



# Construction

in 36 jurisdictions worldwide

# 2013

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### Contributing editor:

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### Business development managers

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### Marketing manager – subscriptions

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subscriptions@  
gettingthedealthrough.com

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### Editorial assistant

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### Chief subeditor

Jonathan Allen

### Subeditors

Anna Andreoli  
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### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

### Construction 2013

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London, W11 1QQ, UK  
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# Austria

**Johannes Lindner and Dimitar Anadoliyski**

Fiebinger Polak Leon Rechtsanwälte

## 1 Joint ventures

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

Consortia for larger construction projects in Austria are mostly entered in the legal form of a civil law partnership. The partners of a civil law partnership are jointly and severally liable for all legal liabilities and duties of the consortium.

It is also possible to create a separate legal entity with limited liability, usually a limited liability company, in order to carry out a joint venture construction project. In this case the shareholders enjoy the protection of the corporate veil.

## 2 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?

Foreign designers or contractors can establish a branch or subsidiary in Austria. A branch under Austrian law is not a legal entity, so it cannot hold its own rights and duties. A branch of a foreign company has to be registered with the Austrian commercial register. A subsidiary can be a partnership or a company to be established under Austrian law. The right of subsidiaries of foreign designers or contractors to exercise the regulated professional activities of designers or contractors in Austria is only given if the responsible persons of the respective company or partnership are entitled to such rights. For non-EU, EEA or Swiss citizens or companies the purchase of real estate is generally subject to permits according to local law, the procedure and requirements being different for each region of Austria. For the employment of non-EU, EEA or Swiss citizens a working permit must be obtained, which can be difficult and time-consuming.

## 3 Licensing procedures

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

Designers in Austria generally have to fulfil specific requirements as to their qualifications and must obtain a licence from the competent authorities in order to undertake professional activities in Austria. Citizens of member states of the EU or the EEA as well as Swiss citizens, who have a designer's licence in their home state, are entitled to act temporarily in Austria as contractors subject to Austrian professional rules and certain information duties towards their clients. If the intended professional activity is not temporary, contractors have to file an application with the respective authorities. Similar rules apply to constructors: if they have the respective licence from said member states, they can also temporarily carry out professional activities in Austria subject to the notification of such activities to the Austrian authorities.

Working without a licence can lead to high fines (eg, for constructors, up to €14,000) as well as claims of competitors for the cessation of activity and damages. In the case of damages to third parties caused by non-licensed activities, the liability for damages can be more severe.

## 4 Labour requirements

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

No such rules apply in Austria. However, the employment of non-Austrian citizens (except for citizens of the EU, EEA and Switzerland) is generally subject to the obtainment of a working permit. The employment of foreign citizens without a working permit may trigger severe fines as well as further legal consequences, such as preclusion from participation in a public tender. Administrative law provisions (Austrian trade law, the Construction Work Coordination Act, etc) require, inter alia, persons in charge of compliance with public law duties to have their residence in Austria.

## 5 Local labour law

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

Austrian labour law applies to contracts between a foreign contractor and local employees in case of employment in Austria. The provisions of Austrian labour law are to a great extent mandatory and aim for the protection of employees. However, mutual rights and duties of the employee and the employer cease in general upon effective termination of the employment and rendering of all accrued due payments to the employee. Some duties of the employer arising from their general duty of care also have to be observed after termination of employment, for example, the duty to deliver a written statement confirming the employment and to refrain from making any statements to third parties which could impair the professional prospects of the employee.

## 6 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?

Subsidiaries in Austria established in the legal form of a limited liability company or an Austrian stock company have to be liquidated. Prior to the closing of liquidation proceedings the claims of creditors have to be satisfied or secured if still pending. Prior to the deregistration of the company, a confirmation letter by the tax authorities shall be filed with the register court. In the case of branches of foreign companies the same procedure applies mutatis mutandis. In the case

of branches of companies with the registered seat in a member state of the EU no formal liquidation proceedings are generally required except the filing of a confirmation statement by the tax authority prior to deregistration. The liquidation proceedings are time-consuming and complex so it is strongly recommended to obtain legal and tax advice.

Austrian law does not provide for any termination payments against foreign contractors closing their business in Austria, although, depending on the jurisdiction of the contractor and the legal form of asset transfer to the home country, tax issues may arise, inter alia, the taxation of hidden reserves.

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## 7 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?

In Austria the most popular standard-contract forms for construction works are the forms of the Austrian Standards Institute, in particular ÖNORM B 2110. The standard contracts deviate in many essential issues from the regulations of general Austrian law. Such standard-contract forms have to be agreed between the parties and are therefore subject to negotiation. Therefore, it is advisable to consult an Austrian lawyer before entering into a standard construction contract.

In the event of larger international projects international contract forms like FIDIC are also common.

Austrian law does not provide for any specific contract language as a prerequisite for the validity of a contract. In international transactions English language or bilingual contracts (English and German) are commonly used. In the case of bilingual contracts it is recommended to determine which version shall be binding and which version shall serve only for translation purposes.

The parties to a contract can freely choose the applicable civil law unless such choice would lead to a circumvention of crucial principles of Austrian law. The choice of the governing civil law does not affect the application of Austrian public law provisions.

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## 8 Competition

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

Austrian law does not provide for any advantage to domestic contractors. Furthermore, pursuant to EU law no discrimination of contractors from EU countries is admissible.

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## 9 PPP and PFI

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

PPP and PFI contracts are not subject to specific Austrian regulations but to general Austrian civil and public law. In particular public procurement provisions apply to PPP and PFI projects. The specific PPP between contractor and governmental entity can be based on different civil law contracts like leases or services agreements.

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## 10 Payment of fees

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?

Pursuant to the Austrian Civil Code upon execution of the construction contract by the parties, the contractor can demand securities for the due fees from the client for an amount of 20 per cent of the total agreed fees (40 per cent in the case of contracts with a duration of less

than three months). The respective securities can be, inter alia, a cash deposit, bank guarantee or insurance. The right of the contractor to demand securities cannot be limited in a contract.

Other securities for the contractor's fees have to be agreed between the parties. In particular, pursuant to Austrian law the contractor does not have any statutory claims for liens on the property involved in construction works.

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## 11 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, according to Austrian law damage claims may result from errors or omissions caused by negligence or wilful misconduct of a party to a contract. In case the respective other party is also negligent in its own matters and such negligence results (partly) in the damage, claims against the other party can be lowered.

Warranty claims may arise even if the contractor does not act negligently but the construction or works delivered are defective. If such defect was, however, caused by incorrect instructions or by the delivery of inappropriate materials by the claiming party and the contractor warns such party about the fact, the warranty claims for defects arising out of the use of such instruction or material are precluded.

In standard contracts the duty of the contractor to warn the contracting party about incorrect instructions and inappropriate materials as well as about concerns regarding the documentation and works delivered by the other parties are mostly specified.

According to Austrian law, however, damage and warranty claims can be excluded in contracts to a certain extent. Claims arising from wilful misconduct or gross negligence as well as claims for personal injury cannot be excluded. The same warranty claims cannot be excluded, in particular, if a purchased asset does not meet the explicitly promised requirements.

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## 12 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?

Third parties can claim damages from a contractor arising out of the contractor's negligence or wilful misconduct, if such acts cause direct damage to absolutely protected legal goods of the third party, such as physical integrity or ownership or if the damage is caused by an infringement of specific regulations aimed to prevent such damages.

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## 13 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?

Austrian law does not provide for specific (mandatory) insurance products for constructors. The injury of workers is insured, however, by mandatory statutory accident insurance. In Austria business civil liability insurance generally covers such damages as a third party's property or delay damages. The specific terms, insured risks and exemptions may differ significantly and are subject to individual agreements.

There are no specific limitations of the liability of contractors pursuant to Austrian law; general Austrian tort law is applicable.

**14 Insolvency and bankruptcy**

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

Local bankruptcy law does not provide for any differentiation between contractors and other creditors including with regard to major construction projects. In the case of bankruptcy, contractors shall notify their claims with the insolvency administrator and are entitled to receive only their quota of the liquidation proceeds. Therefore, it is recommended to agree on collaterals and other securities for the fees of the contractors.

Standard-contract forms provide for the right of the contractor to rescind from the contract in case of bankruptcy of the contract partner. Such clauses may be void, however, in the light of the latest amendments to Austrian insolvency law.

**15 Contracting with government entities**

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

Austrian government agencies themselves may be legal entities or they may only constitute organisational bodies of state entities (the Austrian federation, the federation states, the communities) which are then the parties to a contract. If such state entities or agencies that are legal entities enter into a civil law contract (inter alia into a construction contract) they act under civil law and not as holders of state authority, and they are treated legally as private persons with regard to their contractual obligation.

International organisations, third states and foreign diplomatic and consular representatives can assert immunity pursuant to the international law or to the respective seat agreements.

**16 Dispute resolution with government entities**

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

State entities and governmental agencies may also act under civil law by entering into civil law contracts with individuals or entities, signing binding dispute resolution agreements regarding disputes arising out of such contracts and be bound by arbitration awards.

**17 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?

Bribery that involves state representatives can lead to severe detention penalties under Austrian law for both bribe-givers and bribe-takers (up to 10 years' detention). The assumption of more than minor benefits by representatives of private persons or companies can also lead to criminal prosecution (penalties of up to one year's detention).

If a contractor gives a bribe to a representative of a company (or of an individual) in order to influence such representative to enter into a contract with the contractor in the name and on behalf of the represented company (or individual), such contract may be void, provided that the conditions of the contract are detrimental to the represented company.

In public procurement bribery constitutes a reason for recourse against the contracting party.

**18 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?

According to Austrian law, there are no explicit restrictions on contractors or designers working for public agencies because of their financial support for political candidates. If politicians are, however, in the position to decide as state representatives or to influence the decision of entering into a contract with the contractors then such financial support can be deemed corruption and trigger a criminal law prosecution.

**19 Arbitration of private disputes**

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

In Austria, there is no prevailing attitude towards the arbitration of construction disputes versus their litigation before local state courts. Although the domestic judicial system is highly efficient and works quickly – compared with other systems internationally – the parties to very large-scale projects, particularly involving players from different jurisdictions, may agree to arbitration. This is because of the possibility of appointing arbitrators who are experienced in a certain field, while a domestic judge would necessarily have to appoint an expert to deal with the highly technical matters involved. An arbitral tribunal can therefore prove to be more economical than a court. This scenario is specific only to arbitration in Austria, absent any local courts specialised in construction disputes. Finally, counsel to parties involved in large international cooperation contracts, particularly with parties seated outside the European Union, continue to subject disputes arising out of such contracts to arbitration. This is due to the ease of recognition and enforcement provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of which Austria is a signatory state without reservations.

**20 Force majeure and acts of God**

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

Austrian law does not define the terms 'force majeure' and 'acts of God'. If the events leading to the failure of performance are not caused by negligence or wilful misconduct of the constructor or if the constructor is not liable for such events on the basis of specific statutory or contractual provisions, the other party is generally not entitled to claim damages. The issue of damage claims is to be differentiated from the issue of the so-called 'price danger' (ie, the obligation to pay the agreed price although the construction works are destroyed). For the transfer of the price danger the relevant point in time is the handover of the construction works by the client.

If the performance of the contractual duties is factually not possible, pursuant to Austrian law the contract is automatically terminated. Financial difficulties, though, are not deemed to constitute such absolute factual impossibility for the performance of contractual obligation.

**21 Courts and tribunals**

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

In Austria construction disputes are dealt with by the competent ordinary state courts. If the dispute arises out of business-related transactions or if an action against a registered entrepreneur has

to be filed or if the contract at hand is a business contract for the entrepreneur, the dispute has to be brought before the commercial courts.

Arbitration clauses for construction disputes are common due to the higher procedural costs in the case of major international projects as well as in the case of disputes between constructors belonging to the same consortium. A specific arbitration tribunal for construction disputes is established with the Austrian Standards Institute, which deals primarily with disputes arising out of contracts awards after a tender procedure.

## 22 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?

Pursuant to statutory Austrian law warranty claims of clients for construction works related to real property have to be pursued within three years upon delivery of the works. Claims for damages have to be pursued within three years upon discovery of the damage and of the person having caused such damage. Therefore upon expiry of the three years, claims for any defect of such works can be pursued only as damage claims and the claimant has to provide evidence of a breach of contract as well as of negligence or wilful misconduct of the constructor.

In international construction contracts statutory provisions are mostly modified by mutual agreement, so that claims are limited and the period shorter.

## 23 Dispute review boards

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

Dispute review boards are not common in Austria.

## 24 Mediation

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 is still not the prevailing conflict resolution procedure but along with international trends its importance, inter alia in relation to construction disputes, gained acceptance in Austria. Austrian law does not provide for qualification requirements in order to be able to act as mediator. Nevertheless, mediation proceedings prevent claims from becoming time barred only if such mediation is carried out by a mediator registered with the official list of the Austrian Ministry of Justice, whose qualification is determined by statutory rules. Therefore it is advisable to provide in contracts only for such 'registered mediators'.

## 25 Confidentiality in mediation

Are statements made in mediation confidential?

According to the Act on Civil Law Mediation, registered mediators have to keep all statements of the mediation parties confidential. Pursuant to Austrian civil procedure law, registered mediators cannot be summoned as witnesses in civil proceedings about information gained in connection with the respective mediation.

In the case of non-registered mediators confidentiality has to be agreed on in the mediation agreement. Such private confidentiality rules, however, do not release mediators from any statutory duties of rendering witness.

## 26 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?

Arbitral awards issued by foreign or international tribunals may be rejected by Austrian local courts for the reasons for which the New York Convention allows the refusal of the awards' recognition and enforcement. The same – very restrictive – stance holds true for the enforcement of arbitral awards according to domestic law: Austria is a so-called modal law country, meaning that it has implemented arbitration legislation based on the UNCITRAL Modal Law on International Commercial Arbitration. Grounds for the refusal of the recognition and/or enforcement of foreign arbitral awards include the violation of Austrian public policy (eg, a party's inability to present its case) or an award concerning matters outside the scope of the arbitration agreement (*ultra petita*).

## 27 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?

There is no general preference for any of the customary international arbitration providers in Austria. Institutional arbitration in Austria is most often administered by the Vienna International Arbitral Centre and the ICC. This is due to the two institutions' good reputation. Apart from an institutional provider, arbitration clauses often provide for ad-hoc arbitration subject to the UNCITRAL Rules or the arbitration rules of the Austrian Code of Civil Procedure.

## 28 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 has signed the Stockholm Declaration of 1972. Local laws providing for preservation are fragmented, as different aspects of environmental law fall under the legislative power of the federal or the regional authorities. For major construction projects the procedures under the Austrian Act on Environmental Impact Assessment being implemented on a federal level include the scrutiny of all such aspects and the granting of required authority permits.

## 29 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?

For designers and constructors from other EU member states the principle of non-discrimination applies. For designers and constructors from other countries some economic freedoms may, however, be subject to the equivalent treatment of Austrian citizens in those countries.

## 30 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 signed various bilateral investment protection treaties, which are not limited to the protection of construction projects. The exact list can be viewed on the webpage of the Austrian Ministry of Economy. In the standard agreement 'investment' means every

kind of asset in the territory of Austria, owned or controlled, directly or indirectly, by an investor of the other contracting party, whereas investments are understood to have specific characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

### 31 Tax treaties

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

Austria has executed numerous double taxation treaties (inter alia with most European countries). Detailed information about double taxation treaties in force is published on the webpage of the Austrian Ministry of Finance under [www.bmf.gv.at/stuern/fachinformation/internationalessteu\\_6523/diesterreichischend\\_6527/\\_start.htm](http://www.bmf.gv.at/stuern/fachinformation/internationalessteu_6523/diesterreichischend_6527/_start.htm).

### 32 Currency controls

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

Austrian law does not provide for any restrictions of change of currency.

### 33 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

Austrian law does not impose any restriction on the removal of profits and investments subject to compliance with general taxation duties. Nevertheless, tax issues like taxation of hidden reserves

or accrued profits may arise in the course of the transfer of assets abroad. Therefore it is necessary to consult an Austrian tax adviser in order to guarantee compliance with tax duties.

### 34 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?

Depending on the size of the involved parties, in particular the investor, all kinds of contracting possibilities are used in Austria. Major constructions are implemented by general constructors who enter into special agreements with designers. Designers will most likely also control the execution of the building contracts with the subcontractors.

### 35 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?

The duties and liabilities of developers and contractors for the creation of environmental hazards or violation of environmental law are numerous and fragmented in various federal and regional legal acts (Water Law, Waste Law, Forest Law etc.). Breach of statutory duties can lead to severe public law fines. The violation of environmental law duties is also subject to criminal prosecution in certain cases, in particular if such violation creates dangers for human life and physical integrity or significant dangers for wildlife and plants or it leads to long-lasting pollution of water, air and soil. In such case penalties of up to five years' detention can be imposed.

## FIEBINGER POLAK LEON ATTORNEYS-AT-LAW ■

**Johannes Lindner**  
**Dimitar Anadoliyski**

**j.lindner@fplp.at**  
**d.anadoliyski@fplp.at**

Am Getreidemarkt 1  
1060 Vienna  
Austria

Tel: +43 1 582 580  
Fax: +43 1 582 582  
[www.fplp.at](http://www.fplp.at)

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Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
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