

Mexico

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Foreign pursuit of the local market

- 1 If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before taking such a step?**

The Mexican market is friendly to foreign investment. Therefore, legal requirements for foreign companies, either to incorporate or operate, are not as rigid as in other countries.

Nevertheless, key concerns could be: whether the company wants to focus on the public or private sector; what kind of sector are they intending to enter in; and the tax and labor matters which can be burdensome.

Licensing procedures

- 2 Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?**

There are no licenses required to operate as a designer or contractor. The company only has to be duly incorporated to be able to operate. The incorporation procedures are the same for all companies. The holding of the correct permits and compliance with relevant laws is necessary when a project is executed.

Competition

- 3 Do local laws provide any advantage to domestic contractors in competition with foreign contractors?**

When dealing with public works (public procurement), there may be cases when the government issues invitations to bid only to domestic companies, or requires a certain percentage of local content. Other than that, Mexico does not have laws favouring domestic companies.

Bribery

- 4 If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?**

The contract would be enforceable until the administrative body receiving the services initiates a procedure of contract termination. There are two different administrative procedures that will initiate such termination: corrupt practices and termination of contract. In practice, once corrupt practices are found, the administrative body also initiates the procedure for contract termination. If it is found that there was corruption, either by the contractor or by public officials, the contract will no longer be enforceable and the responsible persons could be prosecuted. Also, the responsible party involved in the corruption act will have to pay fines, will be prohibited from holding public office, and will be prohibited from participating in public procurement procedures

Facilitation payments are prohibited in Mexico.

Political contributions

- 5 Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?**

The making of political contributions is not part of doing business. There are electoral regulations that forbid the financial support of parties or candidates. Nevertheless, there are no laws that restrict the ability of contractors or design professionals to work to work for public agencies in these cases.

Other international legal considerations

- 6 Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?**

There are two legal issues to take into consideration. First, many public procurement procedures are directed to Mexican companies. Those companies incorporated in Mexico by foreign entities are considered as Mexican. Therefore, if planning to participate in public procurement procedures, a new Mexican company should be created, otherwise foreign companies will have to wait for an international public procurement procedure.

Second, in Mexico the concept of a joint venture is not regulated as such. A joint venture in Mexico can be created by the formation of a new Mexican company or by signing a contract between the two parties. If creating a new company, the laws regulating business associations will apply, and if creating a contractual joint venture the general contract law will apply.

Construction contracts

- 7 What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?**

There is not a standard contract form for construction or design. The parties could establish different obligations according to their will (bespoke contracts). In practice, it is common to use a similar format of contract, but it is not a standard form. In private contracts, the language of the contract could be different to the local language. However, if a dispute arises and a lawsuit is needed, there should be an official translation in Spanish. This could be risky since the interpretation may vary, and judges in Mexico may interpret differently to the will of the parties. Regarding public contracts, the contract must be in Spanish.

In private contracts, there are no restrictions on choice of law and the venue for dispute resolution. In public contracts, the governing law will be Mexican law and the venue will be in Mexico.

Payment methods

- 8 How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?**

Any method of payment is allowed if agreed to by the involving parties. In practice, the most common way to pay the contractors, subcontractors or

vendors is by electronic payment every month. The most common way to pay the workers is by cash or cheque every week or fifteen days.

Contractual matrix of international projects

9 What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

In practice, the most common contractual matrix for major projects is that the owner contracts directly with a general contractor, which could be the construction manager, or it could subcontract a construction manager. Then, the general contractor will subcontract.

PPP and PFI

10 Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Yes, the Law of Public Private Partnerships. Also, it is important to mention that Pemex and CFE will be regulated by different laws and, even though they will remain state-owned companies, will act as private companies under government supervision.

Joint ventures

11 Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

In Mexico, there is no legally-recognised form of joint venture. The companies could either constitute a new company, in which both companies will be held liable and responsible for the entire project, or they could sign a contract in which they could allocate liabilities as they seem convenient. Regarding public procurement projects, the companies could allocate liabilities and responsibilities among them according to their participation in the project, but usually joint and several liabilities is required.

Tort claims and indemnity

12 Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

No, Mexican laws allow the affected party to be indemnified against acts, errors or omission from the works of the other party, unless otherwise agreed in the contract. But if the affected party was negligent, it could not be indemnified by such acts or errors, unless otherwise agreed in the contract.

Liability to third parties

13 Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

No, only the parties involved in the contract will be able to pursue a claim, unless otherwise provided in the contract. The owner could pursue a claim against the contractor, and the third party against the owner who sold the building.

Insurance

14 To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Liquidated damages could be set up to the amount of the main obligation of the contract (in a contract of 1 peso, contractual damages could be set up to 1 peso). Regarding damages to third parties (property or injuries) or environmental hazards, the liability does not have any limit; the damages produced have to be compensated, including the new concept in Mexico of punitive damages and moral damages (psychological effects). Regarding injury to workers, the government, through the National Institute of Social Security, pays for the injury and death of workers (employers pay a social security (governmental insurance) for each worker).

Regarding delay damages, the contract will establish the agreed amount (the amount cannot be higher than the main obligation of the contract). If not, the responsible party will cover damages caused by the delay.

There is insurance for damages to third parties, the environment, workers (additional to the mandatory provided by government) and any other civil responsibility.

Labour requirements

15 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

No. The only provision established in the labour law regarding local or foreign employees states that 90 per cent of employees of any company have to be Mexican. Therefore, only 10 per cent of employees of every company, including construction companies, can be foreigners. This provision does not apply for officers of the company.

Local labour law

16 If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

No, once the employment is terminated, the employer is obliged to pay the corresponding compensation to the employees. Once the payment is performed there are no legal obligations towards employees.

Close of operations

17 If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

If the foreign contractor creates a new company in Mexico, it has to follow a procedure of dissolution and liquidation of the company, including paying debts (including all payments owed by the company), collecting debts, selling assets, distribution of capital among shareholders, notification of dissolution and publication of dissolution on the internet. If the foreign contractor only operated in Mexico as a branch, it only has to notify the tax authorities and the Public Registry of Commerce. There are no further obstacles for a branch since it is considered as a legal entity in the foreign country (not a new company), and if there is any legal liability or responsibility, the main company in the foreign country could be held liable.

Payment rights

18 How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

It is not common in Mexico that a contractor secures the right to payment of its costs and fees but it is legally possible through a bond or security. Liens are not used or known in Mexico as in the United States or Canada.

Contracting with government entities

19 Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

No. When the governmental agency enters into a contract with a private entity, it is treated as a commercial entity. Therefore, sovereign immunity would not apply.

Statutory payment protection

20 Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

This is usually established in the contract. If not, the laws allow an unpaid contractor to recover the payments for the works done that were not paid until the moment of the interruption or cancellation.

Force majeure and acts of God

21 Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Yes, Mexican legislation excuses contractors from performing contractual obligations due to force majeure and acts of God. However, these concepts are not defined in law. Therefore, in practice, parties establish in the contracts the definition of these concepts and the procedure to follow if an event of force majeure or an act of God occurs.

Courts and tribunals

22 Are there any specialised tribunals that are dedicated to resolving construction disputes?

No, there are no specialised tribunals or courts for construction disputes.

Dispute review boards

23 Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Dispute review boards are a relatively new concept in Mexico. Therefore, such method is not as common as arbitration. The law allows private and public contracts to solve disputes by dispute review boards. Their decisions are considered as mandatory because of the contractual obligation agreed by the parties. Local courts may find it more difficult to treat these decisions as mandatory over arbitral awards. This is because the Mexican Commerce Code establishes a Chapter of Arbitration and the enforcement of arbitral awards.

Mediation

24 Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation is not often used in construction projects in Mexico. Parties choose a more binding mechanism to solve their disputes. Mediation could be agreed by the parties for a first instance and arbitration in the second instance. However, this model is not very common in practice since they prefer either negotiation, arbitration or litigation.

Confidentiality in mediation

25 Are statements made in mediation confidential?

It depends on the agreement made by the parties, and the mediation rules chosen by the parties. There is no specific law or regulation regarding mediation in Mexico.

Arbitration of private disputes

26 What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Yes, arbitration is preferred over litigation for construction disputes. However, if the project involves small amounts of money, litigation could be preferred over arbitration.

Governing law and arbitration providers

27 If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

There are several common arbitration providers for construction projects, such as: ICC Mexico, Construction Industry Arbitration Centre (CAIC), and Mexican Arbitration Centre (CAM). They have their own rules and the parties abide to such rules. In practice, the most common governing law chosen by the parties is Mexican law.

Dispute resolution with government entities

28 May government agencies participate in private arbitration and be bound by the arbitrators' award?

Yes, the laws allow the governmental bodies to submit their claims derived from a contract through arbitration. Also, if the contract specifies

arbitration as a dispute resolution mechanism, the governmental agencies will be bound by the arbitral awards.

Arbitral award

29 Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Yes, the courts will reject the enforcement of arbitral awards if they do not comply with Mexican law (contrary to laws or public order). The court will verify that arbitral awards comply with requirements of substance and form.

Limitation periods

30 Are there any statutory limitation periods within which law suits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

If not established in the contract, the general period for statutory limitation is 10 years. The precondition for commencing or maintaining the lawsuit is when the act that caused damage arose, or once the contract was breached.

International environmental law

31 Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Yes, Mexico is party to the Stockholm Declaration of 1972. The laws adopted by Mexico are the General Law of Environmental Equilibrium and Protection, General Law of Wildlife and General Law of Sustainable Forest Development.

Local environmental responsibility

32 What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Contractors or developers have to comply with the environmental regulations, including permits and procedures for the performance of projects in certain areas. If the constructor fails to comply with such regulations, it will have to pay fines and compensation for the damage caused to the environment (obliged to repair the damage), and criminal liabilities could also be imposed. Each state has its own environmental regulations. Therefore, the constructor has to comply with the federal laws and the laws of the state where the project will be performed.

International treaties

33 Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Yes, Mexico has signed several bilateral investment agreements with several countries around the world, as well as multilateral agreements such as NAFTA (North America Free Trade Agreement). In this last agreement, 'investment' is defined as:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the debt security is at least three years,
 but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the loan is at least three years,
 but does not include a loan, regardless of original maturity, to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the

assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

- (g) *real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*
- (h) *interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under*
 - (i) *contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or*
 - (ii) *contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;*
but investment does not mean,
 - (i) *claims to money that arise solely from*
 - (i) *commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or*
 - (ii) *the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or*
- (j) *any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).*

Tax treaties

- 34** **Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?**

Yes, Mexico has signed several double taxation treaties.

Update and trends

There are three matters currently on the agenda regarding construction in Mexico. The first one is the amendment of the Public Works and Related Services Law that may be discussed by the federal Mexican Congress in the last quarter of 2015. Many actors in the industry are participating in order to ensure that the construction industry's interests are represented. The second is the implementation of the National Anticorruption System that was enacted in May 2015. The new system will allow the federal auditing authorities to review projects while they are being performed, in order to avoid deviations of budgets and resources. Finally, it is important to note that after several years of inactivity, public-private partnership projects seem to start developing again as a consequence of the slow-down in the oil industry.

Currency controls

- 35** **Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?**

No.

Removal of profits and investment

- 36** **Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?**

No, there are no controls other than the declaration of profits before the tax authorities.

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