GAR KNOW HOW CONSTRUCTION ARBITRATION

Austria

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Austria is a civil law jurisdiction. Sources of law include federal laws, state laws, regulations, EU law, international customary law and treaties. The main lawmaking bodies on federal level are the National Council and the Federal Council. At state level, laws are passed by the state parliament. Laws are published in the Federal Law Gazette and are accessible online at www.ris.bka.gv.at.

In general, Austrian civil laws can be passed with retrospective effect. In case a passed law orders retrospective effect and only benefits affected persons, there will, in general, not be any issues. Apart from that, a specific law with retrospective effect may be unlawful when certain circumstances are met (eg, when it violates Austrian constitutional law). However, such a law generally is in force and to comply with until the Austrian Constitutional Court repeals it.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

In general, as any other contract under Austrian law, a construction contract only becomes effective upon the acceptance of a corresponding offer. The parties to a construction contract have to agree on the essentialia negotii (ie, the scope of services or supply that will be performed or rendered under the construction contract and the remuneration for these services or supply). The services or supply to be performed or rendered as well as the monetary remuneration need to be precisely determined or at least determinable.

The Austrian Civil Code (ABGB) is governed by the principle of contractual freedom, including, inter alia, freedom of form and content of a contract.

Under Austrian law, parties also have the possibility to conclude a preliminary contract that entitles both parties to claim for the conclusion of the actual contract within a time period of one year upon conclusion of the preliminary contract.

Contrary, according to Austrian settled case law a letter of intent is not considered to be a binding declaration of intent, but contains the assumption that there is no binding offer regarding the envisaged conclusion of a main contract.

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

The parties of a construction contract are mostly free to choose the governing law of their contract, the law of the arbitration agreement, the seat of the arbitration, arbitral rules, the person to act as arbitrator and the language of the contract and the arbitration. Only the choice of the governing law of the contract is limited to some mandatory provisions.

There are mandatory provisions to be observed, however, when contracting with a consumer. If the parties do not observe mandatory provisions, the agreement will be invalid to the extent it violates mandatory provisions of Austrian law.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

In general, parties are free to include any provisions the parties deem necessary in their construction contract. Any provisions can be agreed upon by the parties either orally, in writing or as a consequence of the parties' conduct. In addition, parties can also include terms by reference to the national standards regarding construction works published by the Austrian Standards International, the Austrian member of the European Committee for Standardization and the International Organization for Standardization. These national standards regarding construction works are non-binding model contracts that only become binding if the parties (at least) impliedly agree upon their application to their construction contract.

To the extent the parties do not expressly agree on certain aspects of the construction contract, the contract terms are supplemented by the relevant provisions of the Austrian Civil Code and other relevant provisions of Austrian law.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

Austrian law does not provide for the requirement of the instruction of a certifier in the course of the implementation of a construction contract. However, the parties can agree to jointly instruct a certifier in form of an expert and can specify the expert's rights and obligations. Any (instalment) payment of the contractor's remuneration can also be made subject to the confirmation of an expert that the respective construction phase has been duly executed. If the parties jointly instruct an expert, the expert is subject to the strict liability of experts stipulated in section 1299 ABGB. Each party to the contract is, therefore, entitled to file claims against the expert.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

In general, under Austrian law, the employer's failure to cooperate does not constitute a culpable delay that would entitle the contractor to an extension of time. Only in case the parties agreed upon certain cooperation duties of the employer, a delay caused by the employer entitles the contractor to an extension of time.

If an employer changes the scope of the construction works to such an extent that a significant delay is caused, any agreed deadline becomes invalid and the contractor will have to perform the agreed services or supplies within a reasonable period of time.

If a contractor culpably causes a delay in the execution of the construction contract, section 918 ABGB stipulates that the employer can choose to insist on the execution of the construction contract or to rescind the contract after granting a reasonable grace period.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

If the employer disrupts the contractor's performance by not fulfilling or delaying its duty to cooperate, the contractor would still be bound to perform and would only be entitled to reimbursement of expenses. If the employer's cooperation is required for the contractor's fulfilment of its contractual obligations, the contractor may – after setting an adequate time period for the employer to cooperate – rescind the contract.

Generally, the contractor would not be entitled to damages unless the parties have agreed otherwise regarding the employer's duty to cooperate. The contractor may only enforce the employer's duty to cooperate in certain circumstances by filing a claim if the contractor's interest in its performance goes beyond its interest for payment.

If the employer's disruption amounts to a breach of contract and is not a simple failure to cooperate, the contractor would be entitled to damages. The contractor must prove (i) that the employer's disruption caused damages and (ii) the amount of damages caused. Where it is established that a party is liable to pay compensation for damage but proof of the disputed amount of damage to be compensated or of the claim cannot be furnished at all or can be furnished only with disproportionate difficulty, the court may, on application or on its own motion, determine that amount on the basis of its own free judgment, disregarding any evidence offered by the party.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

If the employer caused delays and the contractor mitigates such delays by accelerating completion of its own works, the contractor may claim reimbursement of the acceleration costs. Generally, the contractor would not be obligated to accelerate its works in such circumstances (this would be different if the contractor had an obligation under the contract or such obligation is implied by the contract). To receive reimbursement of such acceleration costs, the contractor must not only prove the incurred costs but also that the steps taken were reasonable and necessary. To avoid any dispute regarding acceleration costs, it is advisable that the contractor first requests authorisation by the employer before taking acceleration measures. If the employer acted unreasonably or in bad faith the contractor's damages claim would include claims for loss of profit.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

Under Austrian law, the circumstances of an event of force majeure are not explicitly regulated. A force majeure event is qualified as an extraordinary event occurring from the outside that cannot be expected to occur and that cannot be averted or its consequences rendered harmless even by exercising the utmost reasonable care. Examples in Austrian case law include severe natural disasters.

Austrian law requires a permanent hindrance to performance. An event of force majeure will only be assumed if impossibility of performance is given. The parties are both released from their obligation under the contract and generally may not claim any compensation. According to the prevailing view, it is not necessary to rescind the contract. If a partial performance is still possible and requested, partial payment is due.

The parties can agree to different legal consequences regarding events of force majeure.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

If the contract is based on a cost estimate, a distinction must be made according to whether or not the contractor has assumed responsibility for the correctness of the cost estimate. According to section 1170a (1) ABGB the contractor may not demand an increase in the fees, even if the size or cost of the estimated work is unforeseen, if the contract is based on a cost estimate with a guarantee of its correctness. If an estimate is based on an estimate without such guarantee and if a considerable excess proves unavoidable, the employer may withdraw from the contract, paying reasonable compensation for the work performed by the contractor. As soon as such an excess proves unavoidable, the contractor shall notify the employer immediately, otherwise, the contractor shall lose all claims for additional work. Section 1170a ABGB is not mandatory.

This does not apply to lump-sum price agreements: In principle, these remain binding even if the estimated expenditure is considerably exceeded or not reached or the project becomes more complex.

If a construction contract becomes unduly expensive and the required works would be disproportionate to the value of the works itself in the way that the works become objectively unreasonable and not economic, Austrian case law may qualify the contract as "legally impossible". The contractor would not have to perform its works, the employer would not have to pay. This, of course, would be different if one of the parties was responsible for the works becoming objectively unreasonable and not economic.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

The contractor is released from its obligation to achieve a particular aspect if its performance becomes impossible after conclusion of the contract and it is not responsible for the impossibility. According

to section 920 et seq ABGB, the contractor is liable if it caused the impossibility of performance or is otherwise responsible. If the contractor is responsible for the impossibility, the employer has the right to choose: it is entitled to either perform its own obligations and demand from the contractor the value of the not fulfilled obligation or to rescind the contract and demand the value of the missed benefit.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Parties to a construction contract are generally free to allocate certain risks, including liability with regard to specific force majeure events, unexpected ground conditions or documents provided by the employer. In accordance with section 1168a ABGB, the contractor is liable for the damage if it has failed to warn the employer as a result of obvious unsuitability of the material provided by the employer or obviously incorrect instructions or documents from the employer.

However, section 879 (3) ABGB determines, that a contractual provision contained in general terms and conditions or contract forms that does not stipulate one of the main mutual performances shall, in any event, be null and void if, having regard to all the circumstances of the case, it grossly prejudices one part. This mandatory provision may render a contractual provision invalid.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

According to section 1168a ABGB, the contractor is generally obligated to warn the employer if the unsuitability of the material provided by the employer or the incorrectness of th employer's instructions is obvious (ie, if it is obvious that the work to be delivered will fail with high probability). If the contractor fails to warn the employer, the contractor will be liable for the damage if the work fails as a result of the obvious unsuitability of the material or design provided by the employer or obviously incorrect instructions. The contractor's obligation to warn the employer also applies in cases where the employer can be qualified as an expert itself.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Contract partners are generally bound to act in good faith and rights may not be exercised in an abusive manner. According to Austrian case law abuse of rights is to be assumed not only if the intention to

cause damage is the sole or predominant reason for exercising the right, but also if there is a gross imbalance between the own interests pursued and the impaired interests of the other (ie, if the unfair motive for exercising the right clearly outweighs the fair motive).

Bound by these principles, the employer will, therefore, be limited in its intervention in the contractor's work. Even if a party may be entitled to terminate the contract, it will be limited by the above-described principles. These principles will also limit the employer's discretion to assert claims regarding pre-agreed sums.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

The parties may assert claims outside the expressly agreed terms and provisions of the concluded contract.

Under Austrian law, it is generally permissible to agree to a certain notification regime between the parties. If such a notification is to be qualified only as a duty to cooperate, failure to notify will in general not lead to the preclusion of a claim. The duty to exercise rights in good faith will have to be observed when arguing that a claim is precluded.

The parties may also agree to a shorter period of limitation than the statutory period of limitation. However, such clauses may be qualified as immoral and therefore void if they make it excessively difficult to assert claims without an objective reason. The shorter the agreed period the more valid and reasonable the justification must be.

In principle, no distinction is made as to why a (contractual) deadline could not be met.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

Austrian law generally provides that the employer has to effect payment once the works have been completed. The parties to a construction contract, however, regularly agree to different payment mechanisms (eg, partial payment based on agreed milestones). The employer will be entitled to withhold payments due to non-performance or defective performance by the contractor. The parties can, however, agree on different terms.

Section 1170b ABGB secures the contractor's right to remuneration and constitutes a mandatory provision. Based on this provision and upon conclusion of a construction contract, the contractor may request the employer to provide security for the contractor's remuneration up to one-fifth (20 per cent) of the full amount of the remuneration. The security may amount to two-fifths (40 per cent) of the full

amount of the remuneration if the contractor has to complete its works within three months. If the employer refuses to provide respective security (within the adequate time period set by the contractor), the contractor is entitled to rescind the contract and will receive remuneration for the works already performed.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

According to section 1168 ABGB, the employer may terminate the construction contract at any time prior to the completion of the works. In this case, the contractor is entitled to the agreed remuneration if it was prepared to perform and was prevented from doing so by circumstances on the part of the employer. However, the contractor's remuneration will be reduced by amounts the contractor (i) saved by not having to perform the works, (ii) has gained through performance of other works or (iii) deliberately failed to gain through other works. However, the parties may deviate from this provision and agree on other terms.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Save for termination rights based on the other party's default, the employer may terminate the construction contract at any time prior to the completion of the works. Such a termination will, however, not release the contractor from its payment obligation towards the contractor. The contractor's remuneration will be reduced by amounts the contractor (i) saved by not having to perform the works, (ii) has gained through performance of other works or (iii) deliberately failed to gain through other works.

The contractor may rescind the contract if it cannot perform the agreed works due to the employer violating its duty of cooperation and the employer's cooperation is necessary for the contractor to perform its works. The contractor will in such cases still be entitled to its remuneration. A contractor may also rescind the contract if the employer fails to provide the requested security for its remuneration under section 1170b ABGB (while still being entitled to its remuneration).

Generally, the contractor may also terminate the contract if a cost estimate will be significantly exceeded and the employer is not willing to pay for the additional costs. The employer will have to pay the contractor for the already performed works up to the contract termination.

Construction contracts may also be terminated in part – save for deviating provisions agreed by the parties.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Even if the parties agree to an exhaustive list of termination rights, such agreement may be supplemented by additional termination rights if the exhaustive list would be in violation of moral principles.

If the parties did not agree on exhaustive rights for termination (neither expressly nor impliedly) other termination rights are available. This includes the contractor's right to rescind the contract due to the employer's violation of obligations to cooperate with the contractor or the employer failing to provide a security for the contractor's remuneration.

20 What limits apply to exercising termination rights?

If not already limited by the contract terms, contract partners are generally bound to act in good faith and rights may not be exercised in an abusive manner (including the exercise of termination rights) (see question 14).

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Under Austrian law, the works are completed when the contractor has performed all of the contractually agreed works. If the employer takes beneficial possession of the works and starts using them, this can be qualified as (implied) acceptance of the works. This may even be the case if the parties agreed on specific handover or takeover procedures.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Detailed agreements on acceptance are often made, the main purpose of which is to ensure that the employer can check the work for compliance with the contract before acceptance. If acceptance is refused or if it is made subject to reservation, the fact that the work is already in the employer's possession will not automatically be qualified as acceptance of the works. Even the use of the works may not change this, if the employer cannot reasonably avoid using the works already (eg moving into an incompletely built house due to termination of rent). Under such circumstances, the employer will not be barred to raise claims against the contractor.

As a general rule, an implied waiver of warranty claims due to existing defects can only be assumed if the employer accepted the defective work without any reservation in knowledge of the defects or if the employer declared that he or she approves or authorises the works.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23. To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Pursuant to section 1336 (1) ABGB the parties can expressly agree that liquidated damages are paid in form of a contractual penalty for (i) the non-performance of the agreed scope of works, (ii) the lack of a duly fulfilment of the agreed scope of works or (iii) the untimely fulfilment of the agreed scope of works. Regarding the untimely fulfilment of the performance of works, the parties can agree on a contractual penalty for non-fulfilment of the completion date or for specific milestone dates prior to the completion of the entire scope of works.

In general, the claim for a contractual penalty requires a culpable delay of the contractor. However, the parties can explicitly agree that liquidated damages in the form of a contractual penalty shall also be payable, if the delay, non-performance or unduly performance was not culpably caused.

In any event, a contractual penalty can be claimed, even if no damage occurred due to a (culpable) delay or non-performance.

In addition, to the contractually agreed penalty, the employer (i) can still request the performance of the works (if not explicitly agreed otherwise) and (ii) can assert damages exceeding the agreed contractual penalty (see section 1336 (3) ABGB).

Austrian law distinguishes between slight negligence, gross negligence and intent. A behaviour is considered as slightly negligent, if it is based on an incident that is occasionally caused by a careful person. Gross negligence, also called apparent neglect, is at hand, if the violation of due diligence is so severe that it would not be committed by a prudent person under any circumstances. The parties can agree to exclude any liability for damages slightly negligently caused.

Whether a delay, non-performance or undue performance was caused slightly negligently, grossly negligently or intently will be considered when assessing damages (section 1324 ABGB). If the damage was slightly negligently caused, only the actual loss or damage will be compensated. In the case of grossly negligently or intently caused damages loss of profit can also be claimed. If both parties are entrepreneurs, in all cases lost profit can be claimed pursuant to section 349 Austrian Commercial Code (UGB).

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

According to Austrian settled case law, manageable short-term delays attributable to the sphere of the employer, regardless of whether they result from changes in performance ordered by the employer or the hesitant fulfilment of its cooperation duties, extend the contractually agreed completion deadlines accordingly; the contractual penalty then ensures compliance with the (extended) completion deadlines as modified.

If delays attributable to the sphere of the employer exceed the usual timeframe for such works, the time schedule becomes void and the binding deadline for completion of the works is lifted. In such a

case the penalty agreement is likewise void. This does not change the fact that the contractor remains obligated to complete the works within a reasonable period and thus may eventually be in default.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

Pursuant to section 1336 (2) ABGB the court has the non-waivable right to mitigate the agreed contractual penalty, if the agreed penalty is deemed to be excessive. This right can only be exercised by the court, if the defendant in the proceedings objects to the agreed amount of the contractual penalty. In this case often experts will be appointed by the court in order to assess the reasonableness of the agreed contractual penalty.

When exercising their right to mitigate a contractual penalty, courts will consider (i) the nature and extent of the contractor's fault, (ii) the amount of damages incurred and (iii) the damages that were considered to likely occur at the time of the agreement on the contractual penalty. The contractual penalty will be deemed to be excessive in particular if the damages that occurred are significantly lower than the agreed contractual penalty. It should be noted that the employer also has a duty to mitigate any losses it might suffer.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

A party that suffered damages exceeding the agreed contractual penalty can also assert such damages (see section 1336 (3) ABGB). However, (i) the occurrence, (ii) the amount of damage and (iii) the breach of contract will have to be proven by the claimant. If damages are asserted due to a breach of contract, there is a reversal of the usual burden of proof and the party allegedly in breach of the contract must exonerate itself.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

Under Austrian law, a party can be held liable for all damages that occurred as a consequence of the liable party's breach of the contract. Between entrepreneurs a loss of profit is in general recoverable as part of the claimed damages (section 349 UGB). Even if the lost profit is exceptionally high, this lost profit would be recoverable between entrepreneurs, if the party claiming the lost profit observed its mitigation duty (section 1304 ABGB).

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

The ABGB provides for the employer the right to claim warranties in form of remediation of any defect in the event the contractor's work was technically non-compliant with the instructed work at the time of the hand-over (section 932 ABGB). Austrian law primarily foresees that a defect is remedied instead of granting a price reduction or a termination of the contract.

However, if a remediation of the technically non-compliant work would be disproportionate, the contractor can request that either the remuneration is reduced or the contract is terminated. When assessing whether remediation works are disproportionate not only the costs of the remediation works have to be considered but also the gravity of the defect. If the defect is considered to be a rather minor disadvantage in use, even relatively low repair costs can be "disproportionate". However, if the defect significantly impairs the use, even relatively high repair costs cannot justify a contractor's refusal to conduct the remediation works.

If two entrepreneurs are the contracting parties, the employer's remediation rights can be limited in time and in scope. However, it should be noted that it could violate moral principles, if warranties are entirely excluded for a newly erected work. In addition, warranty rights cannot be excluded for expressly agreed characteristics of the works stipulated in the construction contract. In addition, any employer who is an entrepreneur intending to raise warranty claims has to observe the duty to notify the contractor within a reasonable time of any defect (for details, see question 29).

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

Under Austrian law two deadlines have to be observed.

First, in general the warranty period for movable goods amount to two years after handover of the work product and to three years after handover for immovable property (section 933 ABGB). Any warranty claim must be made within three months after expiration of the warranty period, at the latest (section 933 (3) ABGB).

In addition, any employer who is an entrepreneur intending to raise warranty claims has to observe the duty to notify the contractor (who is also an entrepreneur) within reasonable time of any defect, the entrepreneur could have detected when inspecting the works at the time of handover (section 377 UGB). According to Austrian case law, in general, 14 days for fulfilling the notification obligation are considered reasonable. The duty to notify the contractor only applies if movable work products are handed over. If an immovable construction work was the scope of the construction contract, this provision is not applicable.

If a warranty claim was raised within the respective deadlines for movable and immovable construction works, the contractor has to remedy any defect within a reasonable time period. The employer is not obliged to set a deadline but the reasonable time period already starts with the receipt of the notification of any warranty claim.

If the contractor does not remedy any defect within a reasonable period of time, the employer can (after granting a reasonable grace period) instruct a third party to remedy the defect and the contractor will have to bear the costs for the remediation works.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

According to Austrian law indirect damages constitute damages that lie outside the protective purpose of the violated law. In principle, a party is not liable for such a damage. The situation is different with consequential damages. A party to a contract may be held liable for consequential damages in case of unlawful and culpable behaviour if the contract does not provide an exclusion for such liability. The exclusion of the liability for consequential loss, however, may violate section 879, paragraph 3 ABGB.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

In general, a contractual provision that is contrary to a legal prohibition or violates moral principles will be void. The exclusion of liability for intentional damage is immoral and therefore will be void (even if the parties agree otherwise). The exclusion of liability for slight negligence is permissible and is often agreed between the parties. The explicit or implicit agreement of an exclusion of liability for gross negligence is permissible insofar as it does not constitute a violation of moral principles. Such violation of moral principles will be assumed if the damaging party's negligence is so blatant that such behaviour is so unusual and unexpected that it appears justified to qualify such behaviour as intent. The exclusion clause will then be void. These principles also apply even if the contract is silent as to fraud or wilful misconduct or states that the limits of liability apply notwithstanding such behaviour.

The general test for causation under Austrian law evaluates whether the damages would still have occurred if the accused behaviour was not set or – in the case of omission – any required action would have been taken.

Special regimes for causation exist if:

- two or more separate but simultaneous actions led to the damage, where each of these actions would have led to the damage on its own (cumulative causation);
- the damage occurred after one action but another action was also taken that would have – at a later time – caused the same damage (hypothetical causation); or
- multiple persons acted unlawfully and culpably but it cannot be determined which individual action led to the damage (alternative causation).Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

According to section 471 ABGB, the contractor may retain or withhold handing over its works to the employer if the employer does not pay the contractor's due claims. This right of retention must be asserted by means of an objection. Exercising this right will be limited by the principles of contractual parties exercising their rights in good faith and without violating moral principles.

Section 1170b ABGB secures the contractor's right to remuneration and constitutes a mandatory provision. Based on this provision and upon conclusion of a construction contract, the contractor may request the employer to provide security for the contractor's remuneration up to one-fifth (20 per cent) of the full amount of the remuneration. The security may amount to two-fifths (40 per cent) of the full amount of the remuneration if the contractor has to complete its works within three months. If the employer refuses to provide respective security (within the adequate time period set by the contractor), the contractor is entitled to rescind the contract and will receive remuneration for the works already performed. Cash, cash deposits, savings books, bank guarantees or insurance policies may serve as security.

The parties can also agree that the contractor receives a lien on the employer's processed object or its property. However, there is no legal obligation to establish such a lien.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

The parties can, in general, agree to conditional payments. Such agreements will be limited by the principles of good faith and moral principles and will, therefore, be void if such clauses are in violation of such principles.

If a payment is subject to a condition precedent, the legal effects only begin when the uncertain event occurs. If it is necessary for the parties to cooperate to achieve the occurrence or non-occurrence of a condition they must make every effort to fulfil their own obligations. In the case of a conditional contract, any influence on the course of events contrary to good faith is not permitted.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

As there is no contractual relationship between the subcontractor and the employer, the subcontractor is generally not entitled to claim sums due under the subcontract against the employer. Based on a separate subcontract, the subcontractor generally only assists the contractor in fulfilling the contractor's contractual obligations to the employer. The subcontractor will have direct claims against the employer in cases where the contractor assigns its own claims towards the employer to the subcontractor (if such an assignment is permissible under the main contract). Choices of law in the main contract will not automatically be extended to the subcontract.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

The seat of the arbitral tribunal might play a role in determining the law applicable to the arbitration agreement and its effects on non-signatories and thus also in determining whether the subcontractor can be involved in arbitration proceedings between the contractor and the employer.

Usually, there will be a main contract between the employer and the contractor and a subcontract between the contractor and the subcontractor. If the employer and the contractor agree to an arbitration clause, this clause will not extend to the subcontract. This will also be the case if the dispute between the employer and the contractor concerns a subcontractor (ie, the subcontractor cannot be forced to join the arbitral dispute (by a third-party notice)).

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Generally, third parties will not receive any rights under construction contracts as contractual rights only exist between the parties to a construction contract. The employer may assign the entire contract or certain rights thereunder to a third party subject to not changing any rights for the contractor. Since the content of the obligation or the rights will remain unchanged in such circumstances, the contractor will still be able to exercise all rights of withdrawal and avoidance against the former third party (and now new contract partner) concerning the contract. If an entire contract was assigned, the limitations and exclusions of liability remain unchanged.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Contractual obligations generally only bind the contracting parties and will, therefore, not extend to affiliates, directors or employees. Liability can be assumed in cases where separate assurances or guarantees have been provided by affiliates or directors, which would constitute contractual obligations towards the employer. Limitations of liability do not automatically extend to such an assurance or guarantee and will have to be excluded.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The ABGB provides for a short limitation period of three years and a long limitation period of 30 years. The short period of limitation applies in particular to contractual and tortious claims for damages. Warranty claims (as far as immovable property is affected) are subject to a similarly short limitation period of 39 months (three years and three months).

The limitation period for warranty claims starts with the date of delivery. In the case of damage claims, the statute of limitation begins with the knowledge of, respectively the ability to take knowledge of, the damage and the damaging party.

The start and continuation of the limitation period are suspended, for example, by initiating a mediation with a registered mediator. Settlement negotiations may also suspend the expiry of the limitation period. The limitation period is interrupted by filing an action with a court or respectively an arbitral tribunal. Limitation and prescription periods are rules of the substantive law. Deviations from the statute of limitations are permitted, however, certain restrictions apply.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Due to the large number of mandatory legal provisions in Austrian law that may be applicable to a construction contract, these cannot be listed exhaustively.

Examples of mandatory provisions in construction contracts are:

- section 1170b ABGB, providing for the contractor's right to request the employer to provide security for the contractor's claims;
- section 879 ABGB, according to which contractual provisions must not be contrary to laws or in violation of moral principles; and
- section 1336 (2) ABGB, providing for the judicial obligation of reducing contractual penalties if proven to be excessive.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

A provision of foreign law is not applicable if its application would lead to a result that is incompatible with the fundamental values of the Austrian legal system. If required, the relevant provision of Austrian law shall apply instead. A simple deviation from mandatory Austrian regulations alone will not amount to such a violation of public order. The content of the protected basic values of Austrian law cannot be exactly defined and is subject to changes over time.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

The decision of the DAB is binding for the parties. They are obliged to implement the decision immediately. The binding nature of the DAB decision has the character of a contractual agreement between employer and contractor. Failure to comply with a decision of the DAB is unlawful and thus may also trigger damages claims. Failure to comply with the decision could also constitute a reason for premature termination of the contract. However, since the DAB decision does not constitute an arbitral award, the DAB decision cannot be enforced. The decision of the DAB would have to be brought before the arbitral tribunal to obtain an enforceable decision in the form of an arbitral award.

Parties to an arbitration proceeding may request interim relief from the arbitral tribunal as well as from Austrian courts.

Under Austrian law, the requirements for the issuance of interim measures to secure monetary claims are very restrictive. In any case, the prerequisite would be, that without issuing an interim measure to secure monetary claims (i) the recovery of the monetary claim would be prevented or

would be significantly aggravated or (ii) that the decision would have to be enforced in states in which the enforcement of the claim at issue is not secured either by international treaties or by European Union law.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

In Austria, there are no specialist construction courts and no special procedures regulating construction disputes. Construction disputes between entrepreneurs will, however, be litigated before the Austrian commercial courts (not 'simple' civil courts). Austrian courts generally do not have special chambers dedicated to construction disputes.

The Austrian Supreme Court has a chamber in charge of arbitration issues, such as setting aside an arbitral award. This specific chamber will also (as last instance) rule on litigation disputes initiated after an arbitration (eg, in cases of recognition and enforcement of arbitral awards).

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The relevant levels of court for construction matters are the district/regional court for commercial matters, the court of appeals and the Supreme Court. As for arbitration matters being litigated, any action for setting aside an arbitral award and the action for a declaration of the existence or non-existence of an arbitral award will be reviewed by the Supreme Court (as first and last instance).

The decisions of the Supreme Court, to a limited extent also those of the regional courts and the court of appeals, are published on an official website of the Federal Ministry of Digitisation and Economic Affairs (www.ris.bka.gv.at) and may be subject to articles in the relevant periodicals. There is no general doctrine of binding precedent in Austrian law, although the Supreme Court's decisions will have a binding effect to the extent that other courts will not risk having their decision overruled because it is contrary to the Supreme Court's case law.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

The parties have the general duty to present the facts and submit the evidence in support of their respective case. The initiative will, therefore, lie with the parties. The Austrian civil courts have the duty to determine the facts by asking questions, or even taking evidence on its own initiative (this possibility is, however, not available in cases where the parties both object to such taking of evidence by the civil court). The courts will not be bound by any legal opinion presented by the parties. However, courts may not surprise the parties with an interpretation of the law that they have not observed and to which the court has not drawn their attention to.

In cases where parties are not represented by attorneys, courts also have the duty to instruct and inform the parties. Courts will generally discuss or give an indication of their views, especially to support settlement negotiations.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

If the contractor initiates arbitration proceedings, the employer may still apply for interim measures as explicitly regulated in section 585 of the Austrian Code of Civil Procedure (ZPO).

Pursuant to section 584 ZPO, the court shall dismiss a claim, if the parties agreed on arbitration, unless the defendant raises arguments to the merits of the case or attends an oral hearing without objecting to the court's jurisdiction. Such an objection to the court's jurisdiction needs to be raised at the first opportunity, ie either in the first written submission or the first oral court hearing.

If the court comes to the conclusion that the arbitration agreement does not exist or is unenforceable, the court shall not dismiss the claim. In that case, even if court proceedings are still pending and the court has not dismissed the claim, arbitration proceedings may nevertheless be commenced or continued and an award may be rendered (section 584 ZPO). If an arbitration has already been initiated, neither another arbitral tribunal nor an Austrian court can decide about the already pending dispute (section 584 (3) ZPO).

Disregarding contractually agreed preconditions for filing a claim may lead to damage claims.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

Applying for interim or provisional relief before a foreign court will not lead to the contractor losing its right to arbitrate. It should also be noted that section 585 ZPO stipulates that the existence of an arbitration agreement does not prevent the parties to seek protection by the courts through interim measures pre-trial or during arbitral proceedings.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

The court may appoint an expert if it lacks the competence to assess the facts regarding expert questions. In practice, in the vast majority of proceedings regarding construction works an expert will be appointed. Court-appointed experts owe their primary duties to the court. Parties can appoint experts, who can provide their own written expert opinions, however, their written statements regularly have a weaker evidential value than those of the court-appointed expert, as party-appointed experts owe their duties to their respective party only.

Unless the parties have agreed otherwise, both the arbitral tribunal and each party may appoint experts.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

If a state entity or public authority wants to conclude a construction contract, the Federal Procurement Act may be applicable. The Federal Procurement Act provides a specific procedure on how contracts between public authorities or public entities and private contractors shall be concluded and aims for a fair competition between all potential contractors. The Federal Procurement Act provides for specific proceedings regarding challenging an award but there are no mandatory provisions or requirements regarding the content of the contract or the enforcement of the awarded contract itself. The Act merely states that any contract shall provide for certain provisions such as penalties, delivery date, warranty or liability but does not specify the content of such provisions.

The parties may agree to defer their disputes to arbitration. An arbitral award may also be enforced against state entities or public authorities (subject to certain limitations due to immunity).

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

The parties to an arbitration are free to negotiate and agree on a settlement at any time before or during arbitration. There is no duty of the parties to disclose any settlement discussions or concluded settlement agreements. The arbitral tribunal shall decide on the obligation to reimburse costs, unless the parties have agreed otherwise.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Under Austrian law, there is no general "without prejudice" privilege for settlement offers or settlement negotiations. However, settlement offers may contain provisions according to which such offer shall not be understood as an admission of liability or of fact and that the offer is made irrespective of the factual and legal situation. Based on party autonomy, the parties may also agree to not disclose such settlement offers or their settlement negotiations making such disclosure subject to contractual damages claims.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Under Austrian law, there is no substantive or procedural law protecting the communication between in-house lawyers and the management or other personnel of the company they work for.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

A guarantee contains a third party's obligation to a creditor, which is secured by the terms of the guarantee and must be concluded in writing. The guarantor must not raise any objections and defences otherwise available to the third party towards the beneficiary. For practical reasons, a guarantee contains provisions regarding the time period for which the guarantee shall be valid, the maximum amount guaranteed and certain rules on how the beneficiary is entitled to make use of the guarantee.

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

A guarantee according to Austrian law is "abstract" (ie, "on-demand"), meaning that the guarantor is not entitled to raise objections based on the relationship between the debtor and the beneficiary, or the debtor and the guarantor. It follows that a guarantor's liability is not limited to that of the party to the underlying construction contract.

Nevertheless, the guarantee itself may contain certain limitations or restrictions (eg, to a maximum amount or on the merits).

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

Most commonly the guarantor will be released from liability under a guarantee after expiry of the agreed time period or in case of fulfilment of the obligations of the underlying contract.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

Owing to their abstract character, on-demand bonds as with any guarantee can be challenged only in the case of an abuse of rights by the beneficiary or in case limitations or preconditions set out in the guarantee are not adhered to.

It is in accordance with the prevailing case law that the beneficiary who considers calling upon a bond justified for admissible reasons cannot be accused of malicious or unlawful conduct if it is not clearly proven that it has no claim. In general, the principle applies that disputes should only be settled after payment.

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The (bank) guarantee must specify the conditions on which the guarantee obligation is made dependent on (ie, the parties have to define events that would entitle the employer to call upon the bond). The declaration that the event has occurred must be made in the manner and with the contents as described in the guarantee document. If the employer has no entitlement in principle, the court may restrain a call. The same applies if the amount of the called guarantee is disputed by the contractor.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.

Nikolaus Pitkowitz

Pitkowitz & Partners

Dr Nikolaus Pitkowitz is a founding partner and head of the dispute resolution team at Pitkowitz & Partners. He holds law degrees from the University of Vienna (JD and PhD) and University of Sankt Gallen, Switzerland (MBL) and is also qualified and certified as a mediator.

His practice of over 30 years as an attorney has always been predominantly international. While he started his career with transactional and real estate work in Austria and the CEE region, he now holds a particular focus on litigation, arbitration and mediation. Dr Nikolaus Pitkowitz acted as counsel in many complex and high-profile litigations in front of Austrian Courts and the European Court of Justice, among others in the two largest ever pending class actions in Austria. He has an impressive record of successes achieved in front of the Austrian Supreme Court.

Dr Nikolaus Pitkowitz acted as arbitrator and party counsel in over 100 international disputes, in a range from smaller to multibillion cases. Particularly noteworthy is his role as party counsel in the largest arbitration ever pending in Austria, with a dispute value of several billion euros.

Dr Nikolaus Pitkowitz is Vice-President of the Vienna International Arbitral Centre (VIAC), arbitrator and panel member of all leading arbitration institutions, and Fellow of the Chartered Institute of Arbitrators (FCIArb). He also acts as Vice-chair of the International Arbitration Committee of the Section of International Law of the American Bar Association (ABA) and as Court Member of the Casablanca International Mediation and Arbitration Centre (CIMAC).

Dr Nikolaus Pitkowitz speaks frequently at seminars and is the author of over 50 publications. He is co-editor of the *Austrian Yearbook on International Arbitration* and co-organiser of the Vienna Arbitration Days.

Prior to the formation of Pitkowitz & Partners in 2021, Dr Nikolaus Pitkowitz was a founding partner at Graf & Pitkowitz for over 25 years.

Roxanne de Jesus

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Roxanne de Jesus is a founding partner in the dispute resolution team of Pitkowitz & Partners.

Roxanne mainly advises international clients in complex cross-border litigation and arbitration proceedings. She is experienced in joint venture disputes involving multi-jurisdictional legal aspects and has a considerable track record of advising private clients as well as clients operating in the construction sector. Her broad experience further includes numerous successes with the Austrian Supreme Court in securing the recognition and enforcement of foreign court decisions as well as foreign arbitral awards based on international treaties. Roxanne's clients also appreciate her know-how in white-collar crime.

Roxanne is a member of the Young Austrian Arbitration Practitioners (YAAP) and of the International Association of Young Lawyers (AIJA). She studied at the University of Vienna and the University of Wolverhampton.

Pitkowitz & Partners

Pitkowitz & Partners, based in Vienna, is a leading commercial law firm. The firm's focus is on international arbitration and complex litigation, as well as on real estate and construction law. Pitkowitz & Partners forms one of the largest dispute resolution teams nationwide and has been recognised as one of the leading disputes practices in Austria for years. With its involvement in cases spanning the globe and a myriad of industries, including, amongst others, construction, energy, real estate, technology, and media, the firm has acclaimed a stellar international reputation. Pitkowitz & Partners is listed in the GAR 100 ranking of the world's leading arbitration firms. The firm's team can rely on more than 120 years of professional experience.

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