

Construction and Projects in Chile

by Rafael Vergara, Oscar Aitken, Juan Francisco Mackenna, Juan Pablo Stitchkin, Eduardo Morandé and Martín Pérez-Cotapos, Carey

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A Q&A guide to construction and projects law in Chile.

The Q&A gives a high level overview of the main trends and significant deals; procurement arrangements; transaction structures and corporate vehicles; financing projects; security and contractual protections that funders require; standard forms of contracts; risk allocation; excluding liability, including caps and force majeure; contractual provisions covering material delays and variations; appointing and paying contractors; subcontractors; licences and consents; projects insurance; employment laws; health and safety; environmental issues; corrupt business practices and bribery; bankruptcy/insolvency; public private partnerships (PPPs); dispute resolution; tax and mitigating tax liability; and proposals for reform.

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Overview of the construction and projects sector

1. What are the main trends in the local construction and projects market? What are the most significant deals?

Main trends

The main trends in construction and projects over the last few years have been led by the development of renewable energy projects. Solar parks, which represent a great portion of foreign and local investment within this industry, have been prominent among these projects. The development of desalination plants is also growing in importance in the local market, driven by the ever-growing mining industry and general community needs.

Major projects

The most significant deals by volume are:

- Energy projects.
- Desalination projects.
- Public private partnership projects (such as highways).

Some of the most relevant projects in these fields are:

- Cerro Pabellon, a geothermal energy plant with two units of gross installed capacity of 24 MW each for a total of 48 MW capacity, and the first of its kind in South America.
- Desalination plant for the mining process of Radomiro Tomic (Codelco) with a maximum production capacity of 1,956 litres per second (l/s).
- Desalination plant for both industrial use and drinkable water on Quintero's bay, with a maximum production capacity of 1,000 l/s (Patria).
- Desalination plant for Spence growth option (BHP) with a production capacity of 1,000 l/s.
- The construction of the Chacao bridge which will join the island of Chiloé with the continent and will be the longest suspension bridge on South America at a total of 2,750 metres.

Procurement arrangements

2. Which are the most common procurement arrangements if the main parties are local? Are these arrangements different if some or all of the main parties are international contractors or consultants?

Locally, most projects are structured between a developer (owner) and a contractor (a single company or a construction firm) under:

- Pure construction arrangements under which the owner provides the design and the contractor performs the procurement and construction.
- Engineering, procurement and construction (EPC) schemes. This is where the employer hires a contractor to provide all design, materials and construction services.

Most contracts are structured as a turnkey lump sum (in which the contractor takes over the project to completion for a fixed price), although depending on the nature of the project they might be structured differently (for example, design/supply, under which the contractor provides the design and procurement, but does not perform any construction work and balance of plant contracts, under which a contractor provides all work other than certain specific tasks, such as supply of main equipment).

Another common arrangement, particularly on mining projects, are engineering, procurement and construction management contracts (ECPM), in which contractor is engaged to provide design services, procurement activities (as owner's agent) and construction management of other owner's contractors (as an agent). Less common (but growing in importance) are build, own, operate and transfer contracts (BOOTs) where private parties enter into contracts for the contractor to build, at its risk, a project, operate it for a certain period and then transfer it to the owner.

Transaction structures

3. What transaction structures and corporate vehicles are most commonly used in both local and international projects?

In international projects, transaction structures are similar to local. As, however, they commonly require specialised construction and engineering knowledge and good financial status, international joint ventures (between different contractors) are very common.

Almost every project is developed by special purpose vehicles.

Finance

4. How are projects financed? How do arrangements differ for major international projects?

Projects are mainly financed through:

- Company equity.
- Capital market transactions (either through public offerings or debt instruments).
- Bank loans (corporate and project finance lending).

The sources and methods of financing in Chile do not differ substantially from those normally found in international markets. For instance, project finance has been regularly used in Chile to finance the construction of major infrastructure projects.

Generally, lenders range from:

- Commercial foreign banks.

- Export credit agencies and international financing agencies.
- Development finance institutions and local banks.

Project finance structures vary depending on the type of project being financed.

Security and contractual protections

5. What forms of security and contractual protections do funders typically require to protect their investments?

Security and contractual protections required by funders will vary depending on the type of project and financing structure proposed by the developer. In Chile, non-recourse project finance is a cornerstone of project development.

Security

Funders will typically require, to ensure the correct and timely execution of works and the performance of warranty obligations by contractors:

- Pledges over project assets.
- Bank bonds payable on demand, issued by high credit level banks.
- Standard security packages.

Contractual

The funders will typically protect their investment by requiring the developer to comply with the minimum conditions on the project contracts.

Standard contractual protections include:

- Time bars against claims.
- Step-in-rights (typically, a right for the funder to step-in and take over the developer's role in the contract, if the developer commits a serious and unremedied breach).
- Liquidated damages clauses (both for delay and performance) (that is, pre-determined damages to be paid on certain breaches).
- Minimum insurance requirements.

- Indemnities.

Standard forms of contracts

6. What standard forms of contracts are used for both local and international projects? Which organisations publish them?

Local projects

In Chile, standard forms are not generally used for project development. However, market practice within major infrastructure projects has led to a de facto standardisation of certain key clauses (for example, securities and arbitration) within typical construction contractual arrangements (notably within EPC contracts).

International projects

For international projects, as in local projects, bespoke contracts are mainly used, although the authors have occasionally seen International Federation of Consulting Engineers (*Fédération Internationale Des Ingénieurs-Conseils* (FIDIC)) and New Engineering Contract (NEC) contracts. In the last five years, most of the international projects in Chile have been structured to conform with Chilean law.

Contractual issues

Contractors' risks

7. What risks are typically allocated to the contractor? How are these risks offset or managed?

Risk allocation varies depending on the nature of each project and contract. However, generally most risks are allocated to contractors. These risks include:

- Soil conditions.
- Construction permitting (that is, obtaining most construction-related permits).

- Weather conditions.
- Subcontracting and outsourcing of risks.
- Unexpected market conditions.

However, sophisticated parties will often allocate risks for each party based on cost-effectiveness analysis, normally depending on which party is best suited to mitigate this risk.

Excluding liability

8. How can liability be excluded or restricted under local law?

In project contracts, liability can be (and usually is) limited and certain types of damages are normally excluded. Limitations generally include:

- Monetary caps on damages (*see Question 9*).
- Exclusions of consequential damages.

Carve outs or exceptions to such exclusions and limitations are also usual.

Caps on liability

9. Do the parties usually agree a cap on liability? If yes, how is this usually fixed? What liabilities, if any, are typically not capped?

Parties usually agree a cap on liability. Particularly in international projects, overall liability is usually capped as a percentage of the contract price (varying depending on the nature of the contract). It is also common to limit liquidated damages to a percentage of the contract price.

Commonly, liabilities resulting from the following are typically not capped:

- Wilful misconduct.
- Gross negligence.

- Indemnity obligations related to third party claims (for example, IP violations and labour and security-related claims).

Force majeure

10. Are force majeure exclusions available and enforceable?

The parties may agree to exclude a specific event. The usual exclusions include:

- Earthquakes under an agreed magnitude.
- Adverse climate conditions.
- Labour strikes.

11. What contractual provisions are typically negotiated to cover material delays to the project?

Depending on which party bears the risk or fault for the delay, material delays are usually covered by:

- Liquidated damages provisions.
- Obligations to recover delay time (including the preparation of recovery schedules).
- Acceleration rights (right of owner to require the contractor to accelerate works, usually by agreeing the acceleration price through a change order).
- Extension of time and change order/variation provisions (*see Question 12*).
- Prolonged force majeure provisions.
- Early termination.

12. What contractual provisions are typically negotiated to cover variations to the works?

Variations on the works are typical on any construction project, and they are usually addressed by contractual provisions that establish the procedure under which such changes are proposed, negotiated (for time and cost) and executed. It is fairly common to address these variations provisions, in an effort to minimise cost negotiations and determine how the cost, profit and overhead are going to be calculated (for example, cost plus provisions).

Other negotiated provisions

13. What other contractual provisions are usually heavily negotiated by the parties?

Aside from the provisions previously discussed (liquidated damages, damages caps, overall limitations on liability and exclusions, and force majeure), the most heavily negotiated provisions in commercial issues tend to be:

- Advances on payment and price.
- Insurance policy limits and sub-limits (*see Question 20*).

Depending on the project, some provisions containing risk allocations (such as permits or ground conditions) are also heavily negotiated (*see Question 7*).

Architects, engineers and construction professionals

14. How are construction professionals usually selected? Following selection, how are they formally appointed?

Architects, engineers and other construction professionals are usually selected by companies (both by owners and contractors) based on technical capabilities and proven experience in the field, normally through direct hiring or tender processes (for example, request for proposals (RFP)). Construction professionals (particularly architects and engineers) must hold university degrees, duly recognised in accordance with applicable Chilean laws.

Depending on the selection procedure and characteristics of the role or services required, professionals are formally appointed through:

- An employment contract (becoming permanent or temporary employees).
- A services agreement (becoming a subcontractor or services provider).

15. What provisions of construction professionals' appointments are most heavily negotiated? Are liabilities commonly limited or capped in construction professionals' appointments?

Negotiated provisions

Although the most heavily negotiated provisions will vary depending on the type of professional and the nature of the services required, they are often those regarding:

- Warranties.
- Intellectual property.
- Indemnification rights.
- Limitation of liability.

Liability

Usually liability for damages of construction professionals is capped (the cap range usually being from 10% to 20% of the contract price).

Payment for construction work

16. What are the usual methods of payment for construction work? Are there ways for the contractor and consultants to secure payment or mitigate risks of non-payment under local law?

Methods of payment

There are two main methods for construction payment in the local market. One consists of a monthly payment for the effective physical progress of the works on the month immediately prior to the payment. The second one is based

on milestones, where the contractor only is entitled to payments when it achieves a milestone set in the contract. Both of these methods are often combined with an advance payment to secure neutral cash flow to the contractor.

Securing payment

Payment delays are usually secured by contract provisions that set interest rates and, in the case of material delays in payment, the right of the contractor to suspend the works and terminate the contract early. No materialmen or mechanic's liens are available in Chile. When the owner is a special-purpose vehicle in a medium or large project, an owner-parent guarantee may be requested.

Subcontractors

17. How do the parties typically manage their relationships with subcontractors?

Generally, a contractor can engage subcontractors but remains directly liable to the project owner for the subcontractor's performance.

It is common for general contractors to include back-to-back clauses in their contracts with subcontractors, to ensure that the contractor is liable to pay only if it has been paid by the project owner.

In large projects, main contractors must novate/assign subcontracts to the owner in case of early contract termination.

Licensing

18. What licences and other consents must contractors and construction professionals have to carry out local construction work? Are there any specific licensing requirements for international contractors and construction professionals?

Generally, in the local market there is no special licensing or consents that contractors (as legal entities) must obtain to carry out projects in Chile, with the exception of public projects. To be eligible to participate or bid for public projects, the bidder must be registered in the Contractors Registry of the Ministry of Public Works. Moreover, there are a few important state-owned companies which participate within the market and these companies are free to engage in private tenders or even direct negotiations. However, tenders from this group of companies usually require pre-registration in their own suppliers/contractors registries or in public registries, and/or to go through a pre-qualification process.

Further, construction professionals (such as architects and engineers) must comply with certifications and obligations imposed by law to practise their professions.

International professionals must validate their qualifications with the competent entities in Chile prior to performing their professional services in Chile.

19. What licences and other consents must a project obtain?

Before

Generally, construction projects require a construction permit from the respective municipal works director, prior to the execution of any work.

Some projects will require obtaining an environmental permit, which is obtained through the Chilean Environmental Assessment Service. Other specific permits may be required, based on the project's nature.

Complex projects may require multiple permits. This is always a sensitive matter which should be carefully considered and negotiated.

During

The projects must comply with and maintain the permits obtained before the execution of work, and obtain additional permits, such as:

- Crane permits.
- Zoning permits.
- Environmental related authorisations.
- Hydraulics.

Projects will also be subject to inspections from the relevant authority.

On completion

Certain construction works will need a municipal reception certificate, which is obtained after a final inspection of the relevant authority, certifying that the project meets the design and technical requirements previously approved in the building permit.

Projects insurance

20. What types of insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Compulsory insurance

The general rule is that insurance policies are contracted voluntarily. There are a few mandatory insurance policies, including very basic vehicle third party insurance and statutory worker's compensation insurance.

Non-compulsory insurance

It is customary for construction companies to maintain the following types of insurance (whether under contract or voluntarily):

- Construction & Erection All Risk (C/EAR) and Operational All Risk (OAR), covering property damage and third-party injury or damage claims.
- Cargo insurance, covering damages to freight while it is being transported.
- Liability insurance, which should cover:
 - employer's liability insurance for contractors and sub-contractors;
 - environmental liability (if applicable for the construction project); and
 - cross-liability.

Employment laws

21. What are the main requirements for hiring local and foreign workers?

Local workers

Generally, hiring local and foreign employees is subject to the same requirements under Chilean labour law. The main requirements are:

- The labour relationship should be governed by the principle of non-discrimination (under which discrimination of any kind on any grounds other than personal capacity and suitability is forbidden).
- The employment contracts should be written (as a general rule, within 15 days from the date of commencement of services, or five days in the case of project-based employment contracts and employment contracts with a duration of less than 30 days).
- At a minimum, employees are entitled to the mandatory payments by law:
 - a base salary above the minimum monthly wage (currently about USD395);
 - profit-sharing, under which employers must pay to its employees an amount equal to a percentage of the company's profits, or an additional fixed amount in lieu of the profit sharing; and
 - a full week's benefit for employees who receive variable amounts earned on a daily basis for work done (for example commissions and pieces of work completed).
- In companies with 100 or more employees, at least 1% of the total workforce must be comprised of disabled employees (that is, those who are entitled to a disability pension). Companies that for justified reasons are unable to comply with this obligation, can alternatively comply with this requirement by adopting other measures set out by the Labour Code (*Articles 157 bis and 157 ter*).

Foreign workers

In the case of foreign employees, the labour law additionally requires the following:

- Limits on hiring foreigners. Where a workforce comprises more than 25 employees, a minimum of 85% of those employees must be Chilean nationals. The Labour Code sets out some special rules to determine who is considered Chilean or a foreigner for these purposes.
- Requirement of visas and working permits. To render remunerated services in Chile, foreign employees must be authorised to do so by means of a visa and work permit, such as:
 - a work contract visa;
 - a temporary residence visa;
 - permanent residence; or
 - a special work permit for tourists.

The type of visa will depend on the length of the assignment in Chile and the type of services to be performed.

22. Which employment laws are relevant to projects?

The main employment laws regarding projects are:

- Labour Code, especially regulations on subcontracting (*Articles 183 A–E*).
- Law No. 16,744 on work-related accidents and professional diseases (*especially Article 66 bis*).
- Supreme Decree No. 594 regarding basic sanitary and environmental conditions in the worksite.
- Supreme Decree No. 76 which establishes regulations for the application of Article No. 66 bis of Law No. 16,744, regarding safety and health management at the work sites.

23. Must an employer pay statutory redundancy or other payments at the end of a project? Are all employees eligible?

Whether an employer must pay statutory redundancy will depend on the type of employment contract in force between the parties and the grounds for termination, as follows:

- Indefinite term employment contracts which have been in effect for one year or more and which are terminated for business needs or, where permissible, by the sole will of the employer. These require payment of statutory severance for years of service. The amount is equivalent to 30 days, or the last monthly remuneration for each year of service (and any fraction that is equal to or higher than six months). There are two limitations placed on the amount of the legal severance pay:
 - the number of years of service is limited to 11 years; and
 - the final month's remuneration is limited to UF90 (indexed peso unit) (about USD3,180).

If a higher severance has been agreed, it must be paid. Termination requires either:

- 30 days' advance written notice; or
 - if termination is made with immediate effect, a payment of a severance in lieu of advance notice of one month's remuneration with the same UF90 cap.
- Indefinite term contracts that have been in effect for less than one-year, fixed term contracts ending due to expiration of their term, and employment contracts entered into to perform a specific task or job that are terminated on the conclusion of such a task or job. These do not require payment of any severance.

- Early termination of a fixed term or specific task or job employment contracts. According to Labour Courts' rulings, these require payment of the whole agreed remuneration until the expiration of the agreed term or duration of the task or job.
- Contracts ended by employee fault or breaches set out by law, resignation, death of the employee, force majeure or mutual agreement. No severance is required to be paid.

Pending and/or proportional vacations are also payable in any event of an employment contract termination, except for a contract for a duration of 30 days or less.

Termination of employment contracts is a highly regulated and sensitive matter which is not possible to cover with sufficient detail in the context of this Q&A. Wrongful termination or discriminatory termination may impose significant liabilities on the direct employers. It may also, however, impose liabilities on the main or upper tier contractors (in respect of lower tier subcontractor's employees) as well as on the owner of the construction project under the provisions on subcontracting contained in the Labour Code (also known as the Subcontracting Act).

Health and safety

24. Which health and safety laws apply to projects?

The main health and safety laws are the following:

- Law No. 16,744.
- Supreme Decree No. 594 regarding basic sanitary and environmental conditions in the worksite.
- Supreme Decree No. 76 which establishes regulations for the application of Article No. 66 bis of Law No. 16,744 regarding safety and health management at the work sites.

Other regulatory provisions may apply to certain specific type of projects, including Mining Safety Regulations (*Reglamento de Seguridad Minero*).

COVID-19 measures

In the light of the impact of COVID-19 on the Chilean construction market, the main legal considerations to bear in mind are:

- From 16 March 2020, the closure of all borders was applied.
- From 18 March 2020, a state of emergency was declared in the entire Chilean territory. This state of emergency was extended for 90 more days on 16 June 2020.

- On 19 March 2020, the government announced extraordinary economic measures to protect the country's health, income, jobs and companies, involving fiscal resources of up to USD11.75 billion.

The main restrictions adopted by the Health Authority (at the time of writing) were:

- Curfew applicable to the whole country from 10 pm to 5 pm. Employers must take special measures regarding the commencement and the end of the working day.
- Total quarantine of certain boroughs and cities for a fixed period, subject to renewal. Operations carried out within these boroughs were suspended, unless special authorisation was requested. Employees living in the quarantine zone could only go to work if they provided "essential services" (health services, emergency services, public utility services, public employees, food and essential commerce, press, education, transportation).
- Sanitary border control (*cordón sanitario*) (a prohibition on entering or exiting certain locations without authorisation). People who live in isolated areas could provide services to their companies, as long as they were both located within the same isolated region.
 - New labour regulations:
 - Telework Act (enacted on 1 April 2020);
 - Protection of Income Act (enacted on 6 April 2020). This law was later complemented by a "Brief Law" (enacted on 1 June 2020);
 - Subsidy to the Minimum Salary Act (enacted on 3 April 2020);
 - Temporary suspension in electoral union processes (enacted on 19 May 2020).

Special measures to be adopted by the companies during the crisis included:

- Protective measures such as cleaning of offices, cancellation of business trips, distancing measures in working spaces and providing employees with protective clothing. If the employer fails to adopt safety/hygiene measures, it could be considered to be risking the life and health of its employees, allowing them to exercise their right to not to continue working and not to attend the workplace, while still receiving their pay from the employer (*Article 184 bis, Labour Code*).
- Suspension of employment contracts either within or outside the Protection of Income Act.
- Reduction of the working schedule and/or the salary either within or outside the Protection of Income Act.
- Vacations: collective or individual use of accumulated vacations.
- Home working: must follow the general rules and application of the Telework Act (adopted unilaterally by the employer due to force majeure or the need to protect the health and safety of the employees).
- Workforce reductions and employment termination:
 - in the case of suspension of employment contracts by virtue of the Protection of Income Act, the company cannot terminate protected employees based on the grounds of business necessity and at will of the employer (where applicable);

- within six months after the Protection Income Act is enacted (that is, from 6 April to 6 October 2020), or during the state of emergency, employers cannot terminate employment contracts on the ground of force majeure based on the COVID-19 outbreak;
 - under the Protection of Income Act, employment contracts terminated during the period between the declaration of state of emergency (18 March 2020) and the date the law was enacted (6 April 2020), can be set aside by mutual agreement;
 - under general rules on restrictions for termination of an employment contract, except for the terminations due to force majeure which according to the a Labour Board's ruling, cannot be invoked based on pandemic.
- Employee status:
 - according to the Rulings of the Ministry of Health, only employees diagnosed with COVID-19 or those who are "close contacts" of persons diagnosed with the illness will be entitled to medical leave paid by the social security institutions. Employees considered as "probable cases" may also be entitled to medical licence;
 - additionally, medical leave can also be granted to travellers and employees whose child is between the ages of one and 18, their spouse, life partner, father or mother has a probable risk of death do to COVID-19 (*Article 199 bis, Labour Code*);
 - for employees on preventive quarantine ordered by the authority but for whom no medical leave has been issued, the declaration of preventive quarantine may constitute force majeure and the obligations arising from the employment contract for both the employer and the employee should be suspended. Despite this, a ruling of the Ministry of Health has stated that in this case a declaration of the authority constitutes force majeure only for the employee;
 - if the company decides to send the employee to his/her home under preventive quarantine, not being under medical leave, the employer must continue paying the remuneration (even if the employee cannot work remotely).

Environmental issues

25. Which local laws regulate projects' effects on the environment?

Air

The applicable law is Supreme Decree No. 39/2012 of the Ministry of the Environment, Regulation on the Establishment of Prevention and Decontamination Plans.

Currently there are approximately 25 prevention and decontamination plans referring to specific air pollutants present in certain areas within Chile. Additionally, there are numerous other quality standards referring to specific air pollutants and noise emission regulations.

Water

The applicable law is Decree in Force No. 1.122/1981, Water Code.

In addition, there are numerous other quality standards and other regulations referring to water, such as local regulations for the drinking water supply and sewage wastewater treatment and final disposal.

Waste

The applicable laws are:

- Decree No. 725/1967, Sanitary Code.
- Decree No. 594/1999, Regulation on Basic Sanitary and Environmental Conditions on Workplaces.
- Supreme Decree No. 148/2003, Regulation on Hazardous Waste Management.

Environmental impact assessments (EIAs)

The applicable laws are:

- Law No. 19.300, on General Basis of the Environment, modified by Law No. 20.417/2010, which establishes the Ministry of the Environment, the Environmental Assessment Service and the Environmental Enforcement Authority.
- Supreme Decree No. 40/2012, Regulation on the Environmental Impact Assessment System.
- Law No. 20.600, which creates the environmental courts.

Sustainable development

Chile has signed several international bilateral and multilateral agreements and protocols concerning climate change which establish standards and targets that must be complied with, such as the:

- Vienna Convention on Depleting Substances of the Ozone Layer (*Supreme Decree No. 719/1989*).
- Montreal Protocol (*Supreme Decree No. 238/1990*).
- Climate Change Agreement (*Supreme Decree No. 123/1995*).
- Kyoto Protocol (*Supreme Decree No. 349/2004*).
- Paris Agreement (*Supreme Decree No. 30/2017*).

Additionally, the climate change department of the Ministry of the Environment has established a National Climate Change Work Plan 2017-2022, that includes the commitments stated in the United Nations Framework Convention on Climate Change.

Concerning carbon emission standards and goals, the applicable law is Supreme Decree No.8/2016, Regulation on Tax Obligations and the Establishment of Administrative Procedures for Air Emissions of Particulate Matter, Nitrogen Oxides, Sulphur Dioxide and Carbon Dioxide Taxation. The Ministry of the Environment issued the Decree under Article 8 of Law No. 20.780 on Tax Reform.

26. Do new buildings need to meet carbon emissions or climate change targets?

There are no special legal requirements imposed on new buildings regarding carbon emission or climate change standards. However, it is not unusual for project owners to voluntarily comply with certain certified sustainability standards such as CES (*Certificación Edificio Sustentable*) issued by the Chilean Construction Institute or LEED (*Leadership in Energy and Environmental Design*) issued by the United States Green Building Council.

Prohibiting corrupt practices

27. Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Rules

Corrupt business practices and bribery are addressed in Chilean legislation. The Corporate Criminal Liability Act (CCLA) (*Law No. 20.393*) is of particular relevance in the projects sector. The CCLA imposes criminal liability on legal entities for conduct where the relevant behaviour is a "predicate offence", that is, it concerns a crime of:

- Bribery of local or foreign public officials.
- Money laundering.
- Terrorism financing.
- Wilfully or negligently receiving stolen goods.
- Unlawful negotiation.

- Commercial bribery.
- Embezzlement.
- Disloyal management.

Furthermore, the CCLA imposes criminal liability on legal entities if the predicate offence:

- Is perpetrated in the legal entity's own interest, directly or indirectly by its owners, representatives, main executives, or other individuals in charge of carrying out the relevant entity's business (for example, agents).
- Results from the entity's non-compliance with certain specific supervision and control obligations provided in the CCLA. These obligations are deemed fulfilled if the company has effectively implemented internal controls or regulations to prevent the relevant crimes (for example, a compliance programme). In this regard, the CCLA also regulates the compliance programme's statutory requirements and implementation to grant a safe-harbour provision towards the company (this is not, however, applicable to individuals within the company who may have committed an offence).

Penalties

Besides applicable fines and even jail time for natural persons depending on the crime committed, the following penalties may be imposed on legal entities (*Law No. 20.393*):

- Dissolution of the legal entity or cancellation of its legal personality.
- Temporary or perpetual prohibition on entering into contracts with governmental entities.
- Partial loss of, or absolute prohibition, of governmental benefits.
- Fines.
- Other accessory penalties, such as publication of an excerpt of the judicial decision in the *Official Gazette*.

Bankruptcy or insolvency

28. What rights do the client and funder have on the contractor's bankruptcy or insolvency?

Chilean insolvency law protects foreign creditors that intervene in a proceeding followed before a Chilean court, providing them with the same rights as Chilean creditors of the same category. The treatment of creditors under Chilean insolvency law is based on the public policy principle of equal treatment of creditors (*par condicio creditorum*), which is a public policy principle that governs as a general rule in Chilean insolvency law.

There are two main different insolvency proceedings in Chile: reorganization of the company and liquidation of assets, and the rights of a creditor in these insolvency proceedings depends on the sort of proceeding and the particular circumstances of each credit or debt.

In the case of a debtor's bankruptcy, by virtue of the declaration of liquidation, all debts become due notwithstanding the originally agreed maturity date. The determination of the amount to be paid out to each creditor is to be established pursuant to the rules set forth in the Chilean Civil Code and Chilean insolvency law. Generally, credits are divided into five classes, each of which takes precedence of payment over the next (such as taxes and employee wages, depositary beneficiary credits, pledger credits, mortgagor credits and ordinary credits). In turn, credits of each class are also divided into sub-classes, each of which takes precedence over the next.

Public private partnerships

29. Are public private partnerships (PPPs) common in local construction projects? If so, which sectors commonly use PPPs?

PPPs, as broadly defined, are common for the development of public projects, where the state gives a private company the right to exploit a commercial activity (that cannot be exploited otherwise) in exchange for the financing and execution of the construction, operation and maintenance of public infrastructure by the private entity (concessions). These projects include:

- Public roads.
- Public transport.
- Water provision companies.
- Ports.
- Airports.
- Electrical infrastructure.

In Chile, the development of these type of projects are usually developed under a concession scheme.

30. What local laws apply to public private partnerships (PPPs)?

Concessions are regulated by the DFL (legal decree) No. 164 of 1991 (Public Works Concession Act).

31. What is the typical procurement or tender process in a public private partnership (PPP) transaction? Does the government or another body publish standard forms of PPP project agreements and related contracts?

The state, through the Ministry of Public Works (or a specific public service within the government), makes a public call to tender for the concession of public works, which are regulated pursuant to law DFL No. 164 of 1991. If the project stems from a private initiative that is approved by the public authority, the entity submitting the idea receives certain benefits in the evaluation of its tender.

All PPPs and related contracts are standard forms previously issued by the Ministry of Public Works. To be eligible, the private entity must normally be registered in the contractor's registry of the Ministry of Public Works.

Dispute resolution

32. Which are the most common formal dispute resolution methods used? Which courts and arbitration organisations deal with construction disputes?

Arbitration is the preferred dispute resolution method and is normally governed by Chilean law and carried out in Santiago.

Local parties usually include contract clauses providing that the arbitration is conducted using the service and procedure of the Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce) (CAM arbitration). The arbitration would be under Chilean law and based in Chile.

Foreign parties often insert contract clauses providing for International Chamber of Commerce arbitration, normally under Chilean law and based in Chile.

Ordinary courts deal with litigation matters. There are no special courts to deal with construction disputes.

33. What are the most commonly used alternative dispute resolution (ADR) methods?

Aside from arbitration, conciliation is the most common ADR method in Chile.

Multi-tiered clauses including direct negotiations, mediation and dispute boards have also gained recognition and acceptance within construction contracts and therefore have become more commonly used as dispute resolution mechanisms.

Tax

34. What are the main tax issues arising on projects?

Typical tax issues related to projects are:

- VAT on construction and import of equipment at a rate of 19%.
- Income tax on foreign developers, at a total rate of 35% on net income (for residents of countries with a tax treaty signed with Chile) while those foreign entities from countries with no mutual tax treaty could be liable for rates of up to 44.45%.
- Territorial tax on real estate, calculated according to the property value (considering the constructions).

35. Are any methods commonly used to mitigate tax liability on projects? Are there any tax incentives to carry out regeneration projects?

Mitigating tax

There are provisions in the law that can improve a project's tax efficiency, particularly from an income tax and VAT perspective. For instance, Chilean law contemplates VAT reliefs for certain type of imports and an early cash refund process on VAT borne during the construction phase.

Tax incentives

There are some tax incentives to construction activities related to the use of VAT, under which the owner of the project can recover the VAT from fixed assets in an accelerated form or opt for VAT exemptions for imported fixed assets.

Other requirements for international contractors

36. Are there any specific requirements that international contractors or construction professionals must comply with?

Pursuant to a constitutional right, the general rule is that international contractors and construction professionals are subject to the same laws as local contractors and professionals. However, construction professionals (for example engineers and architects) must validate their professional and technical degrees according to a specific procedure (which involves the Ministry of Foreign Affairs and Universidad de Chile) for their qualifications to be officially recognised and accepted to practice as such.

There are also practical issues that lead foreign entities to incorporate branches, agencies or companies in Chile, related to labour and safety compliance and tax optimisation. Moreover, to bid in governmental projects, registration in the public works' registry is normally necessary. Certain requirements for registration, such as a demonstration of experience, are extremely difficult to achieve if an agency or entity is not incorporated in Chile.

Reform

37. Are there any proposals to reform construction and projects law?

There are no current and active proposals for reform construction and projects laws in Chile.

Contributor profiles

Rafael Vergara, Partner

Carey

T +56 2 2928 2210

E rvergara@carey.cl

W www.carey.cl/

Professional qualifications. Chile, Lawyer, 1987

Areas of practice. Environmental law and litigation; infrastructure and project development; mining.

Oscar Aitken, Partner

Carey

T +56 2 2928 2223

E oitken@carey.cl

W www.carey.cl/

Professional qualifications. Chile, Lawyer, 1989

Areas of practice. Infrastructure and project development; construction and engineering.

Juan Francisco Mackenna, Partner

Carey

T +56 2 2928 2210

E jfmackenna@carey.cl

W www.carey.cl/

Professional qualifications. Chile, Lawyer, 1997

Areas of practice. Energy; infrastructure and project development.

Juan Pablo Stitchkin, Partner

Carey

T +56 2 2928 2223

E jpstitchkin@carey.cl

W www.carey.cl/

Professional qualifications. Chile, Lawyer, 2007

Areas of practice. Infrastructure and project development; construction and engineering.

Eduardo Morandé, Associate

Carey

T +56 2 2928 2223

E emorande@carey.cl

W www.carey.cl/

Professional qualifications. Chile, Lawyer, 2014

Areas of practice. Infrastructure and project development; construction and engineering.

Martín Pérez-Cotapos, Associate

Carey

T +56 2 2928 2223

E mperez-cotapos@carey.cl

W www.carey.cl

Professional qualifications. Chile, Lawyer, 2016

Areas of practice. Infrastructure and project development; construction and engineering.

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