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Specialized legal advice is the main strategy to face disputes in construction contracts in Chile

The Cámara Chilena de la Construcción A.G. surveyed a representative number of construction companies that execute in the country construction contracts for different productive sectors, both public and private. Considering the analyzed contracts, there were disputes in practically 50% of them.

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Asesoría jurídica especializada es la principal estrategia para enfrentar divergencias en contratos de construcción en Chile

La Cámara Chilena de la Construcción A.G. realizó una encuesta a un número representativo de constructoras que ejecutan contratos de construcción en el país para diferentes sectores productivos; públicos y privados. De los contratos analizados, en prácticamente el 50% de ellos se produjeron divergencias.

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Peruvian Government approves Economic Impulse Plan to accelerate public and private investment

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Specialized legal advice is the main strategy to face disputes in construction contracts in Chile.

Estudio Jurídico Otero

Chile

The Cámara Chilena de la Construcción A.G. (Chilean Chamber of Construction), a trade association that groups most of the Chilean construction companies, surveyed a representative number of construction companies that execute in the country construction contracts for different productive sectors, both public and private. It surveyed around 1,968 construction contracts agreed into during years 2014, 2015 and 2016. One third of these contracts were with the public sector and the remaining ones with the private sector.

As regards risk assignment, it should be noted that approximately one third of the contracts reviewed were agreed under the lump-sum modality, i.e., at a fixed price for the construction company. In terms of quantity, they are followed by contracts with a series of unit price and then, a mix of both, which reflect almost all the contracting modalities employed.

Considering the analyzed contracts, there were disputes in practically 50% of them.


The more representative sectors in terms of construction contracts concluded are: Ministries (26,8%) and Mining (24,3%) with 51,1% of the contracts during 2016. Concessionaires (10,5%), Energy (8,1%) and Industry (7,5%) account for 26,2 % of the contracts, followed by Commerce (5,2%), Subway (3,5%) and Other (14,0) which account for 22,7% of the total.

The largest number of contracts (999 contracts), 47% of those concluded between 2014 and 2016 mainly concentrated in the sectors of Industry, Ministries and Energy, showed some divergence (466 contracts), defined as “any type of disagreement, discord, controversy or conflict with the counterpart”, understanding by disagreement the differences resolved by the parties; by controversies, the differences resolved by a third party (not judicial) and by conflicts, the differences between the parties that should resolved by or which are in jurisdictional processes.

During 2016 there were a 74% of disagreements, 12% of controversies and 14% of conflicts.

[Prior to signing the contract, the main disputes](#) refer to design engineering (65%), followed by the incorporation of explicit risks to the development of the project and their respective solution (57%) and the inclusion of dispute resolution mechanisms, which increased from 15% to 38% in 2016 over the previous year.

[During the term or execution of the contract](#), the main disputes are related to amendments to the originally agreed project, with 89%, and the project development period (Gantt compliance) with 78%. It is also interesting to note that from 2015 to 2016 the number of disputes due to non-compliance in the distribution of risks foreseen in the contract, rise from 55 to 62%.



As to their level of importance or conflictiveness, the main cause for “disagreements” and “controversies” is the interference of the client or other contractors in the execution of the work and the lack of inclusion of methods for immediate solution of disputes.

The main cause for “disputes” is the lack of inclusion of methods for early solution of disputes and the lack of risk assessment associated with the contract.

We can notice that the causes for disputes that repeat themselves are those ensuing from project problems, an inadequate identification and balance of risks and the lack of intermediate mechanisms for resolving disputes, both at the base line studies and contract, and during its execution and in the importance of their conflictiveness level.

According to the construction companies surveyed in the study, disputes in construction contracts generate economic impact due to the cost increases and a decrease in the project profit margins, grading it as the main negative effect, which has been increasing from 2014 to date; the first year only 70% of the surveyed companies reported it as the main negative effect and in 2016 it increased to 84%, impacting direct costs by 42%, indirect by 30% and both by 28%.

Thus, we consider that it is important to take into account the statements of the companies which claim to have strategies or policies to face disputes, in the sense that they have identified as the main tool to prevent or resolve these disputes to have “legal advice”

and/or “legal experts”.

It is also apparent from this study that the main mechanism to end or overcome disputes was meetings between the parties (85%), followed by requiring the representation of a lawyer before the principal company, or arbitration, in both cases with 6%.

Therefore, although the existence of specialized legal advice does not guarantee avoiding disputes that may arise during the execution of a construction contract, its backing from the study of the bidding bases and documents until the termination and settlement of the executed contract, is recognized by the industry itself as an important mechanism to solve them or diminish their level of importance and, therefore, their impact on the profitability of the projects.

Carolina Arrau Guzmán

Lawyer specialized in construction contracts
ESTUDIO JURÍDICO OTERO

Peruvian Government approves Economic Impulse Plan to accelerate public and private investment.

Estudio Laos, Aguilar, Limas & Asociados

Chile

On March 9 of this year, the Government approved the execution of an Economic Impulse Plan to accelerate and boost the economy. As part of the plan, the Government is injecting more than S/ 6,660 million Soles (US\$ 2,019 million Dollars) into the economy, which should be invested in specific measures within six different areas.

It is a new fiscal impulse, the dynamization of formal employment, the reactivation of social housing, credit to microenterprises and small enterprises (MSEs), the boost of the system of works and, finally, the promotion of mining investment.

These measures are expected to generate:



150 thousand jobs in the next 12 months

+



the construction of 150 thousand new social housing (15 thousand for this year 2017).

The Economic Impulse Plan consists of seven measures:

1 A new fiscal impulse of S/ 5,500 million Soles (US\$1,682 million Dollars), which will generate up to 100 thousand direct and indirect jobs in 2017. With this measure, the government aims to achieve 15% growth in public investment.

2 To allocate an additional S/. 4,400 million Soles (US\$1,346 million Dollars) to the Transport and Communications, Education, Agriculture, Inte-

rior, Labor, and Regional Governments and Local Governments sectors.

3

Dynamization of formal employment, through the subvention of the contribution to ESSALUD (Public Health Care) for young people who just entering the formal labor market. This measure will contribute 50,000 new formal jobs for young workers between the ages of 18 and 29.

This measure contemplates the following:

- a) Subsidy of the contribution of ESSALUD to new workers (for people in their first job, or who come from six months of unemployment or informalemployment) for a maximum period of three years. The Government will cover the cost of its contribution to ESSALUD.
- b) To maintain the benefit, each year, employers must prove that they have increased their payroll and the total remuneration paid to their workers.
- c) In the short term, it is estimated that up to 50 thousand formal jobs could benefit, with an annual fiscal cost of S/ 60 million Soles (US\$ 18 million Dollars).

4 A boom in social housing, whose goal is the construction of, at last, 150 thousand new houses of TechoPropio in the next five years. This measure aims to promote the acquisition of new housing of TechoPropio (houses up to S/ 80, 000 Soles –US\$ 24,472 Dollars.).

For the implementation of this measure it is proposed:

- a) Intervention throughout the mortgage chain to reduce the cost of credit and increase the credit supply.
- b) Create a Voluntary Programmed Savings Trust for an initial fee of 10%.
- c) Develop real estate projects for houses of this profile with financial and municipal savings banks.
- d) Guarantee Trust will replace the letter of guarantee between banks.

5 Credit program to MYPES (Small and Micro Industries) for S/ 1,100 million Soles (US\$ 336 million Dollars). The purpose of this measure is to provide access to credit to MYPES for the acquisition or renewal of fixed assets.

6 Acceleration Public Works for taxes, which includes the following:

- a) Project Portfolio 2017: S / 1, 000 - S / 1,500 million Soles (US\$ 306-459 million Dollars).

- b) 62 projects that include schools, health centers, police stations, water and sanitation works, irrigation channels, among others.


7 Encouraging Mining Investment. New portfolio of prioritized mining projects for US\$ 18.7 billion Dollars, accompanied by a Social Advancement Fund to promote good conditions in the social environment.

- a) Social Advancement Fund: program for the financing of investment projects in key areas of Regional Governments, after evaluation of sustainability. The first to benefit has been Cajamarca, with a loan of S/ 89 million Soles (US\$ 27 million Dollars) to be paid in 10 years and to finance 24 investment projects.
- b) Prioritized portfolio of mining projects 2017 - 2021 of US\$ 18.7 billion Dollars.

PRIVATE INVESTMENT

Investment in infrastructure and mining: has been given a new portfolio of 23 projects to accelerate the implementation of the private investment of more than US\$ 27.3 billion Dollars, which includes 11 mining investment projects for more than US\$ 18 thousand millions Dollars.

In diversified investment: implementation of new and simple administrative procedures measures for medium-sized projects.

A large, light gray, dotted world map serves as a background for the page, centered behind the text.

US\$ 6 billion Dollars will be invested in commercial projects.

The reduction of logistics costs and fees for non-tariff barriers have also been decreed.

The expansion of the program “Purchasing to MYPERU” is being complemented.

Germany - Does the legislative proposal of a road toll (“Maut Gesetz”) infringe European Law?

ILP Global Mertens Thiele

Alemania

The German Federal Government on the 25th of January 2017 has enacted in a second attempt the so called “Maut Gesetz” or “Road Toll Bill”, after previously having agreed with the EU Commission on several changes. However, the bill will first have to pass the Bundestag (German Federal Parliament) and the Bundesrat (Federal Council).

After a long lasting infight, the german Federal Ministry of Transport and the EU Commission have finally ended their dispute over the “Maut Gesetz” or “Road Toll Bill” in December of 2016. As a result, a new concept was presented, under which motorists from abroad can now choose in between 6 instead of the previously offered only 3 options of a Vignette. Foreign motorists now can purchase short-time Vignettes from 10 days up to 2 months.

According to the German Ministry of Transport, the so called “Infrastrukturabgabe” or “infrastructure fee” shall get a start right after the technical implementation of the fee-rising and control system later this year.

Domestic motorists shall pay a fee for the first time ever for using Germany’s about 13.000 kilometers of motorways and 39.000 kilometers of highways. Motorists from abroad will only pay for the motorways. Vehicles belonging to disabled persons, which already are partially or totally freed from the motor vehicle tax, will as well be freed from the “Infrastrukturabgabe” or “infrastructure fee”. The same applies for motor bikes, electric cars or ambulances.

After deduction of the costs, the earnings shall be completely earmarked, running wholly into the traffic infrastructure in order to come to terms with the expected increase in the traffic of persons and goods within the next years. The idea behind is to make the development and extension of the road networks more independent from the federal budget, thus achieving an increased planning reliability.

The “Infrastrukturabgabe” or “infrastructure fee” has to be paid in advance for the whole of the year. The price for an annual Vignette depends on the cylinder capacity and the environmental characteristics of the vehicle. The average amount is supposed to be in between EUR 74,00 and EUR 130,00 as the upper limit.

The charging of the “Infrastrukturabgabe” or “infrastructure fee” on german motorists will be done through an electronical Vignette (E-Vignette). Every vehicle owner will receive a notification of fees. If the owed amount is not transferred in time, the corresponding licence number will not be unlocked in the elaborated technical system. In that case, the authorisation to use the affected roads expires.

Foreign motorists can purchase a Vignette either through an App, the internet or physical shops as might be gas stations near to the border. For that purpose, they will have to declare themselves the technical dates of their car. If they refrain from doing so, automatically the highest fee level will apply, which will be EUR 130,00 for the annual Vignette, EUR 50,00 for a 2 months Vignette and EUR 25,00 for a 10 days Vignette. Once the payment is carried out, their plate

number will be unlocked.

The legal problem resulting from the new “Maut Gesetz” or “Road Toll Bill” is, that is linked to a reduction of the Motor Vehicle Tax in Germany, which basically equals on a 1:1 basis the owed new fee. The legislators corresponding idea behind is obvious: At the end of the day, the german motorist should not be additionally burdened in any way. Otherwise, under no circumstances the indispensable political and popular support for this project could be achieved.

As a matter of fact, the envisioned reduction of the motor vehicle tax might even to some extent go beyond the “Infrastrukturabgabe” or “infrastructure fee” in certain cases, depending on how environmentally beneficial the vehicle is.

Unlike their german counterparts, foreign EU motorists however do not receive any benefit at all through the reduction of the german motor vehicle tax, since this imposition is a national one. For them there hence is no possible „set-off“ of both fees as intended for german motorists.

This might well be understood as a discrimination of EU foreigners by german legislation, which could be unacceptable under the rule of EU law, inspite of the amendments introduced with their new plan by the german Ministry of Transport in conjunction with the European Comission. Although both projects – the “Infrastrukturabgabe” or “infrastructure fee” and the reduction of the motor vehicle tax - looked upon indivi-

dually - do not represent any legal problem whatsoever, it is their relatedness that might constitute a breach of EU law.

Neighboring countries such as Austria have already signalised that they are willing to take the Federal Republic of Germany to the European Court of Justice over this item on the ground of discrimination against their and other EU nationals. Ironically however, Austria has already introduced a similar Road Toll decades ago. Other countries, like for instance The Netherlands or Belgium, might follow the german example, should it turn out to be viable under European law, thus ultimately leading to a certain restriction in the boundless movement between those countries and Germany.

It remains to be seen how the European Court of Justice ultimately might evaluate the “Maut Gesetz” or “Road Toll Bill”. In first place the bill however will have to pass the Bundestag (German Federal Parliament) and the Bundesrat (Federal Council), although a majority seems to be granted in both houses.

“20 legal issues, you should know about Residential Lease Agreements (in Spain) and you are probably not aware”

ILP Abogados

España

1 Is it true that agreements of less than 12 months (duration) are not considered to be Residential Lease Agreements?

This is not true. The agreement will always be defined by its object and not by its length.

2 If the property represents a main residence and there is no substantive and specific justification that proves temporality, any agreement that reduces the mandatory period established by Law will be fully null and void.

3 Do not make the mistake of not clearly defining the type of contract. Otherwise, it will be considered as a Residential Lease Agreement. The Jurisprudence (Rulings) (in general terms) used to protect the Residential Lease Agreement and, especially, the tenant.

4 Is there absolute freedom of contracts in lease agreements?

Theoretically, there is; however, actually, it is absolute only for the benefit of the tenant.

5 The lease agreement has a duration of at least (in favour of the tenant) three (3) years. Once the period of three (3) years has been reached, both parties must decide whether to extend it or not. For the first three years, the tenant represents the bound party, but not the landlord, as indicated in the section below.

6 The tenant can cancel the agreement once the period of at least six months has expired, provided they inform (notify) the landlord within thirty (30) days before.

In the event of “Breach of Contract” of the above, both parties may include a clause in the agreement that imposes the tenant to pay the amount corresponding to a monthly rent payment in force for each remaining year of the contract. The period of six months cannot be modified to the tenant’s detriment (e.g., it can not be established for eight (8) months, although it can be modified if lower).

7 If the landlord is the beneficial owner, the agreement shall be terminated when the usufruct has ended, fully independent from the contract term.

8 The divorced spouse who is entitled to use and enjoy the family residence, and who is governed by a lease agreement in the name of the other spouse, will become the contract holder.

9 There is absolute freedom to establish the rental income, but:

- It will always be payable on a monthly basis.
- It will be paid in advance and basically within the first seven (7) days of the month.
- The rental income may be updated. And this is very important: the agreement must expressly standardize and agreed that it shall be updated; otherwise, it may not be

enforced.

- Landlords can specify that rent shall only and exclusively be updated when the (CPI) discount rate has a positive value.

10 Payment in advance of more than one month's rent (as a common form of guarantee) is fully null and void, even if it is agreed between the parties.

11 The clause which empowers the landlord to access housing in order to check the property conditions (without any sort of limitation) is null, as it clashes with the Constitutional Right on "breach of domicile".

12 Rent update can be required at any time during the term of the contract, on a retro-active basis, even if from the first year the rent has not been duly updated (despite that clause was agreed in the contract).

13 The communication method between the parties must be enforced in the agreement. Phone or email communication is valid between both parties.

14 It is important to avoid the "Compensation for refurbishment work", which consists of offsetting the rent in return for the tenant carrying out some amendments to the property. This is dangerous as it causes conflicts, but if it has to be done, it is important to


make clear and without any doubt:

- Works (Reforms) to be carried out
- Detailed Budget
- The person in charge of carrying out the work (reforms)
- The period in which it will be carried out
- Rent offset

15 Expenses and services. Community expenses are not considered as rent expenses: they are expenses that the landlord must pay, but they are not legally considered as rent. To be valid and enforceable, it is mandatory that the amounts for such expenses are established when the agreement is signed (even if they are estimated). These expenses can only be updated in the future according to the CPI (they can only be updated to twice the CPI); expenses must be economically established; if not, this clause shall be considered void.

Regarding supplies, it is not necessary to determine an explicit agreement, since they will always be the tenant's responsibility. An explicit agreement concerning rubbish collection fees is not necessary, as the tenant will always be in charge of paying them.

16 The tenant shall be responsible for preservation works (reforms) when they are needed due to improper use or negligence (and



not because of a ordinary wear or deterioration due to normal use).

Works (reforms) shall always be carried out by the landlord, while the tenant is obliged to carry out minor repairs.

17 Concerning the “first refusal right” to acquire the rented house, it represents a waivable right for the tenant, even though if not expressly renounced, the tenant retains such right. This party shall only be exempted if the property is sold as an estate (building).

18 The bank guarantee must be in force for the entire contract period, including its extensions.

19 The security (bail) in Residential Lease Agreement is for one month’s rent (one only); if additional months are required, it will be considered as a deposit.

20 The security (bail) is obligatory, unless otherwise agreed by the parties.