

PLC Cross-border Construction Handbook 2009/10: Q&A Chapter

SPAIN

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The construction sector

1.

What have been the main trends in the construction sector in your jurisdiction over the last 12 months? What have been the most significant deals?

The construction sector plays a significant role in the Spanish economy, which is highly dependent on the sector (which progressively increased its contribution to GDP from 6.9% in 1995 to 11% in 2007). Over the last booming period starting in the mid-90s, construction was an integral part of direct and indirect economic growth and was fuelled by historically low interest rates that increased housing demand, expanding labour supply due to the contribution of immigrants and also demand and financing of public works from European Structural Funds.

After 2007, the construction sector in Spain underwent a significant slowdown, which has been exacerbated by factors such as the international financial crisis, excess supply of real estate, decreasing demand (due to previously elevated activity in the sector) and the decrease in the flow of European Structural Funds due to EU enlargements. The Spanish construction sector is currently undergoing a correction which is expected to last until the end of 2010. In the near future, construction will continue to experience falling demand, negative price growth and a rise in unemployment. Nevertheless, certain indications such as the publicly announced government plans to increase investment in infrastructures and to favour subsidised housing, together with the maintenance of a certain level of activity in the non-residential sub-sector (primarily for industrial premises and the retail sector) might prove helpful for a mid-term recovery.

Regarding the most significant deals, Spanish construction companies are world-class competitors (e.g., ACS, Sacyr, Acciona, etc.) with internationally diversified

portfolios. During 2008, Spanish construction companies mainly focused on bids for public works (domestic) and international activities.

Transaction structures and finance

2.

Please briefly outline the typical transactional structures and corporate vehicles used in a construction project in your jurisdiction, such as special purpose vehicles and joint ventures.

Construction companies in Spain use different structures depending on the type of project. For projects carried out individually, companies usually incorporate a special purpose vehicle in order to limit legal liability. Projects developed by several partners are carried out by virtue of either (i) a typical joint venture structures or (ii) a so-called “temporary union of companies” (“*unión temporal de empresas*”) (“UTE”), the latter being more common in bidding processes for large public works.

Partners in a joint venture usually enter into shareholders’ agreement governing the most important aspects of the project (e.g., governance structure, financing, dividend and budget policies, share transfers and deadlock situation provisions, reserved matters requiring super-majorities, voting regime in the shareholders’ meetings, reporting, etc.). Shareholders’ agreements are usually private agreements that are fully enforceable between parties and undisclosed to the public (except in the case of listed companies that are subject to certain disclosure obligations that affect issues of voting and share transferability).

Finally, the UTE itself does not have legal personality and their members remain joint and severally liable with regard to the project (i.e., creditors may sue any partner). Foreign companies may utilise UTE structures and benefit from a special tax framework which essentially consists in a look-through framework for income allocated to resident members or non-resident members acting through a permanent establishment for tax purposes and capital duties exemption.

3.

How are construction projects generally financed, for example through debt and equity, mezzanine finance and bond issues?

It is common practice to fund a construction project via equity, shareholders’ loans or profit-sharing (PPLs). PPLs are subordinated loans with interest rates indexed to the relevant project which are considered equity for companies’ purposes (i.e., undercapitalisation, etc.).

A typical bank finance structure would be a mortgage-backed senior facility establishing certain binding financial covenants for the debtor such as the “*loan to cost ratio*” (the ratio of funds drawn down and the value of the construction as determined by an independent surveyor) and the “*debt service cover ratio*” (either on a forward looking or a historical basis).

It is also common to include a recourse to a sponsor (either full or limited) in financial contracts in order to guarantee the debtor’s obligations in the event of a shortfall of funds. It is particularly important to draft the contract carefully if any issues are discovered during the due diligence process which may imply payment obligations for the debtor (e.g., town planning obligations, guarantees delivered to public authorities, etc.).

Forward purchase and forward funding structures are also quite common in construction projects. In forward purchase structures, financing is obtained by the seller-developer of the project (as it is sold to the purchaser upon completion of the construction and in an income-generating status). In forward funding structures it is the purchaser who is in charge of progressively providing the funding as the works are undertaken (the purchaser acquires the land at the starting phase). From a financing point of view, forward funding is more flexible than forward purchase as it includes more financing options. On the other hand, the price paid to the developer in a forward funding is less than in a forward purchase given that in this latter case all the risks are assumed by the developer.

While valid alternatives, mezzanine financing and bond issues are more unusual in the Spanish construction market.

4.

What security and other contractual protections (such as step-in rights, warranties and the assignment of contractual rights) are usually required by funders?

Assuming a typical “special purpose vehicle structure”, the parties providing funding will usually request securities on all the valuable assets and rights of such vehicle (both at that moment and in the future). It is also important to ensure that the financial entity will be able to continue with the project in the event of the debtor’s insolvency or a failure to continue due to other circumstances such as breach of contract. In this regard, the contractual step-in rights and assignment of contractual rights are essential issues that should be adequately addressed in the financing and construction agreements. Finally, negative pledge provisions aimed at protecting assets or rights not initially pledged or encumbered are also very common.

The most common security would be a first-rank mortgage on the property (both the land and the building given that the latter would also be considered as mortgaged under Spanish law). A 1% tax on the mortgage value is levied upon the granting of a mortgage as well as upon every increase of the mortgage value or if the mortgage ranking is improved. Banks customarily pledge several assets and rights of the debtor (namely, debtor’s shares and credit rights such as future rents, indemnity rights arising from contracts, credit rights deriving from any guarantees delivered for the benefit of the debtor, bank accounts, VAT refunds, etc.).

Regarding contractual provisions related to “step-in rights” and contractual assignments, a bank would request that the debtor be allowed to be subrogated in all contracts related to the project (including construction contracts, services contracts with different professionals, insurance contracts, etc.).

Finally, sponsors would normally be required to provide the bank with a first demand joint and several guarantee that would entitle the bank to claim payment by the sponsor of the debtor’s obligations. Cost overrun guarantees (designed to fund any cost increases to the initial budget) and completion guarantees (designed to ensure that the project is completed as initially specified, from a timing and quality perspective) are quite common. The rights of the sponsor to bring an action against the debtor will be subordinated to the funder’s rights.

Main parties

5.

Please briefly outline the main parties involved in a construction project in your jurisdiction, and the most common procurement arrangements between them.

According to the classification contained in Law 28/1999 of 5 November on construction (“LOE”), which is generally applicable to construction (notwithstanding the particular aspects that affect public infrastructure) the following are the main parties involved or “*agentes de la edificación*” and which are subject to a specific liability framework:

- **Developer**: the LOE’s significantly broad definition considers a developer as anyone that decides, sponsors, arranges and finances with internal or external resources the building works, either for itself or with the purposes of transferring them to a third party. The LOE sets forth a number of obligations for a developer. The most relevant issue affecting the developer, though, is the joint and severally liability *vis-à-vis* third parties for any material damages to a building caused by construction defects (even if resulting from other construction agent’s fault). The LOE establishes a liability period ranging from one to ten years after construction completion, depending on the nature of the damages.
- **Designer**: the designer drafts the technical project, object of the construction contract. The LOE establishes several obligations for designers, who are also subject to LOE’s liability framework.
- **Constructor**: the constructor is in charge of materially executing the works in accordance with the technical project and the contract and is subject to LOE’s liability framework.
- **Project manager**: although the LOE does not directly mention the project manager, it is common for large construction projects to be monitored by professional project managers. The liability of project managers is determined on a case-by-case basis depending on their involvement in each project.

Developers enter into a wide range of contracts the most important of which is the “works execution contract” entered into between the developer and the constructor. It is the developer and not usually the project manager, which directly hires other professionals such as designers, construction managers, quantity surveyors, etc. Sub-contracting issues are addressed in question 17.

Reference should be made to the private bidding processes designed to obtain the best technical and economic offer from a constructor. These bidding processes are becoming more and more frequent, particularly for large projects. Projects awarded by virtue of private bidding processes require careful attention in the drafting of documents in determining the legal consequences of the participation of bidders in the process, among other issues.

Finally, a word must be said about public works in which the contracting part must be an entity which belongs to the «public sector». This term applies not only to the State, Regional and Local Administrations, but also to other kind of public bodies, such as Autonomous Bodies (“*Organismos Autónomos*”), Business Public Entities

(“*Entidades Públicas Empresariales*”), and Publicly Owned Companies (“*Sociedades Públicas*”). As per the contractor, it must be a construction company, alone or united in an UTE (see Section 2), or in a special purpose vehicle.

Standard forms of contracts

6.

What standard forms of contracts are used for large construction projects in your jurisdiction? Which construction organisations typically produce them?

The use of standard forms of contracts is not as common in Spain as it is in other jurisdictions. For instance, SEOPAN (Spain’s biggest and most important constructors’ association) has yet to produce any standard form of contract. Therefore, although more burdensome, construction contracts are negotiated on a case-by-case basis. Invariably, the importance of negotiations depends on the size, cost and complexity of the project as well as on the number of parties involved.

Notwithstanding the above, standard form contracts produced by international organisations such as the FIDIC may be used in Spain since their provisions do not differ substantially from a typical Spanish construction contract.

7.

Do construction contracts for international projects differ? If yes, please give brief details.

Since standard forms of contracts are not commonly produced in Spain, it is difficult to address contractual differences between a typical Spanish construction contract and a construction contract for an international project. Nevertheless, it is perhaps advisable to follow standard forms of contracts in international projects given that these are more likely to involve international contractors.

8.

Do contracts for engineering projects differ? If yes, please give brief details.

In addition to the above, the main difference between construction contracts for engineering projects and contracts for other kinds of projects is that the former are often “turnkey agreements” by virtue of which the contractor undertakes to deliver to the client or owner of the project a completed project ready for operation and with all the necessary licences and authorisations duly granted, with the price as consideration.

Due to the technical complexity of “turnkey agreements”, they include both the design and the construction of the site. As a consequence, the contractor assumes full liability *vis-à-vis* the owner for the viability and suitability of the works described in the technical project.

Contractual issues

9.

What risks are typically allocated to the contractor? How are these risks (such as material price escalation and ground conditions) offset or managed?

Allocation of risk to the contractor depends on whether or not the contract is a “turnkey agreement” (see section 8). In turnkey agreements, the contractor bears all

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risks related to the viability of the project including design and legal risks as well as the risk that the necessary authorisations are not obtained. On the other hand, the allocation of risk raises more difficulties in construction contracts in which the contractor is not in charge of the design. These contracts usually include a so-called “knowledge clause” according to which contractors expressly declare to have carefully studied the technical project and consider it to be complete and adequate. In non-turnkey agreements, it is advisable that the contractor specifically assume all risk related to the project as if it had been the party who drafted such agreement.

The main method of offsetting other risks such as a material price increases is to include a “lump sum price” clause by virtue of which the parties agree that the price resulting from the contractor’s economic offer is a fixed, set, and closed price offer for the entirety of the execution of the works that constitute the subject matter of the contract and, therefore, no claims will be accepted by the developer/owner unless modifications to the project are introduced (following a contractually agreed procedure).

Ground condition risks may be mitigated by the carrying out of topographic and geotechnical surveys to be taken into account in the technical project and mandatorily disclosed to the contractor. Also advisable are ground inspection clauses declaring that the contractor has examined and inspected the site and the surrounding areas and that these are adequate and sufficient for the execution of the works and that the contractor understands and accepts all risks and contingencies that may affect the site and the execution of the works.

10.

How can liability be excluded? For example, can the contractor exclude liability for indirect or consequential loss, and loss of business or profits?

Notwithstanding certain cases in which imperative rules cannot be contracted subject to the will of the parties (e.g., the developer’s liability for damages in the construction), Spanish law permits contractual exclusion or reduction of liability (including liability for indirect losses and loss of profits). A specific contractual mention in this regard is sufficient. Nevertheless, Spanish judges have broad powers of interpretation over contracts and it should be noted the possibility that, in view of the particular circumstances of a case, a judge might limit or reject contractual exclusion of liability.

11.

Do the parties usually agree a cap on liability? If yes, how is this usually fixed?

Although the parties may agree on liability caps, they are not particularly common in Spanish construction contracts (except in connection with delay penalties). A customary way to fix caps is to establish an amount (i.e., in connection with the delay penalties). An alternative is establish an overall amount of liability equal to a given percentage of the contract price.

12.

Are force majeure exclusions available and enforceable in your jurisdiction?

In Spanish law, force majeure refers to either unpredictable events or events that, although predictable, are inevitable. Public works contracts are bound by the

provisions of Royal Decree 2/2000 of 16 June on public contracts which establishes force majeure events allowing for a time extension (e.g., natural disasters, riots, civil disturbance, “acts of God”, etc.). Private works agreements usually refer to this law regarding force majeure events.

In addition to those events mentioned in the Royal Decree, contracts normally include heavy rains (if certain measured levels are met), strikes affecting the construction sector or the absolute lack of irreplaceable materials in the execution of the various construction units as additional events of force majeure.

Finally, it is advisable to clearly state in the contract that time extensions caused by force majeure will not imply any increase in the agreed price.

13.

How are construction professionals usually appointed and how are their liabilities dealt with in the contract?

Construction professionals are appointed through the signing of different agreements. As indicated, legal liability provisions are imperative in certain cases, such as for developers. In other cases, services contracts entered into with different professionals usually declare that such professionals will be held liable vis-à-vis the developer/owner for their level of compliance with their contractual obligations. Consequently, developers are entitled to bring actions against professionals in breach of contractual obligations.

14.

What are the usual methods of payment for construction work? Are there ways to secure payment or mitigate risks of non-payment?

Payment mechanisms are substantially similar in all construction contracts. The contractor usually delivers a monthly works certificate including the economic value of the units executed. The drafting of the “works certificate” clause is particularly important in order to clearly establish the meaning of delivery (delivery does not mean handover and construction risks continue to be borne by the contractor until the formal handover). It is also important to establish a settlement procedure regarding disputes over works certificates. Works certificates are the basis of invoices to be delivered to the developers prior to payment.

The most common way to secure payment by developers is “*reverse factoring*” (known in Spain as “*confirming*”). Reverse factoring is a mechanism whereby the contractor gets paid by the financial entity before the developer’s payment obligation becomes due and payable. In practice, the financial entity therefore acts as guarantor of payment vis-à-vis the contractor and bears the risk linked to non-payment. This option naturally implies a financial cost for the contractor.

15.

What contractual provisions are typically negotiated to cover material delays to the project?

The works programme is a crucial document attached to the contract. It sets forth the deadline for completion of the project, which is of vital importance for developers. One of the main duties of project managers is monitoring timely execution of works in order to meet this deadline.

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Customarily, material delays are covered contractually by virtue of economic penalties. The works programme usually contains “milestones” regarding which in compliance by the contractors gives rise to penalties (usually, a lump sum per day or week of delay). An effective mechanism to encourage contractors to comply with the programme is to establish the possibility of recovering the amounts paid as penalties if subsequent milestones are met.

The only acceptable material delays that can contractually lead to a time extension are usually those arising as a result of material variations or force majeure.

16.

How are material variations to the works usually dealt with in the contract (for example, the effect on timing and cost)?

Material variations to the technical project required in writing by the developer usually imply increases to the contract price. Spanish contractors usually count on the “extra benefits” that they will cash-in due to variations, so it is crucial to correctly monitor them in the course of the works and correctly address the problem in the contract. Variations due to legal or technical requirements should not be regarded as variations that could cause an increase in the price. If the contract is correctly drafted and the legal and technical risks are transferred to the contractor, legal and technical variations will be included in the lump sum price. Moreover, the Spanish Supreme Court has ruled that these kinds of agreements imply the contractor’s obligation to achieve a result (as agreed in the form of the technical project) and that the contractor is held liable for performing the work in accordance with customary professional standards.

Contracts usually establish a procedure for requesting variations. An agreement on the method of calculating prices corresponding to units of work not initially established in the contractor’s economic offer is essential to avoid conflicts. If no prices are included in the contractor’s economic offer, an arbitration procedure is normally agreed in order to determine the value of the variations. It is also common practice to specify that the prices for variations will be those appearing in trade publications containing updated price lists (such as quantity surveyors magazines).

One advisable option to avoid large cost overruns is to specify a cap for the price of material variations.

17.

How do the parties typically manage their relationships with sub-contractors?

Sub-contractors are of significant importance for the final result of a project. Apart from legislation aimed at protecting the workforce from a health and labour perspective (sub-contracting is certainly a restricted and regulated activity from such standpoint), Spanish law allows sub-contractors to directly claim payment of their work from project owners despite the absence of a contractual link between the two.

Since sub-contractors are important to the owner, contracts normally contain certain reporting obligations for contractors prior to their entering into contracts with sub-contractors. Veto rights are not unusual.

The LOE establishes the contractor’s liability *vis-à-vis* the owner for damages caused by sub-contractors. Contracts normally establish joint and several liability for both

contractors and sub-contractors *vis-à-vis* the developer that would be entitled to bring action and claim all damages against any of them (notwithstanding the contractor's right to bring a claim against the sub-contractor).

In order to avoid disruptions in the course of the works, contracts establish the owner's right to pay subcontractors directly if a contractor fails to do so. Finally, sub-contractors may pose problems in connection with the assignment of contracts to the owner (or a financial entity) if such a possibility is not established in contracts between contractors and sub-contractors.

18.

Please briefly outline the other main contractual provisions that are usually heavily negotiated by the parties.

In our experience, the most troublesome provisions in a negotiation with sub-contractors are those that concern variations, penalties and clauses related to contractor's liability.

Licensing requirements

19.

Please set out what licences and other consents are required by contractors to carry out construction work in your jurisdiction.

The construction of buildings is subject to the granting of a number of permits aimed at enabling the municipal authorities to ensure that constructions are carried out in compliance with the planning regulations. The specific construction permits mainly include the works and the first occupancy licences.

- *Works licences (licencias de obras)*: works licences must be applied for and obtained by the developer prior to starting any construction works. The relevant City Councils will grant these licences if the works are in accordance with planning regulations.
- *First occupancy licences (licencias de primera ocupación)*: First occupancy licences are closely linked to the works licences and must be obtained once the building works have been concluded. By granting the first occupancy licence, municipal authorities authorise the use of the building after ensuring that the works have been carried out in accordance with the works licence and all other applicable regulations, and that the works have been duly completed.

Additional authorisations might be required with regard to those constructions affecting, directly or indirectly, public infrastructures (e.g., public roads, railways, airports, etc.) or natural public domain (e.g., maritime coast, river beds, etc.).

In addition, it is important to note that, as a general rule, works licenses do not deal directly with environmental issues. However, in addition to the specific environmental permits referred to in the answer to question 25 below, the following two general environmental permits are worth bearing in mind: (i) the so-called integrated environmental authorisation, required by the Integrated Pollution Prevention and Control Act (*Ley 16/2002 de Prevención y Control Integrados de la Contaminación*), to be granted by the regional authorities, and (ii) the so-called classified activities license, required by the Decree 2414/1961 on Annoying, Unhealthy, Harmful and

Hazardous Activities (or the applicable regional rule), to be granted by the municipal authorities.

Insurance

20.

Please set out what types of construction-related insurance have to be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Under the general framework for construction projects in Spain (notwithstanding the specific framework for public infrastructure), the only mandatory insurance that must be contracted by developers is “decennial insurance” covering the risk of structural damages, which is only mandatory for residential projects. Decennial insurance policy must be contracted for a period of ten years as from the completion of the works. Insurance companies offering this product will usually require that there be a surveyor in charge of monitoring risks in connection with the insured works. Entities that specialise in rendering these services are known as *Organismos de Control Técnico* or OTCs.

It is customary that all parties involved in the construction project take out standard civil liability insurance, which value normally depends on the value of the works.

Finally, “all risk” insurance policies are also market practice and usually taken out by contractors.

Labour laws

21.

Please briefly set out the labour law requirements to hire construction employees. In particular, what authorisations (such as work permits) do foreign nationals require to work in your jurisdiction?

No specific requirements are set out to hire construction employees in Spain other than those generally applicable.

The hiring of Non-EU individuals requires the prior securing of a valid work and residence visa that is issued following an administrative procedure which might take a few months. Failure to comply with this obligation constitutes an employer’s infringement and, as such, may lead to substantial fines.

22.

Please briefly set out any labour laws relevant to construction projects, such as minimum wage laws or restrictions on working hours.

Together with the Statute of Workers (which is the labour law cornerstone in Spain), the 4th General Collective Bargaining Agreement for the Construction Industry (“4th CBA”) contains specific provisions in this regard (i.e. minimum wage, working hours, leaves, holiday, trial period, night shifts). However, collective bargaining agreements for the construction industry at a province level may also be of application. In general terms, these collective bargaining agreements enhance the employees’ rights provided in the Statute of Workers.

23.

Are there any labour law considerations at the end of a construction project, such as termination payments?

The 4th CBA provides for specific compensations to be paid to employees hired on a temporary basis upon termination of their employment, as follows:

- Temporary employment contracts for (i) specific work or service, (ii) production needs or (iii) internships: An amount equivalent to 7% of the salaries paid in accordance with the 4th CBA accrued during the term of the employment.
- Training employment contracts: 4.5% of the 4th CBA salaries for trainees accrued during the term of the employment.

In addition to the above provisions, collective bargaining agreements for the construction sector at a lower level may also contain different provisions.

Health and safety laws

24.

Please outline the health and safety legislation that applies to construction projects in your jurisdiction.

Carrying out construction works imply the obligation to comply with a wide range of H&S related laws and regulations (some of them specific to the risks or technical requirements of the work). The main provisions on H&S which may be of application to construction projects are the following:

- Law 31/1995, on prevention of occupational hazards.
- Royal Decree 1627/1997, on minimum health and safety measures at construction works.
- Law 32/2006 on subcontracting at construction works.
- Royal Decree 1109/2007, which develops Law 32/2006 on subcontracting at construction works.
- Royal Decree 396/2006, on minimum health and safety measures applicable to works involving exposure to asbestos.

Likewise, the 4th CBA also contains H&S provisions that must be observed when carrying out construction works.

Environmental issues

25.

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Please briefly set out local legislation regulating the impact of construction projects on the environment, in particular in the areas of:

- **Air.**
- **Water.**
- **Waste.**
- **Environmental Impact Assessments.**
- **Sustainable development.**

Without prejudice to the regulations governing in each region, the main rules applicable to each of the environmental areas identified above, of interest for construction projects, are the following:

- **Air:** Air Quality and Protection of the Atmosphere Act (*Ley 34/2007, de calidad del aire y protección de la atmósfera*), and Decree 833/1975, which implements the 2007 Act.
- **Water:** Water Act (*Real Decreto Legislativo 1/2001, por el que se aprueba el Texto Refundido de la Ley de Aguas*), and Royal Decrees 849/1986 and 927/1988, which implement the Water Act on different aspects.
- **Waste:** Waste Act (*Ley 10/1998, de Residuos*) and Royal Decree 105/2008, on production and management of construction and demolition waste.
- **Environmental Assessment Impact:** Act on the Assessment of the Effects of Certain Plans and Programs on the Environment (*Ley 9/2006, sobre evaluación de los efectos de determinados planes y programas en el medio ambiente*), the Environmental Impact Assessment Act (*Real Decreto Legislativo 1/2008, por el que se aprueba el texto refundido de la Ley de evaluación de impacto ambiental de proyectos*), and Royal Decree 1131/1988, on Environmental Impact Assessment.
- **Sustainable Development:** There are no specific regulations applicable on this matter, although the concept of sustainable development is included, whether directly or indirectly, in all main environmental rules.

In addition to the above areas, there are other areas which are worth mentioning in relation to construction activities, namely concerning **Polluted Soils** (Royal Decree 9/2005, which establishes the list of activities which potentially pollute the soil and criteria and standards for declaration of polluted soils), **Coasts** (Coasts Act 22/1988), **Protected Spaces and Species** (Natural Heritage and Biodiversity Act 42/2007) and **Environmental Liability** (Environmental Liability Act 523/2007).

Please further note that (i) the Spanish Constitution expressly imposes the duty to protect the environment and acknowledges a right to enjoy it (article 45), and (ii) there are several crimes in the Spanish Criminal Code concerning environmental issues.

26.

Are there any regulations requiring contractors to make buildings comply with carbon emissions or climate change targets?

Building construction is not one of the activities subject to the European Trading Scheme which implements EU Directive 2003/87.

This notwithstanding, there are certain obligations related to climate change prevention that affect this type of activities, introduced mainly through Royal Decree 1370/2006, on the Greenhouse Gas Emission National Allocation Plan (2008-2012), and the Spanish Technical Construction Code. Specifically, pursuant to the latter new buildings (as well as major refurbishment of existing buildings) must meet certain minimum standards which tend to reduce CO₂ footprint of buildings, such as standards on thermal isolation and energy efficiency, and must cover a certain rate of the sanitary hot water by means of solar panels. These measures must be implemented during the building design and the consumer should be informed about its energy efficiency.

Corrupt practices

27.

Please briefly set out any rules in your jurisdiction that prohibit corrupt business practices and bribery affecting construction projects, and any civil and criminal penalties that apply.

The Spanish Penal Code punishes bribery of a public official, including bribery in the scope of construction projects.

Article 423 of the Penal Code distinguishes two situations: (1) those who deliberately offer, promise or give, directly or through another person, money or another kind of gift, whether goods or services, to the authorities or public officials, will be punished with prison penalties and fines; (2) those who attend to the request of the authorities or public officials will be imposed the same penalties in a lower grade.

The prison penalties to be imposed range from one year up to six years. The fines range from half the value of the bribe up to three times such value.

The concrete penalty to be imposed will depend on whether: (i) the criminal behaviour meets the requisites of paragraphs (1) or (2) of Article 423 of the Penal Code above described; (ii) the object of the bribery is the perpetration of a criminal act; (iii) the object of the bribery is the realization of a non-criminal act (moreover, in such a case the sanction to be imposed will differ depending on whether or not the public official executes the act, and whether or not the act is lawful or unlawful within the duties performed by the official); and (iv) the public official refrains from carrying out an act in the processing or resolution of any matter which he is obliged to carry out as a function of his position.

In case that the criminal offence causes any damages to a third party, the offender will be obliged to pay such damages (this civil liability arising out of the criminal offence can be assessed within the criminal proceedings).

The Spanish Government is currently working in the introduction in the Spanish Penal Code of a new criminal offence that will punish corruption in the private sector, implementing EU Framework Decision 2003/568/JHA.

Insolvency

28.

If a contractor becomes insolvent, what rights will the client and funder typically require (for example, to terminate the construction contract and hire a new contractor)?

The contractor's insolvency does not in itself constitute ground for the termination of contracts, and contractual clauses that authorise the parties to terminate a contract on these grounds are invalid. Contracts may be terminated on other grounds such as breach of contract, but in these cases, once the insolvency proceedings have begun, requests for contract terminations must be submitted to the judge hearing the insolvency proceedings.

However, it is also possible to terminate the contract if the insolvency administration (a figure similar to the administrative receiver in UK, or to the trustees in insolvency in US) or the counterparty file such request before the judge. In this case, the judge will make a decision having heard the parties and taking into consideration the interest of the creditors and the insolvent company.

PPP/projects

29.

Is the use of public private partnerships (PPP) common in construction projects in your jurisdiction? If yes, please outline which sectors commonly use PPP?

PPPs in Spain were originally used in the transport sector, specially related to big construction projects —motorways, railways, harbours, airports, etc. Nowadays, the use of PPPs in Spain has widened its first scope and they are applied in both big and medium-sized projects of very different areas, such as:

- Hospitals and retirement houses for the elderly and chronic patients.
- Energy infrastructures.
- Waste Treatment Plants.
- Theatres and Opera houses.
- Parking spaces.

30.

Please briefly outline the legislation applying to PPP in your jurisdiction.

PPP regulation is basically contained in:

- Law 30/2007, dated 30 October, on Public Sector Contracts, which entered into force in May 2008.
- Royal Legislative Decree, dated 16 June, by which approval was granted to the Revised Text of the Public Administrations Contract Law. It has been mainly abrogated by Law 30/2007, but section regarding private financing of concessions on public works —the kind of public contract mainly used for PPP until now— are still in force.

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- Royal Decree 1098/2001, dated 12 October, which approves the General Regulations of the Public Administrations Contract Law.
- Some Autonomous Regions, such as Navarra and Catalonia, have passed their own legislation, which may complement —and in some cases substitute— National legislation.

31.

Please briefly outline the typical procurement/tender process in a PPP transaction.

Under Spanish law there are, basically, two tender processes for setting up a PPP, either through the awarding of a public works concession or either through a new special process called “competitive dialogue” (*diálogo competitivo*).

These are the main guidelines of the concession process:

- Preliminary actions: Prior to the decision to undertake public works under a concession regimen, the relevant body of the Administration granting the concession shall order a feasibility study of the same.
- Invitation to tender: The call must be published according to the relevant officially approved model of announcement and according to the regulations on publicity of public works contracts.
- Presentation of bids: The tenders presented by the bidders must cover the points required in an administrative specifications sheet.
- Award of the contract: the award of these concessions may be carried out by open or restricted procedure, always by tender, or by negotiated procedure.

As per the competitive dialogue process, the main stages are the following:

- Invitation to tender: The contracting entities will publish a call in which they will show their needs and requisites. After that, bidders will have to follow a selection procedure similar to the restricted procedure.
- The contracting entity will then initiate a dialogue with the selected candidates that will try to determine and define the best ways to satisfy its needs.
- The contracting entity will continue with the dialogue until it finds itself in a position to fully define, after having compared them, the solutions which best satisfy its needs. After closing the dialogue, it will invite the bidders to present their final offer, based on the solutions presented.

Construction dispute resolution

32.

Please briefly outline the most common dispute resolution methods used to resolve construction disputes in your jurisdiction.

Litigation is the most common dispute resolution method used to resolve construction disputes in Spain. Although most disputes are resolved before the courts, it is becoming more common to use alternative forms of dispute resolutions, in particular, arbitration.

33.

What are the most common alternative dispute resolution (ADR) methods used? Consider if relevant adjudication, dispute review boards and expert determination.

Arbitration is the most common ADR method used in Spain. Other ADR methods are very rarely used (although usually construction contracts provide for a panel before which conflicts arising during construction are filed).

34.

Which courts usually deal with construction disputes in your jurisdiction? Are there any specific construction courts or tribunals?

Construction disputes in Spain are heard by civil courts. There are no specific construction courts or tribunals for constructions disputes.

35.

Which organisations are usually used to arbitrate construction disputes in your jurisdiction (please include their website address)?

There are several organisations which arbitrate construction disputes in Spain. The most commonly used are:

- International Chamber of Commerce (ICC or in Spanish “CCI”) (www.iccspain.org).
- Regional chambers of commerce (you can find a list of each chamber at www.camaras.org).
- CIMA (“Corte Civil y Mercantil de Arbitraje” in Spanish or “Civil and Mercantile Court of Arbitration” in English) (www.cimaarbitraje.com).

Construction tax

36.

Please briefly outline the main tax issues that arise on construction projects in your jurisdiction. For example:

- **Value added tax (VAT)?**
- **Stamp duty/transfer tax (or equivalent)?**

The acquisition of urban land on which a project is to be developed is subject to VAT if the seller is a VAT taxpayer and to non recoverable Stamp Duty (at a rate varying from 1%-2%, depending on the Autonomous Community on which the real estate is located). Otherwise 7% non-recoverable Transfer Tax will be triggered.

Where the seller is a VAT taxpayer but the land does not constitute urban land for Spanish VAT purposes, the acquisition will be exempt from VAT and subject to 7% non-recoverable Transfer Tax. However, the VAT Act allows the taxpayers to waive this exemption if certain requirements are met. In this case, the transaction will be subject to VAT at a 16% rate, which will be charged from the seller to the purchaser and to non recoverable Stamp Duty (at a rate varying from 1%-2%, depending on the Autonomous Community on which the real estate is located).

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Spanish VAT is chargeable by the constructor to the owner of the construction at a 16% rate in connection with projects located within the Spanish territory.

For Spanish VAT purposes, a taxpayer will be established in Spain for VAT purposes if it has in Spain a fixed place of business or, specifically in connection with construction projects, if the construction works last at least twelve months. If the taxpayer is not deemed to be established in the Spanish VAT territory under the above rules, the owner of the project is obliged to self charge VAT.

Output VAT (i.e. VAT charged to clients) is deducted from input VAT (i.e. VAT charged by suppliers) in each return. If output VAT is greater than input VAT, the difference is paid to the authorities at the time of filing the VAT return (typically, on the first 20 days of the following month/quarter). If the balance is negative, the taxpayer will be allowed to deduct the excess input VAT in the returns to be filed within the following four years. On each January, the taxpayer may elect for the refund of the outstanding input VAT credit. As of January 2009, an optional new VAT monthly refund regime has been introduced.

Stamp Duty is triggered on Notarial deeds that meet the following requirements (a) they must be recordable in a Spanish public registry (e.g., Land registry or Mercantile registry); (b) the deed must include a transaction with economic value; and (c) the transaction documented in the relevant deed is not subject to Transfer Tax, Capital Duty or Inheritance Tax. Stamp Duty is generally triggered at a 1% rate (although it may vary depending on the Autonomous Community on which the real estate is located)

Typically, construction projects will require granting the following deeds (a) a declaration of new works -taxable at a 1% rate on the market value of the works-; and (b) the establishment of a condominium -taxable at a 1% rate on the market value of the land and the construction-.

The creation of mortgages on Spanish real estate is also subject to Stamp Duty at a 1% rate (varying on the Autonomous Community on which the real estate is situated) on the mortgage responsibility guaranteeing the loan. Deeds documenting transactions on mortgages may also trigger Stamp Duty.

Finally, construction projects are subject to Local Tax on Constructions at a rate of up to 4% on the cost of the construction. Local Tax on Constructions is accrued at the time the construction is authorized on an estimated basis, which will be reviewed at the time the construction is terminated.

37.

Are any methods commonly used to mitigate tax liability on construction projects? Are there any tax incentives to carry out construction regeneration projects?

Stamp Duty is triggered on Notarial deeds that meet the following requirements (a) they must be recordable in a Spanish public registry (e.g., Land registry or Mercantile registry); (b) the deed must include a transaction with economic value; and (c) the transaction documented in the relevant deed is not subject to Transfer Tax, Capital Duty or Inheritance Tax. Stamp Duty is generally triggered at a 1% rate (although it

may vary depending on the Autonomous Community on which the real estate is located)

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Cross-border issues

38.

Please outline any special considerations for foreign contractors operating in your jurisdiction. For example:

- **Special licensing or other requirements for foreign contractors.**
- **Legal or practical considerations that may restrict foreign contractors.**

There are no special requirements for foreign contractors operating in Spain with individuals (i.e., not with public authorities), or legal considerations that may restrict their business in Spain.

However, there are certain requirements that must be complied with when contracting with public authorities, as set out in Law 30/2007 of 30 October on Public Sector Contracts. The most important being the need to have an office in Spain, with designated powers of attorney or representatives for operations, and which is registered with the Commercial Registry. It is also important to consider that in these types of contracts there must be an affidavit declaring the submission of the contractor to the jurisdiction of the Spanish courts and tribunals. Finally, as regards companies from countries that have not signed the World Trade Organization Agreement for Public Contracting, a report accrediting their work capacity must be issued by the Permanent Spanish Diplomatic Mission or Spanish Consulate from where the company is based.

Reform

39.

Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

N/A

Main construction organisations

- **National Construction Confederation (*Confederación Nacional de la Construcción*)**

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It is an “association of associations” that acts as the main lobby that represents the sector. (www.cnc.es).

- **National association of construction companies** (*Asociación de empresas constructoras de ámbito nacional. SEOPAN*)

It is Spain’s biggest and most important construction organization and it is formed by the country’s most important construction companies.(www.seopan.es).

- **National association of public works contractors** (*Asociación nacional de contratistas de obra pública. ANCOP*)

This organization is perhaps the most important one regarding construction companies that often bid in public works auctions.(www.ancop.net).

- **National independent constructors association** (*Asociación nacional de constructores independientes. ANCI*)

An organization of medium size constructors that focuses mainly in public works bidders. (www.ancisa.com).