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CHAMBERS GLOBAL PRACTICE GUIDES

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# Construction Law 2023

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## **Belgium: Law & Practice**

Rui Ribeiro Lima, Vasco Xavier Mesquita  
and Andreia Bento Simões

Morais Leitão, Galvão Teles, Soares da Silva & Associados



# PORTUGAL



## Law and Practice

### Contributed by:

Rui Ribeiro Lima, Vasco Xavier Mesquita and Andreia Bento Simões  
**Moraes Leitão, Galvão Teles, Soares da Silva & Associados**

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**Morais Leitão, Galvão Teles, Soares da Silva & Associados** (Morais Leitão) is a leading full-service law firm in Portugal, with a solid background of decades of experience. Morais Leitão is broadly recognised in several branches and sectors of the law on a national and international level. The firm's reputation among both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some

of the most conventional practices. Comprising a team of more than 250 lawyers at its client's disposal, Morais Leitão is headquartered in Lisbon with additional offices in Porto and Funchal, having recently opened an office in Singapore. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Mozambique (MDR Advogados) and Cabo Verde (VPQ Advogados).

## Authors



**Rui Ribeiro Lima** joined Morais Leitão in 2007 and is a member of the administrative and public law and urban planning and environment teams. Rui practises in several areas of administrative law, mainly in the areas of urban planning, environment, expropriations and public procurement, in procedural matters as well as in administrative litigation. Rui provides legal advice regarding the licensing of activities, as well as urban planning and zoning. He has also been involved in assisting clients in environmental impact assessment procedures and in environmental offences. In 2004 he was legal adviser to the Minister for Public Works, Transportation and Housing of the XV Portuguese Government.



**Vasco Xavier Mesquita** joined Morais Leitão in 2007 and is a member of the firm's administrative and public law and urban planning and environment teams. His practice focuses on several areas of public law, particularly on public contracts. For more than a decade, he has provided legal advice to both awarding entities and tenderers on several phases of procurement procedures, as well as the performance of public contracts. He mainly focuses his activity on assisting private and public entities in litigations related to works contracts. He is a member of CAAD, the Portuguese centre for administrative arbitration.

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**Morais Leitão, Galvão Teles, Soares da Silva & Associados**



**Andreia Bento Simões** joined  
Morais Leitão in 2016 and is a  
member of the corporate real  
estate and tourism department.  
Andreia provides legal  
assistance to both national and

foreign investors on corporate real estate  
transactions, including the development,  
restructuring and sale and purchase of  
shopping centres, retail parks, offices, and  
logistics, residential and tourism projects. She  
also has experience in the negotiation of real  
estate contracts, including sale and purchase,  
sale and lease back, exchange and surface  
rights. Andreia is a lecturer in the postgraduate  
courses at the Law School of the Catholic  
University of Lisbon and Oporto, where she  
lectures on real estate and tourism joint  
ventures.

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## **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

Rua Castilho, 165  
1070-050 Lisboa  
Portugal

Tel: +351 213 817 400  
Fax: +351 213 817 499  
Email: [mlgtslisboa@mlgts.pt](mailto:mlgtslisboa@mlgts.pt)  
Web: [www.mlgts.pt](http://www.mlgts.pt)

**M**  
**L** **MORAIS LEITÃO**  
**GALVÃO TELES, SOARES DA SILVA**  
**& ASSOCIADOS**

## 1. General

### 1.1 Governing Law

The principal laws governing the construction market in the Portuguese jurisdiction are as follows:

- [Law No 41/2015](#), of 3 June, as amended, which provides the regulations applicable to natural and legal persons carrying out public or private works in national territory;
- the [Civil Code](#), approved by Decree Law No 47344/66, of 25 November, as amended, notably Articles 1207 to 1230, which provides specific provisions applicable to the execution of private works; and
- the [Public Contracts Code](#), approved by Decree Law No 18/2008, of 29 January, as amended, notably Articles 343 to 406, which provides specific provisions applicable to the execution of public works.

Although the Public Contracts Code is applicable to public works contracts, it is common for the parties to incorporate concepts or provisions of the Code into private works contracts. The provisions of the Civil Code are from 1966 and the provisions of the Public Contracts Code are from 2008, and are therefore more detailed and better adapted to the current challenges of construction.

### 1.2 Standard Contracts

The use of standard contract forms is not mandatory in Portugal on private works contracts. On public works contracts, minimum requirements laid down by the Public Contracts Code must be met and there are standard forms of tender specification that might be used by contracting authorities.

The authors are aware of various standard contract forms, in particular the FIDIC models, having been used on several projects developed in Portugal in recent years. It is more common to use FIDIC models in foreign investments of significant value, where the parties and the financing institutions are used to carrying out projects through the standard models in other countries.

Therefore, the FIDIC models are not yet widespread in the construction market in Portugal. As a rule, the parties use their own models or models adapted to public works contracts. Notwithstanding this, there is currently opinion in Portugal advocating greater use of the FIDIC models, not only in private works but also in public works.

Besides that, the use of Building Information Modelling (BIM) appears, in the context of digitalisation, as an aid to the modernisation and restructuring of the construction sector in Portugal.

## 2. Parties

### 2.1 The Employer

The employer can be any type of private company or investor as well as a public entity depending on whether the works are implemented on private or public property.

The employer has the right to receive the construction duly executed in accordance with the agreed project and within the agreed deadline. Also, the employers typically have the right to:

- supervise the construction (or appoint a third party for that purpose);
- request the remedy of defects;

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- request variations (in accordance with the contract); and
- terminate the construction agreement in case of breach of the contractor.

The employers' obligations are, among others, the following:

- provide access to the site to the contractor;
- pay the price to the contractor within the agreed deadlines;
- prepare the health and safety plan; and
- obtain the required permits and licences (eg, construction licence).

## 2.2 The Contractor

The companies that typically act as contractors are private companies holding a specific permit for carrying out construction works (the permits vary depending on the type and complexity of the projects to be implemented and whether the contractors intend to execute public or private construction works).

In general, the contractor has the following rights:

- receive the price within the agreed deadlines, provided that the works are completed;
- in the event of default by the employer, suspend the works until they are paid for;
- terminate the contract in case of a definitive breach of the employer; and
- retention right of the project in case of termination of the contract due to a breach of the employer.

The contractor's obligations are usually the following:

- perform, directly or indirectly, all the works necessary for the completion of the project;

- comply with the designs and technical documents of the project;
- be responsible for the suitability, stability and safety of the construction methods used in the project; and
- comply with the established deadlines and notify the owner of any delay in the works' progress.

## 2.3 The Subcontractors

Subcontractors are typically smaller construction companies specialised in a particular field that are appointed and supervised by general contractors (whether or not subject to the previous approval by the employer, depending on what has been agreed in the construction agreement). In principle, no direct relationship is established between the employer and the subcontractors, the contractor being liable before the employer for the works performed by the subcontractors.

The relationship between the contractor and the subcontractor is similar to the relationship between the employer and the contractor, as mentioned above (ie, the rights and obligations of the contractor are in this case similar to the rights and obligations of the employer and the rights and obligations of the subcontractor are similar to the rights and obligations of the contractor).

## 2.4 The Financiers

When the employer is financed by a third-party financier (usually banks or investment funds), such financier usually does not have a relationship with the contractor or any other party involved in the construction, other than with the employer under the terms and conditions of the loan agreement (direct payments from the lender to the contractor may be foreseen, but that is not the most common structure). Usually, the financiers request that a mortgage in their favour is

registered over the construction land/building to secure the timely reimbursement of the loan by the employer.

## 3. Works

### 3.1 Scope

The scope of works is generally described as the entirety of the works required to construct the target building, with all characteristics specified in the designs and other technical documents attached to the construction agreement (which form an integral part of the same).

In addition to the works expressly mentioned in the contract, all preparatory and ancillary construction works are also deemed as included within the scope of works.

### 3.2 Variations

The specifics regarding scope and price variations are usually expressly foreseen in the construction agreement, since they are quite common and may occur through abnormal and unforeseeable events, beyond the parties' control.

#### Variations Requested by the Contractor

Variations of scope and price requested by the contractor mostly refer to unforeseen or additional works, which fall outside the agreed scope of works. The contractor's right to request variations depends on the type of contract. Variations are generally allowed in contracts where the price has been determined based on costs and unit prices set out in the bill of quantities. Differently, in the case of turnkey/fixed-price contracts, the unforeseen/additional works are in principle included in the agreed price and, therefore, contractors are not entitled to demand variations.

#### Variations Requested by the Employer

If the variations are requested by the employer, the contractor is usually required, under the terms of the contract, to accept such variation, informing the employer of the corresponding price increase (based on the unit prices previously agreed with the employer) and extension of deadline, which are subject to the employer's approval.

### 3.3 Design

In the majority of the cases in Portugal, the design is undertaken by an architect hired by the employer and then implemented by the contractor.

Usually, the first step is that the employer enters into a contract with architects, designers and engineers to develop the design for the project. Then, the employer launches a tender for the implementation of the project (where the design is made available to the bidders) and, finally, the employer enters into a construction contract with the chosen bidder for the execution and implementation of the project based on the design.

As the designer/architect is not a party to the construction contract, the employer bears the design risks. In order to mitigate that risk, it is often agreed in the construction agreements that the contractor has a certain time period after the handover to raise any doubts it may have regarding the documents provided by the employer. If such questions and doubts are not formally reported and on time, the contractor shall be responsible for all the consequences of any misinterpretation that may have occurred, including the demolition and reconstruction of those parts of the work where the error has been reflected.

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## 3.4 Construction

In general, the responsibility regarding the construction, including the construction process, lies with the general contractor that has control over the means, methods and sequence of the construction. Contractors take full responsibility for the construction works, including for any subcontracting works since, in principle, no relationship exists between the employer and the subcontractors.

The main obligation of the contractors is to fulfil the agreed scope of works within the time-limits foreseen in the agreement, and to deliver the works, at the handover date, without any defects.

The employer's responsibilities are usually limited to its payment obligations – ie, to pay the agreed price to the contractor within the agreed deadlines.

Subcontractors' liabilities towards the general contractor are similar to the contractors' liabilities towards the employer, it being common practice to include in the subcontractors' agreements back-to-back clauses mirroring the clauses of the general construction agreement.

## 3.5 Site Access

In principle, the employer is responsible for the status of the construction site, regarding pollution, underground obstacles, geotechnical conditions and archaeological finds. In any case, parties may agree otherwise in the construction agreement.

It is common to include in the construction contracts a statement from the contractor representing that it is aware of the conditions and the nature of the work site and its neighbouring areas, including the physical, "geotechnical",

geological and hydrological characteristics; the subsoil conditions; and the hydrological and climatic conditions; so as to avoid any request from the contractor for variation due to specific conditions of the site.

## 3.6 Permits

In Portugal, the construction of buildings regardless of their envisaged use (residential, commercial, services, tourism, industry, etc), is subject to prior control from the competent public authorities, through administrative licensing procedures.

### Licensing Procedure

The licensing procedure is an administrative procedure requested by the applicant of the construction licence and is divided into two stages:

- the architectural project approval, in which the compliance of the project with the applicable territorial planning instruments and rules for construction is assessed by the municipality; and
- the technical engineering projects' approval, in which the projects for sewage, electricity, water distribution and other infrastructures are analysed by the municipality – the approval of the technical engineering projects corresponds to the approval of the construction licence.

### Prior Communication Procedure

The prior communication procedure acts as a more expedient alternative to the licensing procedure: a statement is presented by the applicant, accompanied by all of the architectural and technical engineering projects, as well as all of the applicable legal opinions required. Once eight business days counted as from the application of the prior communication have passed, without an immediate rejection by the municipal-

ity or any request for clarification of deficiencies of the application, the developer may pay the applicable municipal fees and begin construction.

### Use Permits

Upon the completion of the works, the employer should request from the municipality the issuance of the use permit attesting the conclusion of the urban operation, and the conformity of the works with the architectural project and with the conditions of the respective prior control procedure, as well as the conformity of the intended use (residential, commercial, services, tourism, industry, etc) with the applicable laws and regulations.

In principle, the employer is responsible for obtaining the construction permit as well as the use permit, but parties may agree otherwise in the construction agreement.

### 3.7 Maintenance

The contractor shall be responsible for maintenance of the works during the construction phase, bearing the risk of accidental loss or damage. Upon acceptance and takeover, these risks shift to the employer, who usually hires a maintenance company for that purpose.

### 3.8 Other Functions

In general, it is not common to delegate other functions in the construction process (eg, operations or finance) to contractors.

### 3.9 Tests

For industrial projects and other sophisticated constructions (unlike residential and regular commercial and services buildings), tests for completion of the works are common.

Said tests are usually described in construction agreements and the works shall pass the tests as part of the handover to the employer.

### 3.10 Completion, Takeover, Delivery

Upon completion of the work, the contractor has the duty to make the work available to inspection by the employer so that the latter may confirm that the work has been carried out without defects. In this case, a provisional acceptance certificate is signed by both the employer and the contractor and the warranty period starts.

Differently, if there are defects preventing the acceptance of the work, a list of those defects is signed by the parties and, upon correction of the same, a new inspection is made by the employer so that a provisional acceptance certificate is signed by the parties.

Specific handover conditions and documents to be provided by the contractor prior to the issuance of the provisional acceptance certificate may be foreseen in the construction agreement (eg “as built” final drawings, operating manuals and guarantees for the equipment and material used; instruction, maintenance and operation manuals; trial and final test reports; and a completely vacant and clean work site).

After the end of the warranty period, a new inspection is carried out by the employer and, if there are no defects, a definitive acceptance certificate is signed.

### 3.11 Defects and Defects Liability Period Legal Presumption of Fault by the Constructor Towards the Employer

In the event of breach of a construction agreement by the contractor – ie, delivery of an unfinished construction work, or a construction work presenting defects – the contractor may incur a

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contractual civil liability towards the employer, under the terms of the Portuguese Civil Code provisions.

The fact that a situation of contractual liability exists determines the existence of a legal presumption of fault on the part of the contractor. Thus, whenever the contractor is unable to rebut the presumption of fault set out in the Portuguese Civil Code, the contractor will be held liable to the owner of the construction work for any defects in the delivered construction work.

## Apparent and Hidden Defects

In this regard, an important distinction shall be made between apparent and hidden defects.

Apparent defects are presumed to be known, whether or not the work has been inspected. Thus, defects are considered apparent if they are revealed by a diligent examination of the work, and the degree of diligence is measured by an objective criterion of someone without special knowledge of the technical rules of construction. However, if the employer is a skilled tradesperson or if they or the contractor uses an expert to carry out the examination, the degree of diligence is measured by the criterion of the competent professional in that field.

The contractor shall not be liable for the apparent defects in a delivered construction if it was duly and generally accepted (without reservations) by the employer.

Hidden defects are understood to be defects that are unknown to the employer because they cannot be detected by a diligent examination of the work, so that the general acceptance (without reservations) of the construction works by the employer upon conclusion does not preclude the consequent liability of the contractor.

## Necessity to Report the Detected Defects to the Constructor

It is the owner's responsibility to communicate the results of the inspection after the construction works delivery by the constructor, under penalty of the work being considered accepted (without reservations).

### *Owner's rights upon a defected construction (provided that the detected defects were reported to the constructor)*

The specific legal regime applicable to the defects on construction works contracts foresee the following rights of the employer:

- the right to have defects remedied and new work carried out;
- the right to have the price of the work reduced;
- the right to terminate the contract; and
- the right to damages.

Some of these rights may be exercised simultaneously (eg, the termination of the construction contract that causes damages to the owner will give rise to the right of an indemnification, or the defects which, notwithstanding being corrected, have caused damages that shall be indemnified).

## Defect Liability Period

The standard warranty periods are:

- two years in the case of equipment related to the work, but which can be separated from it;
- five years in case of non-structural building elements; and
- ten years concerning structural components of the constructed building/property, facades and roofs.

Construction agreements commonly foresee the provision of a bank guarantee issued by the con-

tractor in favour of the employer, valid during the defect liability period.

Construction agreements may also foresee liability limitation clauses, which are considered valid pursuant to the Portuguese Civil Code (usually the contractor intends to limit its responsibility to a certain amount, related to a percentage of the value of the contract).

## 4. Price

### 4.1 Contract Price

In Portugal, there are three classic models of contract pricing:

- open book;
- price series; and
- global price.

The global price model is most used nowadays, according to which the parties agree on a total and fixed price for the entire construction phase. The global price is calculated on a list of unit prices applicable to the quantities required. The price proposed by the contractor shall consider the design and/or detailed description of the works provided by the employer.

Since the parties agree the price shall be fixed and non-revisable during a certain period of execution of the contract, it cannot be changed due to increases in costs of workforce, materials, equipment, or inflation in general. Therefore, as a rule, the contractor may have to assume the risk of (normal) alterations in costs. Furthermore, additional works and respective costs shall be supported by the contractor, unless it is the responsibility of the employer. Alternatively, the prices of the materials and labour may be

reviewed during the contract when agreed by the parties.

The parties may also agree to procure the works under which contractors are reimbursed based on transparent records of the costs (open book) or to the effective quantities applied to the unit price list (price series).

Payments are often dependent on the approval of a monthly statement of measurement of the work, so that the invoicing is made monthly, resulting from the valuation of the work performed in that month. It is less common to provide milestone payments due to the fact it may jeopardise the contractor's cash flow.

### 4.2 Payment

Typically, construction contracts provide measures to manage late or non-payment. It is common to have an advance payment of up to 30% against submission of a bank guarantee by the contractor. The advance payments shall be proportionally redeemed throughout the issuing of the invoices within the execution of the contract.

As a rule, invoices are issued monthly. Nowadays, contractors are not willing to accept delayed payments and request payment of invoices within 30 to 60 days. In the case of late payment, interests may be charged at the commercial rate in force and the contractor may suspend the execution of the work if the contractual and/or legal conditions are met.

### 4.3 Invoicing

Electronic invoicing mechanisms are increasingly commonly used. In public works contracts, it is mandatory for all public entities to adopt electronic invoicing mechanisms.

In other words, any national company doing business with the Portuguese state or public entities shall be required to issue, communicate and submit invoices in a structured electronic format.

## 5. Time

### 5.1 Planning Programme

Normally, the contractor presents the employer with a bar diagram (a Gantt chart), which is a visual tool used to control and manage the schedule of the activities for a project.

The work schedule may include milestones and binding interim deadlines (non-compliance with which may lead to the payment of penalties). The work schedule shall evidence the articulation of the activities required for the execution of the project.

For public works contracts, it is mandatory that the design includes a description of preparatory and accessory works, as well as a complete list of all types of works necessary for the execution of the work to be performed and the respective bill of quantities. Article 43 of the Public Contracts Code states that the design shall be made available by the employer. Paragraph 3 of the same Article further provides that in exceptional cases, the design may be prepared by the contractor. The contractor shall submit – within the proposal – the work plan and financial schedule (Article 57 (2) (b) and (c) of the Public Contracts Code).

The schedule of works is in any case subject to the approval of the employer.

### 5.2 Delays

Delays shall be considered in two different scenarios:

- if the delay is due to the contractor, legal and contractual penalties may apply, and if the non-compliance is serious or repeated, it may lead to termination of the contract; or
- if the delays are not due to the contractor's fault, the contractor must request an extension of the contractual period and, if justified, claim payment of the extra costs of remaining on-site longer than contractually agreed.

### 5.3 Remedies in the Event of Delays

Whenever there is a delay in the works it is necessary to replan the works, but the employer may request recovering measures or apply penalties that, in some way, safeguard its interests.

Thus, the employer may require the adoption of measures to recover from delays (reinforcement of means and concentration of activities), may apply penalties, enforce the guarantee provided and, ultimately, terminate the contract.

### 5.4 Extension of Time

The contractor may submit requests for a time extension through a formal notice, referring to the respective grounds and providing evidence that the need for an extensions is not its fault. By reasoned request, the contractor shall also establish a causal link between the impact of the delays recorded and the requested deadline extension.

### 5.5 Force Majeure

Force majeure is not defined in a specific regulation, being usually associated with abnormal (and unpredictable) changes of circumstances.

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Since it is not specifically defined, it is very common for construction contracts to incorporate clauses that identify, in an exemplary or exhaustive manner, the facts or circumstances that, when verified, may be qualified as “force majeure events”, as well as to exclude certain events from being qualified as force majeure.

It is also common that, in the referred clauses, the parties establish, from the outset, what the consequences associated with the occurrence of the force majeure event are – such as suspension of the deadline for performance of the contract while the force majeure event lasts, the chance of price review, or termination of the contract if the force majeure event lasts for more than a certain period.

Force majeure clauses inserted in construction contracts often also provide for damage containment mechanisms, under which the affected party undertakes to use its best efforts to reduce the impact of the force majeure event on the performance of the contract.

It is also common for construction contracts to provide the deadlines and procedures to be followed by the affected party in the event of a force majeure event. Thus, the first step will be to consult the contract signed between the parties and check for the possible existence of a force majeure clause and its terms, since this clause, if it exists, will prevail over the law.

## 5.6 Unforeseen Circumstances

The existence of unforeseen circumstances may give rise to the execution of additional or complementary works.

The responsibility for the execution of additional or supplementary works depends on the par-

ticularities of the case in question and the risk-sharing framework established in the contract.

If the project is carried out on behalf of the employer, as a rule the employer will be responsible for unforeseen circumstances. On the other hand, if the project is carried out on behalf of the contractor, the contractor will, as a rule, be responsible for unforeseen circumstances, except when these have been induced by elements prepared or made available by the employer.

The allocation of responsibility between the parties shall be made in accordance with the terms of the contract and its execution by the parties, also taking into account the general terms of law.

The Public Contracts Code establishes specific rules for the allocation of liability between the employer and the contractor for unforeseen circumstances depending on when errors and omissions are required to be detected.

## 5.7 Disruption

The right to obtain an extension of time or compensation due to a disruptive event should be assessed on a case-by-case basis and depending on the relevant circumstances and the contractual framework in place. Disruption may correspond to the concept of “change of circumstances”, which is legally enshrined in Article 437 of the Civil Code. Furthermore, the disruptive event may lead to the presentation of a claim for the restoration of the financial balance, and evidence must be presented as to the facts resulting in greater difficulty in the execution of the work, with aggravation of the respective charges and impact on the deadlines for execution of the work.

## 6. Liability

### 6.1 Exclusion of Liability

In general terms, considering the principle of contractual freedom, there are no liabilities that cannot be excluded under contractual terms.

Limitations of liability must be defined contractually, and the exclusion of liability cannot be contrary to law or public policy.

### 6.2 Wilful Misconduct and Gross Negligence

Wilful misconduct and gross negligence are legal concepts in Portugal.

In Portugal, the courts do not admit the validity of clauses excluding liability in case of intent or gross negligence.

However, an exclusion of liability in cases of simple negligence is admitted.

### 6.3 Limitation of Liability

In private law construction contracts, parties are allowed to contractually limit their liabilities. Specifically, it is possible to limit the contractor's liability to a percentage of the contract price, except in the case of wilful misconduct or gross negligence.

In public works contracts awarded in competitive bidding procedures, it is almost impossible for contractors to cap their liabilities, since the terms and conditions of liabilities are pre-defined in the tender specifications, which bind the bidders and cannot be altered after the contract award without prejudice to the competition principle.

## 7. Risk, Insurance and Securities

### 7.1 Indemnities

In Portugal, indemnities are generally used to limit risk. The contractor is typically responsible for third-party claims (due to direct damages or for breaching the law, safety measures or licences) and it is also common to establish penalties in case of delay of works.

From the employer's side, if the works initially agreed to are reduced, it is typically agreed that the contractor is entitled to receive compensation.

### 7.2 Guarantees

The projects are typically secured by an unconditional and irrevocable first demand bank guarantee, issued by a first-class bank located in Portugal, in the amount of approximately 10% of the construction price. The bank guarantee is provided by the contractor on the date of signature of the construction agreement (or until the handover date) and with the employer as beneficiary. Although this guarantee is not mandatory or regulated by law, normally the amount withheld is released after the completion of the project: 5% is usually released on provisional acceptance of completion of the project and the remaining 5% after the final acceptance upon the expiry of the warranty period.

### 7.3 Insurance

Notwithstanding any other provision to the contrary, the contractor is typically responsible for taking out and maintaining during the construction period the following insurance policies:

- contractor's all-risk (CAR) insurance;
- work accident insurance for all its personnel, in accordance with the applicable legislation (covering, in particular, the expenses and

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charges resulting from eventual disability or death, among others);

- civil liability insurance;
- machinery insurance, covering operation risks, including assembly and disassembly of the machines and auxiliary construction equipment to be used in the construction site;
- insurance covering the transported goods; and
- motor liability insurance, covering each vehicle to be used in the construction activities under the terms of the applicable law.

## 7.4 Insolvency

The insolvency of the contractor is usually considered a situation where the employer is entitled to terminate the construction agreement. In addition, a step-in right is often provided to the employer so that it can pay the subcontractors directly.

In case of the employer's insolvency or financial difficulties, where the contractors are not paid on time, they have the right to suspend their work and in some cases are entitled to a retention right of the project.

## 7.5 Risk Sharing

Portuguese law does not provide for any risk sharing since it rests on the basis that the damages will be attributable to the entity that committed the damage as a result of wilful misconduct or negligence. It is not common for agreements to provide for any risk-sharing provisions. Typically, the employer transfers all possible risks related to the construction to the contractor.

## 8. Contract Administration and Claims

### 8.1 Personnel

Construction agreements usually provide that:

- the contractor is responsible to assign and employ on the work site qualified and experienced workers for the proper and prompt completion of the construction works;
- the contractor is responsible for the fulfilment of the applicable labour law; and
- the contractor is solely responsible for the work performed by its employees and subcontractors.

### 8.2 Subcontracting

Pursuant to law, if the construction agreement does not set forth otherwise, the contractor is entitled to subcontract the works, provided that the subcontractors have the licences required to perform said type of the works. However, it is common to foresee in construction agreements that the contractor may only subcontract part of the works if that is previously authorised by the employer.

### 8.3 Intellectual Property

Construction agreements only include intellectual property clauses in specific cases depending on the scope of the works. Said clauses will be relevant if the scope of the construction agreements also includes the design of the project or the provision of services that could in any way require the implementation of intellectual property rights by the contractor.

The general rule is that all the designs and intellectual property belong to the employer. It is commonly established in construction contracts that contractors cannot use intellectual property

for any purpose other than for the execution of the works.

## 9. Remedies and Damages

### 9.1 Remedies

In case of breach of the construction contract, the non-breaching party may be entitled to be compensated for the damages and losses resulting therefrom.

Depending on the event that gives rise to a breach, the non-breaching party may invoke suspension rights and ultimately terminate the construction contract. Typically, the employer will have broader termination rights and the contractor's or consultant's right to terminate the contract is essentially linked to a situation where the employer fails to pay the amounts due for their services.

In case of non-fulfilment of the general or partial deadlines by the contractor, it is standard that the parties foresee in the construction agreement that the employer is entitled to a daily penalty based on a percentage calculated over the works price. The amount of the daily or weekly penalties can increase if the breach is not remedied up until a certain period, without prejudice to a maximum penalty amount.

The non-breaching party is generally required to send a notice of default before claiming damages and terminating the contract.

### 9.2 Restricting Remedies

It is not common to contractually limit the remedies available to any of the parties, although it is standard to have a maximum amount for penalties due in case of delay and to contractually limit suspension rights.

### 9.3 Sole Remedy Clauses

Sole remedy clauses are not typical in construction contracts.

### 9.4 Excluded Damages

It is not common for parties to expressly exclude indirect and consequential losses. Where such exclusion is agreed, it is usually on a mutual basis and expressly foreseen in the construction contract.

### 9.5 Retention and Suspension Rights

Contractors are entitled to retain the works if the employer fails to fulfil its payment obligations (whether the works have been completed or not), which corresponds to an in rem security resulting directly from the applicable law and without the need for any prior judicial decision. Some construction agreements may foresee the contractor's waiver to the retention right, but the validity of these clauses is debatable.

Suspension rights are also standard and mainly attributed to the contractor.

### 9.6 Termination

The employer may withdraw from the contract at any time, even after the commencement date, provided that the contractor is compensated for its expenses and work and for the profit it could have derived from the works (Article 1229 of the Civil Code).

All expenses incurred with the works, which have not been paid (ie, those related to the acquisition of construction materials, as well as labour costs, equipment and construction site costs not yet amortised), are included.

The determination of the income is based on the construction agreement and not only on the work that remains to be done, considering the

Contributed by: Rui Ribeiro Lima, Vasco Xavier Mesquita and Andreia Bento Simões, Morais Leitão, Galvão Teles, Soares da Silva & Associados

overall cost of the work and the price. The result of the subtraction of these sums (net price minus cost price) will be profit, which may vary and must be demonstrated.

The contractor may only terminate the contract on specific grounds provided for by law or in the contract, or by agreement with the employer. If there is no basis or agreement for the contractor's withdrawal, the employer is entitled to claim compensation for damages caused by the contractor's acts or omissions.

## 10. Dispute Resolution

### 10.1 Regular Dispute Resolution

Unless stipulated by the parties, the civil courts are normally competent to resolve disputes arising from the construction contracts ruled by private law, in accordance with the terms and rules of jurisdiction set out by the contract and by the Portuguese Civil Procedure Code.

Regarding public works contracts, which are normally ruled by public law, the administrative courts are competent to resolve the disputes in accordance with the rules of jurisdiction foreseen in the contract and the Administrative Courts Procedure Code.

In either case, as a rule, depending on the value of the case, the decisions rendered by the courts can be appealed.

### 10.2 Alternative Dispute Resolution

The parties may select to resolve any dispute arising from the interpretation, validity and performance of construction contracts ruled by private law by means of arbitration, under the terms of Portuguese Arbitration Law.

The parties may settle their dispute through *ad hoc* arbitration or through institutionalised arbitration centres, incorporated and operated under the terms of law.

In Portugal, there is an arbitration centre known as *Centro de Arbitragem de Construção*, set up with the aim to resolve disputes arising from construction contracts.

When disputes arise from public construction contracts, arbitration tribunals may also be set up under the terms of the Administrative Courts Procedure Code and the Voluntary Arbitration Law, with the necessary modifications. In Portugal, there are several arbitration centres established and regulated under the terms of law, among which is the *Centro de Arbitragem Administrativa* (CAAD).

Under the Portuguese Arbitration Law, it is legally permitted that the exercise of conciliation or mediation functions may be assigned to arbitration centres.

It is less common for disputes related to public construction contracts to be solved by means of arbitration because of the mistrust of institutions and public decision-makers for the use of alternative dispute resolution mechanisms.

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