

Austria

Lothar Hofmann Hofmann & Partners

Donald G Gavin Akerman Senterfitt Wickwire Gavin

1 Joint ventures

Must foreign designers or contractors enter into a joint venture with a local contractor to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

In Austria, foreign designers or contractors do not have to enter into a joint venture with a local partner to design, build and be paid for their work. However, in principle, except for businesses based within the European Union (EU) or the European Economic Area (EEA), a licence under trade law as a government-approved master builder, or registration as an architect, is required for the professional provision of construction work or construction-related services. If construction-related work is to be performed jointly, all cooperating entities have to possess the required licence or registration, unless the relevant parts of the performance are exclusively allocated to the licensed or registered partners.

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 they took such a step?

In order to set up an operation in Austria, a licence under the trading law or a registration as an architect is required. Businesses established inside the EU/EEA do not need such a(n additional) licence or registration (in Austria).

Preparatory activities may commence before the licence or registration has been granted, but services may be offered and performed only once the licence or registration has been granted.

The licence or registration is also required if the designer or contractor does not have an establishment in Austria, but businesses established inside the EU (or the EEA) do not need such (additional) licence or registration.

As may be concluded from the above, from a legal point of view, it is certainly an advantage for an entrepreneur to act through entities based within the EU (respectively the EEA).

A practical advantage may be to have an established relationship with financial institutions, banks and insurance companies, active and in place in Austria, and a contact with a qualified local legal counsel, ensuring compliance with local laws.

A local operation also has tax consequences (eg, income and corporate income tax, based on double taxation treaties; value added tax, for which special rules apply within the EU). If no double taxation treaty applies, income and corporate income tax in Austria accrues based on qualified income. In any case, transfer prices are to be set at arms' length.

The establishment of a new entity should be considered or, taking into account the voluminous existing capacities in the market, buying assets of a domestic enterprise or shares of a local operating entity. An existing entity not only has a market presence, but also experience

with legal and other requirements, which conversely may result in potential liabilities based on the 'old' activities. However, exposure to liabilities appears to be more predictable than, for example, in the US.

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?

A local operation is to be registered in the firm register at the place of its domestic establishment, either as a separate legal entity (subsidiary) under Austrian law or as a local branch of a foreign entity. No special qualification is required for this registration, but the identity of the foreign shareholders or foreign entity has to be proved through documents (certificate of establishment). EU-registered entities may be used for business in Austria, even if no activities are commenced in the EU 'home country'. The firm name of the local branch of a foreign entity must substantially contain the firm name of the foreign entity; however, it may include an additional indication of its branch character. Sample signatures of the legal representatives must be filed and a tax clearance certificate must be provided. An excerpt from the register may be downloaded electronically.

Particularly in the construction business, legal entities are frequently founded in order to circumvent labour law. If this is assumed to be the case, registration of the entity in the firm register may be refused.

Foreigners who are not EU or EEA residents (in addition to a labour permit, where applicable) also need a residential permit when they want to permanently do business or work in Austria.

Building activities are subject to a licence under trade law; an individual responsible for compliance with trade law has to be nominated, who has to fulfil the personal qualifications for building activities. There is usually a variety of secondary contract trade work, for which separate specific licences are required.

Legal entities applying for a licence have to present their firm registration certificates, personal documents and qualifications of the responsible individual, and a declaration that it has not been the subject of insolvency proceedings recently.

Design activities may be carried out based on a licence under trade law or by a registered architect. Working without a licence or registration may result in termination of the work's contract, liability claims, claims under the unfair competition law combined with motions for injunctive relief, as well as administrative fines.

4 Labour requirements

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

EU law requires equal treatment of workers within the EU.

In public procurement, a contract may be assigned specifically to institutions employing handicapped workers.

5 Local labour law

Are there any labour laws applicable to construction and infrastructure projects?

The parties to an employment contract may choose the applicable substantive law. However, under EU international private law, local labour laws of the worker's usual residence protecting the employee are for the most part compulsory and cannot be contracted around. (In addition, the rules for foreign working permits and secondment permits apply.)

In public procurement law, it may be specifically required that the local requirements for labour, including social security standards, are met; if they are not complied with, a bid must be turned down.

In order to work within Austria, a labour permit is required for non-citizens of the EU or EEA (unless another treaty applies). However, also within the EU, based on temporary arrangements in connection with the EU's enlargement to include eastern Europe, certain restrictions on workers, among others, have been maintained in the construction business. In principle, foreigners may work in Austria based only on a foreigners' working permit to be applied for by the employer; a foreigners' working permit requires compliance with Austrian wage limits and labour standards. Exceptions are in place for residents of EU or EEA countries.

Generally, for foreign workers to be employed for not more than four months by a foreign entrepreneur that does not have a place of operations in Austria for services inside Austria, the Austrian principal has to apply for a secondment permit requiring compliance with Austrian wages limits and labour standards. However, this secondment permit is not available for workers in the construction industry; in any case for construction workers, the employer needs a foreigners' working permit.

6 Health and safety regulation

Are there any specific health and safety rules regulating the construction industry?

There are strict health and safety requirements to be complied with. If workers of different contractors are employed at one single construction site, in accordance with the Construction Coordination Law, a coordinator for health and safety concerns with professional experience in that field has to be nominated. This coordinator must:

- prepare a safety and health protection plan;
- make sure that such plan is complied with;
- prepare a document for later works and;
- take action to assure that such document is followed.

Construction sites of a certain size and duration have to give prior notice to the Labour Inspectorate.

If an entrepreneur located in Austria leaves the country an exit tax may apply.

7 Close of operations

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

Any entrepreneur intending to close down operations, including the lay-off of a significant number of employees, has to give prior notice of such closure to the Labour Market Service. The work council is then required to be involved. Under the lay-off protection rules, employees may question the lay-off in court. Laid-off employees may receive termination compensation taking into account the duration of their employment.

8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

Standard contract forms used are based on Austrian standards (ÖNORMEN) in accordance with EU standards. Standards containing contract standards are to be distinguished from technical standards, also issued by the Austrian Standardisation Institute. Standard contract forms need to be agreed to by the parties to the contract. Technical standards apply even without the agreement of the parties as to the industry standard or 'state of the art'.

The former codes of fees for architects and master builders have been found contrary to the competition law; newly introduced rules are merely guidelines against which fees are to be measured.

The general works contract form is based on ÖNORM B 2110, which has been revised in 2008. There are special standards for various areas of construction.

In many fields, also for certain infrastructure projects, standardised technical specifications have been published and are regularly applied.

FIDIC (the International Federation of Consulting Engineers) contracts and other international contract forms are only used, if at all, in major projects with international financing.

9 Price escalations

In typical construction contracts, who assumes the risk of material price escalation and shortages?

Construction risks are a matter of negotiation and agreement, and remain with the contractor if not otherwise agreed upon. Whereas the risk of loss of the work before the agreed takeover rests with the contractor, under the ÖNORM B 2110, in case of unavoidable events, that risk is allocated to the principal, provided the contractor has undertaken all reasonable measures to protect the work.

Material price escalation or shortage is not automatically a reason for a price adjustment and is primarily an issue to be agreed upon. ÖNORM B 2110 provides rules both for fixed prices and for adjustable prices. Unless agreed upon otherwise, performances within six months from the date of the offer are considered fixed; other performances may be subject to adjustable prices. In contracts with consumers, the reasons for price adjustments have to be described in the contract and cannot be dependent on a contractor decision.

10 Competition

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

Under EU competition law, and also under Austrian competition law, advantages for local (EU) enterprises in other markets, for the purpose of improving their international competitiveness, may be considered a reason for allowing a merger or competition restraint between competitors.

Public procurement law requires equal treatment of bidders. Local market support is not a valid argument in this respect.

11 PPP and PFI

In certain forms of construction such as PPP and PFI, where the contractor is responsible for long-term quality control and maintenance, how is the risk of additional future costs considered and mitigated?

Austrian procurement laws are based on the EU Directives in this field; procurement law contains some concessionary rules. The risk of additional future costs is a question to be negotiated and agreed in the contract, limited by the guidelines of the General Civil Code (ABGB).

Risks taken over by the contractor may be passed on, particularly to those subcontractors who are responsible for that part of the work. The description of the contractual obligations should be specific enough in order to clearly allocate the risks.

Under public procurement law, the service description has to be clear, comprehensive and neutral in order to assure comparability of the offers. All circumstances that are relevant for the performance are to be described; the bidders must get a clear picture about the services required. The tender documentation is to be prepared in a form that enables the bidders to decide about the offered prices without risks, which may not be calculated. Extensive preparatory work may be required only if the service description contains purely functional requirements (in the meaning of article 23 of Directive 2004/18/EC).

In accordance with general principles, a risk should be assumed by the party that is most competent to deal with it.

Commonly a contract is governed by the *clausula rebus sic stantibus*. A waiver of that clause may be considered void. The principal must expect changes in the performance obligations of the contractor in case of unexpected developments, even if the *clausula rebus sic stantibus* has been successfully waived. A contractor should at least request provisions allowing compensation for unforeseeable additional costs and describe the presumptions of its offer as clearly as possible. (Compare Klausegger, Tiefenthaler, 'Risikoverteilung in Konzessionsverträgen für PPP-Projekte', *ecolex 2005*, 261.)

12 Payment of fees

How may a contractor secure payment of its fees from an owner? May the contractor place liens on the property?

Payments and due dates are primarily issues to be negotiated. Advance payments and instalments are to be agreed about, otherwise the contractor gets paid only once he has delivered the work.

There are no mechanics' liens under Austrian law; it is possible but not practical to set up contractual liens, which may be registered on a property where work has been performed, or other properties.

Under the ABGB, a right to security for the contractor's fee has recently been introduced, that cannot be contracted around. Starting at the time the contract was signed, the contractor may require security for one-fifth of the fees that have not yet been paid. Where contracts are to be fulfilled within three months, an amount corresponding to two-fifths of the remaining fees may be required. The security may be provided in cash, money deposits, bank guarantees or insurance policies. The cost for the provision of the security is to be paid by the contractor receiving the security if such cost does not exceed 2 per cent per annum of the secured sum. The contractor's obligation to pay costs for the security is waived once the security has to be maintained only because of principal's objections against the contractor's fees, and it turns out that the objections have been unfounded.

If the principal does not provide the requested security within a reasonable time, contractor is entitled to suspend performance and, after a period of grace, may terminate the contract.

No security may be claimed from a public entity or from a consumer acting as principal.

13 Tort claims and indemnity

Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even when the general contractor is negligent?

A warranty claim (based on an accusation that the work was defective when it was handed over) must be filed within three years from takeover of the work. Under Austrian law, the statute of limitations for a damage claim is three years from the time when it became possible to allocate the damage and the party responsible, not exceeding 30 years overall.

The contractor is responsible to the principal in accordance with their contract. The subcontractors have contracts only with the contractor, not with the principal. A subcontractor is responsible to the contractor for damages caused by the subcontractor. In principle, under the law, fault is required for a damage claim; however, among contract parties, once it has been established that one side has caused damage to the other side and has breached the contract, the allegedly responsible party against whom a claim has been made has to prove that it has not been at fault or at least not acted negligently (which frequently turns out to be a very severe burden of proof; thus, in practice, fault is not a substantial concern in such damage claims).

In principle, a subcontractor is responsible only for the part of the damage that it has caused with fault. If the responsibility for the damage may not be divided clearly to different subcontractors, they are all responsible for the full amount (with a right to a recourse or contribution from each other; in case of doubt, payment of equal shares).

It is possible to get indemnification from third parties, even if the claimant has itself been negligent, provided there was no gross negligence involved on claimant's side. However, it is questionable to seek indemnification from parties not responsible for the damage at all.

There are also cases of responsibility for a damage without a contractual link. Such liability arises if a law protecting third parties has been disregarded.

14 Insurance

Do local laws require the maintenance of any specific type of insurance on construction projects?

In accordance with the law, there is no mandatory insurance in construction projects, but workers have to be registered with social insurance. Motor vehicles to be used on public roads are subject to mandatory car insurance.

Frequently, a specific insurance is required under the contract or under the tender. Contractor's insurance is to be distinguished from insurance coverage to be provided by the principal. If liability insurance is requested, it is advisable to check the insurance policy carefully for coverage and to be aware of the duties regarding the insurance company. Notice requirements have to be monitored.

For employees' claims arising out of accidents during work, there is coverage under a national social security system.

Accurate risk assessment and adequate insurance coverage are important for a construction project.

Costs for damage to the property and to the adjacent properties, which do not arise out of prohibited conduct by the contractor, are to be borne by the owner and may be covered through principals' liability insurance. In relation to the contractor in the classic construction contract scenario, the design professional's faults are attributable to the principal. There may be a special professional design liability insurance. Contractors are covered by a builder's risk, contractor's all-risk insurance, or business liability insurance.

15 Insolvency and bankruptcy

If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor retained to prevent delay on the project?

Insolvency is defined as continuous inability to pay debts; a legal entity is also considered insolvent if its debts exceed its assets and there is no positive future expectation of business development. A creditor or the insolvent party may apply for insolvency proceedings. If the insolvent party does not file for insolvency proceedings in time, the managing directors may be held liable personally.

The employees' claims are covered by a public fund; the administrator has a right to terminate employment contracts because of the insolvency proceedings.

Where insolvency proceedings have been opened, in accordance with the Bankruptcy Code, a contract that has not been fully fulfilled by both sides, may be terminated by the administrator. In such a case the contract partner has a damage claim against the insolvent party (regardless of fault), which will be treated as an ordinary claim against the insolvent's estate, to be honoured only in part, dependant on the funds available in the bankruptcy proceedings for all creditors, and not as a preferential claim. Alternatively, the administrator may agree to continue to perform under the contract; on the other hand he or she may demand performance from the other side as well.

A contractor's insolvency is frequently agreed in the contract as a reason for terminating the contract without compensation for the contractor for the work not performed. In such cases, the insolvent contractor, in accordance with the express wording in the contract, usually receives compensation only for the work performed. (Under Austrian civil law, in principle if a work contract is cancelled by the principal, the contractor receives full consideration, and only has to deduct what it saves because it does not have to complete performance.)

16 Contracting with government entities

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

There is no sovereign immunity available for a government agency, as a defence to a contractor's claim for payment pursued in Austrian courts. Governmental representative (diplomatic) units located in foreign countries, may to a certain degree, in accordance with international public law, claim immunity from foreign local laws and venues.

17 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

Not all contracts which contravene the law to a certain degree are null and void (in full). The consequence of a violation of law is to be defined in the law.

A contract won through bribery may be subject to nullification, because it is against public policy or may be avoided, based on an error caused by bribery for which the contracting party may be made responsible.

Bribing a public official or a leading employee of a public enterprise is a criminal offence. Bribing an agent of a private entity has been prosecuted as a crime only as participation in the agent's criminal activity, but recently a specific provision for bribing agents of private entities has been introduced into the Austrian criminal law.

Under public procurement rules, if a contracting party has received a contract through participation in criminal activities, the principal has a claim for recourse against the contracting party,

which is responsible jointly and severally with the fraudulent government agent.

18 Arbitration

Can a government agency agree to arbitrate disputes privately rather than go to court?

Government agencies are under supervision of the Austrian Court of Audit. A government agency may enter into an arbitration agreement; in practice it may be reluctant to do so. Under Austrian law a written arbitration agreement or arbitration clause is required.

19 Foreign corruption

Do local laws prohibit illegal actions in foreign jurisdictions?

Bribery of officials in other countries is subject to penalisation under Austrian criminal law, also in accordance with EU law.

20 Force majeure and acts of God

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

Categories of and consequences of acts of God need not be defined in the contract. In accordance with the code, objective impossibility non-performance does not cause a breach of the agreement.

In case of objective impossibility the parties are not held responsible for their non-performance. The contract is rescinded; work fulfilled has to be returned or compensated for.

Under the ÖNORM, obstacles to performance that are not clearly attributable to parties acting together, either for the owner or the contractor, are usually allocated to one side or the other. If the obstacles are not allocated to the contractor, the contractor has to continue the work and has to mitigate further expenses, but receives extra monetary compensation for additional efforts.

21 Dispute resolution mechanisms

What dispute resolution procedures are successfully used to solve construction disputes?

Construction disputes are regularly tried in ordinary courts. Many construction-related disputes are finally resolved through settlement, as proceedings relating to construction issues tend to be rather expensive and time-consuming.

Sometimes, more frequently in cross-border transactions, arbitration in the form of institutional or ad hoc arbitration is used.

Recently, alternative dispute resolution procedures and mediation procedures have become popular.

22 Courts and tribunals

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

For construction disputes there are no special courts or tribunals. Depending on the euro amount in dispute, usually the Landesgericht (Provincial Court) and not the Bezirksgericht (District Court) is competent. If the defendant is an enterprise, the Commercial Court or a special division at the Bezirksgericht is competent.

23 Dispute review boards

Are dispute review boards (DRBs) used?

Dispute resolution boards in the formal sense are not yet popular in Austria.

24 Mediation

How is mediation defined? And is it commonly used to resolve project disputes?

In 2003 a civil mediation statute was adopted.

Mediation is structured as deliberate (voluntary) dispute treatment with the help of a neutral intermediary, which does not have authority to decide the dispute, but supports communications between the parties with the goal of facilitating a solution to be reached by the parties on their own.

Mediation is nowadays increasingly used for the resolution of construction disputes.

25 Confidentiality in mediation

Are statements made in mediation confidential?

The Civil Mediation Law predominantly covers the education and qualification of a mediator. Mediators have to obey a statutory obligation to keep information received confidential. However, there is no principle established under Austrian mediation law that any statements made in mediation are covered by a duty of confidentiality.

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 are recognised and enforced in Austria provided the country where they emanate from is a member state to the New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or recognition is based on other treaties.

Local courts may refuse to enforce an arbitral award for limited reasons, for example if the matter is not a matter for arbitration (not applicable in most construction matters), if the arbitration agreement is considered invalid, or if the award contravenes public policy (basic principles of the local law), or if a party was not heard (no due process).

27 Governing law and arbitration provider

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?

International construction disputes are frequently tried under the procedures of the ICC because of the international profile of that institution, and the supervision of the proceedings by the secretariat and ultimately the ICC Arbitration Court composed of international arbitration experts; or they are under the proceedings administered by the Austrian Chamber of Commerce, the institutions of which also have an outstanding reputation. More on the national level, the highly reputable Austrian Standards Institute has introduced institutional arbitration with a special focus on construction disputes, involving particularly recognised experts in the field.

HLAW

Lothar Hofmann

lh@hlaw.at

Johannesgasse 15
1010 Vienna
Austria

Tel: +43 1 518 88
Fax: +43 1 518 88 15
www.hlaw.at



Donald G Gavin

donald.gavin@akerman.com

100 Boone Boulevard, Suite 700
Vienna
VA 22182-2683
United States

Tel: +1 703 790 8750
Fax: +1 703 448 1801
www.akerman.com

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 is a party to the Stockholm Declaration of 1972 and follows and complies with modern developments in international environmental law.

Environmental protection is a valid concern in Austria with its outstanding natural assets. On the other hand, Austria is an industrialised country with high but legally administered requirements for building and infrastructure projects. Environmental assessment procedures are guided by EU rules. Enforcement of environmental rules is to a certain degree within the competence of the province.

29 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business?

From a legal point of view Austria is in principle open to foreign contractors; Austrian legislation is not cause for major unexpected risks.

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'?

In principle foreign investments are treated like domestic investments.

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 a well-developed network of treaties to avoid double taxation.

Under many double taxation agreements, an establishment in the country is assumed, if a construction site or assembly has operated for more than six months or if there is a dependent agent acting with power to represent the principal.

32 Currency controls

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

Currency controls are not a relevant obstacle to business activities in Austria.

33 Removal of profits and investment

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

There are no major obstacles against the removal of profits and investments, as long as this is undertaken in accordance with other legal requirements.

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?

In Austria, different ways of contracting are commonly used. In the traditional way, the principal has a contract with the designer and a separate one with the builder (contractor). The designer (or another architect or engineer) may also be responsible for construction administration. If the principal wants to limit cost, it can contract directly with the contractors; if it is more important to have one responsible contractor it might use a general contractor. Sometimes design-build contract models are used.