

Construction 2020

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Construction 2020

Contributing editors**Robert S Peckar and Michael S Zicherman****Peckar & Abramson PC**

Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Construction*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson PC, for their continued assistance with this volume.



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Germany

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LOCAL MARKET

Foreign pursuit of the local market

- 1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

The first step should be choosing the most suitable corporate or non-corporate structure fitting the size of the operation and the expected business turnover. In Germany, the most frequently met form is a form of private limited company (GmbH), comparable to a limited liability company or a limited company. For entities that need to set up a joint-stock company, the choice would be the AG form, which is a public limited company. These two corporate forms are more costly to establish than non-corporate structures (eg, civil law associations of entrepreneurs). Civil law associations are also advantageous in matters of compliance and publicity. However, non-corporate structures come with greater risk in terms of the partners' unlimited personal liability (see question 14). Subsidiaries of foreign companies are also entitled to do business in Germany.

The next step that is required is registration with the companies' register.

The third step is choosing and appointing a managing director or supervisory staff with the required qualifications. When appointed, the name of the director is also to be registered with the companies' register. These steps can prove difficult for foreign contractors, as German law provides the regulations regarding these steps and because the only official language is German.

REGULATION AND COMPLIANCE

Licensing procedures

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

Foreign designers and contractors need to consider regulations from different sources when doing business in Germany. According to section 34c of the Trade, Commerce and Industry Regulation Act and the German Real Estate Agents' and Property Developers' Ordinance, contractors need a special permit for their operations if acting as real estate agents or as property developers for third parties. When carrying out an operation, German law requires that every application for planning and building permission is signed by an architect, engineer or another qualified professional who completed relevant studies at a German university with at least two years' experience in that profession.

When bringing employees or freelance staff originating from outside the European Union to Germany, valid visas and working permits are required. In that case, further steps need to be carried

out, such as registration with the tax authority, social security plans, labour and industrial inspectorates and the chamber of crafts, where applicable. Violations of social security laws and disregard of laws concerning illegal employment may result in fines of up to €500,000 or imprisonment for up to three years.

Competition

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

Germany has not established a law that protects its domestic contractors. One of the fundamental rights guaranteed by the European Union is free movement of services, which states that any discrimination concerning the provision of services on the basis of nationality is prohibited. However, only nationals or contractors originating from the European Union benefit from this right.

Competition protections

- 4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

The award of construction services by the public sector is regulated by Part A of the German Construction Contract Procedures (VOB/A). The VOB/A lay down the principles for the award of construction services by the public sector. They regulate the conduct of the award procedure and prohibit discrimination against the companies involved in the award process. For this purpose, construction services are to be split, in principle. The award of contracts should not be limited to local companies. The VOB/A also prohibit the acceptance of unreasonably high or particularly low prices. This is intended to prevent bid rigging.

Although the VOB/A do not constitute a law, they are binding for the parties when public entities award contracts. In the internal relationship of the contracting authorities, the VOB/A form administrative regulation[s] (ie, internal instructions in general form). Nonetheless, non-compliance with their requirements may have legal implications for the award process. If a contracting authority does not comply with the requirements, it can lead to the nullity of the entire award process and justify claims for damages by third parties.

Bribery

- 5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

In 2014, the Federal Supreme Court ruled that a purchase agreement was void because of previous bribery. However, the transfer of

ownership, which is to be viewed in the abstract and independent of the purchase agreement, was considered to be valid. Whether or not a contract is void because of previous bribery cannot be determined a priori but has to be reviewed in each individual case. With regard to privately awarded contracts, competitors affected by illegally obtained contracts may demand compensation or seek injunctive relief, or both. Concerning publicly awarded contracts, competitors may require a new bidding and awarding process.

Although German criminal law does not impose criminal liability upon companies, illegal acts such as bribery can result in high penalties. In addition, the contractor may have to face claims for civil law damages. Further, the criminal court may confiscate profits gained from illegal activities if quantifiable. Another outcome can be the blacklisting of the company by authorities, which will deny the respective company access to awarding processes. However, this barrier is only valid in the state it was issued. Under criminal law, facilitation payments are a form of bribery and therefore treated equally.

Reporting bribery

- 6 | Under local law must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

Generally, an employee cannot be held accountable for illegal activities conducted by co-workers or board members. However, if the employee holds a leading position corresponding with supervisory responsibilities, the respective employee may be obliged to report knowledge of bribery. If he or she fails to report the illegal action, law enforcement agencies might consider this conduct as accessory to bribery by omission. In the case of conviction, the respective person faces penalties of up to three years' imprisonment.

Political contributions

- 7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

It is still common among various companies to donate to political parties, but not as part of doing business. However, donating has decreased as political contributions have become more and more regulated owing to the goal of minimising illegal funding of political parties. Thus, all party finances must be declared and any contribution made in order to achieve an advantage is void. The decrease can also be explained by the implementation of laws removing tax benefits arising as a result thereof.

Compliance

- 8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

There is no regulation that construction managers are subject to the same anti-corruption or compliance as government employees. However, in July 2017, the Bundestag passed a law to introduce a corruption register (WRegG). This is intended to regulate the award of public building projects to companies and prevent corruption. The law provides for the establishment of a nationwide electronic competition register at the Federal Cartel Office. Companies that have committed certain offences, such as money laundering, public sector fraud, bribery and bribery in business transactions and the granting of benefits, are

entered in the register. Violations of environmental, social or labour law obligations are also recorded. According to section 6 WRegG, from an estimated contract value of €30,000, the contracting authority will in future be obliged to submit an enquiry to the registry authority regarding the bidder that is to be awarded the contract before awarding a contract. Sector clients and concession providers must make a request when contracts reach the EU thresholds.

However, the mere fact that a company appears in the register is not sufficient to exclude it from public contracts. An intensive reliability test is also required. Bidders that have been convicted of subsidy fraud or bribery and bribery in commercial transactions must be excluded.

Other international legal considerations

- 9 | Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

When pursuing business activities in the German construction market, contractors may be asked to prove technical qualifications, entrepreneurial and financial capacity, and reliability by the respective awarding office. To demonstrate these qualities, a contractor will have to provide details on technical equipment, financial statements for the past three years, and training and qualification of personnel, when requested by the awarding entity.

CONTRACTS AND INSURANCE

Construction contracts

- 10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

The German Civil Code does not contain regulations specifically addressing the challenges and problems typically arising in the construction industry. The non-mandatory general contract terms for the execution of construction works (VOB/B), in turn observing the interests of the parties involved in construction contracts, comprises terms and conditions for these contracts in an impartial manner. The use of the VOB/B is advisable, principally because it has become the most important standard contract form in matters of construction. In addition, even though the validity of terms and conditions is usually subject to a court's revision, the terms of the VOB/B can be implemented as valid terms in a contract without modification owing to its character as a formal legal act or by-law.

Explicit reference to the language to be used, the applicable law and the place of arbitration should be made by the parties when deciding on the German Institute of Arbitration arbitration rules. The parties to an arbitration are free to set the parameters for their proceedings. They can choose the seat, the language and the applicable law, whereas the choice of law lies in reference to substantive law and not to conflict-of-laws rules. Agreements will apply to written statements, hearings, awards and any other communication unless the parties have agreed otherwise. If the parties fail to agree, the arbitral tribunal will decide. If the parties do not agree on the applicable law the tribunal will apply the law of the state with which the subject matter of the proceedings is most closely connected.

Payment methods

- 11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Payments are generally made by cash or electronically. Larger sums of money are traditionally paid by electronic payment. Commonly, the purchase price in a sale of goods is due upon the conclusion of the contract. In fact, the parties usually agree upon other due dates in the economic sector. Furthermore, the buyer is only required to pay for the goods on receipt. Payment for work must only be made by acceptance of the work, unless the parties have agreed otherwise. The contractor can, additionally, demand partial payment in an amount tantamount to the value of the work performed to date. In a service relationship, remuneration is payable after performance irrespective of success. If the payment is assessed periodically, it is due at the end of each time period. Employees normally receive their net wages at the end of a working month.

Contractual matrix of international projects

- 12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Typically, when business in the construction industry is conducted, there is one contractor with whom all the responsibility lies. That general contractor will work with subcontractors, to which he or she will assign parts of the work. Another option is the creation of a special purpose vehicle, which guides the project while a general contractor handles work.

PPP and PFI

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

There is no general or special PPP legislation that provides a uniform framework for PPP projects. As a consequence, every project is based on unique contractual agreements. The legal basis of a PPP project depends on the type of project and on the extent of delegated public powers, which can be found in various, mostly locally enacted, regulations. In 2005, Germany enacted the PPP Acceleration Act, which appears to have accelerated the execution of PPPs by improving some of the existing legal regulations concerning them, owing to the strong demand for a uniform regulatory framework. PPP projects have become an interesting alternative to public procurement, as the economic advantages for public budgets have allowed the execution of a number of deals concerning building new infrastructure or expanding existing infrastructure, that otherwise could not have been conducted.

Joint ventures

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

The extent of a member's liability is determined by the chosen corporate or non-corporate structure.

When acting in the legal form of a partnership, no partner can limit their personal liability. As a result, each partner is liable for the entire enterprise and the actions taken by any other partner. The law provides the possibility of limitation of partners' liability by depositing a certain amount of funds, which caps liability to the amount given. In consequence, a limited partner must not participate in the management of the company.

Also, at least one partner with unlimited liability has to exist. However, the law permits that a GmbH assumes the role of the personally liable partner and so the advantage of a GmbH is the limitation of personal liability of its members by law. When fully registered, only the GmbH, rather than its shareholders, is liable to creditors up to the liability amount. To found a GmbH, a minimum share capital of €25,000 is required, which equals the minimum liability amount.

Tort claims and indemnity

- 15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

The general contractor can be held responsible for all malperformance or violation of duty, regardless of its cause. The law forbids excluding liability for wilful action or gross negligence. Any contractual clause that attempts to do so is void. However, liability for slight negligence can be excluded.

If a contracting party is negligent, it is still entitled to indemnification for all damages caused by the other party or the other parties' subcontractor. Nevertheless, its claim for indemnification is lowered in proportion to the amount of negligence contributed.

Liability to third parties

- 16 | Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

When a third party has suffered damage respecting life, physical integrity, freedom or property resulting from a default in the construction of a building, the law of tort entitles the third party to indemnification, regardless of whether or not there is privity of contract. The same risk may result from the contractor's position as the possessor of the land parcel and the building if it collapses or a part of it detaches.

In addition, the principal's contractual claims against the contractor are often pledged from the principal to the buyer when selling the object.

Insurance

- 17 | To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Contractors will regularly enter into two forms of insurance: indemnity insurance and all-risk insurance. Indemnity insurance covers personal injuries, financial and property damage. Whether or not delay damages are covered depends on the cause for the delay. Coverage might be granted, if the delay is based on incorrect instructions from the architect. In this matter, the individual case would have to be reviewed.

All-risk insurance covers the principal's risk. Even though local law does not limit liability for damages, the parties may insert limits into the contract itself. Naturally, principals will not want to accept limits on the contractor's liability. However, in many contracts there are clauses concerning minimum coverage and the distribution of costs in case of damages.

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

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

There are no laws prescribing a minimum amount of local employees. It also does not matter if the contractor conducts business regarding one project or several projects. Often, public awarding authorities will make it a precondition as part of the awarding process that contractors involved in construction or planning originate from the local or regional area. Some private principals will set out this condition, too.

Local labour law

- 19 | If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

German employment legislation is employee-friendly in this respect, in that the employee shall not bear the entrepreneurial risk of the employer that might result from the sometimes unpredictable duration of a construction project. In consequence, termination of employment contracts is very restricted. Labour law and judicature grants employees strong protection, especially against unfair dismissal. Fixed-term contracts are possible, but a few things should be taken into account: a fixed-term contract for up to two years can be terminated without the employer giving any valid reason for the termination. The contract can be extended three times within the two years, up to a total of two years. For fixed-term contracts over a longer period of time, the employer needs to give a valid reason for termination. According to labour law, a valid reason could be when a company is in need of only temporary work to be carried out. An interim demand for a particular construction project may form such a reason.

Invalidity of fixed terms leads to a contract with indefinite duration. Constructors should consider using fixed-term contracts but be aware of risks arising from errors entering into them.

These regulations do not affect self-employment. However, it is very hard to meet the requirements that are necessary to be qualified as self-employed, since that assumes working independently (not bound by instructions) and for several employers over a certain period of time.

Labour and human rights

- 20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Historically, a work permit issued by the Federal Employment Agency was needed if foreign employees were to perform any kind work in Germany. That requirement has been replaced by the enactment of the German Immigration Act. Since the European Union established free movement of workers, EU citizens and their family members do not need any kind of work permit, so the legal requirement for a work permit is only applicable to non-EU foreigners. When a foreign worker is allowed to perform work either by work permit, or granted by EU law, foreign workers in large parts enjoy the same rights as German workers (eg, regarding working hours or social security, regardless of their origin). Violation of laws that are designed to protect employees may result in fines for a person or company violating respective laws.

Close of operations

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

There are no legal restrictions concerning closing operations and withdrawal from a business. Nevertheless, any foreign contractor has to fulfil the same obligations as any local contractor. First, private contractual obligations (eg, lease agreements or wages) and projects that have been initiated have to be concluded. Secondly, received subsidies might have to be given back to the state or the municipality, if tied to a minimum time of operations. In addition, social security and, where applicable, pension plans have to be fulfilled. Lastly, depending on the chosen corporate structure, asset distribution to the shareholders is forbidden by law for the duration of one year after publication, owing to the protection of creditors.

PAYMENT

Payment rights

- 22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

There are two adequate legal instruments capable of securing anticipated payments.

The first option is securing payments by registration of a mortgage. The German Civil Code grants the constructor an enforceable claim to request encumbrance of the land parcel with a security mortgage in an amount corresponding to the amount of work already performed plus expenses. The encumbrance will be registered with the land register, if the principal is the owner of the land. The principal has to agree to such a request; if he or she declines, the constructor can obtain an injunction to enforce his or her claim.

As a second option, the principal can deposit a security in favour of the contractor – common kinds are bank guarantees or bailments. An advantage of a mortgage is that the principal does not have to be the owner of the respective land parcel and the contractor can not only secure his or her anticipated payments, but also claims from subcontractors. A disadvantage is that the contractor cannot enforce the security.

Neither option applies to claims of property developers, or if the principal is a public body since there is hardly any risk of insolvency.

'Pay if paid' and 'pay when paid'

- 23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

'Pay if paid' and 'paid when paid' clauses are invalid when being introduced into the contract by general terms and conditions of the general contractor. This also applies to all similar clauses that cause the subcontractor to bear the risk of the owner's non-payment or late payment. These terms are only valid if being specifically negotiated among the parties of the contract and if the subcontractor had the real opportunity to influence the content of the specific clause. In the event of a dispute, the general contractor bears the burden of proof with regard to the negotiations.

Contracting with government entities

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

A public body cannot evade its contractual obligations, such as payment, by declaring some sort of immunity. Although the respective contract may have been awarded by a sovereign act of governance, any public body entering a contract based on the regulations of German civil law is bound by these regulations. When entering a civil law contract, the parties are of equal rank. This may not be applicable to cases in which claims against members of diplomatic missions or consular representations are brought to court. These claims are often unenforceable due to diplomatic immunity.

Statutory payment protection

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

With the exception of the possibility of requesting a mortgage or negotiating a security of another kind, there is no protection for unpaid contractors, except for filing a lawsuit. However, a lawsuit bears the risk of taking several years, before full payment can be expected. Also, there is the possibility of insolvency, which bears the special risk of the insolvency administrator's right to reclaim any payment of the debtor, if the debtor was unable to pay and the creditor knew about this. The contestation period begins three months prior to the debtor's motion for insolvency proceedings.

If the principal cancels the contract, which he or she may do at any given moment regardless of the contractor's performance, the contractor cannot insist on concluding his or her work. Nevertheless, the contractual claim to payment remains unchanged, regardless of the level of completion.

FORCE MAJEURE

Force majeure and acts of God

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

German law does not define the terms force majeure and acts of God. The judiciary has determined that an act of God is an external event (not necessarily a force of nature), that cannot be foreseen or averted by the person suffering, not even by use of the utmost care. When there is an act of God, the contractor's non-performance or delay in performing its contractual obligations resulting from the act is excused. If the contractor is already in delay, the contractor carries the legal risk of unforeseen events by himself or herself.

DISPUTES

Courts and tribunals

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

There are no specialised courts or tribunals permanently in office. When seen as necessary and relevant, tribunals are appointed by the parties themselves. In accordance with the Mediation Code for Construction (SOBau), the number of arbitrators depends on the amount in dispute. For amounts in dispute of up to €100,000, section 15 SOBau states that the tribunal will consist of one arbitrator. For amounts above this, the dispute will be dealt with by three arbitrators. The parties can enter into a different agreement concerning the number of arbitrators.

Dispute review boards

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

Since the results of DRBs are neither binding nor enforceable, they can be seen as solely advisory. Hence, DRBs will not often end legal disputes but will suggest a potential solution. Procedures and results alter between the various associations that have established DRBs, such as some chambers of crafts and several associations of the construction industry.

Mediation

- 29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

There are several kinds of mediation provided for in the legislation, such as pre-judicial dispute resolution and judicial mediation by court.

Additionally, there are extrajudicial mediation processes. These processes have gained acceptance by the parties involved and have become increasingly common, as extrajudicial mediation saves enormous amounts of time compared to court proceedings. The most commonly known of these processes is the one provided by the SOBau. The Code classifies the process into three main segments: mediation, the taking of evidence and arbitration procedures. Prior to mediation or arbitration, the parties must have agreed to settle a dispute within the scope of application of the SOBau by including a respective clause in the contract or by separate agreement.

According to the SOBau, the parties shall first try to choose a mediator. The mediator shall be qualified to hold judicial office. However, the parties can enter into a different agreement concerning this matter. If the parties cannot settle on a mediator, the selection is made by the president of the German Lawyers Association. For arbitration, the arbitrator must be qualified to hold judicial office.

Mediation will probably become more established within the European Union because of the EU Mediation Directive (2008/52/EC), which was created to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes.

Confidentiality in mediation

- 30 | Are statements made in mediation confidential?

According to the SOBau, the mediation procedure is not open to the public. Also, every participant is obliged to maintain complete confidentiality concerning all matters disclosed in the process. At the request of one party, the procedure can be opened to the public. However, the approval of all other persons involved is required. For judicial mediation procedures, confidentiality is not prescribed by law, therefore additional confidentiality agreements are advisable.

Arbitration of private disputes

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

Even though arbitration existed in Germany in the seventeenth century, it was never of great importance and was hardly noticed. It is still the case today that most parties seem to prefer traditional court proceedings over arbitration. Nevertheless, the relevance of arbitration has grown significantly as a result of international influence on the German construction industry. Arbitration clauses are usually included in contracts involving international contractors.

Governing law and arbitration providers

- 32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

International arbitration tribunals outside Germany are not very attractive to German contractors or awarding authorities because of the significant costs of a tribunal abroad and the issue of the procedural language. When entering into an arbitration clause determining an international arbitration tribunal outside Germany, primarily the International Chamber of Commerce in Paris and the London Court of International Arbitration, are taken into account. With the exception of these two arbitration providers, German contractors or awarding authorities would not necessarily enter into a contract with an arbitration clause.

Dispute resolution with government entities

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

Since government bodies are *pari passu* partners to a contract they entered into, the same applies to the use of private arbitration, if contractually agreed. The right to participate in private arbitration will be specified in the contract. German law does not stipulate any limits on the use of arbitration clauses by government bodies.

Arbitral award

- 34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

In accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), a German court has to declare any foreign arbitral award enforceable before it can be enforced under German law. If the court comes to the decision that the arbitral award is not enforceable, it holds that the award has no legal effect in Germany and under German jurisdiction. Correspondingly, it is not enforceable in Germany; however, it may remain in effect in other jurisdictions. In reference to matters of international trade, the European Convention on International Commercial Arbitration of 1961 (the Geneva Convention) applies as well as the New York Convention.

Limitation periods

- 35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

Limitation periods within which lawsuits must be commenced depend on the object involved and on which statutory framework has been agreed upon. Parties often will agree to the legal provisions of the German Construction Contract Procedures (VOB). According to the VOB, the limitation period for construction work concerning buildings is four years upon acceptance of the work performed. For certain types of objects, such as combustion plants, the limitation period is reduced to two years, or in some cases even to one year.

When a contract is conducted within the statutory framework of the German Civil Code, the limitation period is five years upon acceptance of the work performed. If a person suffered damage respecting life, physical integrity or freedom resulting from a default in the construction of a building as a result of wilful action, the limitation period is 30 years.

Regional law may prescribe the necessity of prejudicial dispute resolution prior to court action. However, the provision is only effective when the amount in dispute does not exceed €750, which leads to inapplicability in most construction matters.

ENVIRONMENTAL REGULATION

International environmental law

- 36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Germany is party to the Stockholm Declaration of 1972. It has initiated technological advances in the field of environmental protection and the necessary legal framework. As environmental protection is part of its Constitution, Germany has enacted many statutes and by-laws, such as the Renewable Energy Act, the Combined Heat and Power Generation Act, the Energy Saving Act, the Federal Water Act, the Federal Nature Conservation Act, the Federal Act on Protection against Emissions and the Soil Protection Act. These laws have a great impact on the construction industry. If a project may cause risks to the environment, close examination of the respective project in regard to the compatibility with environmental law will be executed.

Local environmental responsibility

- 37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Before commencing a project that is to be expected to have a significant, damaging impact on the environment, a full environmental impact assessment must be carried out. To minimise damage, contractors have to consider responsibility concerning air, water and waste. Therefore, developers are required to limit emissions to the lowest level possible, to prevent pollutants from entering the groundwater or water table and to design a plan to prevent, recover and dispose of waste. Generally, respective construction supervision authorities will assess these areas and impose conditions on the permit, where applicable. If the contractor does not comply with a condition, authorities impose different measures in accordance with building regulations, such as halting construction.

CROSS-BORDER ISSUES

International treaties

- 38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Germany has not signed any such investment agreements.

Tax treaties

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

Germany has entered into double taxation treaties with over 100 countries or administrative regions. Owing to its high complexity, German taxation law should be given due attention. The most significant taxes are income tax, corporate income tax, local business tax and value added tax.

Currency controls

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

There are obligations to unsolicited declarations when transferring certain amounts of money. When cash exceeding €10,000 is transferred from or into the European Union, the transfer is subject to notification. Bank transfers of up to €12,500 from Germany to any other country or vice versa are subject to notification to the German Federal Reserve Bank. These limits cannot be circumvented by acts such as set-off or quitclaim.

Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

There are no restrictions regarding the removal of profit. The European Union guarantees the fundamental right of free movement of capital to contractors from the European Union. However, the declaration obligation, as mentioned in question 40, must be adhered to. Furthermore, it must be taken into account that possible claims to restitution of subsidies received from public authorities or tax duties may be due prior to removal of any existing profits. Thus, transfer of funds cannot be used to evade obligations to contractual partners or to public authorities. In case of an enforceable court's decision, the rightful claimant may seize the contractor's assets for execution of the judgment.

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