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Italy


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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

The Italian legal system allows for the execution of various types of contracts depending upon the activities and needs of the parties. In particular, the following are permissible: (i) contracts covering the design and execution of works; (ii) contracts covering solely design; and(iii) construction contracts covering solely the works. The employer may entrust the design and/or works to:

- a general contractor, in which case, the entire work to be completed shall be subdivided into "work packages" to be entrusted by the general contractor to various subcontractors and sub-suppliers (for example, facade provider), coordinated by the general contractor;
- a single contractor who may subcontract a portion of the activities; or
- to various contractors, subdividing the design and/or works into several separate contracts, each signed by the employer.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

The Italian legal system provides for various forms of collaboration among contractors. Enterprises can establish *consortia*, temporary groupings, joint ventures or enter into pooling contracts in order to "use" the technical/economic requisites of another enterprise. These instruments are used in both private contracts and public contracts and, in the latter case, are aimed at expanding the pool of potential participants in tender procedures.

Our legal system also envisages contractual categories that provide for a collaboration between the employer and contractor. Reference is made to the cost-plus-fee contract, pursuant to which the parties collaborate in identifying subcontractors and agree upon the choices related to the definition of costs of the project, using an open-book method which allows the employer to have free access to the contractor's accounting books.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Traditionally, in the Italian legal system, construction contracts are executed in either the "all-inclusive" form or the "by unit of measure" form.

The all-inclusive contract provides that the contractor undertakes the obligation to complete the work upon payment of a fixed price, which is therefore not subject to changes and price revisions. This type of contract is advantageous in the vent that, at the time of signing of the contract, the technical-economic elements of the project are clearly defined.

In the "by unit of measure" contract, the price is calculated on the basis of quantities actually constructed and fixed prices of each work. Therefore, the "by unit of measure" contract provides for greater flexibility, reducing the risk of reservations and complaints by the contractor during the execution phase with regard to timing, variations, or possible greater costs.

There are alternative contractual forms that ensure greater flexibility and interaction between the parties, such as with cost-plus-fee contracts. In this case, the price is subdivided between direct costs, indirect costs, fees and general expenses. At the signing of the contract, only the fee (and possibly the general expenses) is agreed upon. Therefore, the employer undertakes the risk of the total cost of the project, but takes part in monitoring such costs during the execution phase (open book accounting) and the selection of bids from subcontractors.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Contracts involving public works must satisfy the requirements provided under the public law legal framework set forth in the new Legislative Decree 36/2023. The form of contract is provided by the contracting authority as part of the tender documentation. Therefore, the contract has pre-established, non-negotiable contents, since its terms and conditions must comply with the provisions of the public law legal framework.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

The necessary requirements for entering into a contract that is binding between the parties are indicated in art. 1325 of the

Italian Civil Code, and are: (i) agreement between the parties; (ii) cause; (iii) subject matter; and (iv) written form, when required by law under penalty of nullity.

The Italian Civil Code sets forth a general legal framework on construction contracts in articles 1655 through 1677.

In the case of public contracts, the legal framework on the execution phase of the construction contract is set forth in Legislative Decree 36/2023 and, to the extent not provided under such decree, in Italian Civil Code.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The letter of intent is a commonly used instrument during the negotiation phase of a contract. In particular, the letter of intent is used between the parties as an instrument in situations of urgency, when the need arises to quickly commence certain contractual performances, even though the contract has not yet been fully negotiated. Through a letter of intent, the parties document the progress in the negotiations and regulate their future evolution, in view of execution of the contract. The letter of intent may be more or less binding, depending upon the agreements reached between the parties. During the negotiation phase, the parties are under a duty to act in good faith pursuant to art. 1337 of the Italian Civil Code.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Contractors are required to enter into further insurance policies depending on the characteristics of the project. The contractor is required to enter into an insurance policy covering civil liability toward third parties for any damages that may be caused to third parties during the execution of the works; a civil liability policy covering workers against risks of accidents in the workplace; a "CAR, *construction all risks*" policy for risks to works under construction, for demolition and clearance expenses and for the pre-existing buildings in the area where the works are executed; an "all risk" policy covering all risks of machines and equipment used in the execution of the works; in some cases, a "ten-year indemnity policy" may also be required, covering risks of total or partial ruin of the works or risks deriving from serious construction defects, and damages deriving from the total and/or partial collapse.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

The contractor is required to provide its workers with work and compensation conditions that are not less favourable than those provided under national and territorial collective employment contracts in force for the sector and the area in which the works are carried out. A similar obligation applies to subcontractors. The Italian legal system provides for various worker protection provisions, aimed at limiting the risk of under-the-table work in the supply chain of enterprises involved in the performance of a contract.

The contractor is required to ensure regularity in the payment of salaries, social security and taxes.

Health and safety are governed by Legislative Decree 81/2008. In particular, Title IV of the decree deals with measures for health and safety and the prevention of accidents on building sites.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Contractors must comply with the requirements provided under urban planning instruments, building regulations, sector-specific rules affecting the regulation of construction activities, including rules on anti-seismic matters, safety, fire prevention, hygiene and health, energy efficiency, protection against hydrogeological risk, environmental laws, provisions of the code on cultural heritage, and landscape. All public and private structures must be constructed in compliance with the Technical Rules on Constructions (Ministerial Decree of 17 January 2018), which define the principles for the design, building, testing and durability of constructions. With reference to fire prevention safety, the Technical Rules on Constructions provide for a specific legal framework on the strength/resistance and stability that the building must ensure in the event of fire.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The possibility of retaining sums while works are in progress is governed by the contractual terms and conditions and represents a protective instrument, in favour of the employer, that is included frequently in construction contracts (in addition to or in lieu of a performance bond). Normally, the employer applies to the price a retention in a percentage ranging between 5% and 10% as a guarantee securing the exact performance of the contractual obligations. Such retention is released upon the completion of the works or, in some cases, the parties agree that the employer shall retain the withholding until the expiry of the warranty period of two years from the handover over the works, as a guarantee against any defects, non-conformities or flaws.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is common for employers to require contractors to provide performance bonds to guarantee the contractor's proper performance of its contractual obligations and compensation for damages deriving from the possible breach of such obligations. The performance bond may be provided in the form of a bank

or insurance guarantee, providing for an amount guaranteed generally equal to 10% of the contract price. The bank guarantee is more onerous for the contractor, but more protective for the employer, since it is the only type to be effectively autonomous with respect to the guaranteed obligations and, therefore, may be enforced by the employer upon its simple first demand, without the need to prove the contractor's breach, and without the possibility for the guarantor or the contractor to raise objections (except in the event of fraudulent enforcement). Frequently, the employer makes a draft guarantee available to the contractor, and requests the latter to obtain a bond having conforming contents. The employer also often requests specific requisites for guarantors (rating levels). In the case of public contracts, the performance bond is governed by art. 117 of Legislative Decree 36/2023.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

In the Italian legal system, there are no prohibitions on the possibility for the group parent company to provide company guarantees in favour of its subsidiaries. Such guarantees may be provided in various forms, and may be more or less binding (strong or weak letters of patronage, comfort letters). This is a very widespread option in construction contract practice, since company guarantees do not offer the employer the same protection that bank or insurance guarantees provide, where the party acting as guarantor is a third party having certain solvency requisites provided by law.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

It is possible to contractually govern the transfer of ownership of the materials used in the performance of the contract. The type of terms and conditions may vary depending upon the specific needs of each contract and upon whether the materials are provided prevalently by the contractor (as commonly occurs) or provided prevalently by the employer (as sometimes occurs in the event of trusted suppliers of the employer or particularly delicate suppliers such as systems/plants). For example, the parties may provide that ownership of the materials is transferred to the employer at the time of delivery of the same to the building site.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Under the Italian legal framework, the director of works is tasked with exercising a technical, accounting and administrative control over the performance of the contract. In the field of public contracts, the director of works is a figure appointed by the employer, he receives the service instructions related to the evolution of the contract from the single project manager (*RUP*). Without prejudice to compliance with such service instructions, the director of works operates autonomously and issues service orders to the contractor on technical and economic aspects concerning the management of the contract. In the area of private works, the director of works may also be selected by the contractor (even if this is less common in practice). The director of works' breach of his obligations exposes the latter to professional liability, with respect to which it is possible to activate the professional civil liability policy.

Other figures provide support to the employer in supervising the contract, including the project manager and the advisor and development manager.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The Italian legal system does not prohibit this type of clause, which may, however, expose the contractor to a very high degree of risk (for example, in terms of timeframes for receiving payments) and therefore often gives rise to objections/disagreements during both the negotiation phase and the contract performance phase. In the event that parties intend to include a "pay when paid" clause in the contract, it is worthwhile to govern the related conditions in detail, in order to reduce the risk of claims by the contractor. In the event that the contract is subject to a special purpose loan, it is worthwhile to clearly govern the controls imposed under the loan agreement that could impact the construction contract and which the contractor is required to accept (for example, controls by a Project Monitor appointed by the lender).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Pursuant to art. 1382 of the Italian Civil Code, the parties may include a clause in the contract through which the parties agree that in the event of breach or delayed performance, the contractor is required to pay liquidated damages to the employer. The clause releases the employer from the need to prove damages.

The quantification of the liquidated damages is up to the parties in accordance with the principle of equity in relation to the obligations breached and contractual balance between the parties. Art. 126 of Legislative Decree 36/2023 for public contracts provides that the daily liquidated damages for delay in performance of contractual obligations must range between 0.3 and one per thousand, to be determined on the basis of the consequences stemming from the delay.

In the event that the quantification of the liquidated damages does not also include further damages, this circumstance must be expressed in the contract.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Under art. 1661 of the Italian Civil Code, the employer can submit an order to the contractor for the execution of changes, provided that the following two limits are honoured: (i) the amount of the changes cannot exceed one-sixth of the total price; and (ii) the changes, even if in an amount lower than one-sixth, cannot entail considerable changes in the nature of the work or the quantities of the individual categories of works provided under the contract.

A contractor that executes the changes is entitled to compensation for the additional works executed.

In commercial practice, there has been a tendency to include in the contract derogations from art. 1661 of the Italian Civil Code.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The contractor is under an obligation to execute all works provided under the contract and cannot refuse to execute them, except in cases of supervening impossibility governed by arts 1463 *et seq.* of the Italian Civil Code. Therefore, any unjustified refusal on the part of the contractor to execute the works, in whole or in part, constitutes a situation of contractual breach, which entitles the employer to activate the various contractual remedies, including that of executing or having third parties execute the works not executed by the contractor, at the latter's expense.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Pursuant to art. 1374 of the Italian Civil Code, the contract obligates the parties not only with regard to what is expressed therein, but also with regard to all consequences deriving from the same by law or, in the absence of express provisions of law, according to custom and usage and principles of equity.

The parties are, in any case, entitled to derogate from provisions of law, provided that the derogation is express and does not concern mandatory provisions of law.

Without prejudice to the foregoing, the performance of contractual obligations must always be inspired by good faith, in accordance with the provisions of art. 1375 of the Italian Civil Code.

In addition, a construction contract is commonly recognized as a typical contract giving rise to an obligation of results, consisting in bringing the promised construction work to completion.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

A contractor that fails to execute the works in accordance with the timeframes agreed with the employer is considered in breach unless it proves that the delay was caused by an impossibility to perform deriving from a cause not attributable to the contractor.

However, if the cause of the damages is attributable in part to the contractor, the latter is not automatically entitled to request *tout court* an extension in timeframe or reimbursement of costs incurred due to delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The employer, under the penalty of forfeiture, must report to the contractor any non-conformities or defects in the works within 60 days of discovery. However, such report is not required when the contractor has acknowledged or concealed such non-conformities or defects. A legal action against the contractor due to non-conformities or defects is subject to a statute of limitations of two years from the day of handover of the works.

In the event that the contract concerns the construction of buildings, the contractor's liability for the total or partial collapse (or risk of collapse) of the building and serious defects in the same lasts 10 years from the completion of the works. However, the employer, under penalty of forfeiture, must report such circumstances within one year of discovery and take legal action against the contractor within the statute of limitations of one year from the report.

All other rights of the parties must be enforced in accordance with the ordinary statute of limitations of 10 years provided under art. 2935 of the Italian Civil Code, except in the specific case in which the special statutes of limitations provided under the Italian Civil Code apply.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

In general, Italian courts consider reports of defects or non-conformities in the works submitted within the timeframes provided under the contract to be valid, even if such timeframes differ, by way of derogation, from the term of 60 days provided by law. The procedures for sending the report of defects or non-conformities in the work are usually provided directly under construction contracts. In any case, the law does not provide for a particular form for the report, even if, in the absence of specific provisions in the contract, it is advisable to send the report in writing. As for the substance of the report, the same must clearly state the intention to report the defects or non-conformities forming the subject matter of the report.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Under art. 1664, paragraph 2, of the Italian Civil Code, if over the course of the works, difficulties in execution arise due to geological or hydrological reasons or the like, that were not foreseen by the parties, which render the contractor's performance considerably more onerous, the latter is entitled to fair compensation. Such provision of law may be derogated by the parties on the basis of the specific characteristics of the works.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

In the absence of specific contractual provisions on *ius superveniens*, when a supervening provision of law entails the need to execute changes, reference must be made to art. 1660 of the Italian Civil Code, pursuant to which the parties may reach an agreement in the event that the need for changes imposed by law were to arise. In the absence of an agreement, any additional compensation due to the contractor is determined in the context of legal proceedings.

The price of the change imposed by law is borne by the employer, but the parties may derogate from such rule under the contract.

If the amount of the changes imposed by law exceeds one-sixth of the total price, the contractor may withdraw from the contract and obtain a fair indemnity. In this case as well, it is possible to negotiate the contractor's waiver of the one-sixth limit and/or of the fair indemnity.

Lastly, it should be noted that in the event of execution of changes imposed by law, extensions may be granted in favour of the contractor, where the execution of such changes has prevented the terms originally provided under the contract from being honoured.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

In general, the designer always retains the moral copyrights over the design, which are not transferrable to the employer in any way whatsoever.

The economic copyrights are transferable and waivable by the designer. In such regard, in contractual practice such economic rights are almost always transferred to the employer.

3.10 Is the contractor ever entitled to suspend works?

Under art. 1460 of the Italian Civil Code, each of the contracting parties can refuse to perform its obligation if the other fails to perform or fails to offer to perform its own obligation simultaneously. However, the execution cannot be refused if, taking into account the relevant circumstances, the refusal is contrary to principles of good faith.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Each party may request the termination of the contract in the event of serious breach by the other party. In general, the legal action for termination is preceded by the mailing of a formal written notice setting forth a demand for performance, pursuant to art. 1454 of the Italian Civil Code.

In addition, the parties may insert in the contract the so-called express termination clauses, through which it is possible to agree that the contract is terminated in the event that a given obligation is not performed in accordance with the methods established. In this case, the termination occurs when the interested party declares to the other its intention to avail itself of the express termination clause.

Lastly, under art. 1660 of the Italian Civil Code, the contractor may withdraw from the contract if the amount of the changes necessary exceeds one-sixth of the total price; likewise, the employer may withdraw from the contract if the changes necessary are significant.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Art. 1671 of the Italian Civil Code provides that the employer may withdraw at any time from the contract, provided that it holds the contractor harmless from and against expenses incurred, works executed and loss of profits.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Force majeure is considered by the case law as an impediment falling beyond the control of a party, that is not reasonably foreseeable at the time of execution of the contract, and is also inevitable and irremediable. It is a case of supervening impossibility of performance, governed by arts 1463 *et seq.* of the Italian Civil Code, which provide for the extinction of an obligation that has become impossible and, in cases of total supervening impossibility, the termination of the contract.

In the event that the contract becomes "economically disadvantageous" for one of the parties, it is not possible to claim *force majeure*. However, pursuant to art. 1467 of the Italian Civil Code, if the excessive onerousness is due to extraordinary and unforeseeable events, the disadvantaged party may request the termination of the contract. However, termination due to supervening excessive onerousness may be avoided if the other party makes the contractual relationship equitable.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The Decree Law "*Cura Italia*" provided for a number of facilitations in favour of contractors involved in the execution of works during the COVID-19 pandemic.

Art. 91 provided that compliance with the measures for the containment of COVID-19 is always evaluated for purposes of the exclusion of the contractor's liability, including with reference to applications of possible forfeitures or liquidated damages related to delayed performance or non-performance. Art. 103 paragraph 2-*ter* provided for an extension in works for a period equivalent to the period of the suspension due to the pandemic.

With reference to the economic effects of the pandemic on construction contracts, various laws have been enacted over the course of the last three years in order to ensure greater liquidity for enterprises. Lastly, art. 26 of the "*Decreto Aiuti*" is worth

noting. Such law, for public tender contracts, provided for the issuance of an extraordinary Works Progress Report (SAL) on the basis of the most updated price lists in order to offset the economic imbalance between the parties resulting from the greater costs of raw materials and energy products as a result of the pandemic and the conflict in Ukraine.

With reference to private tender contracts, the principle expressed by the Supreme Court in the summer of 2020 is worth noting. The Court confirmed the parties' obligation to renegotiate the contractual conditions, aligning the contract to circumstances that have changed due to supervening and unforeseeable circumstances.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

The action for non-conformity or defects in the works pursuant to art. 1667 of the Italian Civil Code is only available to the employer.

However, the action provided under art. 1669 of the Italian Civil Code in the event of total or partial collapse (or risk of total or partial collapse) of a building, and serious defects in the same, since it is based on tort may be enforced in the 10 years following the completion of the works not only by the employer, but also by its successors and assigns.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In practice, there are often direct agreements between the contractor and the financing party of the real estate development project. Pursuant to such agreements, the following, for example, may be provided for any more or less broad right to ensure that the lender maintains control over timeframes and costs of the works.

In practice, so-called "*collateral*" forms of guarantee are often used to safeguard the employer against the contractor. Take, for example, the following bank or insurance guarantees:

- guarantee on the advance for the recovery of possible advances paid by the employer;
- performance bond for the possible breach by the contractor of the obligations undertaken under the contract; and
- warranty bond for possible defects or non-conformities in the works.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In the Italian legal system, there exist three types of set-off: (i) legal set-off, which is allows only between monetary debts that are equally liquid and payable; (ii) judicial set-off, which is declared by the judge if the debt claimed for set-off is not due but may be rendered due/liquid readily and easily; and (iii) voluntary set-off, which must be governed in the contract and which allows for making the set-off even in the absence of due or payable debts.

In general, under construction contracts, the employer is permitted to proceed with "voluntary" set-off between the price and the liquidated damages/penalties or other amounts due by the contractor.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

In the performance of the construction contract, each party must act in accordance with fairness and good faith. The breach of good faith, if it occurs during the performance of the contract, gives rise to contractual liability. However, it cannot be excluded in advance that a given conduct may give rise to extra-contractual liability. According to the case law, under certain conditions, contractual and extra-contractual liability actions may be cumulative.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The criteria for interpretation of the contract established under the Italian Civil Code fall into two categories:

- Arts 1362-1365 of the Italian Civil Code provide for subjective interpretation criteria, aimed at seeking out the common intent of the parties.
- Arts 1366-1370 of the Italian Civil Code set forth the criteria for objective interpretation, which may be activated only on a residual basis; they are inspired by the concept of good faith or other criteria that are, in any case, not related to the mutual intent of the parties.

Where, despite the application of the two types of criteria described above, the contract remains unclear, it must be interpreted so as to achieve a fair balancing of interests of the parties.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Contractual clauses, under the penalty of nullity, may not be contrary to mandatory provisions of law. Such provisions of law include, for example, art. 1229 of the Italian Civil Code, which imposes the nullity of clauses that exclude or limit the liability of the debtor on account of wilful misconduct or gross negligence or breach of obligations deriving from rules of public order. In these cases, the clause that is null and void is replaced, automatically by law, by the mandatory provisions breached.

Another category worthy of discussion is that of so-called vexatious clauses included in contracts prepared by only one party through general terms of contract or standard forms. Such clauses are unenforceable only if they are not specifically signed for acceptance by the other party. Vexatious clauses are those listed in art. 1341 paragraph 2 of the Italian Civil Code.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The case law is unwavering in holding that the designer is required to fulfil an obligation of result, consisting in the

possibility of completing the project from a construction standpoint. In light of the consideration that the designer is under an obligation of result, art. 2226 of the Italian Civil Code applies, pursuant to which the employer must report the defects in the work within eight days of discovery and take action within the statute of limitations of one year. It should be noted that in the context of mandates granted to designers/architects, the professional is always required to take out a civil professional liability policy which, for more complex projects, is generally requested in "single project" form.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Art. 1669 of the Italian Civil Code provides for 10-year liability of the builder toward the employer and its successors and assigns if, over the course of 10 years from the completion of the building or other structure designed to last over the long term, due to a defect in the ground soil or defect in the construction, the structure collapse in whole or in part, or presents a clear risk of collapse or serious defects.

Pursuant to well-settled case law, the contractor's ten-year liability is extra-contractual in nature and is based on the breach of the general rule of general duty of care. The *ratio legis* of the provision lies in reasons of public order and, in particular, the interest in the preservation and proper functioning of buildings.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Disputes may be resolved through claims brought before courts of law or through the activation of alternative proceedings. Under the Italian legal system, there is no court specialised in construction and, therefore, disputes related to construction contracts are submitted for review by an ordinary judge. In consideration of the highly technical nature of the subject matter and the lengthy timeframes of ordinary court proceedings parties often prefer to use alternative forms of dispute resolution.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Under the Italian legal system, there exist several instruments aimed at facilitating the resolution of disputes during the execution phase of construction contracts. These instruments feature the presence of an impartial third body, appointed by the parties starting from the commencement of the contract and which follows the entire evolution of the same and therefore has full knowledge of the entire process (unlike a judge or arbitral tribunal which becomes involved only the moment in which a dispute is commenced).

In the area of public contracts, a noteworthy entity is the technical consultative body (arts 215-219 of Legislative Decree 36/2023).

In the case of private contracts, mechanisms similar to those used in public contracts may be envisaged or alternatively the parties may provide for submitting any disputes during the performance phase to an independent, third-party arbitrator, selected from among persons who are expert in the area and possess the necessary professional qualifications.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Arbitration clauses are often used in construction contracts and allow for the submission of the dispute to the exclusive jurisdiction of an arbitral body, which may take the form of an individual arbitrator or a tribunal. The parties may opt for a formal arbitration, in which the arbitrator's award has the same effectiveness as a judgment and may be enforceable. Alternatively, where the parties do not intend to vest an arbitrator with powers equivalent to those of a judge, they may opt for informal arbitration, in which the award does not have the enforceability of a judgment, but settles a dispute on the basis of a contractual agreement between the parties. In arbitration, it is essential to ensure compliance with principles of impartiality and independence of the arbitrators and bilateral participation of the parties. Arbitration allows for a decision to be reached within certain timeframes which are shorter than those of ordinary court proceedings.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Under the Italian legal system, a foreign arbitration award is not enforceable in the absence of the procedure for recognition and enforcement provided under art. 839 of the Italian Civil Procedure Code. This rule was adopted in implementation of the New York Convention of 1958, ratify in Italy through Law 62/1968 and provides for an appeal to the President of the court of appeal in order to obtain the recognition of the foreign award. Recognition may be denied if: (i) the subject matter of the dispute may not be resolved through arbitration; or (ii) the recognition or enforcement of the judgment is contrary to public order.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The Italian legal system provides for three levels of jurisdiction: courts of first instance, courts of appeal and the Supreme Court. Proceedings of first instance are presided over by local courts, which have broad jurisdiction over civil law matters. The average duration of proceedings of first instance is about three years. The judgment issued by the court of first instance may be appealed by the parties before the court of appeal. The latter may re-examine the merits of the dispute, but the parties may not introduce new claims or new evidence. Appellate proceedings tend to last, on average, two years. The judgment issued by the court of appeal may be appealed by the parties through an appeal to the Supreme Court, only on legal grounds. Legal proceedings at the Supreme Court level tend to last, on average, one year.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The enforceability of foreign court judgments is recognised in the Italian legal system without the need for resorting to a specific procedure, provided that the requirements set forth under Law 218/1995 are met. Within the European Union, mutual recognition of judgments is governed by EU Regulation 1215/2012 (Brussels Regulation I *bis*), which establishes the principle of automatic recognition, extending to all judicial decisions on civil and commercial matters the abolition of *exequatur*. In order to facilitate the circulation of such decisions, if a judgment is recognised as enforceable in the Member State of origin, such judgment will also be enforceable in the other Member States without the need for any declaration of enforceability.

Maria Grazia Buonanno, Partner at Bertacco Recla & Partners since January 2023, has been collaborating with the firm for eight years.
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Based in Milan, Bertacco Recla & Partners is a boutique law firm known for its considerable expertise and knowledge gained in all areas of administrative law, yet with a proven track record in construction, town planning, public and private procurements. The firm provides legal assistance to leading national and international construction businesses, investment funds and real estate companies, in drafting and negotiating procurement contracts for works, services, and supplies in real estate development projects.
Thanks to the construction department, clients also benefit from the same level of quality throughout the contract and subcontract negotiation as well as the execution stages, receiving the best possible support during this very delicate phase of the transaction.
The solid expertise in the real estate sector, a sound competence in town planning procedures and in private procurement contracts makes Bertacco Recla & Partners leader in the Italian market, also in managing processes for enhancing, developing and redeveloping urban areas and real estate complexes. In order to assist the clients in every phase of their business, the Firm also provide legal advice in all matters of corporate and commercial law, providing support both in the most complex corporate transactions and during ordinary business activities.
Furthermore, Bertacco Recla & Partners assists clients in all civil and administrative litigation before judicial authorities throughout Italy, as well as in arbitration.

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