

Construction

Contributing editors

Robert S Peckar and Michael S Zicherman



2019

GETTING THE
DEAL THROUGH 

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Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

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Preface

Construction 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Chile and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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.

GETTING THE
DEAL THROUGH 

London
July 2018

Austria

Stefan Artner and Klaus Pfeiffer

DORDA

1 Foreign pursuit of the local market

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 (ie, 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. In addition, potential market entrants take consideration of the tax and labour law regime; due to the single market, currency concerns only play a minor role.

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 provision of personnel in Austria is also taxable in Austria without a PE therein.

Most double taxation treaties provide for special regulations as regards the qualification of building sites, construction or installation projects. For double taxation treaties that follow the OECD model tax convention, building sites, construction or installation projects constitute a PE only if they last for more than 12 months.

2 Licensing procedures

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 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, a foreign designer or contractor has to obtain a trade licence if he or she plans to establish a business in Austria unless he or she only renders cross-border services for a limited period of time (where special rules of the Austrian Trade Code apply) or he or she is an architect.

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, an architect has to pass certain studies and professional training and experience or, in the case of an architect from another EU member state, to 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.

3 Competition

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

According to the provisions of the European fundamental rights, in particular the fundamental right of services and establishment, any legal prohibition or restriction or discrimination of EU nationals is forbidden. As a member state of the EU, Austria has not set up protective laws in favour of Austrian-based contractors. As European fundamental rights only apply to EU nationals, foreign contractors from countries outside the EU are not entitled to rely on such rights and may have a competitive disadvantage.

4 Competition protections

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 (*Bundesvergabe-gesetz* – 'BVerG') implementing the EU Public Procurement Directives in Austria. For awards in the security sectors or with regard to the military, a specific law exists. The BVerG, in principle, applies to all types of public construction, supply and service contracts, regardless of the amount of the contract. However, below the threshold of €50,000, direct awards are admissible. Furthermore, below the thresholds of the EU-Public Procurement Directives, public contractors have more discretion regarding the choice of the award procedure. In any case, the purpose of the BVerG is to safeguard that award proceedings are transparent, non-discriminatory and organise a free and fair public procurement completion. In cases where tender documents are discriminatory, 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, ie, the competent administrative court of one of the nine provinces (if the public contractor is a province of municipality) or the Federal Administrative Court (provided the contracting authority is the Republic of Austria (Bund)). In cases of illegal direct awards the administrative courts even have the power to annul such contracts. Whereas the material part of the BVerG applies to all public contractors and therefore to the Bund 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 aforementioned provincial laws.

To prevent anticompetitive behaviour, the Federal Act Against Unfair Competition (UWG) exists. According to the UWG, anyone who in the course of business resorts to an unfair commercial practice or another unfair practice that is likely to distort the competition to the detriment of enterprises may be sued for a cease-and-desist order and

in case of fault for payment of damages. Unfair commercial practices are, in particular, those that are misleading or aggressive (ie, able to significantly impair the market participant's freedom of choice or conduct with regard to the product by harassment, coercion or undue influence, and inducement to take a transactional decision that would otherwise not have been taken).

5 Bribery

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 of obtaining an award of a contract does not necessarily lead to an invalidity of the contract. A contract is only voidable under certain circumstances (eg, violation of moral principles). Otherwise, such contract is valid and enforceable. If the illegally obtained contract disadvantages the other party, this party may claim for damages resulting from the illegal behaviour.

In respect of public officials, bribe-givers and bribe-takers will be prosecuted. Bribe-takers and bribe-givers are faced with imprisonment for up to 10 years. The actual sentence depends on the value of the benefit of 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.

6 Reporting bribery

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.

7 Political contributions

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 provisions of the Austrian Political Parties Act state that political parties are financed by subsidies and donations. In addition, donations of an amount exceeding €50,000 have to be notified to the Austrian Court of Auditors and the amount and the name of the donor must be published on its website.

8 Compliance

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.

9 Other international legal considerations

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. The contracting authority states such criteria in 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 number and qualifications of staff.

10 Construction contracts

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 FIDIC, 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 they prefer.

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 (safe mandatory consumer protection rules).

11 Payment methods

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.

There is no standard frequency for payment in Austria. Payment intervals depend on the individual requirements of the construction project. 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.

12 Contractual matrix of international projects

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;
- 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.

Foreign investors may prefer the first option as they may lack personnel in Austria. While this option is easier to handle, in particular, as there is only one contractor to deal with, it usually entails a higher remuneration for the one-stop-shop (or all-in-contract). The owner still has to engage an effective project management in order to check the single steps taken by the general contractor. If defects or damages occur, there is only one addressee, which makes the situation easier for the owner.

The second option is the most common solution in Austria: the owner engages a general contractor and, at the same time, also engages other contractors such as architects and project managers. This option is a compromise allowing the owner to have one partner for most obligations (ie, the general contractor) while reducing costs with the others.

The third option should only be chosen if the owner has a strong project management team in place, who are able to direct specific contractors at site. Without such management, coordination between the

teams may be difficult and problems may arise. The owner may be able to save money when engaging the specific contractors with single contracts. The disadvantage is that there will be the question on who caused defects or damages in case such arise.

13 PPP and PFI

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 said Act.

14 Joint ventures

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 liable for their private assets. This unlimited liability towards third parties is mandatory and therefore cannot be limited or allocated. A limitation or allocation of liability may and 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 case 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.

15 Tort claims and indemnity

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 inadequate performance of itself (respectively its workers) or any of its subcontractors – even if only the party is negligent. The parties can exclude their liability, which is only possible to a limited extent and can be made through general terms of contract. It has to be noted that it is not possible to exclude liability for ‘exceedingly’ grossly negligent and intentional behaviour.

16 Liability to third parties

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?

A third party claim against the contractor is unusual and impracticable and often undesired by third parties. If a third party has a claim, he or she may – for practicability reasons – wish to raise his or her claim against the seller or lessor. The seller may then have a contractual (warranty or damages) claim against the contractor.

Third parties may also seek that the seller assigns his or her contractual warranty and damages claim to the third party. In this way a third party could raise a claim against the contractor directly, despite the lack of contractual privity. However, this proceeding is – at least for the private sector – rather unusual and as already mentioned often undesired by third parties.

17 Insurance

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?

In general, contractors are subject to the Austrian Trade Act (section 94, No. 5 for national contractors and article 373a for foreign contractors of the EU). As a subject to these regulated terms it is mandatory to have liability insurance covering personal and material damage. New 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 in order 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 insure 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. Lack of 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), they are 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 are generally covered by liability insurance. As Austrian law acknowledges force majeure, the affected party cannot be held responsible for damages caused by such. 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). Such 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 damages 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 damages 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.

18 Labour requirements

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 in order to be able to do so. With regard to third-country nationals wishing to reside and work in Austria, a points-based system is currently in place.

19 Local labour law

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. The parties must adhere to certain notice periods and termination dates. The notice periods and termination dates that need to be taken into account 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 the applicable notice periods and termination dates 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 (due 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.

20 Labour and human rights

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 in order to be able to do so. With regard to third-country nationals wishing to reside and work in Austria, a points-based system is currently 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. Such minimum standards may include minimum wage according to the applicable collective bargaining agreement, adherence to working time regulations and statutory holiday entitlements. Since 2017, very strict provisions concerning the undercutting of wages have been in place. 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.

21 Close of operations

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

As regards termination of employment relationships, the aforementioned notice periods and termination dates as well as information obligations would need to be observed.

Furthermore, wherever a works council has been established, the works council will need to be informed of the closing of business and consulted with on the matter. In business units with at least 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 will not close its operations, but rather transfers business operations (or parts thereof), then the employment relationships existing at the time of the transfer are automatically and, by operation of law, transferred to the purchaser as employer. The legal consequences are set out in the Employment Law Harmonisation Act and based on the Transfers of Undertakings Directive (2001/23/EC), which was established to protect the rights of employees in a transfer situation.

Basically, there are no restrictions prohibiting a business from ceasing its operation. An entity is, however, obliged to meet its contractual obligations, unless they are duly transferred to someone else with discharging effect. In the event the state or other public entity has granted any kind of monetary support, the contractor may be obliged to pay certain compensation. 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.

22 Payment rights

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 of the Austrian Civil Code, a contractor may in general 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 either hard cash, contributions in cash, pass-books, bank guarantees or insurances. The costs of this security have to be borne by the contractor him or herself, unless these costs exceed 2 per cent of the secured amount.

Update and trends

Austria has continued to attract investment from Austria as well as from abroad. A rising demand can be seen for larger developments, as in particular Asian investors entering the Austrian market demand large-scale projects. Developments of residential buildings have become a thriving factor, owing to the ongoing population increase, particularly in Vienna. Also, 'newer' asset classes such as student housing play an ever more important role for corporate investments.

This contractor's right to secure his or her right to 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 the 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 a close connection with a loan, it is additionally subject to stamp duty of 1 per cent of the secured obligation.

23 'Pay if paid' and 'pay when paid'

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. However, according to judgments of the Supreme Court 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 duly pursue payment of the fees for the subcontractor's work with the diligence of a reasonable business person, if such terms between the general contractor and subcontractor were agreed; this even includes claiming payment of the subcontractor's fees before court.

24 Contracting with government entities

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 state administration (*acta jure imperii*). Construction contracts are not part of the state administration but part of the 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. As a result, government agencies cannot assert sovereign immunity as a defence to a contractor's claim for payment.

25 Statutory payment protection

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 up front. 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 1,168 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.

26 Force majeure and acts of God

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. 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 case of force majeure.

27 Courts and tribunals

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 of construction contracts agree on an arbitral clause.

28 Dispute review boards

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

Dispute review boards are not used in Austria.

29 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where do the mediators come from? If not, why not?

Mediation has gained acceptance and has become more common. Mediation prior to a court trial is even mandatory in some cases, such as disputes between neighbours or employment termination of an apprentice. Other fields, such as business mediation and family mediation, are also experiencing a rise in popularity. Mediators often have a background in law or social studies.

30 Confidentiality in mediation

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 in civil proceedings 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.

In any case, additional confidentiality agreements are advisable.

31 Arbitration of private disputes

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 for 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 these reasons, the importance of arbitration of construction disputes has significantly improved.

32 Governing law and arbitration providers

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 Vienna International Arbitral Centre (VIAC) and the International Chamber of Commerce (ICC). The VIAC is firmly established as it has knowledge of the Austrian market. It is also well-established in central Europe and eastern Europe and is (compared to other providers) cost-efficient and experienced. The ICC is also a well-established arbitration provider.

33 Dispute resolution with government entities

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

Section 577ff of the Civil Procedure Code contains specific clauses for arbitration. As these sections do not state any limitations of use of arbitration for government entities, the general rules (section 1ff 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.

34 Arbitral award

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.

35 Limitation periods

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 the day of handover of the work. The statutory limitation period for claims subject to damages 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.

36 International environmental law

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 would have any negative influence on the environment.

Further, with the Austrian Environmental Impact Assessment Act (UVP-G), the Directive 2011/92/EU (as amended by 2014/52/EU) has been implemented in Austrian law. According to UVP-G, for projects listed in Annex I (eg, power plants, skiing regions, highways and railroads) an environmental impact assessment has to be conducted. Since proceedings according to the UVP-G are called 'concentrated permission procedures', such permit covers all other permits according to federal or provincial law such as permits according to the building laws or the Austrian Trade Code. In case a proceeding pursuant to UVP-G has to be conducted, there is no need to apply for a building permit or an operating permit.

37 Local environmental responsibility

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?

As in question 34, environmental issues have to be assessed in various provisions. As a consequence, there are many responsibilities with respect to the construction and development of building projects. The most important issues are regarding air, water and waste. As a common standard it could be stated that all these provisions regarding environmental issues follow the 'polluter-pays' principle.

With the Austrian Federal Environmental Liability Act, Directive 2004/35/EC has been implemented. Pursuant to this Act, a framework of environmental liability, based on the 'polluter-pays' principle, has been stated to prevent and remedy environmental damages. This means that the economic operator who has caused any environmental damage is liable. Private parties have no right of compensation as a consequence of environmental damage or of an imminent threat of such damage occurring; they have to take legal action based on Austrian civil law.

38 International treaties

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.

D O R D A

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39 Tax treaties

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

Currently, there are about 90 double taxation treaties in force in Austria, including with Australia, Brazil, China, the UK, Hong Kong and the US.

40 Currency controls

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 unproblematic. Owing to the right of the free movement of capital revenues, profits or investments may be removed from Austria, unless there are anti-money laundering issues. In that case, certain assets may be frozen and can therefore not be moved anywhere. Moreover, cash exceeding €10,000 is subject to declaration for customs, when entering or leaving the EU. When currency is entering or leaving Austria without entering or leaving the EU, no declaration has to be made.

41 Removal of revenues, profits and investment

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 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-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.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
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Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
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Private Equity
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Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
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