Construction and projects in Spain overview

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A Q&A guide to construction and projects in Spain.

The Q&A is part of the global guide to construction and projects. Areas covered include trends and significant deals, the main parties, procurement arrangements, transaction structures and corporate vehicles, financing projects, security and contractual protections required by funders, standard forms of contract, risk allocation, exclusion of liability, caps and force majeure. Also covered are material delays and variations, appointing and paying contractors, subcontractors, licences and consents, project insurance, labour laws, health and safety, environmental issues, corrupt business practices and bribery, bankruptcy and insolvency, public private partnerships (PPPs), dispute resolution, tax, the main construction organisations, and proposals for reform.

Overview of the Construction and Projects Sector

1. What are the main trends in the local construction and projects market? What are the most significant deals?

Main Trends

The construction sector is very important in Spain. Historically, it has been one of the drivers of the Spanish economy.

Recent data shows signs of growth in the industrial construction sector. The construction sector grew by 6% in 2018 (*Association of Infrastructure Contractors and Concessionaires) (Asociación de Empresas Constructoras y Concesionarias de Infraestructuras)) (SEOPAN) Construction and Infrastructures report for 2018-2019*: *https://seopan.es/wp-content/uploads/2019/07/Informe-Estadístico-SEOPAN-2018_2019.pdf*,

The industry in 2019 remained at 2018 levels (EUR5.216 million), with the following features:

- PPA civil works represented a 7% growth, the first positive figure since 2014.

- Private residential construction represented a 72% growth.
- Domestic construction activity represented 11% of the Spanish construction companies' total construction activity.

(*Construction and Infrastructures report for 2019 to 2020: https://seopan.es/wp-content/uploads/2020/03/Rueda-con-Anexos.pdf*)

However, a downward trend was reported in public demand for infrastructure in business activity (decreasing from 64% in 2014 to 54% in 2020**:** *https://seopan.es/wp-content/uploads/2021/05/Visual-NO-PRINT-Seopan-Construccio%CC%81n-e-infraestructuras-20-21-V9.pdf*), as follows:

- PPA civil works suffered a drastic reduction in tendering (-26%) and procurement (-40%);
- Private residential construction increased by 37.3%;
- Non-residential construction suffered a stagnation of activity with production levels similar to those in 2019.

Continued growth in the construction industry is expected over the next few years, supported by road and rail infrastructure expansion, increased investor interest across Europe and improved export demand. Increasing numbers of tourists into Spain will also help. Construction in the rail sector is expected to increase under the Strategic Infrastructures and Transport Plan 2005-2020, which aims to encourage better business opportunities for Spanish companies abroad and to reinforce the technological, innovative and business image of Spain.

All sectors, including housing, non-residential construction and civil engineering, are expected to expand in volume.

Spanish construction and engineering companies are world leaders in the sector, participating in the most important worldwide projects. During the financial crisis, Spanish construction companies compensated for the loss of activity with increased international activity, with the largest Spanish construction companies currently carrying out more than two thirds of their activity outside Spain.

Major Projects

Investments in infrastructure amounted to EUR10,030 million in 2019, which represents an increase of 11.6% over the budgeted amount in 2018. Transport sectors such as railways and roads, accounted for almost 70% of the total investment.

Most of the major railways projects are in the construction of the Spanish high-speed rail corridors (*Alta Velocidad Española*) (AVE), which are actually in progress. Among others, the most relevant projects are the:

- Mediterranean corridor (which crosses Spain, France, Italy, Slovenia, Croatia and Hungary and is over 6,000 kilometres long).
- AVE to Galicia.
- Basque Y (Vitoria-Bilbao-San Sebastián), a high-speed route that will connect three Basque cities and extend to the French border. Part of this investment will also be used to undertake improvement works of the different neighbourhood centres, to modernise the network and the stations, and improve the conventional railway lines.

Other transport projects are the:

- Highway Olivar Úbeda (Jaén)-Estepa (Seville) (EUR680 million).
- Lines 2, 3 and 4 of the Seville underground (EUR3.339 million).
- Rail corridor of the Costa del Sol (EUR5,000 million). The railway line is a local line with potential for high speeds, which allows the future transformation of the Malaga-Marbella section, passing through the Malaga-Costa del Sol Airport.

Moreover, in 2020 the Government adopted the decision to invest almost EUR2,000 million to carry out the expansion of Barajas Airport (Madrid) and ease mobility, with two extensions of the underground line, in the region of Madrid. However, this project has been postponed to 2025 due to the impact of the COVID-19 pandemic in the air traffic sector.

Finally, as reflected in the SEOPAN report 2019-2020 (*https://seopan.es/wp-content/uploads/2020/03/Rueda-con-Anexos.pdf*), Spain is trying to implement a series of measures to guarantee compliance with the "Sustainable Development Goals" for 2030, which require the improvement of the infrastructure system and the necessary investment.

Procurement Arrangements

> 2. Which are the most common procurement arrangements if the main parties are local? Are these arrangements different if some or all of the main parties are international contractors or consultants?

The procurement arrangements adopted between local parties vary depending on the nature of the project and parties' bargaining power. Contracting parties can reach any agreements they wish, provided they are not contrary to the law, moral or public policy (*Articles 1255 and 1256, Civil Code*).

The legal framework for construction contracts in Spain is contained in the:

- **Civil Code.** This provides the general legal framework on formation, validity, interpretation, performance and execution of contracts, causes and mechanisms of termination and the liability regime applicable to construction contracts governed by private law.
- **Building Act (Law 38/1999).** The Building Act applies to building processes for both public and private buildings, including all new building works, extensions, modifications, repairs and rehabilitation, and to:
    - contracts between private parties;
    - contracts between entities subject to public procurement legislation act (notably developers), for any matters not covered under the laws on government contracts;

    - compulsory guarantees.

- **Public Sector Contracts Act.** The Public Sector Contracts Act 9/2017 of 8 November (PSCA 2017) implements EU Directives 2014/23/EU on the award of concession contracts and 2014/24/EU on public procurement into the Spanish legal system**.**

When Spanish companies are involved as contractors or consultants in international projects, they frequently use International Federation of Consulting Engineers (FIDIC) forms of contract.

The classification of the contracts subject to the PSCA 2017 depends on the entity that entered into the contracts, and traditionally a distinction has been made between administrative and private contracts. In this context, the main typical contracts in the Spanish public sector include:

- **Construction contracts.** Contracts whose object is:
    - to carry out works to construct a building;
    - the tasks listed in Annex I of the PSCA 2017; or
    - any works that meet the specific needs of the awarding entity.

- **Public works concession contracts.** Under this contract, the awarding entity grants an individual or legal entity (the concession holder) the right to construct and operate the works necessary to provide public services of an economic nature or to engage in activities or services of general interest. The concession holder's remuneration is the right to operate the constructed works or to receive the payment.
- **Service concession contracts.** Under a service concession contract, the public entity awards the management of a service within its own competence to an individual or legal entity (the concession holder), which receives, in consideration, the right to operate under the scope of the contract. In some cases, the concession holder's remuneration can also consist of the right to receive a payment. The PSCA 2017 has changed the previous category of public service management contract to a service concession contract. It is also necessary to distinguish between service concession contracts and service contracts, in the context of operational risk. In the latter, the public entity bears the operational risk, while in service concession contracts the risk is transferred to the contractor.

The PSCA 2017 allows public entities to directly award public works concession contracts and service concession contracts to mixed (public-private) capital companies (*sociedades de economía mixta*) provided that the:

- Selection of the private partner is in accordance with the public procurement rules set out in the Act.
- Object and conditions taken into consideration to select the private partner are not modified. To be awarded other types of concession contracts, the mixed capital company must take part in the tender procedure corresponding to the relevant category of public contract.

The PSCA 2017 has also removed the category of public-private collaboration contract (*see Question 30 and Question 31*), although it retains public works concession contracts and service concession contracts for mixed capital companies, as mentioned above.

Transaction Structures

3. What transaction structures and corporate vehicles are most commonly used in both local and international projects?

Local Projects

In Spain, it is very common to structure the investment in construction projects through special purpose vehicles (SPVs). SPVs are companies with a legal personality separate from that of the sponsor(s), which are set up with the sole purpose of acquiring and exploiting the project and owning the assets of it.

The advantages of SPVs for construction projects are that:

- Since the SPV, theoretically, will not carry out any other activity, it is a ring-fenced company and the insolvency risk is substantially decreased and linked to a specific project only.
- SPVs are attractive for investors in construction projects since:
    - the investors can deconsolidate the investment and the debt is not included in its financial statements; and
    - the SPV's creditors only have recourse, if the project fails, to the SPV's assets, limiting sponsors' potential liability.
- Financing construction projects through an SPV is highly efficient under a project finance structure (when the relevant project is able to generate sufficient cashflows to secure both the repayment of debt in relation to the project and the profitability of the SPV sponsors' equity).
- The mechanism also provides more flexibility if a new sponsor decides to contribute to the project, though a direct investment in the SPV, and enables more agile and efficient disinvestment structures, since these will only require the sale of the SPV instead of its assets (from a taxation perspective).

Finance

4. How are projects financed? How do arrangements differ for major international projects?

Financing of construction projects' in Spain can be public, private or mixed.

Private financing of construction projects consists of a combination of equity and debt, which is measured by the leverage ratio. The leverage of a project is determined on a case-by-case basis (depending on the nature of the project and on the risk and certainty of the revenues, among other factors). Typically, equity (share capital and subordinated debt) usually represents around 25% to 40% of the project's required investment, while debt represents about the remaining 60% to 75%.

Financial creditors usually do not have recourse (or, such recourse is limited) to the project's promoters (the SPV's shareholders), since the construction project, customarily carried out under a project finance structure, is presumed to be self-sufficient in that its cashflows should suffice to cancel in full and at any time the indebtedness incurred in relation with the construction project.

Documents

Financing documents usually comprise the following:

- Bilateral or syndicated facility agreement (or, where applicable, a bonds issuance prospectus).
- VAT facility agreement if relevant VAT amounts accrued.
- Hedging agreement (to mitigate the risk of fluctuation of the variable interest rate agreed under the financing agreement).
- Intercreditor agreement (to co-ordinate the carrying out of acts and the adoption of decisions by creditors when a plurality of them exist).
- Sponsor support agreement (when creditors have recourse (limited) to the project's promoter(s)).
- In rem guarantees agreement (such as pledges or mortgages). Normally, there is no pledge or chattel mortgage over the SPV's assets due to the relevant stamp-duty tax involved. Lenders usually request a promissory security in certain scenarios.
- Direct agreements (to regulate the step-in rights and notifications between constructors and operators with the lenders).

International

The arrangements for the private financing of construction projects do not differ for international projects. Therefore, major international private construction projects have a similar structure. However, since they involve the participation of a higher number of foreign financial entities, they are usually based on facility agreements subject to English law, which are drafted in accordance with the standards of the Loan Market Association. However, a facility agreement subject to foreign law will prevent direct enforcement in Spain of the security package, since the Spanish courts will need to recognise a foreign resolution regarding the breach of the secured agreement, and certain figures typically present in a facility agreement subject to foreign law (security trustee, process agent and so on) are not recognised under Spanish law.

Public Concessions

As public concessions are considered to constitute business assets, they could be subject to transactions within the mercantile traffic and, consequently, can be assigned and mortgaged as security for financing of construction projects. Public concessions are characterised as follows:

- They are based on public works, usually those concerning real estate assets of public interest that permit their economic exploitation.
- Concessionaires assume construction, maintenance and operation risks.
- The economic balance of the concession should be reset when the terms of the concession contract vary as a consequence of certain events restricted by law taking place.
- Concessionaires must be compensated in case of termination of the concession agreement by the administration (administration's patrimonial liability).

Type of Contract

It is not customary for lenders under a project finance scheme in Spain to require a particular form of construction contract. They tend to allow the project company to negotiate the contract with the head contractor according to their usual models and parameters. However, they will later carefully review the contracts to ensure the relevant construction risks are properly addressed and, to the extent possible, covered by the head contractor (either directly or through third-party guarantees or performance bonds). If the lenders consider the construction contract does not cover such risks sufficiently, further recourse to the sponsors during the construction phase of the project can be requested to compensate for those risks.

Security and Contractual Protections

5. What forms of security and contractual protections do funders typically require to protect their investments?

Security

Funders typically resort to the following forms of security:

- Pledges over bank accounts and shares.
- Mortgages over buildings.
- Personal security in the form of guarantees.

Specifically, a well-known feature of construction contracts in Spain is the use of on-demand bonds. These are forms of security the contractor gives the owner under which a guarantor must pay a certain amount to the owner in specific circumstances. On-demand bonds are usually independent of the contract. However, some Supreme Court judgments have concluded that, in practice, there is a reversal of the burden of proof (*Supreme Court judgments of 5 July 2002 and 29 April 2002*). Following these decisions, the guarantor would be authorised to prove that there was no breach of contract and that the owner does not have an entitlement in principle, or that the owner has an entitlement in principle, but not for the amount of the call. Additionally, according to the Supreme Court, the guarantor can challenge the call in cases of abuse or fraud (*Supreme Court judgment of 1 October 2007*). Also, as with any other contract, the bond can be challenged for invalidity.

Contractual

Funders also typically require step-in rights to allow the funder to have the project completed by a third party in case of breach of obligations by the contractor or under exceptional circumstances.

Standard forms of contracts

6. What standard forms of contracts are used for both local and international projects? Which organisations publish them?

Local Projects

There are no local standard forms of contract for the construction industry. Large and medium-sized companies tend to have their own form or model contract, which they try to use in their dealings with other contracting parties. The party that provides its form of contract differs depending on the circumstances. Typically, in private contracts between:

- Developer and head contractor, the developer selects the contract.
- Head contractor and subcontractor, the head contractor selects the contract.
- Equipment supplier and purchaser (the purchaser may be the developer, the head contractor or the subcontractor), the supplier selects the contract.
- Designer (in design and/or consultant services, where the designer may be an architect or engineer) and developer or head contractor, either party can select the contract.

When one of the contracting parties is a public entity, the contract is generally selected and provided by the public entity. Moreover, when the public entity is a Public Administration the contract will be governed by the PSCA 2017.

International Projects

Spanish companies involved in international projects often use FIDIC forms of contract (*see Question 2*).

Contractual Issues

Contractors' Risks

7. What risks are typically allocated to the contractor? How are these risks offset or managed?

The contractor typically bears the design and construction risks, as it is best placed to take these risks and mitigate them. These include the ground condition risk and the risk for design errors and omissions. The contractor also typically warrants that whatever they have been contractually engaged to design, build or supply, is fit for the developer's intended purpose once completed (fitness for purpose warranty).

A performance security is also often issued by the contractor as a means of ensuring the developer against the risk of the contractor failing to fulfil its contractual obligations. Performance securities are often set at 10% or 15% of the contract price.

In performing its obligations under the contract, the contractor also generally bears the obligation to comply with the applicable law and consequently assumes the change in law risk. However, construction contracts sometimes provide for how to deal with the effects of any changes in law. The effect and content of these clauses will vary from contract to contract.

At completion of the works, the contractor transfers the risk of any damage to the works to the developer. Up until completion, therefore, the contractor bears the risk for destruction of the works.

If the constructor was contractually bound to deliver the materials, they bear the loss if construction works are destroyed before being completed, unless there has been delay in receiving the materials (*Article 1589, Civil Code*).

The handover of completed projects must happen within 30 days of the date the works director and the director of the execution of the works issue a certificate of completion (*certificado de final de obra*). The works are deemed to be received if the developer does not state any reservations or give reasons for refusing to receive the works, in writing, within that 30-day term (*Article 6, Building Act*).

There is usually a provisional handover, even if there are some outstanding minor defects (punch list) that the contractor agrees to fix within the guarantee period, which is normally one year. When the guarantee period has elapsed, there is a final handover. Construction contracts usually include conditions precedent that must be fulfilled before the handover can take place.

For legal purposes, the initial handover is recorded in handover minutes (*acta de recepción*) to be signed by both the owner/promoter and the contractor. Liability and guarantee periods established in the Building Act start on the date the handover document is signed or on the date of the deemed handover.

The Building Act (*Article 17*) establishes specific time periods during which a claim for property damages to the building can be brought by owners and third-party buyers against the agents involved in the building process, depending on the type of defect affecting the building. Without prejudice to their contractual liability and to liability arising under other laws (such as the Consumers Act), agents involved in the building process are bound by the following mandatory legal liability periods:

- Agents are liable for any structural damage caused to the building (within ten years from acceptance of the works), due to problems with design or workmanship affecting the foundation, supports, beams, framework, load-bearing walls or other structural elements which directly jeopardise the building's mechanical resistance and stability.
- Agents are liable for any damage caused to the building (within three years from acceptance of the works) by problems with design or workmanship in the construction elements or services, where such damage results in the building failing to meet habitability requirements.
- The contractor could be held liable for damages due to defects in construction affecting elements of the finish works, for one year.

The above actions can be brought within two years from the occurrence of the damage (provided that the damage occurs within the ten, three and one-year time periods referred to in Article 17).

Excluding Liability

8. How can liability be excluded or restricted under local law?

Contracting parties can reach any agreements they wish, provided they are not contrary to the law, moral or public policy (*Articles 1255 and 1256, Civil Code*). Therefore, contracting parties are entitled under Spanish law to exclude or restrict their liability.

However, the voluntary exclusion of applicable law and the waiver of rights are valid only when they neither contravene public policy nor prejudice third parties (*Article 6.2, Civil Code*). The application of public policy or mandatory provisions cannot be excluded by agreement of the parties; specifically, the parties are not entitled to exclude liability arising from fraud, wilful misconduct or gross negligence.

Caps on Liability

9. Do the parties usually agree a cap on liability? If yes, how is this usually fixed? What liabilities, if any, are typically not capped?

Contractors usually request a cap on liability. This is often accompanied with a request to exclude any liability for the profits that the creditor failed to obtain or might otherwise have obtained (*Article 1106, Civil Code*).

Although the parties usually agree a cap on liability, the existence and scope of the limitation of liability will depend on the specific circumstances of each case.

Liquidated damages clauses are presumed to be an exhaustive remedy for all the owner's losses that can arise from the breach of contract or from the breach of the specific obligation for which liquidated damages were agreed.

In contracts with a liquidated damages clause, the damages agreed will cover the damage and interest, in the case of failure to perform, unless otherwise agreed. The debtor cannot avoid performing the obligation by paying liquidated damages, unless this right has been expressly reserved. Additionally, the creditor cannot demand both performance of the obligation and payment of liquidated damages, unless this right has been clearly granted (*Articles 1152 and 1153, Civil Code*).

The application of these liquidated damages clauses is construed restrictively under Spanish law and the courts can limit or mitigate the amount if there was not a complete breach, but a defective performance by the debtor (*Article 1154, Civil Code*).

Force Majeure

10. Are force majeure exclusions available and enforceable?

Spanish law recognises the concept of force majeure, under which no person is liable for non-foreseeable events or, if foreseeable, inevitable (*Article 1105, Civil Code*).

The event must be unforeseeable or inevitable for the person invoking its lack of liability. The express or implied allocation of risk under the contract is essential to determine whether an event would qualify as unforeseeable or inevitable.

Under the freedom of contract principle, the parties are free to regulate force majeure contractually, and the force majeure exclusions are enforceable. In the light of this, some construction contracts include force majeure clauses specifying the events that would fall into this category, as well as the effects they will have on the contract.

Material Delays and Variations

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

Many construction contracts include a specific liquidated damages clause for delay, usually for a certain amount per day of delay. Under this type of clause, the contractor will be liable to pay a predetermined daily or weekly amount as compensation for late completion. Unless otherwise agreed by the parties, these penalties replace claims for losses (both actual and potential loss) or damages.

Therefore, the parties sometimes explicitly agree that the liquidated damages clause for delay does not replace other claims for losses or damage. Additionally, according to the Supreme Court, the amounts agreed in a liquidated damages clause for works not completed by a specified date cannot be limited or mitigated by the courts (among others, *Supreme Court judgment of 4 December 2013*).

12. What contractual provisions are typically negotiated to cover variations to the works?

Parties are free to modify the terms of the contract, including the scope of the works. Construction contracts normally contain specific provisions on the grounds for the modifications of the scope of the works, and their consequences under the contract.

Public Sector Contracts

The PSCA 2017 introduced several reforms including to the contracts modification system (*Articles 203 to 207*), which are more restrictive than the ones provided for in the Directives (*Article 72, Directive 2014/24/EU* and *Article 43, Directive 2014/23/EU*).

While the possibility to modify contracts throughout their term is not limited under those Directives, the PSCA 2017 states that modifications will only be carried out if the assessed premises mentioned in Article 203 are complied with.

In general terms, the modification of public sector contracts is a power of the Public Administration (*ius variandi*), which is mandatory for the contractor within certain limits.

Other Negotiated Provisions

13. What other contractual provisions are usually heavily negotiated by the parties?

The most heavily negotiated provisions by the parties are the following:

- Scope of the works.
- Contract price, payment and retention of amounts to guarantee the quality of the works.
- Performance security.
- Time for completion.
- Liquidated damages for late completion.
- Handover of the works.
- Ground condition risk.
- Change in law risk.
- Extent of design liability.
- Fitness for purpose warranties.
- Variations to the scope of the works and extensions of the time for completion.
- Grounds for the suspension of the works by the employer and the contractor.
- Grounds for termination of the contract.
- Grounds for force majeure.
- Limitations of liability.

Rights of Third Parties under Contracts

14. Does a third party who has or acquires an interest in the project, such as a funder, have any rights against those responsible for designing and constructing the works? Can a third party enforce the terms of a contract to which it is not a party?

A third party who has or acquires an interest in the project, such as a funder, can only have rights against those responsible for designing and constructing the works if this has been specifically agreed in the contract. Under Spanish Law, a third party cannot enforce the terms of a contract to which it is not a party.

Architects, Engineers and Construction Professionals

15. How are construction professionals usually selected? Following selection, how are they formally appointed?

There is no formal selection and appointment procedure for construction professionals in the private sector. The selection and appointment of these professionals is left to the developer's discretion.

The Building Act identifies and regulates the responsibilities of agents involved in the building process as follows:

- **Developer (*promotor*).** The developer drives the project and procures the work.
- **Designer (*proyectista*).** The developer hires the designer to design the building, conforming to all applicable technical urban development requirements.
- **Builder (*constructor*).** The builder or contractor enters into a contractual agreement with the developer, under which the builder agrees to use its own human and material resources, or those of third parties, to carry out the works.
- **Technical supervisors (*directores facultativos*).** The qualified professionals (or professional services entity) responsible for the supervision and direction of the works. This will include the works director (*director de obra*) and the director of the execution of the works (*director de ejecución de obra*). If a company is hired for technical supervision functions under the Building Act, that company must appoint the qualified professional(s) who will carry this out. The firm can be held jointly and severally liable along with the qualified professional(s) specifically appointed.
- **Works director (*director de obra*).** The works director directs the development of the works in all technical, aesthetic, urban planning and environmental aspects, according to the project, the building licence and other compulsory authorisations, and under the contractual conditions.
- **Director of the execution of the works (*director de ejecución de obra*).** This person is responsible for technical supervision as well as the quality and quantity control of the execution works. Director of the execution of the works and director of the works may be the same person.
- **Product suppliers (*suministradores de productos*).** They must comply with specifications in purchase orders, be responsible for origin, identity and quality of products and provide instructions for the use and maintenance of products supplied along with quality guarantees to be included in the documentation of the completed works.
- **Construction quality control entities and laboratories (*entidades y laboratorios de control de calidad*).** These entities assess the quality of the project, the materials and the execution of the works to check whether they conform to the project documents and the applicable regulations.

The following agents can also participate in the building process:

- **Project manager.** This role is not regulated specifically in the legislation, therefore its obligations, responsibilities and liability exposure are linked to the specific functions defined in the contract and those performed.
- **Subcontractor (*subcontratista*).** Act 32/2006 of 18 October, on subcontracting in the construction sector (Act 32/2006), regulates subcontractors.
- **Health and safety co-ordinator (*coordinador de seguridad y salud*).** Royal Decree 1627/1997, of 24 October 24 which implements Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites (Construction Site Health and Safety Directive) regulates the health and safety coordinator role at the development and the implementation stage of a project. In both cases, the goal is to protect workers.

16. What provisions of construction professionals' appointments are most heavily negotiated? Are liabilities commonly limited or capped in construction professionals' appointments?

Negotiated Provisions

The following provisions concerning construction professionals' appointments are the most heavily negotiated:

- Contract price.
- Method of payment.
- Milestones and time for completion.
- Liquidated damages for delay.
- Limitations of liability.

Liability

Liabilities of construction professionals are frequently limited. See *Question 9*.

Payment for Construction work

17. What are the usual methods of payment for construction work? Are there ways for the contractor and consultants to secure payment or mitigate risks of non-payment under local law?

Methods of Payment

There are three main approaches to setting the contract price for a construction contract in Spain. Each of these determines a type of contract:

- **Lump sum (*Article 1593, Civil Code*).** This entails a total fixed price for all construction materials and related activities.
- **Unit price (*Article 1592, Civil Code*).** The contract price is determined by measuring each item of work and applying the appropriate rate or price for the item.
- **Cost of the works plus a fee.** The price is determined at the end as a result of adding up the actual costs, purchases or other expenses generated directly from the construction activity (mainly material and labour cost) plus a fee for the contractor usually calculated as a percentage of the costs of the works (this fee covers the *contractor's overhead*s and profit).

In addition to the above, the parties can agree to other mechanisms to determine the contract price and/or use different pricing mechanisms for different sections of the works.

Payments under a construction contract are usually governed by parties' autonomy, however, some limitations apply, on the time for payment, as provided in Act 3/2004 of 29 December on combatting late payment in commercial transactions) (Act 3/2004). In standard practice, the technical supervisor issues a monthly provisional certificate of partially completed works, including the works completed up to the date of issuing the certificate, which authorises the contractor's application for interim payment of the sums set out in the certificate.

Designers' and technical supervisors' fees are usually calculated in accordance with the corresponding professional society guidelines (Society of Architects or Society of Engineers). Payments are normally made on delivery of the documentation or on a periodical basis.

Between private companies, payment must be made no later than 30 days (Including both working and non-working days) of receipt of the goods or services, unless otherwise agreed by the parties. However, if payments are later than 60 days, the debtor will have to pay interest as provided in Act 3/2004 (*Article 7*)

Securing Payment

Normally, payments to the contractor are reduced by between 5% and 10% as a way of guaranteeing the quality of the works. The retained amount is aggregated and released to the contractor when the one-year guarantee period for finishing works defects has elapsed. The 5% to 10% retention is one of the two forms of security provided by the contractor to the developer under Article 19.1(a) of the Building Act, as an alternative to the insurance policy for material damages.

The parties can agree to additional forms of security (for example, a completion guarantee) for any contractual penalties that can be imposed on the contractor for delay or breach of contract.

Subcontractors

18. How do the parties typically manage their relationships with subcontractors?

Under Act 32/2006, subcontractors must:

- Have the equipment and resources needed to carry out the works.
- Assume the risks involved in carrying out their commercial activity.
- Be registered in the subcontracting book, which must be available at the construction site.
- Be registered with the Registry of Accredited Companies kept by the corresponding regional administrative entity.

In "lump sum" construction projects (*see Question 17, Methods of payment*) subcontractors can claim:

- Against the developer and/or any contractor in the subcontracting chain (even if no contractual relationship exists between the claimant subcontractor and the defendant).
- For any debt owed to the subcontractor as a result of carrying out the works.
- Up to the amount owed by any defendant higher in the subcontracting chain, including the developer to the contractor with whom the defendant is in privity of contract
- Without prejudice of whether or not the Building Act applies

The provision can, however, be waived by express and unambiguous language included in the construction contract or any subsequent contracts entered into with the subcontractors.

Licensing

19. What licences and other consents must contractors and construction professionals have to carry out local construction work? Are there any specific licensing requirements for international contractors and construction professionals?

No licences or consents are needed for construction professionals (engineers, contractors, and so on) to operate or to carry out building works, except for the legal requirements regarding professional qualification, authorisation or membership of the relevant professional association (*Colegio Profesional*), if applicable.

20. What licences and other consents must a project obtain?

There are four main licences required in Spain to carry out construction works and operate the resulting building. These are granted by local authorities:

- **Municipal works licence (*Licencia de Obras*).** The purpose of this licence is to verify that the projected works comply with the applicable urban planning regulations. It is required for any type of construction, including the refurbishment or fitting-out of existing buildings, and for demolition of works. To obtain the municipal works licence it is necessary to submit details of the proposed works signed by an architect who is licensed by the relevant professional association. The grant of any municipal works licence involves the payment of the relevant taxes and, in some cases, the provision of an appropriate guarantee, generally given by a bank, to ensure that the authorised building works are carried out.
- **Municipal activity licence (*Licencia de instalación de actividades*).** The purpose of this licence is to confirm that the project complies with the health and safety standards laid down in the urban planning regulations. The permitted use for the building and the activities to be carried out there will depend on the uses permitted in the applicable urban planning regulations. If the activity is classified as disruptive, unhealthy, harmful or dangerous, the municipal activity licence will lay down some requirements that must be fulfilled by the holder of the licence. To verify that it complies with all relevant requirements, a municipal opening licence is required.

  It is always advisable to obtain the activity licence at the same time as the works licence, since the latter does not itself authorise a specific use to be carried out in the building.
- **Municipal first occupancy licence (*Licencia de Primera Ocupación*).** This licence confirms that the construction has been built in accordance with the technical specifications contained in the relevant municipal works licence. It is usually granted following an inspection of the building by the relevant local authority's technical experts.
- **Municipal opening licence (*Licencia de Funcionamiento*).** This licence confirms that the technical specifications laid down in the municipal activity licence have been properly complied with and, as a result, that the building can be used for the purpose described in that licence.

Projects Insurance

21. What types of insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Compulsory Insurance

Currently, the only mandatory insurance is a decennial insurance policy (for a ten-year period) providing cover against structural defects to be obtained in respect of residential property by the owner/developer after the completion of the work. The minimum insured capital will be 100% of the final cost of the works, including professional fees.

Non-Compulsory Insurance

There are also non-compulsory types of insurance, such as triennial insurance, which covers damages caused by defects in the parts of the building affecting construction elements or services that result in non-compliance with the habitability requirements. The Building Act requires an insured capital of 30% of the final cost of the works (including professional fees).

Also, if no retainage of the construction contract price is applied (*see Question 17, Securing payment*), the contractor must have in place insurance to cover liabilities arising out of the one-year guarantee for defects affecting elements of the finished works.

Additionally, during the construction process, it is common for general contractors to take out:

- All-risks insurance to cover any damage produced in the workplace during the execution of the work (such as fire, flood and so on).
- Civil liability insurance policy in relation to the works.

Finally, designers and technical supervisors and consultants (architects, project managers, technical assistance entities) generally take out professional liability insurance policies.

Employment laws

22. What are the main requirements for hiring local and foreign workers?

Local Workers

Local workers must be registered with the Spanish social security system and both the employer and the employee must pay social security contributions.

Moreover, it is not mandatory to sign an employment contract in Spain (exception made of certain types of employment relationships) although it is highly recommended, as it regulates and clarifies all the terms and conditions applicable to the employment relationship.

Employment agreements in Spain can be entered into either on a permanent or fixed-term basis. However, a permanent employment contract is generally signed as there must be valid business-related reasons to justify the signature of a fixed-term contract.

Foreign Workers

Foreign workers, except for employees from the EU, require a business visa and a work permit to render services legally in Spain.

The initial permit lasts for one year and is limited to a specific geographical area and activity. The employee must also apply for a business visa and must be registered with the social security system.

Certain requirements must be met for the work permit to be granted, such as:

- Non-resident in Spain.
- Absence of criminal record.
- Signature of an employment contract.
- National employment situation (*situación nacional de empleo*): except for certain specific situations, to hire foreign employees, employers must prove that the specific position to be covered cannot be performed by a Spanish resident.

23. Which employment laws are relevant to projects?

The employment contract regulates relevant terms and conditions of an employment relationship in Spain, such as job position, remuneration, working time and holiday entitlement. However, both employment legislation and collective bargaining agreements are a significant and mandatory source of employment law in Spain. In this regard, collective bargaining agreements are applicable to all employment relationships (except for top managerial positions) and depend on the companies' specific industry or activity.

In the construction industry, the main sources of employment law are the:

- Spanish Constitution.
- Workers' Statute Act (*Estatuto de los Trabajadores*).
- Collective Bargaining Agreement for the Construction Sector (*Convenio Colectivo Sector Construcción*).

- Employment contract.

24. Must an employer pay statutory redundancy or other payments at the end of a project? Are all employees eligible?

Employees' entitlement on termination depends on the nature of the employment relationship (that is, a permanent or fixed-term contract) and the type of termination (such as dismissal, termination based on business-related grounds or termination of project).

Nature of the employment. Fixed-term contracts entered into to carry out a specific task or service (*contrato temporal por obra o servicio determinado*) can be signed for the employee to be assigned to a specific project. On termination of the project, employees will be entitled to a severance entitlement of 12 days of salary per year of service. If the reasons justifying the temporary nature of the contract are not justified, the contract will be considered permanent and general termination entitlement rules will apply.

Permanent employment can be terminated by the company for:

- Disciplinary dismissal, based on a serious breach of the employees' obligations: this does not involve any redundancy entitlement at the time of termination.
- Termination based on business-related reasons: this type of termination of employment can be carried out if there are economic, technical, organisational or productive reasons to make the employee redundant. As well as certain formalities such as delivery of a termination letter and 15 days' notice, statutory severance equal to 20 days of salary per year of service (capped at 12 months' pay) must be paid to the employee.

If the reasons are not sufficient to justify termination of the contract as set out above, a court can order the company to pay the employee a severance payment of 45 days of salary per year of service (before and including 12 February 2012), to a maximum of 42 monthly payments, and 33 days of salary per each year of service after 12 February 2012, with a limit of 24 monthly payments.

Health and Safety

25. Which health and safety laws apply to projects?

The most relevant regulations dealing with health and safety issues within the construction industry are the:

- Royal Decree 1627/1997 of 24 October (minimum health and safety requirements applicable to construction works) establishes, among others, the obligations to:
    - appoint a co-ordinator on health and safety issues;
    - draft reports on health and safety issues and prepare a risk and prevention plan;
    - keep at the site an incident book, aimed at checking compliance with the health and safety plan.

- Act 31/1995 of 8 November, on the Prevention of Risks at Work establishes that companies must:
    - have a risk prevention, risk evaluation and an emergency plan;
    - run periodical medical checks on their employees;
    - provide them with information and training on health and safety issues.

- Royal Decree 171/2004 of 30 January, sets out specific obligations aimed at co-ordinating the health and safety activities that must be complied with by companies who share a workplace. These obligations are also applicable to companies working at the same construction site.
- Act 32/2006 of 16 October (regulating outsourcing (subcontracting) in the construction Industry) sets further obligations for contractors and subcontractors aimed at improving health and safety of employees.

While Royal Decree 1267/1997 and Act 32/2006 apply only while the construction is being undertaken, the obligations under Act 31/1995 and Royal Decree 171/2004 must be complied with after the construction is completed.

The above regulations state that the protection of the workforce from accidents in the course of their work requires actions from the employer that exceed the mere formal compliance with a predetermined series of duties and obligations and in particular the simple correction, after the event, of hazardous situations that have become apparent. As a consequence, employers have a wide range of obligations concerning the prevention of labour hazards of their employees involving planning, evaluation, training or drawing up emergency measures.

In addition, the planning of the prevention activity must be carried out through an externalised service (external prevention service) in those companies with less than 500 employees, and so the prevention activity must be organised within a specialised health and safety services provider company.

Also, the breach of health and safety obligations can lead to severe fines (from EUR40 to EUR819,780, depending on the seriousness of the breach) in addition to administrative, civil or criminal penalties for both companies and managers.

Environmental Issues

26. Which local laws regulate projects' effects on the environment?

Air

Legislation on air quality, in particular the Air Quality and Protection of the Atmosphere Act 34/2007, controls emissions of environmentally harmful gases, smoke and other airborne pollutants.

Water

Water quality is protected by legislation governing pollution, surface water, groundwater and discharge to sewers, including the:

- Act 41/2010 of 29 December, on the protection of the marine environment (recently amended in September 2018).
- Consolidated Act on Water, enacted by Royal Legislative Decree 1/2001 of 20 July.

Waste

A wide range of duty of care legislation controls the generation, transportation and disposal of waste aimed at ensuring that the waste is handled and disposed of safely.

Environmental Impact Assessments (EIAs)

Act 21/2013, on environmental assessment, regulates the procedure for the analysis and correction of the effects of a construction project that is likely to have a significant effect on the environment by its nature, size or location. Such projects may require an environmental impact assessment before planning permission is granted.

Sustainable Development

In recognition of the need for sustainable development, minimum energy requirements for new and refurbished buildings are contained in the Spanish Technical Construction Code and the Energy Efficiency Act.

Many regulations to encourage sustainable development have been developed and supplemented at a regional level.

27. Do new buildings need to meet carbon emissions or climate change targets?

Policies and strategies are usually designed by central government, although regions can independently draft and implement local plans and strategies according to their specific needs. The overarching strategy is the Spanish

strategy for climate change and clean energy (*Estrategia Española de Cambio Climático y Energia Limpia* (EECCEL)), which has been in force since 2007. The EECCEL defines the basic guidelines for a medium to long-term approach (2001-2020) including a range of measures that involve a direct or indirect reduction of greenhouse gases and their effects.

The National Climate Change Adaptation Plan 2021-2030 (*Plan Nacional de Adaptación al Cambio Climático 2021-2030 (PNAAC)*) has been implemented by the Ministry for Ecological Transition and the Demographic Challenge (*Ministerio para la Transición Ecológica y el Reto Demográfico*). The PNAAC defines objectives, criteria, areas of work and lines of action to promote adaptation to climate change.

Spain aims to become a green country, mainly through the 2011 Sustainable Economy Act. The Act encompasses a wide range of initiatives and measures for a sustainable economy, including energy efficiency in the construction sector.

Prohibiting Corrupt Practices

28. Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Rules

General rules prohibiting corrupt business practices and bribery including in the project sector are contained in Organic Law 10/1995 of the Spanish Criminal Code (last amended by Organic Law 1/2015 that entered into force on 1 July 2015). These include the following prohibitions:

- Bribery and corruption of an authority, civil servant or person in the exercise of its/their public duties (*Articles 419-427bis*).
- Influence exercised over an authority, civil servant or person in the exercise of its/their public duties (*Articles 428-430*).
- Private corruption, which was introduced into the Criminal Code by Organic Law 5/2010 due to requirements under EU law. This covers the above type of conduct when committed between private operators (*Article 286bis*).

Alongside the above, other rules related to corruption in urban planning and land planning practices, were reformed by Organic Law 5/2010 (*Articles 319 and 320*). This applies to situations where promoters/developers, constructors or technical directors carry out unauthorised development, construction or edification works on undeveloped land, among others.

Penalties

The Criminal Code sets out penalties for parties violating the above rules, including:

- Bribery of an authority, civil servant or public officials: imprisonment of up to six years, a fine of up to 24 months and special disqualification from exercising certain public functions and the right of passive vote (to be elected).
- Exerting influence over an authority, civil servant or person who participates in public duties: imprisonment for up to two years, a fine of twice the amount of the benefit sought or obtained and special disqualification for the exercise of public charge or the right of passive vote (to be elected) for five to nine years.
- Private corruption: imprisonment of up to four years, special disqualification for the exercise of industry or commerce for up to six years and a fine of up to three times the value of the benefit or advantage.
- Urban planning and land planning practices: imprisonment of up to four years, a fine of up to 24 months, and special disqualification for the exercise of profession or trade for one to four years.

Bankruptcy or Insolvency

29. What rights do the various parties involved in the project have on the contractor's bankruptcy or insolvency?

A contractor's insolvency can have varying impacts on the stakeholders involved (clients, funders, contractors, consultants) depending on whether it is aimed at fulfilling all the obligations under existing contracts, and considering the specific interests that each party may have at the moment the insolvency is declared.

Therefore, each situation must be assessed individually, considering the interests that each of the parties involved may have when the insolvency occurs.

However, in general the effects that insolvency proceedings have on the credits held against the debtor as well as on the ongoing contracts can be set out.

The declaration of insolvency has the following effects on the creditors:

- Credits will be ranked in the following order: privileged (special or general privileged, depending on whether the security is created over a specific asset or over all the debtor's assets), ordinary and subordinated. Privileged credits are given preferential treatment over ordinary credits, which in turn have preference over subordinated credits.
- Creditors holding joint additional guarantees granted by third parties (joint obligors and guarantors of the debtor), maintain their right to claim against the guarantor, which means that they may claim 100% of their credit from the guarantor. However, if a composition agreement is reached and the guaranteed creditor votes in favour of the agreement, it will only be entitled to claim against the guarantor in the terms stated in that composition agreement, unless the guarantee expressly provides otherwise.

- Actions involving the attachment of the debtor's assets required for the continuity of its professional or business activity, including mortgages and pledges, are suspended or cannot be executed until approval of the composition agreement or until one year has elapsed from the date of declaration of insolvency (unless liquidation has already begun).

The declaration of the insolvency has the following effects on ongoing contracts:

- All clauses that entitle any party to terminate an agreement based solely on the other party's declaration of insolvency are deemed void (*Article 156, Insolvency Act*). Therefore, a declaration of insolvency does not affect agreements with reciprocal obligations pending performance by either the insolvent or the other party. However, under Articles 165 *et seq*, the insolvency administrator (together with the insolvent debtor or by themselves if the insolvent debtor is not allowed to run its business) can request the court to terminate the contract (on the grounds of convenience in the insolvency proceedings).
- Despite the above, in a material breach of agreements with reciprocal obligations pending performance by either the insolvent or the other party, the non-defaulting party can request the court to terminate the contract (*Articles 160 et seq, Insolvency Act*). Although, if the creditor is the one requesting the termination, on the grounds of convenience, the court can still disregard the breach and force the parties to perform the contract for the remainder of its term regardless of whether the breach occurred before or after the declaration of insolvency. If the non-defaulting creditor requesting termination is forced to continue performing the contract, all the credits it can hold will automatically be considered as credits against the estate (*créditos contra la masa*), which are not subject to ranking or acknowledgement and, in principle, must be paid by the insolvency administrator when they fall due.

Finally, we provide a very brief and broad overview of insolvency proceedings in Spain:

- These proceedings are only triggered in case of a debtor's insolvency. The Spanish Insolvency Act states that a debtor is insolvent when it is regularly unable to meet its obligations as they become due. Usually, insolvency proceedings can be initiated either by the debtor (voluntary insolvency) or by any of its creditors (mandatory insolvency).
- In a voluntary insolvency, the debtor must request declaration of insolvency within two months from when it becomes aware or should have become aware of its insolvency, unless it gives the notice under Article 583 of the Insolvency Act within that two-month term. Article 583 allows an extension of another four months if the debtor notifies the appropriate court that it is negotiating a refinancing agreement or an advance composition agreement. If this negotiation is unsuccessful, the debtor must immediately request declaration of insolvency.
- If the insolvency proceeding is finally declared (regardless of whether it is voluntary or mandatory), the procedure will consist of a common phase (to determine the assets and liabilities) that may be followed by a composition phase, a liquidation phase or both.
- Currently, under the exceptional regulation related to the COVID-19 crisis, the duty to file for insolvency has been stayed until (at least) 31 December 2021. This does not mean an insolvent debtor cannot voluntarily file for insolvency, but that debtor would not be obliged to file on time and will not be punished for late filing. Mandatory insolvency petitions have also been stayed until the end of this year.
- When insolvency has been declared, any acts carried out by the debtor within the preceding two years that have been detrimental to the insolvency estate can be rescinded, even in the absence of any fraudulent intent (*Article 226, Insolvency Act*). Such acts must meet the following two requirements:

- time: only acts carried out by the debtor within the two years before the insolvency is declared can be rescinded; and
- quality: the acts must be detrimental to the insolvency estate. Therefore, the rescissory action must be based on the objective concept of detriment to the insolvency estate, ruling out any subjective connotation.

Public Private Partnerships

30. Are public private partnerships (PPPs) common in local construction projects? If so, which sectors commonly use PPPs?

Although Public-Private partnerships contracts (PPPs) were used in Spain for several years, the PSCA 2017 (*see Question 2*) has recently repealed them, basically, on the grounds of the under-utilisation of this model in practice

However, Law 9/2017 provides for an alternative type of public contract, that is, a concession contract which is a combination of a public works contract and a public service contract.

Semi-public corporations (*Sociedades de economía mixta*) can be awarded concession contracts in the terms established by the 22nd additional provision of Law 9/2017.

31. What local laws apply to PPPs?

See *Question 31* and *Question 32*.

32. What is the typical procurement or tender process in a PPP transaction? Does the government or another body publish standard forms of PPP project agreements and related contracts?

Typical Procurement or Tender Process

Although the PSCA 2017 repealed PPP contracts (*see Question 29 and Question 30*), it provides for a tender procedure for public works and public service concession contracts.

In addition, some laws also include sector-specific rules for public works and public service concession contracts, such as the:

- Water sector law (Royal Legislative Decree 1/2001 of 20 July).
- General ports law (Royal Legislative Decree 2/2011 of 5 September)
- Royal Decree-Law 3/2020 on public procurement in certain sectors such as water, electricity, ports and airports, gas, and postal services.

The typical procurement or tender process is the open procedure, which allows any interested party to submit a tender to the bidding process. Generally, an advert will be placed giving notice that the contract is being tendered, offering an equal opportunity to any organisation to submit a tender.

However, in some specific cases, contracting authorities can choose other types of procedure, such as a negotiated procedure, restricted procedure or competitive dialogue.

Standard Frms of PPP pProject Agreements/Related Contracts

The PSCA 2017 created the National Evaluation Bureau on public contracts (*Oficina Nacional de Evaluación*), a new administrative body with some powers and competences in relation to public concession contracts. The Bureau is required to evaluate any concession contract (works and services) to confirm its financial sustainability, and in case of an economic rebalance of the concession (*reequilibrio económico de la concession*) it must issue a report considering the appropriate measures to be implemented.

There are two other consultant administrative bodies in relation to public procurement matters (the Advisory Board of Government Procurement (*Junta Consultiva de Contratación del Estado*) and the Independent Office of Regulation and Supervision of Contracts (*Oficina Independiente de Regulación y Supervisión de la Contratación*)) which provide recommendations, guidelines for contracting and other type of relevant documents (including standard clauses for different types of contracts, including concession contracts).

Dispute Resolution

33. Is your jurisdiction subject to any specific laws on how construction disputes are resolved?

The legal substantive framework for construction contracts in Spain is contained in the Civil Code, the Building Act (Law 38/1999) and the Public Sector Contracts Act (*see Question 2*). However, the Spanish jurisdiction is not subject to any specific laws on how construction disputes are resolved. Construction disputes arising in Spain are resolved through informal negotiation or through ordinary court or arbitration proceedings (*see Question 34*).

34. Which are the most common formal dispute resolution methods used? Which courts and arbitration organisations deal with construction disputes?

Formal Dispute Resolution Methods

Construction disputes arising in Spain are resolved through informal negotiation or through court or arbitration proceedings.

For disputes submitted to courts for resolution, there is a civil jurisdiction and a contentious administrative jurisdiction. The civil courts generally have the power to hear construction disputes between private parties (whether individuals or legal entities), unless the dispute is subject to a different jurisdiction.

Arbitration is also widely used in Spain to resolve construction disputes. Given the existence of a solid regulatory framework favourable to the development of arbitration, there has been a considerable increase in the number of construction disputes submitted to arbitral tribunals. The basis of this consolidation of arbitration is the Arbitration Act of 2003 (Act 60/2003 of 23 December), which is based on the UNCITRAL Model Law. With regard to the conduct of proceedings, the Arbitration Act is based on the principles of party autonomy, due process, contradiction, and equality of the parties. Regarding enforcement, awards rendered in Spain have the same force as court judgments and foreign arbitral awards can be enforced in Spain under the 1958 New York Convention.

It is therefore very common for construction contracts in Spain to include arbitration agreements, and construction disputes, particularly those involving large amounts, are regularly resolved through arbitration.

Courts and Arbitration Organisations

There are no specific courts or arbitration organisations dealing with construction disputes.

35. What are the most commonly used alternative dispute resolution (ADR) methods?

Alternative dispute resolution methods such as mediation, expert determination and/or adjudication and mediation, are seldom used in projects taking place in Spain.

Construction industry players have historically barely considered mediation as a feasible method to settle their disputes. However, Act 5/2012 of 6 July on Mediation in Civil and Commercial Matters was recently enacted and public bodies are increasingly supporting mediation. However, it remains unclear whether the construction industry will follow this trend.

Similarly, while there is no specific regulation of adjudication for construction disputes in Spain, parties can agree to resort to a third party (adjudicator or an expert) to make determinations, render opinions, resolve disputes and/or facilitate carrying out the parties' wishes. (following principles contemplated in the Civil Code, that is, approval of works, determination of the price and determination of the distribution among the shareholders of the results of the company).

Under Spanish law, adjudicators' decisions are not directly enforceable, but can be enforced as contractual obligations and arbitrators will generally respect the expert's findings. Therefore, on non-observance of the adjudicator's decision by the defeated party, the winning party would have to start legal proceedings and request an order for specific performance, apart from damages, or resort to arbitration, which is usually the path to follow as a last option.

Although these ADR methods have rarely been used in Spain, Spanish firms do resort to them in international contracts, particularly when they are mandatory (for example, dispute adjudication boards (DABs) in projects financed by the World Bank, the European Bank for Reconstruction and Development and/or other multilateral agencies).

Tax

36. What are the main tax issues arising on projects?

The taxation of construction projects is highly regulated under Spanish law. The main taxes issues arising on projects are the following:

- **Construction, installation and works tax (*Impuesto sobre Construcciones, Instalaciones y Obras*).** This municipal tax must be paid on any construction, installation or work within the municipality for which a corresponding building or urban planning licence is required, whether or not the licence has been obtained.

  The municipalities have the power to regulate certain aspects of the construction, installation and works tax, such as tax rate and allowances. Consequently, the calculation of the tax liability may vary in each municipality.

  The taxable base is determined by the real cost of the construction, excluding VAT and other similar taxes. The maximum tax rate provided in Royal Legislative Decree 2/2004 is 4%.

  A provisional liquidation must be made based on the budget of the project at the time the licence is granted or, if not granted, when the construction begins. Once the construction, installation or work is completed, the city council calculates the definitive tax liability according to the real cost of the construction.

- **Increase in value of urban land tax (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana*).** The transfer of an urban real estate is subject to this municipal tax. The taxable event is the increase of value of the urban land during the holding period. The increase of value is calculated

by applying a specific percentage, which varies depending on the number of years of tenancy, over the cadastral value of the land.

The municipalities have the power to regulate certain aspects of this tax, such as the tax rate and any applicable allowances. Consequently, the calculation of the tax liability can vary in each municipality.

The taxable base is the increase of value, the taxpayer is the seller (except in case of a non-lucrative transfer, where the taxpayer is the acquirer) and the maximum tax rate is 30%, although given that the municipalities determine the tax rate, it normally varies between 20% and 30%.

- **Value added tax (*Impuesto sobre el Valor Añadido*).** The VAT Act provides a reversal charge mechanism for urbanisation works and construction or renovation of buildings, where the execution contract is drawn up between the owner of the construction and the main contractor (*Article 84, VAT Act*).

  Additionally, the VAT Act provides different tax rates depending on whether the object of the work meets certain requirements (*Article 90 and 91, VAT Act*):

  - reduced 10% VAT rate applies for construction and renovation works of buildings for housing;
  - general 21% VAT rate applies on all other construction projects.

  Moreover, the first transfer (after construction and development) of real estate is subject to VAT at:

  - reduced 10% VAT rate for housing;
  - general 21% VAT rate applies on all other real estate.

- **Transfer tax and stamp duty (*Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados)*.** Formalisation of deed of declaration of new works and horizontal division is subject to stamp duty (*Actos Jurídicos Documentados*), being the taxable base of the value declared. The tax rate approved by the Transfer Tax and Stamp Duty Law is 0.5%. This rate is likely to be modified by each autonomous region, which in practice varies from 0.5% to 2.5%. There is no taxation to Transfer Tax when formalising a deed of declaration of new works and horizontal division. It is only subject to Stamp Duty Tax (which is one of the modalities of the Transfer Tax and Stamp Duty Tax).
- **Corporate income tax (*Impuesto sobre Sociedades*).** Real estate developers are subject to corporate income tax, at a rate of 25%.

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

Mitigating tax

The methods commonly used to mitigate tax liability on projects are the following:

- **Analysis of the risk of a double taxation.** In international construction projects, it is essential to identify the potential states that can levy tax to minimise, to the extent legally possible, the taxes charged.
- **Transfer pricing.** If several companies or subsidiaries of an international group are involved, the transfer pricing policy of the group must be examined carefully to avoid a tax audit.

Tax Incentives

The most relevant tax incentives to carry out regeneration projects provided in Spanish legislation are the:

- **Construction, installation and works tax.** Some municipalities provide tax allowances, under certain requirements, when the works are declared of special interest or municipal utility.
- **Property tax (*Impuesto sobre Bienes Inmuebles*).** Some municipalities provide tax allowances for new construction projects and integral rehabilitation works or real estate in which systems for the thermal or electrical use of solar energy have been installed.
- **Corporate income tax.** The Corporate Income Tax Special Regime for Real Estate Investment Trusts (*Régimen Fiscal Especial de SOCIMI*) allows corporations to be taxed, for the purposes of corporate income tax (CIT), at a 0% tax rate, when:
    - 80% of the value of their asset is invested in urban real estate allocated for renting, plots devoted to promotion activity and in shares in the capital of other SOCIMIs;
    - 80% of the income of the period, excluding certain incomes, must come from the lease of real estate and dividends from the holding of the other SOCIMIs;
    - There is an obligation of distribution of benefits;
    - There is an obligation to quote;
    - The company is a limited liability company (*sociedad anónima*).

All these requirements must be fulfilled cumulatively for the zero rate to apply.

Additionally, for shareholders taxed under Spanish CIT, any dividends and capital gains derived from the transfer of the shares in entities applying the Special Tax Regime for SOCIMIs will not benefit from the participation exemption provided in Article 21 of the CIT Law, so such dividends and capital gains will be subject to CIT at a rate of 25%.

Other Requirements for International Contractors

38. Are there any specific requirements that international contractors or construction professionals must comply with?

There are no specific requirements that international contractors must comply with.

Developments and Reform

39. Are there any significant developments or proposals for reform that may have an impact on construction projects in the future?

The Public Sector Contracts Act has recently been reformed by the PSCA 2017 (see *Question 1*, *Question 2* and *Question 12*). This Act was published on 9 November 2017 in the State Gazette (*Boletín Oficial del Estado*) No. 272 (*www.boe.es*). It includes several new provisions regarding the categorisation of types of contracts, in-house procurement and special procurement appeals, among others.

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- *La batalla de las sedes, Anuario de Arbitraje 2018, Thomson Reuters*
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Professional associations/memberships. Counsel for the State on leave of absence and was head of the State Legal Services in the Basque Country and in Cantabria; Deputy General Directorate for Consulting of the Government Bureau for State Legal Services; Member of Santander's Port Authority board of directors, has been on the municipal boards of Santander's Water and Urban Transport departments.

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Languages. Spanish, English

Professional associations/memberships. Member of the Chartered Institute of Arbitrators (2007) and the Madrid Bar (2000).

Publications. Regularly writer articles on Comparative Contract Law and *Lex Mercatoria*.

- *Remedios frente al incumplimiento contractual: Derecho español, Derecho inglés y Draft Common Frame of Reference (Remedies for breach of Contract: English Law, Spanish Law and the Draft Common Frame of Reference), Aranzadi, 2016.*
- *Alternative Dispute Resolution (ADR) in construction - country guides (Alfonso Iglesia, Miguel Ángel Malo and Mónica Lasquíbar), IBA International Construction Projects Committee, www.ibanet.org, 2014.*
- *Lex Mercatoria Revisited, The European and Middle Eastern Arbitration Review (Antonio Hierro and Miguel Ángel Malo), Global Arbitration Review, 2009.*
- *Pluralidad de deudores y acreedores en los Principios de Derecho Contractual Europeo (Plurality of Debtors and Creditors in the Principles of European Contract Law), Revista Crítica de Derecho Inmobiliario, nº 713, 2009.*
- *Requisitos de validez del contrato en el Derecho Uniforme (Requirements for the validity of contracts under Uniform Laws), Revista Crítica de Derecho Inmobiliario, Año nº 84, nº 708, 2008, pp. 1741-1782.*
- *Los vicios de la voluntad en los Principios de Derecho Contractual Europeo (Vices of consent in the Principles of European Contract Law), Revista Crítica de Derecho Inmobiliario, nº 689, 2005.*

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