



Construction

in 34 jurisdictions worldwide

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Argentina

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1 Joint ventures

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

In the Argentine legal system there are no laws compelling foreign designers or contractors to enter into a joint venture with a local contractor in order to design, build and be paid for their work. Foreign designers or contractors are free to set up and carry out their business in Argentina. In this sense it is worth noting that if a foreign company carries out commercial activity in Argentina on a permanent basis, it will be required to do it through a registered branch or subsidiary. Hence, if the foreign company decides to enter into a joint venture, local corporate regulations would require prior registration of a branch or subsidiary before the local authorities. However, there is no provision under Argentine law requiring that the local contractor control the joint venture.

2 Foreign pursuit of the local market

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

The key concerns that a foreign designer or contractor should consider before taking such a step are:

- which corporate structure would be best to choose according to local corporate regulations and the type of project. It should be noted that Argentine law encourages foreign investments and grants equal treatment to both foreign and local investors;
- local foreign exchange regulations which will facilitate or limit transfers of funds into and out of Argentina;
- labour laws: selection of local partners and employees. Although the contractor might have subcontractors, they both will normally be considered jointly responsible for damage claims and compliance with labour laws;
- tax implications: the Argentine tax system is not a simple one and requires thorough beforehand tax planning;
- political risk: it is important to carefully analyse the numerous national, provincial or municipal regulations if participating in a public sector infrastructure project; and
- the importance of having qualified employees and executives to allow better adaptation to local practices and policies.

3 Licensing procedures

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

In principle Argentine law does not require foreign designers or contractors to be licensed locally to work. However, depending on each of the local jurisdictions, there might be some administrative requirements and authorisations to comply with before starting a construction project.

4 Labour requirements

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

The local law does not require a minimum amount of local employees, but note that in practice the labour authority controls the residence legal status of all the employees.

5 Local labour law

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

The Construction Statute (Act No. 22.250) applies to workmen or building workers whose specific duties are related to construction operations, that is, for employees exclusively carrying out specific building duties. The regulatory office is a specific entity called Instituto de Estadística y Registro de la Industria de la Construcción (IERIC).

The main characteristic of this system is the creation of a special unemployment fund system, which replaces the normal severance consequences derived from an unfair dismissal. Whatever the cause of the termination, the employee will be entitled to recover from the fund an accumulated amount of money deposited monthly by the employer while the labour relationship was in force.

This construction unemployment fund is maintained at the following rates:

- 12 per cent from employee's monthly wages for the first year of the relationship;
- 8 per cent from employee's monthly wages for the following years; and
- 2 per cent of such contributions as an employer's monthly contribution.

Termination of employment will make fund contributions available for the employee and the employer must make the deposit book available, with all the relevant deposits of contributions to such fund, within 48 hours of termination.

Although termination does not entail severance obligations, there are certain liabilities for an employer who fails to comply with formal obligations (ie, does not give the deposit book to the employee; fails to make fund deposits, etc).

The working hours system is more flexible in the construction business, as it allows the implementation of shift work and days off with more flexibility than the regular labour system.

Although there are two collective bargaining agreements (CBA) applicable for construction activity as a whole (No. 76/75 for building workers and No. 151/75 for administrative and staff personnel), the construction trade union (UOCRA) negotiates specific conditions with construction companies in order to make labour conditions more flexible for each project (eg, working days, leave, holidays).

6 Health and safety regulation

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

Regulatory Decree No. 911/97 (Laws No. 19,587; 22,250 and 24,557) regulates health and safety matters in the construction industry. In addition to establishing health and safety rights and obligations for employers and employees in their place of work, it also creates a special training programme to be promoted by the employer for its employees, regarding health, safety, and the prevention of diseases and work accidents.

7 Close of operations

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

In principle, if a foreign contractor decides to close its operations in Argentina and leave, there would be no major legal obstacles other than the necessity to comply with the applicable corporate liquidation process and its pending obligations (if any), including contractual, labour, social security and tax obligations. As to possible termination payments assessed against the foreign contractor, this would depend entirely on the agreed contractual provisions for the project.

8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

There are no standard-contract forms for construction and design required by Argentine law. However, during past years, the use of the standard-contract forms created by the International Federation of Consulting Engineers (FIDIC) has increased.

9 Price escalations

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

Under Argentine law there is no specific rule regarding who assumes the risk of material price escalation and shortages.

Pursuant to Argentine law the parties are free to agree on risk allocation provided the agreed terms are not contrary to public policy. Regarding price escalation and shortages it is common practice for the parties to agree on a certain threshold beyond which risk is transferred from the contractor to the contracting party.

10 Competition

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

In principle, local laws do not provide any advantage to domestic contractors in competition with foreign contractors. Pursuant to Argentine law, foreign contractors have the same legal and tax treatment that the local contractors have. However, there are, from time to time, certain exemptions when specific industries are promoted or protected due to public policies.

11 PPP and PFI

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

In 2005, Argentina's national government passed new regulations regarding private investment in public infrastructure works and public services. This was achieved with the implementation of two systems: the public private partnership (PPP) and the private initiative system (PRIS). Since the enactment of these regulations, the government has received a significant number of proposals for the development of high value infrastructure projects. This fact reflects the real change that has derived from these favourable regulations and

the idea of involving private sector investors in public infrastructure works is increasingly considered.

In Argentina, the private sector comprises all economic actors not directly controlled by the government. Given the increasing demand for infrastructure projects, public private partnerships, with their promise of shared responsibility and managed risk, are means of creating the right incentives for greater private sector involvement. However, as a PPP mostly requires that the project's proposals be generated by the government, the private initiative system offers opportunities to advance projects developed by private hands.

PPP contracts normally entail a concession contract with the public sector. A concession agreement is a contract between a public sector entity and a private entity, where the private entity provides a service to the public sector entity or directly to the public. This type of contract is most often related to public services. Please note that these concessions are under the control of the corresponding public office and require administrative authorisation.

12 Payment of fees

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

The contractor is entitled to use all kinds of legal rights and remedies to obtain payment. The execution of a formal document supporting the debt will secure payment of the contractor's fees by the owner and entitle the contractor to claim payment before a court of law. The contractor may place any available lien on the property (including mortgages over land or property, pledges over movable assets and inventory, etc) and require personal guarantees as surety.

13 Tort claims and indemnity

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

Pursuant to Argentine law, parties are free to agree the terms of their contractual relationship. This notwithstanding, a general contractor would normally be indemnified against all acts, errors and omissions arising from the work of a subcontractor provided these were not generated due to the general contractor's own negligence.

It should be noted that contractual allocation of responsibility would be effective between the parties to the contract but may not be enforceable in relation to third parties. Finally, it should be noted that a general contractor would normally be held jointly liable with the subcontractor for its labour and social security obligations.

14 Liability to third parties

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

According to the Argentine Civil Code (ACC) and the Consumers' Defence Law No. 24,220 (CDL), contractors bear contractual or tort responsibility to third parties for damages arising from construction defects.

Under section 40 of the CDL, contractors or producers or both, manufacturers, distributors, sellers, importers and owners are jointly and severally liable for any damage caused to consumers (third parties) as a consequence of a good's risk or defect. In order to avoid such liability in total or in part, constructors must prove that the damage was not their fault.

According to the ACC, contractors are liable to a third party for the total or partial building deficiency arising from construction, and soil or materials defects, or both, within a 10-year period after the date of actual possession by the owner. However, in case of latent defects, the third party may file their claim within 60 days of the date

of discovery. Please note that constructors shall not be liable for any apparent deficiency that can be detected without any need of expert assistance at the termination date of the construction. Moreover, contractors shall not be liable for deficiencies arising from any act of force majeure or due to the fault or acts of a third party.

Although contractors are not contractually involved with third parties, the ACC establishes that consequences arising out of risks from goods must be assumed by them. The responsibility for damages to a third party is regulated by section No. 1113 of the ACC which sets liability in tort. This section provides that if damages are caused by goods, the owner of the goods has to prove that the damage was not his fault. However, if damage was caused by a defect in the goods or by risk inherent to the goods, the owner needs to prove that the victim or third parties were at fault to avoid any responsibility.

Therefore, a third party may pursue a claim against the constructor despite the fact that according to the ACC, contracts only have effect between the parties and their successors.

15 Insurance

To what extent may a contractor obtain insurance to cover its contractual risks?

A contractor's risks may be covered by different kinds of insurance depending on the kind of construction project or the terms of the concession. However, according to local laws the maintenance of at least civil responsibility and workplace risk insurance is required. Please note that there are many eventualities that contractors may be insured against; those listed below are the most common:

- natural damages;
- damages made by itself;
- damages made to a third party by the contractor;
- civil responsibility; and
- labour responsibility.

16 Statutory payment protection

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

As we mentioned above, Argentine law allows the parties to agree the terms of their contracts, including those provisions regarding voluntary and involuntary insolvency and bankruptcy proceedings in the event of early termination. However, local laws provide protection to creditors against a debtor's bankruptcy.

The Argentine Bankruptcy Law No. 24,522 (ABL) provides for three types of insolvency proceedings:

- reorganisation proceedings (voluntary proceedings only);
- pre-packaged plans (also voluntary); and
- bankruptcy (liquidation) proceedings (voluntary or involuntary).

In Argentina, a reorganisation or bankruptcy proceeding only commences when the commercial court renders a judgment declaring the debtor subject to reorganisation or liquidation. Thereafter, the reorganisation or liquidation, as the case may be, is permitted to proceed. Generally, the rules are fairly well defined and followed in practice, although the process may actually take longer than the statutes contemplate. In addition, foreign creditors are generally treated the same as local creditors.

17 Contracting with government entities

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

A government agency would not be able to assert sovereign immunity as a defence to a contractor's claim, although, if not otherwise agreed or guaranteed, payment would need to be included in the relevant annual budget for the public sector.

18 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

The Argentine Criminal Code prohibits bribery. Any individual offering a bribe to a public officer in order to obtain an advantage of any kind may be subject to one to six years of imprisonment.

If a court declares that a contractor has illegally obtained the award of a certain contract, the latter would not be enforceable.

19 Arbitration

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

During the past years more and more contractors' disputes have been solved by arbitration. The reason for choosing arbitration over litigation is due to the flexibility, privacy and confidentiality of the process and special emphasis granted to settling disputes quickly.

However, despite this favourable attitude towards arbitration, litigation in the local courts is still the most common practice used to resolve construction disputes.

20 Foreign corruption

Does local legislation prohibit corrupt practices carried out abroad by persons domiciled in your jurisdiction?

There are no laws in Argentina that specifically prohibit illegal actions in foreign jurisdictions. However, the Argentine Criminal Code is applied to any crime committed in Argentina or any crime with effect in the Argentine territory. Also, the Argentine Criminal Code is applied to any crime committed by agents or by Argentine employees in the performance of their duties abroad.

Moreover, bribery in international transactions is considered to be a crime under the Criminal Code since Argentina is a signatory to the International Convention on Combating Bribery of Foreign Public Officials in International Business or Transactions.

21 Force majeure and acts of God

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

According to Argentine law contractors may be excused from performing their contractual obligations owing to events of force majeure and acts of God, unless the contractor was in arrears before said event. It should be noted that Argentine law considers an 'act of God' as one which could not be predicted, or if so predicted, could not be prevented.

22 Dispute resolution mechanisms

What dispute resolution procedures are successfully used to solve construction disputes?

Both institutional and ad hoc arbitration are successfully used to resolve construction disputes.

23 Courts and tribunals

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

In Argentina there are no specialised tribunals dedicated to resolving construction disputes. Disputes arising from a construction contract would be resolved by different courts depending on the matter in dispute.

24 Dispute review boards

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

There are no regulations regarding the application of review boards in Argentine law.

25 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from?

The practice of voluntary participation in professionally organised mediation has fallen into disuse since Law No. 24,573 establishes an obligatory mediation process prior to any formal legal action in the courts (excluding arbitration and alternative dispute resolution). Nevertheless, voluntary participation in professionally organised mediation may be included in contracts by parties as a method of settling disputes arising from the contract.

26 Confidentiality in mediation

Are statements made in mediation confidential?

According to Law No. 24,573 all statements made in a mediation process will be confidential and cannot be repeated in any formal proceedings such as court proceedings, arbitration, etc.

27 Arbitral award

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

In principle, a foreign arbitral award would be executable under the terms of the treaties signed with the host country where the arbitral award was executed. If there are no signed treaties, the foreign arbitral award would be executable if it complies with the following requirements:

- a foreign arbitral award was executed by a competent court according to the local regulation of international jurisdiction and was originated by a personal action or a real action with respect to a personal property;
- the judgment was issued by a competent court in accordance with Argentine laws regarding conflict of laws and jurisdiction and resulted from a personal action, or an in rem action with respect to personal property, and such property was transferred to Argentina during or after the prosecution of the foreign action;
- the defendant against whom enforcement of the judgment is sought was personally served with a summons in accordance with due process of law (including by way of a process agent) and was given an opportunity to defend the action;
- the judgment fulfils all formalities required for its enforceability under the laws of the place where the same was issued and its authenticity established in accordance with the requirements of Argentine law;
- the judgment is not contrary to Argentine public policy; and
- the judgment is not contrary to a previous or simultaneous judgment of an Argentine court.

28 Governing law and arbitration provider

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?

In our experience in Argentina, there is no preference for any jurisdiction. Commonly, disputes arising from a contract with the objective to be executed in Argentina would be subject to the jurisdiction of the local courts and local regulations.

Update and trends

In the past years, no new issues or trends have arisen in relation to the regulatory framework for the construction industry. However, for some years now there has been a significant increase in large public works funded through private trusts, but with state intervention. This has brought about the negotiation of contracts between private parties and the state, often concerning issues relating to traditional public works contracts.

29 International environmental law

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

Argentina is not a party to the Stockholm Declaration of 1972. However, most of its principles are included in the Argentine local environmental regulations. As an example of the above, section 41 of the National Constitution guarantees the right to enjoy a healthy environment to all citizens. In the same way, the General Environmental Law No. 25,675 establishes the minimum environmental protection rules applicable in all of Argentina's territory. This regulation establishes an environmental impact procedure to be followed prior to any kind of construction activity that might cause environmental damage or significantly affect the quality of life of the population. This procedure consists of an environmental impact survey and construction companies have to be granted a formal certificate (CAA) issued by the relevant administrative agency prior to commencing infrastructure and building projects.

As Argentina has many environmental laws, we recommend analysing them in relation to the specific construction project.

30 Other international legal considerations

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

There are some legal issues that might present obstacles to a foreign contractor attempting to do business in Argentina, for example:

- local corporate regulations do not allow offshore companies registration;
- the Office of Corporations will require foreign companies to demonstrate that said foreign company is not subject to legal prohibitions or restrictions to carry out business in its place of origin and evidence that the company has the majority of its assets outside Argentina; and
- from a tax point of view, as mentioned above, a foreign company and a local company receive similar tax treatment, and the legal representatives are also considered local directors and have the same tax obligations.

It is important to note that in some cases the local exchange regulations are strict with respect to requirements in order to introduce funds into Argentina.

31 International treaties

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'?

In the past 15 years Argentina has signed 56 treaties on the mutual protection of general investments, 53 of which are currently in force and were ratified by the National Congress. According to the National Constitution, those treaties are supreme to laws.

- In those treaties, the parties commit themselves to grant fair and equitable treatment to the other party;

- grant treatment similar to that granted to local investors; and
- not to commit any expropriation or nationalisation.

Additionally, the parties are free to choose the jurisdiction or international arbitration forum to resolve any dispute arising out of their contracts.

32 Tax treaties

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

Argentina has entered into 18 tax treaties with the following countries: Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Russia, Spain, Sweden, Switzerland and the UK in order to ensure that taxpayers, including contractors, are not subject to income tax in multiple jurisdictions, generally following the OECD Model Convention.

33 Currency controls

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

In Argentina there are specific foreign exchange regulations that regulate access to the local exchange market. Although they do not generally make it difficult to change operating funds or profits from one currency to another, careful prior analysis of the cash flow structure is recommended.

34 Removal of profits and investment

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

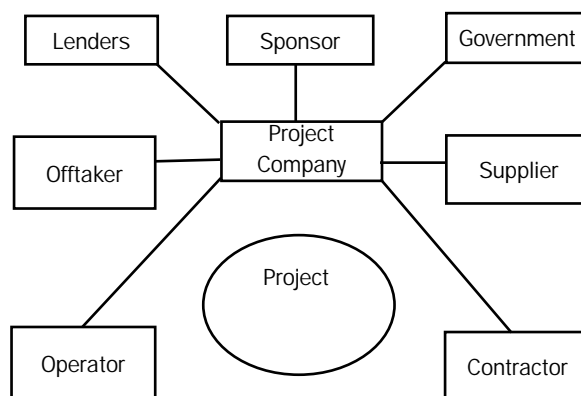
Local foreign exchange regulations, in principle, permit free access to the local exchange market. However, the regulation sets basic controls which depend on the transaction and commonly require specific documents to support it.

In order to remove profits abroad, if dividends have already been audited and posted on a finished balance sheet, then access to the local exchange market is free.

Regarding the removal of direct investments, the local regulation requires that those investments should have been kept in the country for 365 days prior to their removal.

35 Contractual matrix of international projects

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



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