design, if not included in the contractor's scope of work, is also awarded under the PPA.

### *Q1.1.2 Does the employer owe the contractor a duty to cooperate, in order to give full effect to the contract?*

The duty of the employer to cooperate with the contractor follows from the general principles of civil law. The parties are obliged to perform their obligations arising from a contract accurately and in good faith, in accordance with the legal requirements, and each must not impede the other from performing its obligations in the same manner ('the principle of good faith').[18]. Hence in contractual matters the employer has a general duty to cooperate with the contractor and vice versa.

Article 95 of the OCA provides that a creditor (the employer) is in default, if upon being requested by the debtor (the contractor), the creditor fails to provide the debtor with the necessary cooperation, where as a result the latter is not in a position to perform (the 'creditor's default rule').

The OCA provides another express obligation for cooperation: the employer is obliged to take over the works, once executed in accordance with the contract.[19]

The SDA also imposes specific cooperation obligations on the employer at each stage of execution of the project. During the earliest stage, this cooperation covers the physical conditions required for performance of the works (securing zoning and legal rights, access to the site, the necessary permits and a supply of materials, if the contract so provides). The employer's cooperation is also needed in order to secure mandatory construction supervision and designer's supervision.

18 OCA, Article 63.
19 OCA, Article 264.

The employer is also obliged to cooperate in relation to signing the statutory protocols which record different stages of completion of construction; and to take over the works completed by the contractor following a special procedure and the signing of a further protocol.

## *1.2 Design and build*

***Q1.2.1 Is the employer under an obligation to ensure that the contractor has all information in the employer's possession in good time, where this information is necessary to enable the contractor to execute the works (as well as to obtain any necessary permits) and to make the site available to the contractor?***

Currently, there is no specific legal framework for each different type of construction contracts, so the general provisions specified above apply.

In particular, the general good faith principle of civil law and the creditor's default rule apply, obliging the employer to provide all necessary information required for execution of the works, to cooperate with the contractor and to abstain from any action that may negatively affect the process of construction.

The obligation of the employer to obtain the necessary permits also applies. The parties are free to transfer any obligation of the employer to the contractor by contract. This transfer does not change the employer's rights and obligations in relation to administrative procedures, so the employer has a duty to cooperate with the contractor in order to secure the necessary permits.

The regime for delivering possession of the construction site is as described above. The parties are free to agree on specific aspects of the contract, such as milestones for the handing over of the site to the contractor (but always in compliance with the requirements of the SDA).

***Q1.2.2 Does the employer owe the contractor a duty to cooperate to give full effect to the contract?***

See the answer to Q1.2.1.

## 1.3 BOT/DBFMO

### Q1.3.1 What are the answers to Q1.1.1-1.2.2 above in relation to BOT/DBFMO contracts?

The Bulgarian Concessions Act (CoA),[20] Roads Act (RA)[21] and Public Private Partnership Act (PPPA)[22] all provide specific rules in relation to BOT/DBFMO contracts. However, the PPPA, although not formally repealed, is not in practical use; currently, no PPP is under development or operation in Bulgaria. The same is true of roads concessions under the RA.

The CoA provides comprehensive regulation of concessions and allows for BOT and DBFMO to be implemented in Bulgaria. Concessions can be granted for the majority of sectors through a competitive procedure, with the application of a fair and transparent tender selection process. The works concession is the most common type of BOT/DBFMO contract used in Bulgaria.

Under Article 3 of the CoA, under a works concession agreement the private party is awarded full or partial construction, management and maintenance of infrastructure facilities at the risk of the concessionaire, in exchange for the right to exploit the subject-matter of the concession, or of that right in addition to compensation to be paid by the contracting authority.

Under the CoA, the concessionaire has the rights and obligations of an employer during the construction phase; but the design is elaborated, the permits are obtained and the works are performed and commissioned on behalf of the contracting authority, as owner of the infrastructure facilities.

Thus the contracting authority retains the position of employer in all administrative procedures, and all documents are issued in its name, but in practice the contracting authority is relieved of the obligations to secure the design and permits, which are shifted to the appointed concessionaire.

Depending on the scope of the concession granted, the contracting authority may undertake to secure the rights *in rem*, the execution of the required zoning procedures and the elaboration of the design and required permits. The preparatory actions for the awarding of the concession are always carried out by the contracting authority.

The general rules applicable to traditional procurement contracts also apply.

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20 Concessions Act (2006) 36 SG, last amended (2016) 43 SG.
21 Roads Act (2000) 26 SG, last amended (2017) 11 SG.
22 Public Private Partnership Act (2012) 45 SG, last amended (2016) 13 SG.

## 2 General obligations of the contractor

Under Bulgarian law, the contractor is responsible for:

1. Execution of the works, in compliance with the approved design and construction permit and the legal requirements concerning construction works and methods, as well as the requirements concerning the protection of public life and health at the construction site;
2. Execution of the construction works with materials and products compliant with basic construction requirements, including the technical requirements for their use;
3. Preparation of the relevant documents (acts and protocols) certifying compliance with (1) and (2) above;
4. Preparation and retention of the 'as-built' documentation for the works, unless this task is expressly assigned to a third party in the construction process, and keeping other technical documentation concerning the completion of construction;
5. Keeping and handing over of the construction documentation, the Order Book and the construction acts and protocols, at the request of other participants in the construction process or supervisory authorities;[23] and
6. Undertaking construction of only those works for which s/he has the required registration under the applicable registration regime.[24]

In addition, the contractor is liable for damages and loss of profit resulting from its actions and/or omissions,[25] and remains responsible for the fitness of the works for a specific warranty period after their commissioning. The minimum warranty periods are set by statute, varying from 1 to 10 years, depending on the type of project.[26] Longer periods may be agreed contractually.

### *2.1 Traditional procurement*

#### *Q2.1.1 Does the contractor have an obligation to perform those duties which by the nature of the contract are required by law, by good faith or usage, or which relate to proper use of the materials?*

Bulgarian law recognises the good faith principle, which has an impact on all commercial contracts, including construction contracts (see the answer to Q1.1.2). The contractor under a works contract, including one for construction, is furthermore obliged to

23 On the Order Book, see note 6.
24 SDA, Article 163.
25 SDA, Article 163, para 3.
26 SDA, Article 160 and Ordinance 2 of 31 July 2003 on Commissioning of Constructions in the Republic of Bulgaria and minimal warranty periods for executed construction works and for equipment (Ministry of Regional Development and Public Works) (2003) 72 SG, last amended (2016) 65 SG.

perform the work in a manner fit for its ordinary purpose or for the purpose stipulated in the particular contract.[27]

The good faith principle is also applicable to the interpretation of contracts: all contracts are to be interpreted in accordance with the nature of the contract and with a view to their purpose, usage and the good faith principle.[28]

The obligations of the contractor concerning materials are also regulated by Bulgarian law. The contractor under a works contract is to perform the agreed work by its own efforts, including the provision of materials, unless otherwise agreed. If the contractor provides materials, then s/he is responsible for their good quality.[29]

The contractor is required to execute the works using materials and products that comply with the basic requirements applicable to construction in general and the technological requirements for the use of each. Failure to comply with this obligation may result in the contractor incurring liability in damages to the employer for any resulting damage or loss of profit.[30]

### *Q2.1.2 Does the contractor have an obligation to comply with instructions and directions given to him by the employer, including via an agent?*

The contractor's obligation to comply with instructions and directions given by the *employer* is usually regulated by the construction contract. This commonly requires the contractor to perform the specified works in accordance with instructions given by the employer or a duly authorised agent. The employer and/or agent are also entitled to check performance of the work, provided they do not hinder the contractor from performing its duties.[31]

The contractor must comply with instructions and directions given by the *consultant* regarding the lawful execution of the construction work in compliance with construction regulations, provided that these instructions are recorded in the Order Book of the relevant project.[32] The contractor may object to these instructions within three days to the National Construction Control Directorate (NCCD), which will inspect and then issue mandatory instructions. Until the NCCD's decision, construction is suspended.

27 OCA, Article 261.
28 OCA, Article 20.
29 OCA, Article 259.
30 SDA, Article 163, para 2, item 2.
31 OCA, Article 262.
32 SDA, Article168, para 4. On the Order Book, see note 6.

***Q2.1.3 Does the contractor have an obligation to remedy or replace, at his expense, unsatisfactory work to the satisfaction of the employer, unless the unsatisfactory work is the employer's responsibility?***

If the contractor has deviated from the work agreed in the construction contract, or if defects are established in the work, the employer is entitled to claim:

1. Rectification of the work by the contractor without additional payment, within a period laid down by the employer;
2. Reimbursement of the cost of rectification; or
3. An appropriate reduction in the price.[33]

The employer has these options during the construction phase, as well as after taking over the completed works. If the deviation or the defects are so fundamental that the work is unfit for its contractual or ordinary purpose, the employer may terminate the contract.

Bulgarian law imposes a special obligation on the contractor to repair hidden defects after the completion of construction and commissioning of the works. Ordinance 2 provides for minimum warranty periods during which the contractor remains responsible for the works, including for rectifying defects in them.[34] It is the employer's choice whether to seek a remedy under the provisions of the OCA or under Ordinance 2.

The applicable legislation provides for several situations in which the contractor is not deemed in breach of the contract and therefore is not required to rectify or replace unsatisfactory works. For example, where unsatisfactory work derives from materials supplied by the employer being unfit, or faults in the design provided by the employer, the contractor is not liable for damages and is entitled to receive the agreed remuneration, but this may depend on the contractor having duly warned the employer about unfit materials or design faults.[35]

If the performance of the work becomes impossible due to a cause for which neither party is responsible, the contractor does not have an obligation to rectify or replace the unsatisfactory work. In such a case, the contractor is entitled to receive either partial remuneration (depending on how much of the completed work could be of use to the employer) or no remuneration at all (if the work is of no use to the employer).[36]

***Q2.1.4 Is the contractor required, before the contract is entered into or during it (or both), to warn the employer against obvious faults or defects?***

Under Bulgarian law, the contractor should notify the employer immediately if the design provided or materials supplied are unfit for the works. As part of this notice,

33 OCA, Article 265.
34 Ordinance 2: note 26.
35 OCA, Article 267, para 2.
36 OCA, Article 267, para 1.

the contractor should request amendment of the design and a supply of appropriate materials: see further the answer to Q3A.2. The contractor is also entitled to terminate the contract if the employer fails to supply appropriate materials/design when requested following such a notice. If the contractor fails to give notice, s/he is liable for any costs and losses caused.[37]

## 2.2 Design and build

***Q2.2.1 Does the contractor have an obligation to carry out the design and construction in such a manner that, at completion, the works will be in accordance with the requirements of the contract? If the works are not in accordance with these requirements, does this amount to a defect (unfitness for purpose)?***

Bulgarian law does not differentiate between the different types of construction contract. The general rules of contract law and the provisions regulating works contracts are equally applicable to design and build contracts. Parties to such contracts are free to agree additional rights and obligations individually.

The contractor in a works contract, including a design and build construction contract, is obliged to perform the work in a manner fit for its ordinary purpose or the purpose stipulated in the particular contract.[38] S/he is also obliged to ensure that the completed works can be operated and used in an ordinary way and is liable for defects during the period of the applicable warranty.[39]

See the answer to Q2.1.3 for further details.

***Q2.2.2 Does the contractor have an obligation to perform all those duties which by the nature of the contract are required by law, good faith or usage?***

See the answer to Q2.1.1.

***Q2.2.3 Is the contractor required, before the contract is entered into or during the contract (or both), to warn the employer if the employer's requirements contain or show obvious faults or defects, or if materials, goods, variations or other information supplied by the employer also show obvious faults or defects?***

See the answer to Q2.1.4.

37 OCA, Article 260.
38 OCA, Article 261.
39 OCA, Article 160, para 3.

### *2.3 BOT/DBFMO*

#### *Q2.3.1 How are the topics in Q2.1.1-2.2.3 regulated under these procurement models?*

See the answer to Q1.3.1.

Under a concession agreement, the concessionaire normally undertakes to build and/or operate public infrastructure or provide a service, being paid through fees collected from the public and/or payments from the grantor of the concession. The concessionaire will itself award construction work to contractors. Usually, the grantor will retain certain key rights in the concession agreement, such as the right to approve the design before it is submitted for approval to the authorities, the right to approve the cost of the investment etc.

As for the obligations of the contractor towards the concessionaire, the same principles apply as in a traditional procurement contract.

## 3 Duty to warn

The duty to warn concept deals with two distinct situations: (A) the contractor's duty to warn of deficiencies in design under traditional procurement methods; and (B) the consultant's (architect's or engineer's) duty to warn of matters outside the scope of their express contractual obligations.

### *3A The contractor's duty to warn: introduction*

This sub-section refers to the position of the contractor under traditional procurement, where the design is provided by the employer or the employer's consultants (architect or engineer). It does not refer to design and build contracts, where the contractor provides the design.

The basic position is that the contractor is not responsible for the design or specification. For example: FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999 (the Red Book), Sub-Clause 4.1 provides: 'the Contractor (i) shall be responsible for Contractor's Documents, Temporary Works, and such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract and (ii) shall not otherwise be responsible for the design or specification of the Permanent Works'.

#### *Q3A.1 Is this the basic position under traditional procurement in your country?*

Under the model common in Bulgaria for design and construction, the design is prepared by a designer appointed by the employer; the contractor, by virtue of a written contract with the employer, undertakes to perform the relevant construction and works at its own risk, in accordance with the employer's instructions. The contractor has a

duty to warn the employer if the design is unfit or defective; failure to do so will impose liability on the contractor for works which are defective as a result.

***Q3A.2 Is this position usually set out expressly in the contract, or is it the consequence of the general law?***

Bulgarian law expressly provides for the contractor's duty to warn the employer if the design provided is unfit for the proper performance of the work, namely that the design is defective, and to request the necessary changes.[40]

This duty to warn arises by operation of law. Possessing knowledge and skills in the relevant area, the contractor must make the necessary efforts to verify the suitability of the design which has been submitted in order to achieve the result agreed in the contract. If the design is defective, the contractor must serve notice on the employer. This must include three elements:

1. Notify those defects in the design which may affect the expected result of the work;
2. Request the employer to undertake the appropriate actions to remedy the defects (new instructions); and
3. Give the employer an appropriate period of time, according to the relevant circumstances, to do so.

The notice must be served 'immediately', ie on receiving the design, if the defect is obvious. If the defect is hidden, the duty to warn arises when a reasonably diligent contractor would have become aware of it.

Once the contractor has exercised the duty to warn:

1. The contractor becomes entitled to remuneration if the performance of the work has become entirely or partially impossible due to the unfitness of the design;[41]
2. The risk of loss or damage passes to the employer;
3. The contractor is released from liability for improper performance of the work when this is due to a defect in the design; and
4. If the employer does not remedy the design defect, the contractor can terminate the contract.

If the contractor fails to warn, s/he becomes in default, bears the risk of loss or damage to the work,[42] and becomes liable for losses incurred by the employer. The limits of the contractor's liability are laid down in the OCA. It covers those losses and loss of profit which are a direct and immediate consequence of the breach and foreseeable when the

40 OCA, Article 260.
41 OCA, Article 267, para 2.
42 OCA, Article 263.

duty to warn arose. However, if the contractor has acted in bad faith, he will be liable for all direct and immediate losses.[43]

The contents of the contractor's duty to warn may also be inferred from the general good faith principle. The duty to warn must be performed with due diligence, except when the law provides for some other degree of diligence.[44] As far as commercial relations are concerned, the rules on the duty of care of a merchant are relevant; under the Commercial Act (CA), a debtor in a commercial transaction must exercise the care which a prudent merchant would.[45]

In addition to the above, the construction contract may contain express provisions on the contractor's duty to warn.

***Q3A.3 Are there exceptions to this basic position? The contract might require the contractor to notify the employer or the engineer of any errors he has detected in the design documents. In FIDIC contracts, this is expressed as an obligation on both parties: 'If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.' (Sub-Clause 1.8) Is such an obligation usually placed on a contractor?***

As specified in the answer to Q3A.2, Article 260 of the OCA provides for the contractor's duty to warn the employer of defects in the design. Current Bulgarian law contains no equivalent provision putting a duty on the employer. However, taking into consideration the general requirements for good faith principle and due diligence in contractual relations,[46] we can conclude that the employer must also warn the contractor of any defects in the design which may affect performance of the assigned works.

***Q3A.4 Is such an obligation contained in the contract? Or is it imposed by statute or some other form of general law?***

As specified in the answer to Q3A.2, the obligation derives from Article 260 of the OCA; the same conclusion follows from Article 63 of the OCA and Article 302 of the CA, as well as from the general legal principles of good faith and due diligence. However, express provisions on the duty to warn may also be contained in the construction contract.

43 OCA, Article 82.
44 OCA, Article 63.
45 Commercial Act (1991), 48 SG, last amended (2016) 105 SG, Article 302.
46 OCA, Article 63 and CA, Article 302.

***Q3A.5 Is the obligation reciprocal, as in FIDIC, applying to both contractor and employer?***

Please see the answer to Q3A.3.

***Q3A.6 Do traditional procurement contracts contain provisions for part of the design to be undertaken by the contractor?***

Although there are examples of such contracts, this is not a common practice in construction in Bulgaria; the law does not deal directly with such a situation.

***Q3A.7 What effect does the contractor undertaking part of the design have, if any, on the contractor's duty to warn of defects in the overall design?***

By virtue of the construction contract, as a type of contract for work, the contractor's obligation to perform the construction works is at his own risk. If he prepares part of the design, he will be responsible if the agreed result is not achieved due to the unfitness of his design. The duty to warn the employer of defects in such a case is not expressly stipulated by law, but could be derived from Article 63 of the OCA and Article 302 of the CA.

***Q3A.8 Are such duties imposed beyond express contractual provisions? If so, by implication in the contract or by the general law?***

Yes: the duty to warn is imposed by the general law as an express rule and by interpretation of the good faith principle.

***Q3A.9 What might be covered by a contractor's duty to warn? (a) of inconsistency in design documents? (b) of possible breaches of building codes, standards or other legal requirements? (c) of the design not being buildable? (d) of safety risks created by the design?***

Bulgarian law does not expressly provide for specific aspects of the design to which a duty to warn is related. Any defect in the design that could prevent completion of the works free from defects falls within the scope of the duty to warn.

Taking into consideration the contractor's duties to perform construction works in compliance with the construction documentation issued and with the legal requirements for construction, as well as with the rules for performance of the works and the measures for protection of life, safety and health of those on the construction site, a conclusion may be drawn that any defect in the design which may lead to violation of the legal requirements for the performance of construction works, as well as any non-compliance of the design with the applicable legal requirements, also falls within the scope of the contractor's duty to warn.

### *3B The consultant's duty to warn*

***Q3B.1 Does the architect/engineer have a duty to warn the employer of defective work by the contractor? Is there such a duty even if the architect/engineer is only carrying out design work and has not agreed to supervise the construction process? Does the architect/engineer have a duty to warn of dangerous methods of work by the contractor? If so, under the contract or under the general law?***

A duty to warn the employer may arise for the designer (architect/engineer) where s/he exercises designer's supervision during the construction process - mandatory for all parts of the design for all works, except low risk ones. The terms and procedure for the exercise of the designer's supervision will derive from the contract between the employer and the designer.

A duty to warn can also be inferred from the general requirement of good faith and due diligence in contractual relations. The instructions of the designer relating to compliance with the design will be entered into the Order Book, which is mandatory for the other participants in the construction process.[47] The entries made provide the employer with the necessary information.

In the course of performance of his/her duties, the designer has unlimited access to the construction site, construction documentation, Order Book and all documents (acts and protocols) which come into existence during the construction process. The designer supervises the works in order to ensure compliance with the design and has no specific obligations in respect of dangerous methods of work, for which the employer is required to nominate a health, safety and welfare expert for the project.

Where the designer does not exercise designer's supervision during the construction process, s/he may warn the employer of defective work by the contractor only where s/he participates in drawing up required documents (acts and protocols).

As regards low risk projects, where designer supervision and participation in the drawing up of acts and protocols is not mandatory, imposing a duty to warn on the designer is barely possible.

***Q3B.2 Is the architect/engineer who carries out the design usually involved in supervising the implementation of the design (the construction phase)? Or is that usually done by someone else? If so, by whom?***

Yes: the design has copyright protection and normally only the designer, as its author, may exercise designer's supervision during the construction process, by virtue of a contract with the employer. In those cases expressly provided for by law, the designer must do so. However, with the designer's consent, a third party having the required designer's

47 SDA, Article 162, para 3; and Ordinance 3 of 31 July 2003 (note 6), Article 5, para 6.

capacity may be tasked with designer's supervision, in case of the proven inability of the original designer to do so.

Construction supervision during the construction process is exercised by a consultant.[48]

***Q3B.3 If an architect/engineer becomes aware of deficiencies in services provided by another consultant, eg the architect in relation to deficient work by the engineer, does the architect then owe a duty to warn the employer? Do consultants normally accept project management responsibilities which include reviewing the performance of other consultants, as well as contractors? Would such a role include an express duty to warn?***

All documents - graphics and text - on all parts of the design must be signed and stamped by the relevant designer (architect/engineer) and are coordinated by means of the signature of the designers of all other parts and of the employer.[49] So each designer may exercise control over the activity of all other designers through the coordination process. Although a designer's duty to warn the employer of deficiencies in the works by the other designers is not expressly provided for by law, this control process serves to provide the employer with the necessary information and implicitly includes warning of such deficiencies.

The conclusion that the designer does have a duty to warn may be also drawn from the general requirements of good faith and due diligence in contractual relations. It could be also spelt out in the design contract.

The same general requirements suggest a duty to warn on the *consultant*, with in addition his/her duties under SDA,[50] in particular as regards assessment of conformity with the designs.[51] The consultant's duty to warn may also be spelled out in the contract concluded with the employer.

Bulgarian legislation does not provide for the designer's project management responsibilities, which include an express duty to review the performance of other designers (consultants), as well as contractors, including warning the employer of deficiencies in the work performed by those other parties. The same also applies to the consultant, except for the duty to review the performance of the contractor which is fundamental to the consultant's role when performing construction supervision.

48 See the answer to QG.3.
49 SDA, Article 139, para 3.
50 Please see note 4.
51 OCA, Article 63 and CA, Article 302.

***Q3B.4 Does the general law, or do professional codes, impose a duty to warn on consultants? Or is it simply a matter of contract?***

Bulgarian law does not provide expressly for a designer's or consultant's duty to warn, nor is any such duty included in any professional codes. Implicitly, however, the duty to warn is contained in the obligations of a designer performing designer's supervision and from the general good faith and due diligence obligations.

A consultant has duties, imposed by the provisions of the SDA in respect only to reviewing the performance of the contractor ;[52] this could be further spelt out in the contract between the consultant and the employer for construction supervision.

***Q3B.5 If a designer becomes aware, after the completion of the project, of a problem with the performance of a particular product, material or piece of equipment, does the designer owe a duty to warn the employer/owner of the problem? If so, how long does such a duty last?***

A designer may have a duty to warn of a problem with the performance of a particular product, material or piece of equipment, as long as the designer continues to be bound by a contract with the employer in relation to the exercise of designer's supervision during the construction process. The scope of such duty, the period of the obligation and other details will depend on the terms of this contract.

## 4 Liquidated damages

Background: The purpose of a liquidated damages clause is to provide a remedy for the employer (or the main contractor under a subcontract) in the event of breach by the contractor (or subcontractor). Liquidated damages are typically available for (a) failure to complete work by the completion date (delay damages or delay liquidated damages) and/or (b) failure to provide a facility or plant capable of achieving the specified performance standard, for example, output (performance damages or performance liquidated damages).

52 Consultant's duties related to the construction supervision, such as: ensuring legally conforming commencement of the construction works; exercise of control as to the completeness and correct drawing up of the acts and protocols during the construction process; exercise of control as to compliance with the requirements for health and safety at work in construction; entering prescriptions into the Order Book which are mandatory for the contractor, employer and site manager; preparation of a final report to the employer etc (SDA, Article 168).

***Q4.1 In England, in 2001, a building contract was entered into for the upgrading of an office building; the contract sum was £11.57m; the time for completion was 16 months and liquidated damages were agreed at £45,000 per week, upheld by the court. What comparable provisions would be usual in your country?***

Bulgarian law does not distinguish between *liquidated damages* (meaning 'damages whose amount is pre-agreed upon by the parties to a contract as representing a genuine pre-estimate of loss in the event of a breach' - also called *stipulated damages*)[53] and a *penalty* (meaning 'a pre-agreed sum (or pre-agreed principle for defining a sum) which a contract party agrees to forfeit in case of non-fulfilment of contractual obligations'). Both are treated as a contractual penalty ('*неустойка*'), which 'secures the performance of the obligation and serves as compensation for damages caused by a breach, whereas the damages need not be proven'.[54] In addition to the amount of a contractual penalty, the creditor may claim compensation for additional losses or damage, but must prove these.[55]

In relation to this, the following example can be given:

In 2012 a Design and Build contract was signed for construction of a photovoltaic power plant. The parties agreed:

- 0.2% of the contract sum per day for the contractor's delay, up to a maximum of 25% of the contract sum; as well as
- 20% of the contract sum if the contractor failed to achieve the 95% production ratio of the photovoltaic power plant, as stipulated in the contract; but
- A cap on the aggregate maximum amount of these penalties at 30% of the contract sum.

The only restriction on the parties agreeing penalties in a commercial agreement would be if such provisions, as a result of the level of damages payable, or for any other reason, are against public policy.[56]

53 *Merriam-Webster Dictionary*, online at *www.merriam-webster.com*.
54 OCA, Article 92
55 OCA, Article 92.
56 Under the CA, Article 286, a commercial transaction is (i) any transaction concluded by a merchant, which is related to the occupation exercised by him/her; or (ii) the following transactions, regardless of the status of the parties:
1. Purchasing goods or other things for the purpose of reselling them in their original, processed or finished form;
2. Sale of one's own manufactured goods;
3. Purchasing negotiable securities for the purpose of reselling them;
4. Commercial agency and brokerage;
5. Commission, forwarding and transportation transactions;
6. Insurance transactions;
7. Banking and foreign-exchange transactions;
8. Bills of exchange, promissory notes and cheques;

***Q4.2 How are liquidated damages usually calculated? Are they a percentage of the contract sum? A lump sum? Or a fixed amount per day or per week? Is the loss likely to be suffered by the employer (main contractor under a subcontract) in the event of breach relevant in calculating the amount?***

A contractual penalty can be agreed between the parties in any of these ways. The choice adopted depends on the parties' objective. Hence, the penalty for delay usually is calculated as a percentage of the contract sum for each day of the delay, capped as a maximum number of days in delay or as a fixed amount/percentage of the contract sum. Failure to provide a facility, or plant, capable of achieving the specified performance standard is usually sanctioned by a penalty of a fixed amount.

Bulgarian law considers that a contractual penalty may have three functions: (1) to secure performance of an obligation; (2) to compensate for losses or damage caused by a breach; and (3) to punish the wrongdoer for the breach. Based on this, parties may choose exactly how contractual penalties will function in their case. If the purpose of the penalty is just to punish for breach, the actual loss incurred by the employer will not be relevant. In general, since a contractual penalty is enforceable under Bulgarian law without needing evidence of any damage (losses included), the employer's actual loss is usually irrelevant.

However, note that under specific circumstances the actual damage (losses included) may be relevant, since a court or arbitral tribunal can reduce the amount of the agreed penalty, taking this into account (see the answer to Q4.5 below).

***Q4.3 Is it usual for parties to agree a 'cap' or maximum limit on liquidated damages? How would that be calculated: as a percentage of the contract sum, or some other fixed amount? Does this vary between different industries? Please give some examples.***

Under Bulgarian law there is no need to prove the actual loss incurred if the damages payable are defined, which leads to the need for a cap or limit. Usually this is agreed as a percentage of the contract sum. Exceptionally, this cap may represent a preliminary estimate of the damages which would otherwise be payable. The law gives the parties a wide discretion to define the functions and ultimate amount of the penalty. Usually they agree on a cap based on the contract sum.

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9. Warehousing transactions;
10. Licence transactions;
11. Supervision of goods;
12. Transactions in intellectual property;
13. Hotel operations, tourism, advertising, information, entertainment, impresario and other services;
14. Purchase, construction or furnishing of corporeal immovables for the purpose of sale; and
15. Leasing.

Examples:

- In 2012 a Design and Build contract was entered into for construction of a photovoltaic power plant. The parties agreed that if the contractor failed to complete the works by the agreed completion date, the employer was entitled to a penalty in the amount of 0.4% of the contract sum per each full week of delay. This Delay Penalty was capped at 10% of the contract sum.
- In 2011 a construction contract was signed for the provision of industrial flooring, traffic signalization, painting, skirting and all associated civil works. The parties agreed a penalty in the amount of 0.2% of the contract sum per day but capped at 10% of the contract sum.

***Q4.4 Is it necessary for the employer (main contractor under a subcontract) to have suffered loss in order to claim liquidated damages? Or can these damages be claimed, delivering a profit, where no loss has in fact been suffered as a result of the breach?***

When the purpose of the penalty is just to punish for breach, the actual loss suffered by the employer is not relevant, needing to prove only the fact of the breach. The same applies in all cases of penalty claims under Bulgarian law. However, the parties are free to agree while negotiating a contract and to spell out a different regime, including the employer waiving his right to payment of a penalty if no loss has in fact incurred.

***Q4.5 Can the tribunal (judge or arbitrator) vary the amount of liquidated damages agreed in the contract? Can the tribunal refuse to enforce this provision altogether? What grounds would justify such a variation, or a refusal to enforce?***

At the request of the party affected in a contract, the court can reduce the amount of a contractual penalty. This could happen, for example, when the penalty is excessive in comparison with the actual loss suffered or if the secured obligation is partially fulfilled and this partial performance is of value to the creditor. In such cases, each party must prove the facts on which its rights or objections are based. The court usually appoints an independent expert to evaluate the actual loss and/or to establish the extent and manner of fulfilment of the obligation secured by the penalty.

However, this possibility of reducing the penalty is not available in commercial relations.[57] Here, the only consideration is whether the penalty is 'null and void', which could be the case if a court or arbitrator holds that the penalty is inconsistent with any of its three possible functions.[58]. All facts supporting such objection must be given in evidence, and will be considered on a case by case basis.

57 CA, Article 309.

58 Interpretative Decision No 1/2009 of the Bulgarian Supreme Court of Cassation. For a penalty's three possible functions, see the answer to Q4.2 above.

***Q4.6 Is the use of liquidated damages provisions specifically controlled by law?***

Bulgarian law regulates the functions of the contractual penalty, the cases when it can be reduced (in non-commercial relations only), as well as when it can be considered null and void. The law does not contain specific provisions establishing the amount of a penalty on a case by case basis. It can be summarised that the law does not control directly the penalty provisions but provides for a means of control, which is within the court's competence.

***Q4.7 Summarise the extent and nature of usage of liquidated damages provisions in construction projects. What, if any, legal issues arise?***

As a means for securing timely and due performance, these types of provisions are widely used in construction projects. The legal issues which may arise are related to the following important aspects:

- To ensure that both parties have the same understanding of the meaning of 'liquidated damages' or 'penalty' (there may be difficulties in enforcement if definitions are not clearly included in the contract)
- To define the amount of the penalty based on objective criteria, which can be readily proven
- To define a penalty in a way that is consistent with one of the three legal functions (as in the answer to Q4.2 above), since any inconsistency may cause the amount payable to be reduced below the level of the penalty (in non-business relations); or the nullity of the whole penalty clause (in business relations).

## 5 Liability before and after handover

A crucial stage of every construction project is the end of the construction period. Either a neutral person or the employer issues a certificate, or simply declares the 'handing over' of the works, when these are in accordance with the contract documents. Several legal consequences follow from this handing over or 'acceptance', the most typical being the beginning of the contractor's defects liability period, the end of the contractor's liability for damage to the works caused by unforeseen events etc.

### *5.1 Traditional procurement*

***Q5.1.1 Who issues the 'handover' certificate: the employer or a neutral contract administrator?***

In traditional procurement, handing over of the works is performed with the signing of a document (the Handover Certificate - the so-called 'Act No 15'), the contents of

which are laid down by statute.[59] The document is executed simultaneously by the employer, contractor, designer and consultant.[60]

If a party does not sign this certificate, the contractor can ask the authority that issued the construction permit to sign the certificate instead of the missing party.

***Q5.1.2 What requirements must be fulfilled for handing over to take place? Can it take place if minor parts of the works have not been completed or if there are minor defects?***

The works are to be taken over when completed in accordance with the contract, the design documents and the statutory requirements. Works involving the installation of machines or other equipment should be tested, under operating conditions, continuously for a period of 72 hours before acceptance.

***Q5.1.3 Are there any formal requirements for handing over the works? Must there be a certificate, or can it take place without formal declaration, for example simply by making use of the works?***

Taking over of the works takes place formally by signing a Handover Certificate: see the answer to Q5.1.1 above. This protocol is a document providing evidence that handover has occurred.

Bulgarian case law stipulates that handing over can also be performed impliedly, by actions by the parties which transfer possession of the works from contractor to employer, together with an express or implied statement from the employer that it accepts the works. If making use of the works itself includes the transfer of possession and the express or deemed acceptance of the works by the employer, this will qualify as handing over and will relieve the contractor from responsibility for the works.

Following the signing of the Handover Certificate, the consultant will issue a final report and ask the state acceptance committee to accept the construction works and the relevant state authority to issue a Use Permit. Before this permit has been issued, making use of the works is restricted. Therefore, in reality the parties need to sign the Handover Certificate in order to use the works.

59 Ordinance 3 (note 6), Article 7, para 3, item 15.
60 See the answer to QG.3 above.

***Q5.1.4 What are the legal consequences of handing over? Please consider (a) the end of the contractor's liability for damage to the works caused by unforeseen events for which the parties are not responsible; (b) the right of the contractor to claim payment from the employer; (c) the right of the contractor to claim back the performance bond from the employer; and (d) the beginning of the limitation period for claims for breach of contract.***

As a result of taking over of the works:

a. The risk of unforeseeable damage to the works passes from the contractor to the employer;
b. Payment for the works becomes due;
c. If the contract adopts a remeasurement basis, payment being based on calculating the quantity of work and multiplying by unit prices or rates, the final account is calculated at handover of the works. Also, unless otherwise agreed in the contract, any change in the prices of materials or labour costs will be reflected in the calculation of the final account.
d. Unless otherwise agreed, any form of security provided by the contractor for the execution of the works (bonds, retention money etc) should be returned to the contractor; and
e. The employer's rights in relation to defects, and the limitation period in relation to these rights, start running;

At 'taking over', the employer must record all known defects and make any claim that the contract has not been properly performed, otherwise its rights in respect of such defects will be lost. Claims for latent defects, or defects that become obvious at a later stage, can be made within a five-year limitation period following handover of the works.

***Q5.1.5(a) What legal remedies does the employer have available against the contractor if defects later come to light? Damages, specific performance, abatement (reduction of the price) etc?***

Subject to any other specific contractual provisions, if the works have been improperly performed or are defective, the employer is entitled to request:

- The contractor to rectify the works at its own cost
- The contractor to reimburse the cost of repairing or replacing defective work
- The contract price to be decreased accordingly.[61]

The employer may choose one of these options.

If the defect is such that the employer cannot make use of the works, the employer is ordinarily entitled to terminate the contract.

61 OCA, Article 265.

Apart from the remedies for latent defects, which can be claimed within the five-year limitation period following handing over of the works, the SDA provides minimum warranty periods for construction works. These vary from a ten-year warranty period for structural defects to a five-year warranty period for machines and equipment etc. The employer is entitled to claim against the contractor either based on liability for defects under the OCA or under the SDA warranty.

Bulgarian case law holds that if a defect qualifies as a latent defect, and if it is covered by the contractor's warranty, the employer can choose which way to pursue its claim against the contractor.

***Q5.1.5(b) Is the employer entitled to withhold 'retention money' until the end of a 'defects liability period'? If so, can the contractor submit a bond in exchange for the retention money being paid out to him?***

If so agreed in the contract, the employer can withhold retention money, or a bank guarantee, until a later stage, eg until expiry of the defects liability period (or part of the period).

Contractors are obliged by statute to maintain insurance, which covers damage occurring to construction works completed within the term of the insurance or completed within the term until the so called retroactive date (which could go back five years). An employer can claim under the insurance for the costs incurred in repairing or replacing defective work.

***Q5.1.5(c) May the employer engage a third party to remedy defects, or must the employer turn first to the contractor? If the employer engages a third party, may he claim the cost from the original contractor?***

The employer may decide between these remedies: see the answer to Q5.1.5(a). If the employer elects to claim on the contractor's warranty for rectification work, it must first notify the contractor of the defect and give the contractor the opportunity to remedy the defect, before attempting to do so itself.

## *5.2 Design and build*

***Q5.2.1 Are any of the issues in Section 5.1 treated differently under a design and build contract? In particular, who is responsible for determining the date of the handing over: the employer or a neutral contract administrator?***

These issues are not treated differently in a design and build contract as compared to traditional procurement. Note that in both cases there is, ordinarily, an independent supervisor who is a signatory to the Handover Document.

### *5.3 BOT/DBFMO*

***Q5.3 Are any of the issues in section 5.1 treated differently under a BOT/DBFMO contract?***

In a BOT project, such as a concession, the contractor will hand over the works to the concessionaire, acting as a representative of the owner. In comparison to traditional procurement, the risks of both unforeseeable damage and delayed implementation remain with the concessionaire (and not the owner) after handover of the works.

## 6 Payment

### *6.1 Determination of the amount to be paid to the contractor (the contract sum)*

The contract sum can usually be determined by a range of methods. The amount may be fixed when the contract is entered into, or later. Not doing so at all may not mean that the contract is void: if the parties do not in fact reach agreement, determination may be made by a court or arbitral tribunal.

***Q6.1.1 If the parties agree to determine the amount after the contract has been entered into, must they determine at least one criterion against which the determination is to be made, or may they give themselves total freedom for the future?***

Under Bulgarian law, construction contracts, as a type of works contract, are considered contracts for a pecuniary return, so remuneration payable to the contractor is considered one of the contract's essential elements. However, the parties to a construction contract are free to determine what type of remuneration will be payable. Most often, the remuneration is in the form of payment of a certain amount to the contractor but it may take other forms: for example, the contractor may acquire property rights *in rem* to part of the construction.[62]

A construction contract is normally in writing, specifying the amount to be paid to the contractor and the terms and conditions for payment. However, under Bulgarian law the contract does not need to be in writing to be valid: there still will be a contract binding the parties, provided that they have agreed on its essential contents: that defined construction works will be performed in consideration for remuneration. On entering into the contract, the parties are not obliged to fix the amount owed to the contractor, nor even to specify the criteria for its determination (at that time, nor even later). If the parties fail to agree on the amount due, or to fix the criteria for determination what the contract sum will be, they may ask a third party (an independent expert or a commission of such experts) appointed by them, or the ordinary courts, to resolve the issue.

62 Construction contracts under which the contractor acquires part of the construction in consideration of performance of construction work have many special features, beyond the scope of this study.

***Q6.1.2 If the contract sum is fixed in advance (ie when the contract is entered into), it can be a global figure (ie a 'lump sum') and will then usually be not subject to change; or sums may be fixed for each unit comprised in the work (for example, building a wall or a road at a certain amount per metre: a 'remeasurement basis'). If the complete project is broken down into activities (for example, an excavation during which the contractor will first meet soft ground and then rock), many types of price may be agreed, one for each aspect of the work. Does the law control the process of fixing how what is owed is arrived at?***

Bulgarian law does not control the process of fixing what is owed. Parties to the construction contract are free to determine the amount owed to the contractor, as well as the terms and conditions for its payment, including for how the amount may be fixed.

The amount to be paid to the contractor may be determined in different ways and combinations, such as:

- As a lump sum (fixed price) for the whole project, for separate parts of the project (but note that, under Bulgarian law, even in a lump sum situation the amount owed may change if the price of materials or labour costs change in the process of construction)[63]
- On a remeasurement basis (where rates are agreed and applied to the actual quantities constructed)
- On a cost reimbursable basis (where a percentage fee is added to the actual cost of the work).

***Q6.1.3 May parties provide that the amount to be paid by the employer to the contractor will be determined by an arbitrator, who will decide this in the light of the circumstances of the case?***

Under Bulgarian law, there is no legal obstacle to the parties appointing a third party (an independent arbitrator or an expert, or commission of such experts) to determine the amount owed to the contractor.

The parties to a construction contract are usually commercial entities and the contract is, therefore, considered a commercial transaction. If the parties agree that a third party shall determine particular provisions of the contract, such a determination will become binding upon the parties only if the third party has acted in accordance with the objectives of the contract, the rest of its contents and commercial customs.[64] Should the third party fail to determine the amount due, or do so without respecting these statutory principles, either party may challenge this in court.

63 OCA, Article 266, para 2.
64 CA, Article 299.

***Q6.1.4 In determining the contract sum, may the parties expressly refer, in the contract itself or in a subsequent agreement, to a schedule of rates or to the custom of the place?***

As discussed in Q6.1.2 above, the parties are absolutely free to determine the amount payable to the contractor, including by referring to a schedule of rates or to the custom of the place. In view of the fact that construction contracts are normally commercial transactions, commercial customs in determining the price will be commonly used, and where commercial customs vary, the customs of the place of performance will apply.

***Q6.1.5 If the parties have not determined the amount to be paid to the contractor, nor any method of determining it, and if there is no reference to rates or custom, is the amount determined by a judge (at the request of one or both parties) - including if an arbitrator appointed by the parties cannot decide or refuse to do so? If so, what criteria will the judge use to set the amount?***

If the parties have not determined the amount payable to the contractor and if they, or an arbitrator appointed by the them, fail to decide on the amount due, either party may bring the matter to the court. The same applies if the parties agree to supplement the contract on the occurrence of certain circumstances, then failing to reach agreement when those circumstances occur.[65] The court will take into account the objectives of the contract, the rest of its contents and commercial customs.

The court may itself determine the amount owed to the contractor; or it may, at the parties' request or *ex officio*, appoint an expert to define the actual quantities constructed and the actual cost of the work.

## *6.2 Payment of the contract sum*

***Q6.2.1 Payment of the final contract sum is usually due when the work is completed, at the time of handover. Does this final payment become due only after the employer (or someone acting on his behalf) checks that the completed project is in conformity with the plans and specifications?***

The parties to a construction contract are free to agree a schedule of payment, including that final payment is due prior to acceptance of the work or even where the works are not compliant with the plans and specifications.

Even though the parties may agree that acceptance of the works is not a precondition for the final payment to become due, the law imposes an obligation on the employer to pay for any works which have been accepted.[66]

65 CA, Article 300.
66 OCA, Article 264, para 2.

The common practice is that the parties record handover of the construction works by together signing a written protocol: see the answer to Q5.1.1. However, the works will be deemed accepted even if the parties have not signed this document, provided that the employer is in occupation and/or use of the project.

The conformity of construction works with the plans and specifications approved by the employer, the compliance of such works with the statutory construction provisions and the mandatory instructions given by the construction supervision body: all these are also pre-conditions for acceptance of the work.[67]

***Q6.2.2 May the parties define milestones in the project, the achievement of each triggering part of the total payment?***

Yes: the parties are free to define milestones the achievement of which will trigger payment of part of the contract sum. No express requirements regarding the possible milestones are provided for by the general law.

***Q6.2.3 Is it usual for the contractor to have security in the event the employer's default, eg rights over the employer's assets (a mortgage or charge) or third party guarantee (eg a third party bond from a bank)?***

The obligation of the employer to pay the contract sum may be secured by a mortgage, a pledge, or by another form of security (such as a personal warranty or bank guarantee). The security may be provided by the employer itself or by a third party. If the amount of the contract sum is not determined, some forms of security may be unavailable, such as a mortgage, where the obligations to be secured have to be clearly specified.

## 7 Delay and disruption

### *7.1 Traditional procurement*

In a traditional construction contract, the contractor undertakes construction work according to a design provided by the employer. The contractor is responsible for performing the work of the necessary quality and within the agreed time, in compliance with the employer's design.

Instead, in the construction contract the contractor may undertake both to design and perform construction work. In this case, the contractor is responsible for the suitability of the design, as well the quality of the work. If the design developed is unsuitable, it is the contractor who bears the risk of the need to rectify and of any resulting delays.

67 SDA, Article 169.

***Q7.1.1 What is the effect of a provision that a request for an extension of time by the contractor will be considered only if made in writing and at least N days before the applicable completion date?***

Bulgarian law contains no express rules for extensions of time under a construction contract. There is therefore no prescribed form which a request for an extension of time must take, nor a deadline within which it must be made. So the contractual provisions prevail: if they provide that a request for an extension of time must be made by the contractor in a certain form (eg in writing) and within a deadline, then the parties must comply with these conditions. The same rule applies to both traditional construction contracts and design and build contracts.

***Q7.1.2 May the time within which the works must be completed and accepted be extended by the employer, either on his own motion or in response to a request by the contractor?***

The answer to this question is closely connected to the answer to Q7.1.1, as extensions of time are subject to whatever rules the parties' contract contains. Depending on which party requests an extension of the time and whether one of the parties has acted culpably, there are several possible scenarios:

- The *employer* may request an extension of time under the contract,
- This will entitle the contractor (unless in default) to compensation for the extra costs of equipment and of the workforce.
- The *contractor* may request an extension of time under the contract.
  If the performance of the contract depends on the cooperation of the employer and the employer has failed to provide it, the latter is in default ('*mora creditoris*'). In such a case, the time may be extended for the period of delay.[68] If the employer refuses to accept performance or to provide the necessary assistance, the contractor may terminate the contract and claim compensation for the expenses necessarily incurred as a result of the employer's delay.[69]

Under a design and build contract, if the extension of time is due to defects in the design and as a result a variation is necessary, the contractor is not entitled to compensation.

68 By argument from the OCA, Articles 83, 95 and 98.
69 OCA, Article 98.

***Q7.1.3 Is the contractor entitled to an extension of time if the works cannot be completed within the agreed time due to* force majeure*, or to circumstances for which the employer is responsible, or to changes made by (or on behalf of) the employer in the specification or in the execution of the works?***

According to the general rules of contract law, a debtor is not responsible if s/he has not culpably caused the impossibility of performance.[70] The contractor is usually in law a merchant; and the debtor in a commercial contract is not responsible for non-performance caused by *force majeure*.[71]

When delay has been caused by the employer, time should be extended for the period of the employer's delay. As the contractor should perform the works in accordance with the design, if the design has been amended by or for the employer, time should be extended for the period necessary for the elaboration and approval of the amendments under the relevant administrative procedure.[72]

***Q7.1.4 Does the employer have the right to suspend or terminate the execution of the whole or any part of the works?***

The employer is entitled to terminate the contract when the contractor:

i. Is not able to perform the construction within the agreed time period(s), or
ii. Will not perform the construction in the agreed or appropriate manner.[73]

In addition, the employer is also entitled to claim compensation under the general law.[74]

Bulgarian law provides a special case where an employer may terminate a works contract in the course of its performance without the contractor being at fault. The employer has the right to do so if there are reasonable grounds for termination of the contractual relationship. 'Reasonable grounds' mean circumstances outside the legal relationship between the employer and the contractor but which are related to the works contract and give the employer a reason for discontinuing the contractual relationship. In that case the employer must pay the contractor remuneration for the work done up to that point and the profit that he would have received from completing the project.[75]

The contractor is obliged to perform the work in in such a way that it is fit for its ordinary purpose or for the specific purpose of the contract.[76] When there is deviation from the approved design, the performed work may not only be unfit for its ordinary

70 OCA, Article 81, para 1.
71 CA, Article 306, para 1.
72 SDA, Article 154.
73 OCA, Article 262, para 2.
74 OCA, Article 262, para 2.
75 OCA, Article 268.
76 OCA, Article 261.

purpose/the specific purpose of the contract, but may also be considered illegal construction within the SDA.[77]

For construction to be labelled as illegal triggers adverse consequences for the employer and for the contractor:

i. Construction already complete may have to be demolished; and
ii. Participants in the project, including the employer, may be subject to fines (administrative liability).

A work of construction which does not conform to construction standards could also constitute a threat to the life and health of people and to their property, ie could potentially result in liability claims against the employer for harm caused. To mitigate these risks, the employer may suspend work on the project (if not already suspended by order of the relevant authorities), and require the contractor to execute the project in compliance with applicable requirements.

Construction work could also be suspended by the project's participants following a specific procedure under Ordinance 3. The parties sign the so-called 'Act establishing the state of construction'.[78] This document will be signed in case of:

i. Requests for amendments in the design;
ii. Breach of a contractual obligation by one of the parties;
iii. Delay in the supply of machinery and equipment;
iv. Unfavourable geological conditions;
v. Change of one of the participants in the construction - employer, contractor or consultant;
vi. Suspension of construction, under the SDA or for any other reason.[79]

Ordinance 3 lays down what the 'Act establishing the state of construction' must contain.[80] After the reasons for suspending construction are no longer present, construction

77 SDA, Article 224, para 1, item 2: when the construction (i) substantially deviates from the approved project, or (ii) is executed with construction materials that do not ensure compliance with the basic requirements for construction works, or (iii) is in violation of the construction rules, then the construction is illegal if the described defects reflect the constructive safety and safe usage of the construction and the construction cannot be aligned in accordance with the requirements of the SDA.

78 A template for a document establishing the state of progress of the project is provided as Appendix 10 to Ordinance 3 (note 6).

79 Ordinance 3 (note 6), Article 7, para 3, item 10.

80 Ordinance 3 (note 6), Article 7, para 3, item 10. The 'Act' is to contain exact details on: the state of construction; the types of construction and assembly work carried out; the materials, inventory, equipment, etc supplied; the works to be removed; the necessary work to ensure the strength and spatial stability neded for preservation of the construction; necessary additional projects, expertise etc and the deadlines for their submission; the necessary materials and facilities; the necessary changes in the supply of machinery and facilities, as well as other requirements and measures for suspending construction.

work may continue after signing of another document: the 'Act establishing the state of construction on the continuation of construction after a suspension'[81]

***Q7.1.5 During a suspension, is the contractor required to (a) take appropriate measures to prevent and limit any damage which might occur to the works; and (b) refrain from doing anything which might result in damage to the works or which might impede the later resumption of work?***

Such obligations are imposed on the contractor under the special rules regulating the obligations of participants in construction.[82] Liability is imposed on the contractor for all damage or lost profits caused by its culpable actions or omissions.[83] During a suspension of construction, the contractor's responsibilities continue, since the construction site remains in the contractor's control. It is the contractor which bears the duty of protecting the works.

***Q7.1.6 If the suspension of work continues for more than N days or weeks, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?***

Bulgarian law does not provide an express rule entitling the contractor to leave the works in their unfinished state. The general rules for contract termination will apply.[84]

If the works have been suspended for a reason for which the employer is responsible, the contractor is entitled to terminate the contract with a termination notice - first giving the employer a suitable period within which to remove the obstacle to performance of the construction works, with a warning that after expiry of the notice it will consider the contract terminated and will leave the construction site.[85]

The contract may be terminated without giving a termination notice if:

i. the performance has become impossible, in whole or in part;
ii. Performance has become useless to a creditor under a contract because of the debtor's delay; or
iii. The obligation had by its nature to be performed within the agreed time period.[86]

There is a five-year limitation period for the right to terminate the contract.[87]

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81 A template for the 'Act establishing the state of construction on the continuation of construction after a suspension' is provided as Appendix 11 to Ordinance 3 (note 6).
82 SDA, Article 163, para 2, item 1, in conjunction with Article 169, paras 1 and 3.
83 SDA, Article 163, para 3.
84 OCA, Articles 87-89.
85 Termination: OCA, Article 87, para 1.
86 OCA, Article 87, para 2.
87 OCA, Article 87, para 5

If the obligation of one of the parties comes to an end because performance has become impossible, the contract is terminated by operation of law. Where the impossibility is only partial, the other party may request the court to modify its obligations in order to require only partial performance, or to terminate the contract completely, if this party has no substantial interest in partial performance.[88]

***Q7.1.7 On what basis is work done by the contractor up to the date of the suspension remunerated (if not already)?***

There is no mandatory regulation on this topic.

Although the OCA provides for the entitlement of the contractor to receive remuneration for accepted works,[89] including taking into account changes in the price of materials or the cost of labour;[90] but in case of impossibility of performance due to a reason for which none of the parties is responsible, the contractor is not entitled to receive any remuneration.[91] However, if part of the work has been performed and could be useful to the employer, the contractor is entitled to receive the relevant part of the agreed remuneration. If the performance of the work has become impossible, in whole or in part, due to unfitness/defects of the material or the design provided by the employer, and if the contractor has duly notified the employer, the contractor is entitled to full remuneration.[92] If the contract is terminated due to the death of the contractor or his inability to perform the work, the employer must pay for the work already performed and for all already incorporated materials, according to the agreed remuneration.[93]

***Q7.1.8 If the execution of the works has been delayed for an uninterrupted period of more than N days or weeks, by reason of circumstances which are at the employer's risk, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?***

See the answer to Q7.1.6 above.

## *7.2 Design and build*

In design and build contracts, the contractor is responsible not only for the quality of performance of the construction, but also for the suitability of the design. The answers to the questions in this section are therefore generally similar to the answers given in Section 7.1 above for contracts where the employer provides the design. However, the contractor bears the risk of delay in a design and build contract, as it is responsible for preparation of the design. This will be the case when:

88 OCA, Article 89.
89 OCA, Article 266.
90 OCA, Article 266, para 2.
91 OCA, Article 267, para 1.
92 OCA, Article 267, para 2.
93 OCA, Article 269, para 2.

i. There is delay in the competent authority approving the design because it contains defects; or
ii. During construction it becomes clear that the design does not meet construction standards.

***Q7.2.1 Would the answers to any of the questions above be different in the case of design and build?***

See the answer to Q7.1.4 above.

***Q7.2.2 During a suspension, is the contractor required to (a) take appropriate measures to prevent and limit any damage which might occur to the works, and (b) refrain from doing anything which might result in damage to the works or which impede the later resumption of work?***

See the answer to Q7.1.5 above.

***Q7.2.3 Is the contractor entitled to compensation and/or an extension of time at a result of a suspension?***

See the answer to Q7.1.2 above. Note that, because the contractor is responsible for the design of the project, s/he is not entitled to compensation if completion is delayed due to defects in the design and the need to amend or supplement the design.

***Q7.2.4 On what basis is work done by the contractor up to the date of the suspension remunerated (if not already)?***

See the answer to Q7.1.7 above.

***Q7.2.5 If the suspension of work continues for more than N days or weeks, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?***

See the answer to Q7.1.6 above.

***Q7.2.6 If the execution of the works has been delayed for an uninterrupted period of time than N days or weeks, by reason of circumstances which are at the employer's risk, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?***

See the answer to Q7.1.6 above.

## *7.3 BOT/DBFMO and PPP*

### *Q7.3.1 Would the answers to any of the questions above be different in the case of a BOT/DBFMO contract?*

An example of a BOT/DBFMO contract under Bulgarian law would be a concession contract including construction works. The Bulgarian Concessions Act (CoA) follows the general EU legal framework in this area.[94] There are however some specific rules under Bulgarian law. The general principle of Bulgarian concession law is that the concessionaire bears all the risks. The design and execution of construction (if included in the concession contract) and construction operations are the responsibility of the concessionaire; when carrying out the contract, the concessionaire has the rights of the employer within the meaning of the SDA.

An extension of time or a suspension of construction is normally available under a concession contract only if these possibilities are included in the contract itself, or where the contract provides for its own amendment. In the absence of such provisions, amendments to a concession contract are possible under specific conditions regulated in detail by the CoA.[95]

The CoA contains rules for terminating a concession contract, as well as providing for the possibility of doing so under conditions laid down in the contract. The specific situations for terminating a concession contract are: (i) when objective circumstances justify this outcome; (ii) when no agreement can be reached on amending or adding to the concession contract; or (iii) where there are other grounds, provided for by law or in

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94 The CoA: note 20.

95 Under the CoA, Article 70, a concession contract may be amended and/or supplemented for unforeseen circumstances - adding additional construction works not included in the contract, altering the type or scope of construction works in the contract, or adding extra services of public interest - under the following conditions:
1. The additional works or additional services cannot be technically or economically separated from the main works or services which are the subject of the concession agreement without significant dificulties, or they can be separated but are fundamental for the implementation of the concession agreement; and
2. The total cost of the additional works or the additional services is not more than 50% of the cost of works and services under the agreement; or
3. The total cost of the altered works does not decrease or exceed more than 50% of the cost of the works listed in the agreement.
Beyond the cases described above, the concession agreement may be amended or supplemented only for the purpose of recovering the concession's economic balance, as contained in the concession agreement, in the following cases:
1. A supervening threat to national security and defence; to the environment, to human health; to protected areas, zones and sites and to public policy;
2. Partial loss of the subject-matter of the concession, or the objective impossibility of using it as originally intended;
3. Change of law (legislation); or
4. Any other cases specified by law.

the concession contract. The CoA provides both for unilateral and agreed termination of the concession contract, listing the conditions under which this may occur.[96]

The CoA also provides the contracting authority with the possibility of terminating the concession contract without notice, where the concessionaire fails to fulfil a basic obligation determined by the decision of the contracting authority for opening of the concession procedure. If the contract includes obligations to construct and time-limits for this and the concessionaire does not achieve the construction objectives in time, this would constitute a reason for terminating the contract, unless the breach has not been culpably caused by the concessionaire and there are grounds for amending the contract in order to extend time.

Where there has been a breach of the concession contract, the innocent party is entitled to terminate the contract after giving the other party notice, including an appropriate time to remedy the breach and a warning that if the breach is not remedied by the end of the notice period it will consider the contract terminated. The notice must be in writing and must comply with the procedure and time periods laid down in the relevant contract.

The CoA contains special rules on the payment of compensation to the concessionaire where the concession contract is terminated early, whether the contracting authority or concessionaire is responsible.[97] The existence of these rules makes sense, given the duration of the concession contract and the usually heavy investment made by the concessionaire. In order to prevent early termination of the concession contract, the law introduces the requirement that, regardless of the right to compensation just described, the concession contract must contain liquidated damages clauses applicable on early termination.[98]

## 8 Damages

Damages (financial compensation) can be claimed by the aggrieved party if the other party is in breach of his obligations under his contract or in the tort of negligence (the law of delict). Generally, the party in breach of his obligations has to compensate for the loss, but there are limitations to this. Thus, it is important to know how the obligation to pay damages is limited by law (statute and case law), by standard form contracts and by bespoke contracts. Also relevant is the extent to which the parties can exclude or limit their liability through express provisions in the contract.

For an overview of the obligations of employers and contractors see Sections 1 and 2; for an overview of liquidated damages, see Section 4.

96 CoA, Article 75, para 1, item 1.
97 CoA, Article 80.
98 CoA, Article 80, para 8.

## *8.1 Traditional procurement*

***Q8.1.1 What are the rules, and where are they found, on damages for breach of contract? In what situations is the contractual liability of (a) the employer; (b) the contractor; and (c) the architect or engineer relevant in the field of construction?***

The rules on damages for breach of contract are generally laid down in the OCA. Certain specific provisions are applicable in commercial relations, regulated in the CA.

In case of breach of contract, under Bulgarian law the innocent party is entitled to claim:

i. Specific performance (of whatever the contract requires), plus damages for delay; or
ii. Damages, instead of performance.[99]

Generally, damages for contractual liability cover the losses actually incurred and loss of future profit, so far as these are direct and immediate consequences of the breach and could have been foreseen when the contract was entered into. However, where a contracting party is in breach and has acted in bad faith, it owes damages for all direct and immediate losses suffered by the other party.[100]

In addition to the general rules on contractual liability, there are certain specific provisions applicable to construction contracts and the relevant liability of the persons involved in the construction process:

***(a) Liability of the employer***

Under the OCA: as a rule, the employer is liable to pay the contract price.[101]

Under the SDA: the employer has special obligations in relation to construction works (see the answer to Q1.1 above) and thus is liable for any breach of these obligations.

***(b) Liability of the contractor***

Under the OCA: if it becomes evident that the contractor will not be able to perform the assigned work in good time, or that the contractor will not perform the work in the agreed manner, the employer is entitled to terminate the contract and claim damages under the general rules.[102]

The contractor must immediately notify the employer if the design provided or materials supplied are unfit for the due performance of the work, and must ask for necessary changes in the design, or for the supply of appropriate materials: see the answer to

99 Article 79, Para 1 of the *OCA*
100 Article 82 of the *OCA*
101 Article 258 and 266 of the *OCA*
102 OCA, Article 262, para 2.

Q2.1.4 above. If the contractor fails to notify, it will be liable in damages to the employer for the losses which result.[103]

Under the SDA, the contractor is responsible for a number of actions related to construction works and is thus liable for any breach of these.[104]

***(c) Liability of the architect or engineer***

Under the OCA, architects and engineers are involved in construction, their contracts being 'works contracts' regulated by this statute. The relevant provisions of the OCA, discussed under point (b) above in relation to the contractor, apply equally to architects and engineers.

Under the SDA, architects and engineers have special obligations relating to design and design supervision and are liable for any breach of these.

***Q8.1.2 What are the rules, and where are they found, on damages in the tort of negligence? In what construction situations may tortious (delictual) liability be relevant?***

The general rules on tort liability are laid down in the OCA (Articles 45-54).

Every person must remedy the harm, which they have wrongfully caused to another person. In all cases of tort, wrongfulness is presumed until its absence is proved.[105]

Damages in tort are due for all harm and forms of loss which are a direct and immediate consequence of the tortious act or omission, whether the defendant has acted with wilful misconduct, gross negligence or 'simple' negligence.[106]

Tort liability in the field of construction typically becomes relevant when a person who suffers harm is not in a contractual relationship with the relevant construction party, who is responsible for causing the harm or treated as so responsible (for example, the owner of the plot adjacent to a construction site may look to the construction employer in tort for harm caused to buildings by construction work nearby).

There are special provisions concerning situations where someone commissions work from another. A person who commissions another to perform work is be liable for the damage caused by, or in connection with, the performance of the work.[107] Similarly, a construction company (contractor) is liable for the tortious acts or omissions of its employees or subcontractors as part of a construction project. In such a case, the person

103 OCA, Article 260.
104 Please see note 24.
105 OCA, Article 45.
106 OCA, Article 51.
107 OCA, Article 49.

who is liable for the wrongful actions of another may look to that other party to indemnify him for liability to a third party.[108]

***Q8.1.3 What principles limit the liability of the party in breach? For example, ideas of compensation, causation, foreseeability, the duty to mitigate losses, the need to give the contractor a (second) chance to rectify defects, or liability requiring proof of fault (rather than being strict).***

*Causation*. A successful claim in either contract or tort requires proof of a causal link between the wrongful act and the damage.

*Foreseeability*. In case of contractual liability, the party in breach owes compensation for all direct and immediate damage or loss, which the parties could reasonably have been foreseen when the obligation was taken on (the time of formation of the contract). Foreseeability concerns only whether the harm could reasonably have been expected to occur, not its quantification as an award of damages. However, a contracting party in breach who has acted in bad faith will be liable for all direct and immediate damage or loss resulting from the breach.

Foreseeability is not a test applied to claims in tort, where the wrongdoer owes damages for all harm directly and immediately caused.

*Contribution of the other party* Where a breach of contract is due to circumstances for which the other party (claimant or plaintiff) is also responsible, the court may reduce the damages payable, or even exempt the defendant entirely from liability.[109] Similarly in tort: if the person suffering harm has contributed to its occurrence, the damages awarded may be reduced.[110]

*Duty to mitigate losses*. In contract, one party will not owe damages for losses which could have been avoided with the due diligence of the other party.[111]

***Q8.1.4. The assessment of damages in the event of defects: can the employer claim the full cost of rectifying defects, or are damages limited to the 'loss of value' to the project? Can the employer claim any damages if the cost of rectifying the defects is not proportionate and if the loss of value is zero?***

Rules regarding defects, in particular defects under works contracts (including construction contracts), are laid down in the OCA and the SDA.

108 OCA, Article 54.
109 OCA, Article 83, para 1
110 OCA, Article 51, para 2.
111 OCA, Article 83, para 2.

As a general rule, if during the performance of the work, the contractor has deviated from the order or if the work done has defects, then the employer has a range of possible claims, described in the answer to Q5.1.5(a) above.

In addition, the employer is entitled to compensation for any damage and/or loss of profit which s/he has suffered as a result of the breach of the contractor's obligation to deliver the work as agreed (ie without defects or deviations), under the general rules described in the answer to Q8.1.1 above.

The employer is entitled to claim the recovery of all expenses needed for rectification of the defects, but must prove their exact amount. The employer is entitled to claim to have the work rectified (or the cost of doing so), even if the loss of value is zero. As far as a claim for damages under the general law is concerned, the employer has the burden of proving the damage and/or loss which is a direct consequence of the breach.

***Q8.1.5 For how long does the contractor or employer retain liability for a breach of contract or in tort? Where are these limitation periods laid down?***

The main piece of legislation governing limitation periods in contract and tort is the OCA.

The general limitation period is five years, but the law may provide a special limitation period, in which case this special period applies.[112] A special three-year limitation period applies to:

i. Claims related to payment of an employee by an employer (in the labour law sense), for which no other limitation period is provided;
ii. Claims in damages (including contractual penalties) deriving from non-performance of a contract; and
iii. Claims related to rent, interest and other periodical payments.[113]

Rules define the date on which the limitation period starts running: the day on which the right to sue comes into existence. If, under a contract, the right to make a claim depends on serving a notice or making a formal request, the limitation period commences as of the day when the obligation was taken on. In case of claims for damages as a penalty deriving from delayed performance, the limitation period commences from the last day when the penalty is due.

For construction contracts, there is also a five-year period for making a claim where the contractor has deviated from the work as specified or work completed is defective.

112 Article 110 of the *OCA*
113 OCA, Article 111.

The limitation period in tort is five years, commencing on the later of (a) suffering the harm; or (b) discovering the identity of the wrongdoer.[114]

***Q8.1.6 If a defect was caused by the negligence of both the contractor and the architect who supervised the works, may the employer claim all the damages from either party? Or does proportional liability apply, capping the liability of each of them at the level of their relevant contribution to causing the loss?***

In the construction process, joint and several liability applies between the contractor and the consultant who supervises the construction works.[115]

***Q8.1.7 When would the negligence of the architect (if this results in a defect) be considered as 'negligence of the employer', reducing the contractor's liability? When either (a) the architect negligently issues defective plans to the contractor; or (b) the architect is negligent in supervising the contractor's work?***

Under a traditional model of procurement, responsibility for design lies with the employer and any negligence of the architect will be considered as negligence of the employer. However, the contractor has a duty to warn the employer if the design is unfit or defective; if the contractor fails to do, its own liability will not be reduced: see the answer to Q2.1.4 above.

The architect is obliged to exercise designer's supervision and thus liable for negligently supervising the contractor's work.

Construction supervision during the construction process is exercised by a consultant.[116] The consultant and the contractor are jointly and severally liable for damage or losses caused by non-compliance with technical rules, legislation or the approved design for the project.[117]

114 OCA, Articles 110, 111 and 114.
115 SDA, Article 168, para 7.
116 Please see *QG.3*
117 SDA, Article 168, para 7.

***Q8.1.8 Is it possible to limit contractual liability? What limitations or exclusions are usually agreed and are they enforceable when included in standard form contracts? How about (a) financial caps? (b) exclusions of 'consequential damages' (as opposed to direct damages)? (c) limitations of liability to the proportion of loss caused by the party in breach (a 'net contribution clause')? or (d) exclusions of liability for negligence?***

Clauses within a contract which limit liability are in general valid, unless the parties have agreed in advance to reduce or exclude a party's liability for gross negligence or wilful misconduct. Such an agreement would be null and void.[118]

a. *Financial caps*. Financial caps may be agreed for failure to perform the contract or a part of it or for a specific breach indicated in the contract: see the answers to Q4.1ff. Such compensation, subject to a financial cap, could be labelled as liquidated damages (or 'a contractual penalty'). Thus, in case of agreed liquidated damages, the person who has suffered a loss may claim the amount of the agreed liquidated damages without the need to prove the amount of the loss. However, if the loss suffered exceeds the amount of the agreed financial cap, the party may still claim the difference under the general law, provided the amount of the loss can be proved.
b. *Excluding 'consequential losses' (as opposed to direct losses)*. Bulgarian legal theory and court practice accepts that if the loss is not direct damage or loss of profit (ie is consequential damage), there is no liability (or the liability could be limited). However, if such damage/loss of profit is direct, liability could not be limited in case of gross negligence or wilful misconduct.
c. *Limitations of liability to the proportion of loss caused by the party in breach ('net contribution clauses').* Net contribution clauses are generally valid between parties who have undertaken the same obligation.

***Q8.1.9 What liabilities, if any, are usually unlimited?***

The general rule is that liabilities are unlimited. Parties may limit their liability by contract, within the scope allowed by law; the principles of good faith, as well as the doctrine of abuse of rights, may also be relevant in this connection. The parties may also widen their liability by contract, including for situations of *force majeure*. For forms of limitations of liability common between construction parties, see the answers to Q4.1ff.

***Q8.1.10 Can the contractor claim damages from the employer for losses caused by force majeure?***

Before handing over the works to the employer, the contractor bears the risk of unforeseen events, including those which have caused damage to the works, so is not entitled to compensation.

118 OCA, Article 94.

In respect of goods and materials not yet incorporated in the works, the risk is on the party that has supplied them.

***Q8.1.11 Can the employer claim damages for building defects from the contractor even if he has no intention of rectifying the defects?***

In case of breach of contract (including performing work with deficiencies/defects), the employer may claim damages instead of performance. In this case, the contractor is entitled to propose performance of the original obligation (including rectifying the defects at his account) plus damages for delay, provided that the employer is still interested in specific performance.[119]

The contractor is liable for damages and loss of profit which are caused by his actions or omissions[120]. Since the relations between the employer and the contractor are based on a contract, the employer would be entitled to claim damages under the general rules for contractual liability.

***Q8.1.12 In tort, can the building owner claim damages from the contractor for the cost of rectifying defects?***

Bulgarian legislation provides for minimum warranty periods for construction and assembly works, equipment and construction objects during which the contractor remains responsible for the works executed by him, including for repair of the defects in these works. The minimum warranty periods vary depending on the type of work and vary between ten years for the foundations and structural works (decennial liability) and three years for works related to waterproofing, heat-insulating, soundproofing and anticorrosive works of buildings and facilities in aggressive environment (the shortest term is one year for maintenance works on streets and roads of lower category). The most common warranty term is five years.

Any building owner (not only one who has contractual relations with the contractor) can claim under the warranty Bulgarian court practice classifies this liability as 'guarantee' liability, which bears the characteristics of tort liability.

## *8.2 Design and build*

***Q8.2.1 Would the answers to any of the questions above about liability be different in the case of a design and build contract?***

No: since a design and build contract is a type of works contract, the general rules referred to above will apply equally.

119 OCA, Article 79.
120 SDA, Article 163, para 3.

### 8.3 BOT/DBFMO

***Q8.3.1 Would the answers to any of the questions above about liability be different in the case of a BOT/DBFMO contract?***

Specific provisions concerning obligations, liability and compensation may be found in the CoA. The PPPA also provides rules which may be applicable in such model contracts, such as principles of risk distribution, liability and compensation between the public and private partners.

General rules regarding liability may also be applicable, depending on the case.

## 9 Subcontracting

### 9.1 Right to subcontract

***Q9.1.1 A subcontractor is a person or a company which has a contract (as an 'independent contractor' and not an employee) with a contractor (usually designated as the 'main' or 'prime' contractor) to provide some portion of the work or services under the construction contract. Subcontracting is usually seen as a right of the main contractor; but is it permitted for the performance of construction works in all circumstances?***

Unless the contract provides otherwise, the main contractor can subcontract part or all of the works, or services under the construction contract.

If the construction contract is awarded via public procurement, the main contractor will have to list in its tender the subcontractors it intends to use for the works or services. The subcontractors must meet the qualification criteria for taking part in public procurement procedures.

In a public procurement procedure, the contractor may be required to subcontract a minimum part of the works, but not more than 30% of the value of the contract. In this case, the subcontractors are to be selected by virtue of a public procurement procedure.

***Q9.1.2 May a subcontractor perform all of the work the main contractor has agreed to perform under the construction contract?***

Unless the contract provides otherwise, or is awarded via public procurement (on which see the answer to Q9.1.1) the main contractor may subcontract all of the work to (a) subcontractor(s).

***Q9.1.3 Is the right to subcontract construction works limited by any legal provisions, or by the type of works to be performed?***

Only under public procurement procedures: see the answers to previous questions in this Section.

## 9.2 Subcontracting the design

***Q9.2.1 Under traditional procurement, the employer supplies the contractor with the design, the contractor then contracting with an architect or engineer to carry out the design. May the architect or engineer subcontract part of the design work?***

Unless the main design contract provides otherwise, a designer can subcontract part of the design work to another designer.

***Q9.2.2 May a subcontractor provide the totality of the design which the architect has agreed to undertake?***

There is no rule preventing a designer from subcontracting the totality of the design.

For every project in Bulgaria, there is a statutory set of design documents which must be prepared by registered designers in order to obtain a construction permit.[121] If a foreign designer, not registered with the Bulgarian Chamber of Architects, is hired to do the design, it will normally subcontract to a registered designer that part of the design work necessary to apply for and obtain a construction permit.

***Q9.2.3 Is the right to subcontract the design limited by any legal provisions, or by the nature of the design to be performed?***

The restrictions on subcontracting work in contracts awarded via public procurement apply here as well: see the answers to Section 9.1 above.

## 9.3 Limitation of liability clauses

***Q9.3.1 Is the main contractor responsible for seeing that the project is completed, hence liable to the employer when delay, damage or loss is caused by a subcontractor?***

Yes: normally, the construction contract will not relieve the main contractor from full responsibility for delay, damage or loss, even if these have been caused by a subcontractor.

***Q9.3.2 Where a subcontractor is nominated by the employer, is the liability of the main contractor automatically excluded or limited for delay or defects caused by the nominated subcontractor?***

To the extent the contract does not provide otherwise, the main contractor is not automatically relieved from responsibility for work performed by subcontractors nominated by the employer.

121 The Investment Design Architects and Engineers Chamber Act (2003) 20 SG, last amended (2016) 27 SG, Article 7.

Nomination of subcontractors by the employer is not common practice in Bulgaria.

### 9.4 Damages in the event of subcontractor delay or defective work

***Q9.4.1 Is a subcontractor who fails to complete works on time or whose work is defective required to pay damages to the main contractor, if this causes delay to the project? Can the main contractor claim from the subcontractor the total amount of damages that he has paid his employer, or are there implied terms (or any rules of law) which limit the subcontractor's liability to the value of the subcontractor's contract?***

A subcontractor is responsible to the main contractor for performance of the subcontracted work, in the same way that the main contractor is responsible towards the employer. A subcontractor will be liable for damages for delay, if this is a direct consequence of the subcontractor's breach of its own subcontract. Since a subcontractor is not a party to the main (head) contract, it is not automatically liable for damage or delay to the whole project.

There are no implied terms or rules of law which limit the subcontractor's liability; however, a subcontractor is liable only for its part of the project and only for damage or losses, or delays to the project as a whole, which are a direct consequence of its own breach.

***Q9.4.2 When the contract between the employer and the main contractor contains a liquidated damages clause, can the main contractor require the same liquidated damages from the subcontractor? What is the legal basis for such a claim? Are there any implied terms or rules of law, or is it necessary to include an express clause in the subcontract?***

Liquidated damages can be claimed from a subcontractor to the extent they have been agreed in the contract between main contractor and the subcontractor. No implied terms or rules of law apply in this case.

### 9.5 Limitation of contractor's liability

***Q9.5.1 If the contract between the employer and the main contractor validly includes a limitation of liability clause (see Q8.1.8), may this also limit the main contractor's liability when delay or defects are caused by the subcontractor? May the main contractor limit his liability when delay or defects are caused by the subcontractor's fraud or gross negligence?***

The provision of a limitation of liability clause in the main contract will limit the contractor's liability for damages or delays caused by subcontractors, but not if they are due to the subcontractor's fraud or gross negligence.

***Q9.5.2 Do the same principles apply to design subcontractors?***

Yes.

***Q9.5.3 Does limiting liability for the acts or omissions of a subcontractor require an express clause in the head contract? Are there any implied contract terms or rules of law regarding the limitation of liability for a subcontractor?***

A subcontractor is not directly responsible to a construction employer for subcontracted work, even if nominated by that employer. Limiting a subcontractor's liability should not be attempted in the main (head) contract.

## *9.6 Rights of the subcontractor towards the employer*

***Q9.6.1 The most important concern of a subcontractor is getting paid promptly for work and materials provided for the project. The main contractor is under an obligation to pay the subcontractor any sums due to him, but are 'pay-when-paid' clauses common, or illegal?***

Usually, a subcontractor will be paid by the contractor after the latter has been paid by the employer. Such 'pay-when-paid' clauses are not illegal and are often used.

In public procurement contracts, where a part of the works can function independently and is subcontracted, the subcontractor could be paid directly by the employer. The main contractor may disagree with the subcontractor's request to be paid directly; but the employer is entitled to disregard such an objection and proceed with direct payment.

***Q9.6.2 When the subcontractor is not paid at the time scheduled and agreed, does the contract or the general law provide for a direct claim against the employer?***

Except in public procurement contracts (see the answer to Q9.6.1 above), neither the general law, nor contract principles, gives a subcontractor a direct claim against the employer.

***Q9.6.3 Where there is a direct claim, is it in contract or in tort?***

If there were a direct claim, it would be in contract.

***Q9.6.4 If a direct claim is permitted by statute, may the parties exclude it in their contract?***

Currently no such claim allowed under Bulgarian law.

***Q9.6.5 What defences does the employer have to such a direct claim?***

No answer possible, as no such claim allowed under Bulgarian law.

***Q9.6.6 Does such a direct claim give the subcontractor any preferential rights in the event of the main contractor's insolvency, compared with the main contractor's other creditors?***

No answer possible, as no such claim allowed under Bulgarian law.

***Q9.6.7 Are there any formal requirements in filing such a claim (such as doing so in court or with the arbitral tribunal, or in an official register)?***

Not relevant in Bulgaria.

***Q9.6.8 Does a subcontractor benefit from the same direct claim?***

Not relevant in Bulgaria.

***Q9.6.9 In the event of non-payment, does the subcontractor benefit from any legal privilege or rights in relation to the assets of the employer or the main contractor?***

No: the subcontractor has no privilege over assets of the employer or the main contractor.

## *9.7 Rights of the employer towards the subcontractor*

***Q9.7.1 Does the employer whose project suffers from a defect attributable to the subcontractor have a direct claim against the subcontractor (for specific performance, for damages, or both)?***

If the main contractor takes no action against the subcontractor, based on the provisions of the subcontract, the employer can make a claim against both contractor and subcontractor, in order to obtain a judgment or decision requiring the subcontractor to perform the contract. Such claims are not used very often in practice.[122]

***Q9.7.2 Is such a direct claim in contract or in tort?***

Under the qualifications made in Q9.7.1, a direct claim would be in contract.

***Q9.7.3 When such a direct claim is allowed by statute, may the parties exclude it?***

No: the parties cannot validly exclude such a claim.

122 OCA, Article 134.

***Q9.7.4 What defences (if any) does the subcontractor have to such a direct claim?***

In addition to the usual defence that the subcontractor has duly performed its contract, it can also object that the direct claim depends on the main contractor's personal assessment.

***Q9.7.5 Does such a direct claim give the employer any preferential rights in the event of the subcontractor's insolvency, compared with the subcontractor's other creditors?***

No.

***Q9.7.6 Does the employer also have a direct claim against the subcontractor's subcontractor?***

No.

***Q9.7.7 Are there any formal requirements in filing such a claim, such as doing so in court, or with the arbitral tribunal, or in an official register?***

If the employer can make a direct claim against the subcontractor, this would be filed in court or at the arbitration venue agreed by the parties.

***Q9.7.8 Is the employer's position different if he suffers loss or damage as a result of defective materials supplied by the subcontractor?***

The employer's position is no different in this case.

## 10 Subsoil conditions

### *10.1 Traditional procurement*

***Q10.1.1 Is the employer normally responsible for the effect that soil conditions may have on construction and construction methods?***

In traditional procurement the employer procures the design. Part of that design (or of the pre-design feasibility study) is the Engineering Geology and Hydrogeology Report. Thus, the employer is responsible for ascertaining the soil conditions and the effect they may have on construction works. The employer must sign a construction contract, a supervision agreement with a registered consultant (the 'construction supervisor') and an agreement for design services, including control by a designer during construction.[123]

When the construction works have advanced to the excavation stage, the consultant is to check compliance of the subsoil conditions with those described in the Engineering

123 See the answer to question QC.3 above.

Geology and Hydrogeology Report, in the presence of the author of the report, the designer of the structure and the contractor.[124] If there is a discrepancy between the *in situ* subsoil conditions and data in the Engineering Geology and Hydrogeology Report, representatives of the contractor, consultant and designer decide on the necessary measures and inform the employer if the design needs revising.[125] The consultant then makes a record in the Order Book suspending the works and prescribing preventive measures, where applicable.[126] The designer next elaborates a revised design, which may have an impact on the time for completion and the contract price - at the employer's risk.

The contractor is responsible for ensuring that the technology used in the process of construction is suitable for the employer's design. The contractor has a duty to warn the employer if it considers the design not suitable for the project. The contractor has to complete the works so that they are fit for purpose. In case of changed subsoil conditions, leading to more expensive construction methods, the design changes will result in variations, increasing the contract sum. The contractor may be responsible for their impact, if s/he fails to warn the employer.[127]

## 10.2 Design and build

***Q10.2.1 Is the contractor responsible for matching the method of working to the soil conditions? If the manner in which this has been done causes delay in the execution of the contract and/or loss, will the contractor be liable to the employer?***

Usually, the contract provisions define the responsibility of the parties in respect of unforeseen subsoil conditions. In some design and build contracts the employer provides the Engineering Geology and Hydrogeology Report as part of the employer's requirements, so taking the risk of discrepancies leading to exra time and cost. In other D&B contracts the employer may submit the Engineering Geology and Hydrogeology Report to the tenderers for information only, requiring detailed geotechnical investigation to be performed at the beginning of construction works and shifting responsibility to the contractor. In limited cases, the employer provides no Engineering Geology and Hydrogeology Report, requesting the tenderers to investigate the site before submitting their tenders, thus transferring full responsibility for subsoil conditions to the selected contractor.

124 SDA, Article 159 para 1.

125 Ordinance 3 (note 6), Article 7, para 3 defines this obligation in relation to the compiling of the mandatory Protocol for opening the site and determining the construction line and level (Protocol forms 2 and 2a); see Section III 'Findings from the checks implemented on reaching the controlled design levels' and the Act for acceptance of the subsoil conditions and the actual levels of the completed excavation works (Act form 6).

126 See the answer to question QC.3 above.

127 OCA, Article 260: see also the answers to Section 3A above.

***Q10.2.2 Is the contractor not liable if he proves that he has taken all the precautions that a prudent contractor would be expected to take?***

The contractor is not liable if it has acted as a prudent contractor and has undertaken the necessary precautions.

The standard of professional care expected of a contractor is higher than the duty of care and good faith obligation under the OCA. The contractor is a registered body under the CCA, which requires it to demonstrate its capacity to take on the relevant type of project. So the contractor is a professional who owes the more onerous standard of care of a competent trader under the CA.

***Q10.2.3 If damage to the works has been caused by the manner in which the methods of work have been matched to the soil conditions, is this treated as an extraordinary circumstance entitling the contractor to extra payment?***

The contract may give relief to a contractor who has acted as a prudent contractor would (in the form of extra payment, an extension of the time for completion or both) in cases where the employer is liable for the damage, where this results from the employer's requirements, including the subsoil conditions data.

The effect of soil conditions could be regarded as an extraordinary circumstance (*force majeure*) if a prudent contractor could not have been expected to foresee and prevent such an effect by applying the professional standard of care.[128]

***Q10.2.4 Is the contractor liable for pollution on, in or under land or water discovered during the execution of the works?***

The contractor is not liable for pollution discovered during the execution of the works, unless its own construction methods have caused the pollution. A contractor must plan the necessary precautionary measures by preparing the mandatory Health and Safety Plan and Construction Waste Management Plan before commencing the works and must implement these during the construction phase.

The contractor is responsible for preventing any pollution or damage to the environment during the execution of the works. In fulfilment of this obligation, both the contractor and the employer should take measures to protect the trees, water resources and areas which are located on and/or around the construction site. Specific obligations exist in respect of the disposal of construction waste, air preservation, transportation of loads, prevention of pollution on the roads etc, aimed at preserving the environment during the course of construction.

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128 CA, Article 306, para 2 provides that a *force majeure* event is an unforeseeable and unavoidable event of extraordinary nature. A party is relieved from the obligation to perform for the duration of this event.

### 10.3 BOT/DBFMO

#### Q10.3.1 How are the matters in Sections 10.1-10.2 regulated under BOT/DBFMO contracts?

BOT/DBFMO contracts almost invariably place the risk of adverse subsoil conditions upon the contractor.

## 11 Dispute resolution

### 11.1 General

#### Q11.1.1 Summarise the different ways to file a claim against employer, principal, main contractor or subcontractor, architect, engineer, supplier, manufacturer and insurance company.

Unless the parties agree otherwise, the party wishing to make a claim will do so by filing this with the court, following the general rules of the Bulgarian Civil Procedural Code (CPC).[129] The parties have several possibilities. A claim on the merits of the dispute could be:

i. For declaratory relief (eg to establish that certain amounts under the contract are due, or not due);[130]
ii. For an order requiring the other party to do, or to refrain from doing something (eg paying an amount due under the contract);[131] or
iii. To make changes in the legal position (eg a claim to terminate or invalidate the contract due to mistake, fraud, intimidation etc).

There are also various types of summary proceedings such as (i) provisional measures[132] or (ii) a payment order procedure.[133]

The parties are also entitled to agree on arbitration by including an arbitration clause in their contract. Note that Bulgarian courts do not examine *ex officio* whether the contract contains an arbitration clause. Thus, the court in principle could consider claims arising out of a contract which in fact contains such a clause. Only where one of the parties makes a procedural objection due to the existence of an existing arbitration clause will the court terminate the proceedings before it.

There are also some limitations under Bulgarian law on disputes that can be resolved by arbitration. Claims regarding rights *in rem* to, or possession of, immovable property, alimentation, employment relations, or disputes with a party who is legally 'a consumer'

129 Civil Procedure Code (2007) 59 SG, last amended (2017) 13 SG.
130 CPC, Article 124, para 1.
131 CPC, Article 124, para 1 and/or 2.
132 CPC, Articles 389-409.
133 CPC, Articles 410-425.

cannot be the subject of an arbitration agreement: see the answer to Q11.1.3 below.[134] If a sole arbitrator or an arbitral tribunal hears a dispute in violation of any of the provisions on non-arbitrability, the final award will be void[135]. In execution proceedings the district court for the place where the party who was the loser in the dispute is domiciled, or has its seat, will examine whether the award is void, and if so, will refuse to issue a writ of execution.[136]

An arbitration may have its seat outside Bulgaria if one of the parties has its habitual residence, registered office or place of actual management outside Bulgaria.[137]

### *Q11.1.2 What time limits (eg a statute of limitations) apply to filing a claim against any of the parties above?*

On limitation periods, see the answer to Q8.1.5, above; and on mandatory warranties for construction, see the answer to Q8.1.12.

Under Bulgarian law, insurance is mandatory against the professional liability of the designer, consultant, contractor and the person exercising technical control of the structural part of the design for which a consultant's assessment has not been carried out. The insurance covers damage and losses caused to other participants in the project and to third parties, as a result of wrongful actions or omissions in the course of, or in the performance of, the duties of any of these construction parties. Cover under the insurance starts on the day the project is completed. The rights under the insurance contract should be exercised within 5 years as of the date of expiry of the contract.[138] See further the answer to Q12.1.1.

General liability insurance claims lapse in five years and claims against insurers under insurance beyond the scope of mandatory cover lapse in three years.

### *Q11.1.3 Do the available dispute resolution methods differ where a consumer is involved?*

Bulgarian legislation recently reformed the rules on the arbitrability of disputes which involve consumers: any clause in a contract between a merchant and a consumer which provides for arbitration as a dispute resolution mechanism (outside the scope of the ADR mechanisms in the Consumer Protection Act), is invalid.[139] Furthermore, all pending arbitration proceedings in disputes between commercial entities and consum-

134 CPC, Article 19, para 1. For the definition of 'consumer', see note 8.
135 ICAA, Article 47, para 2.
136 Article 405, para 5, in connection with para 3 of the *CPC*
137 CPC, Article 19, para 2.
138 Ordinance on the Terms and Conditions for Compulsory Insurance in Design and Construction (2004) 17 SG, Article 20.
139 CPC, Article 19, para 1; and CPA, Article 3, para 4.

ers were to come to an end.[140] There are fines and pecuniary sanctions for violation of the prohibition on resolving consumer disputes via arbitration.

In relation to consumer disputes, the CPA provides for two ADR mechanisms: Alternative Dispute Resolution Bodies (ADRB)[141] and Conciliation Commissions.[142] An ADRB resolves national and cross-border disputes relating to obligations arising from sales contracts or contracts for provision of services between a merchant established within the EU and a consumer residing in the EU. The procedure before the ADRB may have one of the following outcomes: (i) proposing a decision; (ii) imposing a decision; or (iii) bringing the parties to the dispute together, in order to assist in finding a mutually agreed solution.[143] ADRB are recognized by the Ministry of the Economy[144] and they are included in specially designated list approved by the Ministry.[145]

The Minister of the Economy has also created General and Sectoral Conciliation Commissions (GCCs and SCCs).[146] GCCs assist in resolving national and cross-border disputes between consumers and merchants on contracts for the sale of goods and provision of services, including in relation to warranty liability, the rights of complaint regarding goods or services, unfair contract terms, unfair commercial practices, providing essential information and travel services.[147] GCCs resolve disputes in economic sectors where there is no ADRB.[148] SCCs resolve national and cross-border disputes between consumers and merchants in the following sectors of the economy: energy, water supply and sewerage, electronic communications and postal services, transport and financial services.[149] In case of dispute, the consumer should approach the merchant directly. If no agreement is reached, the consumer may refer the dispute to GCCs/SCC.[150]

GCCs/SCCs assist in resolving the dispute by drafting a conciliation proposal for the parties, which, once approved by them, has the force of an agreement. Where the parties to the dispute have entered into an agreement but one of them fails to fulfil its obligations under it, the other party may refer to the court for consideration of the dispute relating to the agreement. The parties may give enforceable status to the agreement reached in the conciliation procedure by submitting it for approval to the competent court. GCCs/SCCs do not re-consider disputes between consumers and merchants for

140 Transitional and Final Provisions of the Act for Amendment and Supplement of the CPC, Article 6, para 2.
141 CPA, Articles 181a-181w (181ц).
142 CPA, Articles 182-185.
143 CPA, Article 181a, para 1.
144 CPA, Article 181o.
145 CPA, Article 181p.
146 CPA, Article 182, para 1.
147 CPA, Article 182, para 2.
148 CPA, Article 182, para 3.
149 CPA, Article 182, para 4.
150 CPA, Article 183e (183д).

which a conciliation proposal has been made, whether the parties have accepted it or not.[151]

### *Q11.1.4 What principles govern the burden of proof and the methods by which facts may be proved?*

Each party is obliged to establish the facts upon which its claim(s) or objection(s) are founded. Facts in respect of which a presumption established by law exists do not need to be proved. Any facts of common knowledge and any facts known to the court *ex officio*, of which the court is obliged to inform the parties, are not required to be proved.[152]

The parties are free to use a variety of evidential means: witness statements, explanations of the parties, written evidence, expert reports, site visits etc. One of the most commonly used evidential means in construction cases is the appointment of a construction technical expert to prepare an expert report.

### *Q11.1.5 Do determinations by a process server (bailiff, or equivalent)) have any evidential value?*

Determinations by a bailiff are not usually used as evidence in construction litigation under Bulgarian law. Bailiffs (state or private) are specially designated persons who are in charge of the enforcement of private and public claims. They usually participate in the civil process after the litigation proceedings have been completed and a writ of execution has been issued. However, any document prepared by bailiffs within their competence, in the form and under the procedure established by law, is an official document, ie is evidence of the statements and actions made before the bailiff.[153]

The situation is different in relation to court-appointed experts. The court is entitled to appoint various types of experts to draw up expert reports - accounting reports, construction and technical reports etc. Courts are not bound by the conclusions made in an expert report, ie they do not have a special kind of evidential value. A courts will consider an expert report in the light of all other available evidence concerning the dispute.

### *Q11.1.6 Does your legal system provide for possibility of obtaining a court order rapidly (eg in summary proceedings? If so, does the judge in such proceedings have a wide range of powers, or only limited powers?*

The Bulgarian legal system provides for the possibility of obtaining a court order for interim measures.[154] These can be obtained in support of claims already before the court, as well as possible future claims. In order to obtain interim measures, the requesting party needs to meet all of these tests:

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151 CPA, Article 183g (183ж).
152 CPC, Articles 154-155.
153 CPC, Article 179, para 1.
154 CPC, Articles 389-403.

1. The claim for which interim measures are requested must be admissible;
2. It must also be well founded, meaning that:
   a. It is supported by convincing written evidence; or
   b. The requesting party lodges security with the court of an amount determined by the court, which may be equal to the direct and proximate loss that the other party would suffer if the interim measures were unjustified. The court may require security even if the claim is supported by convincing written evidence.
3. Interim measures must be necessary: without them, the party requesting them could not adequately protect its legal position.

A request for security measures is considered *ex parte* on the day it is lodged with the court, but in practice deliberation on the matter can take up to one week.

Interim measures may take the form of:

1. Imposing an interdiction over an item of real estate and imposing duties on its possessor not to harm it;
2. Imposing restrictions on the movable property and other assets of the defendant;
3. Any other measures determined appropriate by the court, including immobilising a motor vehicle and suspension of execution proceedings.

The judge has limited powers, ie does not resolve the merits of the dispute, and assessing at this preliminary stage whether the claim is well founded will have no impact on the final outcome of the dispute. Furthermore, the court order imposing interim measures is provisional: at a closed hearing, the court may revoke these measures if it is convinced that the reason for interim measures no longer exists, or if the defendant offers security for the full value of the claim.

***Q11.1.7 Is a judicial expert always appointed by the court? If so, what is the evidential value of his report? If a party may appoint his own expert, what is the evidential value of this report?***

A judicial expert is appointed, either at the request of a party or *ex officio*, when to clarify issues arising in the case requires special knowledge in science, arts, crafts etc.[155] The court may appoint more than one expert if the case requires it. On the evidential value of an expert report, see the answer to Q11.1.5.

Bulgarian law does not provide for an expert being appointed by a party. Judicial experts are only appointed by the courts, selected from a special list of experts registered at court.

155 CPC, Article 195, para 1.

### *Q11.1.8 What different systems of alternative dispute resolution (ADR) are available?*

In Bulgaria, the most popular ADR mechanisms are arbitration (national and international) and mediation.

Construction disputes are in principle arbitrable (unless a party to the dispute is a consumer: see the answer to Q11.1.3). International arbitration is governed by the provisions of the International Commercial Arbitration Act (ICAA).[156] Its provisions (with minor exceptions) apply to domestic arbitration as well.[157] In order to take a dispute to arbitration, the parties should have concluded an arbitration agreement in writing. The need for writing is considered to be satisfied when an arbitration agreement is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or any other method of communication. An arbitration agreement is considered concluded when the respondent, in writing or by an application included in the minutes of the arbitration proceedings, agrees that the dispute should be resolved by arbitration or when the respondent takes part in the arbitration proceedings through lodging an answer in writing, providing evidence, bringing a counterclaim or attending an arbitration hearing without questioning the jurisdiction of the arbitrator or panel.[158]

Another ADR mechanism is mediation, which is governed by the provisions of the Mediation Act (MA).[159] The process is defined as a voluntary and confidential procedure for ADR, under which a third person (mediator) helps the disputing parties to reach an agreement.[160] Disputes subject to possible mediation include civil, commercial, labour, family and administrative ones connected with consumers' rights, as well as other disputes - including transnational ones - between natural persons and legal entities.[161] A settlement agreement reached in a mediation procedure has the same legal force as a court judgment and is subject to approval by district courts.[162]

Third party determination is also recognized under Bulgarian law, although not for resolving legal disputes, instead for supplementing some contractual clauses (eg by determining the price or quality of construction materials). Under the CA, if the parties agree that a third party shall determine certain terms and conditions of the contract, such determination will become binding, provided that the third party has determined them in compliance with: (1) the objectives of the contract; (2) the other provisions of the contract; and (3) commercial custom.[163] According to some scholars, the decisions of the Engineer and of Dispute Adjudication Boards under FIDIC forms of contract

156 International Commercial Arbitration Act (1988) 60 SG, last amended (2017) 8 SG.
157 ICAA, Transitional and Final Provisions §3.
158 ICAA, Article 7, para 3.
159 Mediation Act (2004) 110 SG, last amended (2011) 27 SG.
160 MA, Article 2.
161 MA, Article 3, para 1
162 MA, Article 18, para 1
163 CA, Article 299, para 1.

can be treated as third-party determinations, although this theory has not been confirmed in practice.

### *Q11.1.9 Does your legal system permit arbitration in construction disputes?*

Yes, arbitration is permitted in construction disputes. It should, however, be noted that disputes in which one of the parties is a consumer are not arbitrable (see the answer to Q11.1.3).

### *Q11.1.10 Does your legal system provide for the possibility of an appeal against (or challenge to) a judicial decision (or an arbitral award)?*

Yes: the general rule is that first-instance judicial decisions can be appealed once to a higher (second-instance) court, appeal needing to be requested within two weeks of receiving the judgment at first instance.[164] Decisions of a second-instance court can be challenged before the Supreme Court of Cassation, this needing to be requested within one month of the relevant party receiving the second-instance judgment.[165]

Final appeal by way of cassation in Bulgaria is restricted in scope and subject to special criteria of admissibility.[166] Decisions of second-instance courts where the value of the claim was below BGN5,000 (approximately €2,500) in civil matters and below BGN20,000 (approximately €10,000) in commercial matters (but not cases concerning real property and related claims) are excluded from cassation. Equally excluded are decisions on claims in other specific categories, such as claims for financial support, matrimonial claims under the Family Code, some restitution claims etc.

Arbitral awards can be set aside by the Supreme Court of Cassation. The claim for setting aside must be filed within three months of the date of delivery of the award to the relevant party.[167] The grounds for setting aside an arbitral award are limited:

1. The party making the application for having the award set aside was under some incapacity when concluding the arbitration agreement;
2. The arbitration agreement was not concluded or is not valid under the law chosen by the parties or, in the absence of a choice of law, under the ICAA;
3. The party applying to set the award aside was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or for reasons beyond its control it was unable to participate in the proceedings;
4. The award deals with a dispute which is not within the scope of the arbitration agreement or contains decisions on matters beyond the subject of the dispute;
5. The composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the parties' agreement, unless such agreement was in conflict

164 CPC, Article 259, para 1.
165 CPC, Article 283.
166 CPC, Article 280, para 1, items 1-3.
167 ICAA, Article 48, para 1.

with mandatory provisions of the ICAA, or (in the absence of agreement on these matters) the provisions of the ICAA were not observed.[168]

## 11.2 Design and build

### *Q11.2.1 Is there a different dispute resolution system in relation to design and build contracts?*

There are no specific rules in Bulgarian law regarding design and build contracts. Thus, the legal regime applicable to all construction contracts described above also applies to design and build contracts.

## 11.3 BOT/DBFMO

### *Q11.3.1 Is there a different dispute resolution system in relation to BOT/DBFMO contracts?*

See the answer to Q11.2.1.

## 11.4 Contracts for public works

### *Q11.4.1 How can a tenderer who is not awarded a contract challenge the decision to award the contract to a competitor, and before what judicial body? Does the contracting authority (the employer) have to respect a standstill (term/period) before it can conclude the contract? What possibilities are open to candidates in relation to a contract awarded to a different tenderer? Which court deals with these disputes?*

Under the PPA, a tenderer who is not awarded a contract is entitled to challenge the award decision issued by the contracting authority before the Commission for Protection of Competition (CPC).[169] The period for challenge is 10 days from the receipt of the award decision.[170]

The general rule is that a complaint filed against the award decision suspends the procedure until final resolution of the dispute.[171] However, this does not apply if any of the expressly listed exceptions is present (eg interim execution of the appealed decision, award of a public contract in the hypotheses of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, including related to protecting the public interest, protection of human health and life, national security and defence etc). The CPC's ruling can be appealed to the Supreme Adminis-

168 ICAA, Article 47, para 1, items 1-6.
169 PPA, Article 199, para 1.
170 PPA, Article 197, para 1, item 7.
171 PPA, Article 203, para 4.

trative Court, there being a 14-day period to launch this from notification of the CPC ruling to the parties.[172]

The law provides for a 14-day standstill period from notification of the award decision to the interested candidates and/or interested participants, during which the contracting authority is not entitled to conclude the contract.[173] The PPA includes exceptions to this principle, ie situations where the contracting authority is entitled to conclude the contract immediately. These include where:

- The contract has been awarded following procedures without prior publication and there is only one invited tenderer
- There is more than one tenderer but an urgent need for the contract to be entered into, due to exceptional circumstances, necessity for urgent actions during a crisis etc
- The selected tenderer is the sole participant and there are no other interested candidates
- The contract is concluded on the basis of a framework agreement with one tenderer.[174]

#### *Q11.4.2 What dispute resolution methods apply between the contractor and employer during the contract period? And after acceptance of the works?*

The general rules for filing a claim in court apply to disputes between contractors and employers. The parties are also free to choose ADR mechanisms.

## 12 Insurance

### *12.1 Traditional procurement*

#### *Q12.1.1 What different insurance policies are available which offer cover against the risks linked to construction activities?*

Bulgarian law provides for both mandatory and non-mandatory insurance policies for participants in the construction process. The basic principle is that certain participants in the construction process are required to insure their professional liability: see the answer to Q11.1.2.

A special Insurance Ordinance ('On the conditions and order for effecting compulsory insurance in the field of design and construction') determines the minimum liability limits under the insurance policies for different participants in the construction process and for different categories of construction projects.[175] The Ordinance further specifies

172 PPA, Article 216, para 1.
173 PPA, Article 112, para 6.
174 PPA, Article 112, para 7, items 1-3.
175 Ordinance on the Terms and Conditions for Compulsory Insurance in Design and Construction (2004) 17 SG.

the risks which are excluded from insurance coverage and the minimum insurance fees. Insurance contracts for mandatory insurance must be concluded within 15 days of the commencement of the professional activity of the relevant professional. The policy must be valid for a period of one year and should cover the liability of the policyholder for written claims filed within the term of validity of the insurance contract for any acts or omissions of the policyholder in the course of, or in connection with, the performance of his/her/their duties, performed either (1) during the term of validity of the insurance contract or (2) for the period from the 'retroactive date' to the conclusion of the insurance contract. The retroactive date is the date of commencement of business of the relevant policyholder - not more than five years before the conclusion of the insurance contract.

The mandatory insurance covers only the minimum liability of the policyholder under any and all projects in which the relevant policyholder participates during the term of validity of the policy.

Since the contractor bears the risk until handing over the works to the employer, it can obtain an insurance covering the risk of fire, explosion, storm, earthquake and other events not in its control. Such extended insurance coverage (eg Contractor's All Risks cover - see also the answer to Q12.1.4 below) would be agreed contractually, as it is not mandatory.

Usually, the employer requires the participants in a particular project to take out additional (non-mandatory) insurance to cover the relevant person's liability under the particular project, or the risk of damage or loss caused during the process of construction to the site and plant, materials, the mechanical equipment for construction and the equipment on the construction site.[176]

***Q12.1.2 What different insurance policies are available which offer cover against risks deriving from the activities of the main contractor? Do these policies cover damage or loss suffered by third parties and/or contractual damage? Are there standard form insurance policies which cover all or part of the main contractor's liability to third parties or to his subcontractors?***

The different insurance policies available are described in the answer to Q12.1.1 above. Mandatory insurance covers both damage or loss incurred by third parties and contractual liability incurred by the policyholder in the course of, or in connection with the performance of its duties. Additionally, on a case by case basis, the contractor may be required to have additional insurance cover, also described above.

Bulgarian law does not provide standard form insurance policies. Each policy is agreed individually, depending on its type (mandatory or non-mandatory), the construction category and insured risks and other terms agreed between the parties.

176 SDA, Article 173, para 2.

***Q12.1.3 Is the architect and/or engineer required to take out liability insurance?***

Both the architect and the engineer are required to have insurance for any damage or loss caused by the policyholder in the course of, or in connection with the performance of his/her duties: see the answer to Q12.1.1 above.

The architect and engineer are free to take out any additional insurance they find appropriate to cover risks related to their work.

***Q12.1.4 Is the employer or main contractor required to take out a Contractor's All Risks (CAR) policy? Is there a standard form for CAR insurance? Which parties are usually covered in a CAR policy and who usually bears the cost?***

CAR is not mandatory under Bulgarian law. Such a policy could be taken out individually and is usually agreed in the construction contract between employer and contractor. A CAR policy covers the contractor's risk of non-completion of the works due to a reason outside the contractor's control.

***Q12.1.5 Does the law contain provisions dealing with the problem of coverage of the same risks by more than one insurance policy?***

The Insurance Code regulates so-called 'multiple insurance': the problem of the same risk being covered by more than one insurance policy.[177] This occurs where the same interest is insured against the same risk with more than one insurer, the total sum insured exceeding the amount of the *de facto* insurance value, or the amount of any claims made.

In a situation of multiple insurance, each insurer is responsible in the same proportion as the insured sum under the individual policy relates to the total insured sum under all insurance contracts. Further, anyone who insures the same interest against the same risk with more than one insurer is obliged to notify each of the insurers about the other insurance contracts immediately, giving details of the other insurers and of the sums insured on each of these policies. In a case of multiple insurance, each insurer to whom a claim has been made is obliged to notify the other known insurers. Each insurer who accepts a claim is obliged similarly to inform the other insurers immediately.

The insured is not entitled to receive from all insurers an amount exceeding the loss actually incurred. If the purpose of taking out multiple insurance was to make an unjustified profit (unjust enrichment), the policies may all be treated as void. In this situation, an insurer is entitled to receive and retain premiums due up to the moment when it became aware of the circumstances which lead to the policies all being void. If the insurer has issued a policy which has led to multiple insurance, the insurer may terminate a policy or reduce the sum insured and the premiums payable, to reflect only the risk additional to that covered by a policy (or policies) taken out earlier.

177 Insurance Code (2015) 102 SG, last amended (2017) 8 SG.

#### *Q12.1.6 Are there any time limits (eg a statute of limitations) which apply specifically to claims against insurers?*

The basic principle is that the rights and obligations under the insurance contract in relation to the insurance compensation lapse with the expiry of a three-year limitation period, commencing on the date the insured risk materialises.[178] In cases where retroactive coverage is agreed, the prescription period starts on the date the claim was submitted to the respective insurer within the term of the policy.

The limitation period under general liability insurance is five years from the date the insured risk materialises. The only exception is liability insurance covering contractual non-performance. where the limitation period is the same as under the main contract.

### *12.2 Design and build*

#### *Q12.2.1 Are there insurance policies that offer cover against the special risks deriving from design and build contracts?*

Bulgarian law does not provide any special regulation; but the mandatory rules on insurance cover for construction and its related activities, as described above, are applicable.

### *12.3 BOT and DBFMO*

#### *Q12.3.1 Are there insurance policies that offer cover against the special risks deriving from BOT and DBFMO contracts?*

Bulgarian law provides no mandatory requirements for insurance of the specific risks deriving from BOT and DBFMO contracts. The CoA, as the main legislation in the field, provides only a general obligation on the concessionaire to insure on its account the subject-matter of the contract. The parties to the concession contract are free to set the conditions of this insurance. The only necessity is its term: insurance must be in place for the whole duration of the concession contract. Property insurance under a concession agreement is usually obtained by the concessionaire on its own account but with the grantor of the concession as its named beneficiary. The grantor will then transfer the proceeds of an insurance claim to the concessionaire in order to rebuild the concession's subject-matter (though the whole concession agreement may be terminated if its subject-matter is destroyed).

The mandatory rules on insurance of construction and related activities, as described above, are applicable.

178 Insurance Code, Article 378.

## 12.4 Public works contracts

### *Q12.4.1 Are there insurance policies that offer cover against the special risks deriving from contracts for public works?*

Bulgarian law provides no mandatory requirements for insurance of the specific risks deriving from public works contracts.

All the regulations on mandatory forms of insurance (such as mandatory insurance of construction and related activities, of the professional liability of a lawyer or notary) are applicable, so these forms of insurance must be in place for a public works project. The PPA expressly authorizes the contracting authority to adopt, as part of the selection criteria, the possession of suitable professional liability insurance (eg insurance for the professional liability of the designer, consultant or construction company).[179] No further selection criteria looking to insurance are included in the PPA. To set additional requirements may be considered a violation of the procurement procedure.

The contracting authority is entitled to request a performance guarantee from the selected contractor, in order to secure the timely and good performance of the contract. This could take the form of insurance covering the contractor's liability under the contract.[180] The terms of the insurance would be laid down in the public works contract itself

179 PPA, Articles 61- 62.
180 PPA, Article 111.