

Construction 2022

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Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Construction*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Iraq and Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson PC, for their continued assistance with this volume.



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LOCAL MARKET

Foreign pursuit of the local market

- 1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

From a legal perspective, companies entering the Austrian market are usually concerned about which legal entity is most suitable – an Austrian branch of a foreign company or an Austrian subsidiary (joint-stock company, private limited liability company, or partnerships with or without limited liability). This decision is also driven by tax implications and the labour law regime. Currency concerns only play a minor role because of the single market. From a tax perspective, foreign designers or contractors who do not have their seat, place of management, residence or habitual abode in Austria are subject to limited tax liability for Austrian-source income. Austrian-source business income is subject to tax in Austria if the foreign designer or contractor has a permanent establishment (PE) or an agency PE in Austria, or if Austrian real property is concerned. However, income derived from commercial consulting, technical consulting or the provision of personnel in Austria is also taxable in Austria without a PE there. Most double taxation treaties provide for special regulations regarding building sites, construction or installation projects. For double taxation treaties that follow the Organisation for Economic Co-operation and Development model tax convention, building sites, construction or installation projects constitute a PE only if they last for more than 12 months.

REGULATION AND COMPLIANCE

Licensing procedures

- 2 | Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

In general, every commercial activity in Austria triggers the need to obtain a trade licence. According to the provisions of the Austrian Trade Code, 'trade' is defined as any activity carried out independently, on one's own account, at one's own risk, regularly and with the intention of making a profit. A 'trade' activity is already deemed to be carried on if it is offered to a considerable number of persons (eg, by advertising). Hence, foreign designers or contractors must obtain a trade licence if they plan to establish a business in Austria unless they only render cross-border services for a limited period of time (where special rules of the Austrian Trade Code apply). The provisions of the Austrian Trade Code do not apply to architects as they have to comply with the more severe rules of the Austrian Civil Engineer Act. Thus, architects must obtain certain university degrees and professional training and experience or, in the case of architects from another EU member state, they must prove that

they have equivalent professional experience to be allowed to render services in Austria. Therefore, designers or contractors from other EU countries (regardless of whether they operate under the Austrian Trade Code or the Austrian Civil Engineer Act) have access to the Austrian market under the freedoms of services and establishment if they can prove that their professional training and experience complies with certain minimum standards. Foreign employees (as well as freelancer staff) from outside the EU need to hold a visa including a working permit. The consequences of not complying with the provisions of the Austrian Trade Code or any other applicable laws are administrative penalties.

Competition

- 3 | Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

According to the freedoms of the European market, in particular, the freedoms of services and establishment, any legal prohibition, restriction or discrimination of EU nationals is forbidden. As European fundamental rights only apply to EU nationals, contractors from countries outside the EU are not entitled to rely on such rights and may have a competitive disadvantage.

Competition protections

- 4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

Public contractors are subject to the Austrian Federal Public Procurement Act (BVerG), implementing the EU Public Procurement Directives in Austria. Specific laws exist for tenders in the security and military sectors. The BVerG, in principle, applies to all types of public construction, supply and service contracts, regardless of the amount of the contract awarded. However, below the thresholds of the EU Public Procurement Directives, public contractors have more discretion regarding the choice of the tender procedure. The purpose of the BVerG is to ensure that tender proceedings are transparent, non-discriminatory and result in a free and fair public procurement completion. In cases where tender documents are discriminatory, where the contract has not been awarded to the best bidder or with regard to any other relevant decisions of the contracting authority, the BVerG provides for effective remedies and interim relief until the decision of the competent public procurement review authority, namely, the competent administrative court of one of the nine provinces (if the public contractor is a province or municipality) or the Federal Administrative Court (if the contracting authority is the federal government). In cases of illegal direct awards, the administrative courts have the power to annul such contracts. Whereas the material part of the BVerG applies to all public contractors and, therefore, to the federal government as well as the provinces or municipalities, with respect to remedies against the decision of a contracting

authority, the provinces have nine separate public procurement review laws that, in principle, 'mirror' the provisions of the BVerG. In practice, therefore, it does not make a difference if review proceedings before the administrative courts are subject to the BVerG or the provincial laws.

In addition, the Federal Act against Unfair Competition outlaws unfair competition as anyone may be sued for a cease-and-desist order and, in the case of fault, for payment of damages if they resort to an unfair commercial practice or another unfair practice that is likely to distort competition to the detriment of enterprises. Unfair commercial practices are, in particular, those that are misleading or aggressive (ie, able to impair significantly the market participant's freedom of choice or conduct with regard to the product by harassment, coercion or undue influence, and constitute an inducement to take a transactional decision that would otherwise not have been taken).

Bribery

- 5 | **If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?**

Illegality in obtaining an award of a contract does not automatically lead to the invalidity of the contract. A contract is only voidable under certain circumstances (eg, violation of moral principles). Otherwise, the contract is valid and enforceable. If the illegally obtained contract disadvantages the other party, this party may claim for losses resulting from the illegal behaviour. In respect of public officials, bribe-givers and bribe-takers will be prosecuted and could face up to 10 years' imprisonment. The actual sentence depends on the value of the benefit conferred by the unlawful behaviour of the public official. Austrian law also imposes criminal liability upon companies. According to the Austrian Act on Corporate Criminal Liability, legal entities are liable for the criminal behaviour (such as bribery) of their legal representatives. Except for a few insignificant exemptions, neither the receipt nor the contribution of facilitation payments is allowed under Austrian law.

Reporting bribery

- 6 | **Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?**

Under Austrian law, employees of the project team are not obliged to report suspicion or knowledge of bribery of government employees. The Austrian Corporate Governance Code states that the management board reports at least once a year to the supervisory board about measures to combat corruption. The regulation is not a legal requirement. Corporations either have to comply or explain why they did not comply with the regulation. The Austrian Corporate Governance Code is only relevant for corporations that are listed on the stock exchange. Except for the Austrian Corporate Governance Code, no mandatory laws exist in Austria that regulate internal compliance rules.

Political contributions

- 7 | **Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?**

Political contributions are not a necessary part of doing business in Austria.

The Federal Political Parties Act was amended with effect as of 9 July 2019. Political parties are only allowed to accept contributions of €750,000 in total per annum. Contributions of more than €2,500 in one calendar year must be reported to the Court of Audit and the results will be published. Contributions from certain entities are prohibited, in particular, parliamentary clubs or enterprises, institutions in which the public sector has a share of at least 25 per cent, and foreign persons.

Compliance

- 8 | **Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?**

Pursuant to section 309 of the Austrian Criminal Code, it is illegal to request or to accept any sort of bribe, with such behaviour being sanctioned with imprisonment of up to two years and, in more serious cases, up to five years. Additional provisions apply to public employees.

Other international legal considerations

- 9 | **Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?**

Contractors participating in tender proceedings may be required to provide financial statements, technical qualifications and prove reliability according to the tender documents. The contractors usually only provide a financial statement, a confirmation by the tax office that there are no outstanding social security payments, excerpts of the criminal register of the managing directors, details on technical equipment and the number and qualifications of staff. Since July 2020, foreign direct investments may be subject to approval by state authorities, which will usually be irrelevant for mere contractors but may impose difficulties if such contractors invest on a bigger scale.

CONTRACTS AND INSURANCE

Construction contracts

- 10 | **What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?**

International standard forms, such as from the International Federation of Consulting Engineers, are generally known but are mostly used only in transactions with international aspects. The Austrian standard form for construction agreements is the Austrian Standard B 2110, which contains standard contractual provisions for construction services. The standard is widely used, in particular, for construction agreements with a smaller contract volume. The applicability of the standard is subject to the agreement between the contracting parties; however, it is mandatory under the Federal Procurement Act, where any deviations need to be justified. There is no legal requirement to use a specific language in the contract. According to the Austrian Standard B 2110, the contractual language is German, but this is not mandatory. The parties can agree to any language. There is no restriction regarding choice of law or venue for dispute resolution in Austrian law and the parties are also free to agree on arbitration proceedings (except for mandatory consumer protection rules).

Payment methods

- 11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Contractors, subcontractors, vendors and workers are usually paid via electronic payment. Cheques are not commonly used for payments in Austria. There is no standard frequency for payment in Austria. Usually, payments are made in instalments that are due upon completion of certain stages of the project (to be agreed upon in the contract). The standard frequency for payment of workers is monthly, as is set out in the wage agreement for the building sector. The payment schedule for subcontractors and vendors may vary. In recent years, the Austrian legislature has enacted several provisions according to which the buyer may be liable for the contractor's social security or tax payments.

Contractual matrix of international projects

- 12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

In general, owners choose one of three alternatives in Austria, as follows:

- to contract with one contractor covering all services for the construction project (including architect);
- to contract with one general contractor and a few additional contracts with specific contractors (eg, architect and project manager); or
- to contract with contractors for specific purposes.

PPP and PFI

- 13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Austria does not have a general or special PPP or PFI Act. However, according to the Austrian Public Procurement Law, public procurements must comply with the provisions of the Act. PPP projects (eg, construction of railways) fall under the provisions of the Austrian Public Procurement Law.

Joint ventures

- 14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Joint ventures may be established in the form of a corporation, such as a limited liability company, with the members being the shareholders or a non-corporate entity such as a partnership, a limited partnership or a civil company. Partners of a partnership and a civil company are directly liable. This unlimited liability towards third parties is mandatory and cannot be limited or allocated with effect to third parties but can be agreed upon internally between the partners. Another possibility to limit or allocate the liability and responsibility would be to establish the joint venture as a limited partnership with one level of partners having unlimited liability and one level of partners only being liable towards third parties for a specific amount (this amount is registered in the commercial register). The liability of the latter towards the company is limited to their capital contribution as stipulated in the articles of association (this may be a different amount from the amount registered in the commercial register). The downside of this limitation of liability is that the latter has no management authority and no power of representation towards third parties. In the case where a corporation is the vehicle for the joint venture, the liability of the members is limited to their capital contribution, which can be allocated freely.

Tort claims and indemnity

- 15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

In general, a contracting party is liable for all damages resulting from its own (or its workers') inadequate performance or from the inadequate performance of any of its subcontractors – even if there is only negligent behaviour. Exclusion of liability through general terms of contract is permitted but only to a limited extent. It is not possible to exclude liability for 'exceedingly' grossly negligent and intentional behaviour. Negligence by the first party may reduce but does not generally exclude indemnification.

Liability to third parties

- 16 | Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

It is very difficult to raise claims based on Austrian tort law (ie, outside contractual relations). In general, buyers prefer to raise contractual claims (warranty or damages) against the seller or the lessor. Third parties may seek the assignment of contractual warranty and damages claims from the seller. In this way, a third party could raise a claim against the contractor directly, despite the lack of contractual privity. However, this is rather unusual and often undesired by third parties. Such assignment is enforceable under the Austrian Property Developer Act, which confers the right to purchasers to request assignment of the claims of the developer against the contractor.

Insurance

- 17 | To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Contractors are subject to the Austrian Trade Act (section 94, No. 5 for national contractors and article 373(a) for foreign contractors of the EU) and under those regulated terms are required to have liability insurance covering personal and material damage. Regulations published on 1 August 2013 require insurance liability for financial losses too. The insured sum per insured event of damage has to be at least €1 million. If the insured company's revenue exceeds €38.5 million per year, the insured sum per insured event of damage has to be at least €5 million. The insured sum per year (aggregate limit) must be between €3 million and €15 million. The insurer has to be officially permitted to offer liability insurance in Austria to comply with the required regulations. The deductible per insured event is limited to 5 per cent of the aggregate limit. The Austrian Insurance Association publishes non-binding insurance liability conditions. These policies include the general conditions of insurance for the construction industry (BW 2010) and the general (AHVB 2005) and additional (EHVB 2005) conditions for liability insurance. These general conditions concerning the construction industry provide insurance coverage for the building contractor's supplies and actions, including construction parts, materials and compounds limited to the sum insured at the insured's location. Insured risks and damage are unexpectedly occurring damage, destruction or loss of insured things, but not a delay to the construction. Insured interests are those of the policyholder and the builders as well as the other involved contractors. The builder, in comparison to the building contractor, is the one

on whose order the building project is executed and funded. Some events are excluded from liability. Exceptions may be earthquakes, all kinds of circumstances in connection with warfare, errors that had to be known by the insured or the building contractors at the time the contract was agreed, or intentional or grossly negligent actions or omissions and violations against statutory and official regulations caused by the builder or building contractor. Improper work on insured objects is also excluded from counting as insured physical damage. As damage to the property of third parties (eg, adjacent buildings) can be subsumed under one of the three liability insurance facts (personal, material or financial loss), it is covered by liability insurance. An exclusion of liability exists if the damage occurred through actions taken intentionally or grossly negligently. As section 99, paragraph 7 of the Austrian Trade Act regulations demands, liability insurance for personal and material damage as well as for financial loss, injury to workers or third parties (eg, pedestrians and passers-by) is covered.

In addition to the general conditions of insurance for the construction industry as well as the general and additional conditions for liability insurance, the Austrian Accident Insurance System provides insurance for workers in case of injury or disease that occur in connection with the insured activity (employment). The general conditions for liability insurance explicitly exclude claims by third parties concerning compensation for damage done intentionally or grossly negligently. Insured services provided by the legal social insurance range from prevention of industrial accidents and occupational diseases to first aid and follow-up treatment as well as paying pensions and continued pecuniary payment. Damage incurred from environmental hazards caused by construction sites is generally covered by liability insurance.

As Austrian law acknowledges force majeure, the affected party cannot be held responsible for damage caused by this. Therefore, there are many exceptions given by the general conditions of insurance for the construction industry as well as the general and additional conditions for liability insurance (eg, typical permanent emissions caused by construction sites, radioactive radiation and improper construction material). These articles are mostly covered individually. General local tort law does not provide for any limitations of liability. The general conditions for liability insurance exclude claims that exceed the liability for damage stated by legislation. Austrian law does not justify excessive legal responsibilities as is common in some other countries. Limitations can be seen in the way the Austrian law does not provide liability for damage caused by actions taken intentionally or grossly negligently. In the case of intentional damage, it is impossible to validly exclude liability by law. On these grounds, it is common practice in business-to-business relations to limit one's liability for gross negligence or agree on a cap in respect of liability to each other.

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

18 | Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There are no laws requiring a minimum amount of local labour to be employed on a particular construction project. While EU citizens generally have the right to move freely and to work in Austria, third-country nationals require a permit. With regard to third-country nationals wishing to reside and work in Austria, a points-based system is currently in place. A strict regime concerning the undercutting of wages is in place.

Local labour law

19 | If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

If an employee is engaged on a fixed-term contract, the employer generally has no further legal obligations to that employee upon termination of the employment relationship. Consecutive fixed-term agreements may, however, be deemed to constitute an employment agreement for an indefinite term, unless the conclusion of fixed-term agreements is objectively justified. Such objective justification may be the case, for instance, in seasonal businesses. While the possibility of terminating the employment agreement prior to the fixed term may be agreed upon contractually, the number of possible termination dates must be proportionate in relation to the duration of the fixed term. Employment agreements entered into for an indefinite period may be terminated without good cause. Notice periods and termination dates may vary depending on the applicable laws and collective bargaining agreements, the employee's seniority as well as his or her classification as a white- or blue-collar worker. Non-compliance with these may trigger compensation claims for unlawful termination. Although the employer may give notice without cause, employees (apart from managing directors and employees with decisive managerial functions) with more than six months of service may challenge the termination before the courts for labour and social affairs on one of the following grounds:

- there is a proscribed motive for the termination (eg, activity in organising the election of a works council or the recent raising of claims against the employer that are, at least in part, justifiable); or
- the termination is socially unjustified (owing to age, financial obligations and future career opportunities), and, based on a balance of interest test, the employer cannot justify the termination based on personal or economic reasons.

If a challenge is successful, the competent court will declare the termination null and void and the employee has to be reinstated. Certain groups of employees, such as pregnant employees, employees on parental leave or on parental part-time work, works council members, employees with a recognised disability status, employees performing military or civil service, and apprentices, enjoy special termination treatment. This means that they may only be terminated with good cause and with the prior approval of the competent labour court or a competent public authority.

Labour and human rights

20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

While EU citizens generally have the right to move freely and to work in Austria, third-country nationals require a permit. With regard to third-country nationals wishing to reside and work in Austria, a points-based system is in place. The parties to the employment contract may agree upon any choice of law they desire. Nevertheless, if the employee carries out his or her work in or is temporarily deployed to Austria, then certain minimum standards according to Austrian law will be applicable. These minimum standards include a minimum wage according to the applicable collective bargaining agreement, adherence to working time regulations and statutory holiday entitlements. Very strict provisions concerning the undercutting of wages have been in place since 2017. General contractors paying below the minimum wages according to law, regulations or collective bargaining agreements, as well as their employers, may become liable. Consequences may include fines from public authorities, as well as compensation claims by employees.

Close of operations

- 21 | If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

There are no general rules prohibiting a business from ceasing its operation. An entity is, however, obliged to meet its contractual obligations. If the state or other public entity has granted any kind of monetary support, the contractor may be obliged to pay damages. Depending on the corporate structure, a statutory period of time has to pass before any assets may be paid out to the shareholders. Wherever employers intend to terminate a large number of employees (be it unilaterally or by mutual agreement) within a period of 30 days, the Labour Market Service must be notified thereof at least 30 days prior to giving notice of termination of the first employment relationship. Otherwise, the terminations are legally ineffective. In addition, notice periods, termination dates and notifications need to be observed. Furthermore, wherever a works council has been established, the works council needs to be notified and consulted with. In business units of more than 20 employees, the works council may enforce a social plan, which is meant to mitigate the detrimental effects of the shutdown on employees, especially elderly ones. If the contractor does not close but transfers its operations, the employment relationships existing at the time of the transfer are automatically, by operation of law, transferred to the purchaser as employer. The legal consequences are set out in the Employment Law Harmonisation Act, implementing the Transfers of Undertakings Directive (2001/23/ EC), which was established to protect the rights of employees in a transfer situation.

PAYMENT

Payment rights

- 22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

According to section 1170b Civil Code, a contractor may request up to one-fifth of the fees that have not yet been paid – or, if the contract is to be fulfilled within three months, up to two-fifths – for the purpose of securing his or her right to payment. This security may be provided by way of cash, passbooks, bank guarantees or insurance. The costs of this security have to be borne by the contractor unless these costs exceed 2 per cent of the secured amount. This contractor's right to secure payment cannot be waived. However, the above is not applicable if the owner (commissioning party) is a legal entity of public law or a consumer in the sense of Austrian consumer protection law. Apart from the possibility to secure the right to payment by way of the law, the contractor may try – regardless of his or her statutory right – to secure a higher amount of the concluded fees and costs by way of a bank guarantee. This, of course, is not implemented in the Austrian Civil Code but is dependent on the outcome of negotiations with the commissioning party. Although a lien on the property may be possible for this purpose, this type of security is rather unusual and impracticable. Liens, or mortgages, are usually used for securing a financial debt (such as loans) and established by a written contract with notarised signatures and its registration in the land register. Court registration fees in the amount of 1.2 per cent of the secured amount will be payable upon registration. If a mortgage is not established in close connection with a loan, it is additionally subject to stamp duty of 1 per cent of the secured obligation.

'Pay if paid' and 'pay when paid'

- 23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

According to section 1170 of the Civil Code, payment is due upon completion and handover of the works. However, this provision is not mandatory and parties may agree to deviating terms in the contract. According to settled Supreme Court case law, the risk of the owner's non-payment or late payment cannot be fully passed on to the subcontractor. The Austrian Supreme Court ruled that the general contractor is obliged to pursue payment of the fees for the subcontractor's work with the diligence of a reasonable businessperson if such terms between the general contractor and subcontractor were agreed; this even includes claiming payment of the subcontractor's fees before the court.

Contracting with government entities

- 24 | Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Government agencies can only assert sovereign immunity when acting within the field of state administration (*acta jure imperii*). Construction contracts are not part of state administration but constitute commercial activity (*acta jure gestionis*). Therefore, such actions do not provide immunity. There are no additional provisions under Austrian law that would grant government agencies immunity in such litigation proceedings.

Statutory payment protection

- 25 | Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Usually the contractors' fees and costs are payable upon completion of the work. However, if the project is separated and built in different stages, contractors may claim the proportional part of the fees and costs upfront. If the project has been interrupted or cancelled a contractor may seek for his or her fees and costs for the services performed until the interruption. According to section 1168 of the Civil Code, the contractor has the right to claim his or her fees and costs in the case of the project being interrupted or cancelled if the interruption or cancellation was caused by circumstances in the sphere of the commissioning party.

FORCE MAJEURE

Force majeure and acts of God

- 26 | Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

If no other provisions are set out in the construction agreement, the contractor is liable under the Civil Code for any delays or additional costs resulting from force majeure (before handover). If the Austrian Standard B 2110 has been agreed on, inevitable delays or additional costs caused by force majeure do not have to be borne by the contractor, if he or she is unable to prevent or reduce the impact of the force majeure. Usually, construction agreements contain specific clauses stipulating the consequences and distribution of risks in cases of force majeure.

In 2020, force majeure clauses were discussed intensively because of the covid-19 crisis. Contractors claimed adaption of the contracts; new contracts now contain specific clauses in relation to the consequences of the pandemic, taking account of the current legal situation and future developments.

DISPUTES

Courts and tribunals

- 27 | Are there any specialised tribunals that are dedicated to resolving construction disputes?

There are no specialised tribunals dedicated to resolving construction disputes. However, in many cases, the contracting parties in construction contracts agree on an arbitration clause for international disputes.

Dispute review boards

- 28 | Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Dispute review boards are not used in Austria.

Mediation

- 29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation has gained acceptance and has become more common. In certain fields, such as business mediation and family mediation, mediation is experiencing a rise in popularity and acceptance. Mediators often have a background in law or social studies.

Confidentiality in mediation

- 30 | Are statements made in mediation confidential?

Austrian law distinguishes between registered and non-registered mediators. The Law on Mediation in Civil Proceedings is only applicable to registered mediators. Pursuant to section 18 of the Law on Mediation in Civil Proceedings, statements made in mediation are confidential. Pursuant to section 320 of the Code of Civil Procedure, registered mediators may not be called on to testify as witnesses in court with regard to facts disclosed in the mediation process. However, this only applies to registered mediators. There are no binding regulations regarding non-registered mediators. Additional confidentiality agreements are advisable.

Arbitration of private disputes

- 31 | What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration of construction disputes is generally preferred over litigation in the local courts as it has many advantages, including the following:

- parties can choose arbitrators with special knowledge in their field;
- arbitration is generally better suited to international cases and construction disputes are often international;
- proceedings in arbitration are flexible and can be adjusted to the parties' needs; and
- starting from an amount in dispute of approximately €1 million, arbitration is generally more cost-efficient than litigation in the local courts, and construction disputes often have a high amount in dispute.

For all those reasons, the importance of arbitration of construction disputes has significantly increased.

Governing law and arbitration providers

- 32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

In Austria, the two most frequently used customary international arbitration providers are the Vienna International Arbitral Centre (VIAC) and the International Chamber of Commerce. The VIAC is firmly established as it has knowledge of the Austrian market. It is also well-established in Central and Eastern Europe and is (compared with other providers) cost-efficient and experienced.

Dispute resolution with government entities

- 33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

Section 577(ff) of the Civil Procedure Code contains specific clauses for arbitration. As these sections do not state any limitations on the use of arbitration by government entities, the general rules (section 1(ff) of the Civil Procedure Code) apply. Hence, if government agencies are parties to a contract, they may agree on an arbitration clause if private entities do so.

Arbitral award

- 34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Austria is a signatory of the New York Convention of 1958. An arbitral award can only be rejected for reasons stated in the Convention.

Limitation periods

- 35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

A claim subject to a warranty must be filed within three years of hand-over. The statutory limitation period for damages claims is three years from the time of knowledge of the damage, the damaging party and the causal link. However, the absolute statute of limitation is 30 years.

ENVIRONMENTAL REGULATION

International environmental law

- 36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Austria, as a member state of the United Nations since 1955, participated in the Conference on the Human Environment in Stockholm in 1972. In general, environmental and wildlife issues have to be assessed during almost every building project. Usually the competent building authority has to assess whether the building project will have any negative influence on the environment. Further, with the Austrian Environmental Impact Assessment Act (UVP-G), Directive 2011/92/EU (as amended by 2014/52/EU) has been implemented into Austrian law. According to the UVP-G, for projects listed in Annex I (eg, power plants, skiing regions, highways and railways) an environmental impact assessment has to be conducted. As proceedings according to the UVP-G are called 'concentrated permission procedures', such a permit covers all other permits according to federal or provincial law, such as permits according to the

building laws or the Austrian Trade Code. If a proceeding pursuant to UVP-G has to be conducted, there is no need to apply for a building permit or an operating permit.

Local environmental responsibility

37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Environmental issues have to be assessed in line with various provisions. As a consequence, there are many responsibilities with respect to the construction and development of building projects. The most important issues concern air, water and waste. Environmental provisions generally follow the 'polluter pays' principle. Pursuant to the Austrian Federal Environmental Liability Act, a framework of environmental liability, based on the 'polluter pays' principle, has been stated to prevent and remedy environmental damage. This means that the economic operator that has caused any environmental damage is liable. Private parties have no statutory right of compensation as a consequence of environmental damage or an imminent threat of such damage occurring; they have to take legal action based on Austrian civil law.

CROSS-BORDER ISSUES

International treaties

38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Austria has not signed any such investment agreements.

Tax treaties

39 | Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Currently, approximately 90 double taxation treaties are in force in Austria, including treaties with Australia, Brazil, China, the United Kingdom, Hong Kong and the United States.

Currency controls

40 | Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

Converting euros to another currency is generally unproblematic. Within the EU, profits or investments may be withdrawn from Austria, except for anti-money laundering issues, in which case, certain assets may be frozen. Cash exceeding €10,000 is subject to declaration for customs when brought into or taken from the EU. No declaration has to be made in respect of cash brought into or removed from Austria, where the cash is not coming into or leaving the EU.

Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

According to the Austrian Capital Outflow Reporting Act, the outflow of funds worth €50,000 or more from the private bank accounts or depository accounts of individuals has to be reported to the Minister of Finance by financial institutions, payment institutions and the Austrian Federal Financing Agency. Further, according to European anti-money

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laundering regulations, strict know-your-customer regulations apply, under which, for example, in real estate transactions, a check of personal IDs of the parties (or directors of the entities involved) needs to be made before transactions may be completed.

UPDATE AND TRENDS

Emerging trends

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

The past 15 years have been marked by a boom in construction. Prices for residential and commercial real estate have been growing considerably and yields have developed respectively. There has been a disproportionate influx of new people to Austria's capital Vienna, which is close to passing the threshold of two million inhabitants. The city tries to keep prices for apartments low while, at the same time, promoting social intermixing. Vienna is regularly ranked as the city with the highest quality of life and, compared with other European capital cities, is still marked by moderate prices. The corona crisis did not change the trend but shifted investors' interest to specific asset classes (eg, residential, logistics).

Coronavirus

43 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has led to several changes as the Austrian federal parliament passed multiple laws to regulate the economic consequences of the pandemic. In the case of contracts concluded before 1 April 2020, companies may be exempt from paying penalties if the delay was as a result of the pandemic. Investors still see Austrian real estate as safe haven and thus investments are still very high. Prices for real estate have grown considerably in 2020 and the trend seems set to continue in 2021. Demand for office spaces has change in relation to quality (eg, single rooms, elevators, air conditioning) and quantity (more or less space depending on business and availability of home offices).

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