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Belgium

CONSTRUCTION

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This country-specific Q&A provides an overview of construction laws and regulations applicable in Belgium.

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BELGIUM
CONSTRUCTION

1. Is your jurisdiction a common law or civil law jurisdiction?

Belgium has a civil law tradition.

NB: Belgium is a federal state, consisting i.a. of three regions: the Flemish, Walloon and Brussels Metropolitan Region.

There is an historic evolution to entrust the Regions with authority in ever increasing matters. Environmental protection, including planning law, is almost entirely left to the Regions. Contract law (including insurance and securities), public procurement, product regulations and (occupational) health and safety remain within the scope of the federal authority. On the other hand, much of the matters have been pre-empted by EU law.

2. What are the key statutory/legislative obligations relevant to construction and engineering projects?

Editor's note: The Belgian Civil Code is being amended in stages. For some parts already amended, the New Civil Code applies. For other parts not yet amended, the Old Civil Code remains applicable.

Both construction and engineering contracts are governed by general contract law as set forth in the Belgian Civil Code, more specifically in its articles 5.1 – 5.270 New Civil Code (general contract law), and by a specific set of rules applying to contracts for the hire of works or services (articles 1787 and following of the Old Civil Code).

As a general principle, the content of construction and engineering contracts is to be determined by the parties themselves (principle of contractual freedom; article 5.69 New Civil Code).

However, articles 1792 and 2270 of the Old Civil Code, which establish the so-called decennial liability, are considered public policy provisions and therefore parties are not entitled to derogate from these rules. This specific liability is incurred by the contractor and/or the architect when defects occur within a period of 10 years from completion and affect the stability of the building.

In addition, there are several mandatory rules to be observed.

A construction contract relating to the construction of a house or the sale of a house to be or being built, shall take into account the provisions of the mandatory Act of 9 July 1971 (and its implementation decree, the Royal decree of 21 Octobre 1971). In addition, some provisions of Book VI – Market practices and consumer protection of the Code of economic law must also be taken into account.

Public construction contracts however are dealt with in the more specific public procurement regulations. This area of law is a transposition of EU law (more specifically 3 Directives adopted in 2014 (2014/23/EU; 2014/24/EU and 2014/25/EU)). Therefore, the provisions of the Act of 17 June 2016 on public procurement and various royal decrees adopted, must be taken into account.

Note that engineering contracts between an employer and an architect are not, as such, regulated. Parties are therefore free to determine the content of an engineering contract (except for the decennial liability – see above). The architect as such is bound by several ethical and professional rules, as it is a regulated profession.

3. Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.

Health and safety on construction sites is regulated by the Act of 4 August 1996 regarding the well-being of employees in the execution of the works and various implementing royal decrees.

Some of these royal decrees were codified in the Code

on the well-being at work (adopted on 28 April 2017).

The Royal decree of 25 January 2001 relating to the temporary or mobile working areas is one of the main relevant royal decrees in this area and i.a. implements EU Directive nr. 92/57/EEC.

Pursuant to the above regulatory framework, the building direction or the owner must appoint a health and safety coordinator. This person shall supervise the design and the execution phase in order to make sure all health and safety rules are complied with.

In all three regions, operating activities or installations that are potentially harmful to the environment are subject to an environmental permit or notification and/or to general, sectoral and/or specific operating conditions. The regulatory framework is set out by:

- the Flemish Act of 25 April 2014 regarding the integrated environmental permit;
- the Walloon Act of 11 March 1999 regarding the environmental permit;
- the Brussels Act of 5 June 1997 regarding the environmental permits.

All three regions have enacted more or less comprehensive sets of rules relating to material life cycle and waste management and soil pollution. The regulatory framework is set out by, respectively:

- the Flemish Act of 23 December 2011 regarding the sustainable management of waste and the life cycle of materials and Act of 27 October 2006 regarding soil clean up and protection;
- the Walloon Act of 27 June 1996 regarding waste and Act of 5 December 2008 regarding soil management; and
- the Brussels Act of 14 June 2012 regarding waste and Act of 5 March 2009 regarding soil pollution and clean up management.

In the framework of the evolution towards a circular economy, the interplay between EU, federal and/or regional rules oftentimes entails specific obligations (e.g. use of specific materials, energy performance requirements, specific requirements for demolition, etc.).

Pursuant to EU obligations, the 3 Regions adopted specific legislation in order to integrate the requirement of an Environmental Impact Assessment (EIA) for plans and projects.

Planning policy being a regional competence, the regulatory framework is set out by:

- the Flemish Urban Planning Code of 15 May 2009.
- the Walloon Territorial Development Code of 20 July 2016;
- the Brussels Urban Planning Code of 30 November 2017

Belgian employment law is mainly based on the Act of 3 July 1978 regarding employment agreements.

Note that foreign contractors executing a temporary assignment in Belgium must fill in the so-called “LIMOSA-declaration” for their foreign employees who are not subject to Belgian social security. Failure to make such a declaration may result in criminal or administrative sanctions.

Furthermore, anyone commissioning construction works with a contractor must, at the time of signature of the contract and afterwards, during the execution of the works, verify that the contractor has no outstanding fiscal or social security debts. If so, one may incur joint and several liability for such debts or will have to retain a certain percentage of the sums due to the contractor (during the execution phase of the works). The contracting parties also incur joint and several liability for non-payment of the wages (or the minimum wage) of the (foreign) employees. It is possible to be (temporarily) exempted from this joint and several liability by including a written declaration by the contractor (can be done in the contract). However, this exemption shall be lifted if the social inspectorate reports non-payment and the client does not respond in time. There is also an obligation for contractors to report construction sites to the NSSO (National Social Security Office). Failure to comply with this obligation may result in sanctions.

Be aware that , in principle, the lending of personnel is prohibited in Belgium. This prohibition only applies, however, if there is a concomitant delegation of the employer’s authority. In this respect it is important that the employer’s authority remains at all time with the contractor and that it is not transferred to another entity (user). Violation of the rules on the lending of personnel can result in the imposition of both civil and criminal sanctions. Furthermore, in the event of an unlawful lending of personnel, the employees concerned will be considered employed by the client.

Detailed rules on anti-corruption and bribery can be found in the Criminal Code. The offence of bribery is dealt with within articles 246 and following (public bribery) and articles 504bis and ter (private bribery) of the Criminal Code. It is important to know that both active and passive bribery can lead to prosecution.

Penalties are increased in transnational and/or public settings.

4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

In principle, for all types of construction projects as well as for certain modifications to existing buildings a building permit (or notification) is required and starting work without such a permit (or notification) is subject to administrative and criminal sanctions in all of the 3 Belgian regions.

In case of significant impact on the environment, an environmental permit is also required.

Some commercial development projects also require a so-called socio-economical permit. Such a permit will be granted only if certain conditions (i.a. impact on local employment, land use, ...) are met/respected.

NB: all three Regions have, to a greater or lesser extent, an integrated permit for complex projects that would require a combination of different permits (construction permit, environmental permit and/or socio-economical permit), the most notable example being Flanders' integrated environmental permit or *"single permit" ("omgevingsvergunning").*

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

Yes. Pursuant to article 1382 of the Old Civil Code, a person who violates the general duty to act in a reasonably prudent and diligent way (as would the *bonus pater familias*), and who causes another person to suffer damages as a consequence thereof, is under the obligation to fully compensate the victim.

A very important exception in this respect is the so-called principle of non-cumul: between contracting parties, the application of tort law is, in principle, excluded regarding issues under the contract (exceptions do exist).

6. Who are the typical parties to a construction and engineering project?

On the one hand there is always the client, i.e. the public or private entity or the natural person who acts as principal, and on the other hand there is the contractor receiving the instruction to build.

Other actors are often involved in the project. A lot of construction projects require the services of an architect. Basically, as soon as a building permit is required for the project, the intervention of an architect becomes mandatory. The specific relation between the client and the contractor on the one hand, and between the client and the architect on the other hand, is usually the subject of different contracts. However, recently new forms of collaboration (the so-called *"bouwteam"*, under influence of a practice in the Netherlands), are becoming increasingly popular. Nevertheless, associating a contractor and an architect in the same contract remains tricky under Belgian law due to a strict incompatibility of these professions.

7. What are the most popular methods of procurement?

In public construction projects, under the previous regulatory framework the most popular form of procurement was the so-called *"openbare aanbesteding" / "adjudication publique"*, meaning an open public tendering on the basis of the lowest price as sole determining criterion. However, given the fact that such tendering procedures do not allow the contracting authority to take into account quality elements, over the last years, and also under the influence of the EU, contracting authorities tend to award contracts based on the most economically advantageous tender based on criteria of price and quality.

Under the new regulatory framework, the procedures that can be applied without restrictions, such as the open (one step) and restricted procedure (two steps), are also likely to be the most widely used.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

In private construction contracts, the use of standard forms (e.g. FIDIC-contracts and the like), is not very common. Standard forms are mostly used in more international settings. A multitude of different contracts is in use (based on templates provided by i.a. professional associations).

In public construction projects, public authorities are obligated to apply the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts. This royal decree establishes a set of rules dealing with all kinds of execution issues, normally dealt with within a construction contract

(payment clauses, completion mechanisms, contractor's liability, etc.). Deviating from these rules requires specific motivation and justification in the tender documents and is even excluded for certain rules.

9. Are there any restrictions or legislative regimes affecting procurement?

For public procurement, a certain number of legal restrictions apply. These can be found in the Act of 17 June 2016 on public procurement and the Royal decree of 18 April 2017 on the award of public procurement contracts in the classic sectors. This Royal decree contains various obligations to be observed by public authorities during tendering (publication of a contract notice, procedures to be followed, rules governing the validity of tenders received, etc.).

Furthermore, public authorities are also bound by the provisions of the Act of 20 March 1991 organising the accreditation of contractors. In order to qualify for certain projects, the contractors must prove that they are sufficiently qualified on the basis of categories (nature of the works) and classes (price of the works). Public authorities will always specify in the tender documents which category and class are required for the tendered works.There is no similar set of rules for private procurement procedures.

10. Do parties typically engage consultants? What forms are used?

In some circumstances – mainly for new constructions and renovations requiring a building permit (although some exceptions do exist) – it is obligatory to work with an architect. The latter shall, in compliance with the Act of 20 February 1939 on the protection of the title and the profession of architect, establish the necessary drawings and supervise the execution of the works.

11. Is subcontracting permitted?

Yes. Parties (e.g. client or (main) contractor) can contractually limit subcontracting. Very often contracts stipulate that subcontracting the whole of the works is not allowed. Also, in certain circumstances, the client may require the contractor to enter into subcontracting agreements with specific subcontractors (so-called nominated subcontractors).

12. How are projects typically financed?

Public construction contracts are usually financed by public authorities, although PPPs (Public-Private Partnerships) often do rely upon private capital, especially within the framework of DBFM-contracts (Design Build Finance and Maintain).

Private construction works are financed either by own funds or by bank loans (mortgage loans).

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

Contracting parties are free to determine which specific securities the contractor is to provide. Performance bonds as well as parent company guarantees are very common.

Most of the time, a performance bond shall be released in 2 steps: one half at provisional acceptance of the works, the other at final acceptance.

Note that the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts contains specific rules governing the specific performance bond to be provided by the contractor to the client.

The Act of 9 July 1971 relating to house construction and the sale of houses to be or being built provides for an obligation of the contractor to constitute a specific security to the benefit of the client. This is a guarantee of 5% of the contract price for certified contractors. However, non-certified contractors must provide a guarantee of full completion, i.e. a guarantee of 100% of the contract price (Royal decree of 21 October 1971 implementing the Law of 9 July 1971).

14. Is there any specific legislation relating to payment in the industry?

The Law of 9 July 1971 relating to house construction and the sale of houses to be or being built contains several clauses governing the payments the client is to execute to the contractor, especially the advance payment that cannot exceed 5% of the contract price.

For public construction projects, detailed provisions on the payment mechanisms can be found in the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts (deadline for approval of the payment request, subsequent deadline for payment, interest rates).

In a B2B context, specific obligations in respect of payment, interest rates and compensation for debt recovery efforts, can be found in the Act of 2 August 2002 on combating late payment in commercial transactions.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

In subcontracts the use of pay-when-paid clauses is very common as a part of the so-called back-to-back nature of the contract, meaning that the rights and obligations of the main contractor towards the employer are deemed to apply to the subcontractor to the same extent (as if he were the main contractor). In this logic, it is the right of the main contractor to receive payment that triggers the right of the subcontractor to payment for works executed.

16. Do your contracts contain retention provisions and, if so, how do they operate?

In private construction contracts, it is often stipulated that the client can withhold a certain percentage of the amount due to the contractor for the execution of the works. These retention rights end with the provisional and/or final acceptance or completion of the works and constitute leverage towards the contractor, motivating him to complete the works. Note that this is not regulated by any specific default rules and that contracting parties are under no obligation to use such security mechanism.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

These are very common in both public and private construction contracts.

In public procurement, they are capped on 5% of the contract price (Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts). In private construction contracts, the same mechanism can be found and a cap may or may not be established by the parties.

Such clauses are often called penalty clauses *("schadebeding", "strafbeding", "vertragingsboetes" / "clause pénale")* but are not to be mistaken for penalties under common law. In fact, these clauses are only enforceable if they are ment to compensate the other party for losses due to the breach of contract. If the real intent is to benefit from the other party's breach of contract, such clause will prove unenforceable (cf. article 5.88 of the New Civil Code).

18. Are the parties able to exclude or limit liability?

As a general principle, parties are allowed to exclude or limit their contractual liability towards one another. However, such limitation will not be upheld in case of fraud. Furthermore, if the limitation is considered to deprive the agreement of any meaning, it will prove unenforceable. Last but not least: deviation of mandatory rules is excluded (e.g. decennial liability).

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

As a general rule, the client is allowed to terminate for convenience pursuant to article 1794 of the Old Civil Code. However, in that case the contractor has to be compensated for all works executed, all costs already incurred in view of the further execution of the works and lost profits. This is a default rule from which the parties can, and oftentimes do, (partly) derogate.(e.g. limit or exclude compensation for loss of profit).

On force majeure, the debtor is released if the performance of the obligation has become permanently impossible. If the performance of the obligation has only become temporarily impossible, then the performance shall be suspended for the duration of the temporary impossibility. (article 5.226 New Civil Code)

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Various securities in order to preserve funders' rights and protect their investment exist (e.g. (silent) mortgage).

Purchasers of a building, althoug they may not be involved in the contractual relation between the client (seller) and the contractor, benefit from several possibilities, such as a direct claim against the contractor in case of hidden defects.

Also noteworthy is the possibility for subcontractors to introduce a direct claim against the client, even in the

absence of a direct contractual relation (cf. article 1798 of the Civil Code).

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

The principle of contractual freedom applies.

In public construction contracts, the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts provides strict deadlines for submitting claims to obtain a contract revision of the contract, compensation for losses incurred or time extensions.

22. What insurances are the parties required to hold? And how long for?

Insurance for the decennial liability of building contractors and other service providers (such as architects, security coordinators, land surveyors and consultancy agencies) is mandatory as from July the 1st of 2018.

As for public construction projects, the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts requires contractors to be insured against industrial accidents and accidents which cause damages to third parties.

Besides the abovementioned insurance obligations, Belgian law does not impose any additional insurances on contractors and/or employers. Very often though, especially for important projects, a CAR (Construction All Risks) is put into place.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

Litigation with subsequent adjudication remains the most popular way of dealing with construction and engineering disputes, despite taking a lot of time.

In construction disputes, the judge will very often appoint an expert (usually an engineer with proven experience in construction) to advise on all relevant technical aspects of the case. Such procedures frequently take several years before a final solution is reached.

Arbitration clauses are not very common, except in important (international) projects. Parties are free to determine how arbitration proceedings shall take place (venue, applicable law, applicable rules, etc.).

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

Belgium is very arbitration friendly. Awards are enforced expediently, also due to the limited grounds upon which they can be challenged.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

Generally speaking, contractual disputes, i.e. disputes arising from a breach of contract, must be brought before the court withing a period of 10 years after the breach, or knowledge thereof.

However, claims relating to minor hidden defects must be brought before the court as soon as reasonably possible after the discovery of the defect.

Note that these rules are default rules (except for the decennial liability – see above)

As for public procurement, the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts, state that typical contractual claims (unforeseen circumstances, fault of the client, suspension of the works) are to be brought before the courts within a relatively short period of 30 months after provisional acceptance of the works.

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the liability of a defaulting party to a “fair and reasonable” proportion of the innocent party’s losses), and are these commonly used?

More often than not construction disputes involve several parties in the construction process (architect, contractor, client, etc.).

There are several ways of apportioning liability.

In the absence of a specific rule, contractual provision or custom providing joint and several liability, each defendant can only be held to pay for its own share of liability (the apportionement of which is often determined with the assistance of the court appointed expert).

However, if several parties jointly commit a fault causing the same damage, the judge can impose in solidum liability, meaning that the defendants can be held to pay the entirety of the damages (with the possibility for that defendant to recover with the others).

27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

In the Flemish Region a political agreement was reached within the previous government to end the consumption of open space by 2040. The issue proved quite controversial in the media and with the public and was nicknamed the *"betonstop"* (literally: *"cement concrete stop"*). The new Flemish government, although no fundamental changes were made to the initial principles agreed upon, renamed the plan and called it the *"bouwshift"* (literally: *"construction shift"*). The exact details still have to be worked out. More focus on renovation projects and efficient use of already occupied space – less new buildings.

The evolution towards a circular economy is very, if not most tangible in the construction sector, as it is one of the primary targets where policy makers discern (rightly so) large potential. A more integrated approach to the life cycle of constructions is imposed and encouraged (EPC-certificates, Building Integration Modeling, demolition inventories,...). An ongoing issue is the (cost of) ever stricter energy efficiency requirements for (new as well as existing) buildings.

In the framework of public procurement regulations, recently, under influence of the European Directives, specific rules were introduced to combat unfair competition and social dumping.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

Infrastructure projects will probably become very important in Belgium in order to deal with the traffic congestion. In Antwerp such infrastructure works have already started with the so-called *"Oosterweel-project"*.

Furthermore, the planned expansion of the Antwerp port will probably also attract interesting investment opportunities.

The renewable energy market continues to flourish with, for example, various projects for the installation of on shore and offshore wind turbine(s) (farms).

Another concept attracting investors is the concept of service flats. These buildings are designed to welcome senior citizens and are combined with a full range of services these people can benefit from.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

A new trend in the building sector is called BIM (Building Information Model(ling) / Management). Contractors are under increasing pressure regarding deadlines and this concept allows them to manage information relating to the project. It combines geometry and information, and therefore allows all contractors working on the same project, to deal with potential interferences, planning issues, etc.

Environmental issues also require the construction sector to further investigate new ways of limiting the environmental footprint of buildings (solar panels, renewable energy, isolation, etc.) and to integrate otherwise optional techniques in their projects.

30. What do you anticipate to be the impact from the COVID-19 pandemic over the coming year?

Now that the covid pandemic is behind us, ongoing disputes in this area are being handled further.

These disputes have caused the doctrines of force majeure and imprevention to gain importance

There is, however, a fundamental difference between public procurement contracts and private construction contracts.

Formerly, the concept of hardship was as such not recognized in relation to private construction contracts by the Belgian Court of Cassation. In the New Civil Code, this is now explicitly recognised in Article 5.74. In case of hardship (recognised under certain conditions), parties

now have a duty to negotiate. If negotiations do not come to a successful conclusion, the court can be asked to modify or terminate the contract. This provision in its entirety is of supplementary law, which means that the parties' contractual right to renegotiate and to amend the contract may be deleted or modified.

In public procurement contracts on the other hand, the Royal decree of 14 January 2013 on the general rules of performance of public procurement contracts explicitly provides for a hardship mechanism (which also covers force majeure circumstances), which allows the contractor, under certain circumstances, to claim compensation for damages suffered.

Whether or not the COVID-19 pandemic must be considered as force majeure or hardship, should be assessed on a case-by-case basis, taking into account the unforeseen nature of the pandemic.

Only if the COVID-19 pandemic qualifies as an unforeseen event, such mechanisms (force majeure and hardship) shall apply.

The impact of the COVID-19 pandemic definitely gave new life to the debate on hardship and force majeure.

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