



Analysis and comparison of construction law in Iran and China

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Abstract

This article has the task of analyzing and focusing on the differences and possible similarities that the construction sector has in common, therefore Construction Law, in two of the greatest world powers in terms of innovation and still little known globally for their construction and the consequent law that creates limitations and organizations. In addition, the purpose of the article is also to direct attention to the methods of resolving disputes in these specific areas, through the use of arbitration and specifically related the two different geopolitical area.

For China was analysed the Arbitration Law of the People's Republic of China that in the Article 1 is committed to ensure the impartial and prompt arbitration of economic disputes, protecting the legitimate rights and interests of the parties, and guaranteeing the sound development of the socialist market economy.

At the same time, an analysis of arbitration as understood in Iran has been carried out since its introduction in 1939, retracing what is specified in Articles 454 to 501 of the Iranian Code of Civil Procedure (the 2007 version is currently in force) up to the most recent regulations/additions which have considered arbitration as one of the most important dispute settlement method.

Keywords: Iran, China, construction-law, arbitration, contract, civil-law, damages, penalties, termination, commercial, liability, socialist-market

Introduction

1. Construction contracts in Iran's body of law

In order to make the analysis of the Iranian legislation clear and specific, we must point out that in Iran there is no specific law on construction in force, but at the same time there are various regulations which in some way recall the standardization of issues or contracts that they play a key role in the correct preparation of public or private works.

To this end it is essential to specify that first of all a differentiation must be made between public works and private works.

At the basis of a construction process is the choice of the contractor, i.e. a procurement path that can be divided into three types. First of all there is direct individual negotiation, possibly followed by a tender and a hybrid choice version.

When we talk about private constructions, therefore carried out by a private entity, it is usually common practice to use direct individual negotiation between the client and the contractor, which generates the signing of contracts concerning the execution of small projects. On the other hand, while state-owned enterprises and public organizations must use the tender procedure to choose a contractor, private companies are not obliged to follow the tender procedure even if they prefer to use it in large and complex projects.

As regards public works and public clients, it is necessary to follow the dictates of the "Tender Law" of Iran which specifies that "All three powers of the Islamic Republic of Iran will follow the provisions of this Law in organizing a tender; this includes: ministries; public bodies, institutions and companies; profitable institutions affiliated with the Government; financial institutions and public banks; public insurance companies; public institutions and non-governmental foundations". This provision means that every public contract signed by a public body in the absence of a tender is automatically declared null and void.

This need to follow the specific Tender Law in the case of public works means that any contractors, in order to access the tender procedure itself, must obtain a qualification license before starting the construction works. In house construction projects, most of the key players (contractors and engineers) must hold a license obtainable from "Building Engineering Organization". However, when the project involves the construction of an industrial plant or in which foreign contractors are involved, the qualification of the contractors is often assessed during the tender process. Of no less importance is the authorization and licensing process which in Iran for construction projects is much more varied than what is required in Europe for example.

Unlike many countries in Europe however, in Iran, the use of any type of insurance in construction work is not mandatory under the laws and regulations in force. However, almost all construction and engineering contracts contain some conditions relating to insurance requirements. A contractor is often required to take out "Third Party Liability Insurance", "All Risk Insurance" and "Property and Plant Insurance". As far as possible responsibilities are concerned, an employer and a contractor can negotiate and divide their responsibilities and civil liabilities, leaving Iranian law ample room for negotiation in this sense.

2. Use of different standard construction contracts devised by PBO in Iran

Fundamental in the construction field in Iran is the Plan and Budget Organization also known as PBO, which is a government organization whose tasks are, among other things, the guidance and monitoring of the country's development, as well as the management, the orientation and leadership of the country's technical and executive system and qualifications, rating and evaluation of technical consultants and contractors. This organization has created and developed a series of contractual sets which in the Construction sector represent the focal point of Iran, these

contracts include the standard Construction Contract, the Consulting Services contract which includes consultancy, design and supervision services from part of engineering studies and sometimes used as a design-only contract, the Procurement and Construction Contract, the Engineering and Procurement Contract, the Design-Build for EPC Industrial Projects and finally the Design-Build for non-industrial EPC projects. These contractual standards represent, although not a norm, a basis for the ordinary administration of both public and private contracts. Similarly, the Ministry of Petroleum has also taken steps to produce draft standard contracts more or less equal to those introduced by the PBO which are used in oil, gas and petrochemical projects.

3. The protection of Intellectual Property in the creation of a work in Iran

Since construction is a subject that is also based on the design and construction of works, one of its foundations is the protection of the project's intellectual property (including patents, copyrights, design patents and know-how) which it is related to who developed the project. In Iran it is expected that the intellectual property rights belong to the Contractor but that the Employer has ownership of the documents provided by the Contractor under the Contract and has the right to use them to operate, repair or maintain the property developed in the scope of the contract. In the same way, however, the ECP contract provides that "if the Employer decides to use the same documents in the development of other projects or plans, the responsibility for any discrepancies, conflicts and errors lies with the Employer" in the sense that the Employer of work will be responsible for the use of the documents and also for the relative discrepancies or implementation of the works, without wanting to claim responsibility that may be the responsibility of the designer.

4. Construction contracts in China

The Construction Law is an extremely important law in China, it refers to a comprehensive legal system for the construction industry which includes contract awards, qualifications for construction projects, licensing for construction projects, quality standards and supervision, issues safety, legal responsibilities and so on.

The basis of this legislation is the need to obtain construction licenses before the start of construction projects as well as the criteria for obtaining them. Certain qualifications are intended to be met for construction engineering companies, prospecting units, design units and project supervision units that engage in construction activities.

In relation to construction projects, the legislation provides for various classifications which are intended as all-encompassing qualification, professional qualification and qualification of the work service. It is therefore a three-level qualification system which recalls the need for each contractor to obtain professional qualifications to operate.

For those which concern only planning, there are four levels of qualifications, the all-encompassing qualification, sector qualification, professional qualification and special qualification. The all-encompassing qualification is considered to be Grade A and achieving this qualification means that the business can provide any design service for any contracted project across all types of industry sectors.

Sectoral qualifications, professional qualifications and special qualifications have been divided into different classes depending on the nature of the project and the technology involved.

5. The MOHURD and the State administration for market regulation or the state administration for Industry and commerce

As in many other countries, in China there are a series of contractual types that are believed to be useful and necessary for the implementation of some projects and constructions. The contracts referred to above are model contracts made jointly by MOHURD and the State Administration for Market Regulation or the State Administration for Industry and Commerce and may be revised or modified as necessary.

Among the most important and used models we find the Standard Subcontracting Contracts between a contractor and a subcontractor, the Model Engineering Contract for construction projects between an employer and a design engineer, the Model Cost Consultation Contract for construction projects between an employer and a consultant, the Standard Survey Contract for Construction Projects between an Employer and a Surveyor.

These contracts are used in both the private and public spheres but it is important to point out that in the public sphere there is no obligation to use specific contracts

However, the model contracts mentioned above are more commonly used in the public sector than in the private sector. The employer in a public interest project will often draft their contracts or tender documents based on this template and insert some modifications or variations to reflect specific points of interest. Chinese construction contract follows the basic mode of contract law in which a contract consists of offer and acceptance and it is common for a tender procedure to be the basis of a contract and for a tender document to be recognized as an offer and the award of the tender as an acceptance.

6. The protection of intellectual Property in the creation of a Work in China

In China, as in many other countries, the intellectual property right belongs to the author of the work, but it is also worth specifying that in China, by intellectual property we mean in this context a work in a typical construction process can take on the form of drawings, work records, technical documents, development of techniques, Communications in texts.

Parts of the construction contract may include relevant provisions relating to intellectual property rights and these provisions specifically concern the drawings and technical documents provided by the employer. These rights belong to the employer and the contractor may copy and use such documents only for the purpose of carrying out the works.

Otherwise, for the documents that the contractor creates for the purpose of carrying out the works, the contractor has only the right of authorship and all other intellectual rights belong to the employer, and likewise the contractor cannot use such documents for purposes unrelated to construction works. To conclude, it is highlighted that each party is responsible for its own improper use of the intellectual property rights of third parties and therefore must indemnify the other party for acts or actions detrimental to such rights.

Materials and Methods

1. Analysis of the two concepts of bargaining in Iran and China

From an analysis of the current legislation and local contracts, and specifically the most important in the construction sector, we highlight the non-obligatory nature of a contractual scheme which is aimed at imposing schemes and contracts on the parties, but at the same time there is a varied compilation of documentation which ensures that part of the contracts and terms are included in already complete and usable contract documents in different fields.

The method found is that of an approval of contents which serves to protect the freedom of contractualization but at the same time to protect the parties from any excessive involvement of one or the other party.

Results and Discussion

1. Dispute resolution in Iran—the arbitration

As regards the Republic of Iran we can start from the establishment of the Arbitration Center of the Iranian Chamber (ACIC) which was the first independent arbitration institute, established in 2002 for the resolution of disputes in both national and international matters through arbitration or conciliation.

It was then in 2005 that the Regional Arbitration Center of Tehran began its activities by publishing its own Arbitration Rules, carrying forward assistance in the application of international arbitration awards and the conduct of arbitration proceedings in Tehran.

Such dispute resolution is based on the Model Law which guarantees freedom to the parties regarding the choice of the seat of arbitration, procedural rules, the law that should be applied by arbitrators, the number of arbitrators and the procedure for their appointment. It features two different bodies, a national and an international body, each composed of a president, a vice president and a maximum of 12 members. It is among other things important to underline that since Iran is a member of the New York Convention, arbitral awards are enforceable in almost 159 countries.

In the contractual context it is specified that a contract which has an arbitration clause within it means that, despite the nullity of the contract or part of it, it does not affect the validity of the arbitration clause which instead remains intact and will serve to manage all the difficulties of operation of the contract.

In addition it is specified that if a contract contains an arbitration clause and a dispute arising from the contract is referred to a court, the court must refer the parties to arbitration, if so requested by either party by the end of the first hearing period of the court, unless the court finds the arbitration agreement to be void or otherwise barred by law.

2. Dispute resolution in China—the arbitration

The basis of arbitration in China is the Arbitration Law of 1994, which, like any arbitration, requires that there be an agreement between the Parties to settle any disputes arising between the Parties, especially in the contractual context. One of the major arbitration institutions in China is the China International Economic and Trade Arbitration Commission "CIETAC". From 1 May 2023, however, the ownership of the Shanghai International Arbitration Centre, also known as "SHIAC", emerged, which, through a series of new and modern dictates, innovatively allows third

parties to participate in arbitration proceedings under certain conditions. Arbitration is essentially a consensual process of the parties within their autonomy.

The basis of the arbitration is the selection of the Chinese arbitration body or institutions, it being also recognized that the Arbitration Law recognizes only institutional arbitration and not ad hoc arbitrations. In any case, it is essential to point out that the law, while considering only arbitral institutions as valid, also recognizes value in an ad hoc arbitral award issued outside of China.

Article 2 of the Arbitration Law provides that contractual disputes and other disputes over property rights and interests between citizens, legal entities and other equal organizations can be arbitrated, therefore it is easily found that in case of contractual disputes, the inclusion of an arbitration clause and the use of arbitration has a very important and binding value, being therefore a first act of effective resolution.

During arbitration, an arbitrator is expected to examine the legal rights and wrongs of a dispute and make a binding decision between the Parties themselves, whether they agree or not.

Conclusion

In order to take a point of the situation it is possible to highlight what are in fact the key concepts of the construction Law in Iran and China.

Likewise, both States present protection consisting of specific regulations which, rather than dictating protections, dictate limits that cannot be crossed and which represent the correct way to carry out this type of construction activity.

Both states recognize a different classification in relation to constructions linked to public procurement and constructions linked to the private sector, and finally both states recognize contractual standards which in some way dictate operational limits on the basis of technical and legal criteria which serve to protect the contracting authority and contractor.

There is a lack of precise indication of specific laws, which are otherwise replaced by contractual templates.

It would be extremely superfluous to point out that, despite the lack of legislation, to date these two States offer considerable protection in the construction sector, a protection which can also be found in the merit of the increasingly frequent use of certain and rapid dispute resolution channels in order to speed up activities and contractual closures and finalization.

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