Mexico

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have 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.)

Mexico has not developed its own general standard types of construction contracts (model contracts). Nevertheless, some projects have used international forms such as FIDIC, AIA (USA) and CONSENSUSDOCS (USA).

On the contrary, in Mexico companies develop their own construction and engineering contracts, according to the applicable law of the place where the works are to be performed and according to the nature of the contract (public or private).

Regular types of construction contracts include Lump Sum, Unit Prices, Mixed (Lump Sum and Unit Prices), and in recent times, due to the participation of foreign companies in the market, more Construction Management contracts (at-risk or pure) have seen the light of day.

According to Mexican legislation, parties can agree on any matter that they decide as long as they do not violate public order/public interest rules.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

To create a legally binding contract in Mexico it is important to comply with all the requirements established in the law for contracts in general. Nevertheless, there could be specific rules such as the following:

For the lump-sum contract in the private sector the contract must be in a written form, with a description of the work and the amount or design of the work when applicable. The contract can include clauses that parties consider appropriate for the characteristics of the work, without affecting the essence of the contract.

For contracts in the public sector, a public procurement process must be followed in order to formalise a public works contract. This type of contract must include all the requirements established in article 46 of the Law of Public Works and Related services (LPWRS), as the name of the government authority, the applied public procurement procedure, the information of the bidder, the characteristics of the work to be done, the amount and forms of payment (which are also established in the law). The bidder must know the model contract at the time of the bid.

1.3 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.

The equivalent to a letter of intent in Mexico is the so-called "Preliminary Contract" foreseen in the Civil Code which contemplates that parties or the party are obliged to celebrate a future contract. For this contract to be legally binding it must be in a written form.

This preliminary contract can only have as its object the future celebration of a contract made in the terms and conditions agreed by the parties.

1.4 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?

Yes, there is statutory insurance for the contractor in respect of its employees under the Law of Social Security. In addition, depending on the object of the contract the parties can establish as clauses of the contract, the insurance that they consider necessary in respect of the object of the contract such as general liability, auto, environmental, etc.

For public contracts the public works contract usually obliges the contractor to provide insurance on certain matters, in order to cover contingencies during the execution of the contract.

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

Regarding public contracts:

(a) General requirements: for this type of contract the LPWSR establishes a list of requirements that the contract must contemplate and comply with in order to be the one for the award.

(b) Labour: the Labour Law establishes that all companies shall comply with the terms of the Labour Law, including sub-contractors, outsourcing companies, etc.

(c) Tax: according to the tax laws both parties shall comply with their own obligations.

(d) Health and safety: this requirement is only for the contractor in terms of article 67 LPWRS.

Regarding private contracts: the parties can agree the general terms and conditions for the contract, taking care not to violate the public interest rules and requirements such as the following:

(a) General requirements: for example, the lump-sum contract is required to be in written form, with a description of the work and the amount or design of the work where applicable.

(b) Labour: it is important to distinguish if the status of those working on site is as employees of the employer or employees of the self-employed contractor. For the first assumption the employer must comply with the obligations that the Federal Labour Law requires. In the case of self-employed contractors, the labour relationship will be between the contractor and the employees, so the contractor must be the one who complies with the obligations of the Federal Labour Law (articles 10, 13, 15 FLL).

(c) Tax: in this matter the taxes will be paid under the Tax Code. Each of the parties shall comply with its own obligations.

(d) Health and safety: in terms of article 15-C of the Federal Labour Law the employer is obliged to review that the contractor complies with the applicable measures for safety, health and the environment.

1.6 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 is complete?

For public contracts the LPWRS establishes in its article 46BIS the possibility for the employer to hold a retention in two phases: (a) during the performance of the works (as a performance guarantee); and/or (b) that of defects liability. This retention is a general requirement mentioned in section X of article 46 of the same law.

For private contracts the parties are entitled to agree on this and make it a clause of the contract, however, in the case that the parties never agreed on the possibility of a retention from the employer, the Civil Code contemplates the payment of liquidated damages from the contractor to the employer instead of a retention (article 2104 Civil Code).

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

Performance bonds (*fianzas*) are the most common mechanisms for guaranteeing obligations under a contract in Mexico.

Regarding public works contracts, the LPWRS, in its articles 46 *BIS* and 48, establishes the requirement for performance bonds, which must be provided in order to sign the contract. The amount and other requirements are decided by the authority, but usually the percentage is not higher than 10 per cent.

With regard to private contracts, for there to be performance bonds, they are subject to the condition that they absolutely must have been agreed to by the parties.

1.8 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?

It is not common practice to include these provisions in construction contracts. Nevertheless, article 2644 of the Civil Code mentions that when the contractors have not been paid they can retain the work that has been constructed, but it never mentions the right to retain the title or to remove goods. The only case for this to be possible is if the parties expressly agree and establish it as a clause of the contract.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be suspended on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

It is not common for the third party to take this decision. Usually the engineer or architect may provide elements for the employer to decide the suspension but unless there is an express authority from the third party (again, this is not usual), the suspension shall come from the employer directly.

2.2 Are employers entitled 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?

This is possible in private contracts given the freedom the parties have to establish the clauses of the contract, when the parties agree on this term and condition. This can be inferred from article 1839 of the Civil Code, being that "pay when paid" is a form of payment and not an essential element of the contract.

2.3 Are the parties permitted 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 suffered?

Liquidated damages (*penas convencionales*) are the most commonly used way to sanction breaches of contract under Mexican law. The parties can agree in advance a certain sum which will be paid in the event of particular breaches, or in the cases agreed by the parties. These kinds of clause have some restrictions, for example that the amount established in them cannot be greater than the amount of the obligation that was breached.

3 Common Issues on Construction Contracts

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

For public contracts, article 59 of the LPWRS entitles the employer to vary the works to be done. However, there are some limits on this right: the responsibility of this change is for the employer, and the decision must be founded and explicit, showing also how this change will modify the payments and how it is going to be paid; this change can neither exceed 25 per cent of the total amount or time of the contract, nor modify substantially the original project. It is important to consider that if the changes exceed the mentioned percentage but do not vary the object of the contract, the parties can agree on this and sign the Change Order document, which will be considered part of the contract.

In this type of contract those signed as lump-sum contracts cannot be modified when the total amount or the time are affected.

With regard to private contracts, under a lump-sum contract it can be assumed by the articles 2623 and 2627 of the Civil Code that the employer is entitled to vary the works. In this type of contract it is important that the parties agree on the terms and conditions of this Change Order, due to all the changes that may be involved (in terms of payment and time).

When there is a Change Order it is important to comply not only with the clauses of the contracts or the will of the parties, but also with other laws and regulatory laws (i.e. Construction Regulatory Law).

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

If there is an omission, the employer can do it himself or get a third party to do it at the expense of the contractor, in accordance with article 2027 of the Civil Code. This article applies to private contracts, and to public contracts due to article 13 of the LPWRS which establishes that the Civil Code is supplementary.

3.3 Are there terms which will/can be implied into a construction contract?

In the case of public works contracts, the LPWRS provisions will apply automatically and even in the case that there is an omission on the contract related to a matter established in the LPWRS, the latter will apply.

In the case of private contracts, parties may choose a specific piece of legislation to apply to the contract. Therefore the Civil Code of the respective state, and/or the Commercial Code, shall apply.

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

Article 46 *BIS* of the LPWRS mentions that if the delay is caused by the contractor the conventional damages established in the contract will apply, with the limitation that there is no possibility for the conventional damages to be greater than the total amount of the contract; so there will not be an extension of time unless the parties agree to one.

If the delay is caused by the fault of the employer the contractor is entitled to receive: (i) the costs occasioned by that concurrent delay; and (ii) an extension of the final deadline by the same number of days that the delay lasted, in accordance with article 52 of the LPWRS.

In the case that there are two events that generate the delay, the affected party can allege concurrent delay. Nevertheless, this has to be proved, notwithstanding that the law is not expressly clear on this.

For private contracts, the Civil Code does not establish a hypothesis regarding the extension of time caused either by the contractor or by the employer; however in the case of the costs occasioned, article 1840 mentions that the parties can agree on a clause for liquidated damages in case one of them does not comply with its obligations which, in this hypothesis, may result in a delay.

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

There is no specific provision or case law regarding this matter, but in principle the contractor would not be entitled to an extension of time, since that float is a way to "cover" the risks and providing an extension would mean a double benefit for the contractor.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

The general period of the statute of limitations under Mexican Law is 10 years. Nevertheless, this period can be modified or changed in an agreement by the parties.

As an additional note, article 66 of the LPWRS establishes the limit for the employer to bring a claim within 12 months after the day to completion of the works and acceptance of the employer; the claims may only be in the cases of latent defects and for any other responsibility that the contractor may have incurred in terms of the contract.

3.7 Who normally bears the risk of unforeseen ground conditions?

For private contracts, article 2618 of the Civil Code establishes that every risk that may occur before the completion of the work will be

at the contractor's expense, unless otherwise agreed by the parties.

The LPWRS does not contemplate this hypothesis but it may be contemplated in the contract and if it is not, the Civil Code is considered as complementary (article 13 LPWRS).

Notwithstanding the aforementioned, it is important to understand the kind of construction (floor-level or underground), in order to define who bears that risk.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

In public contracts the party who bears the risk of a change in law is the contractor, due to his obligation in complying with the applicable law in accordance with article 67 LPWRS.

Regarding private contracts, in the case of lump-sum agreements, all the risks that may arise during construction will be borne by the contractor (article 2617 Civil Code); by interpretation of this article it may be understood that the risk of a change in law is also included. However it is important that, when drafting a contract, this clause is negotiated clearly.

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

The employer owns the intellectual property in public contracts in accordance with section XII of article 46 LPWRS; all the intellectual property rights derived from the contracted services will be property of the employer except when there is an impediment.

In the case of private contracts the Civil Code does not establish anything about this; it must be agreed by the parties, but the owner shall usually keep these rights.

3.10 Is the contractor ever entitled to suspend works?

This hypothesis is rarely seen expressly, but the contractor may suspend the works in the case that the employer does not pay the contractor.

3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

Under the terms of article 60 LPWRS the contract can be terminated on the ground of general interest, and when it is demonstrated that continuing with the work would not be to the benefit of the State. The only hypothesis that the LPWRS contemplates for the contractor to terminate the contract is when *force majeure* has occurred, making it impossible to continue with the works (article 62).

In terms of the Civil Code, which applies to private contracts and to public contracts in a supplementary way, the innocent party has the right to choose between requiring compliance with the obligations of the contract, and terminating the contract (article 1949 of the Civil Code).

However, it is important that in the contract the termination rights are expressly set out so that the parties are clear as to under which circumstances the contract can be terminated.

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

Force majeure is recognised in our jurisdiction as an event that is not foreseeable where the party is unable to prevent it from happening.

Given the nature of such events, it is not possible to ask for liquidated damages (article 1847 Civil Code), unless the party caused the *force majeure* event or, having the opportunity to prevent it, did not do anything.

Under the terms of article 62 LPWRS, it is possible in public contracts to argue that the *force majeure* event caused the impossibility to continue with the works, bringing about the possibility to terminate the contract.

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

According to article 1869 of the Civil Code the third party is entitled to claim the benefit only in cases where the parties to the contract agree to establish that the benefit will be for this third party.

In public contracts the law does not contemplate this hypothesis.

3.14 Can one party (P1) to a construction contract which 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?

This hypothesis will follow the Civil Code as it mentions that in these cases it is possible for the parties to set off the debts up to the amount of the lowest one (article 2185 and 2186 Civil Code). The limitations to this right are expressly mentioned in article 2192 of the Civil Code, some of which may be applicable if one party waives this right, and/or if the debts to set off are fiscal debts.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

Parties owe a duty of care to each other considering that they are professionals, performing a valid work under the law. Lack of duty of care will impact on the performance of the contract and the possible breach by the person that does not comply correctly.

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

Yes, the Federal Civil Code and the Codes of the 31 states and Mexico City, as well as the Commercial Code, provide rules for the interpretation of a contract in the following ways: (i) the ambiguous term must be interpreted in accordance with the other conditions of the contract, but also applying the sense that complies with the object and purpose of the contract; (ii) the customary practice of the country of the party must be taken into consideration; (iii) if it is impossible to resolve the doubt through these rules, then it will be resolved in favour of the greater reciprocity of interests (articles 1851-1857 Civil Code).

3.17 Are there any terms in a construction contract which are unenforceable?

In general, terms and conditions that are illegal and/or against a public order or public interest provision are not enforceable.

By "illegal", this must be understood as all those acts which go against laws or customary practices (articles 1830, 1795 Civil Code).

3.18 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 designer's obligations are not absolute in the sense of those situations in which a construction contractor may incur a fault for construction reasons and not design factors.

4 Dispute Resolution

4.1 How are disputes generally resolved?

In public contracts, disputes are generally resolved through claims, conciliation, arbitration and trial (articles 83-104 LPWRS).

Disputes in private contracts may be solved through the mechanisms agreed by the parties and established in the contract. In this case, the law establishes no limitation.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

No. there is no adjudication as it is understood in the United Kingdom, Australia or Malaysia. Nevertheless, parties can agree to submit their disputes to a Dispute Adjudication Board.

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

Many construction contracts have arbitration clauses. Arbitration in Mexico follows the rules of the UNCITRAL Model Law whose text was included in the Commercial Code.

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 to enforcement.

Yes, the courts recognise and enforce international arbitration. Mexico is signatory of the New York and Panama Conventions.

4.5 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?

There are provisions in the procedure laws for enforcement of a judgment in a foreign court.

4.6 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 reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In cases related to construction, this is a commercial matter. Usually such matters are solved by civil or commercial judges. There is a main procedure, an appeal and two federal instances. The entirety of the instances may take about two to four years.

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