

Construction 2021

Contributing editors
Robert S Peckar and Michael S Zicherman



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

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Construction 2021

Contributing editors**Robert S Peckar and Michael S Zicherman****Peckar & Abramson PC**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Construction*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Austria, Canada, Israel, Japan, the Netherlands, Qatar and United Arab Emirates.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson PC, for their continued assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

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Israel

Benjamin Sheffer and Lance Blumenthal

S Horowitz & Co

LOCAL MARKET

Foreign pursuit of the local market

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

There are several options available to foreign entities wishing to set up an operation in Israel. These include the establishment of a branch office of the foreign entity in Israel, the establishment of a representative office or the establishment of a local office (subsidiary of the parent company) for the foreign designer or contractor. Each business entity has different requirements for its establishment and will likewise carry different obligations. The most suitable option depends on the company's business plans and the specific objectives it seeks to achieve.

In each instance, the abilities of the corporate structure will differ. For example, a branch office of a foreign designer or contractor will be considered a registered legal entity in every respect but remains an extension of the foreign entity. Accordingly, the parent company will bear the responsibility for the actions and obligations of the branch office, which will only be able to perform tasks that further the parent company's objectives. Alternatively, a representative office is not considered a legal entity, does not have to be registered in Israel and, accordingly, will not be able to conduct any 'for profit' operations, such as entering into any contractual relationships. Its scope will be limited to observation on behalf of the parent company, usually with a view to considering entry into a particular project. The consequences of any actions taken by the representative office in Israel will be borne by the parent company.

Alternatively, setting up a local company for the foreign designer or contractor will be considered a separate legal entity from the parent company, even if the parent company is the sole shareholder thereof. Actions taken by the local company will remain its sole responsibility and will not be extended to impose obligations on the parent company. The establishment of a subsidiary must therefore undergo extensive set-up procedures, including registration with the Registrar of Companies, registration at various tax authorities and registration with the social security and national health authorities.

In addition to the aforementioned, the Ministry of Labour, Social Affairs and Social Services requires that all engineers and architects must be registered in the register of engineers and architects as a condition for obtaining a licence to engage in areas with unique activities, including, inter alia, civil-structural engineering. The registration of engineers and architects is specified in the Engineers and Architects Law 1958 and its regulations.

Additionally, according to the Ministry of Construction and Housing, contractors are required to be registered with the Contractors' Registrar. The Contractors' Register includes all registered contractors, setting out their professional and financial classification. The Law of Contractors for Construction Engineering Works 1969 stipulates

that construction engineering works of a certain financial size or type executing government works may be performed only by a registered contractor. A company not incorporated in Israel during the tender stage that is successful in its bid may request an exemption in accordance with section 14(a) of the Law and will accordingly not be required to register. A subsidiary, however, will be required to fulfil the registration requirements applicable to all Israeli companies.

REGULATION AND COMPLIANCE

Licensing procedures

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

Only an employee may obtain a work visa in Israel, not an independent designer or a contractor.

According to the Population and Immigration Authority's procedures, sectors in which a foreign worker would be able to receive permission to work in Israel include registered foreign contractors and experts (academic or non-academic). In addition, there is a special procedure that relates to large governmental infrastructure projects in terms of which the Immigration Authority may grant work permits to large groups of employees if the employer is working on a national infrastructure project that requires the employment of foreign employees as such work cannot be done by Israeli employees. Granting permits under such a procedure is subject to the consent of a committee of the relevant government ministry (finance, economy, infrastructure, etc) and will generally take no less than six months.

A request for a permit can be submitted by any company registered in Israel or by a company outside Israel that grants the power of attorney to a representative in Israel.

The visa is provided for a period of 12 months and may be extended annually up to a period of 63 months.

If an expert is invited to work in Israel on a temporary basis for a period of time not exceeding 45 days in a given year and he or she holds a valid passport of a country whose citizens are exempt from obtaining a tourist visa prior to their arrival in Israel, then the relevant work visa can be applied for and obtained by means of an expedited visa approval process.

Unauthorised employment of a foreign expert (or any migrant worker) constitutes a criminal offence and may lead to harsh sanctions on the foreign expert, the company employing the unlicensed worker and its management. These sanctions may include heavy fines, detention, deportations and, in some cases, imprisonment.

Competition

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

There is no local legislation that hinders foreign contractors in private projects or, alternatively, provides domestic contractors with greater advantages. All contractors are considered equal before the law and are accordingly bound by it equally. However, there may be tenders that require a minimum number of Israeli products to be utilised in a specific project or a minimum number of local workers to be employed in a particular project. In such an instance, the Mandatory Tenders Regulations (Preference for Israel Products and Mandatory Business Cooperation) 1995 states that in a tender for the procurement of goods, there will be an advantage for products that include an Israeli component (at least 35 per cent).

Competition protections

4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

Bid rigging is strictly prohibited in Israel. Any kind of bid rigging might cause the disqualification of the bidder and may even incur criminal sanctions. The Israel Competition Authority (ICA) is an independent government agency that operates to eradicate anticompetitive and restrictive arrangements and monopolies abusing a dominant position. The ICA has the power to prosecute criminal cases and its Director General can impose administrative fines upon certain violations of the Competition Law. Severe violations of the Competition Law may be subject to criminal prosecution that may result in fines and prison sentences, the liability for which may be imposed on a corporation and its executives. The administrative remedies for infringements of the Competition Law include administrative fines, consent decrees, injunctions and court orders, which are granted by the Competition Tribunal.

In addition, the ICA's mandate includes enforcement, inter alia, of the Law for Promotion of Competition and Reduction of Concentration 2013.

Importantly, the ICA does not only function to prevent and eliminate anticompetitive practices by businesses but has now become increasingly focused on promoting pro-competitive policies and regulation, for example, by taking an active role in the work of government committees aimed at removing competitive barriers .

Bribery

5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

A contract that was awarded by bribery may be declared null and void. However, this will be determined on a case-by-case basis, taking into account the relevant circumstances (including the stage at which the bribery was discovered).

With regard to the criminal aspects, section 278 of the Israeli Penal Law 1977 states:

Where a public servant who by virtue of his office has judicial or administrative powers in respect of property of a particular kind or in respect of any manufacture, trade or business of a particular kind exercises such powers, either by himself or through another, whilst having, directly or indirectly, a private interest in such property manufacture, trade or business, he is liable to imprisonment for three years.

The excerpt sets out the unacceptability of illegally obtained contracts that have come about as a result of the abuse of position by a public official. With regard to the source of the illegality being bribery specifically, Israel has ratified the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) that, in July 2008, effected an amendment to the Israeli Penal Law making it an offence to bribe a foreign public official (section 291A). Accordingly, an offence would have been committed if one makes an offer or facilitates a bribe of a foreign public official for the purpose of promoting business activities (or an advantage in respect of same).

Both individuals and companies that attempt to – or actually do – offer, make or facilitate a bribe to foreign officials may face criminal prosecution. In the case of a company, both the company and the persons involved in the commission of the bribe may be liable to criminal prosecution.

The OECD Anti-Bribery Convention includes different provisions in respect of the penalties that offenders will face, including, inter alia, imposing sanctions on the briber (such as monetary sanctions, seizing and confiscating the proceeds of bribery (article 3)); providing legal assistance in foreign bribery cases, including in respect of criminal procedures (article 9); and defining the bribery of foreign public officials as an extraditable offence in both local legislation and any extradition agreements concluded between member states (article 10).

The penalties that bribe-givers and bribe-takers will face are set out in the Penal Law of 1977 and include the following:

- if a public servant took a bribe for an act connected with his or her position, then he or she is liable to seven years' imprisonment; and
- if a person gave a bribe, he or she shall be treated in the same way as the person who took it, but the penalty to which he or she is liable shall be half.

Section 297 mandates that if a person – natural or juristic – is convicted in accordance with, inter alia, the above sections, the court may confiscate what was given as a bribe and anything that came in its place and cause the person that provided the bribe to pay the state the value of the benefit derived therefrom.

With regard to facilitation payments, section 293 of the Penal Law of 1977 deems such payments to constitute bribery. According to the section, it is immaterial whether the bribe was:

- (2) given for an act or an omission, or for a delay, acceleration or impediment, for preference or for discrimination;*
- (3) for a specific act or to obtain preferential treatment in general;*
- (7) taken for a deviation from the performance of his obligation or for an act which the public servant must perform by virtue of his position.*

The aforementioned applies even when the public official has no discretion to perform the act for which he or she is being bribed.

Reporting bribery

6 | Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

The Israeli Penal Law does not specifically obligate employees of the project team members to disclose potential violations regarding the bribery of government employees. Nevertheless, knowledge of an offence and failure to disclose it may make this project team member an 'accessory after the fact' in accordance with section 260 of the Penal Law and could accordingly expose this person to the penalties contained in

sections 261 and 262 thereof that, based on the severity of the offence, could result in up to three years imprisonment.

Political contributions

- 7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

There are no prequalifications for doing business in Israel based on the extent to which a company makes political contributions. In accordance with the Political Parties Financing Law 1973, companies and partnerships, whether registered in Israel or abroad, are prohibited from making political contributions. To prevent any infringement, a company can ensure rigid compliance with all laws and regulations that will safeguard it against any of the forms of bribery. A compliance officer should be appointed to record and report on any political contributions when surveying the company's records and proactively develop mechanisms to prevent violations of internal compliance regulations.

Compliance

- 8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

In general, the answer is yes as long as the manager or other construction professional is acting with the power and authorisation of the public entity. The provisions of the Penal Law apply to both government and non-governmental employees.

Other international legal considerations

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

As part of the registration process, foreign contractors may be required to prove their technical qualifications and financial reliability by providing technical details relating to plant and equipment and past financial statements. In addition, project managers may be required to provide evidence of their experience. From a practical perspective, foreign contractors should note that all documents evidencing their foreign activities will need to be produced in Israel in their original form. Notarised copies of the original may be utilised thereafter. Furthermore, in certain instances, the foreign contractor's country of origin may present certain legal obstacles but these will have to be dealt with on a case-by-case basis.

CONTRACTS AND INSURANCE

Construction contracts

- 10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

The form of contract utilised in construction projects in Israel is not limited to a particular model. The parties have discretion to draft their own contracts or utilise a more standardised form, such as the forms of contract options presented by the International Federation of Consulting Engineers.

Additionally, the parties are free to determine under which laws of which state the contract will be governed. Notwithstanding the

forementioned, in all public construction projects, the choice of law will be Israeli law and the jurisdiction will be the Israeli courts (or an arbitration held in Israel). Finally, the language of the contract is not prescriptive but, rather, will be based on an agreement between the parties. Often, if one or more of the parties is a foreign entity, the parties may agree to conclude the contract and conduct the dispute resolution proceedings in English.

English will also be the language used in all international tenders. In a dispute, the parties may include an arbitration clause in terms of which the arbitration will be conducted in English. However, disputes that are brought before the court will be conducted in Hebrew.

Payment methods

- 11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

The manner in which payments are made will be recorded in the agreement between the parties. Contractors, subcontractors and workers are normally paid electronically and, typically, payment will be made on a monthly basis or upon achieving a particular milestone. Often, subcontractor payments have to be made that also have an impact on the date on which a contractor will be paid. Generally, a contractor will provide the employer (or engineer, or both, depending on the form of contract) with a request for payment, and the employer or engineer will issue an interim payment certificate before payment is made. Payments will generally include any approved amounts.

Even though the method of payment is determined by the parties, payment invoices will be required to be submitted for taxation purposes and, therefore, proper accounting is required.

Contractual matrix of international projects

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

In general, the main contract will be signed between the primary contractor and the employer. The primary contractor will conclude separate agreements with any subcontractors who are to be engaged in the project. However, in some projects, the employer may request specific and direct obligations from some of the major subcontractors, mainly to assure direct responsibility and to allow the employer to easily control the project in case of termination of the contract with the main contractor or in the event of its bankruptcy. Subcontractors appointed by the employer (nominated subcontractors) will also be required to interface directly with the primary contractor.

PPP and PFI

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

There are no specific forms and statutory framework for PPP or PFI contracts in Israel. However, owing to the fact that they are largely government-linked, there are departmental structures of government that regulate particular projects. For example, and as recorded on the governmental website, the following sets out various governmental departments' involvement in PPP contracts currently being executed in Israel. In each instance, the relevant governmental authority will regulate the execution of the project with adherence to the law.

- The Infrastructure and Projects Division at the Accountant General Department in the Ministry of Finance: the division is composed of the Accountant General's staff and the PPP Projects Unit located at the government company, Inbal. The division promotes PPP

projects in various sectors (transportation, energy, environment, water and construction) through inter-ministerial tender committees headed by a representative of the Accountant General.

- The Transfer to the South Administration in the Ministry of Defence: the Ministry of Defence promotes projects of development of several army bases through the Transfer to the South Administration, which manages the transfer of Israel Defence Forces units from the centre of Israel to the Negev area in the south, as part of the strategic plan to support and develop the Negev area.
- The Governmental Building Administration at the Accountant General's Department in the Ministry of Finance: the Governmental Building Administration is a branch of the Assets, Procurement and Logistics Division at the Accountant General in the Ministry of Finance. It is in charge of governmental building, including head offices (ministries), district and regional complexes, courts and other construction projects.
- The Metropolitan Mass Transit System Ltd (NTA): a government company in charge of planning and establishing mass transit systems in the metropolis of Tel Aviv.
- The Cross Israel Highway: a government company in charge of planning and establishing Cross Israel Highway segments (Highway 6) and a light rail line in the northern metropolis of Haifa. In addition, the company acts as an implementing authority for Highway 6, Carmel Tunnels and the fast lane to Tel Aviv.

With regard to both PPP and PFI contracts, an appointed authority accompanies the project from the announcement of the successful bidder throughout the execution up until the final handover of the completed project to the state. The appointed authority shall ensure adherence to the schedule, compliance with the contractual provisions, fulfilment of the state's obligations and management of the state's activities in respect of its responsibilities under the contract.

Joint ventures

14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

There are no specific regulations that apply to all joint ventures (JVs). However, there are several models of JVs that may be established that, depending on the selected model, will be governed by particular legislation.

For example, the Israeli Contracts Law (General Part) 1973 and the Contracts Law (Remedies for Breach of Contract) 1970 will apply to contractual JVs. This model allows the parties to define their relationship and allocate the percentage of their respective responsibilities in a particular project. In such an instance, the joint venture members are jointly and severally liable to the employer but the members themselves will specifically set out the extent to which each is liable to the other in their agreement in the event of a claim.

Alternatively, the parties may decide to set up a JV partnership. JV partnerships are subject to the Israeli Partnership Ordinance (New Version) 1975. There are two forms of partnership: a general partnership; and a limited partnership.

A general partnership is an unlimited liability partnership in which all partners jointly and severally share unlimited liability for the obligations of the partnership. In contrast, a limited partnership has at least one general partner that will be liable for the obligations of the partnership and at least one limited partner who will be limited to the amount that it invested in the partnership.

Other than the vehicle of a limited partnership, the employer will hold the JV jointly and severally liable for any loss or damage it incurs arising from the contractual relationship. The vehicle selected by the JV

members or partners to regulate their internal relationship will determine the extent to which one member or partner is liable to the others.

Tort claims and indemnity

15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

There is nothing preventing a contracting party from indemnifying other parties against acts, errors and omissions that may arise from the works executed by the indemnifying party.

However, an indemnification clause for acts and errors made by the indemnified party's gross negligence or wilful misconduct may be declared null and void as it contradicts public interest. In addition, a claim for the enforcement of such an indemnification clause may be denied by virtue of estoppel or because of a lack of good faith. Such a clause may also be heavily scrutinised by the courts in a way that will prevent the indemnified party from being compensated for acts or errors that it committed with gross negligence or wilful misconduct.

Liability to third parties

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

Generally, relief of the third party will be sought against the seller of the building that, if found liable, will likely proceed against the contractor to recover its loss in a third-party claim. As there is no contractual relationship between the buyer and the contractor, the buyer's recourse rests with the seller. It is also possible that a specific clause will be inserted into the agreement between the seller and the contractor that, in the event of a claim being raised against the seller, the contractor will be liable for any damage arising from the claim with regard to works performed by the contractor. However, the contractor will not be the defendant in the action initiated by the buyer.

While this represents the general position, there are exceptions. For example, in accordance with the Sale Law (Apartments) 1973, the contractor will be liable for specified periods of time in respect of defects following the completion of the building regardless of the buyer-seller relationship (eg, flooring and wall ceramics work – two years' liability; or defective piping, including water, heating and sewerage – four years' liability).

Insurance

17 | To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Israeli law does not limit the liability for damage for which the contractor is responsible.

Insurance products are generally available for all of the above.

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

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

No.

Local labour law

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

If the employment agreement is for an indefinite term, it can be terminated upon completion of employment and after advance notice has been given in accordance with the Advance Notice for Termination or Resignation Law 2001. In such an instance, the employer will have no further obligations to the employee.

If the employment agreement is for a definite term (eg, a specific number of years), it is preferable that the employment contract include an option for it to be terminated upon advance notice if the employer wishes to terminate earlier than planned. However, if this option is not included in the employment contract, the employer will be liable to continue paying the employee until the end of the period defined in the contract.

Labour and human rights

- 20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Other than local labour laws that apply to all workers in Israel, the following legislation applies specifically to foreign construction workers.

- The Foreign Workers Law of 1991 entitles foreign workers to the right for appropriate housing and medical insurance. An employer who does not comply with this obligation may lose his or her work permits and be liable to a civil lawsuit and criminal charges, including fines and even imprisonment.
- Foreign workers engaged in the construction industry are entitled to an extension order that will be granted by the Minister of Labour. The extension order entitles construction workers to certain additional rights, such as an education fund and a higher minimum wage than the general minimum wage, in accordance with predefined wage tables that are particular to different sectors in the economy.

An employer's failure to comply with the aforementioned laws insofar as foreign workers are concerned operates in the same manner as infringing the laws regarding local workers would be handled which may include the imposition of a fine or imprisonment, or both.

Close of operations

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

Leaving the project unilaterally before fulfilling all its contractual obligations will be regarded as a breach of the contract by the contractor and might expose it to all of the contractual remedies available to the employer. The contractor will be liable for all damage that the employer suffers as a result thereof and will probably not be able to recover the retention monies (that are usually only returned upon successful completion of the project).

Regarding the finalisation of the local legal entity, for the purposes of this question, we will assume that the foreign contractor established a company in Israel (as opposed to a branch office). Closure of operations in Israel of a solvent company amounts to voluntary liquidation. Since only a solvent company can go into voluntary liquidation, the company's shareholders and the majority of the company's directors must declare that the company will be able to pay any outstanding debts within 12

months of the date on which the voluntary liquidation commences. This declaration is made by filing a 'solvency affidavit' with the Companies' Registrar. If the company has assets and liabilities, a liquidator will be charged with disposing of the assets and settling the liabilities. In respect of any employees, the employer will be liable to make payment of employees' entitlements that are due upon the termination of employment, such as severance pay, unused leave days and recreation pay.

The Israeli Companies Ordinance (New Version) 1983 provides that the process of voluntary liquidation shall commence with a resolution of the company to wind itself up and cease business barring any actions required for the liquidation of the company. A company may initiate its voluntary liquidation by a resolution adopted by 75 per cent of the shareholders who will vote at an extraordinary general meeting. Within seven days of the adoption of the resolution, the company must send a notice to Reshumot, the official gazette of Israel, and appoint a liquidator who will assume the powers of the board of directors and manage the voluntary liquidation. This liquidator will notify the Companies Registrar of his or her appointment within 21 days thereof and provide a report detailing how the voluntary liquidation will be conducted, including, inter alia, the distribution of assets (if applicable) and the payment of liabilities.

The liquidator will notify the shareholders of a final general meeting via publication in Reshumot at least one month before the date set for the meeting at which the contents of the report will be presented to the shareholders. A week later, the report must be filed with the Registrar.

PAYMENT

Payment rights

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

The terms relating to payment will be clearly recorded in the contractual provisions. Contracts in Israel generally provide for different instances regarding the non-payment of accounts and the remedies available to the contractor in these instances. Liens cannot be placed without the consent of the employer and, therefore, the ability to use them will be conditioned upon the provisions of the contract.

In short, the failure to make a payment that is due, owing and payable to a contractor will constitute a breach of contract and entitle the contractor to all of the ordinary remedies that flow from a contractual breach, such as specific performance, cancellation and damages. The contractor can also ask the court to attach a liquid amount or particular asset of the employer to secure a specific amount for his or her claim.

'Pay if paid' and 'pay when paid'

- 23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

'Back-to-back' clauses are familiar in many contracts in Israel. However, it has been decided in numerous judgments that set out exclusions to these clauses that a subcontractor will be able to force the main contractor to make payment to it, even if the employer has not yet paid the relevant payment to the main contractor, including, inter alia:

- when the refusal of the employer is not linked to any failure or breach by the subcontractor; or
- when the main contractor did not act fairly to enforce the payment upon the employer.

Contracting with government entities

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

No. When the government enters into a contract for a construction project, it acts in its private capacity and, therefore, is subject to the general civil laws of contracts.

Statutory payment protection

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

The source of the cancellation is important. If the cancellation of the project came as a result of force majeure, the provisions of the contract that apply thereto will govern that situation. If the project was cancelled for reasons pertaining to the contractor's company's liquidity, the laws that govern liquidation and insolvency will apply and the workers will be accommodated in accordance with these laws.

If the contract was cancelled as a result of the employer's decision to take on another contractor or omit the majority of the contractor's works, thereby effectively causing the contract to be cancelled, the contract between the employer and the contractor will likely have provided for such a situation and will govern it in accordance therewith. Usually, upon such termination, the parties (or the engineer as applicable) shall determine the value of the work done and shall determine:

- the amounts payable for any work carried out for which a price is stated in the contract;
- the cost of plant and materials ordered for the works that have been delivered to the site that shall become the property of (and be at the risk of) the employer when paid for; and
- the cost of removal of temporary works and contractor's equipment from the site.

FORCE MAJEURE

Force majeure and acts of God

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

Being excused from performing contractual obligations owing to events beyond a contractor's control is not automatic. Whether the contract provides for excusing a contractor from its obligations upon the occurrence of an event beyond its control depends on the wording of the contractual provision.

In any event, under the law of contract, force majeure will usually excuse the contractor from performing its obligations to the extent that this event actually prevented the performance thereof. However, not every event that is beyond the contractor's control will be deemed a force majeure event. Indeed, according to Israeli case law, even wars have not been declared as force majeure.

Accordingly, the exact wording of the provision is important as a contract may excuse the contractor from performing its obligations in different events that it labels as force majeure; for example, declared war, natural disasters, national strikes or national or general shortage of materials.

In most instances, especially in respect of a defined list of events, the contract will further stipulate that the event will only be deemed a force majeure event if it constitutes exceptional circumstances that could not have been foreseen upon the commencement of the works and that, despite the exercise of every reasonable effort, the contractor was unable to prevent or minimise the damage to the project.

DISPUTES

Courts and tribunals

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

There is no specific construction court in Israel. Litigious disputes are resolved either in court or in arbitration proceedings.

Dispute review boards

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

There are no mandatory or statutory bodies that are permanently retained to function as dispute review boards (DRBs). Parties may, in the framework of their agreements, require the appointment of a DRB to function as a preliminary stage prior to approaching an arbitrator or arbitral tribunal. In such an instance, the parties will determine the powers of the DRB, the extent to which and in what respect its decisions will be binding and any appeal procedures that emanate from it.

Mediation

29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation is usually absent from major construction contracts as an option that has to be extinguished prior to initiating arbitration proceedings. Notwithstanding the inclusion of clauses that support amicable settlement between parties prior to commencing litigation in certain contracts, mediation is not necessarily specified as the mandatory route for achieving this goal. However, mediation is frequently used in Israel, and construction cases are not exceptions in this regard. As courts find these kinds of cases difficult to decide, they encourage parties to conduct mediation proceedings.

With regard to the origin of the mediators, in most instances in Israel, the mediators will be Israeli lawyers or retired judges who are familiar with the field of construction. It is essential that the mediator is familiar with Israeli law, as this is the basis on which an accurate assessment of the parties' risks will be determined. In complicated engineering cases, it is not unusual that the mediator will be assisted by an engineer with the relevant expertise.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Yes. In accordance with the Courts Regulations (Mediation) 1993, all material and statements made within mediation proceedings are strictly confidential and parties are not allowed to use them outside the proceedings.

Arbitration of private disputes

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

In construction disputes – especially with regard to megaprojects and even more so when the project includes international clients – arbitration is preferable as the parties have a greater ability to be involved in the selection of the arbitrators (including the option to select engineers as arbitrators), the venue, the schedule and the language in which the arbitration proceedings will be conducted. Arbitration proceedings are

usually more efficient compared to court proceedings – an advantage that is crucial to the field of construction. Additionally, the decision handed down by the arbitrator carries the same authority as an order of court and can be made an order of court officially should the parties require it.

Governing law and arbitration providers

32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

No preference is mandated with respect to international arbitration providers. The parties are entitled to agree on a specific provider by subscribing to the particular rules set by it or, alternatively, adopt a universal set of rules, such as the UNCITRAL Arbitration Rules, for the dispute in question. In the former instance, the choice of the international arbitration provider will often come as a result of accessibility for the parties determined by their proximity to the provider. Accordingly, the International Chamber of Commerce would be an acceptable provider in these circumstances.

The parties also have the discretion to select the law governing the arbitration proceedings. Accordingly, it is possible that the parties will select a governing law that may differ from the national law of the country in which the arbitration is being held. While this affects the application of that country's substantial law, the proceedings will remain subject to the procedural law of that country and, accordingly, will continue to be governed thereby for the duration of the proceedings.

Dispute resolution with government entities

33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

If the government agency has entered into an arbitration agreement, it will be bound by the arbitrator's award or any appeal procedures contained therein, or both.

Arbitral award

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

Whether an arbitral award issued by a foreign or international tribunal may be rejected by local courts will be determined in accordance with the state in which the arbitral award was given. If the relevant state is a party to an international convention to which Israel is also a party, the rules of the relevant convention will be applied (eg, the New York Convention was incorporated into Israeli law through the Regulations for the Execution of the New York Convention 5738-1978).

According to section 29A of the Arbitration Law 1968, an Israeli court may, on application, reject a foreign arbitration award to which an international convention applies and to which Israel is a party in accordance with the provisions of the relevant convention. By way of illustration, in accordance with article V(2) of the New York Convention, the recognition and enforcement of an arbitral award may be refused by an Israeli court if it believes that the differences between the parties cannot be settled by arbitration under the law of a particular country or the recognition or enforcement of the award would be contrary to the public policy of Israel.

Limitation periods

35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

As a general rule, the statute of limitations for a civil claim not based upon a right in land is seven years. Specific laws that provide for shorter limitation periods exist, but these are not relevant to construction disputes. The time for the statute of limitations begins to run on the date on which the cause of action arises. There are several exceptions to this rule that are primarily caused by a lack of knowledge (and inability to reasonably obtain the knowledge) on the part of the claimant as to when the action arose.

ENVIRONMENTAL REGULATION

International environmental law

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

While not a signatory to the Stockholm Declaration, Israel is a member of the United Nations Environment Programme (UNEP). Israel held a position on the board of directors from 2004 until 2013, when the UNEP membership became universal and the executive committee ceased to exist. Israel participates in forum sessions during which participants discuss various aspects of global environmental policy. In addition, Israel has extensive environmental legislation that is overseen and enforced by the Ministry of Environmental Protection. Any impact on the environment – be it environmental nuisances (air, noise, water and marine pollution), contaminants and pollutants (hazardous materials, radiation, and solid and liquid waste) or construction and infrastructure development – must comply with the laws and regulations that promote and enforce environmental protection. In certain instances, specific environmental issues are catered for by particular industry-specific legislation and comprehensive laws, for example, the Planning and Building Law 1965 and the Licensing of Businesses Law 1968 (which provide a framework for controlling the use of resources and promoting sustainable development), which also serve to ensure the protection of the environment and nature (air, water and soil) in a more general sense.

Local environmental responsibility

37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

The infringement of environmental legislation is strictly enforced through administrative, civil and criminal measures. Owing to the importance of environmental protection, much of the legislation empowers the Ministry of Environmental Protection to impose administrative orders on persons and companies that disregard environmental laws and that, in many instances, are quite far-reaching; for example, the temporary or permanent shutdown of a business, clean-up and remediation orders and permit revocation. These measures are generally employed in order to prevent anticipated hazards or to stop and remove existing hazards. Furthermore, violations of environmental laws may give rise to criminal proceedings against the company that may be extended to its employees. The administrative authority is also empowered to impose administrative financial sanctions for breaching environmental legislation.

CROSS-BORDER ISSUES

International treaties

38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

According to the website of the Ministry of Finance in respect of bilateral trade agreements, Israel's strategy of globalisation and liberalisation has led to a process of specialisation and increased efficiency in which uncompetitive industries were relocated to emerging markets. To this extent, Israel has successfully executed numerous investment agreements with many countries with each instance consisting of tailor-made provisions to define that relationship.

To that extent, it is not plausible to provide a generalised definition for 'investment' as this term will vary slightly in each agreement. However, taking this into consideration, and for the purposes of providing clarity, 'investment' will generally mean 'investment in an enterprise involving active participation therein and the acquisition of assets ancillary thereto or the enterprise or assets acquired as a result of such investment.'

A full list of the states with which Israel holds investment agreements may be found at: <https://mof.gov.il/en/InternationalAffairs/TradeAgreements/Pages/BIT.aspx>.

In further clarifying the definition, 'investment' will comprise the following: movable and immovable property, company shares, monetary claims or claims to any performance that has an economic value, copyrights, industrial property rights, know-how, technical processes, trademarks, trade names and goodwill, as well as business concessions under public law including the ability to exploit or extract natural resources.

Tax treaties

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

Israel currently holds over 50 tax treaties with the majority of developed countries that function to prevent double taxation. Israel continues to sign tax treaties on an ongoing basis in this regard. In the context of construction specifically, a tax treaty will generally include a determination that a construction project or a construction site erected for a period of more than 12 months will be considered a permanent establishment.

A list of the countries that have concluded taxation treaties with Israel can be found at: <https://mof.gov.il/en/InternationalAffairs/InternationalTaxation/Pages/AvoidanceDoubleTaxationTreaties.aspx?WPID=WPQ11&PN=2&ptoken=312020137410>.

Currency controls

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

Restrictions on foreign exchange in Israel began to be abolished in the 1990s and the process ended in 1998. Since 1998, there are no restrictions on changing operating funds or profits from one currency to another.

Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

As a rule, there are no special restrictions on transferring profits from within the State of Israel.

S.HOROWITZ & CO.

Benjamin Sheffer

benjamins@s-horowitz.co.il

Lance Blumenthal

lance.blumenthal@s-horowitz.co.il

31 Ahad Ha'am Street

Tel Aviv

Israel

Tel: +972 3 567 0700

Fax: +972 3 566 0974

www.s-horowitz.com

However, in the case of income or profits that were subject to a special tax regime (tax exemption or better tax rate), government grants to encourage a particular activity or investment (eg, benefits under the Capital Investment Encouragement Law 1959) or scientific grants, diversion of these profits will be restricted.

In these instances, profit diversion may be subject to tax or penalty payments based on the circumstances and conditions of eligibility for the relevant benefit.

UPDATE AND TRENDS

Emerging trends

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

In November 2019, the matter of *Bibi Roads and Development Ltd v Israel Railways* 8100/19 was brought before the Supreme Court. The matter set a worrying precedent for contractors for the manner in which courts would consider a claim of additional costs and extensions of time for additional work carried out by the contractor in a public tender. The court rejected some of the claims for additional payment and extensions of time, inter alia, on the basis that any contract awarded following a public tender would be classified as a 'closed contract with all stipulations included' and, therefore, cannot be deviated from, even if a change of circumstances was not anticipated by the parties. Under this precedent, the contractual procedures for requests for additional payment or extensions of time must be strictly fulfilled, otherwise the contractor's claim will almost automatically be dismissed (even if it was justified on the merits).

In April 2020, an application for an additional hearing was brought before the Supreme Court. However, the application for a further hearing was not granted for the following reasons. First, according to the Supreme Court, a determination according to which all contracts following public tenders would be classified as a 'closed contract with all stipulations included' and, therefore, cannot be deviated from was not explicitly set out in any of the judgments by any of the judges. Second, no new precedent was required by the decision as the parties explicitly agreed on a pricing mechanism for the execution of specific works and, therefore, the situation is not one in which unforeseen circumstances not anticipated by the parties will occur.

As the judgment is fairly recent, its impact on the canon of construction litigation has yet to be tested. Some have suggested that as the Supreme Court did not grant a further hearing, the case does not create significant consequences that are objectionable for contractors. If it did, the Court would have had to allow an additional hearing. However, the judgment was handed down by the Supreme Court, which binds other courts.

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