International Comparative Legal Guides

Construction & Engineering Law 2021

A practical cross-border insight into construction and engineering law

Eighth Edition

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Expert Analysis Chapter

Q&A Chapters

Portugal

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

A wide range of construction and engineering contracts are admissible and commonly used in Portugal, both in private and public sector construction contracts, including (among others) engineering, procurement and construction ("EPC") contracts as well as simpler contracts for construction of a project that may be presented by the employer. In private contracts, it is also common to see management contracting arrangements. EPC and turnkey agreements are usually favoured for large, complex infrastructure (both public and private). For landmark projects, public authorities and private real estate developers acting as employers usually favour separating the design/project contract from the actual construction.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is relatively common in Portugal, especially in complex projects or in projects that involve a combination of different construction and/or engineering capabilities.

The most common form of association is the consortium, in which two or more contractors agree to perform one or more contracts together without incorporating a new legal person for that purpose. There are different forms of consortium but usually employers require that contractors form external consortia in which all members assume joint and several liability towards the employer for completion of the works.

The complementary group of companies (*agrupamento complementar de empresas* – "ACE") is another form of association, usually for major projects requiring a longer performing period and in which a new legal person (the ACE) is incorporated by the contractors to assume the role of main contractor.

In public concessions, contractors are usually required to incorporate corporate special purpose vehicles ("SPVs") to act as concessionaires.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The use of international standard forms of construction contract – such as the International Federation of Consulting Engineers ("FIDIC"), Institute of Civil Engineers ("ICE") or New Engineering Contract ("NEC") – is not uncommon in Portugal, although it is not widespread. Such forms are rarely used in public sector construction contracts (which are subject to specific provisions under the Public Contracts Code – "PCC"). As such, standard forms are mostly left to private sector contracts. Usually, the application of these standard forms comes as a requirement from foreign investors or financing entities.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

There is no specific standard form for public works contracts in Portugal. The award procedure and performance of these public contracts are subject to the PCC, which sets out extensive and detailed provisions applicable to agreements entered into by public sector entities. Most such provisions are mandatory and cover matters that are usually addressed by standard contract forms, such as risk allocation, additional works, penalties for delays, bonds, liability for defects and the defects liability period, among others.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Pursuant to Portuguese law, agreements become legally binding when an offer is accepted by the other party. It is mandatory for construction contracts valued above €16,600 to be in written form, pursuant to Law no. 41/2015, of 3 June, which also sets that such agreements must mention: (i) full ID of the parties; (ii) contractor's permit issued by the supervising authority (*Instituto dos Mercados Públicos* – "IMPIC"); (iii) scope of the works; (iv) price; and (v) time schedule for completion. Failure to include such specific items causes the contract to be deemed null and void. However, because it is the contractor/subcontractor's obligation to include such details in the agreement, they are legally barred from claiming that a contract is null and void for not containing all the details above.

Additional specific requirements apply to construction contracts entered into with public entities, including mandatory references to (i) the awarding decision, (ii) the appointment of a contract manager, (iii) spending authorisation, (iv) any adjustments to the agreement draft accepted by the contractor, and (v) conditions under which the contract may be amended according to the tender specifications.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent are generally admissible under Portuguese law, although not expressly regulated. Pursuant to Portuguese law, parties are generally free to enter into any kind of agreement, other than those expressly prohibited by law. Therefore, a letter of intent shall be deemed binding/non-binding in view of its content.

In essence, it is up to the parties to decide whether they wish to execute a letter of intent and the extent to which they wish to be bound by the content of said document.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Employer's liability insurance is mandatory for contractors performing any kind of construction works. Such insurance must cover the risks of death/personal injury of construction workers. Even though it is not mandatory, it is common practice for employers to demand that the contractors take out contractors' all-risk insurance policies to cover risks arising from execution of the works.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

In terms of (a) labour, pursuant to Law no. 23/2007, of 4 July, all non-EU workers must hold visas/work permits in order to be allowed on construction sites. Employing construction workers that do not hold the necessary permits is an administrative offence and may lead to the application of fines as well as ancillary penalties (including prohibition from performing construction activities or loss of public funds awarded). In order to avoid being held joint and severally liable together with the contractor for the consequences of such infractions, the employer must obtain a declaration from the contractor attesting that all requirements for employing foreign workers are met.

As for (b) tax, we would highlight that, in general, construction contracts are subject to a reverse charge rule, under which value-added tax ("VAT") is to be assessed by the employer and not by the contractor.

With regard to (c) health and safety, Decree-Law no. 273/2003, of 29 October, rules that the employer must provide a health and safety plan prior to execution of the works, but that the contractor must further adapt such plan in view of the expected conditions in which the works shall be performed. Any developments/amendments to the plan must be approved by the employer. There are a significant number of technical regulations on health and safety on construction sites, with which the contractor is expected to comply.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

There is a legal regime concerning fire safety in buildings in effect (Decree-Law no. 220/2008, of 12 November), which applies to all kinds of buildings. All construction projects submitted to approval by the relevant authorities must comply with the standards set therein.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

It is legally admissible and common market practice for employers to retain a part of the contractual price (usually between 5% and 10%) as a performance bond to secure both (i) the completion of the works, and (ii) all of the contractor's obligations during the defects liability period. These retentions are often replaced by bank guarantees provided by the contractor (as outlined in question 1.11 below).

Given that certain construction works in Portugal are subject to a mandatory minimum five-year warranty period, during which the contractor is fully liable for any defects (hidden or apparent), a progressive release schedule until the end of such period is sometimes agreed. The full release usually takes place upon the final acceptance of the works (at the end of the warranty period). However, sometimes parties agree that the bond is to be fully released prior to the end of the warranty period (e.g., two years after provisional acceptance of the works).

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds are common in private construction contracts and mandatory in public contracts.

With regard to private contracts, parties are free to choose the type of performance bond. Employers usually ask for autonomous on-first-demand bank guarantees to be provided by one of the major banks operating in Portugal, in an amount corresponding to a given percentage of the price of the works (usually 5% to 10%). In recent years, parties have been showing an increased flexibility in setting complex pre-arranged schedules for gradually releasing the performance bonds.

Autonomous and on-first-demand bank guarantees constitute strong security in case of breach by the contractor. Depending on the contents and wording of the guarantee, the issuing bank is usually expected to pay the guaranteed amount upon request from the beneficiary without questioning if there was an actual

breach of contract by the contractor (and even if the latter is opposed to such payment being performed).

With regard to public contracts, a default 5% performance bond must be provided by the contractor in advance and upon award of the contract. Such bond may be provided in the form of either a bank guarantee, a deposit, assignment of titles issued/guaranteed by the Portuguese state or credit insurance. Failure to provide the mandatory bond causes the awarding decision to expire. Even though the default amount of the performance bond is 5% of the price, the awarding entity may decide to raise such amount to up to 10% of the price.

The only effective way to restrain enforcement of a performance bond is by obtaining a judicial interim injunction ordering the employer not to enforce such bond (or ordering the bank not to pay the guaranteed amount). Depending on the public or private nature of a specific contract, the civil or administrative court shall be competent to issue the injunction. Courts tend to follow a restrictive approach with regard to such injunction, and relief is usually only granted if the contractor is able to evidence that enforcement of the bank guarantee is either fraudulent or abusive.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Parent/affiliate company guarantees are generally admissible for private construction contracts, provided that they comply with the Commercial Company Law, which means that such guarantees must be admissible/justified in view of the corporate scope of the company that provides the guarantee.

On the other hand, company guarantees are not admissible in the context of public works contracts, pursuant to the PCC.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Portuguese law grants contractors the right to retain the works in case the employer fails to meet his payment obligations. This right applies to both private and public works contracts, but with different consequences.

By exercising the retention right in the context of private works contracts, the contractor shall be legally entitled to enforce the judicial sale of the asset and get preferential payment from the proceeds of such sale. This is not the case with public contracts, in which, by exercising the right to retain, the contractor shall be able to keep possession of the works until payment is performed but may not enforce the sale of such asset. In addition, the public contracting party may prevent the exercise of such right by claiming that the retention causes serious harm to the public interest.

The possibility of removing the goods and material from the construction site shall be limited to goods/materials owned by the contractor at such time.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Supervision of the works by a qualified professional (either an engineer or architect, depending on the nature of the works) is mandatory for most relevant private construction works in Portugal, including all those comprising demolition works or any works subject to mandatory licensing procedures, as well as for all public works contracts. Pursuant to Law no. 31/2009, of 3 July, the supervising entity shall act with "technical autonomy", but the law does not foresee any duty to act impartially. In practical terms, supervising entities tend to be more aligned with employers than with contractors.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

As a general rule, parties are free to agree the payment conditions, including "pay when paid" provisions, which are usually part of broader, commonly used back-to-back clauses.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are, in principle, free to set limits, or caps, on the amount of compensation that may be claimed in case of non-performance or defective performance of a contract. Fixed sums to be paid by the contractor as compensation to the employer are also generally admissible under Portuguese law (as a "penal clause"). When such penal clause is agreed, the beneficiary is usually prevented from claiming compensation for the exceeding damages, unless otherwise agreed. Compensation to be paid shall also not exceed the damage caused by breach of the main contractual obligation.

Although the law does not require that this pre-agreed compensation correspond to the actual damages, penal clauses may be reduced by courts under a fair assessment if such clauses are deemed excessive under the specific circumstances of the case.

Construction agreements in Portugal usually foresee penalties for delay (and other forms of non-performance), by setting a specific amount (usually a percentage or permillage of the contractual price) for each day of delay. This penalty mechanism is more common than liquidated damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

As a general principle, the contractor is expected to perform the works in accordance with the scope of the construction contract. However, the employer is entitled to vary the works, within certain limits. For private contracts, the Civil Code sets out that the employer may decide to vary the scope, provided that the cost of such modification does not exceed ⅕ (20%) of the contract price and that the nature of the works to be performed remains unaltered. In the case of additional works, the contractor shall be entitled to compensation for the additional work as well as an extension on the deadline to complete the works.

In public construction contracts, variations of the work are admissible, but limited to specific situations.

The employer is allowed to order additional works in the amount of up to 50% of the initial price without a new tender, provided that (i) it is not possible to hire a new contractor for technical reasons, or (ii) hiring a new contractor would cause a significant additional cost to the employer.

Variations shall also be admissible in public construction contracts (i) as a result of abnormal and unforeseeable events, or (ii) for public interest reasons. In such cases, the variation may not affect the initial nature of the agreement. Additionally, the variation shall not be admissible if it is perceived as a way to circumvent competition rules. Also, the cost of such variation shall not exceed 50% of the contract price.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The employer may decide to exclude certain works from the scope of the contract, within limits. For private contracts, the Civil Code stipulates that the employer may modify the scope of work provided that such modification does not exceed ⅕ (20%) of the contract price and that the nature of the works to be performed remains unaltered.

In public contracts, the employer is also entitled to exclude works from the scope of the contract. If, as a result of this modification, the value of the works actually performed by the contractor is reduced by 20% or more of the initial contractual price, the contractor is entitled to compensation corresponding to 10% of the difference. The contractor is also entitled to terminate the agreement if, considering the net result of variations (additional works and work suppressed), the price of the works was reduced by 20% or more.

The employer is not prevented by law from performing the excluded works himself or from procuring other entities to do so.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Parties are generally free to agree on the terms and conditions of construction contracts, provided that such terms and conditions do not conflict with mandatory legal provisions.

The obligation to act in good faith in the performance of a contract is a general obligation provided by law and applicable to all kinds of contract, whether or not such obligation was specifically foreseen in the agreement. The concept of fitness for purpose, on the other hand, may apply to certain types of contract (whether by agreement of the parties or under market practice) but is not a general requirement that may be implied into all contracts. Therefore, fitness for purpose is a concept that should, when possible, be included in the contract.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Concurrent events in construction contracts are not specifically ruled by Portuguese law. In general, it would be necessary to assess the specific contribution of the event which is not caused by the contractor, to determine whether or not the latter is entitled to an extension of time ("EOT") and compensation for additional costs. In the case that no impact can be specifically attributed to an event for which the contractor is not liable, the latter would, in principle, not be entitled to an EOT or to compensation.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The general statutory limit for contractual liability arising from any agreement, including construction contracts, is twenty years from the event that caused the damage.

However, certain claims are subject to shorter statutes of limitations. In particular, the right of the employer to claim against construction defects expires at the end of the warranty period (usually two or five years unless a longer period was agreed in the contract) and the employer shall be barred from submitting a claim for defects in the works if the contractor is not notified of such defects within one year of the date on which the employer identified the defects (in certain cases, defects need to be notified within thirty days).

In public contract agreements, contractor claims for financial rebalancing of the contract must be submitted within thirty days of the compensation event. There are also procedural time limits that need to be taken into consideration (for example, to challenge certain decisions by the employer, such as termination, application of penalties and others, the claim must be referred to court within three months of notification of such decision). On the other hand, claims for defects from the employer are also limited by the warranty period (which varies from two to ten years depending on the nature of the works).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Courts usually respect the express will of the parties and therefore uphold the time limits to bringing claims under a construction contract. However, such rules may be disregarded if they are found to be unreasonable or extremely burdensome to one of the parties.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

As a general principle, the risk of unforeseen ground conditions falls on the employer. Nevertheless, this risk may be assigned to the contractor in the construction agreement. Representations and warranties regarding ground and underground conditions are usual in private construction contracts, and the content of such clauses may affect the allocation of risk of events caused by such conditions.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Unless the parties agree otherwise in the construction contract, the risk of a change in law shall fall on the employer.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Unless otherwise agreed, intellectual property rights in relation to design and operation of the property shall be held by the author of the project. Intellectual property rights related to the design are usually addressed in contracts that include project design in their scope.

3.10 Is the contractor ever entitled to suspend works?

Causes for suspension by the contractor are usually addressed in the construction agreement. Legal grounds for suspension by the contractor include lack of safety to conduct the works and payment delay by the employer. In the case of public construction contracts, the contractor shall only be entitled to suspend the works in case of payment delays exceeding one month past the date on which the payment is due, and there is a requirement for prior notification and a remedial period in which the employer may still perform payment to prevent suspension.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

With regard to private construction contracts, parties are generally allowed to terminate the agreement in case of definitive breach by the counterparty. In such case, the non-breaching party shall issue a written notice to the other party informing it of the former's intention to terminate the agreement. Delays may be converted into definitive breach of contract by means of a written notice granting the defaulting party reasonable time to remedy the delay, after which the non-defaulting party shall be entitled to terminate the agreement.

For public construction contracts, the PCC provides a number of automatic causes for termination. The employer may terminate a public contract, among others, if: the contractor fails to comply with security, health and safety standards; there is a significant delay in starting the works; the contractor does not initiate additional works within fifteen days as of the employer's order in such regard; or the works are unlawfully suspended with negative consequences for the public interest. The contractor, in turn, shall be entitled to terminate the contract if: the works site is not made available within six months as of the date of execution of the agreement; the price of the agreement is reduced by more than 20% as a result of work being excluded; the works are suspended for certain periods of time (caused by the employer); or the employer's actions impacted the financial balance of the contract and the damages thereof exceed 20% of the contract price.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

For private construction contracts, the general rule is that the employer is entitled to terminate the contract at any time. In case of early termination by the employer, the contractor shall be entitled to compensation for both (i) expenses incurred, and (ii) loss of profit. Parties may (and usually do) regulate the consequences of early termination by the employer and each party's rights arising therefrom in the construction agreement.

In the context of public construction contracts, the employer may terminate the agreement at any time, on the grounds of either (i) public interest reasons, or (ii) breach by the contractor. In case of termination based on public interest reasons, the contractor shall be entitled to compensation for damages caused and loss of profit.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of *force majeure* is addressed in Portuguese law and has been detailed by academics and courts. Although parties are free to agree which events shall be deemed *force majeure* and the consequences thereof (and these clauses are very common in construction contracts), the common understanding is that it refers to natural or third-party events, not controlled by the parties, that prevent the latter (or one of them) from performing their tasks. In such cases, the affected party is usually released (normally just temporarily) from the obligations affected by the *force majeure* event and by the consequences of the delay (in particular, for the purpose of the application of penalties). Portuguese law also includes the concept of "frustration" (impossibility), applicable to situations in which, due to events not caused by the parties, their obligations become impossible to meet (temporarily or permanently; partially or totally). These concepts apply, in general, to both private and public construction contracts.

Under Portuguese law, a contract becoming uneconomic is not necessarily related to *force majeure* events and does not, *per se*, constitute grounds for suspension, compensation or termination. If such loss of financial balance is a result of abnormal and unforeseeable events, the contractor may be entitled to a rebalancing of the contract (which may or not involve financial compensation) if such event (i) exceeds the risks that are usual for the type of agreement in question, and (ii) causes a situation where it is unreasonable to demand that the contractor uphold its obligations as initially foreseen in the agreement.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The only legal statute that was specifically enacted to address the impact of the COVID-19 pandemic in public concession contracts (or other similar long-term public contracts) was Decree-Law no. 19-A/2020, of 30 April, which, among other purposes, was intended to limit the rights of concessionaires to claim compensation for reduction of traffic volume (or of other types of service) due to the pandemic, or the financial rebalancing of contracts. In these cases, compensation or rebalancing can only be carried out by extensions of the time for completion or extensions of the duration of the contract, hence preventing claims for financial compensation from the concessionaires.

In construction contracts not subject to that specific statute, the parties benefit from the general mechanisms provided by law/contract, such as *force majeure* and frustration (addressed above). As such, in certain circumstances, parties (in particular, contractors) may hold that the pandemic constitutes a *force majeure* or a frustration event that prevented the timely completion of certain obligations. Depending on the particulars of the case, these mechanisms may justify or entitle parties to suspension of the contract, temporary (or even permanent) relief of the contractual tasks affected by the pandemic and, in general, exoneration from the consequences of the non-performance of the contract (such as penalties or liquidated damages for delay).

The pandemic is not, in general, a cause for the financial rebalancing of public contracts. However, if certain requirements are met, the pandemic may constitute a cause for modification of the contract or for awarding financial compensation to the contractor based on abnormal and unforeseeable events. It should, however, be noted that the modification of public contracts and the payment of compensation for unforeseeable events are subject to strict limits and requirements.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Rights granted by law (as is the case of the owner's right to have defects remedied at the contractor's expense) are automatically assigned to subsequent owners of the property where the works were performed.

The employer shall be allowed to assign all other rights and obligations arising in the context of a construction contract, unless otherwise foreseen by the original parties.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

The use of such agreements or warranties is quite common for major infrastructure projects, which usually involve financing from multiple sources.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The general rule, pursuant to the Portuguese Civil Code, is that a party may set off any amounts owed to the other provided that both parties are creditor and debtor of the other, at such moment in time. The decision to set off is effective upon written notice.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Pursuant to Portuguese law, parties shall act diligently throughout all stages of any agreement. Such duty shall exist concurrently with any obligations and liabilities foreseen in a construction agreement.

In public contracts, the PCC provides that the employer shall use its authority to protect the contractor from third-party acts that may affect the good performance of the contract or the contractor's right to payment.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Contractual provisions shall be interpreted in the sense that most likely corresponds to the will of the parties. However, where such outcome conflicts with the rules of good faith, the latter shall prevail.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

In the context of private construction contracts, any terms that contradict mandatory provisions shall be deemed unlawful and, therefore, unenforceable (e.g. a provision setting a warranty period shorter than the minimum foreseen in law; certain cases of anticipated waiver of rights).

In public construction contracts, any provisions that conflict with rules set forth in the PCC shall be deemed unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The general principle under Portuguese law is that parties – including designers – are fully liable for all damages caused as a result of their performance. However, agreements that include a design project component usually cap the author's liability at a certain amount, usually equal to the fees received by the author of the project.

However, for public projects, the PCC provides that the designer's liability for errors or omissions of the project is up to three times the fees paid to the designer, except in case of wilful misconduct or gross negligence (in this case, no cap exists).

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

No. However, we would highlight that because contractual liability is subject to a general twenty-year statutory limit in Portugal, in theory, if a specific construction is deemed unfit for its purpose, the contractor may be held liable for certain damages caused throughout such period.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Traditionally, disputes in construction agreements were referred to judicial or administrative courts (depending on the nature of the contracts).

In recent years, arbitration has become the primary choice for dispute resolution in the most significant private contracts. For disputes pertaining to lower-price contracts, the usual preference is for these to be referred to judicial courts.

In the public sector, arbitration has been selected as the primary dispute resolution mechanism in the most significant projects, especially in public-private partnerships ("PPPs") involving financing from foreign banks. Amendments to several relevant laws (including the PCC and the Administrative Courts Procedure Code) have been enacted in recent years, with the purpose of facilitating public entities in general to refer their disputes over public contracts to arbitration.

In parallel, arbitration centres specialised in construction disputes have been created and are now available to both private and public operators.

Portuguese law also allows for the use of alternative dispute resolution mechanisms such as meditation or dispute boards. However, the use of these mechanisms is not widespread.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

There are no mandatory adjudication processes currently in effect in Portugal for disputes related to construction agreements. However, the PCC allows parties in public construction contracts to refer any disputes to arbitration or other dispute resolution mechanisms such as mediation or conciliation.

For private construction agreements, parties are free to follow whichever adjudication processes they see fit. Adjudication procedures are often used when parties agree on standard contract forms such as FIDIC or NEC4.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

It is common for private construction contracts to include arbitration clauses. The Law on Voluntary Arbitration ("LAV") sets the legal framework applicable to arbitration proceedings in Portugal.

Pursuant to the LAV, parties may refer their disputes to arbitral tribunals (i) within arbitration centres, or (ii) specifically created to adjudicate a specific dispute (*ad hoc*). The tribunal shall consist of one single arbitrator (not very common) or an odd number of arbitrators (usually three). Usually the claimant appoints an arbitrator in the notice for arbitration and the defendant appoints a second one within thirty days (failure to do so allows the claimant to obtain the appointment from state courts). Both appointees shall then choose the third arbitrator.

The procedure is subject to a number of basic principles (e.g., parties shall be treated equally and shall be heard prior to decisions being taken) and the arbitrators shall set the procedural rules, unless the parties have already agreed on such rules.

In general, the arbitral tribunal holds the authority to issue all decisions necessary for resolving the dispute. However, in certain situations, state courts may be requested to rule on very specific issues. Interim injunctions may be requested from arbitral tribunals but also from state courts.

Parties may waive their right to appeal against an arbitral sentence, but not their right to submit an annulment claim to the state courts (which may only be based on very specific grounds, e.g., violations of the basic principles of arbitration, or the decision exceeding the scope of arbitration or the claim).

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Portugal is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), and arbitral awards from countries that are part of said Convention shall be recognised and enforced in the terms therein.

Under the LAV, recognition and enforcement of arbitration awards issued outside Portugal shall only be denied by Portuguese courts under the following grounds (quite similar to those of the New York Convention): (i) incapacity of either party; (ii) invalidity of the convention of arbitration; (iii) the defendant was not given proper notice of the appointment of the arbitrator, or was not allowed to present its case; (iv) the award exceeds the scope of the arbitration convention; (v) the composition of the tribunal was not in accordance with the agreement or with the law of the seat of arbitration; (vi) the award is yet to become binding or has been suspended by a competent authority; (vii) the matter in question may not be referred to arbitration under Portuguese law; or (viii) recognition and enforcement of the arbitration would lead to a result that is not in accordance with public international order as regards the Portuguese state.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Depending on the private or public nature of the construction contract, possible disputes shall be referred to civil courts or administrative courts.

For disputes referred to civil courts, we would estimate that a decision by the court of first jurisdiction could be issued within eighteen to thirty-six months, depending on the complexity of the case. A decision by the court of appeal may require an additional twelve to eighteen months.

In case of disputes referred to administrative courts, it would be possible to estimate twenty-four to forty-eight months for a decision by the court of first jurisdiction, and an additional twenty-four months for a decision by the final court of appeal.

In both cases, additional appeals to the Supreme Courts (Judicial or Administrative) or to the Constitutional Court may be submitted in a limited number of situations.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

In order to be effective and enforceable in Portugal, awards by foreign courts must be reviewed and confirmed by Portuguese courts, which shall depend on the award meeting the following requirements: (i) being authentic and comprehensible; (ii) being final according to the law of the country of origin; (iii) having been issued by the competent authority of the country of origin; (iv) the ruling shall not refer to a matter reserved to Portuguese courts; (v) the dispute covered by the award is not currently pending decision by a Portuguese court; (vi) the defendant was properly informed of the claim that led to the award and the parties were heard throughout the proceedings and treated equally by the court; and (vii) recognition and enforcement of the arbitration would not lead to a result that is not in accordance with public international order as regards the Portuguese state.

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