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Published by
Global Legal Group Ltd.
59 Tanner Street
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Tel: +44 20 7367 0720
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Portugal

António André Martins

FALM – Sociedade de Advogados, RL

Dalila Romão

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.)

One cannot speak about standard types of construction contracts in Portugal, but rather about usual types of construction contracts.

In fact, there are no standard drafts adopted by the construction sector. However, there are two main types of contracts that are usually adopted in most construction contracts both in the private and public sectors: *Contrato de Empreitada por Preço Global* and *Contrato de Empreitada por Série de Preços*. The first is a lump-sum contract where the price is fixed beforehand, and the latter is a so-called "*price series contract*", establishing a price for each type of works, where the contractor is paid in accordance with the result of the works effectively carried out.

These two main types of contract were, until 2008, expressly provided in the national law. The new Public Contracts Code approved by means of Decree-Law no. 18/2008 no longer establishes a distinction between these two types of contracts. This matter is now left to the liberty of the contracting parties.

Design and construction contracts are common in Portugal. These contracts are in fact standard in certain areas, such as in PPP Agreements.

With regard to management contracting, this has become quite common in recent years due to the increase in outsourcing. Until very recently, Portuguese law expressly provided for the existence of the *Empreitada por Percentagem* (percentage contracting) by means of which the contractor is paid a given agreed percentage over the costs incurred. The position of the managing contractor is recognised by national law. In public contracts, the percentage of subcontracting may not be above 75%.

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)?

For private construction contracts, there are no essential qualities or formalities required for the contract to be legally binding. However, in case of a dispute, the party needing to rely on the contract will require legal proof of the existence of the contract. Therefore, it is prudent to have some sort of acknowledgment from both parties that the contract exists.

For public construction contracts the public procurement procedures are legally binding and are derived from European law. The procedures involve a large number of formalities and requirements comprising both pre-adjudication and post-adjudication procedures.

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.

In Portugal, civil law establishes the principle of freedom of contract, by means of which the parties, with respect to the imperative rules foreseen in the law, are free to agree amongst themselves the contractual discipline by which they wish to abide. Nevertheless, articles 224 and 230 of the Portuguese Civil Code expressly provide the possibility for any entity to give the other party indication of its will to enter into a contract. The law establishes that, unless otherwise specified, such offer is of an irrevocable nature.

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?

With respect to construction activity, the only insurance that is mandatory is accident at work insurance. Such insurance is necessary in accordance with Decree-law no. 12/2004 for any contractor to be allowed to pursue its activity in Portugal.

It is, however, usual for public and private employers dealing with construction contracts to demand the existence of a more comprehensive insurance policy covering all of the relevant risks.

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?

There are no general requirements that apply exclusively to construction contracts. However, the contractor must be previously authorised by the authorities to act as a Constructor pursuant to Decree-law no. 12/2004 and may not carry out works beyond the limits of such authorisation. Employees must hold a valid work visa. Decree-Law no. 272/2003 also demands that a health and safety plan be included in any public or private offer, and such plan must remain as an annex in public construction contracts.

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?

Yes, the employer is allowed to retain part of the purchase price.

In public contracts there is usually a guarantee of 5% which is complemented by a retention of an additional 5% of the contract price. This retention may be replaced by an alternative form of guarantee.

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?

In private contracts, all forms of guarantee are admissible. The most common form of guarantee is the first demand bank guarantee. Company guarantees are less common but are not forbidden.

In public contracts the forms of guarantee are legally established and are, in accordance with article 90 of the Public Contracts Code, either made by means of a cash deposit or titles issued, or are guaranteed by the Portuguese State, bank guarantees, or an insurance guarantee.

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?

The contractor has the legal right to retain the works as long as there are any amounts due, and the contractor also has the right to judicially execute such property with preference over any other common creditors, including mortgage creditors. However, the contractor may not remove goods or materials supplied from the site, as such goods or materials are considered to have been incorporated into the works and therefore transferred to the property of the employee.

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.

Yes, it is common for a third party with supervision powers, and acting on behalf of the employer, to suspend a construction contract. Such third party does not have a duty to act impartially as it represents the employer and therefore acts on its behalf.

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?

Yes, "pay when paid" clauses are frequent in our jurisdiction, and many times combined with "back-to-back" clauses.

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?

The parties are allowed to agree in advance a fixed sum. However, a court may reduce, in accordance with the stipulations of the applicable law, such amount if it is deemed manifestly excessive. Portuguese courts have come to limit such amounts on a frequent basis whenever they clearly exceed the effective damages incurred.

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?

In a private construction contract, unless otherwise agreed by the parties, the employer may not vary the nature of the works, but only their value, and only up to a fifth of the agreed price. Within public construction contracts, the employer may request, if certain conditions are met, variations to be performed under the contract. Such variations should not, however, exceed 5% of the price of the contract.

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?

In private and public construction contracts, works can be omitted from the contract. Works omitted from the contract can then be executed by the employer or a third party on its behalf.

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

Yes, there are terms that may be implied into a construction contract regardless of its public or private nature. Both civil and administrative laws provide an important set of rules which may supplement a contractual agreement.

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?

Concurrent delays would probably only entitle the contractor to an extension of time. The costs occasioned by a concurrent delay would not usually be considered the responsibility of the employer.

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?

Yes, as long as the float is identified as such in the works schedule.

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?

In the jurisdiction of Portugal all claims are subject to a limitation period. In the case of defects in construction works, such limitation period is five years, beginning from the date the finished works were accepted. However, defects must be notified to the contractor within one year from the moment that the employer becomes aware of such defects, and the claim must be filed within the following year. If these deadlines are not met, the employer may no longer bring claims against the contractor.

3.7 Who normally bears the risk of unforeseen ground conditions?

This risk is normally borne by the employer. However, it may be considered as a change of circumstances under which the parties agreed to contract, as long as such event was abnormal and was unpredictable and, in good faith, caused the execution of the contract to be unacceptable. In such case, the risk will be shared either by changing or reducing the terms of the contract or, if the contract is impossible to execute, by resolving it.

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

Usually such risk is borne by the employer, although it is common to make exceptions for tax and environmental law in public construction contracts.

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

Usually such property is transferred to the employer at the end of the works.

3.10 Is the contractor ever entitled to suspend works?

The parties may agree freely on suspension causes. Delayed payments or *force majeure* are common causes of suspension. Civil law establishes that the contractor may suspend the works if payments are delayed ("*exceptio non adimpleti contractus*").

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?

Grounds to terminate a contract can be freely agreed by the parties. Under objective circumstances, the innocent party may terminate the contract by declaring to the guilty party it has lost its interest in the contract. If the execution of the works becomes impossible, any of the parties is entitled to terminate the contract.

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*?

Yes, Portuguese law accepts the concept of *force majeure*, limited to extraordinary events mostly beyond human will. *Force majeure* situations, which in good faith cause the execution of the contract to be unbearable or impossible, allow the injured party to claim a change, reduction or relief of obligations or the termination of the contract. With regard to the second question, it is not likely such a claim would be successfully argued, unless the contract had become uneconomic due to *force majeure* occurrences.

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?

The answer to both questions is affirmative as such rights are related to the building itself and thus will be transferred with the property rights, within the guarantee period.

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?

The right of set-off in pecuniary undertakings is provided in the Civil Code and operates by means of a simple statement to the other party. Such right of payment must be judicially demandable. This right does not exist in public contracts if the public contractor is the Portuguese State.

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 to any contract subject to Portuguese law are obliged to act in good faith towards one another.

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

Yes, the Portuguese Civil Code establishes such rules. In fact, unless otherwise agreed by the parties, the interpretation of the contractual terms shall be made by taking into consideration the hypothetical will of the parties if they had previously foreseen such ambiguity. Nevertheless, if the rules of good faith determine a different solution, such solution shall prevail.

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

No, as long as such terms comply with the law and the obligations are feasible.

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 liability of the designer may be contractually limited.

4 Dispute Resolution

4.1 How are disputes generally resolved?

Disputes are generally resolved by judicial courts. In contracts with higher values, however, the parties frequently choose arbitration as a faster means of resolving their disputes.

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

Adjudication processes similar to those provided in the UK's Construction and Regeneration Act have ceased to exist in public construction contracts, and have never existed in private construction contracts.

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

Construction contracts of higher values commonly have arbitration clauses. Arbitration is well consolidated in the Portuguese jurisdiction and is ruled by Law no. 63/2011, of December 14th. Arbitration usually starts with a notice to all interested parties defining the object of the dispute, presenting evidences and arguments, and nominating an arbiter. The counterparties are given the opportunity to present their evidence and arguments and (dis)agree with the nominated arbiter, or nominate their own arbiter, when the arbitration is to be held by a group of three arbiters. In the latter case, the two nominated arbiters shall nominate the third, who will preside. Awards are taken in accordance with the Portuguese statutory rules, unless the parties should choose that the arbiters shall decide according to equity. The arbiters may also determine injunctions. Decisions are binding between parties, although those taken according to statutory rules may be appealed to the State courts if the parties previously agreed so. Decisions may be revoked by the State courts if void.

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.

The Portuguese courts recognise and enforce international arbitration awards. Enforcement may only be denied within the limitations provided in Law no. 63/2011, related generally to irregularities of the arbitration procedure, violation of the Portuguese statutory rules, or the principles of international order.

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?

Foreign courts' judgments on construction contracts can be enforced in Portugal after being revised by a superior Portuguese court. For some countries specific international conventions may be applicable to ease such procedure.

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.

Court proceedings related to construction contracts both of civil and administrative law will follow a common procedure which begins with a requirement to define the object of the dispute, then to present evidences and arguments, and to conclude with the demand. The counterparty is given the opportunity to present its evidence and arguments. If further evidence is necessary, an audience is adjourned and the final decision will follow. Generally, the right of appeal is allowed only if the plea has a value superior to the "*a quo*" court's limit, and the party's loss amounts to more than half as much as such limit. It is not possible to determine how long each proceeding is likely to take.

António André Martins
FALM – Sociedade de Advogados, RL
Rua Abranches Ferrão, n.º 10, 5.º B
1600-001 Lisbon
Portugal

Tel: +351 21 722 4200
Fax: +351 21 722 4201
Email: aamartins@falm.pt
URL: www.falm.pt

António is the Partner in charge of the law practice groups for Construction, Public Procurement, and Project Finance. Within such practice areas António has successfully advised some of Portugal's largest construction and engineering contracts. António has also been actively participating in the negotiation of numerous project finance deals throughout the last 15 years, advising some of the largest European construction companies.

Dalila Romão
FALM – Sociedade de Advogados, RL
Rua Abranches Ferrão, n.º 10, 5.º B
1600-001 Lisbon
Portugal

Tel: +351 21 722 4200
Fax: +351 21 722 4201
Email: dromao@falm.pt
URL: www.falm.pt

Dalila is an Associate in the law practice groups for Construction, Public Procurement, Project Finance, and Water and Wastewater sectors. Dalila has been involved in several public procurement bids with construction and engineering contracts as consultant for the bidders, and integrates the teams that continuously advise the private contractors in managing such public contracts. Dalila has advised on infrastructure projects, railways, highways, water and wastewater sectors, and major buildings.

FALM – Ferreira de Almeida, Luciano Marcos e Associados, Sociedade de Advogados, RL is a law firm with four partners. Incorporated in 2006, the firm thrives on its partners' and associates' experience of over 30 years within the different areas of public and private law, mostly focused on planning and real estate law, construction, public procurement and project finance.

The firm has advised a large number of national and foreign construction and infrastructure companies in some of the major construction and engineering projects in Portugal in recent years. The teams are very much used to working with clients from the very inception of a project, usually the acquisition of the site, to the licensing and zoning procedures, construction and sale, operation and maintenance of the finished asset.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk