AT

Austria

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General questions

QG.1 Is the term 'construction contract' defined in your country, by statute or case law? If it is, what are the legal consequences of a contract falling within this definition?

The term 'construction contract' (*Bauvertrag*) is only mentioned once in the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB), namely in §1170b ABGB. §1170b ABGB governs the entitlement of the contractor to demand payment security from the employer under a construction contract. However, §1170b ABGB is silent on the definition of a 'construction contract' per se, but merely grants the above right to the contractor for a building, an 'outdoor installation' to a building or a part thereof.

Thus, the 'construction contract' (*Bauvertrag* or *Bauwerkvertrag*) does not form a genuine contract category within the regime of the ABGB. Rather it represents a sub-category of the 'contract for services' (*Werkvertrag*).

Based on such a 'contract for services', one party, the contractor (*Werkunternehmer*), takes over the manufacturing of work in accordance with the instructions of the other party, the employer (*Werkbesteller*), for consideration (see §1151 para 1 ABGB). Thus, the contractor of a 'contract for services' is obliged to achieve a particular result. This obligation to achieve a particular result distinguishes the 'contract for services' from the 'employment contract', where one is merely obliged to perform services for a certain period with a reasonable effort.

The relevant provisions for the 'contract for work' are §§1151, 1152 and §§1165 to 1171 ABGB. These provisions, with the sole exception of the above-mentioned §1170b ABGB, are basically non-mandatory and may be modified by the contracting parties (subject to the condition that such modifications do not violate a legal prohibition or public policy).

QG.2 What standard form construction contracts are in general use? Who publishes them?

The Austrian standard forms for construction agreements are the Austrian Standards (ÖNORM) B 2110 and B 2118. While the ÖNORM B 2110 is intended for building and civil engineering construction works, the ÖNORM B 2118 focuses on major construction projects. However, the content of the two standards contains only minor differences.

The applicability of both standards is subject to an agreement between the contracting parties. However, the use of standard forms is mandatory under the Federal Procurement Act, which requires that any deviations from the standards need to be justified.

ÖNORMs are published by the Austrian Standards Institute and drafted by special committees within the institute. The provisions are intended to ensure consistent terms in building contracts.

QG.3 Does an architect have a neutral role when supervising and monitoring the works, or is he solely the employer's agent?

The role of the architect is not mentioned in the provisions on 'service contracts' in the ABGB (see QG.1) or in the Austrian standard forms B 2110 or B 2118. However, in principle, the architect acts as an agent of the employer and does not have a neutral role when he supervises and/or monitors the contractor's works.

QG.4 Is there legislation which curbs 'unfair' terms (eg exclusions of liability) in standard form construction contracts?

The ÖNORM B 2110 (and all other relevant standards in the construction sector) are standard form contracts. As their drafting committee comprises representatives of contractors and employers, they are considered to be 'qualified consensual standard form contracts' (*qualifiziert konsensualisierte Geschäftsbedingungen*).[1]

Nevertheless, a content review (*Inhaltskontrolle*) in accordance with §879 ABGB is possible, but – since consensus within standardisation bodies is the most important parameter – in principle not promising. §879 ABGB states that a contract which violates a legal prohibition or 'public policy' (*gute Sitten*) is void.

Also, a validity review (*Geltungskontrolle*) in accordance with §864a ABGB, in which contract terms are checked as to whether they are adverse and unusual or whether the contract partner should have expected them, is available. §864a ABGB states that:

> 'unusual provisions used by a contractual party in general terms and conditions or standard forms do not become part of the contract if they are detrimental for the other party and he should not have to expect these provisions under the circumstances.'

QG.5 Is the employer permitted to order variations to the design during the course of the works? What are the usual contractual provisions?

There is no provision within the ABGB that would entitle the employer to order variations during the course of the works. Thus, should the contracting parties not mutually agree on such variations (ie on a change to the contract), the contractor is only obliged to execute the contractually agreed works.

Usually, construction contracts in Austria include the employer's right to vary the works. The ÖNORM B 2110, for instance, has an entire chapter on variations (see clause 7: '*Leistungsabweichung und ihre Folgen*') and allows the employer to change the scope of

1 Karasek, Kommentar zur ÖNORM B 2110³ (2016) 34.

work (*Leistungsumfang*), as far as such change is (i) necessary to achieve the performance target and (ii) not unreasonable for the contractor. This instruction may be explicit or conclusive, in writing or oral.

Corresponding to the employer's right to vary the works, the ÖNORM B 2110 entitles the contractor to additional time and/or additional payment for such variation to the works.

QG.6 Are there any current proposals to reform construction contract law?

No.

Topics

1 General obligations of the employer

1.1 Traditional procurement

Q1.1.1 Under this form of procurement, does the employer supply the contractor with the design, obtain the necessary permits and ensure that the contractor can obtain possession of the site?

In general, the employer supplies the contractor with the design, obtains the necessary permits for the works as a whole and ensures that the contractor can obtain possession of the site.

The ÖNORM A 2050, which regulates the procurement of works, services and supplies, states in clause 5.1.2 that the tender documents have to be prepared in a way that allows the bidders to calculate their prices without extensive preliminary works. If necessary, the description of works has to include plans, drawings, models and samples. So for construction works the employer is obliged to deliver the plans.

As for permits, the ÖNORM B 2110 states in clause 5.4.1 that the employer has to obtain the necessary permits for the works as a whole, for example the building permit and the trade law permit (*Gewerberechtsbewilligung*). On the other hand, under clause 5.4.2 and clause 6.2.3 the contractor is obliged to obtain any necessary permits from the public authorities for the execution of accessory obligation (*Nebenpflicht*) works, such as the submission of certificates or the notification of specific measures. Thus, the obligation to obtain the necessary permits is divided between the employer and the contractor, depending on the kind of permit.

The employer has to ensure that the contractor can obtain possession of the site. Furthermore, the ÖNORM B 2110 clause 6.2.8.1 states that the employer has to provide workspaces, storage facilities, access roads, rail connections and the like free of charge, but under the customary limits.

All these provisions are non-mandatory law. In practice, mutual obligations regarding plans, permits and possession of the site are agreed in the contract.

Q1.1.2 Does the employer owe the contractor a duty to cooperate, in order to give full effect to the contract?

Yes, the employer is obliged to cooperate with the contractor.

The employer's duty to cooperate has a broad range and, in a nutshell, includes every contractual obligation lying within the employer's sphere. The ÖNORM B 2110 even

lists several employer duties, including obtaining possession of the site, supplying the design, making decisions when the contractor raises concerns, coordinating several contractors on the same site or appointing a design coordinator and site coordinator in accordance with public law.

Pursuant to §1168 para 2 ABGB, the contractor is even entitled to terminate the contract if the work cannot be performed due to the lack of cooperation of the employer (after the expiry of a reasonable period of time to cooperate as declared by the contractor).

1.2 Design and build

Q1.2.1 Is the employer under an obligation to ensure that the contractor has all information in the employer's possession in good time, where this information is necessary to enable the contractor to execute the works (as well as to obtain any necessary permits) and to make the site available to the contractor?

In Austria, design and build contracts are mostly referred to as *Totalunternehmerverträge*.

A special standard form for design and build contracts does not exist; neither does the ÖNORM B 2110 include any special regulations for such contracts. If the parties want to achieve a design and build contract and incorporate the ÖNORM B 2110, they have to agree considerable amendments.

The employer's obligation to cooperate is similar to traditional procurement. The design and build contractor is also obliged to give all the necessary information in his possession to the employer.

The most common difference regarding permits between traditional procurement and design and build contracts is that – in most cases – the design and build contractor has to deliver an approvable planning application and has the duty to obtain the relevant construction permit.

Q1.2.2 Does the employer owe the contractor a duty to cooperate to give full effect to the contract?

Since there are no specific rules for design and build contracts, the duty to cooperate is similar to traditional procurement as described in the answer to Q1.1.2.

Q1.3.1 What are the answers to Q1.1.1-1.2.2 above in relation to BOT/DBFMO contracts?

There are no standard form contracts for BOT/DBFMO models in Austria. Hence, the answers to Q1.1.1-1.2.2 also apply to BOT/DBFMO contracts.

2 General obligations of the contractor

2.1 Traditional procurement

Q2.1.1 Does the contractor have an obligation to perform those duties which by the nature of the contract are required by law, by good faith or usage, or which relate to proper use of the materials?

The main obligation of the contractor is to perform the work in person or subject to his personal responsibility (§1165 ABGB). The contractor has to achieve a particular result. Furthermore, under Austrian warranty law (§922 ABGB), the work has to fulfil 'generally presumed qualities' (*gewöhnlich vorausgesetzte Eigenschaften*), even if these are not mentioned in the contract.

The ÖNORM B 2110 additionally states in clause 6.2.1 that the contractor has to perform the work according to the contract and in compliance with legal and regulatory provisions as well as the generally accepted technical principles (*anerkannte Regeln der Technik*). This term refers to the scientific answer to a particular technical question, which the contractor has to apply.

Q2.1.2 Does the contractor have an obligation to comply with instructions and directions given to him by the employer, including via an agent?

Following the provisions of the ABGB on service contracts, the contractor is free to decide how to perform the works and does not have an obligation to comply with any instructions and directions of the employer. However, the employer's right to give binding instructions and directions may be agreed.

As mentioned in QG.5, under the ÖNORM B 2110 clause 7.1, the employer is permitted to order variations of the contract under certain circumstances. The contractor has an obligation to comply with these instructions and directions, irrespective of whether they come from the employer or an agent. On the other hand, the contractor is entitled to claim additional time and payment.

The role of the employer's agent/supervisor (örtliche *Bauaufsicht, ÖBA*) is not defined in the ABGB or in the ÖNORM B 2110. The contracting parties usually define and agree the extent to which the employer's agent is permitted to act for the employer in the contract.

Q2.1.3 Does the contractor have an obligation to remedy or replace, at his expense, unsatisfactory work to the satisfaction of the employer, unless the unsatisfactory work is the employer's responsibility?

Under Austrian construction law, the parameter 'satisfaction of the employer' is not taken into account. The executed works are compared to the obligations defined in the

contract and under Austrian law. Any deviations are subject to the defects liability and damages regimes.

Q2.1.4 Is the contractor required, before the contract is entered into or during it (or both), to warn the employer against obvious faults or defects?

The contractor is obliged to warn the employer against obvious faults or defects, before and after entering into the contract.

Prior to contract conclusion, the contractor's duty to warn is based on the principle of *culpa in contrahendo* and may also be derived from §1168a ABGB. §1168a ABGB states that:

> 'if the work is unsuccessful due to the apparent unsuitability of the material provided by the employer or the apparent incorrect instructions from the employer, the contractor is liable for the damage if he did not warn the employer'.

Faults within the tender documents may be subsumed under 'incorrect instruction'. Before entering into the contract, the contractor does not have a duty to carry out an extensive review of the documents provided and is only obliged to warn the employer against obvious faults.

After conclusion of the contract, the contractor's duty to warn is more extensive. In this regard, the ÖNORM B 2110 clause 6.2.4.1 complements §1168a ABGB under which the contractor has to examine the execution documents (*Ausführungsunterlagen*), the instructions, the materials and the preliminary work as soon as possible. However, clause 6.2.4.3 states exceptions, in particular, defects the determination of which would require extensive, technically difficult or cost-intensive examination, and also defects of which the contractor may assume that the employer is aware.

2.2 Design and build

Q2.2.1 Does the contractor have an obligation to carry out the design and construction in such a manner that, at completion, the works will be in accordance with the requirements of the contract? If the works are not in accordance with these requirements, does this amount to a defect (unfitness for purpose)?

Design and build contractors have to perform the design and the construction works such that, on the date of completion, the works are in accordance with the requirements defined in the contract and with the law (see also Q2.2.2). Since the outcome of design and build contracts is usually defined by their purpose, the contractor has to meet the necessary requirements to fulfil the contractual purpose. Therefore, the contractor is under a fitness for purpose obligation. However, this obligation is not specific to design and build contracts. An Austrian contractor bears the same obligation with the traditional model.

The consequence of the works' non-compliance with the contractual and legal requirements is a contractor's breach of his contractual duties. In other words, the works will be considered defective and the contractor will be liable to the employer regarding these defects.

Q2.2.2 Does the contractor have an obligation to perform all those duties which by the nature of the contract are required by law, good faith or usage?

The contractor has an obligation to perform all duties which by the nature of the contract are required by law, good faith or usage. Austrian warranty law (§922 ABGB) states that the contractor has an obligation to conduct the works in a manner that reflects the properties agreed upon in the contract, the qualities generally presumed, and for the purpose assumed by the nature of the contract or the contractual agreements.

Q2.2.3 Is the contractor required, before the contract is entered into or during the contract (or both), to warn the employer if the employer's requirements contain or show obvious faults or defects, or if materials, goods, variations or other information supplied by the employer also show obvious faults or defects?

Contractors are generally required to check the employer's requirements, materials, goods, variations or other information within the scope of their own profession and, if there are obvious faults or defects, to warn the employer accordingly (§1168a ABGB). This duty of the contractor applies both prior to and during the execution of the works, but with a more extensive scope after the conclusion of the contract (see Q2.1.4).

2.3 BOT/DBFMO

Q2.3.1 How are the topics in Q2.1.1-2.2.3 regulated under these procurement models?

Since there is no standard form for BOT/DBFMO projects in Austria, the answers to Q2.1.1-2.2.3 also apply to BOT/DBFMO contracts.

3 Duty to warn

The duty to warn concept deals with two distinct situations: (A) the contractor's duty to warn of deficiencies in design under traditional procurement methods; and (B) the consultant's (architect's or engineer's) duty to warn of matters outside the scope of their express contractual obligations.

3A The contractor's duty to warn: introduction

This sub-section refers to the position of the contractor under traditional procurement, where the design is provided by the employer or the employer's consultants (architect or engineer). It does not refer to design and build contracts, where the contractor provides the design.

The basic position is that the contractor is not responsible for the design or specification. For example: FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999 (the Red Book), sub-clause 4.1 provides:

> 'the contractor (i) shall be responsible for contractor's Documents, Temporary Works, and such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract and (ii) shall not otherwise be responsible for the design or specification of the Permanent Works'.

Q3A.1 Is this the basic position under traditional procurement in your country?

No. Prior to the duty to warn, the contractor also has a duty to examine the design and/or the specification of the works. The standard for how extensive the contractor's examination has to be can be derived from §1299 ABGB. This states that:

> 'whoever publicly claims an office, an art, a profession or a trade or whoever, without an emergency, voluntarily assumes a task the performance of which requires specific expertise or unusual diligence, shows that he is confident of having the required diligence and the required, not common, knowledge: he is hence responsible for the lack of such.'

With this in mind, the contractor is an expert (*Sachverständiger*) and has to recognise any unsuitability (*Untauglichkeit*) of the provided material (*Stoff*; including plans, subsoil etc.) or instruction by the employer which is obvious for a contractor with the customary knowledge of an expert in his field. However, it is not within the scope of the contractor's duty to advise the employer to obtain an expert opinion.[2]

Q3A.2 Is this position usually set out expressly in the contract, or is it the consequence of the general law?

The contractor's duty to examine and warn is general law in Austria and, as mentioned above, it is regulated in §1168a ABGB.

Q3A.3 Are there exceptions to this basic position? The contract might require the contractor to notify the employer or the engineer of any errors he has detected in the design documents. In FIDIC contracts, this is expressed as an obligation on both parties: 'If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.' (Sub-Clause 1.8) Is such an obligation usually placed on a contractor?

Yes, that is the usual obligation within Austrian construction law. The contractor has the duty to warn the employer if any errors or defects are detected within the documents.

2 Karasek, ÖNORM B 2110[3] page 311ff.

Q3A.4 Is such an obligation contained in the contract? Or is it imposed by statute or some other form of general law?

The contractor's duty to examine and warn is general law in Austria and, as mentioned, it is regulated in §1168a ABGB.

Q3A.5 Is the obligation reciprocal, as in FIDIC, applying to both contractor and employer?

This obligation is not reciprocal. The employer does not have the same obligation to warn the contractor if any errors or defects are detected. Nevertheless, the employer is obliged to fulfil his duties of protection and diligence (*Schutz- und Sorgfaltspflichten*). These include the duty to warn and inform the contractor of any dangerous facts. Depending on how far the fact lies within the employer's sphere, the extent of the employer's duty to warn varies. Obvious dangers are not included under the employer's duty to warn.

Q3A.6 Do traditional procurement contracts contain provisions for part of the design to be undertaken by the contractor?

Yes, it is not unusual under traditional procurement contracts for the contractor to be responsible for the detailed design, which is based on the employer's general design (which is usually part of the employer's tender).

However, the contracting parties have to agree on the extent of the contractor's design obligations in the contract. Otherwise, all parts of the design have to be undertaken by the employer (see ÖNORM B 2110 clause 5.5.2).

Q3A.7 What effect does the contractor undertaking part of the design have, if any, on the contractor's duty to warn of defects in the overall design?

Depending on which part of the design the contractor has to undertake, he may have a more detailed insight into adjacent works provided by the employer and therefore a more extensive duty to warn the employer about errors or defects in the overall design.

Q3A.8 Are such duties imposed beyond express contractual provisions? If so, by implication in the contract or by the general law?

The duty to warn is an obligation imposed on the contractor by general law (§1168a ABGB) and may be altered by the parties.

Q3A.9 What might be covered by a contractor's duty to warn? (a) of inconsistency in design documents? (b) of possible breaches of building codes, standards or other legal requirements? (c) of the design not being buildable? (d) of safety risks created by the design?

In Austria, the contractor's duty to warn covers all the examples mentioned under (a) to (d).

However, the crucial question regarding the contractor's duty to warn under Austrian law is not the nature or the origin of the defect, but rather whether the defect was obvious and should have been detected by a diligent member of the contractor's profession.

3B The consultant's duty to warn

Q3B.1 Does the architect/engineer have a duty to warn the employer of defective work by the contractor? Is there such a duty even if the architect/engineer is only carrying out design work and has not agreed to supervise the construction process? Does the architect/engineer have a duty to warn of dangerous methods of work by the contractor? If so, under the contract or under the general law?

Basically, the duty to warn only applies within the scope of the performance obligations of the architect/engineer as well as within the protective duties and due diligence arising from the contractual relationship between the parties.[3] The architect/engineer's performance obligation to supervise the works carried out by the contractor does not follow from the duty to warn under general law (§1168a ABGB) but rather is a contractual duty.

If the architect/engineer is only carrying out design work, the duty to warn does not apply within the scope of the performance obligations. However, in such cases a duty to warn may arise out of the aforementioned protective duties and due diligence of the architect/engineer.

If dangerous and/or new methods of work are planned by the architect or used by the contractor the duty to warn intensifies for the architect/engineer. Unless the employer has been specifically educated about the possible risks, the architect/engineer bears the risk of failure due to those dangerous and/or new methods used.

Q3B.2 Is the architect/engineer who carries out the design usually involved in supervising the implementation of the design (the construction phase)? Or is that usually done by someone else? If so, by whom?

Whether the architect/engineer is involved in supervising the implementation of his design depends on his contractual agreement with the employer.

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3 Karasek, ÖNORM B 2110[3] page 321.

Usually, in smaller projects the architect supervises the implementation of his design. The larger and more complex the projects are, the more likely it is that the employer assigns professionals in the respective fields to supervise the associated works.

Q3B.3 If an architect/engineer becomes aware of deficiencies in services provided by another consultant, eg the architect in relation to deficient work by the engineer, does the architect then owe a duty to warn the employer? Do consultants normally accept project management responsibilities which include reviewing the performance of other consultants, as well as contractors? Would such a role include an express duty to warn?

If an architect/engineer becomes aware of deficiencies in services provided by another consultant, the aforementioned principles apply. Even though, in principal, the architect/engineer only has a duty to warn within the scope of his own performance obligations, there is also a duty to prevent anything which may interfere with the completion of the works.

Furthermore, the architect/engineer is obliged to collaborate with all other consultants (or other contractors) to complete the works. Within the scope of this necessary technical collaboration the architect/engineer has a duty to warn the employer.

Consultants do accept project management responsibilities which include reviewing the performance of other consultants as well as contractors. Whether this may be called a standard procedure is not known. In cases where a consultant accepts a contract in which the performance obligation entails reviewing the performance of other consultants and contactors, the contract's scope of performance will usually include an express duty to warn.

Q3B.4 Does the general law, or do professional codes, impose a duty to warn on consultants? Or is it simply a matter of contract?

§1168a ABGB provides that contractors (this provision applies to all kinds of contractors, including architects, engineers and consultants) have a duty to warn and are liable for damages in the case of a failure of the works.

The duty to warn has been constantly developed by the courts. Within the provisions of a contract the duty to warn may be amended by the parties.[4]

4 Krejci in Rummel, ABGB[3] §1168a ABGB page 27.

Q3B.5 If a designer becomes aware, after the completion of the project, of a problem with the performance of a particular product, material or piece of equipment, does the designer owe a duty to warn the employer/owner of the problem? If so, how long does such a duty last?

In general, Austrian law recognises a post-contractual duty between the contracting parties. The infringement of such a duty may lead to a contractual liability. However, there are no specific rules in Austrian statutory law or case law which determine the period of time in which such a duty applies. The decision whether such a duty was breached would have to be determined on a case by case basis.

4 Liquidated damages

Background: The purpose of a liquidated damages clause is to provide a remedy for the employer (or the main contractor under a subcontract) in the event of breach by the contractor (or subcontractor). Liquidated damages are typically available for (a) failure to complete work by the completion date (delay damages or delay liquidated damages) and/or (b) failure to provide a facility or plant capable of achieving the specified performance standard, for example, output (performance damages or performance liquidated damages).

Q4.1 In England, in 2001, a building contract was entered into for the upgrading of an office building; the contract sum was £11.57m; the time for completion was 16 months and liquidated damages were agreed at £45,000 per week, upheld by the court. What comparable provisions would be usual in your country?

Within the boundaries of certain rules, liquidated damages and penalties may be contractually agreed in Austria.

There are different types of contractual penalties frequently used in Austria to incentivise the contractor to finish the works or part(s) of the works within the agreed time for completion. Basically, such types of contractual penalty provisions can be distinguished by their calculation.

If, for example, the employer has a special interest in the works being completed by a certain date, the employer is most likely to use one large sum as a contractual penalty in order to cope with the losses caused by the delay. This contractual penalty may be calculated as a percentage of the contract price or may be a fixed figure (*Stichtagspönale*).

Another method of calculating contractual penalties is the way which is used in the example above, whereby either a certain amount or a percentage of the contract price becomes due for a certain period of delay (days, weeks, months). Usually these types are combined by setting a certain percentage as well as a minimum amount per delay period. In such cases every day, week etc. of delay is added and multiplied by the agreed sum or percentage which results in the final contractual penalty (*akkumulierende Pönalen*).

Irrespective of the form of contractual penalty the court's right to mitigate the contractual penalty always applies and cannot be excluded by the parties.

What may be considered a usual penalty depends on the contract at hand. The performance objective, the time for completion and the contract price are factors which determine what may be called a standard contractual penalty provision.

Q4.2 How are liquidated damages usually calculated? Are they a percentage of the contract sum? A lump sum? Or a fixed amount per day or per week? Is the loss likely to be suffered by the employer (main contractor under a subcontract) in the event of breach relevant in calculating the amount?

All of the above-mentioned ways of calculating the amount of liquidated damages are possible and can be agreed upon in the contract according to Austrian law. However, it is usual to determine a percentage of the contract price per calendar day of around 0.05% to 0.2% as a basis for the calculation of liquidated damages.

Q4.3 Is it usual for parties to agree a 'cap' or maximum limit on liquidated damages? How would that be calculated: as a percentage of the contract sum, or some other fixed amount? Does this vary between different industries? Please give some examples.

In Austria it is usual to agree a maximum limit of liquidated damages ranging between 5% and 15% of the contract price.

Q4.4 Is it necessary for the employer (main contractor under a subcontract) to have suffered loss in order to claim liquidated damages? Or can these damages be claimed, delivering a profit, where no loss has in fact been suffered as a result of the breach?

The party who claims liquidated damages only needs to prove the breach of contract for which the contractual penalty was agreed. An actual loss is not required in order to claim liquidated damages.

Q4.5 Can the tribunal (judge or arbitrator) vary the amount of liquidated damages agreed in the contract? Can the tribunal refuse to enforce this provision altogether? What grounds would justify such a variation, or a refusal to enforce?

§1336 ABGB states that the judge or arbitrator may reduce the amount of liquidated damages if the liable party proves that the amount is excessive. This right to reduce may not be excluded by the contracting parties. However, the fact that the amount of liquidated damages is excessive must be asserted and proved by the party liable.

The mere fact that the amount of liquidated damages is excessive does not lead to omission, but rather gives the judge or arbitrator the possibility to reduce the amount to what seems just.

Q4.6 Is the use of liquidated damages provisions specifically controlled by law?

As mentioned before, §1336 ABGB determines the use of contractual penalties to a certain extent. The provision states that the right of the judge to mitigate may not be excluded by the contracting parties.

Otherwise, the use of liquidated damages is not specifically controlled by law.

Q4.7 Summarise the extent and nature of usage of liquidated damages provisions in construction projects. What, if any, legal issues arise?

Liquidated damages provisions are used in nearly every construction project and have become a standard provision. The ÖNORM B 2110 clause 6.5.3 also regulates liquidated damages. Hence, it is safe to say that liquidated damages provisions are a permanent part of construction contracts in Austria.

Usually, liquidated damages provisions are used to penalise the contractor for failure to finish the works within the time for completion. However, liquidated damages provisions may also be agreed in cases where the works are not finished to the agreed standard.

As mentioned before, contractual penalties usually provide that the party liable has to pay liquidated damages based on a percentage of the contract price per calendar day of delay.

However, the delay is not necessarily calculated only from the time for completion. Contracts for lengthy construction projects in particular include intermediate deadlines as well. Those intermediate deadlines can also be subject to liquidated damages provisions.

Those liquidated damages may either be a fixed sum or increase with the delay of the contractor. In most cases, liquidated damages that increase subject to a fixed maximum are used. The liquidated damages increase either by a percentage of the contract price or by a fixed rate per unit of time.

5 Liability before and after handover

A crucial stage of every construction project is the end of the construction period. Either a neutral person or the employer issues a certificate or simply declares the 'handing over' of the works, when these are in accordance with the contract. Several legal consequences follow from this handing over or 'acceptance', the most typical being the beginning of

the contractor's defects liability period, the end of the contractor's responsibility for damage to the works caused by unforeseen events etc.

5.1 Traditional procurement

Q5.1.1 Who issues the 'handover' certificate: the employer or a neutral contract administrator?

The Austrian Civil Code does not stipulate any provisions regarding the taking over of works. Thus, the procedure and the requirements for any formal taking-over need to be defined in the respective contract.

Under Austrian law, according to both the Austrian Civil Code and the ÖNORM B 2110 (clause 10), it is the employer who accepts and takes over the works. It is, however, also very common that the employer delegates this task to an architect or an engineer who acts as the employer's agent.

Q5.1.2 What requirements must be fulfilled for handing over to take place? Can it take place if minor parts of the works have not been completed or if there are minor defects?

In principle, the handing over takes place if the works are executed in accordance with the contractual requirements, when the contractor has offered the works to the employer and when the employer has accepted the works.

The employer may also take over the works even if minor parts have not yet been completed or if there are minor defects.

However, under the concept of the Austrian Civil Code, the employer is entitled to refuse the handing over of the works even if the incomplete or defective parts are minor. By contrast, according to the provisions of the ÖNORM B 2110, the employer may refuse the taking over of the works only if the incomplete or defective parts of the works do not represent mere minor deficiencies or do not prevent the intended use of the works.

Q5.1.3 Are there any formal requirements for handing over the works? Must there be a certificate, or can it take place without formal declaration, for example simply by making use of the works?

The Austrian Civil Code does not contain provisions stating formal requirements for handing over the works nor does there have to be a certificate.[5] If the employer starts using the works, it may be seen as behaviour indicating that the employer has accepted the works as meeting the contractual requirements. Such behaviour of the employer

5 Karasek, ÖNORM B 2110[3] page 864.

may constitute a taking over of the works, even if the contract requests a formal taking over of the works.[6]

Usually, the contract requires a formal handing over of the works in writing (*Niederschrift*) recording any incomplete or defective parts of the works, delays to the time for completion and possible liquidated damages.

Under the ÖNORM B 2110 (clause 10), prior to the employer taking over, the contractor first has to request that the employer take over the works within a deadline of 30 days. If the employer fails to do so without giving proper reasons, the works are deemed to be accepted and taken over by the employer (*fiktive* Übernahme).

Q5.1.4 What are the legal consequences of handing over? Please consider (a) the end of the contractor's liability for damage to the works caused by unforeseen events for which the parties are not responsible; (b) the right of the contractor to claim payment from the employer; (c) the right of the contractor to claim back the performance bond from the employer; and (d) the beginning of the limitation period for claims for breach of contract.

The legal consequences of handing over the works to the employer are the following:

- According to §1168a ABGB, the risk of the loss of the works due to unforeseen events passes from the contractor to the employer;
- The contractor's claim for (final) payment becomes due; and
- The legal warranty period starts to run.

Q5.1.5(a) What legal remedies does the employer have available against the contractor if defects later come to light? Damages, specific performance, abatement (reduction of the price) etc?

If defects come to light later, the employer has the following legal remedies available against the contractor:

- Warranty (§932 ABGB):
  - Right to require rectification by the contractor,
  - Right to abate the price.
- Damages (§933a ABGB):
  - Costs of rectification by a third party,
  - Right to damages for breach of contract,
  - Right to reimbursement of futile expenditure.

6 Karasek, ÖNORM B 2110[3] page 869.

Q5.1.5(b)Is the employer entitled to withhold 'retention money' until the end of a 'defects liability period'? If so, can the contractor submit a bond in exchange for the retention money being paid out to him?

As the ABGB does not have any provisions regarding retention money (*Haftungsrücklass*), the employer has to pay the full contractual price upon taking over the works, if there are no apparent defects.

However, provisions for retention money are agreed in most construction contracts. In most cases, the sum of the retention money is agreed in the range of 2% to 5% of the final invoice amount. Additionally, the contractor usually has the right to submit a bond for the said amount in exchange for the retention money and to claim the payment of the retention money.

If the parties have agreed the ÖNORM B 2110, the retention money amounts to 2% of the gross final invoice amount and may be exchanged by bond. The retention money (or the bond) must be returned – unless a defect has occurred – within 30 days after the defects notification period has elapsed.

In cases where the original defects notification period has been extended (for example because of rectification), only 10% of the value of the works in question may be withheld after the original defects notification period. The absolute maximum of 2% of the gross final invoice amount is not affected by such circumstances (see ÖNORM B 2110 clause 8.7.3).[7]

Q5.1.5(c)May the employer engage a third party to remedy defects, or must the employer turn first to the contractor? If the employer engages a third party, may he claim the cost from the original contractor?

Under Austrian law, the employer must turn first to the contractor and request that the contractor remedy the defects within the scope of the original construction contract. Only if the contractor delays or declines to remedy the defects or if the employer has cause not to engage the contractor any further, the employer is entitled to engage a third party to remedy the defects (§933a ABGB).

In this case the employer may also claim the costs incurred for the rectification works from the contractor.[8]

If the employer does not turn to the contractor first and directly engages a third party to remedy the defects, the employer does not lose the right to claim the costs completely (*voreilige Selbstvornahme*). However, the employer's entitlement to compensation is

7 Karasek, ÖNORM B 2110[3] page 849ff.

8 Zöchling-Jud in Kletečka/Schauer, ABGB-ON[1.02] §933a page 18.

capped at the costs the contractor would have incurred if he had done the rectification works himself.[9]

5.2 Design and build

Q5.2.1 Are any of the issues in Section 5.1 treated differently under a design and build contract? In particular, who is responsible for determining the date of the handing over: the employer or a neutral contract administrator?

The issues covered under Section 5.1 are not treated differently in a design and build contract.

5.3 BOT/DBFMO

Q5.3.1 Are any of the issues in Section 5.1 treated differently under a BOT/DBFMO contract?

BOT and DBFMO contracts are usually based on design and build contracts. The part of the contract which governs the planning and construction phase as well as the taking over of the works remains the same as already discussed in Section 5.1. However, the contractor's duties to operate and maintain the plant may be governed by different rules. The duties of the contractor as well as the question whether the issues discussed under Section 5.1 are even applicable have to be determined by the specific terms of the agreement between the parties.

6 Payment

6.1 Determination of the amount to be paid to the contractor (the contract sum)

The contract sum can usually be determined by a range of methods. The amount may be fixed when the contract is entered into or later. Not doing so at all does not mean that the contract is void due to uncertainty: If the parties do not in fact reach agreement, determination may be made by a court or arbitral tribunal.

Q6.1.1 If the parties agree to determine the amount after the contract has been entered into, must they determine at least one criterion against which the determination is to be made, or may they give themselves total freedom for the future?

Usually, the amount due to the contractor for the execution of the works will be determined in the contract. If the price has not been agreed upon at the time the parties entered into the contract, §1152 ABGB stipulates that – where the parties did not agree

9 Zöchling-Jud in Kletečka/Schauer, ABGB-ON[1.02] §932 page 45; Zöchling-Jud in Kletečka/Schauer, ABGB-ON[1.02] §933a page 24; OGH 20.01.2016, 3Ob213/15t.

that the contractor shall execute the works for free – a reasonable price is deemed to be due to the contractor.

The parties to a contract may give each other (or one party may entitle the other to) the right to determine either the price or the works (§1056 ABGB). Nevertheless, the party executing this right is not entirely free to determine the price or the works as the party sees fit. The use of this right is generally limited to the boundaries of reasonable discretion.[10]

Therefore, the parties are not entirely free to determine the price in the future as they please.

Q6.1.2 If the contract sum is fixed in advance (ie when the contract is entered into), it can be a global figure (ie a 'lump sum' for the whole project) and will then usually be not subject to change; or sums may be fixed for each unit comprised in the work (for example, building a wall or a road at a certain amount per metre: a 'remeasurement basis'). If the complete project is broken down into activities (for example, an excavation during which the contractor will first meet soft ground and then rock), many types of price may be agreed, one for each aspect of the work. Does the law control the process of fixing how what is owed is arrived at?

The types of contracts mentioned above – fixed contract sum (*Pauschalpreisvertrag*) and fixed sums per unit (*Einheitspreisvertrag*) – are the most common ones in Austrian construction law and are regulated in the ÖNORM B 2110.

However, Austrian law does not have provisions controlling the process of fixing how what is owed is arrived at.

Q6.1.3 May parties provide that the amount to be paid by the employer to the contractor will be determined by an arbitrator, who will decide this in the light of the circumstances of the case?

Yes.

Q6.1.4 In determining the contract sum, may the parties expressly refer, in the contract itself or in a subsequent agreement, to a schedule of rates or to the custom of the place?

Yes.

10 Verschraegen in Kletečka/Schauer, ABGB-ON[1.05] §1056 page 13.

Q6.1.5 If the parties have not determined the amount to be paid to the contractor, nor any method of determining it, and if there is no reference to rates or to custom, is the amount payable determined by a judge (at the request of one or both parties) – including if an arbitrator appointed by the parties cannot decide or refuses to do so? If so, what criteria will the judge use to set the amount?

If the parties haven't agreed a method for determining the amount due to the contractor, the contractor is entitled to a reasonable amount. What price is reasonable will have to be decided by the court, if there is no other way of determining the amount.

The judge is likely to assign an expert to determine the reasonable amount due to the contractor. Should the expert also be unable to specify a reasonable amount, according to the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) it is left to the discretion of the court as to what the reasonable amount due to the contractor would be (§273 ZPO).

6.2 Payment of the contract sum

Q6.2.1 Payment of the final contract sum is usually due when the work is completed, at the time of handover. Does this final payment become due only after the employer (or someone acting on his behalf) checks that the completed project is in conformity with the plans and specifications?

Generally, the maturity of the final contract sum depends on the completion of the works (§1170 ABGB). Thus, the general rule under Austrian law is that the final payment does not become due until the works are free of all defects.

However, in most cases the parties agree a certain completion date, the terms of handover as well as the arrangements for billing. In such cases all those factors might have an impact on the due date of the final contract sum.

It is not a legal requirement for the maturity of the final payment that the employer or somebody on his behalf check the project for its conformity with the plans and specifications. However, most contracts, especially the ÖNORM B 2110 clause 10.2., have a provision regulating the arrangements for handover which include a check that the works conform with the plans and specifications.

Q6.2.2 May the parties define milestones in the project, the achievement of each triggering part of the total payment?

Yes. Defining milestones is a common practice in Austrian construction contracts.

Q6.2.3 Is it usual for the contractor to have security in the event of the employer's default, eg rights over the employer's assets (a mortgage or charge) or a third party guarantee (eg a third party bond from a bank)?

Yes, based on the Austrian Civil Code (§1170b ABGB), the contractor has the absolute right to demand security from the employer in the amount of 20% (or even 40% if the time for completion is shorter than 3 months) of the contract price.

The security might be a third party guarantee (e.g. insurance or a bond from a bank), cash, cash deposit or a savings book.

7 Delay and disruption

7.1 Traditional procurement

Q7.1.1 What is the effect of a provision that a request for an extension of time by the contractor will be considered only if made in writing and at least N days before the applicable completion date?

The Austrian Civil Code does not contain provisions explicitly addressing the contractor's claim for an extension of time. In principle, the time for completing the works is extended *ex lege* if the circumstances hindering the contractor are attributable to the employer and caused a delay.[11] An explicit request is not required by law; however, the contractor must inform the employer of such delay and the extension of time resulting from it.[12]

In contrast, if the parties contractually agreed the ÖNORM B 2110, clause 7.4.2 stipulates explicitly that the contractor is entitled to an extension of time if a change to the works or circumstances hindering the performance cause a delay. However, the contractor is obliged to notify the employer of the extension of time before executing the changed works according to the ÖNORM B 2110 clause 7.3.1. Furthermore, if hindering circumstances cause the delay, the contractor also has to duly inform the employer as soon as possible of the circumstances including any foreseeable impact on time and cost.

Such a notice does not need to be in writing unless explicitly stipulated in the contract. If the circumstances causing the delay and its delaying effects are apparent to the employer, a formal notice or request regarding the extension of time is not required. Moreover, requesting an extension of time is not a prerequisite for the contractor's entitlement. Even if the contractor delays in submitting the notice or fails to inform the employer, he is still entitled to an extension of time. However, if the employer would have been able to reduce the impact of the hindering circumstances had he been informed in a timely manner, the contractor's entitlement is reduced by the corresponding amount.

11 Karasek, ÖNORM B 2110[3] page 1317.

12 Kodek in Kodek/Plettenbacher/Draskovits/Kolm, Mehrkosten beim Bauvertrag (2017) 37.

The question whether the contractor's contractual entitlement to an extension of time is forfeited if a request for such extension is not made within a stipulated time period remains a controversial issue; court decisions do not exist yet. However, it is the opinion of the authors of this section that such a provision would be void.

Q7.1.2 May the time within which the works must be completed and accepted be extended by the employer, either on his own motion or in response to a request by the contractor?

The Austrian Civil Code does not entitle the employer to extend the time for completion or handover arbitrarily.[13] However, if the contractor requests an extension of time (to which he is not already entitled by law), the employer may accept the contractor's request. In such a case the time for completion is mutually extended; the contract is amended with regard to the time for completion. This also holds true for the ÖNORM B 2110.

Whether the ÖNORM B 2110 also entitles the employer to extend (or reduce) the time for completion is subject to debate. However, the prevailing opinion is that the employer does not have the right to order only time related changes. The time for completion is only extended if a permissible change order by the employer also has time-related effects.

Q7.1.3 Is the contractor entitled to an extension of time if the works cannot be completed within the agreed time due to force majeure, or to circumstances for which the employer is responsible, or to changes made by (or on behalf of) the employer in the specification or in the execution of the works?

According to the Austrian Civil Code, the contractor is only entitled to an extension of time if the circumstances causing the delay are attributable to the employer, ie they are assigned to the employer's sphere of contractual risk.[14] If the event or matter is attributable to the contractor itself or to the 'neutral sphere', the related risk is borne by the contractor and therefore no entitlement to an extension of time exists. However, the allocation of risk between the parties is always subject to interpretation.

Therefore, unless otherwise stipulated in any contractual provision, the contractor is entitled to an extension of time if the circumstances are attributable to the employer; the risk of force majeure lies in principle with the contractor, but the degree of severity has to be taken into account.[15]

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13 Karasek, ÖNORM B 2110³ page 1147; Karasek/Duve, Forcierung der Leistung 17.

14 Krejci in Rummel, ABGB³, §1168 ABGB page 7ff with further references.

15 Krejci in Rummel, ABGB³, §1155 ABGB page 17 with further references; Welser/Zöchling-Jud, Bürgerliches Recht II[14] 1138; Rummel in Rummel/Lukas, ABGB[4], §901 ABGB page 5ff regarding the cancellation or adaption of the contract if the basis of the contract ceases to exist.

If the parties have incorporated the ÖNORM B 2110 into the contract, the statutory basis regarding the risk allocation is amended. According to the ÖNORM B 2110 clause 7.2.1, any provided documents, a delay in awarding the contract, provided material (including soil conditions etc.) and instructions are attributed to the employer. Furthermore, the provision stipulates that the risk for the completeness and accuracy of the tender documents is also borne by the employer as well as any event or circumstances which (i) result in performance of the contract being impossible, or (ii) were not foreseeable when concluding the contract and could not reasonably be prevented; as regards extraordinary weather conditions, the 10-year event (ie floods etc.) needs to be exceeded. Therefore, any events described in Q7.1.3 would entitle the contractor to an extension of time, if the ÖNORM B 2110 is contractually incorporated.

Q7.1.4 Does the employer have the right to suspend or terminate the execution of the whole or any part of the works?

As described in the answer to Q7.1.2, according to prevailing opinion the employer is not entitled to order only time-related changes. Therefore, the employer is not entitled to suspend the whole or any part of the works unless the contract provides for suspension.

However, the employer is entitled to terminate the works contract without any reason. If the employer terminates the works wholly or partially the contractor is entitled to remuneration for the terminated works; however, the contractor has to set-off what he saved due to the non-performance or what he acquired or wilfully missed acquiring through other employment.

Q7.1.5 During a suspension, is the contractor required to (a) take appropriate measures to prevent and limit any damage which might occur to the works; and (b) refrain from doing anything which might result in damage to the works or which might impede the later resumption of work?

The contractor is always obliged to protect the employer against losses or to minimise such losses insofar as such measures are reasonable for the contractor. This obligation is derived from the contracting parties' fiduciary duty on the one hand and the general principle to mitigate losses on the other hand.[16]

However, neither the Austrian Civil Code nor the ÖNORM B 2110 contains specific provisions on the contractor's obligation to protect the works in the event of suspension.

16 Karasek, ÖNORM B 2110³ pages 1160 and 1322.

Q7.1.6 If the suspension of work continues for more than N days or weeks, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?

According to the ÖNORM B 2110 clause 5.8.1 para 6), the contractor is entitled to terminate the contract as soon as it becomes certain that the hindering event or circumstances will last longer than three months. The termination needs to be effected in writing.

The employer is obliged to take over and remunerate the works executed so far. Furthermore, if the events or circumstances entitling the contractor to terminate the contract are attributable to the employer, the employer also has to pay for works not carried out; however, the contractor has to set-off what he saved due to the non-performance.

Q7.1.7 On what basis is work done by the contractor up to the date of the suspension remunerated (if not already)?

The executed works are to be paid for in accordance with the contractual provisions, for example the unit price for any unit carried out.

However, if the execution of the remaining works has become permanently impossible due to an event or circumstances allocated to the employer's sphere of risk or the employer has terminated the remaining works, the contractor is entitled to remuneration for the non-performed works; however, the contractor has to set-off what he saved due to the non-performance or acquired or wilfully missed acquiring through other employment.

Q7.1.8 If the execution of the works has been delayed for an uninterrupted period of more than N days or weeks, by reason of circumstances which are at the employer's risk, does the contractor have the right to terminate its obligations in relation to the project, leaving the works in their unfinished state?

See the answer to Q7.1.6.

7.2 Design and build

Q7.2.1 Does the employer have the right to suspend or terminate the execution of the whole or any part of the works?

See the answer to Q7.1.4. There is no difference between design and build contracts and 'traditional' (unit price) contracts in this regard.

Q7.2.2 During a suspension, is the contractor required to (a) take appropriate measures to prevent and limit any damage which might occur to the works; and (b) refrain from doing anything which might result in damage to the works or which might impede the later resumption of work?

See the answer to Q7.1.5.

Q7.2.3 Is the contractor entitled to compensation and/or an extension of time as a result of a suspension?

If the execution of works is suspended by the employer, the contractor is entitled to an extension of time and additional payment according to §1168 para 1 second sentence ABGB and the ÖNORM B 2110 clause 7.4.

However, it is the contractor who suffers any loss resulting from the suspension. For example, the contractor will not be able to reduce the workforce immediately or increase on-site and off-site overheads.

Following the prevailing opinion, the additional payment for the loss suffered is calculated on the basis of the original calculation; the actual costs incurred do not determine the claim. It is not even necessary for the contractor to actually incur any losses as the additional payment is derived on a pure calculation basis.[17] The contractor calculates his entitlement for additional payment referring to his original calculation, ie all cost factors for executing the works which were initially taken into account.

With regard to the extension of time, whether the suspended works are part of the critical path is evaluated. The critical path is the longest sequence of works in the works schedule which must be completed on time for the works to be completed on the initial date for completion. If works on the critical path are delayed for a specific period, the completion date will be delayed for the same amount of time unless the latter works following the delayed works are completed faster. Furthermore, secondary delays also need to be taken into account, ie if the works are suspended in October for two months then realistically the works will be delayed for more than two months due to the weather conditions in winter.[18]

Q7.2.4 On what basis is work done by the contractor up to the date of the suspension remunerated (if not already)?

See the answer to Q7.1.7.

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17 Karasek, ÖNORM B 2110³ page 1313; Karasek, Rechtliche Anmerkungen Zum Beitrag von Herrn Univ.-Prof. Dr. Wolfgang Oberndorfer, bau aktuell 2012, 2; Kletečka in Kletečka/Schauer, ABGB-ON[1.02] §1168 page 39 with further references; different view Kodek, Mehrkosten beim Bauvertrag: Dogmatische Grundfragen und praktische Anwendung, bau aktuell 2017, 135.

18 Karasek, ÖNORM B 2110³ page 1448.

Q7.2.5 If the suspension of work continues for more than N days or weeks, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?

See the answer to Q7.1.6.

Q7.2.6 If the execution of the works has been delayed for an uninterrupted period of more than N days or weeks, by reason of circumstances which are at the employer's risk, does the contractor have the right to terminate his obligations in relation to the project, leaving the works in their unfinished state?

See the answer to Q7.1.6.

8 Damages

Damages (financial compensation) can be claimed by the aggrieved party, if the other party is in breach of its obligations under the contract or due to negligence. Generally, the party in breach of its obligations has to compensate for the loss, but there are limitations to this. Thus, it is important to know how the obligation to pay damages is limited by law (statute and case law), by standard form contracts and by bespoke contracts. Also relevant is the extent to which the parties can exclude or limit their liability through express provisions in the contract.

For an overview of the obligations of employers and contractors see Sections 1 and 2; for an overview of liquidated damages, see Section 4.

8.1 Traditional procurement

Q8.1.1 What are the rules, and where are they found, on damages for breach of contract? In what situations is the contractual liability of (a) the employer; (b) the contractor; and (c) the architect or engineer relevant in the field of construction?

Austrian tort law is guided by the principle *casum sentit dominus*, ie damages are in principle borne by the owner. Only under certain circumstances is another party obliged to indemnify the owner.

The law on damages is found in §§1293 to 1341 ABGB.

What is relevant in relation to the contractual liabilities of the employer is his duty to cooperate, to provide all necessary information and to coordinate the works of different contractors (if there is more than one). Infringement of those duties may lead either to damage claims or to additional payment.

For the contractor the most notable liability is the duty to complete the works in accordance with the contract. The contractor is often liable for damages arising from additional costs for repairs of defective works and failure to complete the works within the time for completion which may result in loss of earnings for the employer.

The architect's or the engineer's contractual liability is mostly relevant in cases of faulty design, miscalculations of costs or insufficient inspections.

Q8.1.2 What are the rules, and where are they found, on damages in the tort of negligence? In what construction situations may tortious (delictual) liability be relevant?

The central rule for damages in tort law is §1295 ABGB which states that anybody is entitled to compensation for damages inflicted upon them through tortious behaviour, whether or not in connection with a contract.

Tortious liability becomes important in construction situations when the tortious acts lie beyond the execution of the contractual works or the tortfeasor and the aggrieved party have no contract with each other. Finally, tortious liability may become relevant in defects cases where the contractor's contractual liability is statute barred but the tortious liability is not.

Q8.1.3 What principles limit the liability of the party in breach? For example, ideas of compensation, causation, foreseeability, the duty to mitigate losses, the need to give the contractor a (second) chance to rectify defects, or liability requiring proof of fault (rather than being strict).

There are various principles which limit the liability of the party in breach. For example, the damage must have been caused by the breach of contract (*Kausalzusammenhang*). Furthermore, the loss or damage in question must have been foreseeable (*Adäquanzzusammenhang*) and the loss or damage must be within the scope of the purpose of the obligation which has been breached.

Further principles which limit the liability of the party in breach:

- The principle of fault-based liability (§1295 ABGB): fault is generally a requirement of liability. However, within the scope of a service contract (*Werkvertrag*) the contractor is under strict liability with regard to the works the contractor has to provide under the contract. In the case of defective works, the employer may therefore demand rectification from the contractor regardless of the element of fault. Damages in excess of the defects themselves on the other hand have to be at least negligently caused by the contractor.
- According to §§932 and 933a ABGB, the contractor has to be given a second chance to rectify any defects. This rule applies in strict liability cases as well as in fault-based liability cases.

- In Austrian tort law the aggrieved party always has a duty to mitigate their losses (*Schadenminderungspflicht*).
- The principle of betterment (also known as *Neu für Alt* and *Vorteilsausgleich*) is also established in Austrian tort law. The aggrieved party must not incur any losses as a cause of a tortious act but neither must the aggrieved party be enriched.
- The limiting principle of costs which the aggrieved party would have had to bear even without the breach of contract (*Sowieso-Kosten*).
- Limitation periods.

The ÖNORM B 2110 stipulates special limits to liability. Clause 12.2 lays down the rights of the employer if defects come to light. One important difference between ÖNORM B 2110 contracts and ABGB-contracts is that the amount of damages is limited under clause 12.3 of the ÖNORM to either EUR 12,500 or 5% of the contract value but ultimately limited to EUR 750,000. This limitation of damages must always be addressed by the employer and is removed in most cases when the ÖNORM B 2110 is used as a contractual basis.

Q8.1.4. The assessment of damages in the event of defects: can the employer claim the full cost of rectifying defects, or are damages limited to the 'loss of value' to the project? Can an employer claim any damages if the cost of rectifying the defects is not proportionate and if the loss of value is zero?[19]

Generally, the employer has to give the contractor the opportunity to rectify the defect himself. If the employer fails to do so or if the costs of rectification are excessive in relation to the 'loss of value' the defect causes, the employer has the right to demand the 'loss of value' to the project. If the loss of value to the project is zero and the cost of rectifying the defect is considered unreasonable the employer might not have the right to claim any damages.

Q8.1.5 For how long does the contractor or employer retain liability for a breach of contract or in tort? Where are these limitation periods laid down?

The general rule under Austrian law is that any claims are time barred 30 years after they arose (§1478 ABGB). For how long the contractor or the employer bears liability for a breach of contract in any given scenario depends on various factors.

The contractor's strict liability period in Austrian construction law lasts three years beginning at the point of handing over the works (§933 ABGB).

19 In English law in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, the House of Lords thought the total rebuilding of a swimming pool whose depth did not match the employer's requirements, claimed as damages from the contractor, an unreasonable expense, the discrepancy causing no loss of value to the house itself, nor impeding the intended use of the pool for swimming, though a claim for a modest sum for loss of amenity (pleasure) did succeed.

If the contractor breached the contract negligently, claims are time barred three years after the employer becomes aware of the loss and the party responsible (§1489 ABGB). However, the general 30-year rule applies as well (§1489 ABGB).

The rules laid down in §1489 ABGB also apply to tortious acts. In addition, the section states that it applies to claims which may or may not have arisen in connection with a contract.

Q8.1.6 If a defect was caused by the negligence of both the contractor and the architect who supervised the works, may the employer claim all the damages from either party? Or does proportional liability apply, capping the liability of each of them at the level of their respective contribution to causing the loss?

In cases where the contractor and the architect are both liable for the damages, proportional liability applies, except if it is not possible to determine the exact proportion of each party's liability. If that is the case both parties are jointly liable and the employer may claim all the damages from either party.

However, the party which the employer held liable may have recourse against the other party.

Q8.1.7 When would the negligence of the architect (if this results in a defect) be considered as 'negligence of the employer', reducing the contractor's liability? When either (a) the architect negligently issues defective plans to the contractor; or (b) the architect is negligent in supervising the contractor's work?

When (a) the architect issues defective plans to the contractor, those plans are viewed as instructions (*Anweisungen*). If those instructions are defective, generally, the contractor's liability is reduced unless the contractor should have realised their defectiveness within the scope of his duty to warn (§1168a ABGB).

When (b) the architect is negligent in supervising the contractor's work it is not considered 'negligence of the employer' because it is not part of the contractual duties of the employer to supervise the works of the contractor. Hence, the contractor's liability is only reduced to the extent explained under Q8.1.6.

Q8.1.8 Is it possible to limit contractual liability? What limitations or exclusions are usually agreed and are they enforceable when included in standard form contracts? How about (a) financial caps? (b) exclusions of 'consequential damages' (as opposed to direct damages)? (c) limitations of liability to the proportion of loss caused by the party in breach ('net contribution clauses')? or (d) exclusions of liability for negligence?

Yes, under Austrian law it is possible to limit liability to a certain extent. All of the above-mentioned forms of limitation of contractual liability are eligible and are enforceable when included in standard form contracts. However, employers do not usually accept any limitations of the liability of the contractor.

The ÖNORM B 2110 limits the contractual liability as already mentioned under Q8.1.3.

In the case of a contract with a consumer the regulations of the consumer protection law (*Konsumentenschutzgesetz,* KSchG) – especially §6 KSchG – must also be taken into consideration. The contractual liability of the contractor towards a consumer may only be reduced to intentional or grossly negligent behaviour. With regard to personal injury the contractual liability cannot be reduced at all.

Q8.1.9 What liabilities, if any, are usually unlimited?

Usually, liabilities for the defects themselves as well as liabilities for personal injury are unlimited.

Q8.1.10 Can the contractor claim damages from the employer for losses caused by force majeure?

In the case of an ABGB construction contract the contractor cannot claim damages for force majeure because the destruction of the works – before the taking over – falls within the sphere of risk of the contractor (§1168a ABGB).

Construction contracts which are based on the ÖNORM B 2110 split the risk of force majeure between the employer and the contractor. Generally speaking, force majeure which was unforeseeable and whose effects could not have been prevented by reasonable countermeasures falls within the sphere of risk of the employer.

Q8.1.11 Can the employer claim damages for building defects from the contractor even if he has no intention of rectifying the defects?

In Austrian warranty law primary and secondary legal remedies are available. Rectification and replacement are primary legal remedies which the employer must seek first if possible. Only if those primary legal remedies are impossible, unreasonable or intolerable for either one of the parties, the secondary legal remedies apply. The secondary legal remedies are a reduction of the contract price and the repeal of the contract.

Therefore, the above-mentioned damages may only be claimed, if (i) the contractor fails to rectify or (ii) the secondary legal remedies apply.

Q8.1.12 In tort, can the building owner claim damages from the contractor for the cost of rectifying defects?

The Austrian law of torts is guided by the principle of restitution in kind (§1323 ABGB). However, in reality damages arising from torts are usually handled by value compensation.

8.2 Design and build

Q8.2.1 Would the answers to any of the questions above about liability be different in the case of a design and build contract?

In the case of a design and build contract the answers dealing with defective plans from the architect do not apply.

8.3 BOT/DBFMO

Q8.3.1 Would the answers to any of the questions above about liability be different in the case of a BOT/DBFMO contract?

In the case of a BOT/DBFMO contract there are additional contractual duties of the contractor which have to be taken into consideration. However, the general principles laid down above still apply.

9 Subcontracting

9.1 Right to subcontract

Q9.1.1 A subcontractor is a person or a company which has a contract (as an 'independent contractor' and not an employee) with a contractor (usually designated as the 'main' or 'prime' contractor) to provide some portion of the work or services under the construction contract. Subcontracting is usually seen as a right of the main contractor; but is it permitted for the performance of construction works in all circumstances?

According to the ABGB, there is no restriction on the use of subcontractors.

In public tender proceedings the bidder has to name all subcontractors and may only change subcontractors with the written consent of the employer. The employer may only deny his consent based on objective reasons. If the employer does not object within three weeks of notification by the contractor, the subcontractor is deemed to be approved.

Q9.1.2 May a subcontractor perform all of the work the main contractor has agreed to perform under the construction contract?

In general, there is no limitation on subcontracting all works.

In public tender proceedings, it is not permitted to subcontract all of the work. However, subcontracting all of the work to a group company of the main contractor is permitted.

Q9.1.3 Is the right to subcontract construction works limited by any legal provisions, or by the type of works to be performed?

No. However, the subcontractor has to have the necessary permits etc. to perform the works.

9.2 Subcontracting the design

Q9.2.1 Under traditional procurement, the employer supplies the contractor with the design, the contractor then contracting with an architect or engineer to carry out the design. May the architect or engineer subcontract part of the design work?

According to Austrian law, there is no limitation on subcontracting design works. However, most design contracts provide that the architect or engineer must obtain the approval of the employer before subcontracting parts of the work.

Q9.2.2 May a subcontractor provide the totality of the design which the architect or engineer has agreed to undertake?

See above Q9.2.1.

Q9.2.3 Is the right to subcontract design limited by any legal provisions, or by the nature of the design to be performed?

No.

9.3 Limitation of liability clauses

Q9.3.1 Is the main contractor responsible for seeing that the project is completed, hence liable to the employer when delay, damage or loss is caused by a subcontractor?

Yes. The main contractor remains fully liable to the employer regardless of any subcontracting.

Q9.3.2 Where a subcontractor is nominated by the employer, is the liability of the main contractor automatically excluded or limited for delay or defects caused by the nominated subcontractor?

No. As the concept of a 'subcontractor nominated by the employer' is uncommon in the Austrian construction sector, there is no relevant statutory or case law on this. However, it could be argued that the employer may be liable for contributory negligence (in nominating an unqualified subcontractor), thus reducing the liability of the main contractor.

9.4 Damages in the event of subcontractor delay or defective work

Q9.4.1 Is a subcontractor who fails to complete works on time or whose work is defective required to pay damages to the main contractor, if this causes delay to the project? Can the main contractor claim from the subcontractor the total amount of damages that he has paid his employer, or are there implied terms (or any rules of law) which limit the subcontractor's liability to the value of the subcontractor's contract?

According to Austrian law, there are no limitations on the subcontractor's liability towards the main contractor. Such limitations may be included in the subcontract.

Q9.4.2 When the contract between the employer and the main contractor contains a liquidated damages clause, can the main contractor require the same liquidated damages from the subcontractor? What is the legal basis for such a claim? Are there any implied terms or rules of law, or is it necessary to include an express clause in the subcontract?

The main contractor can require such liquidated damages from the subcontractor, given the culpability of the subcontractor (§920 ABGB). An express clause in the subcontract is not required, but the liability of the subcontractor can be extended (e.g. in the case of causation without culpability).

9.5 Limitation of contractor's liability

Q9.5.1 If the contract between the employer and the main contractor validly includes a limitation of liability clause (see Q8.1.8), may this also limit the main contractor's liability when delay or defects are caused by the subcontractor? May the main contractor limit his liability when delay or defects are caused by the subcontractor's fraud or gross negligence?

Yes, the limitations also apply to subcontracted works. Regarding the requirements for limitation of liability, see Q8.1.8.

Q9.5.2 Do the same principles apply to design subcontractors?

Yes.

Q9.5.3 Does limiting liability for the acts or omissions of a subcontractor require an express clause in the head contract? Are there any implied contract terms or rules of law regarding the limitation of liability for a subcontractor?

Yes, a specific clause would be required. Regarding the requirements for limitation of liability, see Q8.1.8.

9.6 Rights of the subcontractor towards the employer

Q9.6.1 The most important concern of a subcontractor is getting paid promptly for work and materials provided for the project. The main contractor is under an obligation to pay the subcontractor any sums due to him, but are 'pay-when-paid' clauses common, or illegal?

Pay-when-paid clauses are legal under Austrian law. However, such clauses are deemed uncommon and have to be read restrictively. In the case of insolvency of the employer, the risk of collectability shall be split between the main contractor and the subcontractor (based on the value of the works). Should the employer withhold payment because of existing defects, a reduction or delay of the payments to the subcontractor may only be permissible insofar as the works performed by the subcontractor are defective.

Q9.6.2 When the subcontractor is not paid at the time scheduled and agreed, does the contract or the general law provide for a direct claim against the employer?

No.

Q9.6.3 Where there is a direct claim, is it in contract or in tort?

Q9.6.4 If a direct claim is permitted by statute, may the parties exclude it in their contract?

Q9.6.5 What defences does the employer have to such a direct claim?

Q9.6.6 Does such a direct claim give the subcontractor any preferential rights in the event of the main contractor's insolvency, compared with the main contractor's other creditors?

Q9.6.7 Are there any formal requirements in filing such a claim (such as doing so in court or with the arbitral tribunal, or in an official register)?

Q9.6.8 Does a sub-subcontractor benefit from the same direct claim?

Q9.6.3 to Q9.6.8 are not applicable: the subcontractor does not have a direct claim against the employer.

Q9.6.9 In the event of non-payment, does the subcontractor benefit from any legal privilege or rights in relation to the assets of the employer or of the main contractor?

No. However, the mechanism described under Q6.2.3 is available to the subcontractor against the main contractor.

9.7 Rights of the employer towards the subcontractor

Q9.7.1 Does the employer whose project suffers from a defect attributable to the subcontractor have a direct claim against the subcontractor (for specific performance, for damages, or both)?

No contractual claims can be made. If the subcontractor damages the property of the employer, the subcontractor is liable.

Q9.7.2 Is such a direct claim in contract or in tort?

The claim is in tort.

Q9.7.3 When such a direct claim is allowed by statute, may the parties exclude it?

Exclusions of tort claims are permissible within the general restrictions according to law (see Q8.1.8).

Q9.7.4 What defences (if any) does the subcontractor have to such a direct claim?

All defences available in tort law can be used.

Q9.7.5 Does such a direct claim give the employer any preferential rights in the event of the subcontractor's insolvency, compared with the subcontractor's other creditors?

No.

Q9.7.6 Does the employer also have a direct claim against the subcontractor's subcontractor?

See Q9.7.1.

Q9.7.7 Are there any formal requirements in filing such a claim, such as doing so in court or with the arbitral tribunal, or in an official register?

No.

Q9.7.8 Is the employer's position different if he suffers loss or damage as a result of defective materials supplied by the subcontractor?

No.

10 Subsoil conditions

10.1 Traditional procurement

Q10.1.1 Is the employer normally responsible for the effect that soil conditions may have on construction and construction methods?

Yes, in accordance with the Austrian Civil Code the employer bears the risk of any adverse/unforeseeable soil conditions encountered by the contractor at the site when executing the works. In other words, the employer bears the risk of such soil conditions that deviate from (i) the data of soil conditions available at tender stage or from (ii) the soil conditions reasonably foreseeable by the contractor at tender stage.

However, the contractor faces the 'duty to warn' in accordance with §1168a ABGB. Thus, should the contractor's work be unsuccessful due to the apparent unsuitability of the soil conditions, the contractor will be liable for the damage and the effect that soil conditions may have on construction and construction methods, if he did not warn the employer prior to execution.

However, the parties may shift the risk of soil conditions from the employer to the contractor by contractual agreement.

10.2 Design and build

Q10.2.1 Is the contractor responsible for matching the method of working to the soil conditions? If the manner in which this has been done causes delay in the execution of the contract and/or loss, will the contractor be liable to the employer?

The answer depends on the contractual distribution of risks:

If the design and build contractor bears the risk of adverse/unforeseeable soil conditions, matching the method of working to the soil conditions is the contractor's responsibility. Accordingly, the contractor is liable for any delays due to his erroneous design with regard to the soil conditions.

If, however, the employer bears the risk of adverse/unforeseeable soil conditions, the same principles mentioned under Q10.1.1 also apply for a design and build contract. Hence, should the soil conditions deviate from (i) the data of soil conditions available at tender stage or from (ii) the soil conditions reasonably foreseeable by the contractor at tender stage, the contractor will only be liable if he has breached his duty to warn.

Hence, a design and build contractor does not necessarily face more responsibility than a contractor under the traditional model of procurement.

Q10.2.2 Is the contractor not liable if he proves that he has taken all the precautions that a prudent contractor would be expected to take?

Assuming that the contractor does not bear the risk of adverse/unforeseeable soil conditions, the contractor is not liable for unforeseeable deviations of the subsoil conditions. If the contractor has taken all precautions that a prudent contractor should have taken and he complies with his duty to warn (if any), he is not responsible for any defects caused by differing subsoil conditions.

Q10.2.3 If damage to the works has been caused by the manner in which the methods of work have been matched to the soil conditions, is this treated as an extraordinary circumstance, entitling the contractor to extra payment?

This answer depends on the contractual distribution of the risks of soil conditions and whether the contractor faces a duty to warn (see Q10.2.1).

Q10.2.4 Is the contractor liable for pollution on, in or under the land or water discovered during the execution of the works?

The relevant question is whether the contractor has undertaken all necessary inspections or not. If so, he is not liable; if not, the contractor may be held responsible for the defectiveness of the work.

10.3 BOT/DBFMO

Q10.3.1 How are the matters in Sections 10.1-10.2 regulated under BOT/DBFMO contracts?

The principles described above also apply to BOT/DBFMO projects as far as the construction parts of the project are concerned.

11 Dispute resolution

11.1 General

Q11.1.1 Summarise the different ways to file a claim against employer, principal, main contractor or subcontractor, architect, engineer, supplier, manufacturer and insurance company.

Austrian law does not differentiate as to whom a claim is filed against. Hence, there are not different ways of filing a claim against different parties to the project. In fact, the relevant issue determining how and where to file a claim is the kind of matter in dispute.

Claims arising out of construction contracts are to be filed at the Civil Courts. Depending on the amount in dispute, the district court (*Bezirksgericht*, BG) (up to EUR 15,000) or the regional court (*Landesgericht*, LG) is competent in the first instance. The applicable procedural rules are on the one hand the Court Jurisdiction Act (*Jurisdiktionsnorm,* JN) and on the other hand the Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

Matters regarding public and administrative construction issues are to be filed with the public authorities, depending on the particular matter. The appellate courts are the regional administrative courts (*Landesverwaltungsgerichte*, LVwG).

Competence regarding procurement issues lies with the Federal Administrative Court (*Bundesverwaltungsgericht*, BVwG), with the exception of civil claims arising out of procurement procedures, for which the Civil Courts are competent.

Q11.1.2 What time limits (eg a statute of limitations) apply to filing a claim against any of the parties above?

Claims for contractual duties have to be filed within three years from their own fulfilment. Damage claims have to be lodged within three years from the knowledge of damage and the liable party. The claim for appeal or adjustment of a contract out of a misconception has to be lodged within three years from the conclusion of the contract.

Q11.1.3 Do the available dispute resolution methods differ where a consumer is involved?

No, the involvement of a consumer and the applicability of the consumer protection law (*Konsumentenschutzgesetz,* KSchG) do not have an impact on the dispute resolution methods. The Austrian procedural rules do not differentiate between claims with a consumer and claims where only professionals are involved.

An exception is §617 ZPO which provides that arbitration agreements between a professional and a consumer may only be concluded in respect of already existing disputes.

Q11.1.4 What principles govern the burden of proof and the methods by which facts may be proved?

The general rule provides that either party needs to prove the facts representing the basis of its claim. Thus, the burden of proof lies with the asserting and claiming party and as such the party asserting certain facts needs to prove that these facts are correct.

There are several different ways in which presenting evidence is possible. The Code of Civil Procedure (*Zivilprozessordnung*, ZPO) provides for five types of evidence: documents, witnesses, experts, visual examination and interrogation of a party. The prevailing opinion is that all conceivable sources of knowledge may be considered.

Q11.1.5 Do determinations by a process server (bailiff, or equivalent) have any evidential value?

Bailiffs are competent to enforce court judgments. Their determinations have no evidential value.

Q11.1.6 Does your legal system provide for the possibility of obtaining a court order rapidly (eg in summary proceedings)? If so, does the judge in such proceedings have a wide range of powers, or only limited powers?

For claims with an amount in dispute of EUR 75,000 or less, the Code of Civil Procedure provides in §§244ff. ZPO for a default action (*Mahnverfahren*). Thereby the court has to issue a conditional default summons (*bedingter Zahlungsbefehl*) to the defendant without any oral proceedings. The defendant has the chance to raise an objection; otherwise the default summons becomes binding and enforceable. If there is an objection an ordinary trial takes place.

Besides that, the Enforcement Regulation (*Exekutionsordnung*, EO) offers several instruments for emergency proceedings. §§370ff EO regulate the execution for guarantee for monetary claims. §§378ff EO provide rules for preliminary injunctions (*einstweilige Verfügungen*).

The judge is bound to particular situations in which such proceedings are possible. As such the judge has only limited powers.

Q11.1.7 Is a judicial expert always appointed by the court? If so, what is the evidential value of his report? If a party may appoint his own expert, what is the evidential value of this report?

A judicial expert (*Gerichtssachverständiger*) can only be appointed by the court. His report is not binding on the court, but it has a substantial impact on the judge's decision in practice.

The parties are free to appoint an expert of their own (private experts, *Privatgutachter*), which is quite usual in disputes over construction issues. However, the judicial expert's report has the highest evidential value. In civil proceedings, private expert opinions (*Privatgutachten*) have to be accepted by the judge, because – as mentioned above under Q11.1.4 – all conceivable sources of knowledge may and have to be considered. The legal doctrine defines private expert opinions therefore as 'documented statements' (*urkundlich belegtes Parteivorbringen*).

Q11.1.8 What different systems of alternative dispute resolution (ADR) are available?

Regulations on arbitration proceedings are to be found in §§577ff Austrian Code of Civil Procedure (ZPO), which refer to 'ad hoc' arbitration. In labour law, arbitration

agreements amongst employees or between employers and employees are only valid for disputes which have already arisen. Management and members of the board of a joint stock corporation may make arbitration agreements to cover future disputes relating to their individual claims under labour law.

In disputes relating to the law of tenancy (*Mietrechtsgesetz*, MRG) local authority conciliation procedures have to be initiated before the matter is brought before a court.

The use of mediation is of special importance within family law, especially regarding divorce and trusteeship proceedings.

Q11.1.9 Does your legal system permit arbitration in construction disputes?

Yes, Austrian law permits arbitration in construction disputes.

Q11.1.10 Does your legal system provide for the possibility of an appeal against (or challenge to) a judicial decision (or an arbitral award)?

Yes, Austrian procedural law provides for the possibility of an appeal against a judicial (court) decision and of a challenge to an arbitral award.

The possibility of appeal against a judicial (court) decision depends on the competent court of first instance: If the local court (*Bezirksgericht, BG*) is competent at first instance, the appeal has to be addressed to the regional court (*Landesgericht*, LG). If the regional court is competent at first instance, the second instance is the higher regional court (*Oberlandesgericht*, OLG). A further appeal to the Supreme Court of Justice (*Oberster Gerichtshof*, OGH) is only permitted if the question of law is of substantial legal importance.

An arbitral award may be challenged by an action for annulment brought to the Supreme Court of Justice (*Oberster Gerichtshof*, OGH) according to §§611, 615 ZPO. Except for a violation of *ordre public*, under such an action for annulment only the compliance with procedural regulations is reviewed.

11.2 Design and build

Q11.2.1 Is there a different dispute resolution system in relation to design and build contracts?

No, the same rules as explained above are applicable.

11.3 BOT/DBFMO

Q11.3.1 Is there a different dispute resolution system in relation to BOT/DBFMO contracts?

No, the same rules as explained above are applicable.

11.4 Contracts for public works

Q11.4.1 How can a tenderer who is not awarded a contract challenge the decision to award the contract to a competitor, and before what judicial body? Does the contracting authority (the employer) have to respect a standstill (term/period) before it can conclude the contract? What possibilities are open to candidates in relation to a contract awarded to a different tenderer? Which court deals with these disputes?

The review procedures provided by Austrian procurement law (*Nachprüfungsverfahren*) are the primary legal protection (*Primärrechtsschutz*) allowing tenderers to challenge decisions of the contracting authority. They are only possible during the tendering process and have to be initiated within a period of – normally – 10 days. The basic rule is that only a tenderer who has sustained damage or is about to sustain damage is eligible to file a review procedure. The competent authority is either the regional or the federal administrative court (*Bundes- oder Landesverwaltungsgericht*), depending on whether the procurement falls within the range of execution of a federal state (*Bundesland*) or of the state itself.

Due to the fact that the review procedures have no suspensive effect, tenderers may claim preliminary court proceedings to postpone the award of the contract to another tenderer.

According to §132 Federal Procurement Act (*Bundesvergabegesetz*, BVergG), there is a standstill period of 10 to 15 days (depending on the method of the transmission of the notification) between the notification of the award decision and the conclusion of the contract.

After the procurement has ended with the award of the contract or by revocation, the decisions of the contracting authority may be reviewed as to their legality. This review is only possible if the illegality could not have been appealed with a review procedure during the tendering process. The decisions of either the regional or the federal administrative court aim to determine whether there was a legal violation in the procurement procedure or not. This determination can only be made if the legal violation also had significant influence on the result of the procurement. The determination offers the possibility of an action for damages before the civil courts.

Q11.4.2 What dispute resolution methods apply between the contractor and employer during the contract period? And after acceptance of the works?

There is no special form of dispute resolution for public contracts.

12 Insurance

12.1 Traditional procurement

Q12.1.1 What different insurance policies are available which offer cover against the risks linked to construction activities?

The main legislation is the Insurance Contract Act 1958 (*Versicherungsvertragsgesetz,* VersVG). In Austrian construction law there are multiple different insurance policies which offer cover against the risks linked to construction activities, namely:

- Liability insurance (*Haftpflichtversicherungen*):

  One example of liability insurance is liability insurance for employers (*Bauherren-Haftpflichtversicherung*) which covers risks to life and property of third parties (personal injury, material damage and financial loss) during the construction period. Damage to buildings through uplifts, lowering or vibrations are covered by insurance only if and to the extent that the static structure of the building is affected in a way that the stipulated applicable standards are not reached or the safety can no longer be ensured. Under these conditions, the insurance covers in particular the damage to ceilings, walls, floors, plastering, paintings, wallpapering, tiling, windows and doors.[20] Excluded from the insurance is damage caused by dust and unavoidable damages. Unavoidable damage is either technically inevitable or technically avoidable but not economically justifiable.[21] The main benefit of this insurance is that the employer is also liable for damage caused by negligence. The insurance is on a voluntary basis.

  Another example of liability insurance is property liability insurance (*Grundstückshaftpflichtversicherung*), which covers damage to third parties caused by the undeveloped site.

- Property insurance (*Sachversicherungen*):

  Building performance insurance (*Bauwesenversicherung* or *Bauleistungsversicherung*) for example protects the construction site financially from harm (for example, from force majeure and destruction by third party interference) during the construction period. However, weather, political risks and, most importantly, inherent defects are excluded.

  Policy holders can be the main contractor as well as the employer. Construction companies may obtain building performance insurance for a specific project or for a specific period of time.

- Home insurance (*Wohngebäudeversicherungen*):

  This covers all the elementary risks after completion of the building (such as damage through fire, storm, hail or tap water). There are also different supplementary insurances to the home insurance, for example fuel tank insurance (Öltankversicherung) or fire insurance for the construction phase (*Feuerrohbauversicherung*).

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20 AH BP BB546 Bauherrnhaftpflichtversicherung 2.

21 Katzensteiner, Die Bauherrnhaftpflichtversicherung 38.

- Defects liability insurance (*Baugewährleistungsversicherung*):

  This is a very new form of insurance in Austria. It offers comprehensive protection against financial burdens which may arise from defects liability obligations.

Q12.1.2 What different insurance policies are available which offer cover against risks deriving from the activities of the main contractor? Do these policies cover damage or loss suffered by third parties and/or contractual damage? Are there standard form insurance policies which cover all or part of the main contractor's liability to third parties or to his subcontractors?

The main contractor should obtain liability insurance (*Betriebshaftpflichtversicherung*) and building performance insurance (*Bauwesenversicherung*). The liability insurance is mandatory and the contractor is very often obliged to conclude liability insurance to a certain amount stated by the contract. The building performance insurance, on the other hand, is non-mandatory.

While the building performance insurance (*Bauwesenversicherung*) covers the construction site financially, the business liability insurance (*Betriebshaftpflichtversicherung*) protects the insured party against claims of third parties for damages caused by the main contractor. However, the liability insurance does not fully protect the insured against the claims of third parties.

The business liability insurance does not cover the entrepreneurial risk itself. Not covered therefore are claims arising from warranties against defects, claims from unavoidable damage and contractual risks.

Furthermore, a contractor may obtain defects liability insurance (*Baugewährleistungsversicherung*) to insure against the risk of construction defects.

Q12.1.3 Is the architect and/or engineer required to take out liability insurance?

In Austria architects and engineers have to obtain professional liability insurance (*Berufshaftpflichtversicherung*). It covers claims for damage arising from violations during the planning phase or violations of their construction supervision duties. In contrast to professional liability insurances in other countries, professional liability insurance in Austria does not cover miscalculations of mass weight determinations.[22]

22 Blach, Bauprojekte richtig versichern 145.

Q12.1.4 Is the employer or main contractor required to take out a Contractor's All Risks (CAR) policy? Is there a standard form for CAR insurance? Which parties are usually covered in a CAR policy and who usually bears the cost?

In Austria, Contractor's All Risks (CAR) policies are only used to a very limited extent. There is no obligation for employers or main contractors to take out CAR insurance.

Depending on its specific arrangements, the Austrian building performance insurance (*Bauleistungsversicherung*) may be similar to a CAR insurance.

Q12.1.5 Does the law contain provisions dealing with the problem of coverage of the same risks by more than one insurance policy?

The issue of multiple insurance (double insurance) is stipulated in the provisions of §§58ff of the Insurance Contract Act (*Versicherungsvertragsgesetz,* VersVG).

In cases of double insurance, the insurers are jointly liable to the policyholder pursuant to §890 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch,* ABGB), according to their contract.

The policy holder may claim compensation from any of the insurers (as a whole or in part) and each insurer is obliged to pay compensation to the extent to which it would without multiple (double) insurance. However, §59 VersVG limits the entitlement on compensation because the insured person is not entitled to more compensation than the amount of its incurred damage.

The benefit arising in the case of double insurance on the part of the unclaimed insurer is to be distributed among the participating insurers through recourse claims. A recourse claim already arises through the existence of the insurance case (not only after payment of compensation by one insurer).[23]

If the policyholder has taken out the policy which led to the occurrence of a multiple insurance without his realising it, he may either demand that the more recent policy should no longer be valid or that the sum insured be reduced, therefore also reducing the insurance premium proportionally to the share not covered by the earlier policy (§60 VersVG).

Q12.1.6. Are there any time limits (eg a statute of limitations) which apply specifically to claims against insurers?

The provisions of §§11ff VersVG regulate the time limits applying to claims against insurers, although it only covers claims for cash benefits. Such cash benefits are due

23 Leitner/Fischer, Bei Doppelversicherung haften Versicherungen zur gesamten Hand 54.

as soon as the necessary surveys to determine the insured event as well as the scope of services by the insurer are completed. The due time for payment arises without any further pre-condition if the policyholder demands an explanation as to why surveys have not been finished, after a period of two months from the claim if the insurer does not comply with this request within one month.

Generally, claims arising from the policy are subject to a limitation period of three years. If a third party is entitled to claim payment, the limitation period starts as soon as he became aware of his entitlement. If he was not aware of his right, the respective claims shall only be time-barred after ten years (§12 VersVG).

12.2 Design and build

Q12.2.1 Are there insurance policies that offer cover against the special risks deriving from design and build contracts?

There are no common specific insurance policies for design and build contracts in Austria. The design and build contractor (*Totalunternehmer*) is normally hedged through a combination of building performance insurance (*Bauleistungsversicherung*) and liability insurance (*Haftpflichtversicherung*). This form of insurance policy is a typical example of a planning risk.

12.3 BOT and DBFMO

Q12.3.1 Are there insurance policies that offer cover against the special risks deriving from BOT and DBFMO contracts?

There are no specific insurance policies in Austria covering the special risks involved with BOTDBFMO contracts.

12.4 Public works contracts

Q12.4.1 Are there insurance policies that offer cover against the special risks deriving from contracts for public works?

In Austria there is a diversified insurance law. In nearly all sectors, like the construction sector, there are special insurance policies. However, there are no special policies that offer coverage for certain risks deriving from contracts for public work.