

Spain

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Joint ventures

- 1** Must foreign contractors enter into a joint venture with a local contractor in order to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

It is not necessary for a foreign contractor to enter into a joint venture; they can operate directly in Spain. The only requirement is to be registered before the Tax Authorities, either as a resident or non-resident contractor (construction works that last more than 183 days per year are considered to be a permanent establishment in Spain, and therefore are taxed as resident entities).

In some cases (ie, if all payments received or made by the contractor are from or to foreign companies), and the works last less than 183 days, it would not be necessary to register with the tax authorities.

If a foreign contractor forms a joint venture with a local contractor, it is not necessary that the local partner controls it.

Foreign pursuit of the local market

- 2** If a foreign contractor wanted to set up an operation to pursue the local market, what are the key concerns you would counsel them to consider before they took such a step?

A foreign contractor could start opening a “representative office”, which the easiest way to have a legal presence in Spain. A representative office cannot trade; it is authorised just to collect or to give information, and is exempt from taxes in Spain. It may have employees and rent an office. The only limitation, in order to be exempt from taxes, is not executing any operation, even if acting as a commercial agent of the mother company.

If the foreign contractor starts operating in Spain, then it may choose to set up a Spanish subsidiary or to operate through a branch or a permanent establishment of the mother company. There are no limits applicable to foreign investors setting up wholly owned subsidiaries or joint ventures. The convenience of using one figure or the other should be analysed in each case, but in general, for a medium- or long-term

presence in Spain we usually recommend setting up a Spanish subsidiary.

Licensing procedures

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

Architecture and engineering projects need to be legalised by the correspondent professional association, which in practice means that a licensed professional should sign the project. It is usual that foreign architects work in cooperation with Spanish ones in order to get the projects legalised.

Foreign contractors need not be licensed, but they should fulfil all applicable tax and labour obligations in Spain. If the contractor is going to subcontract part of the works, it should be registered in a special registry within the labour authorities.

Labour requirements

- 4** Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project? At the end of a project will there be termination payments assessed against a foreign contractor?

Spanish Law does not require that a minimum amount of local labour is employed. If a foreign contractor is going to use its own labour in Spain, the department of social security should be notified, and depending on the time the workers will spend in Spain, they may have to obtain a work permit.

If a subcontractor fails to meet his labour obligations, the contractor becomes jointly liable; owners are jointly liable for the contractors’ labour debts.

Local labour law

- 5** Are there any labour laws applicable to construction and infrastructure projects?

Yes, there are collective bargaining agreements (CBA) applicable to the construction sector, which contain very detailed information about salaries and other payments to workers. The CBAs are different for each

Spanish province or region. The minimum wage and some other issues are updated each year; sometimes they are extended from one year to the following one, until there is a specific agreement for that year.

Health and safety regulation

6 Are there any specific health and safety rules regulating the construction industry?

Yes, Spain ratified the 62nd International Work Organisation Treaty, dated 1937, regarding safety in the building industry, and more recently it has implemented EC Directive 57/1992.

The local applicable law is Royal Decree 1627/1997. This establishes the necessity for the owner to appoint a coordinator for health and safety matters during the drafting of the project. If more than one company participates in the construction works, or one company and self-employed workers, the owner should appoint a health and safety coordinator.

In general, the obligations of owners and constructors regarding health and safety are to:

- evaluate the labour risks;
- organise the safety and the work;
- integrate prevention within all the company's activities and at all hierarchical levels;
- take into account the workers' capacities;
- limit the labour risks;
- cooperate and coordinate with other companies;
- set up the necessary safety services;
- take the necessary measures regarding:
 - first aid;
 - fire prevention;
 - evacuation and rescue;
 - serious and immediate danger; and
 - urgent medical assistance;
- have updated documentation regarding:
 - evaluation of labour risks;
 - prevention and protection measures;
 - lists of and information on accidents;
- take information and training measures; and
- oversee mechanisms regarding consultation with, and the participation of, the workers.

Since April 2007, Law 32/2006 regarding Subcontracting in the Construction Industry has been in force. The main purpose of this law is to increase safety in this industry and reduce the number of accidents. Abusive use of subcontracting is considered an important cause of the high accident rate in the construction industry. The law establishes a limit of three tiers of successive subcontracting for specialised activities, and only one tier for labour-intensive jobs, with some very limited exceptions. Companies that breach these limits will be jointly liable for any damage caused. Companies that wish to subcontract or

be subcontractors must be registered with a special registry of the labour authorities and they should keep a so-called "subcontracting book".

Close of operations

7 If a foreign contractor, who has been legally working, decided to close its operations, what are the legal obstacles to closing up and leaving?

If the foreign contractor has acted in Spain through a company, it should respect the corporate and tax rules regarding liquidation and winding up. Winding up is not possible if the company has any outstanding debt. If this is the case, the debt must be paid or assigned to the parent company; otherwise the company should apply for insolvency.

Foreign contractors acting directly (through a permanent establishment or not) in Spain can close their activities without having to fulfil such corporate requirements. However, they have to fulfil their labour, tax, environmental and other obligations; serious breaches of such obligations could be considered a criminal offence.

Standard forms of construction contracts

8 What standard-contract forms that apply to multinational construction projects are used?

FIDIC rules are not very widespread in Spain, even though in engineering projects they are becoming more known. Instead, many contracts are inspired by the same principles as those included in the law regulating constructions works awarded by public administrations (Ley de Contratos de las Administraciones Públicas, LCAP), whose rules are favourable to the owner, but not abusive. Whenever an owner is in a position to favourably negotiate with the contractor, it would propose a contract inspired by the LCAP.

Allocation of construction risks

9 In typical construction contracts, who assumes the risk of material price escalation and shortages?

All kinds of agreements are possible regarding this issue. The agreement depends on the negotiation power of each party in each case. However, normally the owner does not assume these risks.

Competition

10 Do local laws provide any advantage to local contractors in competition with international contractors?

No, the only advantage for local contractors is their knowledge of the market and local laws. Spain has recently updated its local law regarding defence of competition with Law 15/2007, which follows European Council Rulings 1/2003 and 139/2004.

PPPs and PFIs

11 In certain forms of construction such as PPP and PFI, where the contractor has a private obligation to long-term quality control and maintenance, how is the risk of additional future costs for quality control and maintenance considered and mitigated?

In Spain PPPs and PFIs are less developed than in other countries that started using these forms before (for example, the UK). The regional governments in Spain have authority to execute infrastructure projects, and this implies that there is not uniformity in the types of agreements used in this field. In general, direct toll, shadow toll and direct payments from the government entity are used to finance these investments, but shadow toll is less used at the moment. To date, the interests of government entities have been focused on the raising of funds, more than on the quality of the service. Therefore no special instruments to consider the increase in quality control and maintenance costs have been designed. Therefore no special instruments to consider the increase in quality control and maintenance costs have been designed, except some formulas aimed at adapting the amounts received by the private companies to the inflation rate in such costs which directly affect the activity.

In order to avoid these problems, there is a draft law, which introduces many new considerations to the present situation, such as whether:

- private companies could propose the execution of infrastructure or public services investments;
- risk allocation should be more balanced (today in general it is unbalanced against the private partners);
- there should be quality controls on the service;
- private partners will have to introduce technical improvements;
- shadow tolls will be regulated;
- if the service lacks quality it could be awarded to another company;
- there will be more financing sources; and
- infrastructure projects could include additional commercial or industrial areas in order to increase their profitability.

Payment of fees

12 How may a contractor secure payment of its fees by an owner? May the contractor place liens on the land or the property itself?

It is possible to place liens on the land or property, but not usual. Normally, Spanish construction contracts include clauses that balance the obligations of both parties regarding payments: if an initial payment from the owner is requested, then normally the contractor should provide a bank guarantee for the same amount. The rest of the

payments are made according to the development of the works, based on “certificates” approved by each party. It is normal that the owner withholds a percentage of each invoice as a guarantee, or withholds the last payment at some point (ie, until the provisional guarantee expires or the works are accepted).

Tort claims and indemnity

13 Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even if the general contractor is negligent?

Under Spanish laws, all parties involved in a construction project (owner, general contractor, subcontractors) are in principle jointly liable for the damages caused to third parties, and the specific liability of each party is discussed at the corresponding trial and decided by the judge. Therefore, a general contractor is usually considered liable before the owner and third parties for damages caused by himself (ie, his company) and his subcontractors. The remedies he has are the possibility of claiming against the subcontractor, or to agree with the owner a limit to his liability.

Insurance

14 Do local laws require the maintenance of any specific type of insurance on construction projects?

According to the Spanish Edification Act (Ley 38/1999, de Ordenación de la Construcción), construction companies should have the so-called ‘Seguro Decenal’. This is valid for a term of 10 years, during which the constructor and owner are liable for structure defects that directly threaten the mechanical resistance and stability of the building. There must be insurance for each construction work. This obligation is applicable only for buildings that are to be used mostly for dwelling use. The minimum insured capital shall be 100 per cent of the final cost of the material performance of the construction works, including professional fees. The deductible fee of the insurance (*franquicia*) shall not exceed 1 per cent of the insured capital for each registered real property.

Insolvency and bankruptcy

15 If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor instated to prevent delay on the project?

No, the Spanish Insolvency Act provides just the opposite. It is not possible for any party to terminate an agreement because of the insolvency of the other party. Judges and receivers may oblige a party to continue fulfilling the contractual obligations entered with the insolvent party. However, it is possible to

introduce some clauses in the correspondent agreement in order to avoid, or reduce the risk of, being in such situation.

Contracting with government entities

16 Have government agencies that deal with contractors ever sought refuge under sovereign immunity and avoided paying a contractor disputed amounts on that basis? If so, is there recourse in the local courts?

No. Government agencies may be slow to pay, but in the end they meet their legal obligations. The delay in public agencies paying their debts is usually very long (ie, more than 18 months after the due date), but there are some legal instruments to try to avoid this delay or at least mitigate its effects (eg, overdue invoices accrue an annual interest equal to the ECB basic rate plus seven points). In contrast to private companies, government agencies cannot be insolvent or bankrupted; therefore credits against them have usually been considered 'safe'.

Bribery

17 If it is proved that a contractor has delivered something of value or bribes to facilitate the award of a construction contract to that company, will the contract be enforceable under local law? Will that contractor suffer any other adverse consequences?

Such acts are considered crimes under Spanish law, and both the public authority and the contractor may be declared guilty and sentenced. If any aspect of the procedure to award the contract to a party has been irregular (not only because of bribery, but also because of formal defects in the award procedure, for example) the contract may be declared void. If the contract has already been executed, the party who legally argues, through the corresponding lawsuit, to have been damaged by such illegal award of the contract could ask for compensation.

Please note that most construction contracts are awarded through public tender procedures, and the companies participating in them have full defence rights in case any infringement of the law is produced during the allocation procedure.

Arbitration

18 Can a government agency commit to arbitrate disputes privately or must matters go to court?

Yes, a government agency could commit to arbitrate disputes privately. The limits for arbitration refer to those subjects who are considered to be of "public order" and should necessarily be seen by the Courts of Justice: ie, labour, health and safety, environmental, etc. Spain has entered into many bilateral conventions for the promotion and protection of foreign investments, and all of them foresee arbitration as one of the dispute resolution mechanisms.

Foreign corruption

19 What are the prohibited acts that your laws limit? What may your jurisdiction's contractors do locally and abroad, and what is prohibited?

Article 429 of Spanish Criminal Code provides that: *The individual who influences a public servant or authority taking advantage of any situation deriving from its personal relationship with the alter or with other public servant or authority in order to attain a resolution which could generate, either directly or indirectly, an economic benefit for himself or for a third party, shall be punished.*

There are many other articles in the Spanish Criminal Code aimed to prevent corruption, but in principle they are only applicable to acts which take place in Spain. However, in recent times, some Spanish judges have tried to sue foreign persons for outstanding crimes committed outside Spain, and the results have been partially successful.

Force majeure and acts of God

20 Under local law, are contractors excused from the obligations of the contract if they cannot work because of events beyond its control?

The concept of force majeure – defined as "those facts which could not be foreseen or that, even when they had been foreseen, cannot be avoided" – is a cause for the termination or suspension of a contract, which is reflected in the Spanish Civil Code (article 1.105).

Notwithstanding this, given the lack of detailed rules on this matter included in the Civil Code, it is advisable to include in the agreement a clause on force majeure that further regulates its effects and implications: ie, how long the contract can be suspended for, communications among the parties, under which circumstances it can be terminated, etc.

Dispute resolution mechanisms

21 Other than contractual international arbitration, what dispute resolution procedures are used successfully to solve construction disputes?

There are no special procedures. The options are the Courts of Justice, or arbitration by either Spanish or International Arbitration Tribunals.

Courts and tribunals

22 Are there any specialised courts or other tribunals that resolve construction disputes?

No, there are no specialised courts for this matter.

Dispute review boards

23 Have dispute review boards been used with success or failure?

Dispute review boards are not well known in Spain.

Mediation

24 How is mediation defined and is it commonly used to resolve project disputes?

Mediation is not used in Spain in commercial matters. It is used in family and consumer matters, but not in construction, except where consumers are involved. The disadvantage of mediation, when used in these areas, is that the agreement is not directly enforceable; that is, if a party does not fulfil it, the other party should file a lawsuit and obtain a judgment, which is then enforced.

Confidentiality in mediation

25 If a party participates in mediation, will the statements made therein be absolutely confidential or are the parties at risk that their statements can be used against them?

Not applicable.

Arbitral award

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

Article 46-2 of the Spanish Arbitration Act provides that the acknowledgement and enforcement of foreign arbitral awards should follow the 1958 New York Convention, except if there is a more favourable international convention applicable to the case. Spain has entered into 51 bilateral agreements regarding the promotion and protection of foreign investments, and all of them acknowledge arbitration as a possible dispute resolution mechanism.

There are very limited reasons for a Spanish Court rejecting the enforcement of an arbitral award: for example, if the arbitral award does not exist or is not valid, if the arbitrators have decided on subjects of public order, etc.

Governing law and arbitration provider

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 no special preferences among Spanish companies. Of course, the nearest entities (the ICC – London International Court for Arbitration) are preferred to those further away.

The Spanish Arbitration Act allows for the performance of international arbitration procedures by Spanish Arbitration Tribunals, and Barcelona and

Madrid, especially, have arbitrators with international experience.

International environmental law

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

Spain is a signatory of the Stockholm Declaration of 1972, and there are local laws that provide for preservation of the environment and its wildlife while advancing infrastructure and building projects – for example, Law 9/2006, which implements in Spain the principles of EU Directive 2001/42.

This law establishes the obligation of government entities to make the correspondent evaluation on the consequences for the environment of the investment projects. The procedure consists of three main steps:

- the production of an environmental report by the government entity promoting the investment. This report should include reasonable alternatives to the investment project, including, if necessary the “zero alternative”, which means not executing the project;
- the opening of a consultation period, for a minimum term of 45 days, during which other government entities and the public are invited to analyse the project and raise their opinion. Non-profit environmental organisations are also invited if they have been incorporated at least two years before; and
- the drafting of a memorandum to include environmental aspects in the investment plan.

Other international legal considerations

29 Are there any other legal considerations that will present a difficulty or obstacle for a foreign contractor attempting to do business?

There is no such legal consideration that would present a difficulty or an obstacle for a foreign contractor attempting to do business in Spain.

International treaties

30 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’?

To date, Spain has signed 51 bilateral agreements for the reciprocal protection and promotion of investments (BARPPI), which apply to investments in general. The countries who have signed a BARPPI with Spain are: Albania, Algeria, Argentina, Bolivia, Bosnia-Herzegovina, Costa Rica, Croatia, Cuba, Chile, Egypt, Estonia, El Salvador, the Philippines,

Update and trends

A new law regarding subcontracting in the construction industry came into force in Spain on 19 April 2007.

The main purpose of this law is to limit the number of subcontractors on a construction site. The law acknowledges that subcontracting is necessary in order to achieve a good level of productivity, but using an excessive number of subcontractors, which has been common in Spain, does create some risks. These risks affect not only the quality of the works, but also the rights of the workers, particularly regarding health and safety.

The law establishes a limit of three tiers of successive subcontracting for specialised activities, and only one tier for labour-intensive jobs, with some very limited exceptions. Companies that breach these limits will be jointly liable for

any damage caused.

Companies acting as contractors or subcontractors should progressively increase the number of their employees with an indefinite term employment contract up to a minimum of 30 per cent by 19 October 2009. In addition they must provide the necessary health and safety education to the employees.

Companies that wish to subcontract or be subcontractors must be registered with a special registry of the labour authorities and they should keep a so-called 'subcontracting book'.

Trade unions hope that this law will reduce the high accident rate in the Spanish labour market. The construction sector currently employs 2.6 million workers (13 per cent of the Spanish working population).

Guatemala, Equatorial Guinea, Honduras, Hungary, Indonesia, Iran, Jamaica, Jordan, Khazajstan, Kuwait (not in force yet), Latvia, Lebanon, Lithuania, Macedonia (not in force yet), Malaysia, Morocco, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Poland, Dominican Republic, Romania, Russia, Serbia and Montenegro, Syria, South Africa, Trinidad and Tobago, Turkey, Tunisia, Ukraine, Uruguay, Uzbekistan and Venezuela.

Few of these agreements request that the foreign investor first obtain a judgment from the local Courts of Justice. Most of them allow the investor to claim either before the local Court or before an International Arbitral Court. All agreements request that the investor start negotiations with the state as a prior step to litigation, with the deadline to reach an agreement being six months.

Some of the BARPPI include, in the definition of foreign investment, local companies controlled by the foreign investor. Some do not, but in general they protect foreign investors, even if the investor does not control the local company. On the other hand, the usual interpretation by the Arbitral Courts is that the objective of the BARPPI is the protection of "investments" in general, and this includes investments through local companies.

Tax treaties

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

Yes, Spain has subscribed to tax treaties with the following countries: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Czech Republic, Chile, China, Croatia, Cuba, Denmark, Ecuador, Egypt, Slovakia, Slovenia, Estonia, Finland, France, Greece, Germany, the Netherlands, Hungary, India, Indonesia, Iran, Ireland, Iceland, Israel, Italy,

Japan, Korea, Latvia, Lithuania, Luxemburg, Macedonia, Malta, Morocco, Mexico, Norway, New Zealand, the Philippines, Portugal, Poland, United Kingdom, Romania, South Africa, Russia and the former Soviet countries, Sweden, Thailand, Switzerland, Tunisia, Turkey, Venezuela, United Arab Emirates, the United States and Vietnam.

These tax treaties follow the OCDE model (except the Treaty with the US, which has its own pattern). They introduce the principle that a company's profits can only be taxed in the country where this company has its domicile, provided it does not execute business in the other country through a "permanent establishment".

Currency controls

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

No, currency controls have gradually disappeared in Spain and they are not in force now.

Removal of profits and investment

33 Are there any controls or laws that restrict removing profits and investments from your jurisdiction?

No. Contractors must only fulfil very straightforward tax and banking formalities before removing profits and investments from Spain. Of course, all applicable corporate and tax obligations should first be fulfilled.

Contractual matrix of international projects

34 What is the typical contractual matrix for a major international project in your jurisdiction in terms of the contractual relationships among various parties?

In principle, owners contract directly with contractors, but the common practice is that contractors

subcontract a big part of the work, and such subcontractors also subcontract part of their work. In order to limit the tier of subcontractors, the Law on Subcontracting in the Construction Sector, which

has been in force since April 2007, establishes a limit of three tiers of successive subcontracting for specialised activities, and only one tier for labour-intensive jobs, with some very limited exceptions.

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