Czech Republic

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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?

Construction contracts are not treated as a special contract type but are included under the heading of 'a contract for work'. A contract for work is governed by Act No 89/2012 Coll, the Civil Code, Articles 2586-2635.

Under a contract for work, the contractor undertakes to construct 'the works' (the project) at his own expense and risk and the employer undertakes to take the works over on completion and pay the sum(s) agreed. By 'the works' is meant construction of a defined thing, unless the contract is only a purchase contract; additionally, 'a contract for work' can be also maintenance, repair or modification of a thing, or any activity aiming at a defined result. Construction, maintenance, repair or modification of a building is always considered 'work'.

The specific provisions governing construction as the subject-matter of a contract for work include certain rights and obligations of the parties, the procedure for taking the project over and the liability of the contractor for defects (see below for further detail).

The amount(s) payable for the project should be agreed in the contract, either by setting out the total ('a lump sum') or by setting out a method how what is payable will be determined. However, where the contract sets out the obligation of the parties to provide and accept performance for a consideration without specifying the amount to be paid or a method for determining it, the contract sum will be deemed to be the cost of the same or similar/comparable work (construction) at the time the contract was entered into and on similar contractual terms.

The contractor is obliged to perform the work with reasonable care and in the agreed time period, or (where the time is not specified in the contract) in a timescale corresponding to the nature of the project. The contractor performs the work independently. He is bound by the employer's instructions only if this is expressly agreed upon or if this is the custom for that type of contract or is customary between the parties..

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

Under the Civil Code (Article 1752), part of the contents of a contract may be determined by referring to standard terms and conditions issued as a separate document by either party. The party wishing to include such terms and conditions must expressly refer to them in the contract and attach them to it; or must ensure that the other party

is familiar with them. The Civil Code also allows the parties to lay down the contents of their contract by reference to general terms and conditions prepared by specific organizations. The SIA (The Council for Construction and the Economic Chamber of the Czech Republic) has published General Commercial Terms for Construction (GCT). The GCT may become a part of the contract and be thus binding on the parties, but only if the parties refer to the GCT in their contract. The text of the GCT does not need to be appended to the contract as the parties are assumed to be familiar with it. The most recent version of the GCT is from 2007 and can be found at *www.stavebnistandardy.cz*.

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

Supervision by an architect of a construction project is not specifically regulated by law. Architects, as well as other designers who prepare project documentation for the administrative steps necessary for the authorisation of construction work and for the process of construction, do supervise projects, in order to verify their compliance with the architectural and other project documentation. They do so based on appointment by the employer or the contractor. Their supervision is thus based on agreed terms and their role is not neutral.

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

Under the Civil Code (Article 1753), a clause which deviates from standard terms and conditions (standard forms of contract) and which the other party could not have reasonably expected is ineffective, unless expressly accepted by that party; any contrary provision is ineffective. Whether or not a provision is of such a nature is assessed with regard to its content as well as to the manner in which it is expressed.

The same Code article provides protection against abuse of a standard form where one party imposes a provision that would not have been included had the contract been freely negotiated, ie where such a provision would be unexpected. A clause limiting liability would be an example, if this issue was not raised while the contract was being negotiated. The Civil Code here exemplifies the general obligation of every party to a private law relationship to act fairly and in good faith. Assessing whether a particular provision is unexpected is based on the knowledge an average (and averagely experienced) contract party would have in the context of that specific case. The scope and manner of pre-contractual negotiations will be relevant, as well as what information was provided by the other party, the impact of any advertising etc. Where one or more standard terms become inapplicable, the default rules in the Civil Code apply instead.

There is specific regulation and further limitation of the use of standard form provisions in contracts between a trader and a consumer (B2C contracts) in order further to protect the consumer as the weaker party.

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

Czech legislation is based on the principle that changes to the subject-matter of 'the work', ie including a construction project, can be made only where such change is anticipated in the contract or individually and specifically agreed. This means that the employer may request changes during the course of construction; but the contractor is obliged to comply with these requests only if the contract so provides or if the parties agree to modify their obligations under the contract. The law provides no specific mechanism for negotiating changes to a contract for work; the initiative is left to the parties.

In most cases, parties to a construction contract agree a mechanism for negotiating possible variations, if requested by the employer. They will decide how such a variation can be proposed, including its justification and the technical documentation in the form of a variation order, as well as the time frame for the contractor to react to the variation order. The parties usually also agree in the contract on the cost implications of a variation.

Where after conclusion of the contract the parties agree to vary what is to be built but do not agree the cost consequences, the Civil Code requires the employer to pay a price appropriately decreased or increased in light of the variation.

The contractor also may, under certain circumstances, require a change in the substance of the contract. Where the contractor finds hidden obstacles on site which make it impossible to construct the project as originally agreed, under the Civil Code (Article 2627) he is obliged to notify the employer and propose a variation. Until agreement is reached on such a variation, the contractor may suspend work. If the parties cannot agree a variation within a reasonable time, either party may withdraw from the contract. In such a case, the contractor has the right to be paid for the work already performed.

Finally, the parties to the construction contract may apply the *rebus sic stantibus* principle contained in the Civil Code (Article 1764). Under this Article, if there is such a substantial change in circumstances that it creates a gross disproportion in the rights and duties of the parties by disadvantaging one of them, either by disproportionately increasing the cost of performance or disproportionately reducing the value of the subject of performance, the affected party has the right to claim renegotiation of the contract with the other party. For this, it must be shown that the party could neither have expected nor prevented the change, and that the change occurred (or the party became aware of it) only after the conclusion of the contract. Asserting this right does not entitle the affected party to suspend performance.

In this connection, noted that where modifying a project also involves modifying aspects approved by the relevant public authority via a building permit, any such modification must also be approved by the same authority.

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

The new Civil Code, in effect from 1st January 2014, provides newly for regulation of the contracting process and for several types of contracts, including the contract for work. All references to Articles in this chapter are to the current text of the Civil Code.

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?

It is usual for the employer to arrange for the design, as well as the project documentation necessary to authorise construction, as well as for zoning and building permits. The employer (investor) also provides for all other administrative consents necessary for the project and is a party to the proceedings in which such consents are granted. In most cases, the employer also provides the land on which the project will be constructed and (where necessary) a site for construction equipment, materials etc. The employer further arranges for the contractor's access to the construction site and coordinates access of all other relevant parties to the site.

The law does not impose any specific obligations on the employer in this respect. His fundamental obligations are to take the work over on completion and pay the agreed sum(s) as payment. Nevertheless, additional obligations are usually included in construction contracts, ie providing the necessary authorizations and consents and a construction site; they form a part of the necessary cooperation obligation of the employer. The contract should also include deadlines in respect of the employer's duty to cooperate. The employer is also responsible for providing water, electricity and all other services to the construction site. Who bears the cost of these services should be determined by the main contract between contractor and employer.

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

As mentioned in the answer to QG.1, the contractor provides his services independently. However, in some instances cooperation from the employer is required. Under the Civil Code (Article 2591), if cooperation is necessary to carry out the project, the contractor is to determine the period within which such cooperation is to be provided (unless agreed otherwise). Once this period is over, the contractor may arrange for whatever is necessary itself – at the employer's cost – or may withdraw from the contract, provided that he gives the employer prior notice of his intention to withdraw.

The scope and contents of cooperation should be agreed in the construction contract. In the absence of express provision, its scope and the need for it will be decided by the court in the light of the nature of the project.

The law protects the contractor against the negative impact of the employer not providing the necessary agreed cooperation. Under the Civil Code (Article 1975), the contractor is not in default (delay) in providing its services in a period when it cannot fulfil its duties due to the failure (delay) of the employer. If, for example, the employer does not provide the necessary consents, equipment or access to the construction site, or does not hand over items or documentation which have been agreed, and as a result the contractor may not be able to meet the contractual completion date, the contractor is not treated as being in breach of his obligations and may have no sanctions imposed on him.

The contractor is also protected in situations where the completion of the works and performance of his obligations depend on steps to be taken by the employer. This relates to the right of the employer to check the performance of the work, in particular where, under the contract, the quality of the work and its successful completion are to be determined by agreed tests. The contractor is obliged to invite the employer to attend these tests. However, if the employer does not show up, the tests can normally go ahead, provided the nature of the tests or other circumstances allow them to be performed without the employer. The results of the tests are normally to be evidenced in a protocol signed by both parties. But where the employer does not participate in the tests, an alternative reliable and independent party with sufficient expertise who participated in the tests may sign the protocol instead (Civil Code, Article 2626).

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?

Czech law does not regulate design and build contracts in any separate way. Such contracts therefore fall under the general rules for all 'contracts for work'. Thus everything above about the employer's obligation to obtain all necessary permits and make the site available to the contractor applies here too. It follows from the general regulation of pre-contractual liability contained in the Civil Code (mainly Articles 1728-1730) that each party is obliged to provide the other with all information necessary to enable it to perform its side of the contract. The employer must above all provide the contractor with all information about the construction and his expectations about the characteristics of the completed project, so that the subject-matter and the obligations of the parties are sufficiently clearly specified and correspond to the expectations of both parties.

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

The obligations of the employer and the consequences of breach are the same as in the traditional model.

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?

Most of the answers already provided for traditional procurement apply also to BOT/DBFMO contracts. There is no specific regulation of BOT/DBFMO contracts.

2 General obligations of the contractor

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?

The contractor is obliged to fulfil its obligations as set out in the contract, as well as by legal and other regulations and commercial usage.

The works, ie both design and construction, must have the characteristics specified in the contract but also must comply with the requirements set out by law, by technical, safety, hygienic and other rules and norms; they should also have the characteristics appropriate for the purpose and nature of the project. The construction should also comply with public law requirements in relation to the permit for construction, the use of products and methodology in construction; it should also comply with the project documentation etc.

The construction should have all the features that a project of this type has, and should have no defects untypical for such a project, on which the employer may rely.

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?

As mentioned in QG.1 above, the contractor performs his tasks independently. He is bound by instructions from the employer only if this is expressly agreed or if usage so requires.

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?

The contractor is obliged to perform his work properly in order to avoid any defects in the works. The employer has the right to check the execution of the contract and if he finds that the contractor has acted in breach of his obligations, the employer is entitled to request the contractor to remove the defects and remedy the situation. If the contractor does not do so within a reasonable time, the employer has the right to with-

draw from the contract. The employer may inspect the work of construction himself or appoint an agent for this purpose.

Where the employer gives the contractor specific instructions in relation to the work of construction, or provides it with items or materials to be used, and such instructions, items or materials are not fit for purpose, the contractor must inform the employer of this without undue delay. The obligation to inform the employer does not apply where a reasonably competent contractor would not have discovered that the instructions, items or materials were not fit for the project. Until the instruction or the materials and items are replaced, the contractor may suspend work. If the employer insists on compliance with the original instruction(s) or on the use of items and materials he has provided to the contractor, the contractor may withdraw from the contract; but if the contractor continues with the project, he is not then liable for defects in construction caused by following these instructions or by using items or materials provided by the employer which are not fit for purpose.

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?

As mentioned in the answer to Q1.2.1, a pre-contractual duty to warn exists for both parties. As for the duty to warn during the contract, the obligations described above under Q2.1.3 apply.

As also mentioned above, should the contractor discover hidden obstacles relating to the place where the work is to be performed, which prevent the contractor from performing the work in the manner agreed (eg unexpected archaeological findings or unsuitable geological conditions), he is to notify the employer without undue delay and suggest a variation in what is to be constructed. Until an agreement on the changes to the work has been reached, the contractor may suspend work. If the parties fail to agree to amend the contract within a reasonable period, either of them may withdraw from the contract. The contractor is entitled to be paid the price of the part of the project in fact performed, until such time as the obstacle could have been discovered by exercising reasonable care (Civil Code, Article 2627).

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)?

As under the traditional model, the contractor has to carry out design work and construction work in such a manner that, at the date of completion, the work will be in accordance with the requirements of the contract. If the works are not in accordance

with these requirements, the construction is considered defective and the contractor is liable for these defects.

As mentioned above, fitness for purpose is a part of the obligation of the contractor to provide due performance. Thus where the completed construction is not fit for its agreed or usual purpose, it is defective and the contractor is liable for these defects.

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?

The contractor is obliged to fulfil its obligations under the contract, under the statutory and other regulations as well as those which derive from commercial usage.

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 answers to Q2.1.3 and 2.1.4 above.

2.3 BOT/DBFMO

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

There is no standard form for BOT/DBFMO projects. Therefore, no general answers can be provided.

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, Tempo-

rary 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?

No. The contractor is obliged to treat the instructions received from the employer, including the design, with expert care. If the contractor finds defects and/or unsuitability of the items, documentation or instructions which come from the employer relating to the project, he is obliged to inform the employer. If the contractor fails to do so, he bears the risk of liability for defects in construction resulting from these.

The duty to notify the employer about design defects follows from the general rule that the contractor has been selected by the employer for his expert knowledge and ability to perform the work. Therefore, as an expert, the contractor must be able to assess whether or not the design supplied by the employer has defects or will prevent due performance of 'the works'.

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

This obligation follows from general law, ie from the Civil Code (Article 2900): if required by the circumstances of the case or the usages of private life, everyone has the duty to act so as to prevent unreasonable harm to freedom, harm to life, bodily harm or harm to the property of another. The contractor's obligations in relation to items, materials and documents provided by the employer are usually further specified in the contract.

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?

See the answer to Q3A.2.

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

As described in the answer to Q3A.2, this contractor's obligation is based on the Civil Code, ie the general law.

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

As mentioned above, the employer has the right to verify the contractor's performance; if he discovers that the manner of performance has caused defective work, he may notify the contractor and request that the situation be remedied. This is a right of the employer, not an obligation. The obligation to notify any defects which have been discovered could be derived from the general obligation to prevent damage which derives from the Civil Code (Article 2900): see the answer to Q3A.2.

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

In traditional procurement contracts, the employer provides all the documentation necessary for obtaining permission for construction, ie the zoning permit and building permit. The contractor who is to perform the work arranges for operational documentation and actual construction documentation.

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?

When preparing the operational documentation, the contractor will refer to the documentation provided by the employer in order to obtain permission for construction. Even in this case, if the contractor finds defects or unsuitability of the documentation from the employer, he is obliged to inform the employer, otherwise will bear the risks related to such defects or unsuitability: see the answer to Q3A.1.

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

These obligations follow from the law and are added to the obligations under the contract. They are one example of the duty to warn.

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?

This obligation covers defects in all items, materials, documentation and instructions handed over to the contractor by the employer that could affect the work of construction and its characteristics. The obligation relates to all deficiencies and disadvantages the contractor could have detected when exercising due (professional) care.

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?

The architect/engineer is not obliged to supervise the construction process, unless expressly undertaking this role. If the architect/engineer does not participate in the supervision process, he cannot find out whether or not the contractor is performing work in accordance with the contract, project documentation and the applicable rules. Therefore, the architect/engineer may carry no duty to warn. Such a duty could be possible only as a part of the general duty to prevent damage, provided he knew about deficiencies in the performance of the contractor, which could include using dangerous methods.

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?

An architect/engineer may take part in supervising construction as specific supervision over implementation of the design, based on an agreement with the employer. In addition, the employer may commission a third party to perform overall supervision of construction, including supervising the implementation of the design. Such supervision is usually performed by specialized engineering agencies.

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?

Expert consulting institutions may, in the course of their activities, agree to take on responsibility for expert management of construction, including also reviewing the performance of other consultants as well as contractors. If they do, they will also have a duty to warn in case they uncover deficiencies in the work of other parties (consultants, contractors) participating in the project.

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?

As in the case of contractors, this obligation is imposed by law: see the answer to Q3A.2.

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?

Designers also share the general legal duty to prevent damage. This means that where the designer as an expert learns about a construction defect, whether concerning the manner of construction, the design or the materials used, which could cause damage, it is obliged to notify the contractor or the owner in order to prevent such damage. Whether or not the designer has a duty to notify to prevent damage depends on the facts of each particular case. Legal action for damages for a breach of this duty to notify must be started within the limitation period: see the answer to Q8.1.5.

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).

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?

The term 'liquidated damages' is not used in Czech law. The 'contractual penalty' has the equivalent role under the Civil Code (Articles 2048- 2052). A contractual penalty is usually a monetary sanction, agreed upon by the parties for breach of a defined contractual obligation, eg the contractor's duty to complete the project on time and without defects; or to remedy any defect within an agreed period of time, and to do so completely. Naturally, a contractual penalty can also be agreed for breach of the employer's obligations, typically the obligation to pay the contract sum or to take 'the works' over at the agreed time and on the agreed terms.

Where the parties have agreed a contractual penalty, the innocent party may request payment when the other party is in breach of his obligations, regardless of the loss in fact incurred.

As mentioned, the contractual penalty usually takes the form of an obligation to pay money. As from 1 January 2014 the Civil Code allows a contractual penalty to take a non-monetary form.

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?

It is for the parties to agree the nature, form and manner of determining the amount of a contractual penalty. The law provides a general requirement that a contractual penalty must be determined sufficiently clearly, ie the manner of determining the contractual penalty set out in the contract must allow for clear identification of the contractual penalty and its amount.

A contractual penalty may take any of the forms in the question. Very often it is set as a fixed amount for a breach of a specific obligation. For cases of delay it is quite common to set a certain percentage of a fixed amount, eg the overall contract sum, for the extent of the delay. What counts as delay can be determined in units of days, weeks or months.

The existence of the obligation to pay a contractual penalty is not dependent on the existence of the loss or other harm caused by the breach of the obligation that gave rise to the right to a contractual penalty. However, the amount of the actual loss or harm can be taken into account when assessing whether or not the agreed damages are unreasonable and hence contrary to public policy (see the answer to Q4.5).

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.

If a contractual penalty is defined as a percentage of a defined amount, paid for a certain period of default, a cap is very often agreed. Where the contractual penalty is a fixed amount or a non-monetary payment, any cap is out of the question. The amount or manner of calculation of the cap differs between industries. In construction contracts a cap is often agreed, so that the total amount of all contractual penalties paid cannot exceed a certain percentage of the overall contract price. In other industries much depends on the nature of the performance. In relation to delay, it is possible to agree a cap that cannot be exceeded, so that the penalty would be payable only for a limited maximum period.

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?

See the answer to Q4.1. For the obligation to pay the contractual penalty to arise, there is no need for the employer (main contractor) to suffer any loss.

A contractual penalty has two basic functions. First, it serves as a sanction, which means that it motivates the party to whom it applies to make due and timely performance of its obligations. Secondly, its function is compensatory: to a certain extent it serves to compensate the innocent party for the loss it suffers from the breach. In the Civil Code, Article 1050 provides that if a contractual penalty is agreed, the creditor (the employer, main contractor) has no right to damages for breach of the obligations covered by the penalty. However, the parties may opt out of this provision in their contract, agreeing that the aggrieved party is entitled to damages in addition to the penalty, in which case the general rules applicable to damages apply. This means that the aggrieved party must prove (i) a breach of duty by the other party; (ii) the existence of loss or other harm; and (iii) a causal link between the breach of duty and the loss or harm.

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?

Under the Civil Code (Article 2051), at the request of the party subject to a contractual penalty (but only at this party's request), a court (arbitrator or arbitration tribunal) may reduce this if it is excessive, having regard to the value and importance of the duty to which it relates. Its amount may be reduced to the level of damages which would be awarded for the loss or other harm actually incurred as a result of the breach of the duty in question. If the innocent party becomes entitled to make a claim in law for damages, it is entitled to these only up to the amount of the contractual penalty.

For the court (or equivalent) to reduce a disproportionately high contractual penalty, it must assess the facts of each individual case, the relationship between the amount of the penalty and the value of the obligation it secures, the circumstances under which the contract was entered into, what type of obligation is secured by the penalty etc. Regard will also be had to the harm caused by the breach and what damages would otherwise be payable. If the contractual penalty is a fixed amount which significantly exceeds the total value (amount) of the obligation to which it relates, the court may consider it too high and reduce it. By contrast, where the contractual penalty was fixed as a certain percentage of that total amount and depended on the scale of the breach (the length of the delay), and where the contractual penalty payable exceeded the total amount which would have been payable as damages for the same delay, the court refused to reduce the level of the penalty. It held that the total amount of the sanction was the result of a continuing breach, so any reduction would be equivalent to condoning the conduct of the party in breach.

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

As mentioned above, the Civil Code accepts that the parties may agree a contractual penalty for breach of certain obligations. Any such agreement must comply with the general requirements for legal acts, ie must be clear and sufficiently specific. If not, the

contractual penalty provisions will be null and void and a court (or equivalent) will not enforce them.

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

Most construction contracts contain provisions for contractual penalties, whereby the parties incentivise performance of the obligations they have agreed; the law in general supports them, save for the power to reduce excessive penalties.

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?

Completion/fulfilment of the obligations of the contractor under the construction contract is governed by the Civil Code (Articles 2604-2607 and 2628).

The Civil Code anticipates that the manner of completion/fulfilment of these obligations is primarily a matter for agreement in the contract. The contractor usually hands the completed project over to the employer in the course of a handover procedure in which they both participate. The administrator of the project and other experts may also take part. A special document (an 'acceptance protocol') may be created, signed by representatives of the contractor and employer, possibly also by other parties if the agreement between contractor and employer so provides.

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 project can be handed over, ie the contractor's obligation is fulfilled, once the works are completed. A project is complete once its fitness to serve its purpose(s) has been demonstrated. The employer may take over the completed work with or without reservations (Civil Code, Article 2605). So even if there are minor defects, or minor parts of the construction are not complete but the construction can fully serve its purpose, it is deemed complete and may be handed over to the employer.

This general rule, applicable to a 'contract for work' in all sectors, applies specifically to construction in Article 2628: 'The employer does not have the right to refuse to take over a construction due to isolated small defects which, by themselves or in conjunction with others, neither functionally or aesthetically prevent the use of the construction, nor substantially limit its use.'

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?

As mentioned in the answer to Q5.1.1, it is for the parties to agree the manner of handover. The general law does not impose any formal requirements. If the parties agree that a document ('protocol') must be created to evidence handover, the contractor's obligations come to an end once this protocol is complete.

Where the parties have agreed that completion depends on the results of certain agreed tests, the works are considered complete on successful performance of these tests. On the employer's duty to cooperate in handover, see the answer to Q1.1.2.

Where the employer refuses to take over the works and thus prevents the fulfilment and completion of the obligations of the contractor under the construction contract, the contractor may request the court to order the employer to take over the project.

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.

The legal consequences of handover are as follows:

- Payment for the works becomes due (Civil Code, Article 2610)
- The risk of unforeseeable damage to the works passes from the contractor to the employer (Civil Code, Article 2624)
- The employer's rights in relation to defects arise; and the limitation period in relation to these rights starts running (Civil Code, Article 2617)
- 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.

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?

The Civil Code sets out the rights of the employer in case of defective work undertaken by the contractor by reference to the provisions which govern sale contracts. The Civil Code distinguishes between two sets of rights, reflecting the seriousness of the contractor's breach of contract: (a) rights which the employer has where the defects constitute a fundamental breach of the contract; and (b) rights where the breach is not fundamental.

In case of a fundamental breach of contract, the employer has the following rights the Civil Code (Article 2106):

- The contractor must rectify the defect by constructing/making/delivering a defect-free new thing/construction or by supplying the missing parts;
- The contractor must remove the defect by repair;
- The employer may claim an appropriate discount against the payment due for the works; or
- The employer may withdraw from the contract.

A fundamental breach is defined in the Civil Code (Article 2002) as one which the party in breach (the contractor) knew or should have known, at the time the contract was in fact entered into, would cause the innocent party (the employer) not to enter into the contract if he had foreseen such a breach.

In case of non-fundamental breach of the contract, the employer has the following rights under the Civil Code (Article 2107) :

- The contractor must remove the defect by repair; or
- The employer may claim an appropriate discount against the payment due for the works.

The Civil Code also sets out conditions for the employer to claim his rights, so that where the contractor does not comply with his request he can then successfully ask the court to require the contractor to comply.

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?

It is quite common in construction contracts to give the employer the right to withhold a percentage of each interim payment during the course of the project as a security for proper performance of the works, ie. a retention. The contract will lay down conditions for the release of retention money. In practice, retention may serve different purposes. Retention money withheld for the purpose of proper and timely performance is usually returned upon handover of the construction to the employer. Retention money serving

as security against potential construction defects is usually returned at the end of the 'defects liability period'. It is also common for the contractor to be allowed to submit a bond in exchange for the retention money being paid out to him.

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?

Under the Civil Code, the employer must notify the contractor of the defect and choose between one of the rights arising in those circumstances: see the answer to Q5.1.5(a). The employer may not change his choice without the consent of the contractor. Where the employer requires the defect to be removed and the contractor refuses to do so or does not do so within a period of time reasonable in the light of the defect, the employer may request a discount against the payment due for the works or withdraw from the contract. So the general law does not authorise the employer to engage a third party to remedy the defects and claim the cost from the contractor. Such a right could arise only from express contractual provisions.

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?

Since design and build contracts are not specific contract types under Czech law, all the answers for this Section apply to such contracts.

5.3 BOT/DBFMO

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

No: any differences need to be agreed in the contract.

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 for uncertainty: 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?

A contract for work – including a construction contract – is a contract for monetary consideration. Agreement to pay the sum(s) due is an essential part of the contract, even though under certain circumstances the contract does not have to contain an agreement on the amount payable or a method for determining this. The Civil Code (Article 2586) provides some guidelines on whether or not the payment due has been sufficiently clearly and unambiguously determined. It provides that the sum(s) due are sufficiently determined where at least the manner of determining them is agreed or the payment due is determined by at least an estimate.

The requirement for certainty is thus satisfied by adopting a mechanism which will be used to calculate the payment due, or fixes it by some other route. Although the parties are free to agree the manner of determining the amount payable, this must mean that what is payable is ascertainable at any point in time. Such a mechanism must derive from the contract, otherwise what has been agreed to be payable cannot be considered sufficiently clear and unambiguous.

The Civil Code accepts that under certain circumstances the contract sum may not be agreed in the contract at all. Where it is clear from the contract itself that the parties have intentionally agreed not to determine what should be payable for the work, the contract sum is what would be payable for the the same or comparable work, carried out under the same or comparable terms and conditions (Civil Code, Article 2586). It must be clear that the parties did intend the employer to have an obligation to pay, what is payable being equal to that for a comparable project. This solution will not be available where the parties simply forgot to address the issue of payment or failed to reach agreement on it.

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?

The Civil Code leaves the manner of determining what is owed to the parties. The contract sum may be set as a lump sum that cannot be further adjusted. If so, the contractor performs the construction at its cost and bears the risk that the real cost of construction will exceed the agreed lump sum. The parties may also agree that the lump sum may be adjusted after completion of the contract and even in the course of construction.

However, the criteria under which the contract sum can be adjusted must be clearly laid down. If the parties fail to do so, there is a risk that the provisions on the contract sum will be considered unclear and as such null and void.

As for construction contracts, the Civil Code (Article 2625) assumes in that the price will be determined by reference to the actual scope of work and its value or the value of the materials and equipment used, ie on a unit rate (re-measurement) basis. In such a case the employer may request the contractor to list all the work already performed and all incurred costs.

In the construction industry, the most commonly used manner of determining the contract sum is by reference to a budget. If the contract sum is agreed as a fixed price, based on a budget forming part of the contract or provided by the contractor to the employer prior to entering the construction contract, the Civil Code provides that neither employer nor contractor may request adjustment of the price even though the budget was exceeded. This applies whatever the reason for exceeding the budget, eg because additional work was necessary or the performance of the works was more expensive. The budget is then final and conclusive.

One exception is provided for in the Civil Code (Article 2620): where an extraordinary unforeseen event arises that hinders completion of the project substantially, the court may in its discretion increase the contract sum. Alternatively, the court may cancel the contract and determine how any live issues between the parties should be resolved. Even where Article 2620 could apply, the parties may exclude court intervention by agreeing that the contractor bears all risks of changes of circumstance.

Under the Civil Code (Article 2622), the parties may base the contract sum on a budget but state that the budget is not complete (exhaustive) or conclusive. The contractor may then request an increase of the contract sum, where during the project works need to be performed which are not listed in the budget and which were unforeseeable at the time the contract was entered into or if reasonably incurred costs exceed the costs anticipated in the budget. Where the employer disagrees with an increase claimed by the contractor, the court will determine the issue at the contractor's request. The contractor loses his right to an increase if he fails in a reasonable period to notify the employer of the need to exceed the total in the budget and of the amount of increase claimed, once he learns that an increase is inevitable.

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 the Civil Code (Article 1749), the parties may agree that aspects of the contract will be determined by a third party, ie an arbitrator or a court. This option is available to parties to a construction contract in order to determine the contract sum. The person or body exercising such a power should take into account the purpose of the contract, the circumstances under which the contract was entered into and to the fair and just

determining of the parties' rights and obligations. However, in practice this manner of determining the contract sum is not used for construction contracts.

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?

Parties are free to determine payment by reference to a list of rates set by an expert body or agreed in a separate document. It is essential that their agreement on the contract sum is clear and specific: the courts have repeatedly held that agreeing the contract sum by referring to the custom of the place is not sufficiently specific, so any provision to this effect would be considered null and void.

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.

For the possibility of the parties not agreeing the contract sum, see the answer to Q6.1.1; and for the conditions under which the court may determine this, see the answer to Q6.1.3.

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?

See the answer to Q5.1.4. The parties may agree whatever terms they wish about when the final payment becomes due, ie whether this occurs after the employer or his agent has checked the project's conformity with the plans and specifications. Such an arrangement is not very frequent, the same purpose being achieved by retention provisions.

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

The parties may agree terms for payment in instalments and agree a range of possible 'triggers' under which such instalments become due, eg the achievement of particular stages in the project.

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)?

Parties often agree that the contractor is entitled to withdraw from the contract if the employer is late in making an agreed payment. In some cases, the contractor requires a bank guarantee or third-party bond to secure the employer's payment obligations. A mortgage or charge over the employer's assets is exceptional.

7 Delay and disruption

7.1 Traditional procurement

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?

The contractor is obliged to comply with the agreed deadline for completion of the project: the employer is not generally required to agree a request for an extension of time. The Civil Code (Article 2627) gives the contractor a right to request an amendment of the contract, including an extension of time, only where the contractor discovers, in the course of the project, hidden obstacles preventing him from completing the work on time: see the answer to QG.5.

The parties are free to agree the manner of changes and amendments to the contract, including extensions of time. They may agree a certain period of time within which a request for an extension of time must be given to the other party, as well as the form in which such request should be submitted. The consequences of failure to meet such conditions can also be agreed by the parties. If there is no specific agreement on such issues, the general law, as described above, will apply.

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?

Any changes to the contract, including postponing the completion date, must be agreed between the parties. Unilateral change is not possible. As mentioned above, the parties may lay down conditions and procedure for agreeing changes, including changes of timing, but such terms and formal steps never depend on the initiative of one party alone.

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?

On the right of the contractor to an extension of time due to circumstances for which the employer is responsible, or changes made by the employer, see the answers to Q3A.1 and Q7.1.1. On the right of the contractor to request an extension of time for hidden obstacles see the answer to question QG.5.

In addition, the contractor may rely on the general principle of *clausula rebus sic stantibus* in the Civil Code (Article 1765): see also the answer to QG.5. This can reflect the impact of *force majeure*. If in the course of performance under the contract circumstances change so that a disproportionately disadvantageous relationship arises between the contractor and the employer, the contractor may request the employer to open negotiations to reflect the changed circumstances in the contract. The contractor may require these negotiations, provided it can show that: the disproportion in its relationship with the employer is not attributable to it; has occurred as a result of an event(s) that took place only after the contract was entered into; and that the contractor could not have foreseen or influenced these event(s). Where the parties fail to agree changes to the contract, the contractor may request the court to vary the scope of the contractor's obligations or to annul the contract and (if so) how the rights and liabilities under it should be apportioned between the parties.

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 Civil Code enables the contractor to suspend work only in certain specific cases. These are: (a) where the contractor finds out that items or materials provided by the employer for the project are unfit for the work and the employer, when notified, insists on their being used (see the answer to Q2.1.3); or (b) where there are hidden obstacles to performing the work (see the answer to QG.5).

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?

The contractor bears a general duty to prevent damage to health and property: see the answer to Q3A.2. Thus, in case of suspension of work for any reason, the contractor must secure the project so that during the suspension it is prevented from being damaged.

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?

The contractor may withdraw from the contract within a reasonable time where the parties have failed to reach agreement about defective items or materials provided by the employer or hidden defects preventing the work (see the answer to Q7.1.4). The contractor's ability to withdraw from the contract is not linked to the period of suspension of work but derives from the parties' inability to reach agreement on adjustment of the contract in relation to those matters that caused the suspension.

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

In cases where the Civil Code enables work to be suspended and the contractor to withdraw from the contract, it also regulates the manner and scope of the contractor's payment for work already undertaken. Where the contractor withdraws from the contract for hidden defects, having failed to agree with the employer on changes to the contract, the contractor is entitled to the amount owing under the contract for the work already undertaken, until the moment the contractor could have discovered the hidden defect if it had exercised reasonable care (Civil Code, Article 2627).

If the contractor suspends work for defective items or materials provided by the employer and notified to him, then withdraws from the contract because the employer insists on the use of such items or materials, the contractor is entitled to compensation for the value of the enrichment the employer has acquired through the work already undertaken. Compensation is based on the general rules of unjust enrichment, but quantifying this will also be based on the project's own payment rules and on the progress in fact achieved (Civil Code, Article 2999).

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?

Yes: see the answers to Q7.1.3 and Q7.1.7.

7.2 Design and build

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

The situation is the same as under traditional procurement. See the answers 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?

As mentioned above, BOT/DBFMO contracts are not recognized as a special type of contract. The answers to individual questions will depend on the specific circumstances of each case.

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.

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?

Rules for damages for breach of contract and for situations of tort liability are laid down in the Civil Code (Articles 2894- 2971).

The employer is liable for harm caused by breach of his obligations under the contract, eg failing to give the necessary cooperation, to provide agreed items, to secure the necessary approvals etc.

The contractor is liable for failing to achieve due and timely performance of 'the works'. The consequences of breach are contained in the Civil Code under two headings: (a) liability for defects; and (b) liability for harm. The relationship between the two is laid down in Article 1925: 'A right arising from defective performance does not exclude the right to compensation for damage; however, what can be achieved by asserting right deriving from defective performance may not be claimed for any other legal cause.' It follows that the contractor has an obligation to compensate in damages, based on the general rules about liability for harm, rests on the contractor in cases of so-called 'subsequent damage', in addition to its liability for defects. 'Subsequent damage' covers damage to other property, inflicted as a result of the contractor's defective performance, as where defective construction causes damage to neighbouring land or to other proper-

ty of the employer. The contractor has an obligation to compensate for damage caused to third parties by its own defective construction.

The same applies to the obligations of an architect or engineer to compensate for damage caused by a breach of their obligations.

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 basic provision governing tortious liability is in the Civil Code (Article 2910): 'A person who is at fault by being in breach of a statutory duty, thereby interfering with an absolute right of the victim, shall provide compensation to the victim for the harm caused. This person also becomes obliged to provide compensation if he interferes with another right of the victim by a culpable breach of a statutory duty enacted to protect such a right.'

Tortious liability in the field of construction becomes relevant when a person who has suffered loss is not a party to a contract with the person who caused the loss. An example would be a claim by a subsequent house owner, who purchased the house from the construction employer, against the contractor. The basic provision setting out the rules for liability to third parties but deriving from contract is in the Civil Code (Article 2913): 'If a party is in breach of a contractual duty, such a party shall pay damages for the resulting harm to the other party or to the person who was evidently intended to benefit from the carrying out of the duty concerned.' A typical example of tortious liability in the construction area would be where defective construction causes damage to third parties as a result of its collapse or partial collapse, or where parts of it (roofing or masonry) fall off. However, liability to third parties in such cases rests on the owner and not the contractor (Civil Code, Article 2938): 'Where a building collapses or part of it becomes separated as a result of a defect or of lack of maintenance of the building, its owner shall provide compensation for the resulting harm.'

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).

A party seeking damages must prove that the defendant was in breach of its legal obligations, that the victim (plaintiff/claimant) was harmed and that such harm was a direct result of the breach of the obligation by the defendant (causation). The obligation to compensate for harm caused by a breach of contract is based on an objective principle, ie is strict. However, tortious liability as a rule requires proof of fault; but the existence of fault may be presumed. Article 2911 of the Civil Code provides: 'If a person causes harm to the victim by being in breach of a statutory duty, he is presumed to have caused the harm through negligence.'

The victim has a duty to take appropriate precautions to protect himself. Article 2903 of the Civil Code provides: 'If the person who is at risk of harm fails to act to prevent such harm in a manner appropriate to the circumstances, he has responsibility for everything which he could have prevented.'

The defendant has a duty to pay damages for only those types of harm which he should have foreseen as a foreseeable consequence of the breach of his obligation at the time he took on the obligation of which he is alleged to be in breach.

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?[1]

See the answer to Q8.1.1. The employer in such a situation may first assert his rights arising from the contractor's liability for defects. Damages may be claimed only for so-called 'subsequent damage', but then for their full extent.

Q8.1.5 For how long does the contractor or employer retain liability for a breach of contract or in tort? Where are these 11.1.2s laid down?

See the answer to Q11.1.2.

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 respective contribution to causing the loss?

Under Article 2915, if several persons cause harm, their liability is joint and several. This also applies where several persons have committed separate unlawful acts, each of which could, with a high degree of probability, have caused the harm which has occurred, though the person who actually caused the harm cannot be ascertained. This means that an employer can claim all the damages awarded from either contractor or architect.

Under Article 2916, a person who has a duty jointly and severally with others to compensate for harm can claim against potential co-defendants in proportion to their participation in causing the harm. Thus a contractor or architect who is liable to pay damages to the employer greater in value than his share in contributing to the harm can make a claim for the excess against the other party who also caused the harm.

1 In English law in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, the House of Lords thought the total rebuilding of a swimming pool whose depth did not match the employer's requirements, claimed as damages from the contractor, an unreasonable expense, the discrepancy causing no loss of value to the house itself, nor impeding the intended use of the pool for swimming, though a claim for a modest sum for loss of amenity (pleasure) did succeed.

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?

Everyone is liable only for such harm as is caused by breach of his own obligations. If the architect is in breach of his obligations by providing the employer with defective plans and by doing so causes harm, he is liable for such harm. As for the possible liability of the architect for negligently supervising the contractor's work, the general duty to prevent damage under Article 2900 of the Civil Code could apply (see the answer to Q3A.2).

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?

The general rule on limitations of liability can be found in Article 2898 of the Civil Code: 'An agreement which excludes or limits in advance the duty to provide compensation for harm caused to the natural rights of an individual, or caused intentionally or as a result of gross negligence, is of no effect. In addition, an agreement which excludes or limits in advance the right of the weaker party to compensation for any harm is also of no effect. Finally, in such cases, the right to compensation may not lawfully be waived unilaterally.'

A clause limiting liability for damages, if contained in a standard form contract, could be treated as an unexpected provision (one that the other party could not have reasonably anticipated). If so, a court could consider it null and void: see the answer to QG.4.

In other cases, ie in an individually negotiated contract, the parties may agree a limitation of liability for breach of contract. Such an agreement must be sufficiently specific so that what conduct it covers is clear, as well as to what extent liability for damages is limited or excluded. Setting a financial cap on the damages available is quite frequent. Czech law does not recognize the term 'consequential' damage'; the obligation to compensate for harm relates to harm which is a direct consequence of a breach of duty, ie there must be a causal link.

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

Limitations of liability depend on the individual circumstances of the case and the parties' intentions. It is not possible to generalise that certain liabilities are usually limited or unlimited. Unless specifically agreed otherwise, liability for breach of contract is unlimited.

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

See the answers to Q7.1.3 and Q7.1.7.

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

See the answers to Q8.1 and Q8.1.4. The employer's main remedies relate to defects in the works; his right is to request that this state of affairs be remedied. The employer's right to damages relates only to 'subsequent damage'. From this perspective, it is irrelevant whether the contractor has or does not have the intention to rectify the defects.

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

As in the answer to Q8.1.2, the building owner may claim against the original contractor for compensation for harm caused to him by defects in the building. The cost of rectifying the defects may be a measure of this harm.

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: the principles of liability described above for traditional procurement apply.

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?

No: the principles of liability described above for traditional procurement apply.

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?

As a matter of general law, a contractor is free to subcontract part or all of its works, in which case a subcontractor is in a contractual relationship with the main contractor

alone. It is theoretically possible for the contractor to subcontract all of a project to subcontractors, the contractor then having only a coordinating role. If the contractor uses subcontractors, he is liable to the employer for the work as if he performed the work himself.

However, provisions are common in the (head) construction contract to the effect that the employer's consent is required for the contractor to subcontract all or parts of the work.

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

Yes: see the answer to Q9.1.1.

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

In relation to public procurement, Act No. 134/2016 Coll. imposes certain restrictions. In the tender documentation for construction work, a contracting authority asking for tenders may request that the bidders specify the portion of the works they intend to subcontract and to identify such subcontractors. Such a contracting authority may also prohibit subcontracting certain portions of the project, but may not do so completely.

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?

In general yes, but in practice an employer often requests that the possibility of subcontracting part of the design will be subject to their approval.

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

See the answer to Q9.2.1. In most cases, the engineer or architect will need the prior consent of the employer.

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?

As mentioned above, the general law imposes no limitations on subcontracting any aspect of design, though contractual provisions between employer and contractor (or other party) responsible for design may do so, based on the nature of the project and/or of the design to be performed.

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?

The contractor is liable to the employer for the work not only for that part of the work the contractor performed itself, but also for the work of its subcontractors. The employer may not assert its rights relating to defects directly against a subcontractor, even where the defect has been caused by the subcontractor. Similarly, the contractor remains liable to the employer for any delay in completion, even though the delay is caused by a subcontractor (Civil Code, Article 1935).

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?

The employer may require certain subcontractors to be used or may consent to only certain subcontractors, agreed between employer and contractor. Even if the employer orders the contractor to use certain subcontractors or consents to certain subcontractors, the legal position of the contractor and its subcontractors remains unchanged and is as in the answer to Q9.3.1. The use of nominated subcontractors is not common in the Czech construction sector. If used, the parties could agree to limit the contractor's liability for defects or delay caused by nominated subcontractors.

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?

Where the contractor is liable to the employer in damages because of a breach of one of its obligations, in fact caused by a subcontractor, he can claim the same amount from the subcontractor. The amount due to the employer represents a loss to the contractor, ie a decrease in the value of the contractor's assets, caused by the subcontractor's breach of its obligations towards the contractor under the subcontract. To do this, the contractor will, however, have to prove all the necessary elements of liability on the subcontractor's part. Similarly, the contractor may request reimbursement from the subcontractor of any compensation or contractual penalties it has had to pay the employer as a result of the subcontractor's breach. Such rights derive from the Civil Code, so do not need spelling out in a contract. However, any limitations on the subcontractor's liability would have to be agreed expressly in the relevant subcontract.

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?

As mentioned above, the main contractor is liable for 'the works' even where the defects or delay were caused by a subcontractor. The obligation to pay liquidated damages ('contractual penalties' in the Czech context) may arise for breach of such obligations under the contract. There is no general law empowering the main contractor to require the same liquidated damages from the subcontractor at fault as such. However, by paying liquidated damages for delay or defects caused by the subcontractor the contractor will incur a loss which would not have occurred but for the subcontractor's defective performance. The contractor can thus request the subcontractor to compensate him for this loss, as long as he can prove all the necessary elements of liability on the subcontractor's part.

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?

As mentioned above, the legal starting-point is that the contractor is liable to the employer for timely and due completion of 'the works', even where part of the work was provided by subcontractors. The liability provisions in the Civil Code may be changed by agreement, so employer and contractor could agree limitations on the contractor's liability for defects, eg for those caused by a subcontractor.

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?

Yes, it would require a specific clause. The rules which apply are described in the answer to Q8.1.8.

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?

A 'pay when paid' arrangement, so that the due date for payment to the subcontractor occurs only when the contractor obtains payment from the employer, is allowed. It is for the contracting parties to set up their own payment obligations. The relationship between subcontractor and contractor is one between traders, both acting in the course of their ordinary business activities. It would be difficult to consider the subcontractor as the weaker party (equivalent to a consumer) and conclude that a 'pay when paid' provision conflicts with good faith, public policy or fair business practices. Of course, it depends on the circumstances of each particular case.

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?

Arrangements are frequently made between employer and contractor, under which the employer, in case of delay by the contractor in paying a subcontractor, may pay the subcontractor directly, setting this amount off against what he owes the contractor.

As a matter of principle, the contractor (debtor) has the primary responsibility to pay the subcontractor (creditor) for work done, the employer being an outsider to this relationship. However, under Article 1936 of the Civil Code, if the debtor (here the contractor) consents, the creditor (the subcontractor) is obliged to accept performance offered by a third party (the employer), provided that performance is not based on the personal qualities of the debtor (the contractor). Parties are free to enter into such an agreement. The contractor's agreement that the employer for the whole project should pay the subcontractor instead of him has no effect on the nature of the subcontractor's rights, not even in the insolvency proceedings. As the arrangement is simply contractual in nature, there are no specific procedural possibilities under which the subcontractor can make a claim directly against the employer. Similar agreements may be concluded in relation to other subcontracting situations.

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

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

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

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?

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)?

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

Not applicable, as there is no direct claim between subcontractor and employer (in either direction).

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?

A subcontractor has a receivable from the main contractor for payment of the sum(s) due for its performance under the subcontract. If the contractor is bankrupt, the subcontractor may register its claim in the contractor's insolvency proceedings. Any priority of the subcontractor over other creditors would apply only if its receivable from the contractor was a secured right *in rem*, as specified in Act No 182/2006 Coll., On Insolvency Proceedings (Article 2, Item g) in connection with Article 167 of Act No 182/2006 Coll.

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)?

The contractor is personally liable to the employer for every aspect of the project when completed. Even where a defect is a result of the activity of a subcontractor, as a matter of general law the employer has no right of action directly against that subcontractor, though a direct relationship between employer and subcontractor could be created in contract. However, the Civil Code introduces joint and several liability, under certain conditions, between contractor and subcontractor(s) to the employer for the performance of 'the works' as a whole. Under Article 2630, if performance of the obligations under the contract has been defective, the following persons shall, in respect of what each supplied, be liable jointly and severally with the contractor:

a. the contractor's subcontractor, unless he proves that the defect was caused by the decision of the contractor or of those who supervised construction;
b. a person/entity who supplied the construction documentation, unless he proves that the construction defect was not caused by an error in the design; and
c. a person/entity who supervised the construction, unless he proves that the construction defect was not caused by a failure of supervision.

This undermines the theoretical separation between the employer-contractor relationship and the contractor-subcontractor(s) relationship, allowing the employer to look directly to a subcontractor, but only in relation to defects. It does not apply to damages claims, where the employer must prove all the usual requirements under the Civil Code in order to establish the liability of the subcontractor.

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

See the answer to question Q9.7.1.

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

A direct claim may be made only in those cases described in the answer to Q9.7. This Code provision is not mandatory, so the parties may agree differently or may exclude the application of Article 2630 completely.

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

Defences available to the subcontractor are described in the answer to Q9.7.1. The subcontractor is not liable for defects in the project, if he proves that the defect was caused by the decision of the contractor or those who supervised the construction (the employer's consultants, designers, engineers). The subcontractor bears the burden of proof of this.

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

No.

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?

Yes. The contractor may claim compensation under the Civil Code (Article 2913) for harm caused by the subcontractor's breach of obligations: see the answer to Q8.1.2. The employer will qualify as a person (third party) evidently intended to benefit from the fulfilment by the subcontractor of his obligations.

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?

The employer, providing the land for the project, is obliged to inform and provide the contractor with all documentation relating to subsoil conditions, so that construction can be planned and undertaken properly. This is one of the information obligations of the employer, usually spelt out in the construction contract. However, the contractor is himself obliged to act with reasonable care and may not rely only on documentation from the employer. If the contractor finds out, exercising reasonable care, that the subsoil conditions are unsuitable for the project, he is obliged to adapt the working methods used to the actual situation and also to inform the employer about his findings: for what then may follow ('hidden obstacles'), see the answer to Q7.1.7.

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?

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?

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 principles mentioned in the answer to Q10.1.1 apply.

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?

See the answer to Q10.1.1. In addition, according to the Civil Code, this situation could be considered as a substantial change of circumstances from those in which the construction contract was concluded; the *clausula rebus sic stantibus* may be relevant. Hence if the newly discovered subsoil conditions constitute an abusive disproportion in the rights and obligations of contractor and employer, increasing costs disproportionately, the contractor may have the right to request renegotiation of the contract (Civil Code, Articles 1764-1766): see the answer to QG.5.

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

During construction of the project, the contractor is obliged to comply with all hygienic, safety and other regulations, including those protecting the environment. If he is in breach of these obligations, he is liable for any damage or other harm which results.

10.3 BOT/DBFMO

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

There is no commonly used standard form of BOT/DBFMO contract. Such projects will usually be undertaken on a design and build basis. So the principles described above with regard to design and build will apply also to BOT/DBFMO contracts.

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.

A party wishing to make a claim may file this either with the competent court or with an arbitration body. Filing a claim requires the plaintiff/claimant to identify all the parties to the dispute, to describe the key facts on which the claim is based and put forward evidence to support its claim. The action will be defined by what the plaintiff/claimant claims. The plaintiff/claimant also pays the court fee at the level provided by law.

Filing a claim with an arbitration body will be possible if there is an arbitration clause between the parties covering the dispute. Such a clause must be in writing; it could be contained in a separate agreement or be part of the construction contract. The parties may agree to submit their dispute to institutional arbitration or to an *ad hoc* tribunal

(one or more arbitrators). On arbitration with a consumer party, see the answer to Q11.1.3.

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

Every civil claim, hence also one in construction, must be filed within the relevant time limit laid down in the Civil Code (Articles 609-654).

The general limitation period for civil claims is three years. This period starts running on the day when the claim could first be started, so for liability for construction defects, from the first day after notifying the contractor of a defect. The limitation period for claims for damages commences once the plaintiff/claimant becomes aware of the harm and knows who was responsible. All claims are statute-barred ten years (fifteen years, for harm caused intentionally) from the occurrence of the harm.

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

The procedural rules for court proceedings do not differentiate between consumers and professionals. As of 1 November 2016, arbitration may not be agreed as a means of settling consumer disputes.

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

A party making a claim in law has the burden of proving that claim, which includes making evidence available by which to establish the claim. The court decides which forms of evidence will be received. Any form of evidence which could reveal the truth, eg oral evidence from witnesses, expert opinion, reports and statements from authorities, individuals and legal entities, documents or oral evidence from the parties, is potentially acceptable. The court also may reach conclusions about the facts from those facts explicitly accepted by both parties. It is not necessary to prove any facts generally known to the court from its activities; or to prove the law, as published or announced in the Collection of Laws.

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

No.

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?

In cases whose object is the obtaining of payment, the court can issue a payment order summarily without hearing the defendant ie based only on the claimant's petition. A payment order will require the defendant to pay the claimed amount within fifteen days from service of the order (which must be served personally on the defendant). The defendant may challenge the order within the same period, but in the absence of such a challenge, the payment order takes effect as a final court judgment. If the defendant files a challenge and ordinary proceedings are already under way in the same case, an oral hearing will take place. The court will not issue a payment order when the defendant's residence is unknown or outside the Czech Republic.

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?

Where expert knowledge is necessary to decide a dispute, the court can appoint an expert to assist it. Expert report is thus one form of permissible evidence in civil proceedings. To be appointed by the court as an expert, an individual must have the necessary training, or if a legal entity (company, scientific institute) must have employees who have the necessary training; and must be recognised officially by being included on a court list of experts. The court can hear the expert and the parties can ask him questions and require explanations; but the court will not review the expert content of the report and assess its quality or the expert methods used. Only where the expert's report clearly contains inconsistencies or lack of logic can the court ask a second expert to review the report of the first.

An expert is usually directly appointed by the court. However, where one of the parties submits an expert report which it has commissioned and which complies with the necessary formalities, eg from an expert on the relevant court list and containing a statement from the expert that he is aware of the consequences of giving a false opinion, the court may consider this report as equivalent to one from a court-appointed expert.

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

As mentioned above, Czech legislation allows the resolution of disputes by arbitration. In 2012, the Act on Mediation was issued as well. The outcome of a dispute resolved by mediation is a contract settling the disputed matters between the parties. As such it is not enforceable in the same sense as a court judgment or arbitral award.

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

Yes: arbitration is commonly used to resolve these disputes.

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)?

Court proceedings are possible at two levels, giving a right of appeal against a first-instance decision. The decision of the court of appeal is final, but in exceptional circumstances there is a remedy against the judgment on appeal, which if successful will lead to the judgment being declared void.

An arbitral award cannot be appealed. Instead, the court may intervene in case of serious procedural errors, eg if (i) an arbitrator was unqualified or not validly appointed, in general or for the specific dispute; (ii) the arbitration clause was invalid; or (iii) one party to the dispute was unable to present its case to the tribunal etc. In such a case, the court may review and annul the award, at the initiative of one or more of the parties. For disputes to which a consumer is a party, see the answer to Q11.1.3.

11.2 Design and build

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

No.

11.3 BOT/DBFMO

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

No.

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?

An unsuccessful candidate can file an objection with the contracting authority stating reasons for his complaint and how he wishes the contracting authority to amend its decision. The objection must be filed within 15 days as of the day he learned of the relevant decision of the contracting authority. If the contracting authority does not respond to the complaint to the satisfaction of the unsuccessful candidate, he may request the Office for the Protection of Economic Competition ('the Office') to review the tender documentation, the content of the notification or the request for tenders, a decision to exclude one or more of candidates, the selection of the most suitable candidate and the decision on what type of tendering system to use.

Before the 15 day period for filing objections expires, the contracting authority may not enter into a contract with the selected candidate. If there are no objections, the contracting authority may enter into the contract with the winning candidate without undue delay after the expiry of this 15 day period

Further, the decision of the Office is reviewable by the court. The regional courts in special administrative formations decide these cases, with the Supreme Administrative Court of the Czech Republic as the highest authority.

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

There is no specific dispute resolution system for public works contracts, either during the contract period or after acceptance of the works.

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?

Several kinds of insurance exist in the Czech construction sector, in particular:

- liability insurance
- property insurance
- and possibly insurance against financial losses

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 main contractor usually takes out liability insurance, which also covers damage or loss suffered by third parties. It is for the main contractor to decide what type of insurance to select, in addition to liability and property insurance.

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

Under Article 16 of Act No.360/1992 Coll., both architects and engineers are required to take out liability insurance.

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

There is no obligation on main contractors or employers to take out CAR insurance. The individual construction contract usually determines whether a CAR policy is required and who bears the cost.

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 Civil Code addresses this issue in Articles 2816-2818: where the same insurable interest is insured against the same insurance peril and for the same period with several insurers. Insurance with several insurers may arise as:

a. co-insurance, if a contract has been concluded between the policyholder and multiple insurers represented by the leading insurer, and if the policyholder has undertaken to pay the premiums to only one of them;
b. concurrent insurance, if the total of the sums insured does not exceed the insurance value of the insured property, or if the total of the insurance indemnity limits does not exceed the actual amount of the damage incurred; or
c. multiple insurance, if the total of the sums insured exceeds the insurance value of the insured property, or if the total of the insurance indemnity limits exceeds the actual amount of damage incurred.

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

Legal actions against insurers are generally statute-barred after three years. The limitation period begins from the day when the claim could first have been asserted.

A right to indemnity from an insurer under a third-party liability policy becomes statute-barred no later than when the underlying liability becomes statute barred. On the limitation periods for claims for damages, see the answer to Q11.1.2.

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?

There are no such special insurance policies. The contractor is typically required to take out liability insurance.

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?

The answer is the same as for Q12.2.1.

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?

There are no special risks in public works contracts.