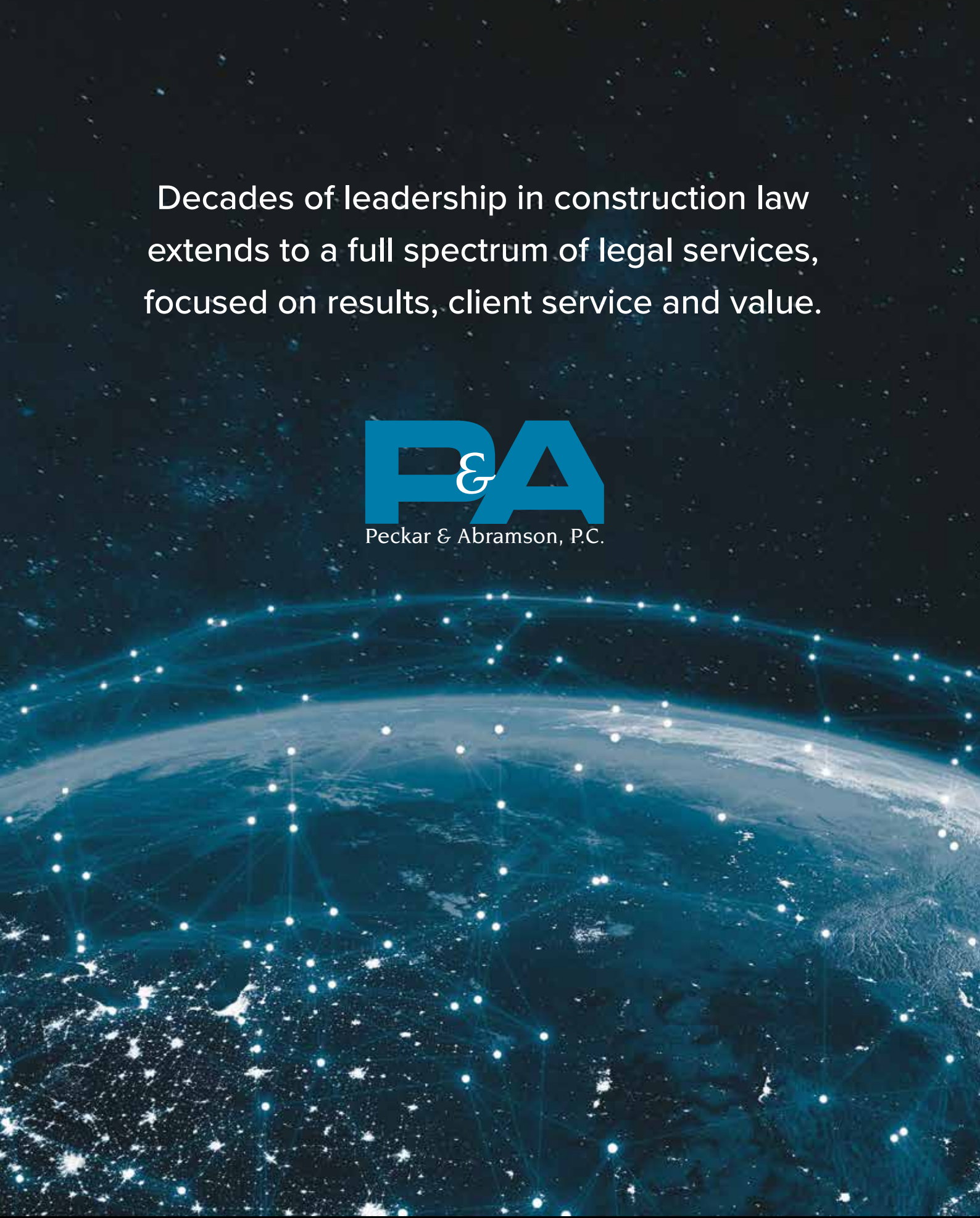
CONSTRUCTION 2023

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

LEXOLOGY
Getting the Deal Through



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Lexology Getting the Deal Through is delighted to publish the sixteenth 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 Israel, Malta and Singapore.

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.

LEXOLOGY
Getting the Deal Through

London
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Global overview

Robert S Peckar and Michael S Zicherman

Peckar & Abramson PC

Who would have predicted that when we wrote the introduction to *Lexology Getting The Deal Through: Construction 2022* that we would find ourselves in much the same situation one year later? Perhaps naively we did not. Yet, even now, many of us still find ourselves sitting in our homes, instead of our offices, while we continue to work remotely, hoping to return to some level of 'normality' sooner rather than later. To be sure, 'normal' is not likely to look quite the same as it did before the pandemic. Most of our interactions with lawyers around the world will continue to be virtual, and many firms that have returned to the office, as well as those that are planning their returns in the coming months, are and will be doing so in some hybrid form. Nevertheless, while there is reason for optimism, owing to the effectiveness of the vaccines, the global community continues to contend with the impact of the virus, which continues to claim lives, careers and businesses as its victims. And, while some construction projects have continued in spite of covid restrictions, many of the same observations we made last year continue to apply.

Although the severe impact of the pandemic, which had caused many projects to be shut down by government requirements, has now yielded to more 'normalcy', it is now clear that the pandemic-induced major supply chain disruptions of construction materials and equipment continue. There are other consequences, as well as projects that were put on hold because of the pandemic being ultimately cancelled.

Last year, we identified 'force majeure' as a legal issue that would become particularly important as delays, suspensions, project cancellations and increased project costs arose and had to be resolved against the legal backdrop of the underlying contracts. Force majeure clauses exist in virtually every construction contract in one form or another. In most contract negotiations, these clauses attract little attention; they are often seen as standard or 'boilerplate'. As long as they reference 'acts of war, acts of terrorism, strikes, and acts of God', little attention is paid to the list of horrors that will excuse performance. However, when the world awoke to the need to shut down global economies, not least construction projects, force majeure became the one clause to which every business and lawyer turned.

Over the last year, the number of law firm alerts posted on the internet about force majeure was impressive. In common law countries, lawyers learned that legal precedent for the application of the clause to a worldwide pandemic is inadequate. Is a pandemic a covered trigger for the clause? Is a pandemic an act of God? Does the application of the force majeure clause mean that a contractor on a project shut down for many months would only receive an extension of time, but no financial relief? Does a developer or contractor have insurance for an event that could be categorised as an event of force majeure? These and other questions related to the applicability of force majeure took centre stage.

As the impact of the pandemic-caused project shutdowns and displacements has largely not been yet resolved, many courts either remain closed or are functioning by working remotely. As a result, there has not been a wave of judicial decisions determining contractual rights pursuant to a contract's force majeure clause, although at least one federal decision in the United States concluded that the risk of costs relating to a pandemic or quarantine under a fixed-price contract rests with the contractor. Some arbitrations, even international arbitrations, are proceeding remotely. While alternative dispute resolution (ADR) providers have been extolling the claimed success of remote ADR, there are mixed reviews from practitioners.

Clearly, the impact of the pandemic on the practice of construction law and the management of construction projects is significant and it remains to be seen which of the adaptations remain in the long term.

So, it is with some greater hope and thankfulness to the brilliant scientists who have developed the vaccines, that we wish all our readers good health, safety and a return to a good quality of life.

Australia

Troy Lewis, Tarin Olsen and Grace Power
Holding Redlich

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?

Before starting a business in Australia in the construction industry, it is important to know about the relevant legislation, licences and permits, and other business requirements.

Some of the key concerns to be aware of include (but are not limited to):

- construction industry-specific legislation, standards and regulations, including the Competition and Consumer Act 2010 (Cth), the Australian Consumer Law and the National Construction Code;
- required licences and permits, such as building permits and development applications;
- taxation laws, including the goods and services tax and taxable payments reporting requirements;
- security of payment laws relevant to one's state or territory;
- state-specific work health and safety laws; and
- insurance requirements, including professional indemnity insurance and public liability insurance.

In Queensland, it is important to understand the licensing requirements under the Queensland Building and Construction Commission Act.

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?

Foreign construction professionals must hold the relevant Australian licences and qualifications to perform construction work in Australia. For construction professionals who have acquired their skills and experience overseas, the recognition of prior learning programmes offers an avenue to have these skills assessed and recognised in Australia and a faster path to the relevant Australian qualifications. Foreign construction professionals must hold an appropriate visa permitting them to work in Australia.

Competition

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

Australia has ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which restricts government entities from discriminating against foreign tenderers.

However, jurisdictions in Australia have various local content requirements and policies that are aimed at promoting opportunities for local businesses, and may, in practice, override this requirement. For example, many jurisdictions have policies supporting small and medium-sized enterprises or local development.

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?

Australia has a multi-agency and regulatory approach to combating corruption, bribery, fraud, collusion and other dishonest practices in the construction sector.

Commonwealth, state and local government procurement is governed by different legislation; however, all have provisions or policies that prohibit bid rigging or other anticompetitive behaviour.

In addition, Australia now has Commonwealth legislation – the Government Procurement (Judicial Review) Act 2018 (Cth), which commenced on 20 April 2019 – that gives bidders a statutory platform to challenge Commonwealth government tender processes. Similar legislation has also been enacted in New South Wales (NSW), and Tasmania has also proposed a similar legislative response that is yet to take effect.

Independent organisations, such as the Independent Commission Against Corruption in NSW, also investigate and expose corrupt conduct in the public sector.

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 has been illegally obtained, for example by bribery, will generally be unenforceable.

Anti-corruption and bribery offences are governed under the Criminal Code Act 1995 (Cth).

Each state and territory has also criminalised public and private bribery under the following acts, with different penalties provided under each:

- New South Wales: section 249B of the Crimes Act 1900 (NSW);
- Victoria: section 176 of the Crimes Act 1958 (Victoria);
- South Australia: section 150 of the Criminal Law Consolidation Act 1935 (South Australia);
- Queensland: sections 442B to 442BA of the Criminal Code Act 1899 (Queensland);
- Western Australia: sections 529 to 530 of the Criminal Code Act Compilation Act 1913 (Western Australia);

- Tasmania: section 266 of the Criminal Code Act 1924 (Tasmania);
- Australian Capital Territory: sections 356 to 357 of the Criminal Code 2002 (Australian Capital Territory); and
- Northern Territory: section 236 of the Criminal Code Act 1983 (Northern Territory).

Facilitation payments (payments to encourage a public official to perform his or her duty in a more time-efficient manner) are not permitted under Australian law.

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?

There is no specific legislation requiring employees of project team members to report suspicion or knowledge of bribery of government employees or penalising those employees for failure to do so.

However, there is whistle-blowing legislation in certain jurisdictions and industries that provides certain protections for those who report corrupt conduct.

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?

The making of political contributions is not part of doing business in Australia.

Relationships or associations with public agencies or public sector personnel, or political associations, may need to be disclosed as conflict of interest issues to the public sector procuring agency where relevant.

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 rules as government employees?

Typically, anti-corruption and compliance rules on construction managers or other construction professionals engaged in a government project are governed by the contract. For example, a government entity can include a provision in a contract requiring the contractor to comply with equivalent anti-corruption laws.

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?

Australia has a strict regulatory framework, which can be difficult to navigate across the three levels of government: Commonwealth, state and local.

Some of the important legal issues that may present obstacles to a foreign contractor attempting to do business in Australia include (but are not limited to):

- foreign investment regulations and policy;
- corporate law regulating forms of business organisations;
- companies and securities regulation;
- taxation and banking laws;
- intellectual property laws;
- privacy laws;
- competition and unfair commercial practices laws;
- labour laws;
- visa and immigration requirements; and
- real property, environmental and planning laws.

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?

Examples of standard contract forms released by Standards Australia used in the construction sector include:

- AS 4000-1997: general conditions of contract;
- AS 4902-2000: general conditions of contract for design and construct;
- AS 4905-2002: minor works contract conditions (superintendent administered); and
- AS 4903-2000: subcontract conditions – design and construct.

Any deviation from the contract will depend on the unique circumstances of the transaction and is commonly reflected in:

- the formal instrument of agreement, which accompanies the contract;
- the body of the contract, as amendments; and
- parts (and annexes) to the contract.

In addition, standard form contracts for specific areas of construction have been made available by different agencies, such as the Master Builders Association, the Property Council of Australia and the International Federation of Consulting Engineers. Generally, the language of the contract must be in English and the governing law will generally be the law of the state or territory where the construction works take place. Parties are free to choose the venue for dispute resolution; however, there are industry-accepted institutions, such as the Resolution Institute (formerly the Australian Commercial Disputes Centre).

Payment methods

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

Payments are generally made electronically.

Australia has state-based security of payment legislation that gives contractors statutory protection against non-payment by principals. Under the security of payment regimes (which differ slightly from state to state), contractors providing goods or services as part of construction work under a construction contract have the right to receive 'progress payments' for work delivered, and the times and frequency of these payments are set out in each state-based security of payment legislation.

If a principal fails to make full or part payment within the required time in accordance with the relevant security of payment legislation, the contractor can apply for adjudication, and any amount determined as payable by the adjudicator will be binding.

Payment terms of between 14 days and 35 days from the date of a progress claim are common.

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?

Typically, principals or owners will contract directly with a head contractor, which then engages subcontractors or subconsultants, or both, but will remain ultimately liable for the delivery of the works.

PPP and PFI

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

The statutory and regulatory framework for PPPs differ across Commonwealth, state and local governments.

PPPs for both Commonwealth and the New South Wales (NSW) State Government are governed by guidelines, whereas PPPs for the NSW Local Government are governed by legislation (Chapter 12, Part 6 of the Local Government Act 1993 (NSW)).

There is no formal statutory and regulatory framework for PFIs as this is not a typical form of contract in Australia.

Joint ventures

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

The allocation of liability and responsibility of joint venture consortium members will depend on the specific terms of the joint venture agreement and potentially the construction contract. Parties are free to allocate liability and responsibility under the contract as they see fit.

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?

No, local laws do not restrict the freedom of contract. If an exclusion, carve-out of negligence or reduction based on the proportionately of the negligence is not specially listed, then the full indemnity will likely be enforceable by the party who agrees to it.

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?

In Australia, there is no contractual cause of action or recourse in contract law against a third party that is not privy to the contract (except for any common law or statutory exceptions). On 4 June 2020, NSW passed the Residential Apartment Buildings (Compliance and Enforcement Powers) Bill 2020 (the Bill) (which has yet to pass into law), which is aimed at protecting third-party users against defective building work by developers. The definition of developers is broad and includes a person who contracted (whether directly or indirectly) for the building work to be carried out. It also includes a principal contractor as defined under the Environmental Planning and Assessment Act 1979 (NSW).

The purpose of the Bill is to provide broad powers to the Secretary of the Department of Customer Service (the Secretary) to:

- issue a stop work order for work being carried out;
- issue a building work rectification order; and
- prohibit the issuing of an occupational certification.

The extra powers provided to the Secretary are aimed at providing further protections for third parties (which are not privy to the contract), such as purchasers of new dwellings or recently built buildings.

Importantly, common law remedies are not limited, such as a product liability negligence claim for a defective building product that causes a party to suffer loss. Other possible actions may include actions under the Australian Consumer Law by a party or the corporate regulator, such as the Australian Securities and Investments Commission, for:

- a breach of safety or information standard;
- misleading or deceptive conduct;
- a breach of a statutory 'consumer guarantee'; or
- loss or damages suffered because of a safety defect.

Courts have recently placed restrictions on some common law claims against contractors by subsequent owners.

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?

In Australia, a policy of insurance will generally not provide coverage to an insured where there has been a contravention of law. Insurance products for contractors will provide coverage for:

- damage to the third party's property;
- injury to workers;
- injury or death to third parties; and
- damage owing to environmental hazards caused by an accident (but not by negligence caused by the contractor).

The equivalent of the Civil Liability Act in each state and territory provides guidance on damages available to a party for claims of negligence. Common law also acts as guidance for damages in negligence claims. However, contractual damages may be unlimited if not specifically capped in the contract.

For injured employees, there is workers' compensation legislation that acts as a guide to damages for the affected party.

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?

There are no laws that specifically require a minimum or certain percentage of labour on a construction project to be locally sourced. The Australian government has, however, taken steps to encourage the hiring of local labour on construction projects by imposing a number of restrictions on the granting of visas to overseas contractors. Any foreign labourers or contractors must enter the country under an appropriate class of visa, typically being the Temporary Work (Skilled) visa (subclass 457) or Temporary Skill Shortage visa (subclass 482). For a foreign labourer or contractor to be eligible for such a visa, it must be established that the particular work they are to undertake under the visa involves a skill that is in short supply in Australia.

There are also no laws that specify the minimum number of employees that should be on a construction project at any one time. However, there is guidance around the maximum number of contractors

on the project at any one time. This is typically set out in a contractor's work health and safety management plan, which is required by the principal contractor of a construction project.

Notably, there may be Australian standard guidelines or internal company work health and safety policies that apply for specific construction trade work that requires a minimum number of people to carry out the work; for example, high-risk works, such as working with overhead powerlines.

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?

Under the Fair Work Act 2009 (Cth), employees have a number of minimum entitlements, meaning employers must comply with them. Upon termination of a contract of employment, the employer will be able to terminate all obligations except for any accrued leave entitlements, redundancy payment and the notice period (which can be paid in lieu of notice). Other contractual obligations may survive the termination of a contract, but this will rest on the contractual terms.

Whether an employer has to pay redundancy will depend on the size of the business. Additionally, the amount an employee receives in a redundancy payout and the notice period depends on the employee's period of continuous service.

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?

Foreign construction workers are entitled to work in Australia under a foreign working visa. The conditions of their visa will stipulate the type of work they can do and the hours in which they can work. Some visas even restrict foreigners from working in certain areas to encourage more people to work in rural or remote areas. Once foreigners are accepted to work in Australia under a foreign visa, they are bound to comply with all local, state and Commonwealth laws. Failure to do so could result in a civil or criminal action being brought against them.

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?

For a foreign contractor to start up legal operations in Australia, they will need to obtain a specific type of visa. This will require the foreign contractor to meet the eligibility criteria set out for the visa, which is typically much harder to meet owing to the heightened legal risks.

When a business decides to close (whether owned by a foreign contractor or not) there will likely be termination payments that are applicable to those contracts that are in force. There will also be important legal obstacles to close out, such as:

- paying employees, suppliers and contractors;
- finalising any lease obligations;
- terminating payments for any enforceable contracts; and
- paying out any tax obligations.

Immigration law in Australia is a very specialised area of law and good advice should always be sought from an immigration law specialist before setting up a business.

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 security of payment regimes in each state and territory provides statutory protection against non-payment for subcontractors through the right to receive 'progress payments' from head contractors. There are further protections under some security of payment regimes, including the Building and Construction Industry Security of Payment Act 1999 (NSW), which provides a subcontractor with direct rights against a principal to secure payments due to it from the contractor by requiring a principal to withhold money due to a contractor pending the determination of an adjudication application against that contractor. A number of the security of payment regimes also provide for subcontractors' charges or payment withholding requests, whereby a subcontractor may require a principal to redirect or withhold monies owing to the head contractor as a means of securing amounts owed from the head contractor to the subcontractor.

There are laws that permit contractors to place liens and charges over the property, chattels or materials for works that have been done on the property but have not been paid. In effect, the lien prohibits further dealings with the property until the lien is removed.

'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?

Australia has state-based security of payment legislation that gives contractors statutory protection against 'pay when paid' provisions. Under the security of payment regimes (which differ slightly from state to state), contractors providing goods or services as part of construction work under a construction contract have the right to receive 'progress payments' for work delivered. If a principal, owner or contractor fails to make payment within the required time in accordance with the relevant security of payment legislation, the contractor can apply for adjudication, and any amount determined as payable by the adjudicator will be binding on the principal, owner or contractor.

The circumstances under which a contractor may suspend work for non-payment will depend on the exact terms of the construction contract. Typically, a contractor can suspend work (or terminate the contract) where the principal has failed to make payment when due or failed to make payment within a specified time (eg, within 30 days of the due date).

Contracting with government entities

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

No, currently there is no legislation that protects the government from not paying contractors for work validly performed.

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?

Yes, security of payment legislation provides the ability for contractors to claim for any unpaid construction work or supply of related goods and

services. Notably, there need not be a written contract, but, rather, an oral arrangement in which one party carried out construction work or supply of related goods and services for another party.

There are statutory limitation periods for when the claim for payment can be made. In New South Wales, Tasmania and Australian Capital Territory, the claim must be made within 12 months of carrying out the construction works or supplying the related goods and services. In Victoria, this is three months, and in Queensland and South Australia the period is six months. The outliers are Western Australia and the Northern Territory, where there is no limitation period for making a claim for payment after the contractor has performed its obligations.

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?

Force majeure in Australia is a contract law right and has not been settled under common law or enacted into statute.

DISPUTES

Courts and tribunals

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

Construction disputes are often heard first by bodies established by the state or territory government (eg, NSW Fair Trading). Where these bodies are unable to resolve these disputes, the tribunal in the state or territory has jurisdiction to hear these matters. In instances where the dispute cannot be successfully resolved at the tribunal hearing, the parties may apply to the district or Supreme Court (which will be dependent on the disputed amount).

While rectification orders are the preferred outcome in residential building disputes, the orders given by the state's or territory's tribunal or the courts will depend on the facts of the dispute.

In addition, the security of payment regimes in the various states and territories have established a legislative adjudication process through which the parties resolve disputes.

Dispute review boards

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

In each state and territory, there are different government departments that facilitate construction disputes relating to residential building work and certain non-residential building work. For example, in Queensland, this is the Queensland Building and Construction Commission, and in New South Wales (NSW), this is NSW Fair Trading. These departments attempt to resolve the dispute in the first instance by inspecting the works and determining if the alleged defects are in fact defective building works. After an inspection is carried out, the department will decide who is at fault and what action is required.

A decision made by a government department may involve a direction for the builder or contractor to carry out rectification works. Notably, a decision made is not treated as final, but if the builder or contractor fails to carry out the rectification works, the department, depending on the state or territory, may impose corrective actions, such as:

- a direction to rectify the defective building work by a certain date;
- a fine to the person who carried out the building work;
- demerit points; or
- publishing details of the bad performance on record.

A party that is not satisfied with the result of the decision may take the decision to a tribunal or, where the tribunal has no jurisdiction, initiate court proceedings.

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?

The practice of voluntary participation in professionally organised mediation has gained acceptance in the construction sector in Australia. This practice tends to be adopted as an alternative dispute resolution step prior to any form of binding (fault-finding) dispute resolution, such as expert determination and arbitration. Most contracts include clauses regarding the mediator selection process. For example, the clause may specify that the mediator is to be nominated by the Resolution Institute. The rules relating to such mediation are usually incorporated into the contract by reference.

The practice of mediation is generally desirable for parties to avoid lengthy and costly court proceedings. Additionally, mediation is often used as most jurisdictions impose mandatory mediation before court proceedings are initiated.

Pre-litigation mediation is also desirable as it may facilitate a non-adversarial resolution to issues that arise between parties involved in the construction project. Failing mediation, parties may have other avenues of recourse before appearing before the courts, such as through the specialist building and construction commissions and tribunals established in each state and territory.

For parties wanting to locate a mediator, there are many organisations that employ certified mediators who solely specialise in construction and commercial disputes.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Typically, parties will sign a confidentiality agreement prior to carrying out mediation or an agreement at the end of the mediation that contains a confidentiality clause to ensure that any matters discussed are kept confidential. The agreement will generally deal with the confidentiality of any discussions held to ensure that the parties are barred from raising the discussions in formal proceedings. Where there is no agreement or clause to this effect, state and territory legislation also prevents settlement discussions from being admitted as evidence.

It is common to go through a mediation institute, such as the Resolution Institute, and adopt their rules by reference. The rules of the Resolution Institute have confidentiality obligations set out in Rule 4.

Arbitration of private disputes

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

Arbitration is a commonly used method of alternative dispute resolution in construction disputes in Australia. It is often used where the parties are from different countries or where the default position under the contract is for arbitration to apply as a method of dispute resolution. The decision to use arbitration rather than litigation is a client preference and involves project-specific factors. Parties in construction disputes do not appear to have a particular preference except where there are factors that may make arbitration more suitable (as mentioned above).

An example of where arbitration is the default position is in some Australian standard contracts (eg, the AS4000, AS4902, AS4905 and AS4300 (unamended)).

The prevailing attitude nowadays is that arbitration is cheaper and faster than court proceedings and provides parties with greater control of the process. Given its confidential nature, it is often desirable.

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?

A common international arbitration provider for Australian projects (with international elements) is the Australian Centre for International Commercial Arbitration, and a common set of rules to adopt is the UNCITRAL Arbitration Rules.

Two pieces of legislation, the Commercial Arbitration Act 2010 (NSW) and the International Arbitration Act 1974 (Cth) enable the UNCITRAL Model Law to have the force of law in Australia.

However, the default position will generally be dependent upon the standard form contract (unless it is amended). For example, under the Australian standard contracts (eg, AS 4000, 4902 and 4905), the arbitration rules are the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. Other popular rules include those by the International Chamber of Commerce, the International Centre for Dispute Resolution and the International Bar Association.

Regarding jurisdiction, Australian parties generally push for a Commonwealth country because of the similarities with the rule of law, and those countries' courts are likely to have adopted the UNCITRAL Model Law. Popular jurisdictions include London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm.

Resistance to using a particular jurisdiction will be associated with an unstable rule of law and a poor justice system without respectable and trusted judges.

Dispute resolution with government entities

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

Yes, government agencies in Australia are able to participate in private arbitration and can subsequently be bound by the arbitrator's award.

In certain situations, government agencies will prefer arbitration where they are concerned about the sensitivity of the matter owing to the confidential nature of arbitration.

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?

Australian courts generally uphold foreign arbitral awards, and the relevant legislative framework is the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards and the International Arbitration Act 1974 (Cth). Both of these provide an exhaustive and discretionary set of circumstances in which a court can refuse to enforce a foreign arbitral award; however, these are very limited and, provided the award creates a remedy, the court should apply the rules for enforcement.

However, courts may elect not to acknowledge arbitral awards in certain jurisdictions if legislation prohibits an arbitration clause in the contract. In certain Australian jurisdictions, arbitration clauses are prohibited in residential building contracts (eg, under the Domestic Building Contracts Act 1995 (Victoria)). If a court was to decide whether an arbitration was binding when arbitration was clearly not permitted, it may find the determination null and void if it has jurisdiction to do so.

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?

There are various statutory limitation periods in Australia relating to construction projects. These can depend on the jurisdiction in which the work is being done and has also been subject to judicial determination.

Generally, the limitation period is six years for contract-based claims and 12 years for claims under a deed (15 years in South Australia and Victoria). Generally, the time is measured from the date of the breach. In some jurisdictions, there is a statutory longstop date of 10 years on some construction claims (NSW and Tasmania), and in others the contractual limitation period has been found to be extended from six years to 10 years (Victoria) owing to section 134 of the Building Act, which has been interpreted to extend this six-year period to 10 years.

In addition, in NSW, clause 6.20 of the Environmental Planning and Assessment Act 1979 (NSW) applies a 10-year maximum limitation period on completion of the works. This does not extend the six-year contract period but does have the effect of curtailing the 12-year period for deeds.

The following is the relevant legislation by state:

- Limitation Act 1969 (NSW);
- Limitation of Actions Act 1958 (Victoria);
- Limitation of Actions Act 1974 (Queensland);
- Limitation Act 1985 (Australian Capital Territory);
- Limitation of Actions Act 1936 (South Australia);
- Limitation Act 1974 (Tasmania);
- Limitation Act 1981 (Northern Territory); and
- Limitation Act 2005 (Western Australia).

Preconditions depend on the cause of action set out in the applicable state or territory legislation. For example, a cause of action relating to a contractual dispute concerning a construction contract in different states or territories may depend on:

- the date the contract is terminated;
- if the contract is not terminated, the date on which the work under the contract ceased or breached; or
- if the contract is not terminated and work under the contract was not commenced, the date of the contract.

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?

Yes, Australia ratified the Stockholm Declaration on 20 May 2004, and it entered into force on 18 August 2004.

Australia has addressed a number of the principles set out in the Declaration across various local planning instruments and state legislation. For example, in New South Wales, the Environmental Planning and Assessment Act 1979 (NSW) and the Protection of the Environment Operations Act 1997 (NSW) ensures that various controls are in place to protect the environment and wildlife when a development is carried

out. There is also specific legislation that deals with the conservation of nature such as national parks and wildlife, which is consistently referenced throughout the relevant state and territory planning legislation.

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?

Each state and territory in Australia imposes different liabilities on developers and contractors, but, across the board, penalties may apply for a breach of the local environmental laws or regulations. Parties can also be instructed to carry out remedial action to rectify any environmental damage caused.

The amount of the fine depends on the type and severity of the offence. For example, in Victoria, a person who illegally deposits litter from a construction site could be fined up to 40 penalty points (A$6,608.80). In contrast, a person who illegally deposits industrial waste could be fined up to 5,000 penalty units (A$826,100).

There is a long list of duties and liability, but they generally relate to:

- air pollution;
- water pollution;
- noise pollution; and
- land pollution, including depositing and transporting waste.

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'?

Australia is a signatory to numerous free trade agreements (FTAs) with its key trading partners, including the Korea–Australia FTA and China–Australia FTA. These FTAs contain an investor-state dispute settlement provision that allows a contracting party from one country to submit to the jurisdiction of certain international arbitration rules and the selection of a seat. This is a major step for international investors, as FTAs provide enforceable protection to have a dispute adjudicated.

For example, in the Hong Kong–Australia FTA, the definition of 'investment' includes 'commitment of capital or other resources, the expectation of gain or profit, the assumption of risk'. The FTA also includes a provision for compensation to be paid in certain circumstances where there is the expropriation of an investment. It is important to look at the exact definition of 'expropriation' from one agreement to another. This will help determine if the investment is actually taken away, instead of transferred from one party to another (which may not amount to expropriation).

Tax treaties

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

Australia has entered into over 40 bilateral tax treaties with different countries to prevent double taxation occurring.

A full list of the income tax treaties can be found on the Australian Tax Office's website.

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Currency controls

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

No, Australia does not have any currency controls in place that prohibit the flow of currency into or out of the country.

Removal of revenues, profits and investment

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

There are no restrictions on removing money from Australia, except for reporting obligations for transactions over A$10,000. Where there is an international transfer over A$10,000, the Australian Transaction Reports and Analysis Centre will be notified.

UPDATE AND TRENDS

Emerging trends

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

As construction is regulated by each state and territory, the regulatory changes and pace of reform differ from one to another.

In New South Wales, there is currently a big push for the current regulation to be reshaped to promote a better regulatory framework that will transform the focus of the regulator. The government is taking a six-pillar approach to the reform to drive change. The six pillars include building:

- a better regulatory framework;
- rating systems;
- skills and capabilities;
- better procurement methods;
- a digital future; and
- a reputation for quality research.

Among the outcomes for the reform are a push for better technological solutions and a building rating system to identify risky developers, builders and contractors.

In Victoria, the government has appointed a panel of six individuals to review high-rise regulations. The first task the panel will focus on is establishing overarching principles to guide the building system review and identify key themes to be investigated and addressed throughout the reform process.

In Queensland, major reform has been led by the Queensland Building Plan that was released in 2017. Since its release, Queensland has heavily reformed its security of payment laws and is now focused on reforming building certification.

In South Australia, a few major changes include the implementation of a new Planning and Design Code and empowering accredited professionals to verify development applications and the timing of further information requests and amendments. There has also been an introduction of a Building Committee in late 2019, which is to assume the functions, powers and duties of the Building Advisory Committee and Building Rules Assessment Commission.

Brazil

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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?

Characterised by the large and well-developed agricultural, mining, manufacturing and service sectors, Brazil's economy outweighs those of all other South American countries and it is expanding its presence in the world markets. Today, Brazil is the ninth-largest economy in the world (after, among others, the United States, China, Japan, Germany, the United Kingdom and France). With the largest economy and population in Latin America, Brazil presents considerable export opportunities, particularly in areas such as energy generation, construction, infrastructure, safety and security equipment, and metalworking machinery.

To set up an operation to pursue the local market, foreign contractors must be aware of the following:

- the special complexity of the administrative regulatory framework and the tax system in Brazil;
- the need to follow the requirements of competent authorities to comply with specific rules for the remittance of profits and investments;
- the need to have qualified executives to ensure a cultural transition to Brazilian industry practices;
- the need to be very careful with their choice of local partners; and
- the labour law requirements, for example, that two-thirds of the employees in any Brazilian company must be Brazilian citizens, and two-thirds of the total compensation must be received by Brazilian citizens, with exceptions existing only for skilled workers and specialised technicians.

It is possible for foreign contractors to act directly in Brazil without a local business and to participate in public tenders, provided that they obtain the proper registration from the Federal Council of Engineering and Agronomy (CONFEA) and the Regional Council of Engineering, Architecture and Agronomy (CREA). The requirements for registration can be found at the following websites: www.confea.org.br and www.creasp.org.br.

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?

Licensing requirements for designers and contractors are the same in all Brazilian states. According to Law No. 5,194/1966 and Resolution CONFEA No. 444/2000, the following activities are considered professional attributes for architects, engineers and agronomist engineers:

- buildings, structures, transportation, exploitation of natural resources and development of industrial and cattle-raising operations;
- studies, projects, analyses, evaluations, inspections, expert examinations, opinions and technical reporting;
- teaching, researching, experimentation and training;
- construction and engineering oversight; and
- construction and engineering direction.

All such services must be practised by individuals duly registered with CONFEA and the CREA. Foreign designers and contractors wishing to perform any service in Brazil need to be registered with the local engineering, architecture and agronomy councils. Failure to do so may lead to severe sanctions, both of a civil and criminal nature, and compromise the continuity and regular approval of the project and compensation.

As indicated on the websites of CONFEA and the CREA, to register with these councils, individuals must comply with one of the following requirements:

- they must have a duly registered architecture diploma from one of the official colleges or higher education institutions recognised and existing in Brazil;
- they must have a diploma, duly revalidated and registered in Brazil, from a foreign college or higher education institution, or be a professional with such benefit granted by an international or exchange convention; or
- they must be a foreigner, hired in Brazil, who, at the federal or regional councils' discretion, is temporarily registered in Brazil because of national interests.

Competition

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

Article 37 of the Brazilian Federal Constitution and Article 9 of Law 14,133/2021 (Brazilian Federal Bidding Law) prohibits in any public bidding process any differentiated treatment – be it commercial, legal, labour, social security or any other – between Brazilian and foreign companies, including concerning currency, method and place of payment, even when financing from an international agency is involved.

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?

Article 37, XXI, of the Brazilian Federal Constitution sets forth that:

The direct and indirect public administration of any of the Powers of the Union, States, Federal District and Municipalities shall obey the principles of legality, impartiality, morality, publicity and efficiency and, also, the following:

XXI – with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by means of public bid proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as set forth in law, which shall establish only the technical and economic qualifications indispensable to secure performance of the obligations.

Therefore, the rule is that public tenders precede all public works, services, purchases and sales. However, article 37, XXI of the Federal Constitution states that there are exceptions to the cases specified in Law No. 14,133/2021 (the new Public Procurement Law), which regulates public tenders and administrative contracts.

The exceptions to the obligation of holding public tenders, mentioned in article 37, XXI, of the Federal Constitution and regulated by the Public Procurement Law, are waiver of tender and unfeasibility of tender.

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?

Brazil has taken a significant step towards developing comprehensive anti-corruption legislation in recent years. Law No. 12,846/2013 (Brazil's Clean Company Act) aims to fulfil international commitments undertaken by Brazil in various anti-corruption treaties, as well as to meet the population's demands for more effective anti-corruption mechanisms. The Clean Company Act proscribes conduct that may be harmful to the public administration, which includes, among other things, fraud and related misconduct involving government procurement, obstruction of government inspections or investigations, and bribery.

In 2015, several follow-on regulations provided further guidance about the Clean Company Act, bringing it more in line with the Foreign Corrupt Practices Act enforcement. As to anti-corruption compliance programmes, referred to as integrity programmes under the Clean Company Act, Decree No. 8,420/2015 (the Anti-Corruption Decree) identifies 16 mandatory elements of a complete programme that will be taken into account in evaluations by the enforcement authorities. The Anti-Corruption Decree brought about heightened anti-corruption standards, including the mandatory introduction of anti-corruption policies and compliance training within companies.

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?

Cooperation with investigations and the existence of compliance programmes, among others, do not prevent the imposition of sanctions, but may mitigate administrative penalties. Although the Clean Company Act provides that a company will not be released from providing appropriate compensation for the damage it caused, it may benefit under the Anti-Corruption Decree from one or more of the following outcomes by entering into a leniency agreement:

- exemption from publication of the decision sanctioning its conduct;
- exemption from the prohibition against receiving incentives, subsidies, subventions, donations or loans from government bodies, public entities, or financial institutions owned or controlled by the government;
- reduction in the fine imposed; or
- exemption from, or mitigation of, administrative sanctions set out in certain statutes governing public tenders and government contracts.

The highest authority of the government entity and the legal entities liable for the wrongful acts may enter into a leniency agreement. At federal level, the competent authority to enter into a leniency agreement is the General Comptroller's Office (CGU). A leniency agreement may extend to legal entities belonging to the same 'economic group' (ie, corporate family), provided those entities jointly execute the agreement.

The leniency agreement exempts the legal entity from publication of the sentence and reduces the fine by up to two-thirds. A leniency agreement requires cooperation with the government's investigation and administrative proceedings, identifying other involved parties, and expeditiously providing information and documents evidencing the misconduct to the government. Specifically, under the Anti-Corruption Decree, for a company to enter into a leniency agreement, it must do the following:

- take the initiative of approaching the authorities, when doing so is relevant;
- have ceased involvement in the misconduct;
- admit its participation in the misconduct;
- 'fully and permanently' cooperate with the authorities; and
- provide proof of the misconduct.

As set forth in the Anti-Corruption Decree, the CGU may execute leniency agreements relating to conduct at the federal level or involving foreign governments, but it remains unclear whether – and, if so, to what extent – this authority will be shared with other law enforcement authorities, such as federal prosecutors.

Although the legal entity must reportedly be the first one to demonstrate its interest in cooperating with investigations, this requirement is taken into consideration only when deemed relevant by the government entity negotiating the leniency agreement. Thus, in theory, more than one legal entity could enter into leniency agreements for the same investigated violations. The National Registry of Punished Companies was also installed at federal level to collect and disclose those sanctions imposed by executive, legislative and judiciary entities at all levels under the Clean Company Act and the Anti-Corruption Decree.

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?

In September 2015, Brazil's Supreme Court declared corporate donations to political parties and campaigns to be unconstitutional (Extraordinary Appeal No. 1296829). Justices voted eight-to-three in favour of a challenge, brought by Brazil's national bar association, to electoral laws that allow companies to donate up to 2 per cent of their previous year's gross revenue to candidates or party campaign funds. Politicians running for office in the future will be able to receive money only from a pool of public electoral funds and from individuals, who may contribute up to 10 per cent of their previous year's earnings.

It is also prohibited for political parties to receive contributions or financial aid, directly or indirectly, and under any form or pretext

(including by means of publicity of any kind), proceeding from the following:

- foreign governments or entities;
- any private entity that perceives, by virtue of the law, any compulsory contributions;
- non-profit organisations that receive funds from abroad;
- sports entities that receive public funds;
- non-governmental organisations that receive public funds;
- public authorities or bodies;
- independent government agencies, public companies or assignees of public services, mixed capital companies and foundations that were created by virtue of the law and that depend on public funds; and
- class or union entities or bodies.

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 rules as government employees?

No. There are different rules and regulations that may apply in dealing with private and public sector compliance guidelines.

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?

Tax challenges

Brazil's tax system is a real challenge to investors and business players in general. The federal union, states and municipalities levy taxes, fees (corresponding to the use of public services and police power) and contributions targeted at improvements (resulting from public works).

Federal taxes

At federal level, the following taxes may be levied:

- import duties;
- export duties;
- income and capital gains tax;
- tax on industrial goods;
- tax on credit, exchange and insurance, or on securities transactions;
- tax on rural land; and
- tax on large fortunes.

The federal government may also levy the following charges (or social contributions) to fund social programmes:

- social contributions on corporate profits at 9 per cent on pre-tax profits;
- social contributions for funding social security, levied monthly on gross income at 3 or 7.6 per cent;
- contributions towards the social integration programme, levied monthly on the gross income of corporate entities at 0.65 or 1.65 per cent;
- contributions towards the social integration programme and social contribution for funding social security, levied on imports at 1.65 or 7.6 per cent (or certain other specific rates);
- payroll charges for social security contributions (CINSS). Owners must withhold this charge on behalf of their employees at the rate of 11 per cent. Self-employed workers pay 20 per cent. Corporations pay CINSS at the rate of 20 per cent on payments to individuals for services performed, with no ceiling; and
- contributions to intervene in the economic domain (CIDE) as follows:
  - CIDE is due at specific rates on import and trade in the domestic fuel market; and
  - CIDE is due on remittances to foreign individuals for royalties or technology transfers at a rate of 10 per cent.

State tax

The tax on the circulation of goods and services is the main state tax. This is due on both operations involving the circulation of goods (including manufacturing, marketing and imports) and interstate and inter-municipal transport and communications services.

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?

Most large projects use heavily modified or manuscripted documents (that is, not standard contract forms). The larger the project, the more likely it is that the parties will use a specifically drafted document rather than a standard contract form.

The choice of contract depends on various factors, including the following:

- the type of works and time pressure for their execution;
- the parties and their capacity to be involved in one or more areas of responsibility;
- the procurement method;
- the expected risk allocation system, including allocation of the 'fit for purpose' concept and design responsibility; and
- the costing and pricing mechanism.

The influence of international players and multilateral investment agencies has made standard contract forms more popular in Brazil in recent years. The same standard contract forms apply for both national and international construction projects. International projects mostly use the International Federation of Consulting Engineers (FIDIC) construction contract terms. The most commonly used standard contract forms are those produced by FIDIC, which publishes a variety of contracts to suit the particular requirements of different types of projects, including the following:

- the Blue Book: a contract for dredging and reclamation work;
- the Gold Book: a contract for designing, building and operating projects;
- the Green Book: a short form of contract;
- the Red Book: conditions of contract for construction for building and engineering works designed by the owner;
- the Silver Book: conditions of contract for engineering, procurement and construction (EPC) turnkey projects;
- the White Book: a model services agreement (for construction professionals, such as engineers); and
- the Yellow Book: conditions of contract for plant and design–build, for electrical and mechanical plants and for building and engineering works designed by the contractor.

NEC3 contracts are also starting to be used in Brazil because of the influence of European owners with local projects.

Payment methods

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

Contractors, subcontractors, vendors and workers are typically paid electronically through bank accounts. Payments are normally made on a monthly basis or after specific milestones, as agreed by the parties.

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 a typical construction project, the owners, project manager, field engineers, general contractor, subcontractors and suppliers are the primary stakeholders. The owners invest capital and provide the economic power. The project manager and field engineer (eg, representatives of the owner and contractor) maintain efficient progress on a project. The general contractor and subcontractors provide services, skills and knowledge towards achieving a successful project, that is, a project completed on time, on budget and of the highest quality.

The direct relationships between the primary stakeholders are a necessary interactive process for achieving a successful project. Fair compensation, secure economic support and cooperative working environments are expected and required for prosperity in the construction industry.

Design–bid–build

This is the traditional approach to the procurement of a construction project in which the owner hires a design professional to design the project, after which the project is bid, and then a contractor constructs the project according to the specified design.

Design, procurement and construction

This procurement method generally involves the owner contracting with a single entity that provides design, procurement and construction services for the project.

EPC management

This procurement method typically involves a construction manager acting as the owner's agent and the owner entering into separate direct contracts with trade contractors performing various packages of work to complete the project.

Alliance contracting

This procurement method is an incentive-based relationship contract in which the parties agree to work together as one integrated team in a relationship that is based on the principles of equity, trust, respect, openness, no disputes and no blame. In alliances, all parties are bound to a risk or reward scheme where they all share savings or losses, depending on the success or otherwise of the project.

PPP and PFI

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

The Brazilian Federal Constitution states that public services may be rendered either directly by the public administration or by the assignment of such rights and obligations to private parties, under either long-term concession agreements or PPPs.

PPPs are regulated by Law No. 11,079/2004 (the PPP Law). The Federal PPP Act establishes that the states and municipalities may also enact their own PPP laws to govern state or municipal PPPs. The states of São Paulo, Rio de Janeiro and Minas Gerais, for example, have already enacted their own state PPP acts (São Paulo State Law No. 11,688/2004, Rio de Janeiro State Law No. 5,068/2007 and Minas Gerais State Law No. 14,868/2003). PPPs were introduced in Brazil as sponsored concession agreements and administrative concession agreements, pursuant to article 2 of the PPP Law.

The sponsored concession is the ordinary concession of public services and public works regulated by Law No. 8,987/1995 (the Concessions Law) in cases where there are government subsidies plus tariffs charged for consumers. The administrative concession also has government subsidies granted by the public administration to the private party. However, it is more similar to an administrative agreement than to a concession agreement. Its purpose is the rendering of services, but with more flexible characteristics than those included in PPP law. In fact, PPPs in Brazil follow the ordinary types of concession agreements and service agreements with some different aspects, especially the possibility of granting governmental subsidies to the private party.

In PPP agreements, the public administration creates guarantees to assure the payment of the government subsidy to the private party; the agreements' value must be at least 20 million reais and the execution period must be at least five years. A PPP agreement cannot be entered into with the sole purpose of executing public works, supply of workers, or installation and supply of equipment.

PPPs were created with the purpose of attracting a new wave of private investments for projects of high social interest, especially in the infrastructure sector, which, under normal conditions, would not be economically feasible or would be assigned to state action, depending on very scarce budgetary availability. PPPs are, therefore, an answer to the limitations seen in traditional investment regimes by means of collaboration of the state and private parties (concessions, permissions, authorisations and public works bids).

The main driver of the development of PPPs in Brazil is the urgent need for private investment in critical infrastructure areas.

Besides the political and ideological obstacles that PPPs face in certain regions, other challenges include the following:

- the long time frame needed to structure and approve a PPP project;
- the lack of experience of and coordination between public entities and agencies;
- the financial capacity of public entities;
- difficulties in structuring the guarantees for the payment by the public sector entity; and
- risk sharing.

Joint ventures

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

Generally, the owner requires all members of consortia to be jointly liable for the entire project. Nevertheless, Brazilian law authorises consortia to establish individual responsibilities and allocate the responsibility of consortia members among themselves.

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?

Brazilian law permits a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party. Where the first party is also negligent, the concept of contributory negligence may apply.

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?

Brazilian law establishes the responsibility of the contractor for several aspects of the project, especially in relation to its safety and soundness. Therefore, in the event that a building will be sold or leased to a third party, the contractor remains responsible to such a third party and a claim may be brought by a third party to pursue a claim against the contractor despite the lack of contractual privity.

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?

In Brazil, it is common practice throughout the construction industry for contractors to provide performance security in relation to their contractual obligations.

In addition, the contractor is often contractually required to take out the following insurance for a construction project:

- insurance for personal injury;
- insurance for buildings divided into independent units;
- an insurance bond securing payment of the civil construction debtor, including the real estate obligation;
- life and personal accident insurance for employees;
- a performance bond;
- civil liability risk insurance; and
- engineering risk insurance.

The same requirement often applies to subcontractors and suppliers, as well as to consultants (to a lesser extent). In international projects, contractor performance is usually guaranteed by either a standby letter of credit or a bank guarantee. Under these instruments, the principal is promptly paid a stipulated sum of money on demand, provided that the principal's request strictly complies with the terms of the credit. The issuing bank will not inquire about the facts and circumstances surrounding the underlying contract, except in the case of suspected fraud.

Unlike a surety, the issuing bank will not assist the principal in completing the project. Therefore, these instruments may not be suitable for a principal that lacks construction experience. However, they may provide ideal protection for a sophisticated project owner.

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?

Labour and employment in Brazil are regulated by the following:

- the Brazilian Federal Constitution 1988;
- the Consolidation of Labour Laws (CLL), as amended by Law No. 13,467/2017; and
- other supplementary laws.

CLL, articles 253 and 254 provide that companies, individual or collective, that operate public services given on concession, or that carry out industrial or commercial activities, are obliged to maintain, in the framework of their staff, when composed of three or more employees, a proportion of non-Brazilians less than two-thirds of Brazilian employees.

However, lower proportionality may be fixed, taking into account the special circumstances of each activity, through an act of the Executive Power, and after duly determined by the Department National Labor Office and the Social Security and Labor Statistics Service the insufficiency of the number of Brazilians in the activity in question. For example, exceptions exist for skilled workers and specialised technicians (CLL, articles 352 to 358).

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?

The regular procedure to hire an individual to render services in Brazil is through the establishment of an employment relationship under the CLL's rules and regulations. An employee is defined as any individual who both renders services under owner subordination (that is, obedience to rules and orders given by the owner) and receives a salary (CLL, article 3).

Generally, employees are hired for an indefinite period of time. However, as an exception, temporary and autonomous service rendering is allowed, provided that the employee is legally subordinated (that is, the owner sets out the employee's activities and goals). If an individual renders a service without a contract, this requires independence and autonomy, so the service provider will be responsible for his or her work.

A formal written employment agreement between the owner and employee is not required to prove an employment relationship between the two parties. Therefore, an oral employment agreement is fully valid and enforceable, subjecting the employee and the owner to the rules and regulations of the CLL. Generally, an employee is hired by means of inscription in his or her personal labour card (social card), and registration in the company books for the purpose of payment of social taxes and contributions.

An employment contract can be terminated by the employee or owner (Brazilian Labour and Employment Law). A dismissal by the owner can be with or without cause.

On termination of the employment contract by the owner, the employee has the following rights:

- 30 days' notice;
- the outstanding salary for the days worked during the last month;
- the proportionate 13th salary (calculated based on the salary earned during the last month of employment);
- a one-third bonus in relation to holiday leave;
- if applicable, double accrued holiday leave; and
- a release of deposits to a government-administered fund paid by the owners, the Guarantee for Time of Service Fund (FGTS), with a fine of 40 per cent of the total amount deposited in the employee's FGTS account plus 10 per cent of special contributions.

Any waiver of the employee's rights signed by the employee is not valid unless it is signed in court. If both parties are to blame for the act that brought about the termination of employment, the labour court may reduce the compensation payable to half the amount that would otherwise be due (CLL, section 484).

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?

It is prohibited to adopt any discriminatory and restrictive practices for the purposes of hiring and during an employment relationship, including discriminating by reasons of gender, origin, race, colour, marital status, family status or age (Federal Constitution and Law No. 9,029/95). When working in the country, the foreigner shall have the same labour rights as an employee native to Brazil. There is no qualifying period of continuous employment to file a claim on the grounds of discrimination. The employee can seek indemnification for moral and material damage.

Legal entities interested in using foreign labour, either permanently or temporarily, must request a work permit from the General Immigration Coordination, an agency of the Ministry of Labour and Employment. The request will be by submission of a work permit request application, signed and sent by its legal representative or attorney, together with specific documents.

To obtain the work permit request application in Brazil, foreign nationals must do the following:

- obtain a work visa from the Ministry of Labour's Immigration Coordination Unit;
- register with the Federal Police (Ministry of Justice) and obtain the foreign national's ID card within 30 days of arrival;
- register with the Federal Revenue Service (earnings are subject to taxation under Brazilian tax law); and
- obtain a work document (the Brazilian company must sign the work document and notify the Ministry of Labour within 90 days of the foreign worker's arrival in Brazil).

The following categories of workers are eligible for temporary work visas:

- Individuals coming to Brazil to work for a short period for a Brazilian company who can prove that they have specialised skills or knowledge that is unavailable in Brazil. These visas can initially be issued for a period of up to two years and can be renewed for an additional two-year period. The company must provide information regarding its corporate wage structure and the wages paid to the individuals in Brazil and abroad. The portion paid in Brazil must be approximately 25 per cent higher than the portion paid abroad.
- Individuals coming to Brazil to provide technical services or technology transfers under a technical assistance or technology transfer agreement signed by a Brazilian company and a foreign company. These agreements must usually be registered with the Brazilian Patent and Trademark Office before the visa application is made. The technician is not an employee of the Brazilian company and any remuneration should be paid exclusively from a source abroad. The sponsoring company is responsible for the candidate's medical expenses and for his or her dependants while the candidate is working in Brazil. This type of visa may be granted for one year, with the possibility of an extension for an additional year.

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?

If a company decides to close its operations, all employees should be dismissed without cause and the respective severance package must be paid as due. Under Brazilian labour law, the following employees with provisional tenure will be entitled to specific amounts of payment:

- pregnant workers;
- employees elected to internal accident prevention committees;
- employees on occupational accident leave; and
- union leaders.

Other categories of provisional tenure may be prescribed in specific collective labour conventions or bargaining agreements.

Labour claims filed against the owner will proceed normally and will not be affected by the closing of the company's activities. In addition, closing up will not prevent former employees from bringing labour claims against the company for up to two years after the date on which their employment contracts were terminated.

Brazilian employment rights are considered to be a matter of public law and order, and therefore waivers will not be accepted by Brazilian courts when dealing with employment rights unless such a waiver has been granted during a court proceeding. In addition, even if the employee grants full and irrevocable release from and against all claims, this will not prevent the employee from being able to file a labour claim in the courts if it is evidenced that his or her employment rights have not been observed.

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?

Brazilian law does not provide for an automatic construction lien on the property owing to the rendering of construction services in respect of a project. The contractor would be able to secure payment of its fees generally by obtaining the following:

- a mortgage over the land or property itself, or over both;
- fiduciary sale over the property (the validity of the guarantee may be questioned if the contractor is not a financial institution duly registered with the Central Bank of Brazil);
- pledge or fiduciary assignment, or both, of credits or receivables deriving from the sale of the property to third parties; and
- personal guarantees (similar to surety).

The contractor may also request in rem collateral to secure payment of contractor fees and demand that the real estate developer constitute a specific segregated property regime.

'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?

No, there is no such prohibition in Brazilian legislation.

Contracting with government entities

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

We are not aware of any case of a contractor bringing an action against the contracting public agency before the court elected in the contract and the public agency seeking refuge under sovereign immunity.

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?

Law No. 10,406/2002 (the Brazilian Civil Code) establishes the owner's general obligation of payment for all work performed even in the case of interruption or cancellation of a project. Nevertheless, these provisions should be considered in light of the contractual provisions that may have established the partial or entire disobligation of the owner in the case of interruption or cancellation of the construction project owing to, for example, acts of God, non-viability of the project, absence of permits or lack of financing.

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?

Force majeure provisions are set out in Law No. 10,406/2002 (the Brazilian Civil Code) and are fully enforceable in Brazil. However, despite this statutory provision, the parties can contractually agree the definition of force majeure (eg, agreeing not to include a labour or finance shortage).

The basic principle is that parties must not be held liable for damages arising from events beyond their control (such as strikes, riots and wars), or from unforeseen acts of nature (such as hailstorms, floods and earthquakes).

Unless the contract states otherwise, the party alleging that force majeure has occurred must prove it on the balance of probabilities. The alleging party is under a duty to mitigate its loss. Therefore, contracting parties cannot be excused from performing their obligations if the event could have been prevented or avoided, or if the party is unable to prove that it made all efforts to comply with the contract.

DISPUTES

Courts and tribunals

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

There are no courts of special jurisdiction or courts of limited jurisdiction for construction-related disputes. The normal courts resolve these disputes.

Dispute review boards

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

Construction and infrastructure project contracts are complex commutative contracts. The characteristics inherent to this model often require that obligations start to be performed without the complete definition of the costs involved in the engineering project and of the degree of liability and risks assumed by the multiple parties.

The desire to avoid disputes in infrastructure projects led to the search for new dispute resolution methods that provided means of avoiding conflicts and boosting the performance of projects, while preserving the estimated time schedule and the budget allocated to it, without this necessarily entailing the suspension or break-up of the relationship between the parties. Therefore, from 1995 on, the World Bank started requiring dispute boards in projects with a financing amount exceeding US$20 million. The Dispute Resolution Board Foundation played an important role in the promotion of DRBs worldwide.

The use of DRBs in Brazil began in 2001 also as a requirement of the World Bank for the financing of some major infrastructure projects, such as subways, railroads and ports. Line 4 – Yellow of the São Paulo Metro is deemed to be a pioneer model of adoption of dispute boards in Brazil. With this important precedent, imposed by the International Bank for Reconstruction and Development, one of the banks that financed the project, other examples followed in various states of Brazil.

The Municipality of São Paulo was a pioneer in recognising and regulating, through Law No. 16,873/2018, the setting up of DRBs in continuous performance administrative contracts entered into by the local government authority in São Paulo, which may have a review, adjudication or hybrid nature. Finally, Law No. 14,133/2021 (the new Public Procurement Law) recognised, for the first time at the federal level, the validity of using DRBs as an alternative dispute resolution method in public procurement and government contracts.

The moment at which the DRBs are established defines some of their most important characteristics as follows:

- a 'standing dispute board' is set up upon signing of the contract or in a period immediately after its signing, remaining in place throughout the duration of the contract, regardless of the existence or not of a dispute; and
- an 'ad hoc dispute board' is set up only when a dispute is formally referred by the parties, remaining in place until the decision is rendered and the procedures applicable to it are completed.

The binding content of the decisions characterises the main types of DRBs as follows:

- dispute review boards are those that issue recommendations; that is, decisions whose adoption is not mandatory;
- dispute adjudication boards are those that issue decisions, which must be mandatorily adopted; and
- combined dispute boards are those that combine the preceding types, issuing recommendations and decisions, according to the situation that is referred to them.

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?

Law No. 13,140 (the Mediation Law) was enacted on 29 June 2015. It provides for mediation involving individuals and private entities, as well as the settlement of disputes involving public entities. Law No. 9,307/1996 (the Arbitration Law) regulates extrajudicial and judicial mediation.

The provisions on judicial mediation must be interpreted together with Law No. 13,105/2015 (the new Brazilian Civil Procedure Code). The Civil Procedure Code provides for a mediation or conciliation hearing in the early stages of most lawsuits. The Civil Procedure Code also regulates the activities of mediators in judicial proceedings.

Extrajudicial mediation involving individuals and private entities has already been used in some cases, as it does not require a specific law regulating the matter. However, it is expected that the new legal framework will boost the adoption of mediation and provide comfort to parties unfamiliar with this method of conflict resolution.

The Mediation Law establishes that parties to an agreement may provide for a mandatory mediation meeting if a dispute arises. Similar to an arbitration clause, this mediation clause will have a binding effect. According to certain studies, the binding effect of the mediation clause contributes significantly to the development of the mediation proceeding and to the resolution of conflicts without arbitration or judicial proceedings. With respect to disputes involving public entities, the Mediation

Law provides for the future creation of administrative resolution and conflict chambers. However, it also allows the immediate adoption of ad hoc proceedings until these chambers are constituted.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

The overriding considerations during the mediation proceedings must be the autonomy of the parties and confidentiality. A duty of confidentiality will apply to the parties, their lawyers, their experts and any others who participate in the proceedings. This duty would extend to preventing the mediator from testifying in any subsequent court or arbitration proceedings and apply strictly to the parties in any subsequent such proceedings. Statements and admissions made during the mediation and documents prepared especially for the mediation will be deemed inadmissible in any arbitral or judicial 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?

Arbitration proceedings are governed by Law No. 9,307/1996 (the Arbitration Law) and significant events have affirmed the use of arbitration for resolving disputes in Brazil, as follows:

- the Brazilian Federal Supreme Court recognised the constitutionality of the Arbitration Law in 2001;
- Brazil enacted Decree No. 4,311/2002, which ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards; and
- Brazil has also ratified the Inter-American Convention on International Commercial Arbitration, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and the Buenos Aires Protocol on International Commercial Arbitration in the Mercosur.

The Arbitration Law provides for two kinds of arbitration agreements, both in writing:

- the arbitration clause (the parties to an agreement elect to submit to arbitration any controversies arising from it); and
- the arbitration commitment (the parties agree to submit a specific dispute to arbitration).

The arbitration clause may be inserted either in the agreement text or in a separate document referring to it, and must indicate whether the arbitration will proceed under the supervision and in accordance with the rules of a given institution or, alternatively, the rules expressly selected by the parties to govern the arbitration.

In the case of adhesion contracts, the adhering party must start the arbitration or expressly agree, upon affixing the signature or initials in this clause, with such a proceeding for the arbitration clause to produce an effect. The arbitration commitment may be entered into by the parties, either in court or out of court, by means of a public or private instrument (to also be executed by two witnesses) and must indicate the following:

- the parties' names and personal data;
- the arbitrators' names and personal data or a reference to the institution that appoints them;
- the subject matter of the dispute; and
- the place in which the award is issued.

Each party must appoint one or more arbitrators and may also appoint their alternates. If an even number of arbitrators is appointed, the arbitrators must appoint another arbitrator; if they do not reach an agreement, then the parties must request that the court make the appointment. The appointment of an arbitrator may be challenged whenever there are questions about his or her impartiality or independence. In addition, by means of the arbitration agreement, the parties may adjust further restrictions as to the appointment of arbitrators.

Amendments to the Arbitration Law were recently approved, as follows:

- Brazilian governmental bodies are now explicitly authorised to engage in the arbitration of disputes;
- arbitration is expressly provided for in corporate disputes. Shareholders may approve arbitration clauses in the corporate by-laws by a majority vote, giving minority shareholders the right to liquidate and be reimbursed for the value of their shares, with a few exceptions;
- parties may now opt to dispense with those arbitral institutional rules that restrict their choice of arbitrators to those on the institutions' lists (this is one of the most controversial of the proposed changes, with opposition coming from some of the main Brazilian arbitral institutions, which assert a possible loss of institutional quality and an unconstitutional interference with the freedom of private arbitral entities to operate. Those supporting the change believe it is necessary to respect party autonomy in their choice of arbitrators, which is in line with international arbitration practice and rules of major international arbitral institutions);
- arbitrators are authorised to issue partial awards;
- the parties and arbitrators by common agreement can extend the period prescribed by law in which the arbitral award must be issued (in the absence of agreement by the parties, the limit is currently six months under the 1996 law);
- it is now explicitly provided that all foreign arbitral awards must be ratified by the Superior Court of Justice (STJ) to have effect in Brazil;
- before an arbitration is instituted, the law authorises parties to go to the courts to obtain protective or emergency measures (however, once the arbitration is instituted, it will be up to the arbitrators to maintain, modify or revoke these measures. And after the arbitration is instituted, the parties must go directly to the arbitral tribunal to request these measures);
- the arbitral tribunal may issue an 'arbitral letter' requesting that the courts in the territory where the arbitration is seated help to ensure the requests of the tribunal are being carried out; and
- the statute of limitations (prescription period) in a litigation will be interrupted by the pleading of the existence of arbitration of that same dispute.

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?

Arbitration in Brazil is developing quickly and strongly, and it is becoming one of the most important methods for dispute resolution in the country. Statistics of the International Court of Arbitration of the International Chamber of Commerce (ICC) show steady growth in the use of commercial arbitration in Brazil. By the number of arbitrations involving Brazilian parties, Brazil is first in Latin America and fifth in the world for the total number of parties that submit their disputes to the ICC.

The construction and engineering industries have long favoured arbitration as a means of settling disputes. As a result of various systemic and legal changes that have taken place over the past few years, uncertainty as to the effectiveness of arbitration has been

replaced by increasing predictability. The choice of an international arbitration institution or the adoption of international arbitration rules has no influence on the future enforcement of an arbitration award in Brazil. A foreign contractor is, therefore, free to adopt the arbitration rules of any international institution.

The best-known and most popular of the national arbitration institutions are as follows:

- the American Chamber of Commerce Arbitration Center;
- the Brazil–Canada Chamber of Commerce Arbitration Center;
- the Brazilian Business Arbitration Centre in the state of Minas Gerais;
- the Centre of State Industries of São Paulo/Federation of Industries of São Paulo Mediation and Arbitration Center;
- the Getúlio Vargas Foundation Chamber of Conciliation and Arbitration; and
- the São Paulo Engineering Institute Arbitration and Mediation Center.

The best-known and most popular of the international arbitration institutions in Brazilian infrastructure cases are:

- the ICC; and
- the London Court of International Arbitration.

Dispute resolution with government entities

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

Under the original wording of article 1 of Law No. 9,307/96 (the Arbitration Law), any capable person was entitled to resort to arbitration to settle disputes relating to patrimonial and disposable rights.

By referring to capable persons, article 1 of the Arbitration Law allowed the use of arbitration by individuals and entities, both public and private. Article 1 did not expressly mention the public administration, but the capability of entities from the public administration (such as the government itself and its instrumentalities) to enter into contracts is recognised by article 175, sole paragraph, I; article 37, XXI of the Brazilian Federal Constitution and other sets of rules that came into force prior to the Brazilian Arbitration Law, such as Law No. 8,987/1995 (the Concessions Law).

Nevertheless, the lack of an express provision in the Brazilian Arbitration Law concerning arbitration involving the public administration, however, raised certain doubts mostly by the public administration itself as to the arbitrability of such disputes, from both objective and subjective perspectives.

Notwithstanding, the use of arbitration by the public administration in Brazil has been endorsed by Brazilian courts even before the enactment of the Arbitration Law. See, for example, the case between *the State of Minas Gerais v Américo Werneck* and the well-known *Lage* case, both judged by the Brazilian Supreme Court of Justice in 1918 and 1973, respectively. Also, a decision rendered on 20 October 2011 – Special Appeal No. 904813, *Companhia Paranaense de Gás Natural v Consórcio Carioca Passarelli* – the STJ affirmed the validity of an arbitration clause provided in a public request for proposals. With this case, the STJ has broadened the scope of both the Brazilian Arbitration Act and the Public Tender Contracts Act and it has allowed arbitration proceedings not only in public–private joint ventures or public utility concessions but also in any contract stemming from public requests for proposals. In addition, recent amendments approved to the Arbitration Law include the provision that Brazilian government bodies are now explicitly authorised to engage in arbitration of disputes.

Furthermore, several federal laws expressly provide for the possibility of including arbitration clauses in contracts executed by different spheres of the public administration: article 109, section 3 of the Law No. 10,303/2001 (which altered Law No. 6,404/1976, regarding stock corporations), article 4, sections 5 and 6 of Law No. 10,848/2004 (regarding electricity trade), article 11, III of Law No. 11,079/2004 (modified by Law No. 12,766/2012, regarding Public-Private Partnerships), article 23-A of Law No. 11,196/2005 (which altered Law No. 8,987/1995, regarding concessions, permissions and authorisations for providing public services), and article 15, III, and 31 of Law No. 13,448/2017 (concerning tender for biddings and prorogation of biddings in specific fields), are good examples of that.

In 2015, Law No. 13.129/2015 put an end to the debate by expressly including in article 1 of the Arbitration Law that members of the direct or indirect public administration could engage in arbitration. Finally, Federal Law No. 14,133/2021 (the new Public Procurement Law) recognised the adoption of arbitration in public procurement and government contracts.

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?

Arbitral awards in Brazil are as binding as court decisions and are enforced accordingly. Awards can only be challenged by means of court action for the nullification of these awards. To request the nullification of an arbitral award, parties should demonstrate the existence of one of the requirements provided for in article 32 of Law No. 9,307/96 (the Arbitration Law), which are all related to procedural issues (eg, non-existence of arbitration commitment, violation of due process, an award rendered beyond the limits of the arbitration agreement or a decision that fails to address the entire dispute referred to arbitration).

There are no appeals against awards issued in arbitration proceedings and the merits of the arbitration cannot be re-examined by the courts. The arbitral award must be signed by the sole arbitrator or by the entire arbitration tribunal. The chair of the arbitration tribunal must expressly indicate that one or some of the arbitrators cannot or do not want to sign the award.

The Arbitration Law has adopted a territorial criterion that classifies the award in one of two categories: foreign or domestic. Therefore, a foreign award is considered to be one rendered outside Brazil. This distinction is important for recognition and enforcement purposes, as a domestic arbitral award is not subject to appeals or to recognition by the courts and a foreign award will first have to be recognised by the STJ before it can be enforced in Brazil.

The role of the Superior Court of Justice

Application for recognition before the STJ is mandatory for the validity of a foreign arbitral award in Brazil. The award does not have to be recognised by the foreign state's judicial courts before being submitted to the STJ. The application for recognition should contain the original foreign arbitration award or a certified copy thereof, duly notarised by the Brazilian consulate and translated into Portuguese by a sworn translator in Brazil, and the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator. The standards regarding the enforcement of a foreign arbitration award in Brazil are consistent with article V of the New York Convention.

The STJ has recognised foreign arbitral awards whenever they do not violate any of the provisions of article 38 of the Arbitration Law. The STJ has only analysed formal aspects of the award. The merits of the arbitration award have not been analysed. The STJ's internal rules authorise it to issue preliminary injunctions during the recognition proceedings, such as freezing assets or temporary restraining orders. Once the foreign arbitration award is recognised by the STJ, the judgment creditor is entitled to enforce the award in the same way as a domestic award, that is, before a competent first instance state court.

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?

The statute of limitations is understood as the loss of a right to an action, attributed to a material right, as the result of the passage of time. A statute of limitations deadline may be interrupted, suspended and can be renounced, after the expiration of the deadline (article 191 of Federal Law No. 10,406/2002, the Brazilian Civil Code).

The statute of limitation, statutory deadlines, causes for suspension and interruption thereof, and the expiry thereof are all regulated in title IV of the Brazilian Civil Code, articles 189 to 211.

There are cases with different statute of limitation terms, as follows:

- general rule: a party will have its right to claim that a lawsuit is time-barred after 10 years from the starting date;
- specific situations: according to the Civil Code, there are cases with different statute of limitations terms, which may vary from one to five years, as well as specific deadlines fixed in some specific Brazilian Acts, such as the Law No. 6,404/1976 (Business Corporation Act); and
- the decennial liability: among the specific rules, some case law provides that if the claim is based on problems derived from the safety and soundness of any construction, the plaintiff may be required to file its claim no more than 180 days from the moment that the plaintiff became aware of the problem; some other case law extends this notification period for up to five or 10 years; notwithstanding, the STJ recently rendered a new precedent fixing 10 years to the exercise of a right to an action derived from general breach of contract (Special Appeal No. 1281594).

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?

Brazil is not a signatory of the UN Stockholm Declaration, but has adopted an environmental protection policy, including (among others), the following:

- Law No. 6,938/1981, which creates the National Environmental Policy and the National Environmental System;
- Law No. 4,771/1965, which establishes the Forest Code;
- Law No. 9,985/2000, for the study and conservation of wildlife (fauna and flora) in conservation areas;
- Law No. 9,433/1997, to regulate the use of water resources; and
- Law No. 9,605/1998 and Decree No. 3,179/1999, which establish civil, administrative and criminal sanctions for individuals or legal entities that breach environmental laws.

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?

At the federal level, the most relevant environmental legislation is Law No. 6,938/81, which created the National Environmental Policy. It established the basis for environmental protection in Brazil by putting in place an institutional framework and defining the main instruments for environmental management. This policy and its regulations provided for the creation of the following agencies:

- the Brazilian Institute of Environment;
- the National System of Environment; and
- the National Council of Environment.

Licensing requirements are the same in all Brazilian states. Foreign designers and contractors wishing to perform any service in Brazil must be registered with the local engineering, architecture and agronomy councils (Law No. 5,194/1966 and Resolution CONFEA No. 444/2000). Failure to do so can lead to severe sanctions (civil and criminal) and can compromise the continuity and regular approval of the project and compensation.

The three stages of the environmental permitting process are as follows:

- the preliminary licence: this licence is issued during the preliminary planning stage of a project for a maximum five-year term, and:
  - signifies approval of the location and design of the project;
  - certifies its environmental feasibility; and
  - establishes the basic requirements and conditions to be complied with during the subsequent stages of implementation;
- the installation licence: this licence authorises construction, civil works and the installation of equipment in accordance with the specifications contained in the approved plans, programmes and projects, including environmental mitigation provisions and other conditions; and
- the operating licence: this licence authorises the operation of the development in accordance with environmental mitigation measures and operating requirements, on confirmation that the previous licensing conditions were met. These licences can be granted for four to 10 years and are renewable within the legal time frame established by the competent environment agency.

All requirements set by the operational permit must be met during the project's operation. Failure to meet these conditions may trigger administrative, civil and criminal liability. This could mean a range of penalties, including the following:

- fines;
- indemnification;
- suspension of activities; and
- imprisonment.

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'?

In Brazil, only the President of the Republic, the Minister of Foreign Affairs and the ambassadors heading Brazilian diplomatic missions abroad are authorised to sign international agreements. In addition, other authorities may sign treaties provided they have a Letter of Full Powers signed by the President of the Republic and countersigned by the Minister of Foreign Affairs.

Although Brazil signed several bilateral investment treaties in the mid-1990s, these have not yet been ratified by the Brazilian Congress and none has entered into force.

Country	Date of signature
Belgium	6 January 1999
Chile	22 March 1994
Cuba	26 June 1997
Denmark	4 May 1995
Finland	28 March 1995
France	21 March 1995
Germany	21 September 1995
Italy	3 April 1995
Korea	1 September 1995
Luxembourg	6 January 1999
Netherlands	25 November 1998
Portugal	9 February 1994
Switzerland	11 November 1994
United Kingdom	19 July 1994
Venezuela	4 July 1995

However, there are 27 treaties in force in Brazil with Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Norway, the Philippines, Portugal, South Africa, Spain, Sweden and Ukraine.

Tax treaties

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

Brazil is a party to double taxation treaties signed with several countries to avoid or alleviate double taxation of income generated in other jurisdictions. The countries with which Brazil has signed double taxation treaties include Argentina, Austria, Belgium, Canada, Chile, China, France, Germany, India, Italy, Japan, Portugal, South Africa, Spain and Switzerland. Whether the income is taxable, as well as determination of the applicable tax and the place where it is levied, may vary in accordance with the contracting state.

Currency controls

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

Pursuant to Law No. 10,192/01, payments of monetary obligations enforceable in Brazil must be made in reais at face value. Contractual provisions for payments stated in or indexed to any foreign currency are expressly prohibited and are deemed void.

The only exceptions are as follows:

- contracts and bonds related to the import or export of goods;
- finance agreements or collateral agreements related to the export of domestic goods sold by means of credit facilities abroad;
- foreign exchange contracts in general;
- any obligations involving a party that is resident and domiciled abroad, except lease agreements relating to real property located in Brazilian territory;
- assignment, delegation, transfer, assumption or modification of obligations involving a party that is resident and domiciled abroad; and
- leasing agreements entered into by and between parties resident and domiciled in Brazil involving funds raised abroad.

Bank accounts in a foreign currency in Brazil are only permitted in very specific cases, such as accounts held by diplomats, tourism agencies, credit card companies and insurance companies. The foreign exchange rules have been amended over time and now there is considerably greater freedom for remittances of funds to and from Brazil.

Removal of revenues, profits and investment

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

Apart from the normal restrictions and regulations, there are no major limitations on removing profits and investments from Brazil.

The registration of foreign capital with the Central Bank of Brazil (BACEN) is provided for by Law No. 4,131/1962 and Law No. 4,390/1964, guaranteeing equal treatment of foreign and national capital. Foreign capital is defined as goods, machinery and equipment, imported to Brazil without prior foreign capital disbursements, for the production of goods or services, as well as financial or monetary resources remitted to Brazil for application in economic activities, provided that, in both cases, this foreign capital belongs to individuals or legal entities resident, domiciled or with a head office abroad.

Foreign capital must be registered at BACEN in its original currency within 30 days of the entry of the funds into the country. This registration represents the official recognition of the investment and allows for remittance of profits and dividends (as from 1996, exempt from income tax), repatriation of the invested capital and reinvestment of profits at any time and without applying for any further authorisation.

UPDATE AND TRENDS

Emerging trends

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

General aspects about the market

China, seeing the long-term benefits of investment in Latin American infrastructure, is expected to provide major investment to Latin America in the future. Notably, China Three Gorges Corporation, the State Grid Corporation of China, the China Communications Construction Company and the State Power Investment Corporation plan to expand their acquisition of sizeable greenfield assets, develop transmission lines and invest in big infrastructure projects.

One of the government's major strategies, therefore, is to focus heavily on infrastructure, and consistent project investment is required to achieve this. Yet the economy is dealing with high tax rates and high debt, de-prioritising financing for these capital-hungry projects. In an attempt to alleviate this, the government and states are working on ways to develop a PPP model. Concessions are also being offered to investors and companies to finance, build and run the infrastructure. The focus in the medium term is expected to continue in the following areas:

- highways – often using the PPP or concession model;
- air transport and airport facilities – often using the concession model;
- water, wastewater and sewage projects;
- railway facilities – potentially built and owned by private companies that need large-scale transport systems, such as iron ore or mining companies; and
- upgrading and expansion of port facilities – often tied to rail facility developments.

The new Brazilian water, wastewater and sewage framework

The new regulatory framework for basic sanitation has recently been sanctioned by President Bolsonaro with 12 vetoes (Law No. 14,026/2020).

By mid-August, the Brazilian Congress should decide if it maintains or overturns the vetoes. The framework provides that basic sanitation services must be available for the entire population by 31 December 2033, when 99 per cent of people must have access to drinking water and 90 per cent to sewage collection and treatment. Currently, 35 million Brazilians live in houses without treated water and only half of the population is connected to the sewage network, and only half of the collected sewage is actually treated. Investments of 600 billion reais will be needed to repair such alarming data by 2033.

To meet this ambitious goal, the new law extends private enterprises' access to this sector by establishing that basic sanitation services must be provided under concession contracts through previous bidding processes. The new law prohibits the 'contratos de programa', conventions, partnership agreements and other instruments of precarious nature until then used to delegate to state-owned companies provision of these services without a bidding process. The new regulatory framework also permits privatisation through the sale of shared control of state-owned companies.

The Railway Authorisation Programme

Known as 'Pro Trilhos', the Railway Authorisation Programme was created by Provisional Measure 1,065/2021, which introduces the grant per authorisation for the implementation of projects related to the rail industry. Therefore, this programme allows the private sector to construct and operate railroads, branch lines, yards and terminals.

Companies interested in operating in the rail transport segment submit their proposals to the Federal Government, filing them with the Ministry of Infrastructure (MInfra). Applications will be reviewed by the National Land Transport Office and by the National Land Transport Agency, which will examine whether the undertaking is or is not compatible with the Brazilian railroad network and whether the proposal is in keeping with the national transport policies and those of the rail industry. Therefore, the proposal may or may not be authorised, based on these criteria.

Accordingly, the Ministry of Infrastructure currently relies on 36 applications for railway authorisation, which totals 11,142 kilometres of new rails across 14 states. Private investments under Pro Trilhos involve amounts of around 150 billion reais.

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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?

All designers and contractors, including foreign contractors and designers, must comply with local employment legislation in setting up an operation and with the applicable regulatory licensing requirements in the provinces or territories where they intend to practise.

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?

A foreign architect or engineer cannot practise without a licence from the applicable provincial or territorial body. Information on the licensing requirements for foreign architects and engineers is made available by the Canadian Architectural Certification Board and Engineers Canada. Penalties for practising without the necessary licence include fines, imprisonment, injunctions and prohibitions against collecting fees for unlicensed services.

The licensing of contractors is also regulated provincially. Most provinces do not generally require contractors to be licensed, with the exception of Quebec, which has a scheme requiring all contractors to be licensed. Additionally, British Columbia requires that residential builders be licensed. In Ontario, residential builders must register with Tarion Warranty Company, which is the province's new home warranty provider.

Competition

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

Generally, there are no advantages afforded to domestic contractors over foreign contractors in procurement arrangements, though certain 'Canadian content' requirements may be specified. Further, with respect to tendering for government projects, there are many international agreements that import various requirements for government procurements by requiring transparency and fairness, among other things. This includes the Canada–European Union Comprehensive Economic and Trade Agreement, the Canadian Free Trade Agreement and the Canada–United States–Mexico Agreement.

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?

Anti-corruption legislation in Canada exists to address both domestic and international bribery and corruption in the engineering and construction industry relating to procurement, misappropriation, fraud, asset misappropriation, and bribery of domestic and foreign officials.

The federal Competition Act makes it an offence to participate in arrangements such as bid rigging, bid rotation, cover bidding and market division in procurement of government construction contracts.

The Competition Act imposes individual liability for many of these offences. For example, bid-rigging provisions prohibit bidders from agreeing not to submit a bid and from submitting bids that are the product of an agreement between bidders.

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?

The federal Corruption of Foreign Public Officials Act (CFPOA) makes it an offence, punishable by fines and imprisonment, to bribe foreign officials to induce them to influence a foreign state action in awarding construction and engineering contracts. The maximum term of imprisonment for the bribery of foreign officials is 14 years. The Criminal Code also creates offences punishable on indictment for bribing, or attempting to bribe, government officials in connection with the procurement of construction contracts.

The government's Integrity Regime backstops anti-corruption measures through a system of excluding from eligibility a person or entity convicted under federal anti-corruption legislation for the award of government contracts.

The Province of Quebec has instituted a number of specific measures aimed at combatting corruption and collusion in the construction industry based on recommendations arising out of the Charbonneau Commission's Report.

Although not strictly speaking a component of the Canadian anti-corruption regime, civil and common law liability for fraud, breach of fiduciary duties, asset misappropriation in relation to procurement and participation in domestic construction and engineering contracts also serve to enhance the integrity of the industry.

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?

No person is obligated to report violations of anti-bribery and anti-corruption provisions under either the CFPOA or the Criminal Code. This legislation also does not require any self-reporting. However, whether a corporation has self-reported is a factor that may be considered by a prosecutor in its determination of whether negotiating a remediation agreement (ie, deferred prosecution agreements as a means of resolving criminal charges against businesses) is in the public interest.

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 is no express restriction under local law that prevents contractors or design professionals from working with public agencies because of their financial support for political candidates or parties. However, the bribery and corruption offences are broadly worded and may capture a political contribution in certain circumstances. For example, the Criminal Code states that it is an offence for a person or an entity to retain a contract with the government to directly or indirectly give any valuable consideration for the purpose of promoting the election of a candidate or party of candidates (section 121(2) of the Criminal Code; see https://laws-lois.justice.gc.ca/eng/acts/C-46/page-30.html#h-117813).

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 rules as government employees?

Pursuant to the Criminal Code, it is an offence for anyone who is an agent to receive a secret commission by directly or indirectly demanding or accepting any reward, advantage or benefit for doing or not doing any act relating to the affairs or business of the agent's principal. This provision applies to both the public and private sectors and may be applicable to construction managers or other construction professionals where they act as an agent (section 426 of the Criminal Code; see https://laws-lois.justice.gc.ca/eng/acts/C-46/page-89.html#h-122942.)

With respect to conflicts of interest, in practice, many contracts with government entities impose detailed disclosure obligations and conflict of interest guidelines on project participants.

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?

Foreign contractors should seek legal advice to best evaluate any additional obstacles to doing business that they may face in their particular circumstance.

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?

Standard contract forms are widely used in Ontario on a variety of construction projects. The Canadian Construction Document Committee (CCDC) Contract Forms are widely used for the construction aspects of projects. The Stipulated Price Contract is the most common standard form contract used for most projects in Ontario. The CCDC also has a series of subcontract forms that are regularly employed and which were recently updated. Alternatively, the Canadian Construction Association also offers a series of standard construction contract forms, some of which have also been updated within the past two years.

The most commonly used form for the retainer of a prime consultant is the Royal Architectural Institute Contract Form, RAIC 6. Where an engineer is the prime consultant, the contracting forms of the Association of Consulting Engineers of Canada are adopted, most notably, form ACEC 2.

Payment methods

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

The typical method and timing of payment for construction work is by way of submission of regular progress claims during the course of the project, which are often contractually due and owing 30 to 45 days after submission. The payment mechanism is usually triggered by certification by the registered professional with jurisdiction over the project.

In Ontario, prompt payment provisions under the Construction Act require invoices to be provided to the owner on a monthly basis, unless the contract provides otherwise. Under this legislation, the owner must then pay the contractor within 28 calendar days of receiving the invoice, subject to the owner's right of delivering a notice of non-payment.

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?

Construction projects involve multiple parties (owners, designers, general contractors, subcontractors, labourers and suppliers) and can take on a variety of structures. Design–build structures are commonly used, for example, in the industrial sector or on repetitive residential or commercial projects.

On larger public projects (eg, hospitals, tunnels, bridges and highways), the public–private partnership model is sometimes employed. This is known as the P3 model in British Columbia and the alternative financing and procurement model in Ontario. These projects are usually subject to overview by a provincial body (Partnerships BC in British Columbia and Infrastructure Ontario in Ontario), which are entities that comprise various skilled professionals familiar with project development, design and construction. Other alternative project delivery models, such as alliance and integrated project delivery, have also seen an increase in usage across Canada, but are not as common as the P3 model.

PPP and PFI

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

Where government entities are involved as project sponsors or owners, the project is usually subject to a dense and comprehensive contractual arrangement between the public entity and the other project participants.

On most PPP projects, the provincial government has developed a very detailed standard format for public projects, particularly infrastructure projects. The form is amended in some significant ways from project to project to meet individual conditions and requirements.

Specialised federal and provincial government agencies promote and oversee the use of P3 projects; for example, Infrastructure Ontario in Ontario and Partnerships BC in British Columbia.

Joint ventures

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

Liability and responsibility may be allocated among parties based on their private contracting arrangements, which assign both risks and rewards between the partners for the duration of the project.

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?

Under common law applicable in both British Columbia and Ontario, parties are free to limit their liability in any way they see fit. There is no statutory prohibition on defining the limit of liability in contracts.

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?

Under Canadian common law, the doctrine of privity of contract prevents third parties from bringing a claim under a contract to which it is not a party. Therefore, third parties cannot rely on a breach of a construction contract as the basis for a claim against a contractor. However, contractors may still be liable to third parties in tort.

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?

Insurance is often a key source of any recovery that is going to be made for negligence on a construction project. Contractors are afforded a wide range of insurance coverage options, including professional liability insurance for consultants, general liability insurance for the builders and trades, course of construction insurance for any physical damage to property during construction, and pollution liability insurance for various environmental hazards.

It is important to obtain the advice of a skilled insurance broker on each project concerning the nature and extent of the insurance coverage necessary for each project to ensure that contractors have an informed and reasonable insurance programme.

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?

Although there are no clear laws outlining the minimum amount of local labour that is necessary on a particular project, there are fairly comprehensive measures in place that pertain to hiring foreign workers.

Before hiring a temporary foreign worker, most employers must obtain a labour market impact assessment (LMIA). An LMIA confirms that there is a demonstrable need in the labour market that cannot be fulfilled by a Canadian or permanent resident. In other words, the foreign workers must possess unique skills or knowledge for an employer to be granted permission to hire a temporary worker. Employers may obtain an LMIA by applying to Employment and Social Development Canada.

Employers can also access express entry pool candidates, which are skilled workers or tradespersons who apply through the Federal Skilled Worker Programme or the Federal Skilled Trades Programme. Express entry is a system used to manage applications.

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?

In Canada, employers may not terminate employees at will. If an employee is dismissed from employment without just cause, such as when a position is no longer necessary, an employer is required to provide notice of termination or pay in lieu of notice. This notice must comply with the applicable federal or provincial employment standards legislation, including the statutory minimums.

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?

Foreign construction workers are afforded the same protection under federal and provincial labour laws as local labour.

In both British Columbia and Ontario, there are several statutes and codes that apply to the employment of construction workers. These include the Employment Standards Acts and regulations, human rights codes and labour relations codes. These laws provide various rights and protections for construction workers, including regulations with regard to working conditions and remuneration, protection against discrimination and contract bargaining rights. Workers are also protected by comprehensive health and safety legislation.

Employers are subject to a wide range of consequences for failing to follow employment laws, including fines, prosecution, the issuance of compliance orders and civil actions by employees.

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?

Foreign corporations operating in both Ontario and British Columbia must apply for an extra-provincial licence to carry on business in those

provinces. If a foreign contractor wishes to close operations, it must terminate its licence to operate as a foreign corporation by filing an application under the relevant authority. A foreign contractor must also consider all outstanding tax liabilities and the status of all accounts with the Canada Revenue Agency. It is important that foreign contractors seek legal advice to ensure that all tax liabilities are properly discharged.

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?

A contractor or subcontractor can secure payment in several ways. The most efficient way to do this is to ensure that all contracts include the requisite terms and conditions to require payment in a timely manner. In addition, the Builders Lien Act (British Columbia) and the Construction Act (Ontario) permit project participants to file liens against the property on which the construction project is located, and to require security to be posted or payment to be made before the charge against the property is removed.

'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?

'Pay when paid' clauses, which stipulate that a subcontractor is entitled to be paid only when and to the extent that the primary contractor has been paid by the owner, are generally enforceable in British Columbia and Ontario, if properly drafted with clear and precise wording.

Contracting with government entities

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

Government agencies cannot assert sovereign immunity as a defence for non-payment of a contractor. Both Ontario (Crown Liability and Proceeding Act 2019) and British Columbia (Crown Proceeding Act 1996) have enacted legislation that provides that the Crown may be liable in tort as a normal person would be.

Finally, in Ontario, the Construction Act specifically states that the Crown is bound by the legislation, subject to certain lien provisions that prevent a lien from attaching to the Crown or municipal premises.

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?

Contracts for major projects generally contain provisions that pertain to project interruptions or cancellations. Further, in Ontario (under the Construction Act) and British Columbia (under the Builders Lien Act), unpaid contractors who have supplied services or materials in respect of an improvement may enforce a lien despite the non-completion, abandonment or termination of the contract or subcontract.

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?

Contracting parties are free to negotiate the terms of a force majeure provision, which will be enforced by the courts in British Columbia and Ontario.

If a particular event is not captured by the force majeure provision in a contract, parties may be able to seek relief from contractual performance under the doctrine of frustration that, according to the Supreme Court of Canada, occurs when 'performance of the contract becomes "a thing radically different from that which was undertaken by the contract"' (*Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58 at paragraph 53). If a contract is frustrated, the parties are released from future or continuing obligations under the contract.

DISPUTES

Courts and tribunals

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

There are no specialist courts in British Columbia to hear construction disputes, but in Ontario there are some associate justices (previously referred to as 'masters') who specialise in construction lien matters (although currently only in Toronto).

Dispute review boards

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

Contracting parties are increasingly using DRBs to efficiently resolve disputes on an advisory, mandatory and interim basis.

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 has been widely used for the resolution of disputes in the construction industry since the early 1990s. It has been highly successful and continues to have broad application today. In fact, mediation is often mandated in complex construction cases. Although mediators have a wide range of experience, many are retired judges, senior lawyers or other professionals.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Yes, mediation is commonly held on a without prejudice basis. However, confidentiality does not automatically attach to all mediations; the parties must specify in their contract or mediation agreement that the mediation will be confidential.

Arbitration of private disputes

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

Arbitration is frequently used to resolve construction disputes in both British Columbia and Ontario. The courts tend not to be equipped or have the desire to hear complex commercial disputes in the construction and infrastructure industries, so mediation and arbitration have largely occupied this field.

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?

Although many international arbitration providers are regularly used in Canada, the most common are the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes, ADR Chambers and the ADR Institute of Canada.

Dispute resolution with government entities

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

In Canada, it is common for government agencies to participate in private arbitration. All arbitration proceedings, including those involving government agencies, are subject to arbitration legislation that is enacted in each province.

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?

In Canada, the enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) and the UNCITRAL Model Law On International Commercial Arbitration (the Model Law). Canadian courts may refuse to recognise and enforce a foreign arbitral award in limited circumstances, as outlined in article V of the New York Convention and article 36 of the Model Law.

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?

The limitations statutes in British Columbia and Ontario provide for a two-year period from the date of discovery of a cause of action, with an ultimate limitation period of 15 years from the date of the wrongful act in question.

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?

Although Canada participated in the Declaration of the United Nations Conference on the Human Environment that adopted the Stockholm Declaration of 1972, the declaration was not adopted in Canada and it is thus not legally binding. However, Canada is a signatory to other United Nations environmental initiatives, such as the United Nations Framework Convention on Climate Change, and has ratified the Paris Agreement.

With respect to local laws, there are both federal and provincial requirements for certificates of approval to proceed with a project where the project presents a threat to waterways or fisheries, in the case of federal legislation or where the lands in question are historically contaminated. With regard to historically contaminated lands, provincial legislation requires certificates of authorisation for projects on such land to proceed.

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?

At the federal level, Environment and Climate Change Canada is the regulatory authority that exercises jurisdiction over specific environmental areas, such as fisheries, nuclear energy, migratory birds and species at-risk legislation. However, Canadian provinces have enacted legislation that pertains to broader environmental protection issues and that detail the duties and liabilities imposed on parties responsible for the creation of environmental hazards. In Ontario, the primary legislation is the Environmental Protection Act, which is administered by the Ontario Ministry of the Environment, Conservation and Parks. In British Columbia, the key legislation is the Environmental Management Act, which is administered by the British Columbia Ministry of the Environment and Climate Change Strategy.

Both federal and provincial legislation maintain strict enforcement regimes that provide for various types of orders and that also allow for the prosecution of environmental offenders.

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'?

Canada is a signatory of the Canada–United States–Mexico Agreement, which came into force on 1 July 2020. Canada has also ratified numerous foreign investment promotion and protection agreements with individual countries. A full list of these trade and investment agreements can be found on the government of Canada's website. Although these agreements vary, 'investment' is generally broadly defined to include any kind of asset owned or controlled either directly or indirectly through an investor, including movable and immovable property; shares, stocks and bonds; money; goodwill; and intellectual property rights.

Tax treaties

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

To prevent double taxation, the Canadian government has entered into numerous tax treaties with various jurisdictions. As every tax treaty is different, it is important to review the relevant treaties in detail and consult a tax professional to ensure that tax liabilities are properly discharged. A full list of Canada's tax treaties can be found on the Department of Finance's website.

Currency controls

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

Not applicable.

Removal of revenues, profits and investment

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

Not applicable.

UPDATE AND TRENDS

Emerging trends

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

With respect to regulation of the industry, the federal government has recently changed the way it operates its federal construction projects by introducing a prompt payment regime at the federal level. This new federal legislation is based on similar amendments made to the Construction Act in Ontario, which introduced both prompt payment and adjudication regimes.

Numerous provinces across Canada have now either enacted prompt payment legislation or are undergoing their own review of construction legislation to determine whether similar amendments should be made. In particular, some form of prompt payment legislation has been introduced in the provinces of Nova Scotia, Saskatchewan, Manitoba and Alberta, though not all of this legislation has come into force at this time.

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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?

A foreign designer or contractor should consider some key issues, such as whether to meet market access conditions, how to set up operations and become qualified if it wants to operate in the Chinese market. In detail:

- it shall ascertain whether the target business is prohibited by the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2020);
- a foreign contractor shall set up operations in accordance with the requirements of the Administrative Measures for the Registration of Production and Business Operation Conducted by Enterprises of Foreign Countries (Regions) within the Territory of China, and obtain relevant licences to get qualified according to the Qualification Standards for Construction Enterprises; and
- there is no need for a foreign designer to be licensed, but it shall operate jointly with a domestic designer, and the scope of the qualification is limited to that of the domestic designer.

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?

According to article 4 of the Interim Provisions on the Administration of Foreign Enterprises Engaged in Construction Engineering Design Activities in the People's Republic of China, there is no need for a foreign designer to be licensed but it shall operate jointly with a domestic designer and the scope of the qualification is limited to that of the domestic designer.

A foreign contractor must be licensed to work in China.

According to article 65 of the Construction Law and article 60 of the Regulations on Quality Management of Construction Projects, if the contractor is not qualified for construction, it will be prohibited in the market, a fine of 2 per cent to 4 per cent of the contract price will be imposed and its illegal income will be confiscated.

Competition

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

If a foreign contractor has already entered China's market, Chinese laws do not provide any advantage to domestic contractors in competition with foreign contractors.

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?

The public entities referred to here are government departments and state-owned enterprises.

According to article 3 of the Official Reply on the Provisions on Construction Projects Where a Bidding Is Legally Required, all or part of the projects invested by state-owned funds or financed by the public entities shall be legally required to take a bid. Legal instruments, such as the Bidding Law and the Regulation on the Implementation of the Bidding Law, will ensure fair and open competition to secure contracts with public entities.

Bid rigging and other anticompetitive behaviour are prohibited in the Bidding Law, the Government Procurement Law, the Anti-Unfair Competition Law, the Measures for Bidding and Bidding of Construction Projects and the Criminal Law. If such behaviour exists, relevant punitive provisions will apply.

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?

According to article 153 of the Civil Code, a contract signed by a contractor that involved bribery is invalid, which will not be binding on any party and shall not be performed.

According to articles 163–164, article 383, articles 385–391 and article 393 of the Criminal Law, both bribe-givers and bribe-takers shall be prosecuted when the amount concerned reaches the lowest requirements in accordance with the Judicial Interpretation on the Application of Law in the Handling of Criminal Cases of Embezzlement and Bribery. If prosecuted, the bribe-givers and bribe-takers may be sentenced to imprisonment (less than three years to life) or criminal detention with fines.

Under Chinese law, no facilitation payment is allowed.

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?

Under Chinese law, there is no provision requiring employees for such reporting.

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?

Making political contributions is not part of doing business in China. Under Chinese law, any entity or person is not allowed to pursue illegitimate interests by making contributions to others.

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 rules as government employees?

A construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) is not subject to the same anti-corruption and compliance rules as government employees but they must still abide by Chinese laws and are prohibited from accepting others' property in exchange for benefits (see article 163 and article 385 of the Criminal Law).

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?

Foreign contractors may face obstacles in accessing the market and obtaining a business licence and qualification. In detail:

- if a foreign contractor wants to carry out business in China, it shall ascertain whether the target business is prohibited by the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2020); and
- a foreign contractor shall set up operations in accordance with the requirements of the Administrative Measures for the Registration of Production and Business Operation Conducted by Enterprises of Foreign Countries (Regions) within the Territory of China, and obtain relevant licences to get qualified according to the Qualification Standards for Construction Enterprises.

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?

To improve contract management in the field of construction, many standard contract forms have been issued at the national level and are widely used, such as:

- the General Contract of Construction Project (Model Text) (GF-2020-0216);
- the Construction Contract (Model Text) (GF-2017-0201); and
- the Model Text of Design Contract (Professional Construction Project) (GF-2015-0210).

These forms are recommended to be used for construction and design.

The language of the contract does not have to be Chinese but, according to article 789 of the Civil Code, a construction contract must be formed in writing.

According to article 6 of the Judicial Interpretation of the Law on Choice of Law for Foreign-Related Civil Relationships (I), unless there exist foreign elements, parties to a construction contract cannot choose foreign laws and venues for dispute resolution outside of China.

Payment methods

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

Contractors, subcontractors and vendors are typically paid electronically or via cheque or cash. According to article 11 of the Regulation on Ensuring Wage Payment to Migrant Workers, wages of construction workers shall be paid in monetary form by bank transfer or cash and shall not be replaced by other forms such as physical assets or securities.

There is no legal requirement on payment frequency and payment shall be made in accordance with the contract.

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?

The employers usually sign contracts directly with the contractors in a project.

PPP and PFI

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

There are no laws on PPP and PFI in China. In 2017, the State Council promulgated the Regulations on Cooperation between Government and Social Capital in Infrastructure and Public Services (Draft for Comment), which has not yet become effective.

However, the relevant state ministries and commissions have successively issued some normative documents and guiding documents to promote PPP construction, which has formed a regulatory framework (see http://www.cpppc.org/zcfg.jhtml).

Joint ventures

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

According to article 27 of the Construction Law, all members of consortia shall bear joint and several liability for the entire project.

In addition, members shall allocate liability and responsibility among them. According to article 31 of the Bidding Law, all members of consortia shall sign a joint bidding agreement, which would clearly provide the work and liability to be borne by each member. If the consortium wins the bid, all members shall jointly sign a contract with the tenderee and bear joint and several liability to the tenderee for the contracted project.

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?

Where the acts, errors and omissions constitute infringement and cause losses to the other party, even if the adversely affected party is at fault too, it is still entitled to be indemnified, but the damages should be reduced in accordance with article 592 and article 1173 of the Civil Code.

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?

According to article 802 of the Civil Code, the contractor shall bear liability to the third party if there exists any quality defect of the building.

The third party is entitled to claim against the contractor for the quality defect because it is a kind of tort liability in China that should not be premised on a contract.

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?

The common types of insurance and coverage are as follows:

- all risks insurance: material loss of construction, the equipment, etc.; liability to workers and third parties;
- accidental injury insurance: liability for construction workers;
- quality insurance: quality defects;
- contract performance insurance: liability for breach of contract; and
- bidding insurance: liability of the tenderer to the tenderee for violating the bidding documents.

The contractor's liability will be limited under such circumstances:

- according to article 591 of the Civil Code, if a contractor breaches the contract, the other party shall take appropriate measures to prevent an aggravation of loss, and if a loss is aggravated owing to the failure to take appropriate measures, no compensation shall be claimed for the aggravated part of the loss; and
- according to article 584 of the Civil Code, the amount of compensation for losses shall not exceed the loss that may be caused by the breach of contract that the breaching party has foreseen or ought to have foreseen at the time of conclusion of the contract.

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?

Upon completion of the employment, a contractor still shall bear the following legal obligations towards the employees:

- the contractor shall pay the workers financial compensation if a labour contract is cancelled or terminated in the circumstances stipulated in article 46 of the Labour Contract Law;
- according to article 50 of the Labour Contract Law, at the time of cancellation or termination of a labour contract, the contractor shall issue a certificate of cancellation or termination of the labour contract and conduct, within 15 days, the procedures for the transfer of the employee's file and social insurance account; and
- according to article 9 of the Interim Provisions on the Payment of Wages, the contractor shall pay all the wages to the workers once upon the cancellation or termination of the labour 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?

In general, foreign construction workers have the following legal rights in China:

- according to article 21 and article 22 of the Administrative Provisions on the Employment of Foreigners in China, the wages paid to the foreign construction workers shall not be lower than the minimum wage standard in the local area;
- according to article 5 of the Interim Measures for the Participation of Foreigners Employed in China in Social Insurance, any foreign worker who contributes to social insurance shall enjoy the social insurance benefits in accordance with the law provided that the required conditions are met; and
- according to article 47 of the Construction Law, foreign construction workers are entitled to report cases of and file charges against acts endangering lives, safety and physical health.

In case of violation of the above provisions, the competent administrative departments may impose penalties such as orders of correction and fines on the contractors.

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?

If a foreign contractor decides to close its operations, there are the following legal obstacles:

- according to article 16 of the Tax Collection Administration Law and article 15 of the Implementing Rules of the Tax Levying Administration Law, foreign contractors shall apply to the original tax registration authorities for the cancellation of tax registration; and
- according to articles 183 and 184 of the Company Law, if liquidation is decided, the foreign contractor obligations shall manage and clear the remaining business, pay the company's accounts and recover its accounts receivable and pay outstanding taxes, among other things.

At the end of a project, there are no statutory termination payments but, if there is an agreement on them, the foreign contractor shall make such payments.

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?

A contractor may adopt measures to secure its right to payment of costs and fees from an owner, including the following:

- the contractor may require the owner to provide a guarantee for the payment in accordance with the Regulation on Ensuring Wage Payment to Migrant Workers;

- the contractor may ask to add a Liability of Breach Clause on delaying payments to the contract; and
- when the owner fails to make payments in accordance with the contract, the contractor is entitled to exercise the right to preferential payment of the work price.

The contractor is not entitled to place liens on real estate. According to the principle of legality of real rights, liens can only be placed on movable property in China. However, a contractor can enjoy the right to preferential payment of the work price in accordance with article 807 of the Civil Code.

'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?

In China, there is no legal provision prohibiting construction contracts from containing 'pay if paid' or 'pay when paid' terms. In judicial practice, courts tend not to identify such terms as void. However, where the general contractor intentionally delays settlement or delays in exercising due creditor's rights, courts tend to support subcontractors' claims on payments even if 'pay if paid' or 'pay when paid' terms exist.

Contracting with government entities

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

If a construction contract is legally valid and the contractor performs the contract in good faith, a government agency to the contract shall make payments as agreed in the contract and cannot assert sovereign immunity as a defence to a contractor's claim for payment.

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?

If major projects have been interrupted or cancelled, where the purpose of the contract cannot be realised, contractors have the right to terminate the contract according to article 563 of the Civil Code. Upon termination, if the quality of the completed work is approved, the contractor can request the employer to pay the price of the completed work.

However, if the contractor chooses not to terminate the contract or resume the performance after a short interruption, it cannot make the aforesaid claim to be paid.

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?

It depends. According to article 180 of the Civil Code, force majeure refers to any objective circumstance that is unforeseeable, unavoidable and insurmountable. Contractors would be excused from performing contractual obligations only if the events beyond their control meet the conditions of force majeure and there is a causal relationship between the event and the failure to perform contractual obligations.

DISPUTES

Courts and tribunals

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

In China, there are no specialised tribunals that are dedicated to resolving construction disputes. However, taking the complexity and the difficulty of such disputes into account, in practice, the courts will appoint specialised judges with a lot of experience in resolving construction disputes.

In addition, in December 2019, China Construction Industry Association and China Maritime Arbitration Commission jointly established the Construction Dispute Arbitration Centre of China Maritime Arbitration Commission, which specialises in resolving construction disputes.

Dispute review boards

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

DRBs are used in China but not widely. Some foreign-related construction disputes are resolved through DRBs, such as the *Xiaolangdi Hydropower Station* case, the *Ertan Hydropower Station* case and the *Wanjiazhai Water Conservancy Project* case. As to domestic projects, the *TravelSky Beijing Shunyi High-tech Industrial Park* case was the first dispute that was resolved through a DRB.

Decisions made by DRBs cannot be legally enforced. Both parties can still apply to arbitration or bring suits after a decision is made by a DRB.

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?

In recent years, the practice of voluntary participation in professionally organised mediation has gradually gained acceptance. Parties can choose mediators by themselves or make appointments based on lists provided by mediation centres.

However, the acceptance of professional mediation is far lower than that of mediation organised by courts or arbitration institutions. Because mediation is organised by courts or arbitration institutions, if any party does not perform the agreement fully, the other party can apply to the court for legal enforcement. However, if any party does not perform settlement agreements of professional mediation, the settlement agreements would not be enforced legally unless affirmed through judicial procedures.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Statements in mediation are confidential and cannot be repeated in any formal proceedings.

For example, according to article 18 of the Mediation Rules of the Mediation Centre of Beijing Arbitration Commission, mediation shall not be conducted in public unless otherwise agreed by the parties. The process of mediation shall not be recorded in writing. Mediators, parties, agents, witnesses, experts, staff members of the centre and other personnel involved in the mediation have the obligation to keep all matters of mediation confidential. According to article 18 of the Mediation Rules of the Mediation Centre of Beijing Arbitration Commission, no party should invoke any statements, opinions or suggestions made by the other party or mediator in mediation, any relevant written materials, as the basis

for claims, defences or counterclaims in subsequent arbitrations, court proceedings or any other formal court 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 practice, because an arbitration award will be final and binding on parties, and the subject matters of construction disputes are always of high value, parties tend to be very cautious about choosing arbitration as a dispute resolution mechanism. Parties will choose the appropriate dispute resolution mechanism based on the actual situation and their needs.

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?

If a foreign contractor trusts the domestic arbitration institutions and sees convenience in the enforcement of arbitration awards as the most important element, it may prefer to use the China International Economic and Trade Arbitration Commission, the Beijing International Arbitration Centre, the Shanghai International Arbitration Centre or other domestic arbitration institutions. If a foreign contractor tends to use English as the arbitration language and regards well-rounded arbitration rules and the convenience of arbitration activities as more important elements, it may prefer the ICC, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre or other international arbitration institutions based in Hong Kong and other countries.

There is no preference or resistance to hearings being held in a particular jurisdiction. There is no preference or requirement as to the applicable law pertaining to the dispute.

Dispute resolution with government entities

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

According to article 2 of the Arbitration Law, contractual disputes and other disputes arising from property rights and interests between citizens, legal persons and other organisations of equal status in law may be submitted for arbitration. Where Chinese government agencies are civil subjects in disputes, they may participate in private arbitration and be bound by the arbitration award. In other situations, Chinese government agencies shall not participate in private arbitration and will not be bound by the arbitration awards even if they participated.

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?

China is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). According to the Convention, recognition and enforcement of the award may be rejected by the courts if one of the following circumstances exists:

- the arbitration agreement is invalid under the law applicable to parties or the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;
- the award contains decisions on matters beyond the scope agreed by parties (such matters may not be recognised and enforced);
- the composition of the arbitration tribunal or the arbitration procedure does not comply with the arbitration agreement or the law of the country where the award was made;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
- the matters submitted to arbitration shall not be settled by arbitration in accordance with Chinese laws; and
- recognition and enforcement of the award will violate the public order.

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?

According to article 188 of the Civil Code, the statutory limitation period for construction work or design services disputes is three years. This period runs from the date on which a party knows or should have known that its rights have been infringed and who the other party is. The courts shall not protect its rights if 20 years have passed since the infringement. Under special circumstances, the courts may decide to extend the statutory limitation period upon an application filed by the party.

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?

China is not a party to the Stockholm Declaration of 1972.

In China, the relevant laws are: the Construction Law; the Environmental Protection Law; the Wildlife Protection Law; the Prevention and Control of Pollution from Environmental Noise Law; the Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes; the Water Pollution Prevention and Control Law; the Air Pollution Prevention and Control Law; the Energy Conservation Law; the Water Law; the Marine Environmental Protection Law; the Environmental Impact Assessment Law; the Regulations on the Administration of Construction Project Environmental Protection; the Wild Plant Protection Regulations; and the Interim Measures for the Management of the Environmental Inspection of Completed Construction Projects, among others.

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?

Chinese laws impose corresponding civil liability, administrative liability and criminal liability on developers and contractors if environmental hazards or violation of local environmental laws and regulations are created. For example:

- according to article 1234 of the Civil Code, where a developer or contractor causes any damage to the ecological environment due to violation of the relevant laws or regulations, it shall bear the liability for restoration within a reasonable time limit if the ecological environment can be restored;
- according to article 59 of the Environmental Protection Law, where a contractor discharges pollutants illegally, it will be fined by relevant

government departments, and if it refuses to make corrections as ordered, continuous administrative punishment may be imposed;
- if there exists one of the circumstances in article 63 of the Environmental Protection Law, the persons directly in charge of the developer or contractor may be punished by administrative detention; and
- according to article 338 of the Criminal Law, if a developer or contractor discharges, dumps or disposes of any radioactive waste, any waste containing pathogens of any infectious disease, any poisonous substance or any other hazardous substance in violation of relevant laws and regulations, which has caused serious environmental pollution, it shall be sentenced to the crime of environmental pollution.

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'?

China has signed bilateral investment agreements with 104 countries or regions for the protection of investments of a foreign entity in various areas, including construction and infrastructure projects.

Definitions of 'investment' may vary in different agreements.

Tax treaties

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

China has entered into double taxation agreements with 107 countries or regions, of which 101 agreements have come into force to prevent a contractor from being taxed in various jurisdictions (see www.chinatax.gov.cn/n810341/n810770/index.html).

Currency controls

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

There are currency controls in China and they are managed by the China State Administration of Foreign Exchange.

Foreign exchange businesses are classified into current accounts and capital accounts as per transaction and each is subject to different controls as follows:
- article 8 of the Agreement of the International Monetary Fund is effective in China, so there is no currency control of current accounts; and
- the control of capital accounts is still strict even though the exchange is allowable.

Removal of revenues, profits and investment

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

There are controls that restrict the removal of revenues, profits or investments from China. Foreign exchange businesses are classified into current accounts and capital accounts as per transaction. According to articles 13 and 21 of the Administrative Regulations on Foreign Exchange, the restrictions are as follows:

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- foreign exchange income on current accounts may be retained or sold to any financial institution engaged in foreign exchange settlement and sales business in accordance with laws; and
- where any foreign exchange income on capital accounts is to be retained or sold to a financial institution engaged in foreign exchange settlement and sales business, an approval shall be obtained from the competent administrative authority, other than where no approval is required under state provisions.

UPDATE AND TRENDS

Emerging trends

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

There are emerging trends in construction regulation in China.

On 4 December 2019, the State Council passed the Regulations on Ensuring Payment of Wages for Migrant Workers, which became effective on 1 May 2020.

On 1 July 2020, the State Council passed the Regulations on Ensuring Payments to Small and Medium-sized Enterprises, which became effective on 1 September 2020.

On 8 May 2020, the National People's Congress passed the Civil Code, which became effective on 1 January 2021.

On 25 December 2020, the Supreme Court passed the Judicial Interpretation of Construction Contracts (I), which became effective on 1 January 2021.

The revision work of the Construction Law has been included in the annual work plan of the Ministry of Housing and Urban-Rural Development in 2021, which will strengthen the management of the construction industry by revising other regulations.

Germany

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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?

The first step should be choosing the most suitable corporate or non-corporate structure fitting the size of the operation and the expected business turnover. In Germany, the most frequently met structure is a form of private limited company, comparable to a limited liability company or a limited company. For entities that need to set up a joint-stock company, the choice would be the AG form, which is a public limited company. These two corporate forms are more costly to establish than non-corporate structures (eg, civil law associations of entrepreneurs). Civil law associations are also advantageous in matters of compliance and publicity. However, non-corporate structures come with greater risk in terms of the partners' unlimited personal liability. Subsidiaries of foreign companies are also entitled to do business in Germany.

The next step that is required is registration with the companies' register.

The third step is choosing and appointing a managing director or supervisory staff with the required qualifications. When appointed, the name of the director is also to be registered with the companies' register. These steps can prove difficult for foreign contractors, as German law provides the regulations regarding these steps and because the only official language is German.

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?

Foreign designers and contractors need to consider regulations from different sources when doing business in Germany. According to section 34c of the Trade, Commerce and Industry Regulation Act and the German Real Estate Agents' and Property Developers' Ordinance, contractors need a special permit for their operations if acting as real estate agents or as property developers for third parties. When carrying out an operation, German law requires that every application for planning and building permission is signed by an architect, engineer or another qualified professional who completed relevant studies at a German university with at least two years' experience in that profession.

When bringing employees or freelance staff originating from outside the European Union to Germany, valid visas and working permits are required. In that case, further steps must be carried out, such as registration with the tax authority, social security plans, labour and industrial inspectorates and the chamber of crafts, where applicable. Violations of social security laws and disregard of laws concerning illegal employment may result in fines of up to €500,000 or imprisonment for up to three years.

Competition

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

Germany has not established a law that protects its domestic contractors. One of the fundamental rights guaranteed by the European Union is free movement of services, which states that any discrimination concerning the provision of services on the basis of nationality is prohibited. However, only nationals or contractors originating from the European Union benefit from this right.

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?

The award of construction services by the public sector is regulated by Part A of the German Construction Contract Procedures (VOB/A). The VOB/A procedures lay down the principles for the award of construction services by the public sector. They regulate the conduct of the award procedure and prohibit discrimination against the companies involved in the award process. For this purpose, construction services are to be split, in principle. The award of contracts should not be limited to local companies. The VOB/A also prohibit the acceptance of unreasonably high or particularly low prices. This is intended to prevent bid-rigging.

Although the VOB/A does not constitute a law, they are binding on the parties when public entities award contracts. In the internal relationship of the contracting authorities, the VOB/A form administrative regulations (ie, internal instructions in general form). Nonetheless, non-compliance with their requirements may have legal implications for the award process. If a contracting authority does not comply with the requirements, it can lead to the nullity of the entire award process and justify claims for damages by third parties.

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?

In 2014, the Federal Supreme Court ruled that a purchase agreement was void because of previous bribery. However, the transfer of ownership, which is to be viewed in the abstract and independent of the purchase

agreement, was considered to be valid. Whether or not a contract is void because of previous bribery cannot be determined a priori but must be reviewed in each individual case. With regard to privately awarded contracts, competitors affected by illegally obtained contracts may demand compensation or seek injunctive relief, or both. Concerning publicly awarded contracts, competitors may require a new bidding and awarding process.

Although German criminal law does not impose criminal liability upon companies, illegal acts such as bribery can result in high penalties. In addition, the contractor may have to face claims for civil law damages. Further, the criminal court may confiscate profits gained from illegal activities if quantifiable. Another outcome can be the blacklisting of the company by authorities, which will deny the respective company access to awarding processes. However, this barrier is only valid in the state it was issued. Under criminal law, facilitation payments are a form of bribery and are therefore treated equally.

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?

Generally, an employee cannot be held accountable for illegal activities conducted by co-workers or board members. However, if the employee holds a leading position corresponding with supervisory responsibilities, the respective employee may be obliged to report knowledge of bribery. If he or she fails to report the illegal action, law enforcement agencies might consider this conduct as accessory to bribery by omission. In the case of conviction, the respective person faces penalties of 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?

Any private person or any company is free to donate to political parties, but not as part of doing business. However, donating has decreased as political contributions have become more and more regulated owing to the goal of minimising illegal funding of political parties. Thus, all party finances must be declared and any contribution made to achieve an advantage is void. The decrease can also be explained by the implementation of laws removing tax benefits arising as a result thereof.

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 rules as government employees?

There is no regulation that construction managers are subject to the same anti-corruption or compliance as government employees. However, in July 2017, the Bundestag passed a law to introduce a corruption register (WRegG). This is intended to regulate the award of public building projects to companies and prevent corruption. The law provides for the establishment of a nationwide electronic competition register at the Federal Cartel Office. Companies that have committed certain offences, such as money laundering, public sector fraud, bribery and bribery in business transactions and the granting of benefits, are entered in the register. Violations of environmental, social or labour law obligations are also recorded. According to section 6 WRegG, from an estimated contract value of €30,000, the contracting authority will in future be obliged to submit an enquiry to the registry authority regarding the bidder that is to be awarded the contract before awarding a contract. Sector clients and concession providers must make a request when contracts reach the EU thresholds.

However, the mere fact that a company appears in the register is not sufficient to exclude it from public contracts. An intensive reliability test is also required. Bidders that have been convicted of subsidy fraud or bribery, or bribery in commercial transactions must be excluded.

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?

When pursuing business activities in the German construction market, contractors may be asked to prove technical qualifications, entrepreneurial and financial capacity, and reliability by the respective awarding office. To demonstrate these qualities, a contractor will have to provide details on technical equipment, financial statements for the past three years, and training and qualification of personnel when requested by the awarding entity.

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?

Sections 650a–650v of the German Civil Code deal with construction contracts. The non-mandatory general contract terms for the execution of construction works (VOB/B), in turn observing the interests of the parties involved in construction contracts, comprises terms and conditions for these contracts in an impartial manner. The use of the VOB/B is advisable, principally because it has become the most important standard contract form in matters of construction. In addition, even though the validity of terms and conditions is usually subject to a court's revision, the terms of the VOB/B can be implemented as valid terms in a contract without modification owing to its character as a formal legal act or by-law.

Explicit reference to the language to be used, the applicable law and the place of arbitration should be made by the parties when deciding on the German Institute of Arbitration arbitration rules. The parties to an arbitration are free to set the parameters for their proceedings. They can choose the seat, the language and the applicable law, whereas the choice of law lies in reference to substantive law and not to conflict-of-laws rules. Agreements will apply to written statements, hearings, awards and any other communication unless the parties have agreed otherwise. If the parties fail to agree, the arbitral tribunal will decide. If the parties do not agree on the applicable law, the tribunal will apply the law of the state with which the subject matter of the proceedings is most closely connected.

Payment methods

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

Payments are generally made by cash or electronically. Larger sums of money are traditionally paid by electronic payment. Payment terms are usually agreed between the parties. If not, the buyer is only required to pay for the goods on receipt. Payment for work must only be made

by acceptance of the work, unless the parties have agreed otherwise. The contractor can, additionally, demand partial payment in an amount tantamount to the value of the work performed to date. In a service relationship, remuneration is payable after performance irrespective of success. If the payment is assessed periodically, it is due at the end of each time period. Employees normally receive their net wages at the end of a working month.

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?

Typically, when business in the construction industry is conducted, there is one contractor with whom all the responsibility lies. That general contractor will work with subcontractors, to which he or she will assign parts of the work. Another option is the creation of a special-purpose vehicle, which guides the project while a general contractor handles work.

PPP and PFI

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

There is no general or special PPP legislation that provides a uniform framework for PPP projects. As a consequence, every project is based on unique contractual agreements. The legal basis of a PPP project depends on the type of project and on the extent of delegated public powers, which can be found in various, mostly locally enacted, regulations. In 2005, Germany enacted the PPP Acceleration Act, which appears to have accelerated the execution of PPPs by improving some of the existing legal regulations concerning them, owing to the strong demand for a uniform regulatory framework. PPP projects have become an interesting alternative to public procurement, as the economic advantages for public budgets have allowed the execution of a number of deals concerning building new infrastructure or expanding existing infrastructure that could not otherwise have been conducted.

Joint ventures

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

The extent of a member's liability is determined by the chosen corporate or non-corporate structure.

When the consortium is acting in the legal form of a partnership, no partner can limit its personal liability to the owner. As a result, each partner is liable for the entire enterprise and the actions taken by any other partner. Any limitation of liability will only affect the internal liability among the partners.

An external limitation will only be effective if the partners choose to create a corporation with limited liability. To found a GmbH, a minimum share capital of €25,000 is required, which equals the minimum liability amount.

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?

The general contractor can be held responsible for all malperformance or violation of duty, regardless of its cause. The law forbids excluding liability for wilful action or gross negligence. Any contractual clause that attempts to do so is void. However, liability for slight negligence can be excluded.

If a contracting party is negligent, it is still entitled to indemnification for all damages caused by the other party or the other parties' subcontractor. Nevertheless, its claim for indemnification is lowered in proportion to the amount of negligence contributed.

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?

When a third party has suffered damage respecting life, physical integrity, freedom or property resulting from a default in the construction of a building, the law of tort entitles the third party to indemnification, regardless of whether or not there is privity of contract. The same risk may result from the contractor's position as the possessor of the land parcel and the building if it collapses or a part of it detaches.

In addition, the principal's contractual claims against the contractor are often pledged from the principal to the buyer when selling the object.

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?

Contractors will regularly enter into two forms of insurance: indemnity insurance and all-risk insurance. Indemnity insurance covers personal injuries and financial and property damage. Whether or not delay damages are covered depends on the cause for the delay. Coverage might be granted if the delay is based on incorrect instructions from the architect. In this matter, the individual case would have to be reviewed.

All-risk insurance covers the principal's risk. Even though local law does not limit liability for damages, the parties may insert limits into the contract itself. Naturally, principals will not want to accept limits on the contractor's liability. However, in many contracts there are clauses concerning minimum coverage and the distribution of costs in case of damages.

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?

There are no laws prescribing a minimum amount of local employees. It also does not matter if the contractor conducts business regarding one project or several projects. Often, public awarding authorities will make it a precondition as part of the awarding process that contractors involved in construction or planning originate from the local or regional area. Some private principals will set out this condition, too.

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?

German employment legislation is employee-friendly in this respect, in that the employee shall not bear the entrepreneurial risk of the employer that might result from the sometimes unpredictable duration

of a construction project. In consequence, termination of employment contracts is very restricted. Labour law and judicature grant employees strong protection, especially against unfair dismissal. Fixed-term contracts are possible, but a few things should be taken into account: a fixed-term contract for up to two years can be terminated without the employer giving any valid reason for the termination. The contract can be extended three times within the two years, up to a total of two years. For fixed-term contracts over a longer period of time, the employer needs to give a valid reason for termination. According to labour law, a valid reason could be when a company is in need of only temporary work to be carried out. An interim demand for a particular construction project may form such a reason.

Invalidity of fixed terms leads to a contract with indefinite duration. Constructors should consider using fixed-term contracts but be aware of risks arising from errors when entering into them.

These regulations do not affect self-employment. However, it is very hard to meet the requirements that are necessary to be qualified as self-employed, as that assumes working independently (not bound by instructions) and for several employers over a certain period of time.

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?

Historically, a work permit issued by the Federal Employment Agency was needed if foreign employees were to perform any kind of work in Germany. That requirement has been replaced by the enactment of the German Immigration Act. Since the European Union established the free movement of workers, EU citizens and their family members do not need any kind of work permit, so the legal requirement for a work permit is only applicable to non-EU foreigners. When a foreign worker is allowed to perform work either by work permit or granted by EU law, foreign workers in large part enjoy the same rights as German workers (eg, regarding working hours or social security, regardless of their origin). Violation of laws that are designed to protect employees may result in fines for a person or company violating respective laws.

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?

There are no legal restrictions concerning closing operations and withdrawal from a business. Nevertheless, any foreign contractor must fulfil the same obligations as any local contractor. First, private contractual obligations (eg, lease agreements or wages) and projects that have been initiated must be concluded. Secondly, received subsidies might have to be given back to the state or the municipality if tied to a minimum time of operations. In addition, social security and, where applicable, pension plans must be fulfilled. Lastly, depending on the chosen corporate structure, asset distribution to the shareholders is forbidden by law for the duration of one year after publication, owing to the protection of creditors.

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?

There are two adequate legal instruments capable of securing anticipated payments.

The first option is securing payments by registration of a mortgage. The German Civil Code grants the constructor an enforceable claim to request encumbrance of the land parcel with a security mortgage in an amount corresponding to the amount of work already performed plus expenses. The encumbrance will be registered with the land register if the principal is the owner of the land. The principal must agree to such a request; if he or she declines, the constructor can obtain an injunction to enforce his or her claim.

As a second option, the principal can deposit a security in favour of the contractor – common kinds are bank guarantees or bailments. An advantage of a mortgage is that the principal does not have to be the owner of the respective land parcel and the contractor can secure not only his or her anticipated payments, but also claims from subcontractors. A disadvantage is that the contractor cannot enforce the security.

Neither option applies to claims of property developers, or if the principal is a public body, as there is hardly any risk of insolvency.

'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?

'Pay if paid' and 'paid when paid' clauses are invalid when being introduced into the contract by general terms and conditions of the general contractor. This also applies to all similar clauses that cause the subcontractor to bear the risk of the owner's non-payment or late payment. These terms are only valid if being specifically negotiated among the parties of the contract and if the subcontractor had the real opportunity to influence the content of the specific clause. In the event of a dispute, the general contractor bears the burden of proof with regard to the negotiations.

Contracting with government entities

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

A public body cannot evade its contractual obligations, such as payment, by declaring some sort of immunity. Although the respective contract may have been awarded by a sovereign act of governance, any public body entering a contract based on the regulations of German civil law is bound by these regulations. When entering a civil law contract, the parties are of equal rank. This may not be applicable to cases in which claims against members of diplomatic missions or consular representations are brought to court. These claims are often unenforceable owing to diplomatic immunity.

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?

With the exception of the possibility of requesting a mortgage or negotiating a security of another kind, there is no protection for unpaid contractors, except for filing a lawsuit. However, a lawsuit bears the risk of taking several years before full payment can be expected. In addition, there is the possibility of insolvency, which bears the special risk of the insolvency administrator's right to reclaim any payment of the debtor if the debtor was unable to pay and the creditor knew about this. The contestation period begins three months prior to the debtor's motion for insolvency proceedings.

If the principal cancels the contract, which he or she may do at any given moment regardless of the contractor's performance, the contractor cannot insist on concluding his or her work. Nevertheless, the contractual claim to payment remains unchanged, regardless of the level of completion.

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?

German law does not define the terms 'force majeure' and 'acts of God'. The judicature has determined that an act of God is an external event (not necessarily a force of nature), that cannot be foreseen or averted by the person suffering, not even by use of the utmost care. When there is an act of God, the contractor's non-performance or delay in performing its contractual obligations resulting from the act is excused. If the contractor is already in delay, the contractor carries the legal risk of unforeseen events by himself or herself.

DISPUTES

Courts and tribunals

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

There are no specialised arbitration courts or tribunals permanently in office. When seen as necessary and relevant, tribunals are appointed by the parties themselves. In accordance with the Mediation Code for Construction (SOBau), the number of arbitrators depends on the amount in dispute. For amounts in dispute of up to €100,000, section 15 SOBau states that the tribunal will consist of one arbitrator. For amounts above this, the dispute will be dealt with by three arbitrators. The parties may enter into a different agreement concerning the number of arbitrators.

The state courts usually provide chambers or senates specialising in construction disputes.

Dispute review boards

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

As the results of DRBs are neither binding nor enforceable, they can be seen as solely advisory. Hence, DRBs will not often end legal disputes but will suggest a potential solution. Procedures and results vary between the various associations that have established DRBs, such as some chambers of crafts and several associations of the construction industry.

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?

There are several kinds of mediation provided for in the legislation, such as prejudicial dispute resolution and judicial mediation by court.

Additionally, there are extrajudicial mediation processes. These processes have gained acceptance by the parties involved and have become increasingly common, as extrajudicial mediation saves enormous amounts of time compared to court proceedings. The most commonly known of these processes is the one provided by the SOBau. The code classifies the process into three main segments: mediation, the taking of evidence and arbitration procedures. Prior to mediation or arbitration, the parties must have agreed to settle a dispute within the scope of application of the SOBau by including a respective clause in the contract or by separate agreement.

According to the SOBau, the parties shall first try to choose a mediator. The mediator shall be qualified to hold judicial office. However, the parties can enter into a different agreement concerning this matter. If the parties cannot settle on a mediator, the selection is made by the president of the German Lawyers Association. For arbitration, the arbitrator must be qualified to hold judicial office.

Mediation will probably become more established within the European Union because of the EU Mediation Directive (2008/52/EC), which was created to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

According to the SOBau, the mediation procedure is not open to the public. In addition, every participant is obliged to maintain complete confidentiality concerning all matters disclosed in the process. At the request of one party, the procedure can be opened to the public. However, the approval of all other persons involved is required. For judicial mediation procedures, confidentiality is not prescribed by law; therefore additional confidentiality agreements are advisable.

Arbitration of private disputes

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

Arbitration has existed in Germany since the 17th century, but it was never of great importance and was hardly noticed. It is still the case today that most parties seem to prefer traditional court proceedings over arbitration. Nevertheless, the relevance of arbitration has grown significantly as a result of international influence on the German construction industry. Arbitration clauses are usually included in contracts involving international contractors.

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?

International arbitration tribunals outside Germany are not very attractive to German contractors or awarding authorities because of the significant costs of a tribunal abroad and the issue of the procedural language. When entering into an arbitration clause determining an international arbitration tribunal outside Germany, primarily the International Chamber of Commerce in Paris and the London Court of International Arbitration are taken into account. With the exception of these two arbitration providers, German contractors or awarding authorities would not necessarily enter into a contract with an arbitration clause.

Dispute resolution with government entities

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

As government bodies are pari passu partners to a contract they entered into, the same applies to the use of private arbitration, if contractually agreed. The right to participate in private arbitration will be specified in the contract. German law does not stipulate any limits on the use of arbitration clauses by government bodies.

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?

In accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), a German court must declare any foreign arbitral award enforceable before it can be enforced under German law. If the court comes to the decision that the arbitral award is not enforceable, it holds that the award has no legal effect in Germany and under German jurisdiction. Correspondingly, it is not enforceable in Germany; however, it may remain in effect in other jurisdictions. In reference to matters of international trade, the European Convention on International Commercial Arbitration of 1961 applies as well as the New York Convention.

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?

Limitation periods within which lawsuits must be commenced depend on the object involved and which statutory framework has been agreed upon. Parties will often agree to the legal provisions of the German Construction Contract Procedures (VOB). According to the VOB, the limitation period for construction work concerning buildings is four years upon acceptance of the work performed. For certain types of objects, such as combustion plants, the limitation period is reduced to two years, or in some cases even to one year.

When a contract is conducted within the statutory framework of the German Civil Code, the limitation period is five years upon acceptance of the work performed. If a person suffered damage respecting life, physical integrity or freedom resulting from a default in the construction of a building as a result of wilful action, the limitation period is 30 years.

Regional law may prescribe the necessity of prejudicial dispute resolution prior to court action. However, the provision is only effective when the amount in dispute does not exceed €750, which leads to inapplicability in most construction matters.

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?

Germany is party to the Stockholm Declaration of 1972. It has initiated technological advances in the field of environmental protection and the necessary legal framework. As environmental protection is part of its Constitution, Germany has enacted many statutes and by-laws, such as the Renewable Energy Act, the Combined Heat and Power Generation Act, the Energy Saving Act, the Federal Water Act, the Federal Nature Conservation Act, the Federal Act on Protection against Emissions and the Soil Protection Act. These laws have a great impact on the construction industry. If a project may cause risks to the environment, close examination of the respective project in regard to the compatibility with environmental law will be executed.

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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?

Before commencing a project that is expected to have a significant damaging impact on the environment, a full environmental impact assessment must be carried out. To minimise damage, contractors must consider responsibility concerning air, water and waste. Therefore, developers are required to limit emissions to the lowest level possible, to prevent pollutants from entering the groundwater or water table and to design a plan to prevent, recover and dispose of waste. Generally, the respective construction supervision authorities will assess these areas and impose conditions on the permit, where applicable. If the contractor does not comply with a condition, authorities impose different measures in accordance with building regulations, such as halting construction.

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'?

Germany has not signed any such investment agreements.

Tax treaties

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

Germany has entered into double taxation treaties with over 100 countries or administrative regions. Owing to its high complexity, German taxation law should be given due attention. The most significant taxes are income tax, corporate income tax, local business tax and value added tax.

Currency controls

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

There are obligations to unsolicited declarations when transferring certain amounts of money. When cash exceeding €10,000 is transferred

from or into the European Union, the transfer is subject to notification. Bank transfers of up to €12,500 from Germany to any other country or vice versa are subject to notification to the German Federal Reserve Bank. These limits cannot be circumvented by acts such as set-off or quitclaim.

Removal of revenues, profits and investment

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

There are no restrictions regarding the removal of profit. The European Union guarantees the fundamental right of free movement of capital to contractors from the European Union. However, the declaration obligation must be adhered to. Furthermore, it must be taken into account that possible claims to restitution of subsidies received from public authorities or tax duties may be due prior to the removal of any existing profits. Thus, transfer of funds cannot be used to evade obligations to contractual partners or to public authorities. In case of an enforceable court's decision, the rightful claimant may seize the contractor's assets for execution of the judgment.

UPDATE AND TRENDS

Emerging trends

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

No.

Iraq

Hadeel A Hasan

Al Hadeel Al Hasan Law

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?

The main concern would be the licensability of the business – whether it was carried out by an individual designer or contractor or by an entity – as the licence of the business is the critical element in getting that business set up and functioning; then, there are the regulatory compliance and sectoral approvals that the business needs to be aware of and adhere to.

Generally, the foreign designer or contractor can register a branch of its entity that must have already been incorporated outside Iraq at least two years before applying for its branch registration in Iraq. This branch will be allowed to use tenders or contracts with Iraqi entities subject to the above restrictions and the other special requirements for each tender or contract.

The Code of the Iraqi Engineers Syndicate No. 51 of 1979 (as amended) prevents engineers who are not listed in the Syndicate 'or those members who have not fulfilled their obligations under provisions of this code' from practising the profession of engineering.

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?

The licence needed for designers and contractors to practice the profession of engineering or designing is subject to the conditions and stipulations announced from time to time by the Iraqi Engineers Syndicate. Considering that the designer is an engineer, under the Iraqi Engineers Syndicate Code, 'engineers from the other Arab countries shall be dealt with as the Iraqi engineers, and they will have the same obligations and rights under this code'. This necessitates that the engineers should be listed in the Syndicate to practice the profession as designers or engineers.

The licence is a requirement for any entity doing business in Iraq and the terms of designers and contractors; there are also specific requirements for individuals to carry out such activities to be registered with the Engineers Syndicate or be registered with and classified by the Ministry of Planning. In any case, there must be a corporate or professional licence available to the designer or the contractor and such licence entails opening a taxation file with the General Tax Commission, aside from any sectoral approvals required for the business or the office to be opened for that business.

Competition

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

Under the Iraqi Investment Code No. 13 of 2006 and the Regulations of Investment No. 2 of 2009 (as amended), Iraqi or foreign investors enjoy all benefits, facilities and warranties granted under the preceding code. In practice, in Iraq, preference between local and foreign contractors is based on some factors, including but not limited to, the incorporation date of the entity; history of successful works; being specialised in the field of work; and the offered prices. In this respect, note that the Regulations of Governmental Contracts Implementation No. 2 of 2014 stipulates that the assessment of contractors is based on the legal, technical and financial qualifications of each bidder. The project owner forms a professional committee to assess the tenderers and follow the pre-qualification requirements for each tender or project on a case-by-case basis.

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?

Under the Regulations of Governmental Contracts Implementation No. 2 of 2014, fair competition is well adopted in Iraq as the tenders are announced for public participation. Each person or entity interested in bidding can receive the pre-qualification documents (the legal, technical and financial requirements) and apply for the announced project. Then, the project owner receives the pre-qualification documents from all participants and designates qualified participants (at least three participants).

Afterwards, the project owner invites all qualified participants, on a free of charge basis, to provide their technical and commercial offers for review and assessment, and then awards according to the provisions of the Regulations already mentioned.

Based on the above, Iraqi law uses the public announcement of the tenders and filters the participants' qualifications by professional committees as tools of legal protection to ensure fair and open competition with public entities.

In addition, the Iraqi Civil Code and supervision by the Ministry of Planning can be used to secure additional protection to the fair and open competition with public entities in Iraq.

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?

Iraqi laws have not provided for the termination or unenforceability of the contracts awarded illegally (for example, by bribery) but a legal doctrine established in Iraq is that whatever is based on an invalid cause shall entail a null effect. Therefore, if a contract was awarded based on fraud, bribery or any other improper or unlawful measures, then this award could be made invalid. The Iraqi judicial bodies are working on a draft of a law that will provide for unenforceable contracts awarded illegally, but this law has not been enacted yet. Bribery under Iraqi laws is considered a felony. In this respect, the following provisions apply:

- Imprisonment for a period not exceeding 10 years and a fine, not less than 200,001 dinars and not more than 10 million dinars, shall apply to every employee or person charged with a public service that requests or accepts for him or herself or another a gift, benefit, advantage, or promise of something like that for the performance of an act of works of his or her duty, abstaining from it, or breaching his or her duties.
- The above penalty applies to the bribe offeror under provisions of the Iraqi Penal Code, which punishes the bribe offeror for giving, offering, or promising to give anything stated in article (308) thereof to any public official or agent. The penalty is imprisonment for five to 10 years and a fine ranging from 200,001 to 10 million dinars.
- The penalty shall be life imprisonment with the confiscation of movable and immovable property if this crime occurs during a war. Any person who offers a bribe to an employee or someone assigned to a public service, and it is not accepted, shall be punished with detention.
- The ruling of punishment in the crimes of bribery, embezzlement or theft entails, by law, the dismissal of the employee from service and the inability to reappoint him or her in the state departments.
- The Iraqi legislation punishes bribery even if the bribery occurred after the implementation of the duty or refraining from the duty (in such case, the penalty is imprisonment for not more than seven years), or the bribery occurs when the offeree receives the bribery even if the act falls outside its duties (in such case, the penalty is imprisonment for a period of not more than seven years, or detention and a fine not less than the offered, received or promised gift that shall not exceed 10 million dinars in all cases).
- Facilitation payments may be classed as a form of bribery for being a benefit inducing a public official to carry out certain actions, even if they are within the course of his or her duties but are intended to benefit the party paying the facilitation.
- A gift in all its forms shall be confiscated and the confiscation takes place when the gift is seized. Whether or not it has been seized is not material; the ruling for confiscation is not permissible.

In addition to the above original penalties against the bribe-taker, there are ancillary penalties, including:

- deprivation of some rights and benefits; or
- police control.

Whoever interferes through mediation with the briber or the bribe-taker to offer, request, accept, take or promise a bribe is counted as a mediator.

Cases of exemption from punishment

- The briber or mediator shall be exempt from punishment if he or she takes the initiative to inform the judicial or administrative authorities of the crime or admits it before the court contacts the case. Also, it is considered a mitigating excuse if the notification or admission occurred after the court heard the case and before the end of the trial.
- The law limits the exemption to the bribe or mediator, not to the bribe-taker, and to notifying the crime's judicial or administrative authorities and admitting it before the court hears the case. The excuse exempt from punishment prevents the judgment of any original, ancillary or complementary sentence, and based on that and, according to text 129 of the Penal Code, the precautionary measures are not included in the exemption. Therefore, it may be adjudicated even though the original, ancillary and complementary penalties are not ruled. But if the notification or acknowledgement took place after the court heard the case and before concluding it, then the law considers it a mitigating excuse.

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?

Other than the preceding, there is no legal obligation on the project team members to report suspicion or knowledge of government employees accepting bribery under the laws of Iraq. Also, there are no penalties if they do not report such suspicion or knowledge of bribery unless the team member falls within the categories mentioned in the preceding section.

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?

No. Political contributions to do business with public agencies may be classed as a form of bribery owing to the indirect benefit existing between the contributor and the political party or person influencing the public official; the legal provisions governing this form of offence can be found under various legal provisions as follows.

Anti-corruption legal framework in Iraq

Below is a reference to the primary anti-corruption legislation under Iraqi Law.

Public officials related provisions:

- articles 307–308 of the Iraqi Penal Code No. 111 of 1969 and its amendments regarding accepting bribes by public officials, which were amended pursuant to Revolutionary Command Council Resolution No. 160 of 1983 to prosecute the briber (the bribe offerer) and the bribe taker (the employer accepting the bribe) for the crime of bribery in accordance with point (Second) of the Revolutionary Command Resolution No.160 of 1983 which states:
    - second: every employer or person engaged with public service who requests or accepts for him or herself or for others gift, benefit, advantage, or promise of something like that to perform an act of his or her job or to abstain from it, or to breach the duties of his or her position, shall be punished with imprisonment for a period not exceeding 10 years and a fine of no less 200,001 dinars and not more than one million dinars. The penalty shall be life imprisonment with confiscation of movable and immovable property if this crime occurred during a war;

- the penalty is imprisonment for a period between five years and one day to 10 years and a fine and one day to 10 years and a fine ranging from 2,001 dinars to 10 million dinars;

- as well as articles 310 and 311 of the Iraqi penal code for paying or giving bribes to other public employees:
  - articles 315–320 of the Iraqi penal code regarding corrupt acts committed by public employees, including embezzlement, waste or other transfer of property;
  - articles 331 and 334–338 of the Iraqi penal code regarding jobbery;
  - articles 310 and 313 of the Iraqi Penal Code regarding paying or offering bribes to other public officials;
  - articles 315 and 335 of the Iraq Penal Code regarding corrupt acts by public officials, including embezzlement, misappropriation, or another diversion of property; and
  - articles 316 and 335 of the Iraqi Penal Code regarding abuse of position.

Private sector-related provisions:

- articles 310 and 313 of the Iraqi Penal Code relating to bribery or giving or offering bribes to public officials;
- article 453 of the Iraqi Penal Code related to breach of trust as a financial crime;
- articles 439–446 of the Iraqi penal code relating to fraudulent practices; and
- article 80 of the Iraqi Penal Code related to the vicarious liability of corporate entities for the conduct of its employees, directors or agents if such individuals are acting for the account of the company or acting in the name of the company.

Additional anti-corruption measures

The government of Iraq has established specialised and independent anti-corruption institutions to gain more momentum in the process of the fighting corruption, as below:

- parliamentary councils (Councils of Representatives-Provincial Council) as regulatory and legislative bodies.
- the Commission of Integrity, which is in charge of preventing and fighting corruption in Iraq established by Law No. 30 of 2011 (Law of the Commission of Integrity);
- the Federal Board of Supreme Audit, established by Law No. 31 of 2011 (Law of the Board of Supreme Audit);
- investigative judges;
- the Central Bank of Iraq as a monitoring authority;
- the anti-money laundering office in the Central Bank of Iraq as the supervisory and regulatory authority;
- the Integrity Committee in the Iraqi parliament;
- the Public Prosecution Authority;
- integrity committees in provincial councils; and
- the integrity commission, the Financial Supervision Bureau and the integrity committee in the parliament of the Kurdistan region of Iraq.

Furthermore, liability for anti-corruption is extended from individuals to corporate entities. It can result in fines or confiscation according to articles 122–123 of the Iraqi Penal Code. Dissolution or liquidation of the entity, as well as other severe punishments, may also be imposed.

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 rules as government employees?

If the construction manager or other construction professional acts in the capacity of a public entity's representative or agent being part of that agency's personnel, he or she is subject to anti-corruption and compliance rules on a project. If the contractor is a private sector entity working under a construction or engineering consultancy contract, he or she and his or her employees are not subject to the same anti-corruption and compliance rules as government employees. Nevertheless, they are subject to restrictions stated in their employment contracts with their own private companies' employers as well as the legal provisions applicable to the private sector as listed in the previous clause, namely:

- the Penal Code articles relating to bribery are giving or offering bribes to public officials;
- the Penal Code articles related to breach of trust as a financial crime;
- the Penal Code articles related to the action of theft;
- the Penal Code articles related to corrupt practices of fraud; and
- the Penal Code articles related to the vicarious liability of corporate entities for the conduct of its employees, directors or agents if such individuals are acting for the account of the company or acting in the name of the company.

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?

We believe that there are no legal issues that could present obstacles to foreign contractors attempting to do business in Iraq; foreign companies have been doing business in Iraq for the past 20 years freely and on an equal level with local companies. Certain regulatory compliance provisions need to be fulfilled by any entity doing business in Iraq, such as acquiring a corporate entity and acting in a professional capacity and having a good licensing position, whether with the sectoral authority or the tax authority or such like. All these requirements and the visa and employment obligations are standard legal requirements applicable in almost every jurisdiction.

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?

Under Iraqi laws, there are no specific standard contract forms to be used for construction and design. Hence, the parties may execute any form of contract, including that of the International Federation of Consulting Engineers or any desired form to the extent not restricted by a compulsory legal provision, which is not a significant concern in practice. As a general principle, it is not a condition to use the national language in contracts, as the contracting parties are allowed to use the language they wish in drawing up the contract (whether governmental contracts or contracts between private sector persons).

Governing law of the contracts

Generally, there are no restrictions upon the contracting parties under Iraqi law to choose a specific governing law or the mechanism and place

of the dispute resolution. However, governmental contracts executed under General Contracts Code No. 87 of 2004 and the Regulations of Governmental Contracts Implementation No. 2 of 2014 (Article 12/Second) shall be governed by Iraqi Law.

Certain contracts executed with private parties and government entities in Iraq are subject to international arbitration; in this regard, Iraq is a party to several bilateral arbitration treaties and international arbitration conventions. For instance, although Iraq has recently ratified the New York Convention for international arbitration, the mechanism of enforcing arbitration awards in Iraq is cautiously available, but the enforcement of judicial judgments is more accessible in theory and practice than the enforcing of arbitration or tribunal awards.

Dispute resolution

Generally, the contracting parties are allowed to choose the place and ways of solving disputes at their discretion. However, governmental contracts are subject to the following provisions.

First, disputes after signing the contract shall be resolved amicably by forming a joint committee of the disputing parties according to provisions of the law and the relevant regulations, and the contract terms and conditions. Minutes shall be prepared for the foregoing, which will be authenticated by the head of the government contracting party.

Second, if no amicable settlement is concluded, one of the following mechanisms should apply, which shall be included in the contract:

- arbitration, which shall be as follows:
    - domestic arbitration. This shall be according to the procedures outlined in the tender conditions or the Civil Procedural Code No. 83 of 1969;
    - international arbitration. The governmental party of the contract may choose to settle the disputes by international arbitration in case of emergency, for big and significant strategic projects or if one of the contracting parties is foreign, provided that the following should be considered:
        - the accredited international arbitration body to be chosen;
        - the place and language of arbitration should be designated;
        - using Iraqi laws as the governing law; and
        - the governmental party shall have employees whose qualifications meet the requirements of settling the disputes by this mechanism; or
- referring the dispute to the competent court for determining its subject matter.

Payment methods

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

The most applicable payment method for contractors, subcontractors or vendors in Iraq is based on the contractual mechanics, which often apply the form of progress payments against the letter of credit opened, based on the allocation of the project funds. The most common form of payment is through banking wire transfer to the contractually agreed upon bank account of the vendor or contractor.

Payments to workers by their employers vary based on the contractual mechanism in effect; for local employees, the most common practice is cash payments; and, for foreign employees, employers tend to pay their salaries through the banking system, to accounts either in Iraq or in their home countries.

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 Iraq, the government entity that owns the project usually announces the project and invites the contractors to provide their commercial and technical offers. After an extensive pre-qualification and qualification process, including the verification of good standing (eg, not being blacklisted by the Iraqi Minister of Planning) and the availability of required capabilities, the government entity awards the project to a specific contractor or contractors. In such a case, the project owner enters into an agreement directly with the entity awarding the contract. There are several forms of invitation to bid applicable under the Regulations of Governmental Contracts Implementation No. 2 of 2014, and also there are certain standard forms of contracts, whether for construction, service, consultancy and other activities to be provided under the contract.

PPP and PFI

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

The Iraqi parliament is drafting a law for public-private partnerships (PPP). However, certain practices of PPPs were entered into between government agencies, such as the Ministry of Electricity, and the private sector, such as electricity production and distribution companies, to renovate certain power plants. These arrangements may be considered a success and could be used as a model for others to follow regarding the contractual terms and the special approvals received for that arrangement. As for PFI, we are not aware of the existing statutory or regulatory framework, knowing that legal provisions in the Iraqi governing contractual system permit any contract to be entered into as long as mandatory legal requirements do not restrict it. We believe PFI would be available to be executed under the standard or general legal conditions in force.

Joint ventures

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

Members of consortia are usually jointly liable for the entire project (before the project owner) if the tender requirements or conditions stipulate so, but this is not applicable by default under the Iraqi Civil Code. In this respect, note that the liability and responsibility of each member of the consortium can be allocated by mutual written agreement of the parties (the members of the consortium).

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?

Under the Iraqi Civil Code, it is not permissible to conduct an agreement by which tort liability may be dismissed or waived; from a practical legal perspective, any party that caused an injury to another must be subject to compensation, regardless of any arrangements to the contrary.

Concerning contractual liability and indemnification therefrom, the bilateral contracts bind both parties if either party has failed to perform its obligations under the contract, and the other party may, after service of notice, demand rescission of the contract and where necessary claim damages; the court may, however, accord the debtor a further time limit

to pay and may also reject the application for rescission if that which the debtor has not performed is trivial in terms of the total obligation.

In addition, the injured contracting party is allowed to claim compensation for damages incurred by it owing to the default of the other contracting party to fulfil its obligations under the contract. Conditions of liability for compensation are met if the elements of the damage (eg, fault, damage and causative relationship between the fault and the damage) exist. Nevertheless, the assessment of the compensation value will be subject to other factors, such as the action of the injured party that participated in the damage or the injured party's negligence in avoiding increasing the damage.

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?

Under the Iraqi legal system, there is what is called the 10-year liability of the engineer and contractor. Article (870) paragraphs (3.1) of the Iraqi Civil Code states that:

> *The architect and contractor shall guarantee what happens within 10 years of total or partial demolition of the buildings they constructed or what they have erected from other fixed installations even if the demolition was caused by a defect in the land itself or the employer has authorised the erection of the defective installations unless the contracting parties may want these facilities to remain for less than 10 years, and the period of these 10 years begins from the time the work is completed and delivered, and every condition intended to exempt or limit this guarantee is void.*
>
> *The warranty stipulated in Paragraph (1) of this Article includes all defects in buildings and installations that may threaten the durability and safety of the building.*

Article (871) of the Iraqi Civil Code stipulates that:

> *if the architect confines himself to designing the design without being tasked with supervising the implementation, he shall be responsible for the defects that came from the design without defects that are more likely to be executed. He shall be held accountable except for faults that occur in the implementation, without the defects that come from error or lack of foresight in the design development'.*

If both the architect and the contractor are responsible for the defect in the work, they should be jointly liable.

Personal scope of decennial liability

Article (8) of the bylaw of the Engineers Syndicate defines consultant engineer as:

> *anyone who has been practising engineering at the rank of a licensed engineer for five years, and he may then assume responsibility for engineering projects, planning and coordinating the work of specialists in the various engineering fields therein without specifying his specialization.*

According to the previous definition, a consulting engineer is a specialised person with extraordinary qualities distinct from any other engineer. This engineer must fulfil the conditions required by law and the instructions regarding whoever is classified as a consultant engineer and is registered in the Engineers Syndicate in this capacity, as well as the contractor who carries out the works, so he or she must register according to the instructions for registration and classification of Iraqi contractors No. 1 for 2005, which define the contractor as a natural person who practices contracting work and holds the identity of registration and classification of Iraqi contractors. As for the contracting company, this is a company established under the Companies Law No. 21 of 1997 and engages in contracting business according to its activity, and has the identity of registration and classification of contractors. Note that the engineer guarantees the defect or demolition of the building, even if the employer has permitted the construction of such defective installations because he or she is obligated to resist the wrong desires of the employer, which stems from his or her commitment to sharing awareness to others on professional practice.

The contractual liability of the engineer and contractor

It is evident in the field of contractual liability that if there is a valid contract with the parties to the consultant engineer and the contractor on the one hand and the injured project owner, the damage results from a breach of the contractual obligations. As for the default responsibility or liability in tort towards other parties not in contract with the engineer or the contractor, the liability of the consulting engineer and the contractor is established in every case in which the engineer and the contractor inflict harm to others (third parties). Such liability is subject to the general rules of tort liability of the necessity of an error on the part of the consultant engineer or contractor, damage to others and a causal relationship between the error and the damage.

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?

There are two sides to this question. The first is the liability of the contractor, which is to be established based on either contractual liability or tort liability, which would be available to third parties to claim compensation equal to damage or injuries that they suffer from the contractor's default or wrongdoing, although they have no contractual arrangement in place with that contractor. The second part of the answer concerns the insurance coverage for contractual or in-tort liability. Under the Iraqi legal system, insurance is a contract and may cover any form of liability that the contractor may request, subject to each insurance company's field of activity or services that they offer, knowing that several local insurance companies provide comprehensive insurance and others provide reinsurance services locally or abroad as they represent international insurance companies providing coverage of different kinds to companies doing business in Iraq.

Iraqi law does not provide for the limits of insurance coverages for damages to the properties of third parties, delay damages and damages due to environmental hazards and also does not provide for the limitation of the contractor's liability for such damages; the matter is subject to the contract to be concluded with the insurance company and, of course, the verification of financial capability of that insurance company.

Damages resulting from injury to workers are subject to the provisions of the Pensions and Social Security Law No. 39 of 1971. This law, along with the Iraqi Labour Law, both provides specific legal requirements and governs the employers' liabilities towards their employees in case the latter suffer from a work injury or incident, whether minor or severe, or even if it results in partial or total disability or death. There is no legal stipulation concerning financial compensation for the

injured employees, but pension payments are available as well as health coverage that the employee may benefit from; this is the mandatory coverage available to employees. However, employers are also entitled to offer voluntarily (by agreement) private insurance coverage to their employees, often to expatriate employees, aside from the governmental coverage provided under the foregoing laws, for the latter only constitute essential benefits.

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?

Investing foreign companies that enter into contracts with the Iraqi government shall hire Iraqi staff equivalent to at least 50 per cent of its total employees in coordination with the Iraqi Ministry of Labour and Social Affairs (MoLSA).

The practice of MoLSA is that work permits that are required to be given to expatriate employees are only available to employers who hire two local employees for every expatriate employee they hire. Otherwise, the work permit application for expatriate employees shall be denied or suspended.

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?

There are various types of employment forms that employers may seek to apply based on the kind of work or project they are performing, as follows:

- permanent or indefinite employment, which is the form for employment that is not definable in time;
- fixed-term contract, which is a contract for a certain period of time for up to one year;
- part-time contract, which is a contract by which the employee works a certain number of hours over the week; and
- seasonal or project-based employment, which is a form of employment where the employer hires a certain number of employees to fulfil specific projects, with their employment ending by the time the project is completed.

In any of the preceding forms of employment, there is an available termination mechanism, whether by the expiry of employment or by specific procedures, whether attributed to the employer, redundancy or the employee him or herself). One of these measures is the fact that the employment ends when the project that the employee is working on has been completed.

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?

The employment of foreign workers is regulated under the provisions of the applicable Iraqi labour code as follows:

- No foreign worker may be engaged in any occupation whatsoever before obtaining a work permit.
- Work permits will be issued by MoLSA after paying the relevant fees.
- The employer shall give to the foreign worker recruited to work in Iraq, at his or her own expense, a ticket to the country from where he or she recruited him or her unless the worker stops working before the contract expires for reason of illegality.
- The employer shall, upon the death of the foreign worker, bear the costs of preparing the corpse of the deceased worker and his or her transportation to his or her home country or place of residence upon the request of his or her heirs.
- The Minister of Labour may issue particular instructions governing the recruitment and employment of foreign workers in Iraq.
- A foreign worker, legally residing in Iraq for work purposes, is not considered to be in an illegal or irregular situation just because he or she has lost his or her job, and the job loss in itself does not lead to the withdrawal of the residence permit or work permit unless the worker has violated the Iraqi laws.
- MoLSA and workers and employers associations, each separately, may establish contacts and exchange information regularly with their counterparts in the foreign workers' home countries or the countries from which they came, and conclude bilateral agreements to follow the recruitment terms and working conditions of these workers from both sides to ensure fair recruitment and equal opportunity and treatment.
- Any party or person who violates the provisions of this chapter shall be punished by a fine of three times the worker's minimum daily wage to three times his or her minimum monthly wage.

Other than the above provisions enacted for the employment of foreign workers in Iraq, employment of those foreign workers is subject to the same rules and provisions of the labour law applicable to Iraqi workers in respect of their rights, liabilities and relation with the employer. This includes limited working hours; a fixed rest day at the weekend; a lunch or rest break over the working day; the right to have annual leave and other paid leaves including sick leaves and also unpaid leave; the right to have their wages paid on time; the right to be treated respectfully and in an environment free of any harassment; the right to consider their human rights in all dealings; and the right to have a safe working environment that considers and applies all health, safety and environmental regulations applicable in Iraq, whether locally or under the international treaties relevant to Iraq. This includes having protective gear available and having safety officers working in workplaces for a certain number of workers under one project, such as mines and construction sites.

There are also several available legal rights stipulated under the Iraqi labour law that can be elaborated on in further detail.

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?

If a foreign contractor decides to close its project or operations in Iraq, the most practical way to do so is to liquidate the entity it has in Iraq, necessitating the consent of some official authorities, including the Tax Commission and MoLSA. For the Tax Commission to close the tax file after verifying that there are no dues pending; as for MoLSA, if it is to approve the liquidation of the project, it must confirm that all obligations of employees' termination have been adhered to. For this purpose, if the contract is of limited duration the matter will be easy because the employment contract will expire on its expiry date. If the contract is for an unlimited period, it is recommended that the employer amicably settles the termination with the terminated employees in writing to avoid any compensation that those terminated employees may claim.

The minimum legal rights of the terminated employees are:

- notice period (at least one month);

- end-of-service benefit amounting to two weeks for each year of service should be paid to the terminated employee as the end-of-service payment; and
- pending wages and compensation of any unused annual leave.

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?

Payment of the fees shall become due upon the delivery of the work unless the agreement states otherwise without prejudice to the following:

- If the work consists of several different parts or where the price has been fixed based on the unit, either contracting party may require an inspection after the completion of every such part or after the completion of such part that has significance as compared with the totality of the work; in this case, the contractor may receive a pro-rata payment to the extent of the part of the work that has been completed.
- It would be assumed that the inspection of the part of the work that has been paid has been carried out unless it is revealed that the payment was only on account.

In addition, contractors are only allowed to place liens on the property (whether directly or even if by agreement with the owner) by a court order or an order from an official authority entitled to do so. On agreeing with the owner, the contractor can place a precautionary attachment on the property that becomes subject to execution seizure if the owner fails to fulfil its obligation. This is aside from the contractor's right to file a legal action demanding payments due from the owner. This is a debt that is subject to judicial execution with specific interest and expenses to be added until the date of actual fulfilment.

'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?

Iraqi laws do not prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the main contractor's receipt of payment from the owner, but the subcontractor is allowed, under Iraqi law, to directly claim from the owner amounts owed by the main contractor subject to the following conditions:

- the claimed amount does not exceed the sums that are due by the owner to the main contractor at the time of the commencement of the proceedings;
- the subcontractor's workers have the same right of action against the main contractor and the owner;
- where an attachment has been levied by the subcontractor upon sums accruing from the owner or the main contractor, the workers of the subcontractor have the right of privilege on the sums due to the main contractor or to the subcontractor at the time of levying the said attachment in proportion to the amount due to each of them. These sums may be paid to them directly; and
- the rights of the subcontractors and of the workers highlighted above have priority (privilege) over those of a person to whom the main contractor has assigned sums due to it from the owner.

Contracting with government entities

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

If a government agency engages a contractor and fails to make payments or fulfil its other obligations, it may not argue sovereign immunity because it entered into the contract in a commercial capacity and as a contracting party equal to the other party. Hence, the provisions of Iraqi law and the conditions of the contract between the contracting parties apply to any claim or dispute related to any specific project.

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?

Work interruption of major projects is regulated under the applicable laws and regulations.

Suspension and extension of construction works, supply contracts and consulting services contracts

If the suspension period of supply contracts or non-consulting services contracts exceeds 15 days and if the suspension period of consulting services contracts exceeds 60 days, the governmental entity (which is a party to the contract) may take the procedures necessary for determining the matter as follows:

- to terminate the contract if the governmental entity causes the suspension. In such a case, the contractor shall be paid for all works performed by it;
- if the suspension is caused by a force majeure event in supply contracts, consulting contracts and non-consulting contracts, payment shall be made to the contractor for the completed works and resuming work can be determined after the expiry of the force majeure event. If the force majeure event continues, the contract may be terminated by mutual agreement of the parties on the ground of impossibility of performance owing to force majeure; and
- in the event of the termination of the construction contract by the owner without the consent of the contractor (except the event stated in article 67 of the conditions of construction for civil engineering), the contractor shall be paid for the profits it lost from the contract amount provided that such payment shall not exceed 5 per cent of 80 per cent of the non-performed works plus expenses listed in article 68 of the same conditions or any substitute document.

As a matter of general legal provisions, any work performed under a contract entails the rights of the contractor to a corresponding amount that is to be paid by the owner as long as the works performed are within the characteristics of the contract and, as such, payments become a debt on the owner side whether stipulated in the contract or not.

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?

Under Iraqi law, and aside from any contractual agreement, contractors can be excused from performing their contractual obligations owing to events beyond their control. The cases of relevance are as follows:

- As a general principle, article 168 of the Civil Code states that: 'if the obligee of a contract cannot perform his obligations specifically it will be adjudged to pay damages for non-performance of its obligation unless it establishes that the impossibility of the

performance was due to a cause beyond its control; the adjudication will be the same if the obligee has delayed the performance of its obligation'.

- In construction contracts, the Iraqi Civil Code deals with the matter of the obligee's non-performance of its contractual obligations for a cause that falls beyond its control as follows:
  - the craftsperson's contract comes to an end by the impossibility of execution of the work;
  - where the impossibility of the execution was due to force majeure, the contractor will not be compensated except to the extent of the benefit obtained by the owner as provided for under article 889 of the Iraqi Civil Code. Where the impossibility of execution of the work was because of a fault on the part of the contractor, it shall claim the aforementioned compensation but will be responsible for its fault;
  - where the thing has been perished or became defective owing to a fortuitous event before delivery thereof to the owner, the contractor may not claim from the owner remuneration for its work nor reimbursement of the expenses incurred except where the owner has been served with a notice to take delivery of the thing (in this case, the perishing of the materials of the work shall be borne by the person who supplied them);
  - where, however, the contractor failed to comply with a formal summons to deliver the thing or where the perishing or the defect sustained by the thing before delivery was due to the contactor's fault, it is under an obligation to indemnify the owner for the materials that the latter had supplied for carrying out the work; and
  - where the perishing of or the defect sustained by the thing is because of a fault by the owner or to a defect in the materials supplied by it, the contractor is entitled to remuneration and damages where necessary.

DISPUTES

Courts and tribunals

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

Generally, Iraqi first instance courts have the competence to determine the disputes of all kinds of construction contracts. These courts exist in every region of Iraq. Specialised first instance courts were established in all governorates of Iraq (except the Kurdistan region) under the name 'courts concerned with commercial matters' to determine the disputes of contracts, governmental construction contracts and commercial nature disputes in which a foreigner is a party.

Judgments rendered by either of the two courts above can be challenged by appeal within 15 days and by cassation within 30 days from the day after judgment is served or considered served.

As for tribunal establishment, the Iraqi Civil Procedure Code permits parties to a dispute to resort to the competence of a national arbitrator or arbitration committee (tribunal), which parties could be of the legal or technical profession of any specialisation of relevance to the matter of dispute as the parties may elect for the tribunal to decide on the subject of dispute; the procedural requirement for this dispute settlement mechanism is that the tribunal award is not automatically executable; rather, it must receive validation from the first instance court for the execution department to put it into effect.

Dispute review boards

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

In Iraq, matters disputes are not subject to review by the dispute review boards but by the appeal committees or appeal court established to review court orders as well as to review tribunal awards in the exact mechanism of a judicial verdict; the appeal decisions are also subject to be challenged before the court of cassation.

However, dispute resolution and review in government bidding and contracting processing are regulated as follows.

First, disputes after signing the contract shall be resolved amicably by forming a joint committee of the disputing parties according to the provisions of the law and the relevant regulations, and the contract terms and conditions. Minutes shall be prepared for the foregoing, and will be authenticated by the head of the government contracting party.

Second, if no amicable settlement is concluded, one of the following mechanisms should apply, which shall be included in the contract:

- arbitration, which shall be as follows:
  - domestic arbitration. This shall be according to the procedures outlined in the tender conditions or the Civil Procedural Code No. 83 of 1969;
  - international arbitration. The governmental party of the contract may choose to settle the disputes by international arbitration in case of emergency, for big and significant strategic projects or if one of the contracting parties is foreign, provided that the following should be considered:
    - the accredited international arbitration body to be chosen;
    - the place and language of arbitration should be designated;
    - using Iraqi laws as the governing law; and
    - the governmental party shall have employees whose qualifications meet the requirements of settling the disputes by this mechanism; or
- referring the dispute to the competent court for determining its subject matter.

Third, the contracting parties shall choose the optimal mechanism for settling disputes resulting from the contract's implementation according to one of the mechanisms listed above and according to the conditions of the contract, which must be stated from the beginning in the tender documents.

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?

In Iraq, there is no voluntary participation of professional organisations in mediation because mediation is a rarely used mechanism of dispute resolution. Usually, each of the disputing parties appoints a representative for the purpose of the mediation process of a specific dispute but it is rare for mediation to resolve a dispute in Iraq, even if it is included as a condition in the contract.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

The obligation of confidentiality concerning mediation is subject to its contractual extent, meaning that the parties that executed the confidentiality provision must be bound by this obligation from a contractual perspective. However, such an obligation is not extendable

to proceedings or arbitration because the court may order to revoke any obligation of confidentiality in favour of investigating the case or hearing the facts related to 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?

Domestic arbitration in Iraq under the Civil Procedural Code is not preferred to resorting to local courts because Iraqi law adopts a provision that prevents the execution of the arbitral award unless it is certified by the court (article 272/1 of the Civil Procedural Code). In such an event, the certification case gives the court of competence the authority to interfere in the arbitral award and re-examine the dispute (article 274 of the Civil Procedural Code).

In practice, the arbitral award is considered as similar to an expert report, as the courts usually resort to cancelling the arbitral award and referring the case subject matter to experts for re-determination of the dispute, and render a new judgment accordingly.

Accordingly, domestic arbitration is considered an additional phase that involves unnecessary effort and expenditure because the local Iraqi courts will re-determine the dispute as if the arbitral award did not exist.

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?

As a matter of the Iraqi legal system, international arbitration has been subject to increasing recognition in the past 10 years. Although it was not explicitly stipulated in the Iraqi Civil Procedure Code, it is stated in the Regulations of Governmental Contracts Implementation No. 2 of 2014 as a legally recognised mechanism of dispute resolution with foreign contractors doing business in Iraq. As a matter of procedural law, international arbitration may adopt any legal system that the seat of arbitration considers, whether ICC rules or similar procedural provisions, as the referral to such provisions and disregarding the Civil Procedural Code is not a matter of public order and may be subject to the agreement of the parties. If it was stated in the contract that Iraqi law would govern and interpret substantive aspects of the contract including the dispute, then Iraqi law would be referred to as the governing law of contract, although the parties also may agree on a different substantive law to be the law governing the contract.

The other side of this dispute settlement mechanism is the enforcement of the arbitral award, which would need to consider whether there are treaties or conventions between Iraq and the country of the seat of arbitration, knowing that the local Iraqi court would have to validate the award for it to be executable in Iraq.

Dispute resolution with government entities

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

According to Regulations of Governmental Contracts Implementation No. 2 of 2014, Iraqi government entities are permitted to participate in private arbitration, whether ICC or ICDR, and they will be subject to whatever award is issued in favour of the contractor. However, the execution of the award should consider the procedural requirement for having it validated by an Iraqi court unless the plaintiff decides to consider executing the award abroad against any assets belonging to the Iraqi respondent.

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?

The enforcement of arbitral awards issued by a foreign or international tribunal is subject to the same rules that apply to the enforcement of arbitral awards given by a domestic tribunal. Both domestic and foreign or international arbitral awards should be certified by the local courts. Certification of the arbitral awards by Iraqi courts gives those local courts the right to re-determine the dispute.

Law No. 30 of 1928 of Foreign Judgments Implementation in Iraq does not state the principle of automatic tribunal awards execution in Iraq. It may be extended to apply to foreign arbitral awards, especially now that Iraq is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

The Iraqi Civil Procedures Law 83/1969 contains provisions governing the arbitration undertaken based on Iraqi law without reference to foreign arbitral awards. However, to get a sense of how this would work in practice, as long as the applicable law considered in resolving the dispute is Iraqi law and that the procedural laws or regulations applied do not conflict with Iraqi arbitration procedural laws, the foreign arbitral award could be, in principle, enforced in Iraq.

On 4 March 2021, the Iraqi parliament voted that Iraq will become a party to the New York Convention, which came into force on 7 June 1959. The law maintained the following reservations:

- the provisions of the Convention shall not apply to arbitral awards issued before the enforcement of this law;
- the provisions of the Convention shall not apply to recognising arbitral awards issued by other contracting countries. The enforcement of said awards shall also be subject to reciprocity;
- the Convention should not apply to Iraq unless those disputes resulting from the contractual legal relationships are considered commercial ones under Iraqi law; and
- the law of becoming a party to the Convention shall come into force starting from publication in the official gazette. The law mentioned above can be used as a ground for claiming the enforcement of foreign or international arbitral awards within Iraq according to the Convention's provisions.

Iraq also is a party to several treaties, such as the Riyadh Convention, which governs the execution of arbitration awards in the member countries of the Arab League.

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?

The prescription of right does not automatically extinguish the stipulation of the contractor's or engineer's 10 years' warranty mentioned in the Iraqi Civil Code. Instead, it is required from the other litigant to argue or plea the statute of limitations. If the debtor argues the statute of limitations, the original lawsuit must be dismissed because the law prohibits hearing cases or pleas of the lapsed right by prescription if the debtor has filed a plea for a prescription. Therefore, the effect of a lawsuit regarding a forfeited or outdated right by prescription shall be equal to the effect of the plea, that they are not heard, and that the court will dismiss them both because of the statute of limitation that prevents hearing of the lawsuit.

As regards the validity of an agreement of statute of limitations and whether it is recognisable following Iraqi substantive law, note that the rules of prescription are not of a public order nature; hence, courts do

not raise such a plea on their own, and that the right to argue prescription is forfeited by acknowledging the right claimed. Furthermore, the statute of limitations is to be applied to the subjective right. When the subjective right has elapsed by the statute of limitations a lawsuit in its regard is not to be heard, yet the contracting parties are not lawfully entitled to conclude an agreement by which they set a rule to deprive one of the parties, after a certain date, from being entitled to make a claim or even counterclaim because such a stipulation is considered as obstructing a constitutionally guaranteed right of litigation. Hence, the means of protecting rights by way of claims are not to be blocked because such agreement is contrary to public order and shall be deemed null and void if argued from an Iraqi legal perspective.

The statute of limitations is of several types in terms of gaining or extinguishing the right (the prescription and the statute of limitations).

There is a long prescription (15 years) and a short prescription (five, three or two years) in terms of its period. As for the statute of limitations, it is one reason for acquiring ownership and rights in rem if their possession continues for the period stipulated by law.

The extinguishing prescription leads to the lapse of the right if the owner neglects to use it or claim it for a specific period. It leads to the forfeiture of all personal and real rights except the property right. The 15-year statute of limitations includes movable and real estate. The short statute of limitations is five years. This statute of limitations pertains to the periodic renewable rights (such as building rent), taxes and fees owed to the state, and finally, the rights of some self-employed. There is also the triple statute of limitations, that is, the prescription for the right to it after a lapse of three years, and this type applies to unjustly paid fees and taxes. The last type is the annual statute of limitations (where the right in this type expires after a lapse of one year) which concerns the rights of professionals, vendors, merchants and manufacturers, among others.

Certain elements and conditions are to be assessed and looked at in each type of statute of limitations or prescriptions mentioned above.

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?

Iraq was one of the first countries to adopt environmental protection and formed the High Commission of Human Environment by Presidential Decree No. 2411 dated 10 March 1974 after it participated in the United Nations Conference on the Human Environment in Stockholm in 1972. On 13 December 2009, the Iraqi Cabinet issued Law No. 27 of 2009 to protect and improve the environment.

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 duties and liability imposed by the Iraqi Protection and Improvement of the Environment Law can be highlighted as follows.

- Before its establishment, the owner of any project should prepare a report regarding the estimation of environmental impact, including the following:
  - the estimation of the negative and positive impact of the project on the environment and impact on the surrounding environment;
  - the proposed means to avoid and to treat the causes of the pollution to abide by environmental regulations and directives;
  - emergency pollution cases and probability and the precautions that should be taken to prevent their occurrence;
  - the possible alternatives to using technology less harmful to the environment and rationalising the resources usage;
  - reducing waste and recycling or reusing it as much as possible; and
  - the evaluation of environmental feasibility for the project and evaluation of the cost of pollution compared with the production.
- An economic and technical feasibility study for any project shall contain the report stipulated in the point above.
- Anyone who, by his or her action, negligence or omission or by the action of the persons or sub-gradients who are under his or her auspices, supervision, or control, or due to his or her violation of the laws, norms and regulations could cause damage to the environment shall be obligated to pay compensation, remove the damage within a suitable period and return the situation to its condition before the damage happened by his or her methods and within the period and provision stated by the ministry.
- In case of negligence, omission or refusal to perform the above, the ministry, after sending a notification, has the right to make the necessary arrangements and procedures to remove the damage and charge the offender all expenditure paid for this, in addition to all administrative charges, while taking into consideration the following points:
  - the degree of risk of the pollution of different kinds; and
  - the effect of the pollution on the environment, in both the present and the future.

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'?

Since the 1970s, Iraq has been a signatory to several bilateral treaties of investment protection such as those concluded with Iran, Jordan, Kuwait and Saudi Arabia. Iraq has also signed off on the accession of Iraq to the Agreement on Transparency in Treaty-based Investor-State Arbitration for 2014 and has ratified the investment protection agreement between the Islamic league countries.

There are several other treaties that Iraq is a signatory to or has ratified by local laws.

The Iraqi Investment Law No. 13 of 2006, as amended, defined investment to be the investment of capital in any economic or service activity or project that results in a legitimate benefit for the country, whether it was carried out by a local or foreign investor on an equal basis; and whether such investment was in any field of project, except the oil and banking sectors, as separate laws regulate these two sectors.

Tax treaties

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

The Iraqi government has ratified a variety of conventions for avoiding double taxation and preventing tax evasion including, but not limited to, the following:

- the convention for avoiding double taxation and preventing tax evasion between Iraq and Georgia;

- the convention for avoiding double taxation and preventing tax evasion between Iraq and the United Arab Emirates No. 10 of 2019;
- the Convention for avoiding double taxation and preventing tax evasion between Iraq and Slovakia;
- the draft agreement for avoiding double taxation and preventing tax evasion between Iraq and Bulgaria;
- the agreement on avoiding double taxation and preventing tax evasion between Iraq and Austria;
- the agreement on avoiding double taxation and preventing tax evasion between Iraq and Bologna;
- the agreement on avoiding double taxation and preventing tax evasion between Iraq and Hungary No. 18 of 2020; and
- the law of ratifying the two letters attached with the agreement on avoiding double taxation and preventing tax evasion between Iraq and Egypt (ratified by Law No. 161 of 1968 and Law No. 12 of 1973).

Currency controls

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

There are no legal restrictions on changing operating funds or profits from one currency to another in Iraq.

Removal of revenues, profits and investment

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

Iraqi Investment Law No. 13 of 2006 provides a clear path and guarantees the freedom of cross-border exchange of funds for project costs and expenses as well as for any revenues generated from that project. These guarantees have been in effect for some time now and investors rely on them in terms of the right to remove and fund any movements between Iraq and any other country in which the investor elects to deposit his or her funds generated from his or her project in Iraq.

Under applicable Iraqi laws, the investor shall have the right to take out the capital he or she brought into Iraq and its proceeds following the provisions of this law and, according to the instructions of the Central Bank of Iraq, in a convertible currency after paying all of his or her taxes and debts to the Iraqi government and all other authorities. In addition, non-Iraqi technicians and administration employees working on any project shall have the right to transfer their salaries and compensations outside Iraq following the law after paying their dues and debts to the Iraqi government and all other entities.

UPDATE AND TRENDS

Emerging trends

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

The most common trends in the construction industry as per the Association of Iraqi Contractors are as follows.

Implementation on a turnkey basis

Under contracts on a turnkey basis, the contractor bears 100 per cent of the risk. It is usually used for complicated projects in which the owner cannot accurately prepare the drawings and quantities tables in emergency projects. This type of work is generally awarded to contractors with a lot of experience and technical capabilities.

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Implementation on a total price basis

Under contracts on a total price basis, the contractor implements the works according to the drawings and designs provided by the owner for a total lump-sum amount. In this case, the contractor bears 75 to 80 per cent of the risk.

Direct implementation

Under this option, there is no contract for implementing a project's construction works, but the owner has the workforce and ability to implement the project through its own technical and financial capabilities. The owner provides the materials, workforce and equipment needed for the project and supervises each phase of the project. In such a case, the owner is the implementing party, supervisor and designer (by itself or assigning the designing task to an engineering office).

Ireland

Rhona Henry, Kimberley Masuda and Nicola Dunleavy*

Matheson

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?

In Ireland there is a mandatory system of certification of building construction, which was introduced by the Building Control (Amendment) Regulations 2014 (BCAR). This system is intended to provide a level of assurance that a building is built in accordance with the Building Control Regulations 1997–2021 (the Building Regulations). There are a number of certificates that may be required in relation to any part or installation in a building, including a Certificate of Compliance on Completion confirming that the building works comply with the Building Regulations.

If BCAR applies to a project, a commencement notice (ie, a notification to a Building Control Authority) that a person intends to carry out works will have to be issued no fewer than 14 days and no more than 28 days prior to works commencing on site.

In addition, there are numerous categories of developments listed in the Building Regulations that will require a fire safety certificate and a disability access certificate, and these include works in connection with the design and construction of a new building.

Under the Safety, Health and Welfare at Work (Construction) Regulations 2013, contractors are also subject to strict health and safety requirements. This includes the appointment of statutory roles of project supervisor for the design process and project supervisor for the construction stage. Further, contractors must keep a safety file and send notifications to the Health and Safety Authority where necessary.

On 31 May 2017, the government published the General Scheme of the Building Control (Construction Industry Register Ireland) Bill 2017 which has since been renamed the Regulation of Providers of Building Works Bill 2021. The Construction Industry Register (CIRI) was established and is currently maintained by the Construction Industry Federation as a voluntary register of builders and contractors. However, the government has announced its intention to put the register on a statutory footing, with a view to ensuring that builders and contractors have and maintain a level of competence in their area of operation. Builders will be prohibited from carrying out works, or representing that they are entitled to carry out works, unless registered with the CIRI.

The regime applies to any builder carrying out building works that are subject to the Building Control Acts and the Building Control Regulations. However, electrical works carried out by a registered electrician, gas works carried out by a registered gas installer, employees of public bodies carrying out public works and works undertaken by an employee of an approved housing association on a building in its control fall outside the scope of the new bill. Eligibility for registration can be achieved through qualifications, experience or a combination of both. The criteria required for registration will be clear and transparent and will be set out in regulations.

In terms of progress, the bill was published on 12 January 2022 and is currently before Seanad Éireann (the Irish Senate) for review and consideration. If passed by the Seanad, the Bill will be enacted into law and it is envisaged that builders can begin registering in 2023 with statutory registration commencing in early 2024.

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?

Construction workers do not require a licence to work locally in Ireland. However, certain types of consultants and designers, such as architects and quantity surveyors, will need to be registered with the appropriate body (eg, in the case of architects, with the Royal Institute of the Architects of Ireland).

Similarly, tradesmen involved in heating or electrical installation may require registration with the relevant trade organisations (eg, the Registered Electrical Contractors of Ireland).

In addition, if consultants or designers are involved in the auction of property, the purchase or sale of land, the letting of land or property management services (where residential units are included), then the contractor will require a licence under the Property Services (Regulation) Act 2011.

The government's aim is for the Construction Industry Register to be the primary resource used by consumers in the public and private procurement of construction services, and therefore registration is likely to become mandatory.

Competition

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

No, Irish laws do not afford any competitive advantage to domestic contractors.

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?

Irish law includes rules on public procurement and competition that require public contracts to be subject to open competitions in which bidders must act independently. The relevant Irish laws are closely based on the provisions of article 101 of the Treaty on the Functioning

of the European Union and the 2014 Public Sector and Remedies Procurement Directives.

In Ireland, the practice to date has been to regard bid rigging as a form of price fixing or market sharing, which are specifically prohibited under section 4 of the Competition Act 2002 (as amended) (the Act). However, this approach has led to some difficulties with court cases, where bid rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practices outlined in the Act. The Competition (Amendment) Bill 2022 (the Bill) proposes to introduce a new explicit cartel offence of bid rigging through the amendment of section 4 of the Act, including a new definition of bid rigging which covers 'participation or non-participation in a relevant bidding process without informing the person requesting the bids or tenders…'. Types of bid-rigging include, in a relevant bidding process, agreements not to submit or to withdraw a bid or tender; agreements to submit a bid or tender on terms or subject to conditions; and collusive tendering.

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?

The principal statutory source of bribery law is the Criminal Justice (Corruption Offences) Act 2018 (the Corruption Offences Act). This legislation, which was commenced on 30 July 2018, repealed the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906–2010, and modernised and consolidated the law in this area. Under the Corruption Offences Act, it is an offence for any person to corruptly give to, or accept from a person, a 'gift, consideration or advantage' as an inducement to, reward for or on account of any person doing an act in relation to his or her office, employment, position or business. It is also an offence for any person to corruptly give or accept a 'gift, consideration or advantage' to induce another person to exert improper influence over an act of an official in relation to that official's office, employment, position or business. Similarly, it is an offence for an Irish official to do any act or use any confidential information in relation to his or her office to corruptly obtain a 'gift, consideration or advantage'. Under the Corruption Offences Act, 'corruptly' is defined widely and includes acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by other means.

A person guilty of an offence under the Corruption Offences Act is liable on summary conviction to a fine of up to €5,000, imprisonment for a term not exceeding 12 months or an order for the forfeiture of property, or both. A person convicted on indictment is liable to an unlimited fine, imprisonment of up to 10 years or an order for the forfeiture of property, or both. In the case of a public official, a court may order that he or she be removed from his or her position as a public officer. The court can also prohibit those convicted of corruption offences from seeking public appointment for up to 10 years.

If a contractor has illegally obtained the award of a contract through bribery, it will be a matter for the courts to determine if the contract is enforceable. To date, a small amount of domestic bribery law enforcement has taken place, and this has focused on bribery of Irish public officials.

There is no distinction drawn in Irish law between facilitation payments and other types of corrupt payments. As such, a facilitation payment will be illegal if it has the elements of the offences described in this question.

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?

Section 19 of the Criminal Justice Act 2011 (the 2011 Act) introduced a general obligation to report to the Irish police information that a person or company knows or believes might be of material assistance in preventing the commission of a corruption offence or securing the arrest, prosecution or conviction of another person for a corruption offence.

The 2011 Act makes it an offence for a person to fail without reasonable excuse to disclose information as required by section 19. An individual guilty of this offence is liable on summary conviction to a fine of up to €5,000, a term of imprisonment not exceeding 12 months or both. On indictment, an individual may be liable to an unlimited fine, imprisonment for up to five years or both.

Under the Protected Disclosures Act 2014, any employee who makes a disclosure to the Irish police regarding a suspected offence is protected from dismissal and penalisation by their employer.

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?

Persons are free to make political donations in Ireland subject only to the restrictions set out in the Electoral Acts 1997-2012 (the Electoral Acts) and guidelines published by the Standards in Public Office Commission (the Guidelines).

The Electoral Acts and the Guidelines provide that a political party cannot accept a donation from a person (which includes an individual or a body corporate) exceeding €100 without knowing the name and address of that person. If a person makes donations exceeding €1,500 to a political party, or €600 to an individual member of the Houses of the Oireachtas, an MEP, or a candidate at Dáil, Seanad or European elections, in any one year the political party or individual donee must disclose this information to the Public Offices Commission in a donation statement.

Irish law does not expressly prohibit the ability of corporations to contract with public bodies because of their support for political candidates or parties. However, the Electoral Acts and the Guidelines provide that corporate bodies making donations over €200 must disclose this in their annual return and, further, they must be entered on the Register of Corporate Donors maintained by the Standards in Public Office Commission. Therefore, public bodies contracting with contractors making political donations will be aware of those donations.

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 rules as government employees?

In Ireland, unlike in other jurisdictions, there is no distinction in legislation between corrupt acts or omissions of private persons and corrupt acts or omissions of persons employed by or acting on behalf of the public administration of the state. However, there is a presumption of corruption in certain instances that only applies to public officials. These include where:

- a payment was made by a person, or agent of a person, who is seeking to obtain a contract from a government minister or a public body;

- an undisclosed political donation above a certain threshold is made to certain specified persons and the donor had an interest in the donee carrying out or refraining from doing any act related to the office or position; or
- a public official is suspected of committing an offence under the Corruption Offences Act and the person who gave the gift or advantage had an interest in the public official carrying out a function relating to his or her position as a public official. Therefore, the compliance obligations of construction professionals who are employed by or are acting on behalf of the state are no different than if they were employed by or acting for private entities.

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?

Contractors should also be aware of the tax implications in the local market. Where a trade is being carried on in Ireland by a contractor through a branch or agency, a contractor (as a non-resident company) will generally fall within the scope of Irish corporation tax, with the income attributable to the branch or agency being subject to corporation tax at the 12.5 per cent rate applicable to trading income. In this context, it would then need to consider whether its presence in Ireland amounts to a 'permanent establishment' for tax treaty purposes (assuming the contractor is resident in a country with which Ireland has a tax treaty). Contractors also need to consider the taxes they will pay on behalf of their employees – the starting position is that, where an employee of a contractor (as a non-resident company) carries out any duties in Ireland, Irish payroll taxes would need to be operated by the contractor (though certain dispensations can apply depending on the time spent in Ireland by the employee in question). Finally, the contractor's presence in Ireland would need to be considered from a VAT establishment perspective.

Where contractors from another EU member state send employees to work in Ireland for a limited period, those employees will be entitled to certain minimum terms and conditions of employment under the European Union (Posting of Workers) Regulations 2016 (as amended). To monitor compliance with such requirements, the Regulations will require such contractors to furnish certain information to the Workplace Relations Commission no later than the date on which the work begins.

There may also be immigration law considerations where the foreign contractor employees are not nationals of a country within the European Economic Area (ie, the member states of the European Union, Iceland, Norway and Liechtenstein), Switzerland or the United Kingdom as such individuals require an employment permit to work in Ireland (subject to certain limited exceptions).

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 most commonly used standard-form construction contracts are as follows:

- the Conditions of Building Contract issued by the Royal Institute of the Architects of Ireland (RIAI) (together with a subcontract form); and
- the Engineers Ireland conditions of contract for works of civil engineering construction (together with a form of subcontract).

These conditions of contract are, particularly with respect to larger projects, usually heavily amended through a schedule of amendments to reflect risk profiles currently acceptable in the market and to reflect legislative changes. In a design-and-build scenario, a further set of amendments can be incorporated into these conditions to facilitate a design-and-build procurement route.

In the case of more complicated projects – for example, in the pharmaceutical, information technology and energy markets – there are a number of other types of contracts that are commonly used. For example:

- the International Federation of Consulting Engineers suite of contracts, which includes a build-only form of contract, a design-and-build mechanical and electrical contract and a turnkey or engineering, procurement and construction contract (more commonly known as FIDIC contracts);
- management contracts (which, in Ireland, are typically based on the RIAI form);
- the Institution of Engineering and Technology MF/1 form;
- New Engineering Contract forms; and
- Joint Contracts Tribunal forms.

For public sector works, the Government Construction Contracts Committee (GCCC) has produced a suite of standard documents (including build-only and design-and-build (for both building works and civil engineering works) contracts, a site investigation contract, a framework agreement, a minor works contract, a short-form contract and a contract for early collaboration) for use in public-sector construction procurement.

The most commonly used design-only contracts in Ireland are those contracts that are produced by the regulatory bodies for disciplines such as mechanical and electrical consultancy, civil engineering and architecture, together with bespoke forms. When used, especially in the context of larger projects, these contracts are often heavily amended. In addition, the GCCC has produced a design-only contract for use in public-sector projects.

The language used for standard form construction contracts is English. The choice of law is typically Irish law and the venue for dispute resolution is typically Ireland.

A new private-sector contract, for use in relation to medium to large-scale construction projects and for projects that have been designed by the employer, has recently been introduced in the market. This private-sector contract is in its infancy and so untested to date.

Payment methods

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

The Construction Contracts Act 2013 expressly states that a construction contract (as defined under the Act) should provide for a payment claim date (or an adequate mechanism for determining a payment claim date) for each amount due under the construction contract, and the period between the payment claim date for each amount, and the date on which the amount is due.

Contractors and subcontractors are generally paid monthly and typically by electronic payment. They are usually paid based on the progress of the works. Designers and contractors can be paid monthly or based on the achievement of agreed milestones.

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?

Projects are typically procured on a build-only or design-and-build model.

In the build-only model, the design and construction elements of the project are separated. In this scenario, the owner engages the contractor to carry out the construction and separately appoints design consultants, who will feed design instructions to the contractor.

In a design-and-build scenario, the construction and design elements are combined so that the owner has a single contract with the main contractor, who then appoints design consultants and sub-consultants.

In both scenarios, if it is a large project the contractor will usually engage subcontractors to carry out works packages (such as waterproofing or lifts).

For more complicated builds or projects that are very time-sensitive, management contracting, construction management, mechanical and electrical and turnkey or engineer, procure and construction (EPC) forms of construction contracts can be used. The key feature of an EPC or turnkey contract is that there is a relatively onerous risk transfer to the contractor of price, time and quality.

PPP and PFI

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

The State Authorities (Public Private Partnership Arrangements) Act 2002 (as amended) provides the legislative basis for PPPs in Ireland. The use of PPPs is subject to an institutional framework and various guidelines at both national and EU level. The National Development Finance Agency (NDFA) and the Department of Public Expenditure and Reform's Central PPP Unit and PPP Steering Committee play key roles in the PPP process in Ireland. The Central PPP Unit provides guidance, technical notes and the policy and legislative frameworks underpinning the use and procurement of PPPs. The Central PPP Unit also chairs the PPP Steering Committee which is responsible for project selection, establishing milestones and delivery targets and preparing project reports for the Irish government. The NDFA generally acts as financial advisor to the state in respect of PPP projects and public investment projects valued at over €100 million and procures and delivers PPPs in most sectors, albeit that in some sectors the sponsoring state body may not use the NDFA (eg, in relation to certain transport projects, Transport Infrastructure Ireland procures its own PPPs).

In 2006, the NDFA developed a template PPP Project Agreement (based largely on the UK PFI model). This template is not mandatory for use in PPP projects but it generally forms the foundation of Irish PPP project agreements with adaptations for individual projects. To be classified as a PPP contract, a contract must be for a minimum of five years, and there is no upper limit. Generally, PPP contracts tend to be for long periods (typically 20-25 years).

For further information on the Irish government's approach in relation to the evaluation and procurement of PPPs, refer to the Department of Public Expenditure and Reform's 'Guidelines for the use of Public Private Partnerships (PPP)'.

Joint ventures

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

The liability in a joint venture will depend on the corporate structure used. The members of a consortium may allocate liability and responsibility among themselves as a matter of contract. The apportionment and allocation of liability and responsibility will depend on the structuring of the joint venture and its relevant organisation documents.

Members of a consortium entering into a joint venture arrangement can choose from a variety of structures, including the following:

- private company limited by shares or a Designated Activity Company;
- partnership;
- Investment Limited Partnership (ILP);
- Irish Collective Asset-management Vehicle (ICAV); and
- unincorporated joint venture.

Private company limited by shares or Designated Activity Company

If the joint venture is structured as a private company limited by shares or a designated activity company, the liability of members is limited to the amount, if any, unpaid on the shares they hold. A shareholders' agreement, together with guarantees from shareholders, is typically used to further apportion liability and responsibility between the consortiaum-members or joint venture partners.

Partnership

If the joint venture is structured as a partnership, each partner is jointly liable for the debts and obligations of the partnership and jointly and severally liable for the wrongful acts and omissions of his or her co-partners.

A limited partnership is governed by the Limited Partnerships Act 1907. There must be a general partner (GP) and a limited partner (LP). This liability of the limited partner is limited to the amount of its capital contribution under the limited partnership agreement between the GP and LP. The general partner has unlimited liability; as a result, GPs tend to be incorporated as limited liability companies.

ILP

In addition, Ireland's partnership laws have been updated to modernise Ireland's ILP. The ILP is a regulated fund and is an alternative to vehicles such as the Luxembourg SCSp or the Cayman Islands Exempted Limited Partnership. One of the unique features of an ILP compared to other jurisdictions is its ability to be structured as an umbrella fund with separate sub-funds, with segregated liability between those sub-funds. It is possible to provide for different investment strategies or LPs within each of the sub-funds. In general, an LP's liability will not exceed the amount of its capital contribution or commitment to the ILP unless the LP participates in the conduct of the business of an ILP.

ICAV

Entities could also protect their investment in a joint venture through setting up an ICAV. This form of investment vehicle was created under the Irish Collective Asset-management Vehicles Act 2015. An ICAV is not subject to certain obligations that a limited company would be, such as the requirement to hold an annual general meeting.

Similar to the ILP, an ICAV can be established as an umbrella structure with segregated liability between sub-funds, protecting the investment within each sub-fund. This allows for separate investors, separate pools of assets and differing investment strategies to protect their liability and responsibility.

Unincorporated joint ventures

In our experience, joint venture partners may also choose to use an 'unincorporated' joint venture structure, whereby the joint venture partner entities execute the relevant project documentation and enter into a separate joint venture or consortium agreement to apportion liability and responsibility (which is typically dealt with in a shareholders' agreement in an 'incorporated' joint venture).

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?

Parties are generally free to contract in whatever way they choose, including excluding liability for negligence. However, it is not possible to exclude liability for death or personal injury resulting from negligence. Clauses that seek to exclude liability (exclusion clauses) are interpreted strictly by the courts. This is by virtue of the contra proferentem rule that applies in this jurisdiction, which states that any ambiguity in the meaning of an exclusion clause will be interpreted against the drafter of the contract. Therefore, exclusion clauses must be carefully drafted. Parties should expressly use the term 'negligence' as distinct from other forms of liability.

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?

Unlike the regulatory and legal regimes in the United Kingdom and the United States, parties are unable to avail of a benefit of any contractual right if they are not a party to the contract. This is because of the doctrine of privity in this jurisdiction, which prevents a contract from being enforceable in favour of or indeed against someone who is not a party to that contract. For a third party to receive a benefit, the claimed benefit must be independent or collateral to the main contract. This is typically done through collateral warranties with third parties (eg, tenants, purchasers or funders).

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?

Irish statute law does not require specific insurances in relation to construction projects, save for motor vehicle insurance where appropriate. However, construction projects will typically involve some or all of the following insurances:

- insurance of the project works (typically referred to as 'all risks' insurance), taken out by either the contractor or the employer to cover loss or damage to the works or project materials;
- employer's liability insurance, taken out by the contractor to cover injury to or the death of its employees during the course of a construction project;
- public liability insurance, taken out by the contractor to cover third-party claims in relation to personal injury, death or injury to third parties and property damage (other than damage to the works); and
- professional indemnity insurance, taken out by any party with design responsibility to cover design liability.

Environmental liability can also be dealt with by insurance products in this jurisdiction. A contractor's liability for damages is a matter for commercial negotiation between the parties involved, but note that for liquidated damages for delay to be enforceable they must represent a genuine pre-estimate of the loss (and not be a penalty). The law does not limit contractors' liability for damages.

More recently, the ability for parties to obtain cover for professional indemnity insurance at the required levels has become very difficult and many contracts now include 'commercially reasonable rates' language to allow for contractors to maintain insurance at the best rate obtainable where the required rate cannot be obtained at commercially reasonable rates.

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?

There are no specific local laws that require a minimum amount of local labour to be employed on a particular construction project, and this would indeed be in breach of equality law and discrimination rules.

However, it would not be unusual to see a requirement to hire only local union members (irrespective of their nationality), depending on the level of trade union representation.

On a general level, non-EEA nationals require an employment permit to work in Ireland (subject to certain limited exceptions). The Department of Enterprise, Trade and Employment's policy is to promote the employment of Irish and EEA nationals before offering those jobs to non-EEA nationals. Certain categories of construction and building trades are ineligible for employment permits.

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?

In terms of legal obligations, there are no significant ongoing legal obligations that an employer will owe to an employee once the employee's contract of employment has been terminated. Under common law, the employer's duty of confidentiality and good faith will apply post-termination to certain matters. For example, any reference provided by an employer must not contain any false information that would cause harm to the employee. The employer may also have data protection obligations to the employee post-termination (for example, with regard to the retention of records).

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?

The same laws apply to the treatment of foreign construction workers as apply to local workers, and they have similar rights to local workers. Foreign workers cannot be treated less favourably compared to local workers on the grounds of nationality (race, colour or ethnic origin) under the Employment Equality Acts 1998–2015.

Posted workers (ie, employees who normally work in one EU member state who are sent to work in another member state for a limited period) are entitled to certain minimum terms and conditions of employment when they are sent to work in Ireland under the European Union (Posting of Workers) Regulations 2016 (as amended) (the Irish Regulations). To monitor compliance with such requirements, the Irish Regulations require service providers posting workers to Ireland from within the EU to furnish certain information to the Workplace Relations Commission (WRC) no later than the date on which the work begins. Failure to comply with the disclosure requirements can give rise to the imposition of a fine of up to €50,000. Directors, managers or other

similar officers of a body corporate may also be personally liable where the offence can be attributed to that person.

The Irish Regulations provide for the creation of joint and several liability of the contractor and subcontractor in respect of unpaid wages due to a posted worker in certain circumstances.

A failure to follow such laws may give rise to a claim by the worker under the relevant piece of employment legislation. In addition, if a contractor is the subject of a WRC inspection, this may lead to a fine or prosecution.

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?

If the foreign contractor is still under contractual obligations, there may be payments upon termination of the contract. Termination payments vary from contract to contract but they usually include covering the costs of engaging a replacement contractor to finish the works and for any delay.

Even after a contractor has performed its services, it may still be liable to owners for any defects in the works for six to 12 years after practical completion of the works. The length of time that the contractor will be liable will depend on the contract. Simple contracts contain a default liability period of six years, while deeds have a liability period of 12 years. However, parties are free to contract out of or extend such liability periods. The contractor may also need to consider any redundancies of employees (including possible collective redundancies).

In addition, the foreign contractor will have obligations to its employees and will need to terminate their employment in accordance with employment legislation in Ireland and pay employees in respect of any contractual and statutory entitlements they have on termination of their employment (eg, statutory redundancy payment).

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?

Liens over real estate are not possible. In the case of insolvency, contractors may attempt to place a lien over goods or materials delivered to the site until payment is received. Contractors may also attempt to satisfy their debts through retention of title clauses. For this reason, from an employer's perspective, it is important to ensure that contractors who have not been paid vacate the site promptly and the site is secured against trespass.

Contractors are afforded some statutory protection against the risk of non-payment by section 6 of the Construction Contracts Act 2013 (CCA), which states that payment disputes should be settled by the decision of an adjudicator, which is final and binding in certain circumstances. The appointment of an adjudicator will either be agreed by the parties or will be decided by the Minister for Public Expenditure and Reform. The adjudicator's decision is only binding:

- until the payment dispute is finally settled by the parties;
- a different decision is reached on the reference of the payment dispute to arbitration; or
- if proceedings are initiated in a court in relation to the adjudicator's decision.

Unless otherwise agreed by the parties, it will be treated as binding on them for all purposes and may be relied on by way of defence, set-off or otherwise in any legal proceedings.

The CCA also provides contractors with the right to suspend works in the event of non-payment.

In some circumstances, a contractor may request a guarantee from the parent company of an owner, guaranteeing the fees that the owner has committed to pay.

'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?

Section 3 of the CCA renders ineffective 'pay when paid' clauses except in limited circumstances, such as where a party to a construction contract is in either a bankruptcy or an insolvency process (as appropriate).

Contracting with government entities

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

Sovereign immunity is implemented into the Constitution by virtue of article 29.3, which provides that:

> *Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states.*

However, sovereign immunity does not apply in respect of commercial or trading activities that would be associated with a contractor seeking payment as addressed in the query.

In *Byrne v Ireland* [1972 IR 241], the Supreme Court allowed an appeal from a plaintiff suing the state for damages following a trip and fall along a pathway that had recently been excavated and refilled by a government agency. The Supreme Court held that immunity from suit did not exist in Ireland and found that the state could be found vicariously liable for the actions of its employees.

In *Government of Canada v Employment Appeals Tribunal* [1992 2 IR 484], the court noted that it was doubtful that the doctrine of sovereign immunity was ever conclusively established in Ireland but, assuming that it was, that doctrine of sovereign immunity in Ireland has now expired.

Therefore, a government agency may not be successful in asserting sovereign immunity as a defence to a contractor's claim for payment as this relates to a commercial or trading activity.

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?

Contractors are afforded some protection by virtue of the payment dispute procedure set out under section 6 of the CCA.

Where a project has been interrupted or cancelled, it is common practice for contracts to provide for employers to pay contractors for any work that is completed until that point.

Where the interruption or cancellation is caused by an insolvency event or financial difficulties, this may be more problematic for contractors. There is no statutory protection in such circumstances. In the case of insolvency, the contractor will be at the mercy of the order of priority of payments to any parties involved.

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?

Force majeure clauses exist to exclude liability where exceptional, unforeseen events beyond a party's control prevent the performance of its contractual obligations. Force majeure events within a construction contract generally include acts of God, earthquake, fire, flood or other natural disasters, acts of war and riot.

As there is no doctrine of force majeure in Irish law, it is at the contractual parties' discretion whether they wish to rely upon force majeure and can do so by including a provision in their contract. Force majeure must be expressly included in the contract terms and cannot be implied.

Force majeure may result in an automatic termination of the contract or by a party giving notice of the termination. However, the relevant event must have had a significantly adverse impact upon performance of the contracting party and cannot be used as an excuse to end the contract.

DISPUTES

Courts and tribunals

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

There are no specialised tribunals dedicated to construction disputes.

Mediation, conciliation, arbitration and litigation are the most common methods of construction dispute resolution in this jurisdiction. Contractual adjudication and expert determination are also used. The Construction Contracts Act 2013 provides for statutory adjudication of payment disputes arising under certain construction contracts entered into after 25 July 2016. Otherwise, parties are generally free to agree in contract how their disputes will be resolved.

Dispute review boards

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

DRBs are not commonly used in construction contracts in Ireland. The more common alternative dispute resolution forums that are included in construction contracts are conciliation, mediation, arbitration and adjudication under the Construction Contracts Act 2013. Given the generally complex and technical nature of construction disputes, it is hoped that DRBs will become more widely utilised in construction contracts, in an effort to promote better collaboration between contracting parties and ultimately avoid or resolve disputes in a quicker and more cost-effective way.

The powers of a DRB will be set out in the construction contract, so it is ultimately up to the parties to decide whether their decisions are binding or advisory etc. Generally, a DRB would issue informal advice to assist the parties at an early stage in resolving disputes but their role is ultimately a decision for the parties to provide for in the construction contract.

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?

Yes, the use of mediation has gained acceptance.

The Mediation Act 2017 (which came into force on 1 January 2018) aims to further promote mediation as an attractive alternative to court proceedings. It obliges solicitors to advise their clients to consider mediation before issuing court proceedings and allows refusal by a party to consider the use of mediation to be taken into account when determining costs at the end of legal proceedings.

Mediators are often practising solicitors, but there is no requirement that they are solicitors or barristers. There is independent training and certification for mediators from a number of bodies.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

The format of mediation is subject to agreement between the parties and the mediator. It is standard practice for mediations to be held on a confidential, without prejudice, basis and for parties to be prohibited from using another party's material in subsequent litigation.

Arbitration of private disputes

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

Arbitration is preferred to court litigation in construction disputes. Arbitration clauses are often included in construction contracts. The Arbitration Act 2010 (as amended) (the 2010 Act) applies to all arbitrations commenced after 9 June 2010, and the UNCITRAL Model Law has the force of law in Ireland (subject to the 2010 Act). The Irish courts are supportive of arbitration.

While court challenges to an award are possible, the grounds for challenges are limited.

The parties can agree on the identity of the arbitrator or on a number of arbitrators to form a tribunal. Construction contracts generally provide for a default appointing mechanism, which typically involves an application by either party to the president of a named professional body (for example, Engineers Ireland) requesting that he or she appoint an arbitrator.

Article 19 of the Model Law confirms that the parties are entitled to set their own procedures for the arbitration. If no rules are chosen, and the parties cannot subsequently agree upon how the procedure is to be conducted, then the tribunal can set the procedures.

As the effects of Brexit do not extend to arbitration, UK-based arbitration clauses will continue to have full effect. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Ireland, EU member states and the UK are signatories, governs the enforcement of arbitral awards and maintains the status quo in this area. This may result in arbitration becoming an even more attractive option for dispute resolution than litigation.

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?

The International Chamber of Commerce Arbitration Rules are utilised in Ireland, and the London Court of International Arbitration is also gaining some prominence. For construction in Ireland, there is a preference for the governing law to be Irish law and for the seat of the arbitration to be in Ireland.

Dispute resolution with government entities

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

Yes, government agencies may participate in private arbitration and be bound by the arbitrators' award.

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?

Ireland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has the force of law in Ireland (subject to the 2010 Act).

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Enforcement is not generally problematic unless there is reason to deny enforcement (the grounds for which are set out in article 36 of the Model Law and article 5 of the New York Convention).

In a leading case, the High Court held that the Irish courts would not exercise jurisdiction over an application for the enforcement of an arbitral award where the party against whom enforcement was sought had no assets in Ireland and no real likelihood of having assets in Ireland (*Yukos Capital SARL v Oao Tomskneft Vnk Otkytoye Aktsionernoye Obshchestvo 'Tomskneft' Vostochnaya Neftyanaya Kompania* [2014] IEHC 115, in which the authors acted for the successful party, the respondent).

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?

Generally, the time limits for bringing a claim under a construction contract are governed by the Statute of Limitations Act 1957 (save to the extent that a construction contract specifically provides otherwise). If the contract is signed by hand, the parties have six years to bring the claim from the date of accrual of the action, and if the contract is a deed, the parties have 12 years. If the parties are bringing a claim in tort, they have six years from the date on which the incident occurred.

Recent case law in Ireland has discussed the issue of when the cause of action accrues. In *Brandley v Deane* [2017] IESC 83, Mr Justice McKechnie set out that the limitation period runs from when the damage (not the defect) becomes 'manifest' – ie, capable of being discovered by a plaintiff. This decision affirms the judicial approach whereby defective work and resultant damages are distinguished in determining limitation periods.

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?

Ireland attended the United Nations Conference on the Human Environment of 1972, at which the Conference proclaimed the Stockholm Declaration of 1972. The Stockholm Declaration of 1972 does not form part of Irish law.

Irish environmental law is primarily derived from EU law. There are also over 300 environmental statutes and regulations in Ireland. The following are some key pieces of legislation that provide for the preservation of the environment and wildlife while advancing infrastructure and building projects.

1 The Birds Directive 79/409/EEC and Habitats Directive 92/43/EEC, which have been transposed into Irish law, set out requirements primarily aimed at preserving sites that have been designated as specially protected under EU law. These Regulations may require an 'appropriate assessment' to be carried out in relation to certain plans and projects before those plans and projects are granted consent.
2 The 2011 Environmental Impact Assessment Directive 2011/92/EU, as amended by the 2014 Environmental Impact Assessment Directive (2014/52/EU), which has been transposed into Irish law, requires authorities to carry out an assessment of certain projects that are likely to have a significant effect on the environment before granting consent (eg, before granting planning permission or certain environmental licences). The 2014 EIA Directive was, for planning law purposes, transposed into Irish law on 26 July 2018 by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018. The Environmental Protection Agency (Integrated Pollution Control) (Licensing) Regulations 2020 transpose the requirements of the 2014 EIA Directive for the purposes of Environmental Protection Agency licensing for integrated pollution control, industrial emissions, and waste licensing and wastewater authorisation.
3 The Planning and Development Acts 2000–2022 contain requirements to assess the impact of proposed developments on the environment or protected sites as part of the planning process and before development consent is granted. These include the requirements in points (1) and (2) above.

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?

Environmental statutes and regulations in Ireland (of which there are over 300) generally target 'polluters' being based on the 'polluter pays' principle. The identity of the 'polluter' is generally defined by reference to the person who 'causes' or 'permits' pollution to occur, who controls the polluting activity, or who 'holds' waste on land. Typically, Irish environmental statutes and regulations impose liability on one or more of the following categories of person:

- a licence or permit holder or operator;
- the owner of land or a premises or a landlord (although note that the definition of 'owner' varies and the term is often not defined in legislation);
- the occupier or person in control of a premises;
- the waste holder;
- a person causing or permitting polluting matter to leave a premises;
- directors, managers, secretaries or other officers; and
- shareholders.

Under the Environmental Liability Regulations, an operator of an activity may be liable for any damage to protected species and natural habitats or imminent threat of that damage. The 'operator' is defined as the person who operates or controls the activity or the person to whom decisive economic power over the activity has been delegated.

There are also various common law actions that may be used by third parties to limit, prevent or secure compensation for environmental damage. Where these actions are taken, a claimant may recover damages for losses suffered on a compensatory basis, which may not be possible under statute. Essentially, any polluter in the chain of polluters could be a mark in such a claim.

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'?

No, Ireland is not a signatory to any such (tax) treaties relating to the protection of investments of a foreign entity in construction and infrastructure projects.

Tax treaties

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

Ireland has signed comprehensive double taxation treaties with 76 countries, 73 of which are in effect. The agreements cover direct taxes, which are income tax, universal social charge, corporation tax and capital gains tax.

Irish tax treaties typically follow the approach adopted in the Organisation for Economic Co-operation and Development model tax treaty (though the specific provisions will vary across the different treaties). None of Ireland's double taxation treaties would prevent a contractor from being taxed in another jurisdiction, though the provisions could provide sole taxing rights to one jurisdiction in specific circumstances, depending on factors such as the type (and source) of the income, profits or gains at issue and the residence status of the contractor.

Currency controls

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

No, Ireland has no such currency controls.

Removal of revenues, profits and investment

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

No, Ireland has no laws that restrict removal of revenues, profits or investments from the jurisdiction.

UPDATE AND TRENDS

Emerging trends

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

Growth in demand for construction workers

As the construction industry in Ireland continues to prosper, one of the hot topics is the persistent growth in demand for construction workers. However, as Ireland is approaching full employment, labour from abroad will need to be sought to meet this huge demand. In a move to encourage the entry of construction specialists from outside the European Union, a number of changes are being introduced.

The Department of Enterprise, Trade and Employment announced changes to permit requirements for construction workers outside the European Economic Area, making it easier for skilled workers to gain employment in Ireland. These changes include:

- adding occupations, such as quantity surveyors, construction project managers, mechanical engineers and electrical engineers to the Critical Skills List (meaning they will qualify for Critical Skills Employment Permits); and
- removing certain occupations, such as scaffolders and crane drivers, from the Ineligible List of Occupations (meaning that they may for the first time be eligible to apply for a General Employment Permit).

Furthermore, the Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2019 amend the 2013 Regulations so that registration cards and construction skills certification schemes from states other than EU member states that are equivalent to Safe Pass are compliant with these regulations.

Brexit

The lasting impact of Brexit continues to have a significant impact on the construction industry in Ireland. Logistical issues are at the forefront, with continued uncertainty around the imposition of tariffs and duties as a result of a possible hard border being put in place. However, there are also concerns around the ability to use construction products sourced from the United Kingdom and the effect of Brexit on the resolution of contractual disputes.

In the context of drafting and negotiating construction contracts, employers are now expressly excluding any allowances in respect of extensions of time and additional fees in relation to Brexit-related difficulties. Clauses that can soften the impact of Brexit, by giving employers a means by which to participate in Brexit-related decisions, are instead being included in construction contracts. For example, clauses that require employer approval in the event that a contractor cannot source goods or materials in the EU without delay or where goods or materials sourced from the United Kingdom do not have an EU equivalent.

Covid-19

Similar exclusions are also now being made in respect of extensions of time and additional fees arising from covid-19 related delays. Many employers are restricting such delay events to mandatory government shutdowns only and most contracts now list pandemics and covid-19 in particular as force majeure events. Site shutdowns as a result of covid-19 (or similar pandemic) outbreaks on site or breaches of public health obligations will be the responsibility of the contractor.

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Price inflation and supply chain constraints

Material price inflation and supply chain constraints caused by the lasting effects of the covid-19 pandemic and the invasion of Ukraine are having a significant effect on the viability of construction projects across the country in respect of both private sector and public works contracts. In November 2021, the Office of Government Procurement announced a suite of interim amendments to public works contracts to address these concerns in public works developments. They introduced an indexation mechanism for certain contracts within the public works contracts suite that will address the period between tender submission and award through the limited indexation of the tender price. Furthermore, they also introduced amendments to the price variation clauses in certain contracts within the public works contracts suite to reduce the 'Base Date', otherwise known as the fixed price period, from 30 to 24 months and to adjust the threshold for exceptional material price increases from 50 per cent to 15 per cent.

The Construction Industry Federation of Ireland (CIF) held a meeting with the Minister for Public Expenditure and Reform in March 2022 to address the alarming hyperinflation of construction materials. The CIF is reported to be seeking a new and effective price variation clause to be included in all public works contracts. The CIF wants this mechanism to be introduced retrospectively for all public works developments already under way.

Professional indemnity insurance market

Although not governed by law, it should also be noted that the professional indemnity insurance market has been put under serious pressure in recent years in particular in relation to coverage of metal cladding and roofing. This is a result of a number of factors, including the fallout from the Grenfell Tower fire in London and the subsequent increase in cladding and fire claims, Brexit and the covid-19 pandemic. There are now fewer insurers in the market and those that remain are reducing the amount of cover they are willing to provide or are refusing to provide cover on an 'each and every claim' basis, preferring an 'aggregate claim' basis.

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Israel

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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 setup 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 state 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 that 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 pre-qualifications 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 rules 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 aforementioned, 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 that 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 Defense 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: 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 includes 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.

Employers need to be cognisant of the fact that there are periods when dismissals are prohibited by law, for example, as a result of:

- Mandatory Reserve Duty – employment may not be terminated in the month following the reserve duty period if an employee serves two or more days of reserve duty in the same month.
- Illness – employment may not be terminated while an employee is exercising his or her right to sick days.
- Pregnancy – employment may not be terminated if the pregnant employee has been employed for more than six months.

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 (which 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 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 performed and shall determine further:

- 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, in accordance with 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 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 arbitrational 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 regarding 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 with 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 county 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, therefore, 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 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://www.gov.il/en/Departments/DynamicCollectors/international_agreements?skip=0&limit=10&type=03.

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://www.gov.il/en/Departments/DynamicCollectors/international_agreements?skip=0&limit=10&type=03.

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.

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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.

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.

The impact of the judgment 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.

It must be stated that employers frequently use the judgment in the *Bibi Roads* case to deny requests for extensions of time or additional costs submitted by contractors based on procedural arguments and on the principles established in this case. As an adverse consequence, contractors tend to request that additional legal services be provided throughout the lifetime of a project from a much earlier stage.

Japan

Makoto Terazaki, Masahiro Yano and Mai Kato

Anderson Mōri & Tomotsune

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?

A foreign designer or contractor can set up a subsidiary or branch for its continuous business pursuant to the Companies Act (86/2005).

The subsidiary of a foreign contractor or a foreign contractor itself (with a branch) must obtain a licence to operate a construction business. Licence requirements include the placement of a full-time manager and an engineer with practical experience and the appropriate qualification in Japan. Experience and a qualification in a foreign country can fulfil such requirements, provided that those are certified as equivalent by the Minister of Land, Infrastructure, Transport and Tourism. However, such certification is rarely used. Therefore, practically speaking, it is more or less a requirement to employ a Japanese individual for such purposes.

In addition, the language barrier should be considered, as almost all relevant documents (eg, contracts, specifications and drawings) are written in Japanese.

Licensing issues can become a key concern for a foreign designer. In practice, there may be a specific arrangement for a large project that involves a foreign designer who is in charge of only the design concept and another licensed designer who draws the design in accordance with that concept.

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?

Under the Construction Business Act (100/1949), both foreign and domestic contractors must obtain a licence to operate a construction business, unless the individual conducts only small-scale construction works, the threshold of which is stipulated in the relevant cabinet order. A licence is necessary for each of the 29 categories of construction business listed in the act. An individual operating a construction site without a licence will be subject to imprisonment for up to three years or a fine of up to ¥3 million, while a corporate legal entity will be subject to a fine of up to ¥100 million.

The Act on Architects and Building Engineers (202/1950) requires that foreign and local individuals obtain a licence in accordance with the scale or type of architecture to conduct design works in Japan. Any individual working without a licence will be subject to imprisonment or a fine and any corporate legal entity that employs such an individual or is represented by such an individual will also be subject to a fine.

Competition

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

No local laws provide advantages to domestic contractors in competition with foreign contractors.

In addition, no local laws oblige the Japanese government to purchase products made in Japan. Japan is a contracting party to the Agreement on Government Procurement under the World Trade Organization, which requires the Japanese government to treat the products and services of other contracting parties without discrimination.

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?

The Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade (54/1947) provides various measures against anticompetitive behaviour, including the Fair Trade Commission's orders to cease such behaviour and the imposition of surcharges corresponding to each type of anticompetitive behaviour. The act also orders the criminal penalties of imprisonment or a fine.

Where public bidding is concerned, the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (101/2002) stipulates the mandatory demand for compensation by public entities against officers involved in bid rigging. The act also provides for criminal penalties of imprisonment or fines against such officers.

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?

The Penal Code (45/1907) prohibits bribery involving a public official. Bribery among private individuals is beyond the scope of the code. Therefore, the enforceability of a private construction contract awarded through bribery depends mainly on how such behaviour is regulated within the contract. Contracts regarding public construction works often include a specific clause conferring on the employer the right to terminate on the grounds of bribery. Otherwise, the enforceability of such contracts is subject to the general principle of public policy under the Civil Code (89/1896).

Under the Penal Code, individuals who issue bribes will be subject to imprisonment for up to three years or a fine of up to ¥2.5 million, while individuals who accept bribes will be subject to imprisonment for

up to 20 years. In addition to criminal penalties, a contractor convicted of bribery may have their status of eligibility for public biddings suspended. Moreover, under the Construction Business Act (100/1949), a contractor may be ordered to suspend its business or have its licence for construction business rescinded.

Facilitation payments towards a public official may constitute bribery and are therefore illegal under Japanese law.

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?

No local laws oblige employees of the project team members to report suspicion or knowledge of the bribery of government employees in Japan.

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?

Under the Political Funds Control Act (194/1948), foreign companies and nationals are prohibited from making political donations in Japan, while domestic companies and other forms of organisations are permitted to make political donations to political parties, the limitation of which is stipulated in the act.

Political contributions are not generally considered to be part of doing business in Japan. Therefore, it is not recommended to make political contributions to facilitate business activities. No local laws restrict the ability of contractors and design professionals to work for public agencies.

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 rules as government employees?

A construction manager or other construction professional who holds the position of engaging in the performance of public duties in accordance with laws and regulations is subject to the same penalties for bribery as those under the Penal Code (45/1907). Compliance rules for government employees are applicable if they hold the status of government 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?

No other important legal issues are known in Japan. Approximately 150 foreign contractors operate businesses in the country.

Practically speaking, attention should be paid to commercial factors such as:

- the language barrier;
- the competitive market situation;
- the shortage of labour and skilled workers; and
- the fulfilment of local regulations.

In particular, in public construction works, almost all bidding documents are written in Japanese and subsequent communications will be made in Japanese. As such, the height of the language barrier should not be overlooked.

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?

A standard contract form is widely used for domestic construction works in both the private and public sectors. For private construction works, the General Conditions of Construction Contract is provided by a private committee. For public construction works – the employers of which are public bodies – the Public Work Standard Contract is provided by the Central Council for Construction Business. For design works, the General Conditions for Design and Supervision Works Contract provided by a private association is widely used.

No local laws impose any restrictions on:

- the language of the contract;
- the choice of law; or
- the venue for dispute resolution.

In practice, all of the standard forms commonly used in Japan are written in Japanese and Japanese law is implied as the governing law where no choice of law clause is provided. In regard to the venue for dispute resolution, the General Conditions of Construction Contract for private works or the Public Work Standard Contract for public works specify, as a forum of dispute resolution, the Committee for Adjustment of Construction Work Dispute, whose jurisdiction is specified in the Construction Business Act (100/1949).

Payment methods

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

An employer usually makes a payment by promissory notes or bank transfer. The frequency of payments varies with the size and complexity of the project as stipulated in the contract. For large projects, the employer typically applies an advance payment for completion of a milestone. The standard forms of contracts for both public and private works stipulate conditions for an advance payment.

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 major projects, several main contractors commonly constitute a consortium under the name of a joint venture and all main contractors become a party to the construction contract with the employer. A consortium or each of its members typically deploys subcontractors, which often deploy sub-subcontractors. The Construction Business Act (100/1949) prohibits contractors from subcontracting all construction works to a subcontractor, except where prior written consent is given by the employer in relation to a private construction project.

PPP and PFI

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

The Act on Promotion of Private Finance Initiative (117/1999) provides the basic policy and procedure for PFI. However, there is no formal statutory or regulatory framework for other types of PPP. PFI can be classified into two categories – the conventional type and the concession type – which were both introduced recently. Under the conventional type, government entities pay consideration for services rendered by private entities, while under the concession type, government entities do not pay such consideration, as private entities run these projects on a self-financing, profit-oriented basis.

Specifically in relation to the conventional type, the PFI/PPP Promotion Office of the Cabinet Office has issued a standard PFI contract form and two guidelines explaining the aims, matters for special attention and definitions that should be contained in PFI contracts, as well as the main articles. These guidelines are generally adhered to and PFI contracts have become standardised in practice.

Conversely, the concession type – under which public entities concede their operation rights of public facilities to private operators – was only introduced in 2011. As such, concession contracts have not yet been standardised, although the relevant guideline issued by the PFI/PPP Promotion Office provides for the main concept to be considered in the drafting of concession contracts.

Joint ventures

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

In a major project, several main contractors commonly constitute a consortium under the name of a joint venture. In such cases, a consortium for a construction project is typically classified as a partnership under the Civil Code (89/1896). All members of a consortium will be held jointly and severally liable for the obligations borne by each of them in the operation of the consortium (ie, the entire project). Members may allocate liability and responsibility among them in accordance with the agreements made between them.

In some cases, main contractors may prefer to utilise a company under the Companies Act (86/2005) for their consortium. If a consortium is established as a company under the act, the members of the consortium will be responsible as shareholders of the company, to the extent limited by the value of their respective capital contributions.

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?

No local laws prohibit indemnities in general. Therefore, parties are not prohibited from stipulating an indemnification against all acts, errors and omissions arising from the work of the other party if they are caused by the negligence of the party claiming indemnification.

However, Japanese courts interpret these contractual provisions in such a way as to find the reasonable meaning, taking into consideration:

- the intent of both parties;
- the background of the negotiations;
- trade customs; and
- commercial common sense.

In addition, the fairness and equality of construction contracts are referenced under the Construction Business Act (100/1949). The general legal principles of good faith and public policy are also applicable. Therefore, such indemnity provisions may be invalidated separately from the rest of the contract.

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?

Pursuant to the Civil Code (89/1896), a contractor can be the subject of a tort claim brought by a third party that purchased a building constructed by the contractor, even if there is no contractual relationship between the two parties. Case law has held that contractors and designers have a duty of care toward residents, neighbours and passers-by to ensure the fundamental safety of a building. Any breach of this duty resulting in defects in a building that undermine its fundamental safety, thereby infringing the life, body or property of residents, may constitute claims for damages in tort.

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?

The extent of insurance coverage offered for a contractor is a commercial and business matter determined by private insurers. In general, a contractor may purchase an insurance policy covering:

- damage to the property of third parties;
- injury to workers or third parties; and
- delay damages for an employer.

Eligibility for insurance with regard to damages caused by environmental hazards (eg, typhoons, flooding, earthquakes and toxic substances) varies according to the insurer.

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?

There are no local laws requiring a minimum number of Japanese employees for a construction project. However, in practice, foreign contractors must employ Japanese workers to obtain a construction business licence under the Construction Business Act (100/1949).

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?

Apart from construction projects, under the Labour Standards Act (49/1947) and the Labour Contracts Act (128/2007), it is generally difficult for an employer to unilaterally dismiss an employee under their employment contract in Japan. To do so, the employer must give the employee at least 30 days' prior notice or make payment in lieu of notice. In addition, the employer must have an 'objectively and socially justifiable cause' for the dismissal. Otherwise, it is deemed to be an abuse

of right and would therefore be null and void. The difficulty of dismissal should be noted.

In the case of termination of employment by the employer, some unperformed obligations under the employment contract will remain, including the obligation to pay unpaid salary or provide compensation for damages resulting from a breach of the employer's responsibilities. In addition, the Labour Standards Act (49/1947) imposes further obligations on the employer, which exist even after termination, such as the obligations to:

- deliver a certificate on the occasion of retirement; and
- return the reserve funds, security deposits, savings and any other money and goods to which the worker is rightfully entitled – regardless of the name or title by which such money or goods are referred.

If a severance payment is provided for in the labour-management agreement, the employer will pay the amount specified by the agreement. In addition, the employer is required to provide social insurance for its employees. If this is not paid, the payment may be subsequently enforced regardless of termination of employment.

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?

Under the Immigration Control and Refugee Recognition Act (Cabinet Order 319/1951), all foreign workers – not limited to those who work on construction projects – must obtain resident status to reside and work in Japan. Foreign workers are also required to act and work within the scope permitted by their residence status. This status is proven by the employee by submitting certain documents to the employer. Where the employment is found to be illegal, the employer will be subject to a fine. Further, the Labour Standards Act (49/1947) prohibits employers from discriminating on the basis of nationality in respect of working conditions.

Other than this, the laws that apply to Japanese workers – including the Labour Standard Act, the Labour Contracts Act (128/2007), the Industrial Safety and Health Act (57/1972) and the Minimum Wage Act (137/1959) – apply to foreign construction workers in the same manner.

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?

There are no local laws that apply only to foreign contractors in respect of closing their operations in Japan. However, if a foreign contractor has a branch or subsidiary in Japan, it must complete the requisite procedures to close the branch office or liquidate the subsidiary company. This is costly and takes a long time. In particular, if the branch or subsidiary has its own employees, the rules for dismissal will apply. Such procedures and processes apply not only to closing down operations and businesses in construction, but also to conducting business in Japan in general, which is something that foreign contractors should consider.

Regarding any unique aspects of construction projects in Japan, it is sometimes the case that a construction contract includes provisions related not only to construction, but also to the operation and maintenance of the constructed building or facility. The obligations related to this operation and maintenance can remain for a relatively long period after the construction is complete – in some cases, more than a decade. In this case, the contractor cannot cease to provide its services without obtaining the approval of the owner of the building or transferring the obligation to a third party.

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?

Under the Civil Code (89/1896), contractors have a right to the retention of construction works in their possession until all costs and fees due to them by an employer have been paid. The right of retention is effective even for third parties. A contractor may also refuse to deliver construction works until the employer tenders a payment of remuneration for such works. In addition, a contractor may place a statutory lien on construction works to secure fees and costs for such works.

'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?

The Construction Business Act (100/1949) prohibits terms in certain subcontracts that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the employer. Specifically, the act obliges an employer to make a payment within 50 days of an application of delivery of completed construction works, regardless of the status of its payments, on the conditions that:

- the main contractor conducts its business under a special construction business licence; and
- the subcontractor operates its business under an ordinary construction business licence with a stated capital of less than ¥40 million.

Contracting with government entities

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

A government agency cannot assert sovereign immunity as a defence to a contractor's claim for payment.

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?

Pursuant to the amended Civil Code (89/1896) that took effect as of 1 April 2020, a contractor may receive partial payment for partially completed work in proportion to the rate that an employer benefits from that work if either the work becomes impossible to complete due to a cause not attributable to the employer or a contract is cancelled before its completion.

The Civil Code prior to amendment applies to contracts entered into before 1 April 2020. In that case, if a contract is terminated based on a breach by either the contractor or the employer, case law stipulates that the termination can have only a prospective effect, except under special circumstances.

In either case, a contractor may receive full remuneration if that contractor is prevented from completing the work for a reason attributable to an employer. Alternatively, a contractor may claim damages, including lost profits, against an employer based on the employer's breach of contract. In addition, the code permits an employer to terminate a construction contract at its discretion before completion of

the work, on the condition that the employer must compensate the contractor for any damages suffered from the termination.

If the Japanese government is the employer, the Act on Prevention of Delay in Payment under Government Contracts, etc. (256/1949) provides certainty with regard to the date of payment and the rate of arrears interest, among other matters.

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?

Pursuant to the Civil Code (89/1896), a contractor may raise the defence of force majeure to excuse its liability for the failure to perform contractual obligations, except in case of damages for failure to perform an obligation for the payment of money. However, the code has no definition of 'force majeure' and case law has required an extremely high threshold to find the existence of such excusable causes. The amendment of the Code that took effect as of 1 April 2020 clarifies that the purpose of the relevant contract and commercial common sense shall be taken into account to determine whether an excusable cause exists. Therefore, construction practitioners will commonly include a force majeure clause in their construction contracts that enumerates several events that would entitle a contractor to raise the defence of force majeure.

DISPUTES

Courts and tribunals

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

Various departments are designated to resolving construction disputes in courts such as the Tokyo District Court and the Osaka District Court. With regard to alternative dispute resolution, there are two types of institution:

- the Committee for Adjustment of Construction Work Disputes, established pursuant to the Construction Business Act (100/1949) to solve disputes relating to construction contracts; and
- the Committee for Adjustment of Housing Disputes, established pursuant to the Housing Quality Assurance Act (81/1999) to solve disputes relating to specific housing contracts.

Dispute review boards

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

DRBs are rarely used in domestic construction contracts. In fact, neither standard contract forms for public construction nor forms for private construction have applied provisions for DRBs. The legal status and the effect of decisions or recommendations rendered by DRBs may vary depending on the terms of the contract.

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?

Standard contract forms for both public and private constructions stipulate a multi-tier dispute resolution mechanism, in which parties are initially obliged to refer their disputes to the Committee for Adjustment of Construction Work Disputes established pursuant to the Construction Business Act (100/1949). The committee offers mediation services by three mediators, as well as conciliation and arbitration services. One of the three mediators will have a legal background, usually as an attorney, and the others will have a technical background or experience with public officials for the administration of the construction sector.

In the case of construction disputes before the Tokyo District Court, although it is not mandatory, parties are usually asked to undergo concurrent proceedings of litigation and mediation conducted simultaneously by a judge, who also acts as the presiding mediator of the three mediators.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Mediation proceedings before the court and the Committee for Adjustment of Construction Work Disputes are conducted in private. However, Japanese laws do not prohibit the parties from referring to statements or evidence made or disclosed in the course of mediation. Therefore, if the parties also wish to ensure the confidentiality of mediation in subsequent proceedings (eg, litigation or arbitration), a contractual agreement executed between the parties prohibiting them from referring to such information is required.

Arbitration of private disputes

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

Domestic arbitration held by the Committee for Adjustment of Construction Work Disputes and international arbitration held by the Japan Commercial Arbitration Association (JCAA) are as common as court litigation for the resolution of construction disputes.

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?

The JCAA is preferred among Japanese parties because the seat of arbitration and venue for hearings are likely to be in Tokyo or another city in Japan. If the seat of arbitration or venue for hearings is overseas, Japanese parties typically choose a jurisdiction that is not the other party's origin country. In this sense, Singapore has become a popular choice for dispute resolution. The International Chamber of Commerce, the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre are also preferred arbitral institutions for Japanese parties.

As to governing law, Japanese parties prefer to choose Japanese law. The second option is to choose the law of a neutral country (eg, England and Wales or Singapore).

Dispute resolution with government entities

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

Government agencies may participate in private arbitration and be bound by an arbitral award. In fact, the standard contract form for public works permits the use of arbitration held by the Committee for Adjustment of Construction Work Disputes.

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?

Japan is a party to the New York Convention with the reservation of reciprocity, and the convention is applied directly in the enforcement of foreign awards made in other party states. In addition, the Arbitration Act (138/2003) has adopted almost all the provisions of the UNCITRAL Model Law, and the requirements for the enforcement of foreign awards under the act are almost the same as those of the convention. Currently, the Ministry of Justice is in the process of preparing a bill for the Act to reflect the 2006 amendment to the UNCITRAL Model Law.

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?

The amended Civil Code (89/1896) stipulated limitation periods for contractual claims that accrue on and after 1 April 2020:

- five years from the time when a creditor becomes aware of the possibility of exercising the right; or
- 10 years from the time when it has become possible to exercise the right.

The limitation periods contained in the pre-amendment Civil Code and the pre-amendment Commercial Code (48/1899) remain applicable for contractual claims that accrued before 1 April 2020. In general, contractual claims based on commercial contracts shall be subject to a limitation period of five years, and a specific limitation period related to construction works is three years from the completion of work.

In either case, the Civil Code stipulates various measures to prevent the expiration of limitation periods, including the commencement of judicial claims and of demands outside of the court procedure. The effect and conditions of each measure differ. As measures, effects, and conditions stipulated in the amended Code differ from those in the previous Code, close attention should be paid before taking such measures.

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?

Japan is a signatory to the Stockholm Declaration of 1972 and has enacted various local environmental laws, including:

- the Basic Environment Act (91/1993);
- the Air Pollution Control Act (97/1968);
- the Water Pollution Prevention Act (138/1970); and
- the Soil Contamination Countermeasures Act (53/2002).

In regard to construction projects, the relevant laws and regulations include the Construction Material Recycling Act (104/2000) and the Act on Ensuring Hygienic Environment in Buildings (20/1970).

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?

Various Japanese local environmental laws (eg, the Basic Environment Act, the Air Pollution Control Act, the Water Pollution Prevention Act, and the Soil Contamination Countermeasures Act) provide regulations and measures to protect the environment, and impose penalties for any breaches thereof in accordance with the importance and extent of the breach. For example, the Construction Material Recycling Act imposes an obligation on the contractor to recycle specific construction materials.

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'?

Japan is a signatory to several bilateral investment treaties (BITs) and economic partnership agreements (EPAs) that provide for the protection of investments in Japan. In recent years, Japan entered into separate EPAs with the EU, the United States and the United Kingdom. Among those, Japan ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which came into effect in 2018. Most recently, Japan ratified the Regional Comprehensive Economic Partnership Agreement in 2021, which became effective on 1 January 2022.

The definition of 'investment' varies for individual agreements because Japan does not have a model BIT or EPA. For example, the CPTPP defines 'investment' in a broad way, which includes 'turnkey, construction, management, production, concession, revenue-sharing and other similar contracts'.

Tax treaties

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

Japan has entered into 69 tax treaties with 77 jurisdictions as of 1 April 2022 to avoid double taxation and prevent tax evasion and avoidance.

Currency controls

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

There are no such currency controls in Japan.

Removal of revenues, profits and investment

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

There is no local law that restricts the removal of revenues, profits or investments from Japan, apart from transfer pricing taxation, which prevents multinationals from avoiding or reducing corporate income taxes by transferring income to foreign affiliates.

In exceptional circumstances (eg, where international economic sanctions come into play), overseas payments and capital transactions are controlled pursuant to the Foreign Exchange and Foreign Trade Act

(228/1949). Under the act, the investor must report to the Bank of Japan in advance or subsequently, depending on which industry it intends to inject on. In addition, certain transactions are monitored under the Act on Prevention of Transfer of Criminal Proceeds (22/2007).

UPDATE AND TRENDS

Emerging trends

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

Apart from extreme factors related to covid-19, working conditions in the construction industry have been a topic of discussion for a long period. In particular, long working hours and the ability to secure social insurance have raised significant issues for construction workers. To address these issues, the amendment to the Construction Business Act (100/1949) and the ordinance of the Ministry of Land, Infrastructure, Transport and Tourism, which became effective in October 2020, stipulate the mandatory requirement that applicants for a licence to operate in the construction business must ensure that their employees enrol in social insurance. In addition, the amended Act prohibits employers from entering into a contract with a term that is much shorter than normal and practicable for a subject project. The Central Council for Construction Business specified the issues that should be taken into consideration to determine the standard periods for construction projects.

Another recent trend is that, as a part of the enactment of the Reformation Acts for the formation of the digitalised society, some construction-related documents, such as a quotation for a construction contract and a disclosure statement for a design contract, can be digitalised with the parties' consent.

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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?

The complexity of setting up operations in Malta would depend on what services are being provided. By way of example, the exercise of the profession of Perit (ie, architectural services) can only be done by warranted professionals in accordance with Chapter 390 of the Laws of Malta ('the Periti Act', soon to be replaced by Chapter 622). If designers were actually providing architectural services, then they would either need to be warranted professionals in Malta or be approved to provide these services pursuant to the Mutual Recognition of Qualifications Act (Chapter 451 of the Laws of Malta) because under Maltese law the practice of the profession of Perit brings with it personal liability and responsibility. If foreign contractors want to pursue the local market to provide construction services, it would be advisable that they set up a legal entity to segregate risks and limit liability, although most employers would still require some form of guarantee from the contractors' parent companies. The setting up of legal entities in Malta is a straightforward process subject to normal know your customer and due diligence rules of vetting of key persons.

With regard to employment in Malta, one would have to consider whether a work or residence permit (or both) is required for employees such as non-EU nationals.

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?

Any person practising the profession of Perit needs to be in possession of a warrant in accordance with the provisions of the Periti Act. Therefore, any foreign person assuming responsibility for the design and construction of building works under the generic title of architect, including works in architecture and civil and structural engineering, must be cognisant of the requirements and limitations set out in the Periti Act, namely that he or she must either hold a Maltese warrant or be approved to provide these services pursuant to the Mutual Recognition of Qualifications Act or must only practice the profession in Malta on a temporary and occasional basis subject to further requirements as may be provided under the Periti Act.

The Building and Construction Authority Act (Chapter 623 of the Laws of Malta), which was enacted in 2021, sets up the Building and Construction Authority and provides that the minister will adopt regulations setting out which activities require a licence and which service providers need to be approved. By way of example, masons must be licensed and entered on the register of licensed masons of the Authority. These regulations will also provide the instances where the Authority may revoke, suspend or cancel a licence in situations in which the licensee has been found to be dishonest, negligent or non-compliant, or has failed to comply with the conditions of this Act.

With respect to foreign workers, if these are third-country nationals then they must be in possession of a Single Permit allowing them to work and reside in Malta legally. EU, EEA and Swiss nationals are exempt from applying for an employment licence to work in Malta.

Competition

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

There are no local laws that favour local contractors as opposed to foreign contractors. In addition, articles 26 (internal market), 49–55 (establishment) and 56–62 (services) of the Treaty on the Functioning of the European Union (TFEU) eliminate discrimination on the basis of nationality between EU member states. This means that self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one EU member state may carry out an economic activity in a stable and continuous way in Malta (freedom of establishment: article 49 TFEU) or offer and provide their services in Malta on a temporary basis while remaining in their country of origin (freedom to provide services: article 56 TFEU). Furthermore, the TFEU generally prohibits state aid (ie, no company may receive government support and gain an advantage over its competitors unless this is justified).

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?

The Public Procurement Regulations (S.L. 601.03) govern public contract awards for supply and services locally. As a general rule, public contracts are awarded following a call for tenders allowing participants to place their bid on a level playing field. Bidders who have reason to believe that the award process was not carried out in a transparent and competitive manner may lodge an appeal before the Public Contracts Review Board and if the appellant is still not satisfied with the decision of the Review Board, an appeal may be lodged before the Courts of Appeal of Malta.

With respect to big rigging or other anti-competitive behaviour, this would amount to collusion between economic operators and is addressed in article 101 TFEU, which explicitly prohibits agreements or concerted practices that have as their object or effect the prevention,

restriction or distortion of competition within the internal market and that may affect trade between member states. The Maltese Competition Act, Chapter 379 of the Laws of Malta, transposes the EU competition law regime faithfully. Bid rigging would therefore fall under article 5 of the Competition Act. In this respect, the Maltese Competition Office applies the same rules as the EU Commission in its investigation and enforcement of these practices to ensure that bid rigging or any prohibited agreements in public tenders are addressed and disallowed. Further guidance may be found in the EU Commission's Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01) - 'bid rigging exclusion guidance' which was published on 18 March 2021. This guidance focuses on the possibility to exclude operators engaged in the manipulation of a tender. Moreover, since the adoption of the most recent generation of EU public procurement directives in 2014, sufficiently plausible indications of collusion have, explicitly, become an optional ground to exclude an economic operator from an award procedure.

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?

Bribery is a crime under the Criminal Code of Malta (Chapter 9 Laws of Malta) and is punishable with imprisonment. Any person holding public office who is found guilty of accepting a bribe will be punished for a term ranging from six months to eight years, depending on the gravity of the crime committed. The person who bribes the public officer shall be deemed to be an accomplice and punished accordingly.

In addition, the Department of Contracts was set up by the Public Procurement Regulations, Subsidiary Legislation 174.04 to ensure that public procurement is carried out on the principles of non-discrimination, transparency and equal treatment between economic operators. In this respect, the department imposes standard conditions and rules applicable to contractors who are awarded public contracts. One example is the rule that if a contractor offers a bribe, gift, gratuity or commission as an inducement or reward for doing any act in relation to the contract or any other contract with the Central Government Authority, the Central Government Authority may terminate the contract, without prejudice to any accrued rights of the contractor under the contract.

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 Criminal Code does not impose any obligations on people to report suspicion or knowledge of bribery of government employees. However, anyone who knowingly aids or abets those who perform the bribe shall be deemed to be an accomplice.

On 18 December 2021, Malta adopted the necessary legislation to transpose the requirements and regulations as set out in the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union Law (also known as the Whistleblower Protection Directive). The aim of this legislation is to curb fraud and corruption and to create a safe and comfortable environment for employees to address and disclose improper practices.

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?

Donations to political parties are regulated by the Financing of Political Parties Act (Chapter 544 of the Laws of Malta) which specifically restricts political parties from accepting donations that are made in the expectation of, or in return for, some specific financial or political advantage. Moreover, political parties are prohibited from receiving donations from the same person or entity in excess of €25,000 in the same calendar year.

There are no laws restricting contractors from working for public entities because of their political support. On the contrary, the freedom to associate with a political party is a right protected by the Maltese Constitution as well as the European Convention on Human Rights and no person shall be discriminated against on account of that person being a member of a political party.

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 rules as government employees?

Article 112 of the Maltese Criminal Code prohibits unlawful exaction and applies not only to a public officer or person employed in any public administration but also to any person employed by or under the government, whether authorised or not to receive moneys or effects, either by way of salary for his or her own services, or on account of the government, or of any public establishment. Any such person who, under colour of his or her office, exacts that which is not allowed by law, or more than is allowed by law, or before it is due according to law, shall be guilty of an offence punishable by imprisonment for a term from three months to one year.

Furthermore, anyone who knowingly aids or abets those who perform a bribe shall be deemed to be an accomplice.

In addition, the Public Procurement Regulations provide that entities may be blacklisted for a period of two years if it is found that such entity has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, award or selection.

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?

Non-tax-resident contractors should be aware that there would potentially be tax implications in certain instances where a branch or agency is established in Malta. In principle, any Malta-sourced income derived by a body corporate is subject to tax in Malta at the standard corporate income tax rate of 35 per cent. However, this is subject to the caveat that there would be no restriction on Malta source taxation in terms of any applicable double tax treaty in place between Malta and any applicable foreign country. This analysis would need to be made on a case-by-case basis taking into consideration the specific circumstances of the case, such as, inter alia, an examination of the significant people functions undertaken in Malta.

With respect to employment, if contractors from an EU member state want to send employees (EU nationals) to work in Malta on a construction project for a limited period of time, the employees would need to comply with EU Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. This was transposed into Maltese law by virtue of Subsidiary Legislation 452.82. In this respect, one would need to file a Posted Workers Notification at the Department of Industrial and Employment Relations, at latest on the commencement date.

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 Maltese Civil Law (Chapter 16 Laws of Malta) regulates some principles of Contracts of Works or locatio operis. By way of example, article 1638 provides that if a building or other considerable stone work erected under a building contract shall, in the course of 15 years from the day on which the construction of that building was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, the architect and the contractor shall be responsible therefor. Although the Civil Code establishes general principles, some of which cannot be derogated from, parties are free to use any form of contract that they deem sufficient to regulate their relationship. In this respect, international standard form contracts, such as those published by the International Federation of Consulting Engineers, are gaining increasing popularity in Malta and are being used for both construction and design.

While there is no restriction or imposition on the language, it is common practice for drafters to use the English language, which is also an official language of Malta, for contracts of this nature. The parties are free to choose a neutral choice of law and venue for dispute resolution. However, it would generally be advised that the choice of law would be that of the place where the project is taking place.

Payment methods

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

Bank transfers are the most common form of payment. Payment terms are usually predetermined and contractually agreed between the parties before the works commence. Generally, payments are either agreed in lump sum form or according to a re-measurable contract and would fall due after the completion of different phases of the project. With respect to vendors, payment is generally due upon receipt of the items being purchased, with the exception of certain vendors who may allow for payment to be made within an established period of time after issuing the invoice.

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?

Typically, there would be one leading contractor or a number of contractors who would take charge of the project and in turn, would engage subcontractors to provide other services. It is also common for contractors to form a joint venture, in which one contractor would assume the coordination role but each would be joint and severally liable for the performance of their own obligations undertaken pursuant to the contract. There is, however, no set standard and this depends on the magnitude of the project. It is not uncommon to have a project manager who would oversee all the contractors, subcontractors and suppliers of a construction project.

PPP and PFI

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

PFI contracts are not frequently utilised in Malta, whereas PPP contracts, on the other hand, date back to around 1994 in Malta with the introduction of healthcare PPPs in the elderly sector. The first PPP contract based on PFI practices in the elderly sector was invoked in 2004. Neither PPP nor PFI is defined under Maltese law and jurisprudence is very scarce on the subject matter. Only a few projects in Malta have been done through a PPP, the most recent one being the National Aquarium.

Joint ventures

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

The extent of liability of each party of a consortium may be contractually agreed between the parties and circumscribed through the appropriate legal vehicle used to set up the consortium. Therefore, it is not uncommon that each party to the consortium would be a limited liability company in its own right, responsible for its own obligations, and also a party to a joint venture with other contractors for the purposes of allocating responsibility and liability among them.

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?

A general principle of the Maltese Civil Code is that a party shall not be exonerated from the effects of, or be indemnified for, their own fraud, wilful misconduct or gross negligence. Maltese courts have held that clauses exonerating a party from dolo and gross negligence are deemed to be contrary to public policy and that fraud invalidates a contract as a whole, including any limitation clauses in adherence to the Roman axiom of *culpa/ata dolo aequiparatur*.

Maltese jurisprudence does not deem all limitation clauses to be valid, especially not to the extent that they allow an indemnity or insurance of one's own faults. In this respect, the courts have also held that negligence invalidated the limitation clauses. The basis of the courts' doctrine is of disallowing the clause limiting or excluding liability to be used as a means of avoiding the performance of the contract in question. While minor breaches do not invalidate a limitation clause, a fundamental breach would force the courts to ignore the existence of the limitation clause, since one cannot fail to perform the contract on the strength that one shall not be responsible for damages due to the existence of such clause. The courts have held that where the defect was so significant that it amounted to the non-performance of the contract by the defendant, he or she was not entitled to utilise that clause, so a person who is in fundamental breach of contract could not rely on a limitation clause 'otherwise apt to protect him'.

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?

Tort law provides that every person shall be liable for damage which occurs through his or her own fault, regardless of whether a contractual relationship exists between the contractor and the person suffering the damage. A contractor is deemed to be at fault if he or she does not use the prudence, diligence and attention of a bonus paterfamilias in his work.

Moreover, the Civil Code holds the contractor and the architect responsible if a building or stonework erected under a building contract perishes, wholly or in part or is in manifest danger of falling off, owing to a defect in construction in the course of 15 years from when the works were carried out.

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?

Contractors commonly purchase an all-risks Insurance policy. Prior to purchasing the policy, the insurer is required to carry out an appropriate and adequate assessment of the risks involved in each particular case and provide insurance cover amounting to not less than €500,000.

Contractors' all-risk policies are split into two. They can provide cover in respect of any damages to the contract works, including materials, and are subject to certain exclusions and cover in respect of any legal liability at law towards third-party bodily injury or death, and property damage up to a limit as specified in the policy.

It is not uncommon for contractors to have an annual policy that covers all their work being carried out on several sites as opposed to purchasing a contractors' all-risk policy for every project undertaken.

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?

There are no laws prescribing a minimum amount of local employees.

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?

There are two types of contracts under Maltese law: an indefinite-term contract and a fixed-term contract. An indefinite-term contract may be terminated by the employer only for good and sufficient cause, retirement age or redundancy. If an individual is employed for a particular project, the likelihood is that the employment contract in place would be a fixed-term contract.

If either party terminates a fixed-term contract prior to the end date and without a good and sufficient cause, that party is bound to pay the other party the amount equivalent to one-half of the wages that would have accrued if the contract remained in force. Therefore, if the employee is employed on a fixed term and the project is completed in line with the term of the contract of employment, there will be no consequences.

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?

If a construction worker relocates to Malta for employment purposes or comes to Malta for a limited period of time to carry out a service in line with his or her work, they would be required to obtain a work permit or work authorisation prior to commencing work if he or she is not an EU national. A work permit is required when a non-EU national is relocating to Malta for employment purposes. However, if such employment is for a period of not more than six months, the person would not be eligible for the single permit application and instead would be required to obtain an employment licence, which essentially is a work authorisation.

In terms of Subsidiary Legislation 217.17 (Single Application Procedure for a Single Permit as Regards Residence and Work and a Common Set of Rights for those Third-Country Workers Legally Residing in Malta), the holder of a single permit shall be entitled to:

- enter and reside in Malta;
- have free access to the entire territory of Malta within the limits provided for by Maltese legislation;
- exercise the specific employment activity authorised under the single permit; and
- be informed about his or her rights linked to the permit conferred by EU and local laws in this respect.

Workers who contravene or fail to comply with the provisions outlined in the Immigration Act may be subject to a fine or imprisonment not exceeding six months, or both. They may also be banned from the Schengen Area if their stay has been found to be undocumented. Hence, it is significant that the work permit is renewed accordingly prior to expiration date. The work permit is generally valid for a period of one year and renewed automatically upon submission of a renewal application – provided all eligibility criteria remain satisfied.

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?

If the contractor decides to close operations, the employees would need to be made redundant. Maltese law provides for collective redundancies in cases where there are a large number of employees being made redundant, defined as:

- 10 or more employees in establishments normally employing more than 20 but fewer than 100 employees;
- 10 per cent or more of the employees in establishments employing more than 100 employees but fewer than 300 employees; and
- 30 employees or more in establishments employing 300 employees or more, over a period of 30 days.

In these situations, there must be a representative to represent the employees in negotiations with the employer to safeguard the employees and their employment. Employees have a right to notice when being made redundant and this is either that established in the terms of their contract or in terms of law depending on the length of service as follows:

- one to six months would require one week's notice;

- six to 24 months would require two weeks' notice;
- two to four years would require four weeks' notice;
- four to seven years would require eight weeks' notice; and
- for service in excess of seven years, one would add to the eight weeks' notice an additional week for each subsequent year, up to a maximum of 12 weeks.

Longer periods may be agreed upon in the case of technical, administrative, executive or managerial posts.

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?

Pursuant to the Maltese Civil Code, contractors have a privileged right over the property on which work was carried out for debts due in respect of expenses and the price of their work. This privilege extends to cover also fees for architects, masons and other workers. Article 1999 of the Civil Code defines a privilege as a right of preference that the nature of a debt confers upon a creditor over the other creditors, including hypothecary creditors. Privileges rank in the order they are presented in the law. Payment for contractors ranks second in the list of privileges, the first being the right to payment of ground rent.

The contractor may make use of contractual methods of securing payment, such as asking for a bank guarantee or agreeing to payment terms with the owner.

'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?

The Maltese Civil Code sets out four requisites for the conclusion of a valid contract under Maltese law, namely the capacity of the parties to contract, the consent of the party who binds him or herself, an object that constitutes the subject matter of the contract, and a lawful consideration. Therefore, so long as the price or consideration is lawfully set out, there is no obstacle to the parties agreeing to deferred payment terms contractually.

Contracting with government entities

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

Parties to a contractual agreement are deemed to be equal and a government agency cannot exonerate itself from its contractual obligations to pay what is rightfully due to the contractor by asserting immunity.

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?

Apart from the ranking rights in terms of privileged work, the contractor can demand payment for works done up until the project was interrupted. If the contractor faces difficulty with receiving payment for works done, it may be worth instituting court proceedings. However, as well as being costly court proceedings may also drag on for a number of years.

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?

Under Maltese law, the concept of force majeure is not directly defined. However, article 1134 of the Civil Code does provide for a form of defence where no performance was due to 'irresistible force'. This proviso reads as follows: 'The debtor shall not be liable for damages if he was prevented from giving or doing the thing he undertook to give or to do, or if he did the thing he was forbidden to do, in consequence of an irresistible force or a fortuitous event'.

Maltese courts have also developed and confirmed certain elements that are required to properly determine when a person can count on force majeure as a defence for non-performance of a contract. Firstly, the impossibility of non-performance must be absolute, so (by way of example) a strike conducted by workers has been held not to amount to force majeure. In addition, three more elements must be fulfilled for the force majeure plea to succeed:

- the event must be unpredictable;
- the event must be external or comes from a third person; and
- the debtor cannot have any fault in what happens, in the sense that the event could not have been prevented and was absolutely beyond his or her control.

If there is no interference by a person, whether positive or negative, then force majeure would succeed. It is important that all these elements are fulfilled for the plea to be accepted, meaning that the event must be unforeseeable and inevitable.

DISPUTES

Courts and tribunals

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

No. Claims in connection with construction disputes are usually lodged before the ordinary courts of justice or the Malta Arbitration Centre.

Dispute review boards

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

There are no dispute review boards regarding construction disputes under Maltese Law.

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?

Disputes may be referred to the Centre for Mediation voluntarily following a decision made by the disputing parties. The practice to refer disputes to voluntary mediation is not widespread, possibly because it is not a very well-known option and the public is more accustomed to referring matters in connection with construction to the ordinary courts of justice or the Malta Arbitration Centre.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Yes, statements and all communication between the parties and the mediator are confidential and no evidence of anything said or documents produced during the mediation process are admissible in any litigation proceedings. Also, a mediator cannot be summoned as a witness regarding anything that came to his or her knowledge during mediation 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?

The most common practice is that parties lodge claims before the ordinary courts of justice. However, the use of arbitration in the construction industry has been increasing steadily. The latter commonly occurs where the parties would have agreed to resort to this method, for instance, through the execution of a clause in a contract requiring the parties to submit any dispute arising out of the terms of the contract to arbitration.

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?

Contractors may contractually opt for any international arbitration or dispute resolution mechanism of their choice. While certain projects involving foreign entities do contractually resort to the ICC, it is as yet still common for contracts to opt for Malta Arbitration Centre.

The Malta Arbitration Act, Chapter 387 of the Laws of Malta and the Arbitration Rules of the Malta Arbitration Centre deal with international commercial arbitration. Indeed, the UNCITRAL Model Law on International Commercial Arbitration is incorporated into Maltese law. Therefore, any dispute, controversy or claim arising out of or relating to a contract, or the breach, termination or invalidity thereof will be settled in accordance with the International Arbitration Rules of the cooperating institutions as in force at the time. (The list of cooperating institutions is available on request.)

Dispute resolution with government entities

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

Yes, and the award will be binding. There are no limitations as to who can participate in private arbitration. The only limitations are in connection with the subject matter, that is, disputes concerning questions of personal civil status including those relating to personal separation, divorce and annulment of marriage are not capable of settlement by arbitration.

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?

The Malta Arbitration Act states that foreign arbitral awards can be enforced as an executive title once they are registered with the Malta Arbitration Centre. An arbitral award, irrespective of the country in which it was given, shall be recognised as binding upon application in writing to the competent court.

Arbitral awards other than money awards, awards containing injunctions ordering or prohibiting the doing of acts, decisions or awards by arbitral tribunals (including emergency arbitrators) granting provisional measures, and declaratory awards are not enforceable in Malta.

An arbitral award may be set aside by the court if:

- the party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Maltese Law;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains a decision on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Maltese law; or
- the award is in conflict with the public policy of Malta.

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?

Contractual claims have a five-year limitation period from the day the obligation was due, while tortious claims have a two-year limitation period which begins to run from the day the tort occurred.

Also, the Maltese Civil Code establishes that should a building or 'a considerable stonework perish, wholly or in part, or in manifest danger of falling to ruin', the architect and the contractor are held responsible. The responsibility covers events that occur within 15 years after the date of completion, and even includes situations that arise from 'defects in the ground'. The architect is generally responsible for the design and supervision of the construction of buildings and works, and the contractor for the execution of the works.

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?

Malta is a signatory to the Stockholm Declaration of 1972. In the 1970s Malta became party to several environmental agreements. However, the first step towards regulating such issues took place in the 1990s through the promulgation of the first Environment Protection Act of 1991 and the Development Planning Act of 1992. Over the years the Maltese government has enacted other legal instruments, such as the Development Planning Act, the Environmental Protection Act and the Environment and Planning Review Tribunal Act, and subsidiary legislation such as the Environmental Management Construction Site Regulations and the Building and Construction Agency (Establishment) Order. These legal instruments essentially regulate environmental governance in Malta.

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?

Under Maltese law there are specific regulations that regulate the manner in which an application for the construction of a building is to be approved. Such development permission is granted by the Planning Authority.

Chapter 549 of the Laws of Malta stipulates the duty of individuals, entities (both public and private) and the government itself to protect the environment.

By way of example, they must:

- manage the environment in a sustainable manner by integrating and giving due consideration to environmental concerns in decisions and policies on land use, socio-economic, educational and other matters;
- take such preventive and remedial measures as may be necessary to address and abate the problem of pollution and any other form of environmental degradation in Malta and beyond, in accordance with the polluter pays principle and the precautionary principle; and
- apply scientific and technical knowledge and resources in determining matters that affect the environment.

Failure to comply with these regulations may result in an administrative fine, which shall not exceed €100,000 for each contravention or €1,500 for each day of non-compliance.

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'?

Malta has a series of bilateral investment promotion and protection agreements with third countries. Therefore one would need to assess the protection granted on a case-by-case basis.

Tax treaties

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

Malta has constantly pursued the signing of double taxation treaties and today there are over 80 double taxation treaties concluded with other contracting jurisdictions. Unless the contractor establishes a permanent establishment in the said jurisdictions, only Malta would be allocated the right to tax the mentioned profits. While Malta is not a member of the OECD, the government of Malta and the Maltese tax authorities have, for the most part, always sought convergence with the OECD model convention when concluding double tax treaties. In this regard, Malta has contracted for double tax treaties whereby a permanent establishment is only formed insofar as the building site, construction, assembly project or supervisory activities in connection therewith continue for more than 12 months. This prevents most contractors tax-resident in Malta from being taxed in various jurisdictions. It is pertinent to note that Malta has placed a general reservation on article 14 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS which means that the splitting of contracts will in principle not lead to aggregation of time periods in this determination.

Currency controls

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

Between 1972 and 1994 Malta applied a strict exchange control regime limiting capital flows out of the island. In 1994 current account transactions were freed from exchange controls and between 2002 and 2004 capital controls were gradually removed so that all remaining exchange control restrictions were removed by 1 May 2004, when Malta became a full member of the European Union (EU).

In 2003, the Exchange Control Act (Chapter 233 of the Laws of Malta) was overhauled and re-designated as the External Transactions Act as part of Malta's legal and economic preparations to become a full member of the EU. Since the accession of Malta to the European Union on 1 May 2004, there have been no exchange control regulations in Malta. Furthermore, no distinction is made between undertakings owned or controlled by EU citizens and those owned or controlled by non-EU citizens for the purposes of exchange controls.

The Minister of Finance is conferred with the power to make regulations to impose restrictions on capital transactions in limited and exceptional circumstances provided by law, intended to preserve the stability of Malta's financial system. Such powers are intended to address extreme circumstances such as the prevention of a balance of payments crisis, or the implementation of sanctions against specific countries in line with resolutions adopted by any international organisations of which Malta is a member.

The External Transactions Act also includes ministerial power, which can be exercised after consultation with the Central Bank and the National Statistics Office, to require the furnishing of any foreign exchange transactions for statistical purposes. Operators in the financial services sector are required to complete periodic statistical returns (usually annually) for the purpose of compiling Malta's balance of payments and international investment position and also for submission to Eurostat.

Removal of revenues, profits and investment

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

In line with the EU Freedom of Movement of Capital, there are no restrictions on the movement of capital. However, there are obligations rooted in EU legislation pertaining to unsolicited declarations when transferring certain amounts of money.

The Cash Control Regulations (LN 149 and 411 of 2007), which were promulgated on 15 June 2007 by ministerial powers exercised in accordance with the External Transactions Act, introduced regulations requiring any person entering or leaving Malta, or travelling through Malta, with an amount of cash (including monetary instruments) amounting to €10,000 to report such cash to the Customs Department on a prescribed form. This measure is intended to help in the battle against money laundering.

UPDATE AND TRENDS

Emerging trends

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

The construction industry has been on a steadfast increase for a number of years in Malta and current trends do not envisage any signs of decline in the industry. Over recent years the construction industry has been in the spotlight due to numerous incidents in which adjacent properties collapsed as a result of construction and excavation works being carried out in neighbouring properties. To this effect, on 25 June 2019, the government launched its building and construction reform, which primarily seeks to protect third-party properties by clearly defining the roles and responsibilities of those involved in any excavation, demolition or construction and by increasing fines for non-compliance with construction regulations. The Avoidance of Damage to Third Party Property Regulations, the legal notice that resulted from said reform, now imposes clearer requirements for method statements which are now available to the public, thereby granting neighbouring properties the right to appeal to the proposed method statement.

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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?

The starting point for any foreign designer or contractor contemplating setting up an operation in the Netherlands to pursue the Dutch market would be to familiarise itself with Dutch laws, regulations and customs and to analyse the local prospects and the fiscal implications. This knowledge could be obtained by engaging local expertise – often, the principals for construction projects require proof of engagement in relation to knowledge of Dutch laws and regulations.

There is no specific supervision for foreign designers or contractors in the Netherlands. When engaging in design and construction activities, all relevant Dutch laws and regulations must be complied with.

For a local office, the general options are leasing and acquisition. Leasing or the acquisition of an existing office (brownfield investment) would be the most time-efficient approach. Leasing would likely provide the desired flexibility, as in the case of an exit the property can be redelivered to the landlord in accordance with the arrangements made.

Staff can be hired from abroad and locally. Dutch employment law should be taken into account, such as – for (foreign) contractors in particular – the relevant collective bargaining agreement.

A foreign contractor or designer could opt for entering into a corporation with a local partner or for incorporating a Dutch branch. The corporation can be structured in multiple ways. This is often done by means of a general partnership, a jointly owned private limited liability company or contractual arrangements (eg, subcontracting). For either approach, the incorporation of a private limited liability company may be desired for practical, liability and other legal reasons. This can be arranged in a short time frame.

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?

Dutch laws do not provide for specific licensing regulations for foreign designers and contractors operating in the Netherlands.

However, foreign contractors from another EU member state who bring their employees to the Netherlands must report this to the Dutch Social Insurance Bank (SVB) on the basis of the Dutch Act on Posted Workers (WagwEU). This reporting must be done digitally on the website of the SVB.

Also, contractors using employees from outside the European Economic Area (third-country nationals) on a construction project in the Netherlands must have work permits for these employees. This also applies to self-employed persons that are third-country nationals unless these self-employed persons can show a residence permit allowing them to work as a self-employed person in the Netherlands. In the absence of work permits, the Dutch Social Affairs and Employment Inspectorate may impose fines on the contractor (acting as employer) and on the principal of the contractor. Further, the contractor and the principal will be registered in a publicly available register as companies that have violated the Foreign Nationals (Employment) Act.

Competition

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

Dutch laws do not provide advantages to domestic contractors in competition with foreign contractors.

In the event of publicly tendered contracts by public entities, it is specifically prohibited to discriminate against contractors from other European Economic Area member states (as of 1 January 2021, the EEA no longer includes the United Kingdom). In practice, when organising limited tenders, local authorities have a tendency to favour regional contractors over other domestic or foreign contractors.

In many cases, domestic contractors do have practical advantages over foreign contractors. For example, domestic contractors tend to find it easier to fulfil criteria, such as having a local branch or meeting language requirements. In addition, foreign contractors from outside the European Union working on a construction project in the Netherlands must have work permits for their employees if they are third-country nationals.

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?

The EU and Dutch public procurement rules ensure transparent and non-discriminative tender procedures to compete for all contracts with public entities that exceed the applicable thresholds (as at April 2021: €5.35 million for works contracts), although certain specific exemptions apply. These tender procedures are open to all undertakings within the European Economic Area and all member states of the Government Procurement Agreement under the World Trade Organization. Although the United Kingdom is no longer subject to the EU public procurement rules, the EU and the United Kingdom agreed on public procurement rules in the Trade and Cooperation Agreement, in which the Government Procurement Agreement is declared applicable. Public entities may restrict access to contracts below the applicable thresholds if they have

valid reasons to do so; however, in practice, those contracts are often publicly tendered as well.

Bid rigging (which also includes 'cover pricing' (ie, submitting a bid with no intention of winning the tender in concert with another party bidding with the aim of winning)) is prohibited as a hardcore infringement of both the EU and the Dutch cartel prohibition. Since its inception, the Authority for Consumers and Markets (ACM) has imposed fines for bid rigging and cover pricing practices in, among others, the construction industry on many occasions. For example, on 16 June 2020, the ACM imposed a fine on two roofing contractors for impeding competition in a tender process (bid rigging). Parties that have been sanctioned for bid-rigging agreements by the ACM or another competition authority may also be excluded from participating in public tenders.

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?

The award of a contract that has been illegally obtained may lead to the contract being void or subject to annulment pursuant to Dutch law. The relevant consequence depends on the matter of illegality. If declared void or annulled, the contract will not be enforceable.

The main legislation relating to anti-bribery and anti-corruption offences is detailed in the Dutch Penal Code and includes rules regarding active and passive bribery of public officials (public bribery) and non-public officials (commercial bribery). Combating bribery and corruption is the task of the Public Prosecution Service and other authorities. Facilitation payments fall within the scope of public bribery under the Dutch Penal code and are, therefore, punishable under Dutch law.

There is a range of maximum sentences that can be imposed as a result of the different bribery and corruption offences. The maximum penalty that can be imposed on legal entities is €900,000 or 10 per cent of the annual turnover of the bribing entity.

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 Dutch Penal Code penalises bribery. Neither the Dutch Penal Code nor other Dutch laws include rules that oblige members (ie, individuals) of a project team to report bribery.

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?

Making political contributions is not part of doing regular business in the Netherlands. Making these payments with the intention to gain – directly or indirectly – a business advantage could very easily constitute an act of bribery under the Dutch Penal Code.

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 rules as government employees?

According to Dutch case law, a very broad scope applies to the definition of public officials – the Dutch Supreme Court has ruled that a public official includes any person appointed by a public office to exercise some of the powers of the state or its agencies. This also applies to a person who is appointed to a position (with a public character) that the person cannot be denied to perform part of the government's tasks. Consequently, it is possible that a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) may be qualified as a 'public official' within the meaning of the anti-bribery provisions for government employees. However, this is not always the case and depends on the circumstances of the case.

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?

Work permits are required if third-country nationals work on a construction project in the Netherlands. If foreign workers are working in the Netherlands, certain employment law rules (eg, the Dutch Minimum Wage Act) apply immediately, as well as (part of) the collective bargaining agreement in the construction sector. If the foreign workers who are being employed by a contractor from another EU member state and posted to the Netherlands work for 12 months in the Netherlands, almost all Dutch employment legislation will apply to them. The period of 12 months can be extended to a maximum of 18 months.

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?

In Dutch construction practice, standard form or model contracts and accompanying general terms and conditions have been developed. Which model contract or set of general terms and conditions is the best to use, depends on, for example, the type of project, its complexity and size, and the commissioning party and its need for innovation and involvement in realising the project. The three most commonly used contracts for consultancy services, construction works and integrated works are those based on the DNR 2011, the UAV 2012 and the UAV-GC 2005, respectively. The general terms and conditions may be deviated from, as is often the case in practice.

There is a considerable degree of freedom of contract concerning contracting parties and the content of contracts for design and construction works pursuant to Dutch law. The contracts can be made in any form; however, written contracts are preferred. Contracting parties have freedom in choosing the language of the contract (not necessarily Dutch).

Contracting parties are, in principle, free to agree on the law governing their construction contract. Usually, Dutch law is chosen as the governing law for projects being realised in the Netherlands. However, without a choice of forum the contract will be governed by the laws of the country in which the contractor is domiciled. Despite another

choice of law, Dutch public law will apply to construction projects realised in the Netherlands.

Contracting parties are, in principle, also free to agree whether a dispute will be resolved by the ordinary court or through alternative dispute resolution arrangements. If the parties have not agreed on a forum, the competent ordinary court will have jurisdiction.

Payment methods

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

In Dutch construction practice, generally, the contract price is paid to contractors and subcontractors in instalments per completed milestone or on a monthly basis. Instalments are usually payable in line with the progress of the work, and contractual procedures on inspection, approval and invoicing must be followed. Payment takes place by means of electronic payment.

Lenders to construction projects typically require that the owners-borrowers inject all of the required equity (ie, sponsor equity) before the credit line can be used for payment of instalments owed to the contractor. Lenders often pay instalments due directly to the contractor.

For payments in advance, principals will stipulate security from their contractors and transfer of title. Contractors do not generally accept payment arrangements on a 'pay when paid' or 'pay if paid' basis and will stipulate securities from their principal. However, there are no legal restrictions in this respect.

Vendors (suppliers) are usually paid by electronic payment on delivery at the latest. Workers are mostly paid electronically, typically once a month.

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?

The contractual matrix for a construction project in the Netherlands depends on many aspects, such as the scale and complexity of the project, the expertise and the team of the owner, and the envisaged exit strategy.

Traditionally, owners or end-users contract directly with the designers (architect and other consultants) and the general contractor if the project concerns merely the construction of a building. The general contractor will then often engage more than one subcontractor and supplier. Alternatively, one general contractor can be contracted for both the design works and the construction works.

Investors often involve a project developer for the entire project if there is a development risk or a vacancy risk, or both, in addition to the construction risk. If the investor is already the owner or has purchased the property to be developed by means of forward funding, they will stipulate direct agreements or multiparty agreements to be entered into between the investor, the developer and the respective designers and general contractors in the event of the developer's insolvency.

PPP and PFI

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

There is no formal statutory regulatory framework for PPPs and PFIs in the Netherlands. This applies to contracts and the structure of the partnership.

Possible legal forms into which PPPs are legally cast include a jointly established entity, a private limited liability company or a limited partnership, within which the project is executed and both the public and private parties have authority and contribute capital (financing), knowledge or property (land). A PPP can also be structured through a cooperation contract.

Joint ventures

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

Dutch laws do not provide for specific regulations pertaining to the structuring of consortia for construction projects. Whether the members of a consortium are jointly liable for the entire project or solely for their own contribution usually depends on the requirements of the relevant tender or the result of contract negotiations.

If contractors have jointly submitted a tender or have been contracted for the entire project, they will be jointly liable towards the principal (this may be different if specific arrangements have been made with the principal to that effect). The members of such a consortium will likely have allocated liabilities and responsibilities between themselves.

A consortium may also be structured by means of a legal entity, such as a private limited liability company. In principle, such legal entity will be the responsible party towards the principal.

The liabilities and responsibilities are often divided between the partners based on the expertise or other contributions they bring to the table or simply based on the works they must execute. As joint venture vehicles are often set up for a specific project and do not have endless resources, the principal will likely stipulate that the parent companies provide sufficient security.

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?

Under Dutch law, the parties to a construction contract may agree on a full indemnification of either one of them. However, as this would otherwise be deemed contrary to public order and morality, such indemnification does not apply where it concerns the indemnified party's wilful misconduct or deliberate recklessness. Furthermore, a party cannot invoke an indemnification – or any provision, for that matter – if the result of successfully invoking the indemnification would be unacceptable based on the standards of reasonableness and fairness. In construction practice, the contractor usually indemnifies the principal against claims from third parties in relation to the project.

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?

In principle, a contractor is only obliged to perform its obligations towards its principal under the construction contract under Dutch law. However, there are quite a few exceptions to this general rule. For example, if a certain right towards the contractor is attached to the capacity of being the owner of a building, that right may transfer to a third party obtaining the ownership of the property. Usually, the contractor will provide warranties of which both the principal and its legal successors are beneficiaries. To a limited extent, a third party could claim damages based on a tortuous act of the contractor.

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?

Liability owing to the injury of workers, damage to property of third parties and damage due to environmental hazards

In Dutch construction practice, the insurance most commonly taken out is a construction all-risk (CAR) insurance. This insurance always provides all-risk coverage with respect to damage to the construction work (limited exclusions may apply).

In addition, coverage can be taken out for, among other things, liability of any of the parties involved in the project in relation to property damage (such as damage to adjacent buildings) or personal injury of third parties in connection with the construction works. Liability in relation to injury of workers (generally not qualified as third parties under this section of the CAR insurance) is generally not covered under CAR insurance.

A contractor also often takes out business liability insurance, which provides coverage for liability of the contractor for, and as a consequence of, property damage or personal injury (of workers or third parties). Damage to the property of third parties in connection with the construction works is often excluded in business liability insurance. Additional coverage can be taken out.

Damage to the work itself due to environmental hazards is ordinarily covered under the CAR insurance if it concerns material damage to the work that arose during the construction period. If coverage for the property of the principal is concluded as part of the CAR insurance, damage to property of the principal due to environmental hazards is covered if the environmental hazard causing damage is a sudden uncertain event and this event is not the direct result of a slow process. If the liability section of the CAR insurance is concluded, or if a separate (business liability) insurance applies with coverage for environmental hazards, coverage can exist for damage to third parties due to environmental hazards, but again only if the environmental hazard causing damage is a sudden uncertain event and this event is not the direct result of a slow process.

Delay damages

In general, no coverage for liability in connection with delay damages exists under CAR insurance. However, it is possible to take out coverage for delay damages that are the consequence of damage to either the work constructed or to the property of the principal owing to the construction works.

Business liability insurance generally provides coverage in connection with liability for damages as a consequence of property damage caused by the contractor. Liability of the contractor for delay damages of the principal owing to property damage is, therefore, covered as a starting point. However, an exclusion applies in most policies regarding damages as a consequence of damage to the work constructed; although, sometimes this exclusion is removed, especially in business liability policies taken out by contractors.

In addition, if the contractor is responsible for design and professional indemnity insurance that was taken out in that respect, liability for delay damages as a consequence of a design error is, mostly, covered.

If liability for delay damages is covered under any insurance, this coverage is generally limited to the liability that the contractor would have had towards the principal had no provision been included in the construction contract. In other words, liability as a consequence of liability-increasing clauses (such as a penalty clause) is generally excluded.

Dutch law does not limit contractors' liability for damages, other than general limitations regarding damages that can be claimed by any party (such as a sufficient causal link).

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?

Dutch laws do not require a minimum amount of local labour to be employed on a particular construction project. If a construction contract is publicly tendered by a public entity, there may be a minimum requirement to use at least a certain percentage of disabled persons when performing the contract. A requirement in the tender documents to use a minimum amount of local labour is less common and may even contradict public procurement rules (ie, the freedom of establishment).

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?

Employees can get an employment contract for a definite term pursuant to Dutch law (ie, the term of the project); this is the case even if it is not yet clear on what date exactly the project will be completed. Upon completion of the project, the employment contract terminates automatically. After termination of the employment contract, there are no legal obligations of the former employer, except the obligations following from the employment contract itself (payment of wages, transitional payment and pensions, etc) in relation to its duration.

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?

Work permits are required for employees from outside the European Economic Area or Switzerland (third-country nationals) on a construction project in the Netherlands.

Employees who are 21 years or older are entitled to the statutory minimum wage under Dutch law (€1,725.00 gross per month as at 1 January 2022 and based on full-time employment).

Further, special provisions for foreign construction workers are included in the collective bargaining agreement for the construction sector. The collective labour agreement is declared generally binding most of the time – this means that it applies regardless of whether the employer or employee is a member of an employer's organisation or union.

Furthermore, the Dutch Health and Safety Act, the Dutch Act on Minimum Wages, the Dutch Working Hours Act and the Dutch Waadi Act are important pieces of legislation for construction workers. These provide regulations for on-site working conditions. The Waadi Act is important if a foreign contractor lends its workers to a Dutch recipient and the workers are going to work under the supervision of the recipient.

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?

If a foreign contractor has incorporated a Dutch entity through which it performed its operations, this entity may be dissolved and liquidated once the contractor decides to close its operations and the Dutch company is no longer necessary.

The liquidation of the entity comprises two stages: the formal resolution to dissolve the entity and the winding up of its assets and liabilities.

The dissolution 'reduces' the legal existence of the company; it continues to exist only insofar as is required for the purpose of the liquidation of its assets and liabilities and it cannot transact any business other than what is necessary for the winding-up.

The winding-up consists of the settlement of the accounts and the realisation of the non-financial assets for the purpose of making a final distribution to the shareholders who are entitled by virtue of the articles of association. A two-month waiting period applies, during which any interested person may institute opposition to the published final accounting of the company.

Whether there will be termination payments assessed against a foreign contractor at the end of a project will also depend on the contractual agreements made in this regard.

There may also be fiscal consequences for the contractor to consider when closing the operations.

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?

First, contractors and subcontractors can secure payment by invoking their statutory right of retention. This effectively means that they do not have to provide their principal or third parties with access to the construction site until their due and payable claims have been paid in full. In addition, the contractor may suspend its work in the case of non-payment by the principal. Both rights can be duly exercised only if certain legal requirements have been met, and these rights have not been contractually waived. Further, a contractor may have stipulated security from its principal, such as a bank or company guarantee.

Lastly, the contractor can attach all the principal's assets, such as the land on which the project is realised, other real estate and bank accounts.

'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?

Dutch law does not prohibit the use of 'pay when paid' or 'pay if paid' provisions. However, it is common practice that subcontractors are paid in line with the progress of the work.

Contracting with government entities

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

A Dutch government agency or entity does not have special status when concluding civil law contracts with contractors; however, specific rules on representation of the government apply, and arrangements with respect to public law competences are limited. The Dutch Civil Code provisions pertaining to contracts apply, as well as the procurement rules for tendering works. Sovereign immunity cannot be used as a defence against claims of a contractor under a contract based on Dutch law.

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?

Dutch laws do not provide protection for unpaid contractors in the case of interruption or cancellation. Pursuant to the Dutch Civil Code, the principal is authorised to terminate the construction contract in whole or in part, and is, upon termination, obliged to pay the entire contract sum minus any savings resulting from the termination for the contractor. The UAV 2012, a set of general terms and conditions often used in Dutch construction practice, contains a similar provision, also in the case of a long-term interruption attributable to the principal. Often, construction contracts include further arrangements deviating from the Dutch Civil Code and UAV 2012.

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?

Force majeure events are defined in the Dutch Civil Code as a failure in performance that cannot be attributed to the obligor; that will be the case if the failure is not owed to the obligor's fault pursuant to the law, a juridical act or generally accepted principles. As a result of force majeure, the contractor will not be in default and cannot be held liable for a delay in completing the project. However, the contractor is still obliged to perform, and the other party is entitled to terminate the contract based on non-performance.

The parties to a construction contract can limit or extend the circumstances that constitute force majeure. This is common practice in some construction sectors. The rules of mandatory law and the standards of reasonableness and fairness apply and may restrict these arrangements.

DISPUTES

Courts and tribunals

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

The parties to a contract governed by Dutch law are free to agree that disputes will be resolved by the ordinary court or through alternative dispute resolution, such as mediation, a binding decision and arbitration. For example, the Arbitration Board for the Building Industry is a specialised arbitral tribunal that rules on construction-related cases. However, if the parties have not agreed on a forum, the competent ordinary court will have jurisdiction to settle the disputes.

Dispute review boards

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

The parties to a contract governed by Dutch law may agree on the appointment of experts for dispute review. Review by a DRB is often used in construction projects on behalf of the government, such as by the Dutch Directorate-General for Public Works and Water Management. In most cases, each party is entitled to appoint one expert, after which the two appointed experts will jointly appoint a third expert. The decision made by the experts is generally non-binding; however, often, the arrangements made in relation to the DRB provide that if the matter is not brought before the competent court within a certain period of time, the decision will become binding and, in principle, final.

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?

In Dutch construction practice, the parties generally try to negotiate and reach an amicable settlement without the interference of an ordinary court or an arbitral tribunal. Mediation has gained acceptance over the years but is not often used in Dutch construction practice. A mediator chosen by the parties, who does not need to have a legal background, guides the negotiations between the parties.

Confidentiality in mediation

30 Are statements made in mediation confidential?

Arrangements on confidentiality are typically set out in the mediation contract signed by all parties before the mediation process. If the parties agree, they are contractually obliged to keep confidential all the information that becomes available during mediation and would not have become available otherwise. If this contract is deemed to be an 'evidence contract', it effectively excludes the information from being used as evidence in legal proceedings. In Dutch cases, mediators, unlike attorneys, do not have the right to refuse making a sworn witness statement in court.

Arbitration of private disputes

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

Disputes in the Dutch construction sector are frequently resolved by arbitration. The Arbitration Board for the Building Industry specialises in construction disputes and is often appointed as the arbitral tribunal to resolve construction disputes. Most standard general terms and conditions used in the construction sector refer to the Arbitration Board as the competent tribunal. Disputes are also regularly resolved by the Netherlands Arbitration Institute. When it comes to dealing with construction matters, the Arbitration Board for the Building Industry is generally preferred over a court and the Netherlands Arbitration Institute because of its in-depth construction knowledge.

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?

There are not many projects in Dutch construction practice in which the foreign contractors pursuing a contract for works insist upon international arbitration – if so, the parties will usually appoint the arbitral board at the International Chamber of Commerce. However, generally, the parties opt for having disputes resolved by the competent ordinary court or the Arbitration Board for the Building Industry, which specialises in construction matters.

Dispute resolution with government entities

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

Dutch government agencies may participate in private arbitration. When a government agency enters into a construction contract that includes an arbitration agreement (or choice of court), the state will be deemed to have relinquished its claim to immunity from jurisdiction.

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?

The enforcement of an award by a foreign or international tribunal in the Netherlands requires an exequatur issued by the competent local courts. This concerns formal proceedings, and the court will grant this exequatur except in exceptional circumstances; for example, if the award was issued in conflict with public order or morality.

The Netherlands is party to several conventions regarding the recognition and enforcement of foreign arbitral awards. If a convention is applicable to an arbitral award, the grounds for rejection of the arbitral award follow from the relevant convention. If there is no convention applicable, the grounds for rejection are included in the Dutch Code of Civil Procedure.

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?

Dutch construction law provides for a number of statutory limitation and expiry periods. In addition, there are often contractual expiry periods to take into account. The main difference between the two is that a limitation period can be interrupted, after which a new period begins to run, whereas an expiry period cannot. One must plead prescription and expiry for the legal consequences to take effect.

For the performance of a contractual obligation, the general statutory limitation period of five years applies. The statutory limitation period for claims towards the contractor regarding hidden defects is two years starting from the principal's complaint in this respect. A 20-year limitation period applies to defects after completion. The lapsing of these periods will lead to prescription of the claim against the contractor.

Upon discovery of a defect, the principal must complain to the contractor promptly. If a complaint is not made within a reasonable time, the principal may no longer be entitled to hold the contractor to account. The definition of a timely complaint depends on the circumstances of the case; in any case, the reasonable time should prevent the contractor from finding itself in a more difficult legal position to defend itself against a claim from the principal.

Expiry periods are included in several sets of general terms and conditions often used for Dutch construction projects. Two common expiry periods start from completion or after the defects liability period, which are the five-year period for 'normal' hidden defects and the 10-year period if the work has collapsed or threatens to (partly) collapse or has or will likely become unsuitable for the purpose for which it is intended. Legal actions will not be admissible if instituted after the expiration of the relevant period.

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?

The Netherlands was a member of the United Nations at the time of the conference at which the Stockholm Declaration was established. More relevant in practice, however, is the applicability of the legislation of the European Union in the Netherlands. Specifically, with respect to preservation of environment and wildlife, the Habitats Directive (92/43/EEC) and

the Birds Directive (2009/147/EC) are relevant. These directives have been implemented in the Netherlands in the Nature Preservation Act.

Under the Dutch Nature Preservation Act, it is forbidden to carry out a project that has – in short – a detrimental effect on the conservation objectives of a Natura 2000 area. In addition, it is forbidden to disturb threatened species or their breeding or feeding places. Therefore, a construction project that has an effect on the conservation objectives of a Natura 2000 area or on threatened species may be prohibited unless a permit or exemption is obtained.

Further, construction projects must comply with all (other) relevant Dutch legislation and may require several permits. Most permits can be integrated in an integrated environmental permit (eg, for construction, zoning plan deviation and demolition). The legislation governing the construction sector is spread over many laws and regulations.

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?

Under the Dutch legislation relating to environmental activities, the General Environmental Permitting Act (GEPA) and the Environmental Management Act, an environmental notification or an environmental permit is required for activities with a (substantial) environmental impact.

An environmental permit is generally required for an activity with a material environmental impact (such as large electrical installations and storage of large volumes of hazardous substances). An environmental permit can be obtained from the municipal executive in most cases and requires a permit application that covers the relevant environmental aspects (eg, an environmental impact assessment, soil surveys and noise assessments). In the environmental permit, the competent authority can include conditions relating to the operations of the activities (eg, the maximum amount of hazardous materials and the hours of operation of a noisy installation).

An environmental notification is obligatory when the environmental activities do not exceed the thresholds to obtain an environmental permit but do exceed the threshold to file a notification. A notification can be filed with the municipal authority. If the notification is filed, the general rules of the Activities Decree may apply. For example, noise hindrance rules apply if a noisy activity is notified, or soil protection rules apply if a soil-threatening activity is notified. For construction projects that have a minor environmental impact, such as warehouses, office buildings or similar objects, general rules can also apply with respect to energy efficiency rules.

In addition to the general environmental obligations, specific legislation relating to topics such as waste, water, chemicals, etc, may apply (depending on the operations and use of commodities and utilities).

Lastly, when discussing environmental legislation in the Netherlands, it should be noted that a new Environmental and Planning Act is currently expected to enter into effect from 1 January 2023 which will fully integrate all acts, decrees and regulations that apply to the physical environment – such as the Spatial Planning Act, the GEPA, the Crisis and Recovery Act, the Noise Abatement Act, the Soil Protection Act, the (new) Nature Conservation Act and the Water Act – into one all-encompassing Environmental and Planning Act. Although the Environmental and Planning Act will, at least initially, not change much of the material requirements described above, it is expected that over time such effects are to be expected inter alia because local governments will have more room to tailor (certain parts of) the environmental regulations and requirements to specific local circumstances. In any event, this (legislative) development is expected to remain a hotly debated topic in the coming years, if only because the law-making process and implementation have proven to be much more complicated than initially expected due to a range of difficulties (relating to the IT infrastructure required, among other factors).

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'?

The Netherlands is party to a large number of bilateral investment treaties (BITs) that may provide recourse to foreign investors in construction and infrastructure projects in addition to the Dutch courts and commercial arbitration under specific contractual provisions. The Netherlands has concluded more than 100 BITs, approximately 90 of which have been in force periodically.

The BITs to which the Netherlands is party are regarded as the 'gold standard'. These BITs generally take a strong protection approach by providing for:

- easy investor qualification by the simple test of incorporation;
- the full range of protective standards, including expropriation; and
- immediate, unconditional and unqualified access to investor–state dispute settlement.

At present, these BITs all contain a definition of 'investments' that corresponds to the definition of the 2004 Netherlands model BIT (or a slight variation). Pursuant to that definition, the term 'investments' means every kind of asset; for example, movable and immovable property as well as any other rights in rem in respect of every kind of asset.

Owing to developments in the European Union and at the Dutch national level (where a renegotiation of Dutch BITs has been announced, but with, for the moment, no concrete results), foreign investors may not or may no longer qualify for investment protection if they do not have sufficient business activities in their home state. It is recommended that both new and existing construction and infrastructure projects are regularly assessed on a case-by-case basis to establish that they meet and continue to meet all applicable requirements for investment protection.

Tax treaties

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

The Netherlands has concluded several double tax treaties with other countries. The content thereof may vary per treaty. In principle, a Dutch contractor is subject to Dutch tax on its worldwide profits. If a contractor is active in other countries, it needs to be assessed whether those activities result in a permanent establishment in the relevant country. If so, the right to tax is generally allocated to the country in which that permanent establishment is situated. Exceptions may apply for minor or preparatory activities, but, in principle, developing a real estate project in another country will result in a permanent establishment, as a result of which the results can be taxed in that other country. Likewise, foreign contractors that are active in the Netherlands may be subject to Dutch taxation in respect of those activities.

Currency controls

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

The nominal value of the shares in a Dutch private limited liability company may be in a foreign currency. This currency is recorded in the articles of association of the company, which are included in the

deed of incorporation. After the incorporation of the company, its articles of association can be amended by executing a notarial deed of amendment.

The functional currency is also important for reporting purposes. Normally, the currency of the economic environment in which the Dutch company operates is used for the presentation in the annual accounts. However, it is also possible that the annual accounts will be presented in a currency different to the functional currency if justified by the activity of the company or the international organisation of its group.

From a Dutch corporate income tax perspective, you can request to file your corporate income tax returns in a currency other than the euro, provided that certain conditions are met. This decision is, in principle, valid for 10 years.

Removal of revenues, profits and investment

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

A decision to distribute profits or reserves of a Dutch private limited liability company must be made by the general meeting of shareholders. This power can be limited in the articles of association or attributed to another corporate body, such as the management board or the supervisory board. Distributions can only be made if the equity capital exceeds the legal reserves and the reserves provided for in the articles of association.

Although the resolution to distribute is made by the general meeting of shareholders, the decision has no consequences if the management board does not give its approval and does not make the payment. The management board can only withhold its approval if it is aware, or reasonably ought to be aware, that the company will not be able to continue to pay its debts that have become due and payable (after this distribution is made).

There are several tax rules to take into account in this regard and there might be fiscal consequences.

UPDATE AND TRENDS

Emerging trends

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

Trends in Dutch project development and construction practice include the redevelopment of existing buildings and the promotion of sustainability and innovation in laws and regulations. Sustainability is increasingly becoming more important because of higher market standards, energy transition and stricter EU law requirements pertaining to environmental, social and governance investing.

Construction projects face stricter requirements on quality assurance and are being challenged by nitrogen deposition rules and related regulations.

The demand for housing, logistics and data centres is high, while investors show an appetite for forward-funded turnkey projects. The current conflict in Ukraine, however, creates challenges for contractors and other stakeholders of construction projects, such as steep price increases and scarcity of building materials.

Further, recent and expected tax rules will likely lead to different ways of structuring projects, which will affect the number of entities used, financing and the moment of legal transfer.

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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?

Some of the key concerns for a contractor setting up business in New Zealand are the following:

- considering what type of structure is most suitable and complying with the relevant regulations to establish any entity chosen. Overseas companies and limited liability partnerships must register with the Companies Office if they are 'carrying on business' in New Zealand. This can be done online through the Companies Office: https://companies-register.companiesoffice.govt.nz/help-centre/starting-a-company/#;
- researching the market and determining how factors such as geographical distance and currency fluctuations may impact business. Statistics New Zealand has information, tables and tools that can help and these are available online at: http://businesstoolbox.stats.govt.nz/IndustryProfilerBrowse.aspx;
- checking licensing and professional qualification requirements;
- understanding pertinent taxation issues, including the following:
    - goods and services tax of 15 per cent is charged on the sale of goods and the provision of services; and
    - the Accident Compensation Corporation provides no-fault accident compensation for workplace (and other) injuries, funded by employer levies; and
- understanding other factors that may affect the cost of doing business in New Zealand, including:
    - availability of insurance;
    - ensuring compliance with the law regarding employee contracts, labour and human rights;
    - ensuring compliance with health and safety legislation; and
    - ensuring compliance with consumer protection laws.

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?

Foreign designers and contractors must follow the same licensing procedures that are required for domestic designers and contractors.

All restricted building work (RBW) (residential building work that is essential to the structural integrity or weathertightness of a building) must be carried out or supervised by a licensed building practitioner (LBP). Holders of Australian design or trade-related licences can apply for a New Zealand licence under the Trans-Tasman Mutual Recognition Act 1997.

Becoming an LBP involves a robust application process consisting of a written application, oral testing by assessors and confirmation of the applicant's work by referees. A contractor carrying out RBW without an LBP (or without supervision by a person holding an LBP) may be fined up to NZ$20,000.

In addition, a plumber, gas fitter, drainlayer, electrical worker or architect must be registered in their profession in accordance with the relevant legislation to be able to work in New Zealand. Engineers need not be registered by law to work in New Zealand; however, only qualified persons registered with Engineering New Zealand may use the title 'chartered professional engineer'.

Competition

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

The law does not provide any advantage to domestic contractors over foreign contractors.

Public sector procurement in particular is guided by the Principles of Government Procurement and the Government Rules of Sourcing. 'Being fair to all suppliers' and 'non-discrimination in procurement' are core components of these policies, which aim to encourage competition, treat suppliers from another country no less favourably than New Zealand suppliers and meet New Zealand's international obligations.

In addition to bilateral agreements relating to procurement with a number of other countries (such as Australia, Singapore, Brunei and Chile), New Zealand is a party to the World Trade Organization's agreement on government procurement (GPA). The GPA aims to establish equal conditions of competition in the government procurement markets among countries that accede to it.

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?

The government has developed principles and rules for all public sector procurement, which are designed to ensure a fair and effective approach to appointing suppliers. These principles and rules are underpinned by commercial and public law legislation. In addition, the government has five guides to help public sector agencies with procurement strategies for construction projects, which are supported by best practice guidelines, toolkits and rules for sourcing, tendering, contracting, and risk and value management. These are available online at https://www.procurement.govt.nz/procurement/specialised-procurement/construction-procurement/.

Bid rigging and other anticompetitive behaviours are forms of cartel conduct, which are prohibited by the Commerce Act 1986. The Commerce (Cartels and Other Matters) Amendment Act 2017 (which came into effect in August 2017) has enabled wider collaboration between firms where it is not for the purpose of lessening competition, but has expanded the range of prohibited conduct to include price-fixing, restricting output and market allocation between parties. The Commerce (Criminalisation of Cartels) Amendment Act 2019 came into force in April 2021. This Amendment Act means that individuals convicted of engaging in cartel conduct, such as price-fixing, restricting output or allocating markets, will face fines of up to $500,000 or up to seven years' imprisonment or both.

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 obtained through bribery is illegal and of no effect.

Bribery in the public sector is dealt with under the Crimes Act 1961, which makes it an offence to give or accept a bribe for an act done or not done in an official capacity. 'Bribe' is widely defined to include money, valuable consideration, office, employment or any direct or indirect benefit. Bribe-givers and bribe-takers are prosecuted; the penalty is imprisonment for up to seven years.

Bribery offences in the private sector are dealt with under the Secret Commissions Act 1910, which makes it a criminal offence to bribe an agent, such as a lawyer, broker or real estate agent, to act in a certain way regarding their client's business or affairs. A person who commits an offence against this Act is liable to imprisonment for a term not exceeding seven years. The wronged party may also bring a civil claim for breach of a statutory duty.

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?

Bribery offences in the private sector are dealt with under the Secret Commissions Act 1910. Where an employee has knowledge of bribery, but fails to report that knowledge, they are guilty of an offence under the Act. The maximum penalty for this offence is up to seven years' imprisonment.

As for the public sector, bribery offences are dealt with under the Crimes Act 1961. Where a public-sector employee has knowledge of bribery but fails to report that knowledge, they could be regarded as aiding or abetting that offence. It does not appear that this has been tested in New Zealand, although it is suggested that mere knowledge of bribery may be insufficient – the employee may need to have knowledge and then also take steps to 'encourage' the bribery to continue. The maximum penalty for being a party to the offence of bribery is the same as for the principal offence, being a period of imprisonment of up to seven years.

There is no legal obligation to report suspicion of bribery. However, the Protected Disclosures Act 2000 encourages individuals (whether in the public or private sector) to report suspicions or knowledge of serious wrongdoing in their workplace by providing protection for whistle-blowers. An employee of an organisation may disclose information under this legislation if the following is true:

- the information is about serious wrongdoing in or by the employee's organisation;
- the employee believes on reasonable grounds that the information is true or likely to be true;
- the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
- the employee wishes the disclosure to be protected.

Such a disclosure must be made either in accordance with internal procedures (public sector organisations are required by law to have internal procedures in place) or, in the absence of an internal procedure, to the head of the employee's organisation.

Where the employee reasonably believes the head of their organisation is involved in the serious wrongdoing, there are urgent or exceptional circumstances, or where they have made disclosure in accordance with their organisation's internal procedures but nothing has been done within 20 working days, they may escalate their disclosure to an 'appropriate authority'. An appropriate authority includes the ombudsman, the commissioner of police and various other government authorities.

Provided the above criteria are satisfied, the disclosure is a protected disclosure and the employee is protected from retaliatory action in their employment and liability from criminal or civil proceedings in relation to that disclosure. The recipient of a protected disclosure is also under a statutory obligation to use their best endeavours not to disclose information that may identify the whistle-blowing employee.

Under the Protected Disclosures Act, the term 'employee' includes former employees, contractors, people seconded to organisations and volunteers.

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 laws that prohibit contractors or design professionals from making donations to political parties or candidates.

However, both the Electoral Act 1993 (national elections) and the Local Electoral Act 2001 (local body or regional elections) require any donor who donates (to either a candidate or a political party) an amount exceeding NZ$1,500 where the donor is a New Zealander, or $50 where the donor is from overseas (whether in a single donation or multiple or aggregated donations) to disclose their identity. It is an offence for a donor or recipient to conceal the identity of the donor for donations over this amount. Should that occur, the recipient must also give back to the donor the entire amount of the donation in question.

Political donations should not be a quid pro quo for any conduct by a public official so as to amount to bribery. Public contracts may not be awarded based solely on political support but require a fair and transparent tender process.

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 rules as government employees?

Where a construction manager or other construction professional (such as the engineer to the contract) is acting as a public entity's representative or agent on a project, he or she will likely be captured by the public entity's own anti-corruption or corporate gifts policies, which may be incorporated into a contract with the manager or other professional. Otherwise, bribery and corruption offences in the private sector are dealt with under the Secret Commissions Act 1910, which would capture construction managers or other construction professionals who are not strictly public entity 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?

There are no particular obstacles to doing business in New Zealand; however, a foreign contractor should be aware of how local laws impact foreign workers and foreign building products.

A foreign worker must hold a working visa. A foreign contractor should confirm that there are no double taxation issues applying to foreign employees. In addition, only foreign workers holding a working visa valid for a minimum of two years will be covered by New Zealand's public healthcare system. Foreign workers suffering a personal injury or work-related health condition while in New Zealand will be covered by the Accident Compensation Corporation (ACC), but this does not cover ordinary illness or emergency travel back home. In the event of serious injuries, ACC will only assist to the point where the foreigner is able to safely return to his or her home country.

If a contractor plans on using building supplies or materials sourced from its home jurisdiction, it must ensure that those products and materials would comply with the New Zealand Building Code. Normally this is achieved by testing for compliance with the applicable New Zealand standards regarding quality and safety as established by Standards New Zealand (SNZ), or with a foreign standard that SNZ recognises as being equivalent to the New Zealand standard. The Building Act 2004 also contains a voluntary product certification scheme, whereby if the product or material is certified by an accredited certification body and all conditions on the certificate are complied with, the relevant building consent authority shall accept it as complying with the New Zealand Building Code. This scheme has been strengthened and extended to building methods under the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021. This amending Act provides for greater regulation of building products and methods, including the extension of obligations and liability to product manufacturers and suppliers.

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?

NZS 3910, NZS 3915, NZS 3916 and NZS 3917 are the most common construction contracts. Other well-known contracts (such as the International Federation of Consulting Engineers contract and NEC3 / NEC4) are also used, albeit not as frequently.

NZS 3910 (with an engineer) and NZS 3915 (without an engineer) are intended for traditional procurement arrangements involving only construction work. NZS 3916 is similar to NZS 3910, although tailored for a design-and-build context. NZS 3917 is intended to be used for the provision of services over a defined period of time rather than a fixed scope of work.

Each of NZS 3910, NZS 3915, NZS 3916 and NZS 3917 can be tailored to specific projects and contain special conditions to allow for this.

In addition to the NZS contracts, certain other bodies have produced contracts tailored for New Zealand construction works.

The New Zealand Institute of Architects (NZIA) has produced a series of standard-form construction contracts, some of which are designed for use where the contract is administered by an NZIA architect, others of which may be used when the architect is not contractually involved in the administration of the contract.

The Association of Consulting Engineers New Zealand, Engineering New Zealand, the Auckland Regional Contracts Group, the Institute of Public Works Engineering Australasia New Zealand and the New Zealand Transport Agency have developed standard conditions of contract for consultancy services. These can apply to a wide range of consulting services and for most types of projects.

The Registered Master Builders Association and New Zealand Specialist Trade Contractors Federation jointly provide a standard form of subcontract (informally known as SA-2017).

There is no requirement that English must be the language of the contract, although it is the predominant language used.

There are no restrictions on choice of law or venue for dispute resolution in the NZS suite of contracts. If not contractually specified by the parties, established private international law rules will need to be invoked to determine the venue and governing law.

Payment methods

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

Contractors, subcontractors and vendors of prefabricated, customised components for construction projects have a statutory right to progress payments under the Construction Contracts Act 2002. 'Pay when paid' arrangements are barred and have no legal effect.

Contracting parties may agree the number and frequency of progress payments. In the absence of any express agreement, payment claims can be made at the end of each month. Standard construction contracts generally provide for monthly claims, although the due date may vary. There are strict time requirements for responding to, and discharging, payment claims.

The method of payment can be agreed between the parties, although cash payments should be treated with caution and not used as a method to avoid payment of goods and services tax or other tax. Cheques are being phased out by banks as electronic transfers become the norm.

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?

Owners and developers typically contract directly with a construction company, rather than through construction managers or trade contractors. For example, under NZS 3910, while a construction manager (the engineer to the contract, but not necessarily a chartered professional engineer) is appointed as the principal's agent to manage the contract, the contractual relationship is directly between the principal and contractor. The contractor then subcontracts directly with specialist subcontractors.

An area that is continuing to develop is the use of alliance contracting, typically for large PPP infrastructure projects. In this regard, major construction companies with local expertise will frequently form joint ventures with foreign companies possessing specialist expertise, which, along with design consultants and key specialist subcontractors, form an 'alliance' of parties that contract with the pertinent public authority for the project.

PPP and PFI

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

There is no specific legislative or regulatory framework for PPPs, which are typically only used for large-scale infrastructure projects. Examples include the construction of the Wiri Prison (completed in 2015), and the

development and construction of the Transmission Gully highway near Wellington (which opened on 30 March 2022).

The Treasury's National Infrastructure Unit provides guidance and advice on PPPs (including project agreement forms) on its website: www.infrastructure.govt.nz. PFI contracts are not typically used.

Joint ventures

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

In New Zealand, the term 'joint venture' (JV) has no precise legal definition and is not a recognised legal entity in its own right. A JV will generally be formed using one of the following legal structures:

- a limited liability company (a company);
- a limited partnership (LP);
- a partnership; or
- a contractual agreement.

The liability of each member of a JV will be determined by the legal structure chosen and the commercial arrangements between its members.

Where a company is established to form a JV, it is this entity that undertakes the project and assumes the legal liability, not the members individually. This allows the members to limit their exposure to liabilities and project losses. Liability for company directors will only arise in circumstances where directors have breached certain duties in the Companies Act 1993.

The situation is similar for LPs registered under the Limited Partnerships Act 2008. In the case of a company or LP, members may nevertheless become liable where they are required to provide guarantees on behalf of the company or LP.

A JV may also take the form of a legal partnership, either created expressly by the members or as deemed by the Partnership Law Act 2019. In contrast to a company or limited partners of an LP, the members of a legal partnership are jointly and severally liable and each member may bind the others subject to the laws of partnership.

Alternatively, a JV may be formed purely on a contractual basis between members. Under this form, the liability of each member will be subject to the provisions contained in the JV agreement together with any other agreements entered into with external third parties and the general law of contract.

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?

The law permits a contracting party to indemnify the other party against acts, errors and omissions arising from the work of the indemnifying party. Normally, a head contractor indemnifies a principal for losses arising from acts, errors and omissions in the performance of the contractor's scope of work (including the work of subcontractors). Commonly, subcontracts contain back-to-back indemnity provisions mirroring those provided to the principal by the head contractor.

However, to the extent that a party's loss is caused by its own negligence, it may not be able to recover that loss from the indemnifying party. A contractual clause that indemnifies a party against loss that it has caused is enforceable (in the absence of fraud), but contracts do not normally contain such provisions. To the contrary, provisions for apportionment of loss are increasingly being incorporated into the more common forms of construction contract.

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?

Although the law recognises the common law doctrine of privity of contract, there are significant exceptions, both statutory and at common law.

For example, the Contract and Commercial Law Act 2017 permits a person who is not a party to a contract, but upon whom the contract was intended to confer a benefit, to enforce the contract as if that person were a contracting party.

In the specific context of building contracts, the Building Act 2004 implies certain warranties relating to proper performance of contract works into every residential building contract (the warranties are not implied into non-residential building contracts, and subcontracts with the head builder in a residential project are also excluded). A person who is the owner of a building or land to which the provisions apply may bring proceedings for breach of warranty even if that person is not a party to the building contract. Parties cannot contract out of these consumer protection provisions.

For the past several decades, New Zealand has experienced a significant problem with leaky buildings. In response, the law has recognised an extra-contractual duty of care on the part of contractors, subcontractors, suppliers and consultants (among others) to owners and subsequent purchasers of properties to ensure that building design, materials and construction work comply with applicable weathertightness requirements. While this principle was originally developed in the residential context, the duty of care has been extended to cover the design and construction of non-residential properties. Accordingly, consultants, contractors, subcontractors and others can be sued in tort by owners and subsequent purchasers for breach of this duty of care. Additionally, the Building (Building Products and Methods, Modular Components and Other Matters) Amendment Act 2021 has strengthened CodeMark regulations, introduced a manufacturer certification scheme for modular construction and enhanced penalties for non-compliance.

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?

There is a variety of insurance products available to contractors, including the following.

- Contract works insurance (either project-specific or annual).
- Tools, plant and equipment insurance (generally for market value only).
- Public liability insurance (protection against legal liability to third parties for damage, loss or injury caused by an act or omission of the contractor arising out of the performance of the contract works). Compensation for bodily injury is covered by the Accident Compensation Corporation (ACC).
- Employers' liability insurance (cover for personal injury to employees of the insured, that is not covered by ACC).
- Professional indemnity (PI) insurance (cover for liability costs arising from faulty professional advice or design; used by contractors where design components are the responsibility of the contractor). Most domestic PI (and errors and omissions) insurance policies now exclude coverage for leaky building liability.

- Errors and omissions insurance (similar to PI insurance if a contractor is held liable for third-party loss resulting from an error or omission in performing the contract works, such as failure to follow a design specification or use of the wrong materials). Historically, this type of insurance was difficult for contractors to obtain, but there is now some availability from some specialist insurers and in bespoke policies.
- Statutory liability insurance (cover for legal costs and fines under certain legislation). Fines for breaching health and safety laws cannot be insured but the policy will normally cover legal costs and reparation payments if the contractor is taken to court for breaching health and safety laws.

Contractors' pollution liability insurance is available from some specialist insurers and provides protection against third-party liabilities arising from pollution releases. There are policy exclusions, particularly in relation to pre-existing environmental contamination.

Although not standard, consequential loss insurance may be available from specialist liability insurers to cover financial losses resulting from a contractor's act or omission covered under a liability insurance policy (eg, downtime owing to delays resulting from a contractor's act or omission). Consequential loss insurance, specifically for delays arising from accidental damage to any part of the contract works, is another specialist product available.

Normally, policies exclude liability for liquidated damages. New Zealand's no-fault accident compensation law bars claims for compensatory damages for personal injury or death if cover is available from the ACC. New Zealand law does not generally limit liability for damages, although the parties may agree to a contractual cap.

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?

There are no laws requiring a minimum amount of local labour, although employers need to be aware that, under the Immigration Act 2009, only New Zealand citizens, New Zealand residents and permanent residents, holders of Australian current permanent residence visas and Australian citizens who enter New Zealand on a current Australian passport, are entitled to work in New Zealand as of right. All other persons must hold a valid work visa issued by Immigration New Zealand (INZ).

Each visa category has its own specific requirements. However, generally, before employing a foreign national, an employer must do the following:

- show that the person's occupation is on one of the immediate, long-term or construction and infrastructure skill shortage lists;
- for an occupation not on a skill shortage list, first advertise for the position locally and demonstrate to the INZ that it could not fill the required role; or
- obtain employer accreditation to supplement its New Zealand workforce with foreign nationals.

At present, most occupations in the construction industry will be on one or more of the skill shortage lists. However, in April 2017 the Minister of Immigration announced a package of changes to New Zealand's immigration laws. These changes, which were implemented in 2017, introduced remuneration thresholds for individuals applying for residence under the skilled migrant category and introduced a maximum duration of three years for lower-skilled and lower-paid essential skills visa holders (after which a minimum stand-down period will apply before being eligible for a further work visa). Essential skills work visa and skilled migrant category resident visa remuneration thresholds were further updated as a part of the 2018 Department of Immigration Review, and have increased from 26 November 2018. The new thresholds are based on the median salary and wage rate of NZ$27 per hour. Further information is available on the INZ website: www.immigration.govt.nz.

While entry to New Zealand was restricted during 2020 and 2021 due to the global pandemic, the international border is currently reopening in stages. It is anticipated that the border will completely reopen from October 2022, at which point normal visa processing will resume for all visa categories including visitor and student visas.

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?

Where an employee has been employed on a fixed-term agreement that complies with section 66 of the Employment Relations Act 2000 (ERA), and that employment comes to an end at the conclusion of the specified project, there are no further legal obligations owed to that employee.

To amount to fixed-term employment, the contractor and employee must agree that the employment will end at the close of a specified date, on the occurrence of a specified event or at the conclusion of a specified project. Furthermore, the contractor must have genuine reasons based on reasonable grounds for specifying that the employment will end in one of those three ways.

Where an employee's agreement is one of indefinite duration, their employment will continue beyond the completion of a project. If the contractor attempts to end the employee's employment, it may amount to an unjustified dismissal, unless the contractor can show that the decision to dismiss was one that a fair and reasonable employer could have made in all the circumstances.

Provided that an employee's employment is ended appropriately and lawfully, there are no further legal obligations owed to the employee after that point.

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?

Provided a foreign construction worker is lawfully entitled to work in New Zealand, he or she will enjoy the same rights and protections at law as local construction workers.

If the foreign construction worker is an employee (as defined by section 6 of the ERA), he or she is entitled to the protections afforded by the ERA, the Holidays Act 2003, the Wages Protection Act 1983 and the Minimum Wage Act 1983 (among others).

Critically, status as an employee entitles a foreign construction worker to be paid no less than the minimum hourly wage (NZ$21.20 per hour as of 1 April 2022), accrue annual holidays and sick leave (a minimum of 20 days and 10 days per annum respectively), and raise a personal grievance should the employer unjustifiably disadvantage or dismiss the employee from his or her employment.

Where an employer fails to follow those laws, the consequences vary. In the event of a failure to pay annual holidays or the minimum wage, the employer can be required not only to pay the amounts properly owing, but also to pay a penalty to the government. This process is brought (and paid for) by labour inspectors employed by the Ministry of Business, Innovation and Employment (a government agency).

By contrast, where an employee raises a personal grievance, he or she is required to organise the process themselves – this may entail

attending confidential mediation, or proceedings before either the Employment Relations Authority or Employment Court, or both mediation and proceedings. If successful in the authority or court, the employee may receive compensation for lost wages, compensation for hurt, humiliation and distress and, in the case of dismissal, reinstatement to his or her former position.

If the foreign construction worker is an independent contractor, then there are no equivalent laws providing protection, and the parties' rights and obligations are determined by the independent contractor agreement. Independent contractors are normally required to submit invoices for payment and then pay their own tax. They are also normally required to provide their own tools of trade.

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?

In closing its operations in New Zealand, a foreign contractor must do the following:

- dissolve any limited liability company formed in accordance with the Companies Act 1993 and seek removal of the company from the Companies Register;
- dissolve any limited partnership formed in accordance with the Limited Partnerships Act 2008 and partnership agreement and seek removal of the limited partnership from the New Zealand Limited Partnerships Register;
- dissolve any legal partnership formed in accordance with the Partnership Law Act 2019 and partnership agreement;
- in the case of a limited liability company and a limited partnership, request written notice from the commissioner of Inland Revenue stating that he or she has no objection to the company or partnership being deregistered; and
- distribute assets (if any), finalise the accounts, and pay any outstanding creditors and taxes due.

Where the foreign contractor has employees, it must consult with potentially affected employees. If the contractor implements its decision to close operations, it will need to give notice to employees that their positions are being made redundant, and pay out any contractual and statutory entitlements under the ERA and related legislation.

Where the foreign contractor is restructuring, for example, selling or contracting out its operations, it must also comply with Part 6A of the ERA. This part is technical in nature and legal advice should be obtained.

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?

A contractor may secure the right to payment through the terms of its contract or, if applicable, the Construction Contracts Act 2002 (CCA).

Under the CCA, parties to a construction contract have a statutory right to progress payments and certain enforcement remedies. Those rights and remedies (except charging orders) also extend to residential construction contracts.

To obtain payment under the CCA, the contractor serves a payment claim specifying the amount it considers is due. If the payer disagrees, it must issue a payment schedule recording the amount that it believes is due. The payer is then liable to pay the amount specified in the payment schedule. If the payer fails to issue a payment schedule in the specified time, it becomes liable to pay the amount claimed in the payment claim. In the event of non-payment, the contractor can apply to the court to enforce it as a debt due or suspend work (without affecting any other rights or remedies).

Where there is a dispute about sums withheld, the contractor may refer the dispute to adjudication, follow the dispute resolution mechanism in the contract if one is specified or otherwise commence proceedings. An adjudication decision may be entered as a court judgment where the decision required payment but the payer has remained in default.

A contractor cannot place a charging order (or lien) on the construction site without a court order. The CCA provides a faster process for obtaining this in construction cases. An appropriately nominated adjudicator should, if requested, grant a charging order where the amount claimed is due and the site is owned by the payer or an 'associate' of the payer. The charging order is lodged once the adjudication decision is entered as a judgment.

'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?

The CCA prohibits 'pay when paid' and 'pay if paid' arrangements: these are barred and have no legal effect. Parties to a construction contract have a statutory right to progress payments and certain enforcement remedies.

Contracting with government entities

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

No.

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?

Contractors have rights of suspension under the CCA and most standard-form construction contracts, which may prevent ongoing loss after an insolvency or pandemic-related event. With the exception of retentions, which are now subject to statutory trust protection under the CCA, contractors have no preferential rights to payment for past work, unless they have an agreement with the principal that grants a security interest over the principal's assets or provides for the retention of an ownership interest in the goods and materials being supplied. To maintain security over other secured creditors, interests should be registered with the Personal Property Securities Register. Other contractual options available to secure payments include bonds and guarantees.

Payments made to contractors by an insolvent principal may be subject to clawback, depending on the circumstances and timing of each payment.

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?

Most standard form construction contracts used in New Zealand contain clauses that outline the consequences of an event beyond the control of the parties, although these are not always expressly identified

as force majeure clauses. For example, the most common standard form contract, the NZS suite of contracts, provides that if the performance of the contract has become impossible or the contract has been otherwise frustrated, one party may notify the other party that it considers the contract to be terminated. Similarly, an extension of time may be granted for certain events (such as strikes, industrial action, floods, or volcanic or seismic events) that would fall within a traditional force majeure clause. This approach may vary from other standard form contracts that international contractors may be familiar with, such as the Joint Contracts Tribunal contract (which specifically lists force majeure as a relevant event and potentially grants the contractor an extension of time).

If there is no frustration clause included in a contract, the parties must rely on common law principles to establish that their contract has been frustrated. The court has power under the Contract and Commercial Law Act 2017 to make orders for money to be paid or property to be transferred where it is just to do so.

With respect to the current pandemic, the most commonly used NZS standard construction contract allows for suspension by the engineer to the contract, followed by the possibility of termination by the contractor if the suspension continues for over four months.

DISPUTES

Courts and tribunals

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

There is no specialist court to deal with construction disputes. Claims valued at less than NZ$350,000 are brought in the District Court and claims valued above that are brought in the High Court. Construction disputes are treated by the court like any other civil claim.

Some construction parties favour arbitration, partly because it enables them to appoint a specialist arbitrator. Parties must specifically provide for arbitration in their contract. Statutory adjudication is also available where the contract is a 'construction contract' within the meaning of the Construction Contracts Act 2002 (CCA). Occasionally, specialist project-specific dispute boards are established for large infrastructure projects.

New Zealand's independent bar is supported by a number of barristers with construction expertise who frequently sit as arbitrators, adjudicators and mediators. Retired judges and specialist lawyers from Australia are sometimes also appointed. In addition, a small number of industry organisations are partly or wholly dedicated to the construction sector. They assist in vetting and nominating suitable arbitrators, mediators and adjudicators and in facilitating those alternative dispute resolution processes. These include the Arbitrators and Mediators Institute of New Zealand, the Royal Institute of Chartered Surveyors and the Building Disputes Tribunal.

Dispute review boards

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

DRBs have been used for some large construction and engineering projects, for example, the Matahina Dam strengthening, Manapouri Second Tailrace Tunnel, Christchurch ocean outfall and, currently, the New Zealand International Convention Centre project. They remain relatively uncommon, although there is growing support for their use.

The contractual documents and DRB specifications adopted by the parties will determine whether or when the board's decisions are final and binding, and whether the board can give non-binding advisory opinions. The parties may structure this as they wish.

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 a widely used method for resolving construction disputes. It is usually attempted in the course of litigation or arbitration and when the dispute has reached a sufficiently mature stage.

There is no legislative requirement for mediators to undertake specific training, although many have both a legal qualification and have undertaken further education in mediation. Some construction professionals (eg, engineers, quantity surveyors and building experts) have also begun to move into this space. They tend to mediate construction disputes where the issues are of a purely financial or technical nature (eg, final account disputes).

Under the High Court Rules, a judicial settlement conference (JSC) is available to the parties to litigation as an alternative to mediation. A JSC is akin to mediation, except that a judge assumes the role of 'mediator'. As a result, they may be able to provide the parties with a 'steer' on the merits in a way that a mediator would not ordinarily do. A JSC is confidential and the judge that conducts it is excluded from hearing the case at trial if the dispute does not settle.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Section 57(1) of the Evidence Act 2006 confers a statutory privilege in respect of communications or information that was intended to be confidential and was made in connection with an attempt to settle or mediate a dispute between the parties. The privilege also applies to confidential documents prepared in connection with an attempt to settle or mediate a dispute. The privilege may be disallowed if the communication or information was given or made for a dishonest purpose.

The privilege in section 57 does not apply to the terms of a settlement agreement, evidence necessary to prove the existence of a settlement agreement or a written cost-protecting offer in the context of awarding costs. Excluding these exceptions, a mediator or party to mediation cannot be compelled to give evidence in a proceeding or otherwise disclose confidential information connected with a mediation or settlement negotiations.

Despite this legislative protection, mediation and settlement agreements normally include their own confidentiality provisions. It is not possible, however, to contract out of the admissibility exceptions in section 57.

Arbitration of private disputes

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

Construction contracts in New Zealand usually provide for the arbitration of disputes, often as the final step in a dispute resolution process that includes mediation. While arbitration is favoured for reasons of confidentiality and the power to nominate an arbitrator with specialist expertise, it can be a lengthy and expensive process with procedural difficulties in multiparty disputes. Parties in a contractual chain should consider whether the pertinent contracts have back-to-back arbitration provisions and whether there is power to consolidate arbitral proceedings. The Arbitration Act 1996 also provides for the consolidation of arbitration.

Domestic arbitration agreements do not override the parties' statutory right under the CCA to adjudicate their disputes. The adjudicator's

determination, however, will be overtaken by any subsequent award. Adjudication is not available for disputes subject to international arbitration agreements (unless the parties consent), which include arbitration where the parties' places of business are in different countries.

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?

The Arbitration Act 1996 is based on the UNCITRAL Model Law on International Commercial Arbitration. The parties are free to adopt the rules of an international arbitration provider. International Chamber of Commerce arbitration has historically been the best known and the most widely used. The parties may agree the place of the arbitration and the governing law.

Dispute resolution with government entities

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

Yes.

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?

The award must be properly authenticated or certified. If it is not in English, a certified translation must be provided.

The court may refuse to enforce an award on grounds based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). These are largely concerned with natural justice (eg, incapacity of the parties, prevention of access, inducement by fraud and compliance with the terms of the arbitration agreement).

The dispute that is the subject of the award must be arbitrable under New Zealand law. Most commercial disputes will meet this criterion. The court retains a residual discretion, which is narrowly construed, to refuse to enforce an award that conflicts with New Zealand's public policy.

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?

Proceedings must be commenced within the statutory limitation period.

The Limitation Act 2010 applies to any act or omission that occurred after 31 December 2010 (its predecessor applies to acts or omissions that occurred before that date). A claim must be brought within six years of the date of the act or omission in question. Where the damage is discovered after six years (ie, late knowledge), the claim can be brought within three years of the date the claimant knew or ought reasonably to have known certain facts giving rise to the claim.

To prevent indefinite liability, the Limitation Act precludes claims being brought more than 15 years from the date of the act or omission on which the claim is based.

Different limitation periods may apply in respect of specific legislation. Under the Building Act 2004, claims in relation to building work must be brought within 10 years of the act or omission on which the proceedings are based. Claims for supply of defective building products are not caught by the 10-year longstop of the Building Act and (subject to any applicable shorter limitation period) could potentially be brought up to the Limitation Act longstop of 15 years. Any claims made under the Fair Trading Act 1986 must be brought within three years of the date the loss or damage was or should have been discovered.

The parties may contract to a shorter limitation period.

There are statutory preconditions for commencing and maintaining proceedings set out in the High Court Rules, such as following the correct procedures and time frames for filing and serving documents and paying the correct court fees.

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?

New Zealand is party to the Stockholm Declaration of 1972.

Some key pieces of New Zealand environmental legislation that provide for the environment and potentially impact upon the construction industry are as follows:

- the Resource Management Act 1991, which seeks to promote the sustainable management of natural and physical resources, and mandates that certain activities obtain resource consent;
- the Building Act 2004, which sets out the procedure for carrying out building work in New Zealand, including identifying works requiring resource consent under the Resource Management Act;
- the Climate Change Response Act 2002, which provides for the implementation, operation and administration of a greenhouse gas emissions trading scheme in New Zealand; and
- the Environmental Protection Authority Act 2011, which establishes an agency that administers applications for major infrastructure projects of national significance and administers the Emissions Trading Scheme.

In addition, liability at common law for negligence, nuisance or under the rule in *Rylands v Fletcher* (which imposes strict liability on those who bring onto their land something that may escape and cause harm) may affect the construction industry.

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 primary duty affecting the construction industry is to obtain resource consent for proposed projects under the Resource Management Act 1991 and to comply with any conditions of the consent granted.

The Resource Management Act 1991 imposes the following penalties for offences under its provisions:

- for a natural person, imprisonment of up to two years or a fine not exceeding NZ$300,000; or
- for an entity other than a natural person, a fine not exceeding NZ$600,000.

Where an offence is a continuing one, the penalties may increase by up to NZ$10,000 for every day during which that offence continues.

The Building Act 2004 provides for fines for a range of offences, including carrying out building work without the required resource consent. These fines range from NZ$10,000 to NZ$200,000, depending on the specific offence.

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'?

New Zealand is party to a number of free trade agreements (FTAs) that protect foreign entities investing in New Zealand, including those with Australia, Chile, China, the Association of Southeast Asian Nations, and the United Kingdom.

There is no model agreement for FTAs, therefore the definition of 'investment' varies.

Tax treaties

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

New Zealand is party to 40 double tax agreements and protocols implemented with its primary trading and investment partners. These include Australia, Austria, Belgium, Canada, Denmark, Fiji, Germany, Indonesia, Ireland, Mexico, the Netherlands, Papua New Guinea, Poland, South Africa, Spain, Sweden, Taiwan, Turkey, the United Kingdom, the United States and Vietnam.

Currency controls

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

No.

Removal of revenues, profits and investment

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

Although there are no restrictions per se on the removal of profits or revenues from New Zealand, there are prohibitions under New Zealand law against, for example, transferring funds out of the jurisdiction to defraud creditors.

There are certain reporting requirements with respect to domestic cash transactions of $10,000 or more, or wire transfers of $1,000 or more. These types of transactions require reporting entities to submit prescribed transaction reports to the Financial Intelligence Unit of the New Zealand Police.

UPDATE AND TRENDS

Emerging trends

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

Cost fluctuation and supply chain issues

Like the global economy generally, the New Zealand construction sector is suffering the effects of significant supply chain constraints and inflationary pressures arising from the covid-19 pandemic and now the Ukraine war. With many building materials imported into New Zealand, the industry is experiencing longer than usual lead times (or unavailability) and widespread price rises for products, while border restrictions have resulted in labour shortages and wage increases. This has affected the procurement (and viability) of building and infrastructure projects as well as the approach to contract pricing and risk allocation, such as greater use of provisional sums and cost fluctuation methods, and conversely fewer lump sum or guaranteed maximum price agreements.

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The Construction Sector Accord and proposed changes to building laws

The Construction Sector Accord (the Accord) was announced on 14 April 2019 as a shared commitment between the government and industry. The aim of the Accord is to grow workforce capability and capacity, strive for better risk management and fairer risk allocation, and provide more houses and better durability. The Accord has identified 'priority areas' for improvement to better New Zealand's construction sector, and in 2020 it introduced a three-year Construction Sector Transformation Plan. Government commitments to the Accord include improved pipeline management, regulatory systems and consenting processes. Industry commitments include enhanced leadership, organisation, business performance and improved collaboration.

One of the examples of the government delivering on its commitment to improve regulatory systems (as noted in the Accord) is the changes that have been made to New Zealand's building laws in relation to products and materials. In June 2021, the Building (Building Products and Methods, Modular Components and Other Matters) Amendment Act 2021 was passed. This Act sees new responsibilities relating to building products, strengthens CodeMark regulations, introduces a manufacturer certification scheme for modular construction, and enhances penalties for non-compliance. This Act introduces some of the most significant changes to the building and construction legislative and regulatory framework in the last 15 years.

Constructions Contract Act: retention regime

The shortcomings in the Construction Contracts Act 2002 (CCA) retention regime were highlighted in the high-profile liquidation of Ebert Construction. As a result of this, following a consultation process in 2020, amendments to the regime have been proposed, including clarification of the trust provision within the CCA to ensure that retention is safeguarded through a trust account specifically for retention or a

complying financial instrument (preventing commingling of payer money) and the addition of a requirement to provide a confirmation receipt of retentions being held on trust. The Ministry of Business, Innovation and Employment also proposed to increase penalties for non-compliance with the retention regime. These proposed reforms are aimed at strengthening and clarifying the retention regime to provide benefits to subcontractors, contractors and clients, and have been reflected in the Construction Contracts (Retention Money) Amendment Bill 2021, which was introduced to Parliament on 1 June 2021 and has been considered by Select Committee. This Bill is expected to be passed in 2022 and become law in 2023.

Qatar

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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?

Law No. (1) of 2019 Regulating Non-Qatari Capital Investment in the Economic Activity grants foreign investors incentives to do business in Qatar; foreign companies and individuals are granted the possibility to invest directly in almost all the economic sectors with 100 per cent capital ownership with the pre-approval of the competent authority; the executive regulations for this law are yet to be issued. A foreign investor must also be aware of Law No. 11 of 2015 promulgating the Commercial Companies Law, Law No.19 of 2005 regulating the Practice of Engineering Professions, the labour laws, the laws regulating the entry, exit, residence and sponsorship of expatriates, the Income Tax Law, the Customs Law, and the Civil and Commercial Codes.

Qatari laws and regulations, which are based on the civil law system, can be accessed in Arabic and English through the Qatar Legal Portal Al Meezan and on Hukoomi (the e-government portal for information and services).

Additionally, foreign designers can set up at the Qatar Financial Centre: an onshore centre that permits registered firms up to 100 per cent foreign ownership of their business in Qatar and in the region within a legal and tax environment aligned to international standards, and to conduct business in any currency with a legal, judicial and regulatory framework based on English common law and international best practice, with an independent court, regulatory tribunal and dispute resolution centre. Such designers will be subject to the QFC Employment Regulations, QFC Companies regulations, QFC Tax regulations, and other specific QFC Regulations and Rules.

Qatar has a fair and transparent tax regime that benefits from the double taxation agreements that the country has with over 80 countries, with 10 per cent corporate tax on locally sourced profit and no personal income tax, wealth tax or zakat. Payments of dividends, interest, royalties and management fees out of Qatar by Qatari companies are free from withholding tax, enabling tax-free repatriation of returns and profits for shareholders.

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?

While contractors require only the registration of the company or branch with the Ministry of Commerce and Industry, designers require registration and a practice licence from the Ministry of Municipality and Environment or the Ministry of Commerce and Industry (or both) or the Qatar Financial Centre (QFC). Designers incorporated outside the QFC are governed by the Engineering Law, which established a Committee for the Enrolment of Engineers, Local Engineer Consultancy Offices and Foreign Engineer Consultancy Offices, which is the authority that grants practice licences. If a practising designer or its engineers fail to obtain any of the required licences, such a designer will be subject to imprisonment and a fine. Subject to the approval of the Council of Ministers, non-Qatari natural persons or legal entities registered outside the QFC can practice the engineering profession without a licence if they hold unique technical specialisations that are not available in Qatar or are required for the development of experience and techniques in Qatar.

Competition

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

Generally no, but some tenders issued by certain government entities can be exclusive to domestic contractors. Qatar laws encourage foreign contractors to operate in Qatar, whereas some of the big projects require international know-how, capabilities and expertise, namely in view of the 2022 World Cup and in line with the Qatar National Vision of 2030.

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?

Qatar ratified the UN Convention against Corruption in 2007 and the Arab Anti-Corruption Convention in 2010. It also established the Qatar Administrative Control and Transparency Authority (QACTA). A public tender is subject to the publicity principles of procedures, equality, equal opportunity, freedom of competition, transparency and value for money, as stated in the Public Tenders law. The State Audit Bureau and Financial Tenders and Contracts Audit Department control and audit the project's financials to improve the principles of transparency. The criminal code imposes sanctions on public officers in cases of bid-rigging of imprisonment for a term not exceeding 10 years.

Furthermore, fair and open competition was confirmed by the provisions of the new Public-Private Partnerships law (Law No. 12 of 2020) which was issued on 31 May 2020. This law provides that all tenders be published in local or international newspapers, or on their websites and that all opportunities be posted on the unified website for government procurement, and that the selection of a successful bidder must be subject to the principles of transparency, free competition, and equality of opportunity and treatment.

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?

Any contract proven to be obtained or implemented by the contractor using fraud or bribery of any public officer to harm the contracting governmental authority will be deemed terminated. Both bribe-givers and bribe-takers are criminally prosecuted and subject to imprisonment for a term not exceeding 10 years and a fine not exceeding what was received or promised to pay. The public official is dismissed from their job and sentenced to a fine equal to the amount of such bribe. In addition, a public official involved in the preparation, management or execution of an undertaking, export, works or enterprise dealing with one of the authorities who obtains or attempts to obtain for themself or for another, directly or through an intermediary, or by any illegal way, a profit, a benefit or a commission therefrom is subject to imprisonment for a term not exceeding 10 years. Facilitation payments are equally considered bribes.

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?

Any person who fails to report to the competent authorities, without a valid reason, its knowledge of another person's crime or of a planned crime that could have been prevented, shall be subject to imprisonment, a fine or both. The same sentence will apply to a public official who investigates crimes and neglected or postponed reporting the crime to the competent authorities.

The Qatar Financial Centre Employment Regulations include provisions on whistle-blowing.

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?

Qatar is a hereditary emirate; political parties do not exist.

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 rules as government employees?

The same anti-corruption rules applicable to government employees apply to professionals acting as a public entity's representative and their employees. Any official or employee of any agency of a public authority or a government-owned or controlled enterprise who carries out an activity connected with public service and commissioned by a public employee is considered a public official. The tender documents issued by the Public Works Authority include an Anti-Corruption and Confidentiality Declaration to be signed by the parties.

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?

A Unified Economic Registry has been established in the Ministry of Commerce and Industry for enhancing the transparency of economic and financial transactions, by collecting basic information, data and documents related to economic establishments, legal arrangements and non-profit organisations and free professions, and the required information, data and documents related to real beneficiaries, to preserve them and make them available to the public and relevant authorities.

Qatar – a low taxation country – provides an attractive tax regime to foreigners that benefits from the double taxation agreements that the country has with over 80 countries. Payments of dividends, interest, royalties and management fees out of Qatar by Qatari companies are free from withholding tax, enabling tax-free repatriation of returns and profits for shareholders. Personal per capita income is exempted from paying tax, and companies are subject to a tax rate of 10 per cent of the company's total state income, paid annually. More information can be found in Law No. 24/2018 related to Income Tax and on the government portal (Hukoomi) at the following link: https://portal.www.gov.qa/wps/portal/topics/Business+and+Finance/taxsystem and at https://www.qfc.qa/en/about-qfc/qfc-benefits.

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 used for construction and design varies with every project and depends on the parties involved. Private sector projects have no standard form of contract; the parties usually rely on the International Federation of Consulting Engineers (FIDIC) as amended by the particular conditions of the contract or on the general conditions of contracts issued by the Public Works Authority (Ashghal) which are also amended by the particular conditions. Projects executed for government and public entities, such as Qatar Energy, Ashghal, General Electricity and Water Corporation and the Private Engineering Office, usually rely on their own standard contracts, which are based on the FIDIC set of contracts as amended pursuant to the particular conditions of contract.

Since January 2019, Arabic is the mandatory language to be used by the official and government bodies and all related institutions as well as the courts (except at the Qatar Financial Centre, where English is used). Notwithstanding this, the contracts are available in English. In the private sector, the parties are free to adopt the language of their choosing. The predominant languages are Arabic and English.

The parties are free to choose the governing law of their contract, which will be upheld by the courts provided that the provisions of such law do not contravene the public policy or morals of Qatar.

The parties are free to submit their disputes to a foreign court. However, as a matter of public policy, Qatari courts have in certain cases dismissed the parties' agreements on foreign jurisdiction and retained jurisdiction over disputes filed before them.

Since January 2017, agreement to arbitration in administrative contract disputes is subject to the approval of the Prime Minister or the Prime Minister's delegate.

The parties are also free to agree on alternative dispute resolution, including arbitration, for solving disputes. After Qatar enacted the Arbitration Law in 2017 and ratified the Singapore Convention on

Mediation in March 2020, it subsequently issued Law No. 20 of 2021 on Mediation for the Settlement of Civil and Commercial Disputes.

Payment methods

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

Contractors, subcontractors and vendors are paid in accordance with their contract, which can vary. Payments are usually made by bank transfer or by cheque, whereas the cash payment method is not favoured, noting that subcontractors and some vendors are mostly paid on a back-to-back basis.

The Wages Protection System was established to secure payments for workers and employees by direct wire transfer from the employer's account to the employee's bank account to ensure adequate and timely remuneration. The penalties for violations of this article are imprisonment, a fine or both.

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?

The typical matrix is: employer – employer's representative – engineer – main contractor. The main contractor will be the party signing contracts with subcontractors, as and when needed.

PPP and PFI

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

On 31 May 2020, Qatar issued the Public-Private Partnerships Law No. 12 of 2020, which outlines how partnerships are regulated between the government and the private sector in Qatar. The PPP law includes the allocation of land through rent or use licence, for development by the private sector through build-operate-transfer, build-transfer-operate, build-own-operate-transfer, and operations and maintenance, among other provisions. This law is expected to lead to the launch of several investment projects in Qatar and to support projects connected to the Qatar National Vision 2030 and FIFA World Cup 2022.

Joint ventures

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

Consortia can be established in the form of a joint venture between two companies or more that can be either:

- incorporated in the form of a company: in this case, the responsibility of the shareholders will vary according to the type of the established company and the allocation of responsibility among themselves; or
- unincorporated: in this case, the agreement executed with the employer will determine their respective liabilities towards the latter and the agreement executed between the members will determine their respective liabilities towards each other and the banks, taking into consideration their role, contribution and scope in the project. In most projects, the members will have joint and several liabilities towards their employer and such liability may vary towards the banks.

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?

The Qatari civil code makes a distinction between contractual liability and tort liability. The contractual liabilities of the respective parties can be freely determined between them, except for some cases where restricting or reducing any liability is considered by law as invalid and void, such as the contractors and designer's decennial liability or any agreement that restricts or reduces any liability prior to the establishment of the right or due to an unlawful act.

Indemnification for damages incurred arises from the actions, omissions or negligence of the other party. In construction and design contracts, there are usually provisions for liquidated damages and the provision of an irrevocable, unconditional upon first demand, performance bond.

A contracting party can be indemnified against all acts, errors and omissions arising from the work of the other party, regardless of whether such party was negligent in any way, and such provisions will in most cases be binding, valid and enforceable, noting that a discharging from liability clause will be construed narrowly. Contractual provisions that expose one party to excessive responsibility are likely to be considered invalid due to violation of the principle of justice. The parties should, therefore, exercise caution when including such clauses in their agreements.

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?

Contracts are binding only on the parties that sign them: privity of contract prevents a person who is not a party to a contract from enforcing a term of that contract. This means that a third party (eg, buyer, tenant) will not be able to make a claim under the relevant contract, unless such contract was novated, or the rights and obligations thereunder were assigned. Notwithstanding this, a third party can rely on the tort responsibility, which imposes civil liability for breach of obligations imposed by law. In construction, the tort of negligence arises most often in addition to the decennial liability imposed at law on the contractor and architect or engineer for defects in the building or structure that are serious enough to make it unfit for its intended purpose, or that present a threat to its structural integrity and safety; this liability cannot be contractually limited or excluded, and any attempt to do so will be considered void.

Under the civil code, a third party may consider filing an 'indirect lawsuit' against both the contractor and owner who sold or rented the premise to the third party. Criminal action against the contractor or designer can be taken in case of criminal actions, and compensation against damages incurred can be claimed.

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?

Insurance products in Qatar provide the contractor with a vast coverage area, including:

- damage to the property of third parties;

- professional indemnity;
- fire incidents;
- workers compensation policy, which includes workers compensation and employer's liability;
- delay in start-up; and
- the loss of the anticipated or potential income in the event that a construction project suffers physical loss or damage during construction.

Coverage can be subject to negotiations between the insurance company and the insured to cover further areas.

Delay damages due to environmental hazards (eg, run-off of toxic liquids to adjacent lands) are usually excluded. However, sudden and accidental pollution coverage may apply.

Local laws do not limit contractors' liability except in the case of circumstances beyond a party's control or fault of their clients or a third party, unless otherwise agreed by the parties.

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?

While the laws of Qatar do not mention a minimum number of local labourers to be employed on a particular construction project, the Labour Law provides that Qatari workers are to be given priority in employment over non-Qatari nationals and the proportion of Qatari workers to foreign workers in various work sectors is determined by a decision of the minister, particularly pursuant to the launch of the *Qatarisation* governmental initiative, conceived to increase the number of Qatari citizens employed in the public and private sectors. Foreign workers account for over 90 per cent of Qatar's labour force, many of whom are employed in the construction sector.

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?

The Labour Law outlines the legal rights, restrictions and obligations of employees and employers, whether nationals or foreigners. Accordingly, an employment contract for an indefinite term may be terminated by either the employer or the employee giving written notice without the need to provide a reason; the employee will be entitled to his or her end of service, wages and other benefits due to him or her in full for the full notice period provided the employee performs the work as usual.

If an employee is employed for a definite or fixed term, a mutual agreement to terminate the employee's employment before the expiry of the term is required if there is no specific legal or contractual reason justifying a unilateral termination, and the employer will have to pay all wages and other benefits in full for the remainder of the remaining term of the employment contract. Notwithstanding, the labour law provides for indemnification in case of abusive termination. This would not usually be the case where an employee's employment is stated as being for the duration of a specific project and early termination is the result of the early completion of that project.

In addition to termination without giving a reason, the Labour Law sets out the circumstances in which either an employee or an employer can terminate employment by giving a reason.

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?

Foreign construction workers are subject to Labour Law No. 14/2004 and its amendments, namely in 2020 and 2021, and the Law regulating the Entry/Exit and Residence of expatriates, as well as to several laws setting out employees' health and safety requirements. The Labour Inspection Authority is responsible for the supervision of the proper application of the legislation related to employees' protection and sets out the minimum requirements for employers of foreign workers and the financial and administrative fines for failure to comply with these requirements. The National Committee of Occupational Health and Safety is responsible for high-level policy and enforcement. Blue-collar workers are foreigners working under their employer's sponsorship.

In the past few years, Qatar has implemented reforms to increase the protection of foreign construction resident workers, mainly by:

- increasing the notice period that should be sent from the employer to the employee during the probation period from 3 days to 1 month;
- a minimum notice period of one month for employees during the first two years of service, and two months' notice for employees with longer service;
- cancelling the exit visa requirement;
- easing the requirements for the transfer of sponsorship: employees no longer need a No-Objection Certificate;
- compelling the employer to inform the Ministry of Administrative Development, Labour and Social Affairs (MADLSA) at least 15 days prior to any redundancy dismissal and provide the MADLSA with a written statement of the reasons for the termination;
- effective March 2021 (Law No. 17 of 2020), the minimum monthly basic wage for all private-sector workers, including domestic workers (subject to annual ministerial review) is set at 1,000 Qatari riyals, with 500 Qatari riyals for accommodation expenses and 300 Qatari riyals for food, unless the employer already provides adequate food or accommodation for the employee or domestic worker. All wages due for the work performed up to the date of the annual leave and for the leave shall be paid to the employees prior to their annual leave;
- creating a fund to support foreign workers, which guarantees them care and provides them with their rights and a healthy and safe work environment;
- setting up the Wages Protection System, which secures timely payments of wages to enable the authorities to monitor such payment as stipulated in their contracts;
- recruiting multilingual inspectors with specialised skills for labour inspection and providing them with the latest technology, including GPS equipment that enables them to instantly submit reports online;
- providing and increasing the available means for reporting complaints against employers; and
- enacting a new mandatory health insurance system (Law No. 22 of 2021 regulating the health services in Qatar), compelling employers to provide health insurance for their non-Qatari employees through insurance companies registered with the Ministry of Public Health.

The International Labor Organization opened its first project office in Qatar in 2018 and supports the implementation of a comprehensive technical cooperation programme on work conditions and labour rights in the state.

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?

The right of termination by an employer upon insolvency, bankruptcy, liquidation, receivership, administration or similar of the main contractor is usually found in the construction project's agreements or at law that provides for different legal regimes for each process.

If a foreign contractor decides to close its operations, it must maintain the commercial registration of the company valid throughout the process. All lawyers' and employees' entitlements are considered a preferential debt. The contractor can claim and eventually recover its outstanding payments and entitlements and should pay its dues, complete any pending legal proceedings, obtain an income tax clearance certificate and a clearance from the Ministry of Labour certifying that the company or branch has fulfilled all of its financial obligations to its employees prior to the final closing.

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 right to and means of payment are usually included in the terms of the contract and at law. Advance payments against an advance payment guarantee issued to the benefit of the employer and payment certificates are common. It is also common to see provisions in contracts stating that the contractor must continue its work even in the event of non-payment by the employer.

The available legal actions and liens for contractors can be summarised by:

- initiating proceedings before the Qatari Courts (by default) or the Qatar International Court and dispute resolution centre (by default or by mutual agreement) or by resorting to the ADR contractual dispute clause;
- upon having an instrument that confirms the debt (final judgment, award, cheque, promissory notes or their equivalent, as defined by law), the contractor can resort to enforcement and lien measures before the competent court, which include injunction orders to seize the employer's movable assets and bank accounts and any assets owed to the latter in the hands of third parties;
- pursuant to the provisions of article 1185 of the civil code, contractors and engineers instructed to construct, reconstruct, repair or maintain buildings and other constructions can have a lien on the value of such buildings and constructions in accordance with the specified related legal procedures;
- pursuant to article 702 of the civil law, a subcontractor can file a claim (before the court or arbitral tribunal) against a certain debt directly against the employer instead of the main contractor, and the subcontractor can also seek to attach amounts due to the contractor in the hands of the employer; and
- a contractor can also request the appointment of a custodian.

'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?

There are no laws prohibiting 'pay when paid' or 'paid if paid' clauses. It is expected that employers will take an active role in ensuring that all parties are paid along the contractual chain so as to avoid suspension of the works or delays and to avoid subcontractors bringing claims against them, whereas subcontractors have direct recourse against an employer for unpaid certified works according to certain requirements.

There are Qatari court precedents and arbitral awards that have disregarded similar clauses and ordered the contractor to pay their subcontractor entitlements without consideration of the 'pay when paid' clause.

Contracting with government entities

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

There is a distinction between sovereign and non-sovereign acts of states, acts *jure imperii* (of a sovereign nature with immunity from suit) and acts *jure gestionis* (of a commercial nature without immunity from suit); when looking at the nature of the relevant transaction and when the government is acting as a commercial entity or trader, its activity can be qualified as a commercial activity and therefore can be treated as with any other commercial transaction.

In 1986, Qatar acceded to the Vienna Convention on Diplomatic Relations which provides, under article 22(3), that the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution. The Qatar civil code stipulates that the movable and immovable property of the state or public juristic persons that are allocated for a public benefit are deemed to be public funds and such funds may not be disposed of, attached or acquired (unless for a public benefit). In practice, government and relevant enterprises and organisations abide by the final judgments or awards issued against them.

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?

It is usual to find express terms addressing the suspension, interruption and cancellation of projects in the contract that constitutes the law of the parties; otherwise, contractors will have to rely on the provisions of the law, where the following typical scenarios might occur:

- The rescindment of contracts for failure by a party to perform its obligations under the contract, upon formal notice to the employer, and to apply to the court for confirmation of rescission and compensation unless the contract provides for an automatic rescission without recourse to a court order; if the contractor has performed work, the employer must compensate the contractor for the expenses incurred and the works completed.
- Contracts where the performance becomes impossible, or which are incapable of being performed, where neither party is at fault: the contractor will have the right to claim from the employer compensation for such expenses incurred for any works performed and any fee that is due, within the limits of any benefit that has accrued to the employer.

- Article 707 of the civil code, unless agreed otherwise, gives the employer the right to withdraw from the contract and stop the work at any time prior to its completion, provided that the contractor is indemnified for all expenses incurred, work completed, and any profit it could have made had the work been completed in full. However, the court may reduce the indemnity payable against the loss of profit if the circumstances make such reduction fair.

A Claim and Compensation Committee at the Qatar Ministry of Economy and Finance was incorporated in 2009 that specialises in receiving and studying applications for compensation submitted by contractors to the ministries, other governmental agencies, authorities and public corporations. However, its decisions are not binding.

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?

Although Qatari laws refer to events beyond the control of a party in various articles therein, it does not specifically define what constitutes such events or force majeure; in accordance with such provisions, when the performance of an obligation by a party becomes impossible for an external cause beyond its control, the corresponding obligation ceases and the contract is automatically terminated, unless the parties have agreed to make any of them responsible for the consequences of any force majeure or similar events. The parties are therefore able to contractually determine which events are to be considered as force majeure and the rights and entitlements of each party under their agreement as a result thereof to protect themselves, noting that a force majeure clause is incorporated in most design and construction contracts, emphasising its effect and impact in the event of an occurrence.

DISPUTES

Courts and tribunals

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

In addition to the jurisdiction of the existing standard state courts and the QFC courts for QFC firms, there are currently two specialised entities dedicated to resolving construction disputes.

The Claim and Compensation Committee was established in 2009 to receive and study applications and grievances submitted to the ministries, other governmental agencies, authorities and public corporations:

- for compensation resulting from construction contracts and supplies;
- for compensation for delays in executing obligations, in completing the original or additional works, and in change orders or modifications that may have been conducted on those contracts; and
- over penalties and liquidated damages resulting from the delay in executing the works or supply of materials.

The applicant and each concerned government body are notified of the minister's non-binding decision within 15 days from its issuance; the applicant can either accept in writing such decision or resort to the competent courts or tribunal or alternative dispute resolution referenced hereabove.

The Investment and Commerce Court was recently established by Law No. 21/2021, which will come into force on 4 May 2022. This court jurisdiction covers a wide array of commercial disputes, including those relating to commercial contacts, commercial representation contracts and commercial agencies, lawsuits between merchants related to their commercial activities and their disputes related to public-private partnership contracts.

The QFC courts or any alternative dispute resolution mechanism can be elected by mutual agreement of the parties.

Dispute review boards

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

The law does not preclude the parties from referring their disputes to DRBs as an alternative way to manage and resolve conflicts related to construction projects. The parties are free to agree to have recourse to DRBs and to decide whether their decisions are binding, advisory, final or provisional. Although certain contracts provide for DRBs, the use of DRBs is not yet widespread or common.

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?

After the ratification of the Singapore Convention in March 2020, Qatar issued Law No. 20 of 2021 on Mediation for the Settlement of Civil and Commercial Disputes, which will encourage the parties to adopt mediation as an alternative dispute resolution mechanism. The parties can choose mediators from a mediators registry established pursuant to the provisions and qualifications set out in articles 5 and 7. The authors observe that the creation of a court-based framework around enforcement of mediation settlement agreements may convince the parties to settle their disputes in a more cost-effective and time-efficient manner, rather than proceeding with litigation or arbitration that can take two years or more to be concluded.

Prior to the issuance of the Mediation Law, mediation was already being offered as an alternative dispute resolution service by the Qatar International Centre for Conciliation and Arbitration (which announced in March 2022 a new set of Arbitration and Conciliation Rules) and the Qatar International Court and Dispute Resolution Centre.

In public and private sector contracts, the parties generally resort to the courts or arbitration to resolve disputes arising from their contractual obligations.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

The Mediation Law No. 20 of 2021 allows Qatar courts to request the parties to settle their dispute through mediation within a determined period of time through a confidential process (including the discussions, negotiations and documents related to the mediation), and the agreement reached shall be validated by the court as final, binding, enforceable and having the power of a writ of execution.

A violation of the confidentiality obligation may expose the violator to a penalty of 20,000 Qatari riyals or 5 per cent of the value of the dispute, whichever is higher, provided that the adjudicated amount does not exceed 100,000 Qatari riyals.

Furthermore, mediations conducted in accordance with QICDRC Mediation Rules or QICCA Conciliation Rules are considered thereby as confidential and any settlement agreement between the parties cannot be disclosed unless it is necessary for the purposes of its implementation or enforcement.

Arbitration of private disputes

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

Arbitration is a common practice for resolving construction disputes, as is resorting to local courts. Generally, dispute clauses in contracts for the construction of big projects, including projects for the public sector involving foreign contractors (except for Public Works Authority – Ashghal – which submits all the disputes to the competent domestic courts) refer disputes to institutional arbitration (mainly under the ICC Rules or Qatar International Center for Conciliation and Arbitration (QICCA) Rules).

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?

Foreign contracting parties may either agree to conduct an institutional arbitration or conduct an ad hoc arbitration in accordance with the parties' own rules. The ICC and QICCA are the most customary arbitration institutions chosen in contracts with foreigners, given that they are well-established and recognised institutions. From the statistics circulated by QICCA, there were nearly 77 QICCA arbitral awards issued and 11 QICCA mediation cases between 2018 and 2020 (see https://www.qatar-tribune.com/news-details/id/208004/qicca-issues-77-arbitration-awards-within-two-years). From the ICC 2020 statistics published in August 2021, there were 48 Qatari parties involved in new ICC arbitrations in 2021 and Doha remains one of the ICC's top 10 most popular places of arbitration, with 22 new Doha-seated arbitrations in 2021. The London Court of International Arbitration recorded only three new Doha-seated arbitrations in 2021.

Regarding the applicable law and the seat of arbitration, the law of Qatar and Doha certainly predominates. As for the hearings – and notwithstanding the seat of arbitration and since the covid-19 pandemic in 2020 and thereafter – they can be held in person or remotely, with the parties and tribunal members, experts and witnesses attending from different locations or at the chosen seat or any other venue chosen by the parties or in accordance with the chosen institutional rules or the terms of reference.

Dispute resolution with government entities

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

Qatari laws allow government agencies to participate in private arbitration, whether institutional or otherwise; this is further confirmed by the arbitration law issued in 2017. Arbitration in administrative contracts requires the approval of the Prime Minister or their representative and arbitration under the Public Tender Law requires the approval of the Minister of Finance.

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?

Qatar has acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards rendered by a tribunal or court in one of the other signatory countries, which is mandatory unless the grounds stated therein for the refusal to grant such recognition and enforcement by the Qatari courts are met or there is no valid arbitration agreement or the enforcement of such award is contrary to the public order.

Since the issuance of the Arbitration Law in 2017, the jurisprudence of the court of appeal resulting from applications to set aside arbitration awards is now consistent and unified and has addressed various matters that previously created uncertainty and incoherent precedents and the Court of Cassation has clearly taken a positive position on the implementation of the New York convention (see Qatari Court Rulings in Applications to Set Aside Arbitration Awards by Claudia F. el Hage, published in Volume 13, No. 2 – 2021 of the *International Journal of Arab Arbitration*, available at Kluwerarbitration.com.

Qatar is also party to the following international treaties:

- Convention on the International Centre for Settlement of Investment Disputes 1966 (ICSID Convention);
- Convention on Judicial Cooperation between States of the Arab League 1983 (Riyadh Convention);
- GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996 (GCC Convention); and
- United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 (Singapore Convention).

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?

There is a statutory limitation period of three years for contractors from the time of destruction or from the time the defect was discovered and of 10 years for decennial liability jointly between the contractor and the designer for any destruction or defect, in whole or in part, of the buildings constructed by them.

Liabilities of traders towards each other in respect of their commercial activities will lapse after 10 years from the date of maturity of such liabilities, unless a shorter period is stipulated by the law.

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?

No, but Qatar has signed the Accession to the UN Framework Convention on Climate Change. The Supreme Council for Environment and Natural Reserves grants environmental permission with conditions or rejects them within 10 days, followed by a period of 30 days to appeal the decision of application rejection. There are a range of environmental laws and regulations enacted particularly that environmental development and concerns are increasingly prominent and gaining more importance in construction projects. Qatar is increasingly adopting the Global Sustainability Assessment System and may specify its use in future projects.

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?

Developers and contractors must take all reasonable steps to protect the environment and avoid damage or nuisance to persons or property

of the public or others resulting from pollution, noise or other causes arising thereof. The applicable environmental laws require that projects for public and private development be submitted to the authorities for approval. The authorities may – on a project-by-project basis – require an environmental impact assessment. Penalties for breaching environmental law range from fines to imprisonment, closing the project or the establishment, deportation of a foreigner from the country, confiscation of tools and equipment used in the violation and ordering the perpetrator to remove the violation and take remedial action.

Environment Protection Law No. 30 of 2002 applies to any person who designs, implements or operates any project. This law obliges public and private bodies to include environmental protection and pollution control clauses in local and international contracts that could be, upon implementation, harmful to the environment. Such contracts also need to include penalty conditions and an undertaking to bear the expenses of removing any environmental destruction and damages that may be caused.

For any work potentially harmful to the environment, an environmental impact evaluation or study must be conducted to identify the project's potential effects and to take the necessary precautions or mitigate the risks of environmental harm.

Based on the abovementioned law, any natural or corporate persons operating a project potentially harmful to the environment must also assign a person to ensure that its activities and operations meet the conditions and restrictions stated therein. Further, any person in charge of producing, handling or transporting hazardous substances must also take the necessary precautions to prevent any damage to the environment.

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'?

There are over 60 bilateral investment treaties (BIT), of which 26 are in force. The definition of 'investment' varies depending on the BIT, but it generally refers to all kinds of assets in connection with business, including real rights, movable and immovable property, industrial and IP rights and business concessions conferred by law or under contract.

Tax treaties

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

There are currently over 80 double taxation treaties signed by Qatar.

Currency controls

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

Currency exchange takes place freely at the prevailing rate at the date of exchange, with a stable exchange change rate of 3.64 Qatari riyals per US$1.

المـــري و الحـــــاج
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Removal of revenues, profits and investment

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

A foreign investor is free to transfer all the amounts resulting from its investment from and to any country without any delay or limitation including the investment revenues.

Qatar has a fair and transparent tax regime that benefits from the double taxation agreements the country has with over 80 countries, with 10 per cent corporate tax on locally sourced profit, no personal income tax, wealth tax or zakat. Payments of dividends, interest, royalties and management fees out of Qatar by Qatari companies are free from withholding tax, enabling tax-free repatriation of returns and profits for shareholders.

UPDATE AND TRENDS

Emerging trends

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

The current trends involve the 2022 FIFA World Cup and the Qatar National Vision 2030 (a roadmap towards opening the economy and turning Qatar into a society capable of sustainable development and providing a high standard of living for all citizens by 2030), the diversification of the economy, oil and gas, the investment of non-Qatari capital in economic activity, the PPP Law, and the technical cooperation programme between the government and the International Labour Organization.

The Public Works Authority – Ashghal – has released a number of projects based on the public-private partnership model that was introduced in May 2020 and which is beneficial to the country's economy.

The sixth edition of the Qatar Construction Specifications, which were released in 2014, became mandatory for all construction projects in Qatar, with the purpose of providing technical guidance in connection with the execution of constructions in Qatar and the minimum acceptable material quality and workmanship for those kinds of work that commonly occur in engineering projects.

Singapore

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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?

The key concerns that a foreign designer or contractor should consider include:

- Business incorporation and registration requirements. There are four main types of business structures for registration: sole proprietorship or partnership, limited partnership, limited liability partnership and company. Generally, all businesses, including foreign branch offices, must register, and can do so online with the Accounting and Corporate Regulatory Authority at Bizfile.
- Professional, regulatory registration and licensing requirements. Businesses providing architectural services or professional engineering services require a licence to provide such services, and depending on the type of business are subject to different licensing requirements under the Architects Act 1991 or the Professional Engineers Act 1991 (eg, professional liability insurance). Contractors are subject to registration and licensing requirements under the Building Control Act 1989, depending on the type of building work they intend to carry out.
- Immigration matters (eg, visa requirements). If the foreign designer or contractor intends to employ non-Singaporeans or intends to work in Singapore, he or she will need an appropriate work pass from the Ministry of Manpower.
- Local labour and tax laws. Singapore has a mandatory social security savings scheme funded by contributions from employers and employees known as the Central Provident Fund.

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?

Yes, unless statutory exemptions apply.

Architectural and professional engineering services

The provision of architectural and professional engineering services is regulated by statute, primarily under the Architects Act 1991 and the Professional Engineers Act 1991.

Only licensed corporations or licensed limited liability partnerships may supply architectural services or professional engineering services in Singapore.

With limited exceptions, only registered architects and professional engineers who have in force a practising certificate can provide architectural services and professional engineering services.

Only registered architects and professional engineers who have in force a practising certificate can sign and make submissions to a building authority or to a public authority.

Any person who supplies or offers to supply architectural services or professional engineering services in Singapore in contravention of the Architects Act 1991 or the Professional Engineers Act 1991 is liable on conviction to a fine not exceeding S$5,000 and to further fines or imprisonment for repeat offenders.

It is an offence to employ a person as an architect or as a professional engineer unless that person is a registered architect or professional engineer who has in force a practising certificate.

Any person who employs another person as an architect or as a professional engineer in contravention of the Architects Act 1991 or the Professional Engineers Act 1991 is liable on conviction to a fine not exceeding S$2,000 and to further fines for repeat offenders.

Contractors

Builders who carry out the following works for both public and private sector construction projects are required to hold a builders' licence:

- building works where plans are required to be approved by the Commissioner of Building Control; and
- work in specialist areas, which have a high impact on public safety.

The type of licence class and licensing requirements are set out in the Building Control Act 1989 and regulated under the Builders Licensing Scheme, which regulates the allowable works to be carried out under the relevant licence:

- general builder licence (Class 1): allowable projects are of any value;
- general builder licence (Class 2): allowable projects are of S$6 million or less; or
- specialist builder licence: allowed to undertake specified specialist building works of any value that the builder is licensed for, namely, piling works, ground support and stabilisation works, site investigation work, structural steelwork, pre-cast concrete work and in situ post-tensioning work.

Any person who holds himself out or carries on business without possession of the relevant builder licence and in contravention of the Building Control Act 1989 is liable on conviction to a fine not exceeding S$20,000 or to imprisonment for a term not exceeding one year or both, and further fines for non-compliance and continuing offences after conviction.

Competition

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

No.

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?

Singapore is party to the World Trade Organization's Agreement on Government Procurement, which requires the Singapore government to treat the goods or services offered by the suppliers of other contracting parties no less favourably than those offered by domestic suppliers.

Relevant legislation and subsidiary legislations are:

- Government Procurement Act 1997
- Government Procurement Regulations 2014
- Government Procurement (Challenge Proceedings) Regulations
- Government Procurement (Application) Order

The Auditor-General's Office regularly audits government agencies for compliance with official policies and rules. These audits cover the proper accounting of public moneys and use of public resources to enhance public accountability.

The Competition Act 2004 governs competition law in Singapore, and prohibits three types of anti-competitive conduct, subject to scheduled exclusions:

- anticompetitive agreements, decisions and practices that prevent, restrict or distort competition;
- abuses of a dominant position; and
- anticompetitive mergers and acquisitions that substantially lessen competition

The Competition Act is enforced by the Competition & Consumer Commission (CCCS), which has the power to issue directions to bring infringements of the Competition Act to an end and may also impose financial penalties. The CCCS has powers of investigation and enforcement including search and seize powers. Failure to cooperate with a CCCS investigation is a criminal offence.

Persons who suffer direct loss or damage as a result of another party's infringement of the prohibitions under the Competition Act 2004 may bring a court action against that party for damages or other remedies as a follow-on claim on the basis that an infringement has been found to have occurred by the CCCS or relevant appellate body under the Competition Act 2004.

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 is unenforceable if the person seeking to enforce it must rely on an illegality to prove his or her claim. It is an offence under the Prevention of Corruption Act 1960 to corruptly offer, give, receive, or agree to receive any gratification as an inducement or reward for doing or forbearing to do anything in any private and public matter and transaction. Other offences include corrupt transactions with agents, corruptly procuring withdrawal of tenders in relation to a contract from the government or any public body, bribery of members of parliament and bribery of members of public bodies. The bribery of public services is also an offence under the Penal Code 1871.

The courts will not enforce a contract obtained by bribery if the party seeking enforcement must rely on the illegal conduct for his or her claim.

Bribe-givers and bribe-takers may be prosecuted for offences under the Prevention of Corruption Act 1960 and, depending on the offence committed, shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding seven years, or both. Additional penalties shall be imposed equivalent to the sum or value of the illegal gratification received by the offender.

Making facilitation payments to public officials to expedite the performance of any official act is an offence.

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 Prevention of Corruption Act 1960 does not expressly require internal or external reporting of bribery offences. However, any persons are legally obliged to give any information they have in their power to give to investigating officers if so required. It is an offence under the Prevention of Corruption Act 1960 to obstruct corruption searches, which includes refusing or neglecting to give any information that may be reasonably required and that the person has power to give. Obstruction of corruption searches is an offence and offenders are liable on conviction to a fine not exceeding S$10,000 or to imprisonment for a term not exceeding one year, or both.

Individuals are also obliged under the Criminal Procedure Code to report the commission or the intention of any other person to commit certain offences under the Penal Code, including offences under sections 161–164 that relate to the corruption of public servants.

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?

No.

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 rules as government employees?

An agent for a public entity who corruptly accepts or obtains, or agrees to accept or attempts to obtain, any corrupt gratification as an inducement or reward for any act in relation to his or her principal's affairs or business is guilty of an offence under the Prevention of Corruption Act 1960.

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?

Appropriate home and Singapore jurisdiction advice specific to any foreign contractor's circumstances should be sought.

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?

Most projects in Singapore typically use well-established standard forms. The use of standard forms is not, however, mandatory.

The public sector generally uses the following standard form contracts:

- Public Sector Standard Conditions of Contract (PSSCOC) for Construction Works;
- PSSCOC for Design and Build; and
- Standard Conditions of Nominated Sub-Contract for use in conjunction with the PSSCOC for construction works.

For private sector projects, common standard forms include:

- Singapore Institute of Architects (SIA) Lump-Sum Contract;
- SIA Measurement Contract;
- SIA Minor Works Contract;
- SIA Conditions of Sub-Contract;
- Real Estate Developers' Association of Singapore (REDAS) Design and Build Conditions of Main Contract; and
- REDAS Conditions of Sub-Contract.

Engineering projects may use standard forms by the International Federation of Consulting Engineers (or FIDIC), such as the Red Book (construction), the Yellow Book (design and build) or the Silver Book (Engineering, Procurement, and Construction/turnkey projects).

There is no restriction on choice of language, choice of law or venue for dispute resolution for contracts in relation to construction and design. Certain mandatory local laws will apply to construction projects in Singapore regardless of the choice of law under the contract.

Payment methods

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

Typical modes of payment are by electronic payment or by cheque.

Frequency of payment will depend on the individual contract's payment mechanism. Most construction contracts provide for periodic payments based on the progress of the works or on a milestone basis. The works will typically be valued and certified for payment at prescribed intervals throughout the contract.

The frequency of payment for construction and supply contracts will also be subject to statutory timelines under the Building and Construction Industry Security of Payment Act 2004, which provides default and long-stop timelines for the submission of progress payment claims, payment certifications and payment responses, and the period between the payment certificate or response date and the date on which payment is due.

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 the traditional procurement model, the employer commissions an architect and engineers to prepare the design for the project. Generally, the architect and engineers have a duty to ensure that the works as designed have been properly executed by the contractor during the construction phase. The contractor is employed to construct the project based on this design but is generally not liable for problems related to the design.

Under a design-and-build procurement model, the contractor carries out both the design and construction of the works. The contractor is given 'single point' accountability for both the design and construction of the project. However, some employers prefer a hybrid version of the design-and-build model to retain some control over the design.

At the construction phase, employers typically engage contractors to carry out and oversee the construction works as a whole, with the contractor responsible to engage and be liable for any defective work or delay or any other default committed by subcontractors or suppliers. The contract between the employer and contractor may provide for the employer to stipulate nominated subcontractors or suppliers to be engaged for designated parcels of work.

Foreign contractors commonly undertake projects by way of a joint venture with a local company.

Generally, a subcontractor contracts as an independent agent of the contractor. In the absence of any express provision to the contrary, the contractor can only hold the subcontractor accountable for the subcontractor's work. In practice, a contractor will ensure that the subcontract preserves the chain of contractual accountability upstream.

PPP and PFI

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

There is no formal statutory or regulatory framework for PPPs and PFIs. These would be considered a form of public procurement and would be subject to compliance with the Government Procurement Act and Regulations.

Government procuring entities have the discretion to use PPPs; examples of PPPs include water treatment plants, waste disposal plants, education infrastructure and sports facilities.

Joint ventures

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

The liability of consortia members vis-à-vis the employer or other upstream parties will depend on the agreement or agreements between these parties.

The allocation of liability among consortia members will depend on the underlying agreements and business structures adopted by them.

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?

Parties are generally free to contractually limit liability. However, a person cannot restrict liability for death or personal injury resulting from negligence under the Unfair Contract Terms Act 1977. In the case of other loss or damage, such exclusion of liability must satisfy the requirement of reasonableness.

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?

Under the Contracts (Rights of Third Parties) Act 2001, a third party may rely on a term of the contract if the contract expressly provides that the third party may do so, or a contract term purports to confer a benefit on the third party. Whether a contract term purports to confer a benefit on the third party will depend on whether the contracting parties, on a proper construction of the contract, intended the term to be enforceable by the third party. All such third parties must be expressly identified in the contract by name or as a member of a class or answering a particular description.

A contractor may also bear tortious liability for claims by third parties, subject to any duty of care that the contractor is shown to have assumed vis-à-vis the third party. Even if this is shown, policy considerations may militate against the finding of a duty of care.

Certain third-party claims are insurable under contractor's all-risks policies during the duration of the construction of works and contractual defects liability period.

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?

The following insurances are normally taken out in construction contracts:

- contractor's all risks;
- workers' compensation;
- contractor's plant and equipment; and
- performance and indemnity bonds.

As the name suggests, contractor's all risks insurance covers most risks associated with material or property damage in a construction project (subject to exclusions and excess), in particular, physical loss or damage to the works under construction, including temporary and permanent works as well as materials delivered on site. Such policies are usually procured by the employer or main contractor for the whole project.

Typically, workers' compensation insurance, insurance for the plant and equipment, and performance bonds are procured by the contractor or subcontractors for their own workers and equipment.

The law does not generally limit liability for damages. Contractual limitations on liability for damages are generally effective, save as prohibited under the Unfair Contract Terms Act 1977.

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?

The minimum amount of local labour required is determined by a quota requirement that differs across different categories of work passes for semi-skilled foreign workers, mid-level skilled staff, and foreign professional, managers and executives.

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?

Generally, no.

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?

Generally, the following laws apply to foreign construction workers:

- Employment Act 1968; and
- Employment of Foreign Manpower Act 1990.

Employers of foreign construction workers are subject to requirements in relation to:

- provision and maintenance of cost of upkeep and maintenance, including cost of and insurance for medical treatment;
- provision of acceptable accommodation and safe working environments;
- prohibition of employers from demanding payment as consideration for employment or recovery of employment-related expenses;
- timely payment of salaries and prohibitions on salary deductions; and
- provisions in relation to hours of work and overtime, rest days, public holidays, annual leave and sick leave.

Failure by employers to follow these laws can result in financial penalties and imprisonment, and errant employers can be debarred from applying for new work passes or renewing work passes of existing foreign workers.

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?

There are generally no significant legal obstacles.

If the foreign contractor requires to strike off a solvent Singapore-incorporated company from the Accounting and Corporate Regulatory Authority's (ACRA) Register, it will have to comply with ACRA requirements in relation to its trading status, any outstanding debts or taxes owed to any government agency, any outstanding charges, ongoing or pending legal, regulatory or disciplinary proceedings, and existing and contingent assets and liabilities. If the company is registered with the Inland Revenue Authority of Singapore (IRAS) to pay Goods and Services tax (GST) under the Goods and Services Tax Act 1993, the foreign contractor will have to apply to IRAS for cancellation of GST.

If the Singapore-incorporated company is insolvent, it will likely have to place the company into creditors' voluntary liquidation – this will see the appointment of a liquidator to collect and distribute assets to creditors in a statutory order of priority, which also has duties and powers to investigate prior transactions.

Assuming that the foreign contractor is carrying on business, liability for any unfulfilled contractual obligations or its termination of contracts as part of the planned close of operations will be subject to express terms of contract entered into and the common law for repudiatory breach of contract.

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 contract between the contractor and the owner should provide for how the contractor will be paid.

Where an adjudicated amount payable from the owner to the contractor under an adjudication determination under the Building and Construction Industry Security of Payment Act 2004 remains unpaid, the contractor can obtain a lien on unfixed goods that have been supplied by it to the owner that have not been paid for.

'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?

Yes. The Building and Construction Industry Security of Payment Act 2004 provides that 'pay when paid' contract provisions are unenforceable in construction and supply contracts.

Contracting with government entities

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

Generally, no. Subject to the Government Proceedings Act 1956 and any written law, any claim against the Singapore government that arises out of any contract made by the authority of the government that would, if such claim had arisen between private persons, afford ground for civil proceedings, or is a claim (other than a claim in tort) for damages or compensation that might lawfully be enforced by civil proceedings as between private persons, shall be enforceable by proceedings against the government for that purpose.

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?

Contractors can apply for payment claim adjudication under the Building and Construction Industry Security of Payment Act 2004's fast-track statutory adjudication process, subject to contractual payment rights in the event of project interruption or cancellation.

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?

If there are no express contract provisions, the parties may rely on the common law concept of frustration or the Frustrated Contracts Act to be excused from the performance of their obligations.

Events of force majeure must be stated in the contract. Most standard forms set out events considered to be beyond the parties' control and stipulate any modification or cessation of the parties' contractual obligations upon the occurrence of such events.

It is possible to contractually limit or exclude certain circumstances from being defined as force majeure, especially if such circumstances have the quality of foreseeability.

DISPUTES

Courts and tribunals

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

Yes. There are specialised tribunals to address disputes arising out of construction and supply contracts under the Building and Construction Industry Security of Payment Act 2004 and the COVID-19 (Temporary Measures) Act 2000.

While there are no specialist construction courts in Singapore, the General Division of the High Court of Singapore typically places construction disputes before judges experienced in construction law and disputes, and the Singapore International Commercial Court has a specialist Technology, Infrastructure and Construction (TIC) List with specialist TIC judges and additional case management features to address complex construction disputes.

Dispute review boards

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

Whether or not DRBs are used, and if so, whether their decisions are mandatory, advisory, final or interim, typically depends on the particular contract and the DRB used, such as those provided in International Federation of Consulting Engineers (or FIDIC) standard form contracts.

The Ministry of Law launched the Singapore Infrastructure Dispute-Management Protocol 2018 (SIDP) to assist with dispute management and avoidance for mega infrastructure projects, designed and recommended for construction or infrastructure projects of at least S$500 million. The SIDP is intended for parties' incorporation into their contracts and provides procedures for the establishment of a dispute board (DB) for the purpose of matters which form the subject of the parties' agreement. The appointment of DB members is selected from an agreed panel, and can include appointments by authorised appointing bodies such as the Singapore International Mediation Centre (SIMC). The SIMC's appointment of DB members is drawn from its Specialists (Infrastructure) Panel, a list which comprises experts with the appropriate experience in resolving complex infrastructure disputes.

The Building and Construction Authority has introduced an Option Module E (Collaborative Contracting) to the Public Sector Standard Conditions of Contract (PSSCOC), which may be adopted in addition to the PSSCOC terms. The collaborative principles in Option Module E include a dispute board based on the SIDP. A decision made by the DP, known as a 'Determination', is binding on each party upon its receipt.

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 has gained increasing acceptance as a means by which construction disputes can be resolved.

Under the courts' civil procedure rules, all parties to the litigation have an obligation to consider whether some form of alternative dispute resolution, including mediation, might enable them to settle the matter without commencing or continuing court proceedings. The court

may consider the parties' conduct in attempting or refusing offers of amicable resolution in determining any issue of costs.

Singapore is signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention). Under the Singapore Convention, a mediated settlement agreement that has been concluded in writing by the parties to resolve an international commercial dispute can be recognised and enforced in a convention state as if it were a court judgment or an enforceable arbitral award.

Providers of mediation services include:

- the Singapore International Mediation Centre, which has a Specialists (Infrastructure) Panel comprising experts with experience in resolving complex infrastructure disputes; and
- the Singapore Mediation Centre, which includes mediators with construction experience (including construction lawyers, architects, engineers and quantity surveyors).

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Statements made in mediation are typically confidential, subject to any overriding public policy considerations, disclosures as required or allowed by statute, law or order of court, and any confidentiality provisions in mediation agreements.

Arbitration of private disputes

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

Parties to construction disputes often refer their disputes to arbitration instead of litigation. Commonly used standard form contracts often provide for institutional arbitration under arbitral rules of institutions such as the Singapore Institute of Architects or the Singapore International Arbitration Centre (SIAC).

Whether parties refer their disputes to arbitration or litigation often depends on the dispute resolution mechanism in their construction contracts. For instance, it is typical for public sector construction contracts to provide for referral of disputes or differences to arbitration.

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?

There is no evident preference for any customary international arbitration provider, although the SIAC and the ICC are common choices.

The choice of the seat of arbitration determines the governing law for the arbitration process and is down to party preference at the time of contracting. Singapore law and courts are generally seen as supportive of the rule of law and pro-arbitration, with minimal interference in arbitration proceedings unless there is good reason.

The choice of law of contract determines the governing law that determines the substantive contractual rights of the parties, and is a question of party preference at time of contracting.

Dispute resolution with government entities

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

Yes.

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?

Singapore is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards and the Singapore courts will recognise and enforce an award rendered by a tribunal in the territory of another contracting state.

Generally, domestic arbitrations are governed by the Arbitration Act 2001, and international arbitrations are governed by the International Arbitration Act 1994 (IAA).

Subject to the IAA, the UNCITRAL Model Law on International Commercial Arbitration substantially has force of law in Singapore.

The reasons for refusal to enforce a foreign award under the IAA are limited to the following:

- a party was under some incapacity at the time the relevant arbitration agreement was made;
- the arbitration agreement was invalid;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
- the award was made outside the jurisdiction of the arbitral tribunal;
- the composition of the tribunal or the arbitral procedure was not in accordance with the parties' arbitration agreement or, failing such agreement, the laws where the arbitration was conducted;
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority in the jurisdiction where the arbitration was conducted;
- the dispute between the parties was not capable of settlement by arbitration under the laws of Singapore; or
- to enforce the award would be contrary to the public policy of Singapore.

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?

The relevant statute is the Limitation Act 1959.

An action founded on a breach of contract or tort has a statutory limitation period of six years from the date on which the cause of action occurred.

Where the damage suffered is a latent defect, the statutory limitation period is three years from the earliest date on which the plaintiff first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action (if this three-year duration expires later than the six-year limitation period for actions founded on a breach of contract or tort), with an overriding long-stop limitation period of 15 years from the date on which there occurred any act or omission that is alleged to constitute negligence, nuisance or breach of duty; and to which the injury or damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

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?

Singapore is not a party to the Stockholm Declaration of 1972.

The key legislation includes the:

- Building Control Act 1989;
- Carbon Pricing Act 2018;
- Energy Conservation Act 2012;
- Environmental Protection and Management Act 1999;
- Environmental Public Health Act 1987;
- National Environment Agency Act 2002;
- Parks and Trees Act 2005;
- Planning Act 1998; and
- Resource Sustainability Act 2019.

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?

Duties generally relate to water, air, land and noise pollution. Developers and contractors can be required to carry out environmental pollution control studies, to propose and implement environmental pollution control prevention, reduction or control measures, to self-monitor and report environmental pollution, and to take out mandatory insurance pursuant to regulations. Liability can include fines, imprisonment and an obligation to take remedial actions as required by statute.

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'?

Singapore is a party to numerous bilateral and multilateral foreign investment agreements, and the full list of these agreements is listed by the Singapore Ministry of Trade and Industry at International Investment Agreements.

Singapore does not have a model agreement.

Tax treaties

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

Yes. Singapore has signed around 100 double taxation agreements (DTAs). The full list of DTAs is available on the Inland Revenue Authority of Singapore's website at List of DTAs, Limited DTAs and EOI Arrangements).

Currency controls

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

No.

Removal of revenues, profits and investment

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

There are no controls or laws restricting the legitimate removal of revenues, profits or investments from Singapore. Anti-money laundering laws, laws relating to transfer of funds for crime and terrorism, insolvency laws, and laws relating to the use of licensed payment service providers apply.

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UPDATE AND TRENDS

Emerging trends

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

The Singapore Green Plan 2030, or the Green Plan, is a whole-of-nation movement to advance Singapore's national agenda on sustainable development. The Singapore Green Building Masterplan is part of the Singapore Green Plan 2030, and aims to deliver three key targets of '80-80-80' by 2030:

- to green 80 per cent of Singapore's buildings (by gross floor area) – this involves raises in mandatory environmental sustainability standards for new buildings and existing buildings that undergo major retrofitting starting from 1 December 2021, the raising of energy performance standards and greater emphasis on sustainability outcomes such as designing for maintainability, and reducing embodied carbon across a building's life cycle aligned with the United Nations' Sustainability Development Goals;
- 80 per cent of new buildings (by gross floor area) to be super low energy buildings – with private sector participants encouraged to achieve at least 60 per cent energy savings above 2005 building codes and enhancement of sustainability standards for projects developed on land sold under the Government Land Sales programme sites from Q2 2022; and
- achieving 80 per cent improvement in energy efficiency for best-in-class green buildings – with government funding available for industry partnerships to develop innovative energy-efficient technologies and solutions, such as alternative cooling technologies, data-driven smart building solutions and next-generation building ventilation from Q2 2022.

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South Africa

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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?

A foreign designer or contractor would need to consider, among other things:

- the type of legal entity or business vehicle it wished to establish and the formalities related to its registration;
- the sector codes for the construction and the finance services sector gazetted by the Department of Trade and Industry on 1 December 2017 relating to broad-based black economic empowerment; particularly, those relating to ownership, skill development and enterprise and supplier development;
- South Africa's ongoing electricity struggles (ie, load-shedding and obtaining electricity at future sites not already connected to the South African power grid);
- compliance with the requirements of the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993;
- compliance with and the acquisition of the relevant International Organization for Standardization accreditations; and
- the relevant overtime exemptions as set and determined by the Department of Labour.

A foreign contractor should also take into consideration any tax implications, including corporate tax, provisional tax, pay as you earn tax, the Unemployment Insurance Fund and other social security contributions, value-added tax and import and export customs and duties, and familiarise itself with tax legislation in South Africa.

Other factors to consider may be business insurance, compliance with the relevant labour legislation, health and safety requirements and consumer protection laws.

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?

Foreign designers and contractors must comply with the same licensing requirements applicable to domestic designers and contractors.

All contractors involved in public procurement are required to register with the Construction Industry Development Board, a body created in the terms of the Construction Industry Development Board Act No. 38 of 2000 to undertake, carry out or complete construction works for public sector contracts, failing which the respective contractor will be guilty of an offence and may be held liable for payment of a fine not exceeding 10 per cent of the contract value.

In addition, all foreign designers or professional staff are required to register with the relevant professional bodies; namely, architects with the South African Council for the Architectural Profession, engineers with the Engineering Council of South Africa and quantity surveyors with the South African Council for the Surveying Profession.

Competition

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

While compliance with the broad-based black economic empowerment regulations may be easier for domestic contractors, to the extent that foreign contractors are able to comply with these regulations, local laws do not overtly provide an advantage to domestic contractors in competition with foreign contractors.

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?

Among others, the following legal protections exist to ensure fair and open competition to secure contracts with public entities in South Africa:

- section 217(3) of the Constitution of the Republic of South Africa 1996;
- the Preferential Procurement Policy Framework Act No. 5 of 2000;
- the Preferential Procurement Regulations 2011;
- the Promotion of Administrative Justice Act No. 3 of 2000;
- the Prevention and Combating of Corrupt Activities Act No. 12 of 2004; and
- the Competition Act No. 89 of 1998, which regulates fair and open competition by providing rules governing the relationships between the different stakeholders involved in business activities; namely, competitors, suppliers, customers and joint venture partners. The Act prohibits restrictive horizontal and vertical practices wherein agreements are reached that substantially prevent or lessen competition in a market or involve the fixing of prices, division of markets through allocation of customers or collusive tendering. In addition, the Act also establishes three competition regulatory authorities to investigate and enforce any anticompetitive behaviour: namely, the Competition Commission of South Africa, Competition Tribunal and Competition Appeal Court.

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?

Sections 12 and 13 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 regulate offences in respect of corrupt activities relating to the awarding of contracts and the procuring of tenders. Section 26 of the Act states that any person who is found guilty of an offence of corrupt activities relating to, inter alia, the awarding of contracts and the procuring of tenders will be liable to a fine or imprisonment. An aggrieved party may approach the court to request that an agreement concluded through a corrupt process be set aside.

Facilitation payments constitute unauthorised gratification and amount to an offence of corrupt activities.

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?

In terms of section 34(1) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004, any person who holds a position of authority and who knows or ought to have known or suspected an offence, such as fraud, theft, extortion, forgery or uttering a forged document, involving an amount of 100,000 South African rand or more, must report this knowledge or suspicion, or cause it to be reported. Failure to report the knowledge or suspicion will render the person guilty of an offence according to section 34(2) of the Act and the guilty person may be liable for a fine or imprisonment, depending on the circumstances and the respective court imposing the sentence.

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 laws requiring parties to make political contributions to do business in the territory or jurisdiction, nor is it the general practice of political parties to request political contributions, as this would amount to corrupt activity. It is generally accepted that business is won through the tender process and that the service provider scoring the requisite points based on various contributing factors will be awarded the contract. Contributions or donations may be seen to sway these decisions and are accordingly highly regulated. The Political Party Funding Act No. 6 of 2018 regulates how donations or contributions are to be disclosed and managed by the political entity receiving the contribution, to promote transparency and prohibit certain forms of donations. As such, contractors or design professionals are not restricted from doing business on the basis of making political contributions; however, such contributions will be and must be disclosed and must conform to the prescripts of the Act.

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 rules as government employees?

The Prevention and Combating of Corrupt Activities Act No. 12 of 2004 provides for the strengthening of measures to prevent and combat corruption and corrupt activities by all persons, public officials, foreign public officials, members of legislative authority, judicial officers and members of the prosecuting authority. Section 6 of the Act relates to offences for corrupt activities relating to agents and sets out instances in which an agent may be found guilty of the offence of corruption or corrupt activities. A construction manager or other construction professional acting as a public entity's representative or agent would, therefore, be subject to the same anti-corruption and compliance rules as are applicable to government employees (public officials). In addition, the Construction Industry Development Board have further published a Code of Conduct for all parties engaged in public and private construction procurement that regulates acceptable and unacceptable conduct by any party to this process, including the conduct of an employer's representative or agent, or both.

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?

A foreign contractor that employs foreign employees will be required to ensure that all employees have a valid work permit or visa, or both, to enable them to earn an income in South Africa. Foreign nationals must also comply with applicable taxation laws and regulations as prescribed in the Income Tax Act and regulated by the South African Revenue Services, such as registering for payment of income tax earned from a South African source as a non-resident for tax purposes. Furthermore, it is necessary for a foreign company to register, in accordance with section 23 of the Companies Act 2008, with the Companies and Intellectual Property Commission as an 'external company' to be entitled to conduct business in the jurisdiction.

In an effort to address racial imbalances and inequality imposed during the Apartheid era, South Africa has adopted the policies of black economic empowerment (BEE) and affirmative action (AA) governed by the Broad-Based Black Economic Empowerment Act. Government and certain companies and entities require all economic participants, including foreign contracting companies, doing business with them to adhere to the BEE and AA policies and regulations, which may affect a foreign contractor's ability to compete with other contractors in the market.

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 standard contract forms most commonly utilised are contained in four suites of contracts, namely:

- the Federation of Consulting Engineers;
- the General Conditions of Contract for Construction Works;
- the Joint Building Contracts Committee; and
- the New Engineering Contract.

The Construction Industry Development Board, a public entity established in accordance with the Construction Industry Development Board Act No. 38 of 2000, recommends the aforesaid standard forms of contract for private sector entities, while public sector entities are required to utilise one of these standard forms. The requisite standard form contract is elected according to its compatibility with the works to be executed, the services required and the preferences of the contracting parties.

Although South Africa has 11 official languages, English is the most predominantly used language in respect of most, if not all, commercial matters in South Africa. As there are no regulations or restrictions on the use of local languages, the contracting parties are free to agree a language for the recording and exchanging of all communications.

The parties are at liberty to agree the venue for dispute resolution hearings and there are generally no restrictions on the choice of venue. The parties should when agreeing on a venue be cognisant of factors such as costs, travelling, convenience and the duration of the intended hearing and alternatives such as 'virtual' hearings. Clauses relating to the contracting parties' choice of the substantive law governing the contract are enforceable in South Africa, except for any laws that may be inconsistent with the local laws and legislation enacted at that time, including public policy considerations.

Payment methods

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

Electronic payment has become the norm for payments. Unless the parties agree otherwise, the contractor would only receive payment upon completion of the works. However, the norm of the industry provides for a periodic payment regime to alleviate the financial burden on the contractor in funding the project, which is generally done by way of an application by the contractor for the value of the work executed, the assessment and certification of the amount due by the employer or his or her agent and payment of the amount certified.

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?

Major projects in South Africa have historically been executed through direct agreements between the employer and a main contractor, who in turn enter into a contractual relationship with subcontractors. Thus, there is no privity of contract between the employer and the subcontractors. Furthermore, the employer would generally enter into a separate contract with an engineer or principal agent (depending on the form of contract agreed) to which the contractor is not a party. Although the principal agent or engineer has certain duties and obligations to perform as set out in the agreement between the employer and the contractor, the law of agency would regulate these contractual obligations, meaning that the engineer's or principal agent's actions and obligations are performed in their representative capacity of the employer. Failures or breach by the engineer or principal agent are, accordingly, deemed failures or breaches of the employer.

PPP and PFI

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

South Africa has a statutory and regulatory framework established in terms of section 217 of its Constitution that regulates PPPs for the procurement of goods and services by national and provincial government institutions.

PPPs in the national and provincial spheres of government are regulated by the National Treasury Regulation No. 16 issued under the Public Finance Management Act No. 1 of 1999 (PFMA) (as read with the Public Finance Management Amendment Act No. 29 of 1999). The National Treasury Regulation No. 16, however, does not prescribe the financing structure of a PPP (as it is determined on a project by project basis) but PPPs generally require the private party to raise debt or equity to finance the project. The National Treasury has also issued several practice notes and manuals under section 76(4) of the PFMA, which describe the key issues that arise in PPP agreements and which issues are to be dealt with in a manner that achieves substantial risk transfer to the private party, value for money and affordability.

PPPs in the municipal sphere of government are regulated by the Municipal Public-Private Partnership Regulations issued under the Local Government: Municipal Finance Management Act No. 56 of 2003 and the Local Government Municipal Systems Act No. 32 of 2000. The Municipal Service Delivery and Public-Private Partnership Guidelines, prepared by the National Treasury in cooperation with the Department for Provincial and Local Government, also provide guidance as to the principles governing the establishment of PPPs in the local sphere.

Joint ventures

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

Generally, a consortium comprises a group of companies that associated themselves for a specific purpose on a project. The group of companies comprising the consortium accordingly remain (unlike a joint venture) separate legal entities, and their risk and liabilities will relate only to their scope of works provided on the project.

As a number of the companies in a consortium may collectively contribute to or cause a delay to the project, it may be difficult to ascertain the extent of each member's liability to the employer for its poor performance or delays if the employer imposes performance or delay damages at a later stage. Therefore, it is advisable that a consortium agreement is concluded to provide for shared liability in these instances.

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?

The general rule of law is that a contracting party is not responsible for the negligence or the wrongdoing of the other party unless the contracting party has been negligent in regard to the conduct of the other party. Most of the standard forms contracts in use have provisions to the effect that, in certain circumstances, a contracting party is indemnified against claims by third parties. While these clauses are enforceable, it does not affect the liability of that party towards the third party and only provides the party with a contractual right of recourse.

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?

Even though a contractor may have a legal duty to both the employer and third parties to refrain from executing work that is unsafe or in breach of regulatory requirements, there exists no privity of contract between the third party and the contractor. The contractual relationship is between

the employer of the building and the third party it is sold or leased to, and the third party will have to pursue a claim against the employer. As a result, the employer will have to pursue a claim against the contractor should the third party be successful in its claim against the employer.

The success of the third party may likewise be affected by the provision of an indemnification clause to the benefit of the employer that may cover acts of negligence by the contractor.

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?

Contract works risk is an insurable risk that is associated with the physical loss of or damage to the works under construction and property associated with the performance of the works, including damage to adjoining premises. Public liability risk is also an insurable risk for bodily injury or physical damage to the property of third parties arising from construction operations.

In respect of injury to workers or third parties, contractors (as respective employers) will be required to register with the Compensation Fund for Occupational Injuries and Diseases (or a licensed mutual association) under the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993. The Act provides for compensation to employees for disablement caused by occupational injuries or diseases sustained or contracted by the employee during the course of their employment. The employer is protected against all civil claims, which may be instituted against him or her in the event of an injury or death on duty, even in the event of alleged negligence.

With regard to damage resulting from environmental hazards, contractors in South Africa are required to adhere to the provisions of the National Environmental Management Act No. 107 of 1998 (NEMA) and the National Environmental Management Waste Act No. 59 of 2008 (NEMWA). Section 28 of NEMA specifically imposes a duty of care and remediation for environmental damage, which can result in a penalty of a fine or imprisonment, or both, being imposed under section 67 of NEMWA for failure to ensure this compliance. Depending on the extent of the policy, environmental risk insurance will provide coverage to the contractor for losses and third-party claims associated with environmental damage and remediation.

Policies to cover contractors against claims for delay damages are not common, but contractors' liability may be capped at a certain percentage in construction contracts and may be subject to the Conventional Penalties Act No. 15 of 1962, which provides for the reduction of delay damages validly claimed if they are found to be excessive.

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?

There are no laws that require a minimum amount of local labour to be employed on a particular construction project. Government-sponsored infrastructure projects may contain local labour and local skills development requirements that would have to be submitted in the pre-contract phase. Similarly, black economic empowerment requirements contain employment equity provisions that set criteria for the employment of historically disadvantaged South Africans. These criteria, for, inter alia, the employment of local labour, regarding public procurement are governed by the Preferential Procurement Policy Framework Act No. 5 of 2000 and the Preferential Procurement Regulations of 2017.

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?

There are currently no employment-related legal obligations towards employees that cannot be terminated upon valid termination of the employment agreement. To avoid unnecessary disputes, however, the employment contract should expressly provide that the duration of the employee's employment is fixed for a specified period or until the completion of the project, or for that part of the project for which the employee's services are required.

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?

Section 23 of the Constitution of the Republic of South Africa Act No. 5 of 2005 provides foreign construction workers with an overarching umbrella protection in relation to fair labour practices.

The Labour Relations Act No. 66 of 1995, as amended, regulates and provides protection to all employees, including foreign construction workers, in respect of any disputes that may arise relating to unfair dismissal and unfair practices in employment.

Foreign workers are also afforded equal rights to South African citizens, as set out in the Basic Conditions of Employment Act No. 75 of 1997.

A foreign worker would have recourse to the Commission for Conciliation, Mediation and Arbitration or the Labour Court if an employer fails to comply with the aforesaid labour laws.

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?

A foreign contractor (registered as an external company) would need to comply with the deregistration processes and the winding-up provisions of the Companies Act No. 71 of 2008, as set out in section 80 of the Act. Section 83 of the Companies Act provides that a company will be dissolved from the date on which the name of the company has been removed from the companies register, but this does not absolve the directors of the company of any liability incurred before the company name was removed from the register.

In construction matters, the aforementioned processes will take into account any provisions of the agreement relating to the defects notification period and provisions relating to latent defects, which may only manifest after completion of the works and, therefore, may need to be considered in the winding-up process.

With regard to termination payments in construction contracts, a reconciliation (or recovery statement) along with the final payment certificate will be prepared to take into account any payments due by the contractor to the employer at the date of termination (excluding costs for latent defects that may manifest later).

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?

Although a lien may be placed on property, in these circumstances, it only serves as security for the debt and does not in itself afford the right to execute against that security. Furthermore, parties to a contract can agree to a waiver of lien. The preferred method of securing payment is through a payment guarantee where the outstanding payment is secured by a third party (guarantor).

'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?

In a contractor–subcontractor relationship, a 'pay if paid' or 'pay when paid' clause has the effect of placing the risk of non-payment on the subcontractor. These clauses are valid and enforceable, but the Minister of Public Works has proposed amendments to the Regulations of the Construction Industry Development Board Act No. 38 of 2000 where such conditional payment provisions would be prohibited. These amendments were, however, proposed in May 2015 and there has been no real progress thereon to date.

Contracting with government entities

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

Government agencies, as organs of state, contract as an ordinary contracting party and cannot claim sovereign immunity as a defence to a claim for payment. Section 1 of the States Liability Act No. 20 of 1957 provides that any claim against the state that would (if that claim had arisen against a person) be the ground of an action in any competent court, shall be cognisable by such court whether the claim arises out of any contract lawfully entered into on behalf of the state or out of any wrong committed by any servant of the state acting in his or her capacity and within the scope of his or her authority as this servant. A claim instituted against an organ of state should, however, comply with requirements in the Legal Proceedings Against Certain Organs of State Act No. 40 of 2002.

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?

Construction contracts are generally concluded between an employer and an independent contractor. Unlike employees who are afforded protection for payment under sections 32, 40 and 41 of the Basic Conditions of Employment Act No. 75 of 1997, there is no statutory payment protection provided for independent contractors, as an 'independent contractor' is specifically excluded from the definition of 'employee' under the Act.

An independent contractor's only recourse would be to prosecute a claim against the employer in terms of the dispute resolution provisions contained in the construction contract concluded with the employer, whose clauses generally remain binding between the contracting parties, notwithstanding the termination of the contract or cancellation of a project, or both.

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?

Construction contracts generally include a clause that caters for the eventuality that either party to the contract is unable to perform owing to force majeure events. When performance of a contract becomes impossible owing to an event beyond the contractor's control (and as defined in the force majeure clause), the parties would be excused from further performance until this event has ceased. The impossibility should be absolute, as mere difficulty in performance or temporary impossibility would not be sufficient to release a party from its obligations.

DISPUTES

Courts and tribunals

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

There is no specialised tribunal created by statute to resolve construction disputes. As a result, most standard forms of construction agreement provide for alternative dispute resolution (ie, adjudication and arbitration) whereby the parties are at liberty to agree a specialised tribunal to resolve the dispute between them.

Dispute review boards

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

It has become common for construction-related disputes to be resolved provisionally by adjudication. Dispute resolution by adjudication is by agreement, and the adjudicator's determinations are binding on the parties and enforceable in court as a contractual obligation. Subject to agreement, the adjudicator's determination remains binding unless and until overturned or varied in subsequent arbitration or court proceedings.

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?

Although there are a number of experienced mediators in South Africa from different backgrounds, mediation has not gained acceptance as the preferred method of dispute resolution. In most instances, the relationship between the parties has deteriorated to such an extent that the parties have lost all trust in each other to negotiate a settlement and, with that in mind, the parties often believe that the costs and time related to a mediation would be wasted.

Confidentiality in mediation

30 Are statements made in mediation confidential?

Mediation is by agreement and it is advisable that such an agreement provides for the confidentiality of the process. However, both parties must give their consent before statements that are made expressly or impliedly without prejudice in the course of bona fide settlement negotiations of a dispute are disclosed.

Arbitration of private disputes

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

Arbitration has become the universal and most commonly adopted method to resolve construction disputes for various reasons, including the appointment of a specialist tribunal, confidentiality and the saving of time and costs when compared to litigation in court.

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?

There is no prohibition on agreeing to resolve disputes through arbitration that is conducted by international arbitration forums seated outside South Africa (eg, London, United Kingdom (London Court of International Arbitration); Paris, France (International Chamber of Commerce); and Singapore (Singapore International Arbitration Centre)). However, the local forums and associations are able to provide similar (if not better) service and assistance to the conduct of an arbitration at a substantially reduced cost. There are further benefits associated with the resolution of disputes in the country where the project is executed, which results in a significant saving of time and costs.

Dispute resolution with government entities

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

Section 39 of the Arbitration Act No. 42 of 1965 binds the state to any arbitration in accordance with an arbitration agreement to which the state is a party, except for any arbitration agreement between the state and the government of a foreign country. Section 28 of the Act equally applies to the state and states that an award shall be final, binding and not subject to appeal, except for any provision to the contrary stipulated in the arbitration agreement or the Act.

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?

In terms of section 18 of the International Arbitration Act No. 15 of 2017, the enforcement of a foreign arbitral award may be refused if:

- the court hearing the application finds that the subject matter of the dispute is not permissible under South African law or if the enforcement of this award would be contrary to public policy; or
- the party against which the award is sought can prove on a balance of probabilities that:
  - it lacked the capacity to contract under the applicable law;
  - the arbitration agreement is invalid under the laws of the country in which the award was made or the laws to which the parties have subjected it to;
  - it was unable to present its case or did not receive sufficient notice in respect of the arbitrator's appointment and arbitration proceedings;
  - the award deals with a dispute falling outside of the terms of the reference to arbitration or contains decisions beyond the scope of reference to the arbitration;
  - the arbitration tribunal's constitution or arbitration procedure does not accord with the terms of the arbitration agreement or the laws of the country in which the award was made; or
  - the award is not yet binding on the parties or has been set aside by a competent authority of the country in which, or under the law to which the parties have subjected the agreement, it was made.

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?

Section 11(d) of the Prescription Act 68 of 1969 requires that a claim must be brought within three years from the date on which the debt became due and payable (subject to certain exceptions) and, in terms of section 12(1), prescription begins to run from the date on which the debt is due.

Section 13, however, lists circumstances in which prescription is delayed due to impediments to the creditor's ability to recover a debt until such impediment is removed.

In terms of section 14(1), the running of prescription is interrupted by a tacit or express acknowledgement of liability by the debtor or by the service of summons or any court process on the debtor by which the creditor claims payment of the outstanding amount.

Once the claim has prescribed, the creditor will no longer be able to legally claim payment of the debt from the debtor.

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?

South Africa is a party to the Stockholm Declaration, which was ratified on 4 September 2002 and became effective on 17 May 2004. The national legislation that gives effect to the regulations underpinned in the Stockholm Declaration includes, but is not limited to:

- section 24 of the Constitution of the Republic of South Africa 1996;
- the National Environmental Management Act No. 107 of 1998;
- the National Environment Management: Air Quality Act No. 39 of 2004;
- the National Water Act No. 36 of 1998;
- the National Environmental Management: Waste Act No. 59 of 2008;
- the Hazardous Substances Act No. 15 of 1989;
- the Mineral and Petroleum Resources Development Act No. 28 of 2002; and
- the National Environmental Management: Biodiversity Act No. 10 of 2004.

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 South African Environmental Law Framework is extensive and well developed. The framework legislation is the National Environmental Management Act No. 107 of 1998 (NEMA), which gives effect to section 24 of the Constitution of the Republic of South Africa that affords everyone the right to an environment that is not harmful to their health

or well-being and to have the environment protected through reasonable legislative measures. NEMA, together with other specific environmental management Acts and their regulations and standards published thereunder, provide for legislative environmental protections and sanctions for any violations committed in contravention thereof. Prior to and during the execution of a development, the developer or contractor may be legally required to obtain permits or licences, consents or authorisation and implement environmental impact assessments, environmental plans and environmental measures and environmental benchmarks prior to commencement. Developers and contractors are required to apply for environmental authorisation for certain activities that will have an adverse impact on the environment and provides for penalties should a contractor be found to be in violation of such requirement. Legislation such as the National Environment Management: Air Quality Act No. 39 of 2004, National Water Act No. 36 of 1998 and National Environmental Management: Waste Act No. 59 of 2008 specifically state that a failure to adhere to the obligation to obtain a licence or permit to undertake certain activities that may adversely affect the environment is an offence punishable by a fine or imprisonment. In respect of damage resulting from environmental hazards, contractors are required to adhere to the provisions of NEMA and the National Environmental Management: Waste Act No. 59 of 2008, which imposes a general duty of care and remediation of environmental damage, which can result in a penalty of a fine or imprisonment or both being imposed for a failure to ensure such compliance.

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'?

Since 2012, the South African government has terminated bilateral investment treaties (BITs) with a number of countries with the intention of substituting the protection offered by the treaties with domestic legislation.

The Protection of Investment Act No. 22 of 2015 (the Act) came into effect on 13 July 2018 and aims to provide protection to investors in respect of their South African investments, while also attempting to balance the rights of these (foreign) investors with the government's right to implement policy. Most BITs previously concluded, however, contained 'sunset clauses' that extended the protection offered to an investor in terms of the BIT for a further period varying from 10 to 20 years.

In terms of section 2(1) of the Act, foreign investors should find it reasonably easy to qualify for the protection the Act offers, as it broadly defines 'investment' to include the following:

- any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of South Africa, committing resources of economic value over a reasonable period of time, in anticipation of profit;
- the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or
- the holding, acquisition or merger by such an enterprise with another enterprise outside South Africa to the extent that such holding, acquisition or merger with another enterprise outside South Africa has an effect on an investment in South Africa.

The Act does not have a direct impact on the protection of foreign investors who are a party to BITs that have either not been cancelled or that contain sunset clauses; these investors still enjoy protection under the international instruments from which the protection arose.

In addition to the Act and BITs, foreign investors could enjoy protection under international law by way of regional treaties like the Southern African Development Community's Finance and Investment Protocol.

Tax treaties

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

South Africa has engaged with numerous countries, both across the African continent and abroad, in establishing double taxation agreements and protocols. These treaties are country-specific, providing the types of taxes covered under that agreement, persons or entities who qualify for exemptions under these agreements, the requirements that must be met to qualify for exemptions, and other important factors. The double taxation agreements and protocols demand a level of compliance and action on the part of the party seeking double taxation exemption, among other things, to continue to file tax returns and to claim exemption under the relevant treaty.

The Income Tax Act 58 of 1962, however, was amended with effect from 1 March 2020 with the result that a person or an entity that has foreign economic interests may be subject to tax in both South Africa and in the foreign country.

Currency controls

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

Currency exchange controls are governed by legislation, namely the Currency and Exchanges Act No. 9 of 1933 and the Exchange Control Regulations, as well as certain published orders and rules.

The changing of monies from one currency to another is subject to the approval of the South African Reserve Bank (SARB) by way of a process designed to facilitate exchange transactions that are to be carried out through authorised banks. This facilitation comes with limit caps on the amounts that can be exchanged.

Removal of revenues, profits and investment

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

Regulation 10(1) of the Exchange Control Regulations prohibits the exportation of capital from South Africa in absence of permission being granted from the Treasury and in accordance with such conditions as may be imposed.

The SARB governs the Exchange Control Regulations; therefore, any removal of revenues, profits and investments from South Africa must be declared to it. In certain instances, a tax clearance certificate obtained from the South African Revenue Service may also be required.

UPDATE AND TRENDS

Emerging trends

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

A growing trend in the South African construction industry is, as a result of the South African energy crisis and the move toward 'greener' construction, the development of sustainable or reusable energy facilities (ie, wind and solar farms that feed into the nationwide electrical grid) as well as 'green buildings'.

As a result of this growing trend, a number of governing bodies and construction companies have formed over the past few years in an attempt to facilitate and fast-track South Africa's reduction of its overall carbon emissions. An example of this is the Green Building Council of South Africa (GBCSA), which, together with the National Building Regulations and Building Standards (NBRBS), created the green building standards. These green building standards are incorporated in SANS 10400-X: The application of the National Building Regulations Part X: Environmental Sustainability; and Part XA: Energy usage in buildings as well as SANS 204 (2011): Energy efficiency in buildings.

The GBCSA further provides certifications for almost any type of building by utilising the Green Star, Net Zero, EWP and EDGE rating tools. For a building to receive a certificate, it goes through a certification process whereby the process is managed internally (by the GBCSA) and externally by an independent third-party assessor or moderator. Contractors can use these certifications when seeking third-party investors.

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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?

Depending on the individual situation, the main concern would be Swedish labour law. In Sweden, the model of collective agreement between the employer's association and trade unions has a predominant role – the 'Swedish model'. The freedom to contract is extensive. To facilitate foreign companies, the Confederation of Swedish Enterprise and the Swedish Trade Union Confederation have agreed a recommendation to foreign companies to apply for membership in the employer's association for a limited period. Thereafter, a collective agreement is negotiated specifying the conditions for the workers of the foreign company. A benefit to the foreign company is that it will avoid being subject to blockades or other actions from the Swedish trade unions.

Historically, Swedish trade unions have demanded that foreign contractors sign collective agreements, even if they have no Swedish staff and no members of any particular trade union. Any contractor refusing to comply could expect to be boycotted, effectively preventing it from carrying out its work. In 2008, the European Court of Justice (ECJ) found that this practice was not acceptable. The matter was then decided by the Swedish Labour Court, which followed the ruling from the ECJ. These legal developments have opened possibilities for foreign contractors to compete with Swedish companies by means of low prices because of low wages. In Sweden, there are no minimum salaries pursuant to statutory law; instead, minimum salaries are regulated by collective agreements.

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?

There is no such prerequisite.

Competition

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

No. In public procurement, such conditions would also violate the Public Procurement Act.

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?

Public procurement is governed by the Public Procurement Act, which is designed to ensure equal treatment, non-discrimination, transparency and proportionality. The Public Procurement Act is largely based on the EU directive concerning public procurement. The Swedish Competition Act and articles 101 and 102 of the Treaty of the Functioning of the European Union – up to 1 December 2009, articles 81 and 82 in the European Community Treaty – contain two main provisions: prohibition against anticompetitive cooperation and prohibition against abuse of a dominant position. The Swedish Competition Act also contains rules concerning anticompetitive sales activities by public entities and control of concentrations between undertakings.

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?

There is no automatic right for an employer to terminate a contract that was awarded as a result of bribery. The general conditions, AB 04 and ABT 06, do not contain any specific rules. The outcome might be different depending on the kind of illegal means used. For example, a contract concluded after extortion would not be enforceable. Obviously, a contract awarded by a public body as a result of bribery can be expected to be terminated. Bribe-givers and bribe-takers could, depending on the circumstances, be prosecuted and would likely face the penalty of a fine or a maximum of two years' imprisonment. Facilitation payments are not allowable under local law.

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?

There is no statutory law; whistle-blowing is voluntary. However, in 2017, statutory law was introduced to facilitate whistle-blowing by protecting employees from retaliation when they have reported wrongdoing. The legislation also means that an agreement that restricts protection for whistle-blowers will be invalid.

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 restrictions, but it is not common for contractors or other professionals within the construction sector to support, financially or otherwise, political candidates or parties. The making of political contributions is not, to any great extent, part of doing business.

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 rules as government employees?

In general, yes, since the Swedish Penal Code is generally applicable and includes legislation related to anti-corruption.

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?

In general, the business climate is good. Labour and environmental law are areas that require special attention. Tax aspects must also be considered if the foreign company has a permanent establishment in Sweden. Finally, the planning and zoning procedures often take time.

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?

There are two sets of general conditions for construction works: AB 04 General Conditions of Contract for Building and Civil Engineering Works and Building Services for performance contracts, and ABT 06 General Conditions of Contract for Design and Construct Contract for Building, Civil Engineering and Installation Works for design and construction contracts. These general conditions have attained almost universal acceptance among Swedish contractors and employers. However, in their administrative regulations, employers normally amend the general conditions to some extent. AB 04 and ABT 06 are supplemented by addenda for subcontractors (AB-U 07 and ABT-U 07). ABK 09 is the standard form used in contracts between employers and engineers. All of these standard forms are agreed documents between the employer's and the contractor's or engineer's organisations. The general conditions apply to individual contracts only if there is a reference in the contract to the specific form. As there is no specific statutory law, this is important to bear in mind. The language of the contract must not necessarily be the local language. Furthermore, there are no particular restrictions on choice of law and the venue for dispute resolution. The choice of the parties concerning applicable law is respected by the Swedish jurisdiction. Judgments from all jurisdictions are, however, not enforced by Swedish authorities.

Payment methods

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

Contractors, subcontractors, vendors and workers are typically paid by electronic payment.

According to AB 04 and ABT 06, the two basic payment forms are the agreed fixed price and current account. There are also a number of variants of these forms of compensation and other pricing mechanisms, such as incentive agreements. Fixed price means that the contractor will be paid an agreed sum. The price and scope of work are agreed and set out in the contract. Current account means that the contractor gets paid for its costs.

In accordance with AB 04 and ABT 06, the contract price refers to payment for the contract works. Alterations and additions shall be settled by balancing the work added and the work omitted. The contract price shall be paid in accordance with a plan for payment and against an invoice. If there is no plan for payment, the duty of the employer is to make a partial payment of the contract price against an invoice for completed contract works. The value of alterations and additions shall be calculated primarily in accordance with the agreed schedule of unit prices, the priced schedule of quantities or other agreed rules of charging.

Any advance payment received on the contract price will be successively balanced by making a special percentage deduction from each partial payment.

After approval of the works, the employer may retain 5 per cent of the price of the total works for rectification of defects that have been confirmed in a report on the final inspection. The retainer may last until the defects have been rectified, although not for longer than four months. Thereafter, the employer may retain an adequate amount for rectification of defects that have been confirmed at final inspection until the defects have been rectified or settlement has been carried out.

Works specified in invoices must have been completed when invoicing takes place. Unless otherwise prescribed in the contract, invoices shall be paid within 30 days of receipt.

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?

The most commonly used contractual matrix is a contract between an employer and a general contractor. Swedish employers often prefer to retain the contractor to carry out the design work as well, rather than having to contract with consultant engineers themselves. The general contractor almost always uses various subcontractors to perform parts of the work. The scope of the work carried out by subcontractors is sometimes so large that the general contractor is more a coordinator than an actual contractor.

There is also widespread use of divided contracts, where an employer engages a number of individual contractors, each having a direct contractual relationship with the employer. If the contract work is divided among several contractors, the coordination between the individual contractors will normally encumber the employer.

Construction management is a contract matrix still more spoken of than actually used at present, though it has been used in some larger projects.

PPP and PFI

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

No. However, municipalities can be engaged in PPP projects only if the project is to the benefit of its own inhabitants; for instance, one municipality might be entitled to be engaged in an airport project in a nearby municipality.

Joint ventures

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

According to the main rule in the commonly used standard form AB 04, all members of consortia are jointly liable for the entire project. They may allocate responsibility and liability among themselves only with the express consent of the employer.

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 no specific statutory law related to construction. Pursuant to general principles, a subcontractor's liability can be adjusted, even down to zero, if the general contractor has contributed to damage or loss as a result of its own negligence. Under Swedish law, an action in tort cannot be pursued against a party as an alternative to a claim under the contract. Neither can an employer claim compensation directly from a subcontractor. The employer must claim compensation from the general contractor, who must then try to recover compensation from its subcontractor.

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?

The main rule, which applies to the majority of cases, is that a claim must be founded on a contractual basis, and that no claim can be made in the absence of such a legal relation. Consequently, a buyer or a tenant wishing to raise a claim related to the property constructed by a contractor must rely on the liability of its counterparty, namely, the seller or landlord.

One exception must be made pursuant to the general rule of liability for a person's or entity's own negligence. If, for example, the contractor, while carrying out his or her work, causes damage to a tenant's property through a negligent act or omission, he or she is liable to the tenant, notwithstanding the lack of a contractual relationship. Another situation could be if some kind of relationship similar to a direct legal relationship could be construed between the contractor and the third party.

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?

AB 04 contains a standard description of insurance coverage, according to which the contractor shall have all-risk insurance against damage caused to the total works. Generally, this insurance includes coverage for damage to the property of third parties, injury to workers or third parties and environmental hazards. It does not, however, cover delay damages, which are normally expressly exempt from coverage. Local law does not limit contractors' liability for damages.

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?

There are no laws requiring a minimum amount of local labour to be employed on a particular construction project.

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?

The form of employment is general employment for a specific period of time. The employer must confirm in writing to the employee that the employment is for a fixed period and the period must be specified. A notice of termination in this case is not necessary. It is also possible to agree on employment for a specific project.

The employment is terminated at the end of the agreed period. Although a notice of termination is not necessary (unless earlier agreed), there are mandatory rules that must be followed. If the employer violates the law, he or she is liable to pay damages to the employee and his or her union. If the employment has been general employment for a specific period of time or another employment limited in time for more than 12 months in total during the past three years, the following formal requirements apply.

- The employer must give written notice to the employee one month prior to the expiration of the employment informing him or her that renewed employment cannot be obtained. The notice shall, inter alia, contain information about the steps to be taken if the employee is of the opinion that the employment was not limited in time. A specific form should be used to prevent errors.
- If the employee is a member of a union, the union must be notified at the same time. Therefore, the employee must be asked before the notice is given whether he or she is a member of a union or not.
- The employer must negotiate with the employee or the union if either of them requests negotiations. There is no time limit for this request.

Furthermore, it must be observed that, if the employment is terminated on the ground that there is a lack of work, the employee has a right to renewed employment if he or she has been employed for more than 12 months during the past three years and provided that he or she has the necessary qualifications.

If a collective agreement has been concluded, other rules may apply.

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?

There are very few applicable statutory laws because of the model of collective agreement between the employer's association and trade unions. In general, employers are expected to adhere to working conditions and minimum wages as set out in the current collective agreements. These conditions are applicable regardless of whether the workers are

domestic or foreign. Failure to adhere to the conditions may result in union action.

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?

There are no particular legal obstacles to closing down operations. Depending on the conditions of employment, the contractor might have to pay termination payments to its own employees but not to subcontractors. With regard to construction works, the contractor normally has a warranty period. Pursuant to the frequently used Swedish standard forms, the warranty period is five years for work and two years for material. The contractor will normally be required to provide a bank guarantee covering 5 per cent of the contract price for two years after the completion date.

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?

According to AB 04 and ABT 06, the contractor is entitled to a surety, amounting to 10 per cent of the contract sum, provided that the contract does not contain any specific provisions. The nature of the surety is not specified. Depending on the financial viability of the employer, the contractor can require a parent company guarantee or a bank guarantee. Public bodies do not provide any surety and advanced payments are unusual in Sweden in normal construction projects. A surety in the form of a lien on the property is not often used, and retention of title to material to be permanently installed or built in is not valid.

'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?

There is no specific applicable statutory law prohibiting these terms, but the Swedish Contract Act contains a general mechanism for adjusting unreasonable terms in contracts. This mechanism is, however, rarely applicable for commercial contracts and would, most likely, not be applicable for such subcontractor terms.

The most common standard subcontractor agreements (AB-U 07, ABT-U 07) do not contain these terms and must be amended to shift the risk of the owner's non-payment or late payment to the subcontractor.

Contracting with government entities

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

No. Public bodies must follow the same rules as private bodies.

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?

If a project is cancelled, a contractor that has performed work is entitled to payment, according to both the general conditions (AB 04 and ABT 06) and the statutory provisions. If a contract has been signed, the contractor is, in the case of cancellation of the works, entitled to payment for works already performed and damages covering the calculated profit in the project (unless the cancellation was the fault of the contractor).

There are, however, no specific local laws that provide protection for unpaid contractors if the employer will not, or cannot, provide payment to the contractor according to what the contractor is entitled to.

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?

According to the general conditions of AB 04 and ABT 06, a contractor is entitled to a necessary extension of the contract period if the contractor is prevented from completing the contract works within the contract period by circumstances caused by:

- the employer, or a situation caused by it;
- a decision by the authorities resulting in a general shortage of facilities, materials or goods or in limitation of the supply of labour;
- an epidemic;
- a strike;
- abnormal weather conditions and similar force majeure events; or
- other circumstances that are not the fault of the contractor, that it could not have been expected to anticipate and the detrimental effect of which the contractor could not reasonably have been able to eliminate.

The contract can be terminated owing to a serious force majeure event resulting in either damage to the works occurring before the completion date or that has the effect that the works must be suspended for such a long time that the conditions on which the fulfilment of the contract depends are substantially disrupted.

If the failure to perform is owing to circumstances on the employer's side, the contractor will be entitled to compensation for its costs, or at least half of its costs, should the employer be able to prove that it could not reasonably have avoided the consequences.

DISPUTES

Courts and tribunals

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

Unfortunately, there are no specialised tribunals or courts dealing with construction disputes. Therefore, the outcome of a construction dispute before the public courts is often difficult to predict, especially if the dispute contains complex technical elements.

Dispute review boards

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

DRBs are not commonly used. The contract for the Oresund Bridge provided for a DRB procedure but otherwise there are few, if any, examples of DRBs in larger Swedish construction projects.

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 suggested by the court in many disputes. Pursuant to the Swedish Code of Judicial Procedure, the court, considering the nature of the case, can direct the parties to appear at the mediation session before a mediator appointed by the court. The court has the obligation to favour a friendly settlement of disputes. In arbitration, mediation is less prevalent. Mediators are mostly lawyers experienced in the specific area or senior judges.

Confidentiality in mediation

30 Are statements made in mediation confidential?

Unless the parties agree to the contrary, the mediator shall respect the confidentiality of the mediation. According to the rules of the mediation institute of the Stockholm Chamber of Commerce (SCC), the parties themselves also have an obligation of confidentiality concerning information disclosed during the mediation.

Arbitration of private disputes

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

Arbitration is preferred in Sweden on grounds similar to those in most jurisdictions: arbitration is swifter than a court proceeding, confidentiality may be upheld and the degree of knowledge is higher among specialist arbitrators than within the public courts. Owing to the ever-rising costs of arbitration, the procedure is normally reserved for disputes concerning a considerable economic value. The general conditions stipulate that arbitration shall be used for disputes of 7.25 million Swedish kronor or more.

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?

A Swedish employer (like employers in most countries) is likely to prefer a jurisdiction and an applicable law to which it is accustomed. Therefore, a Swedish employer can be expected to prefer Swedish law and to prefer a dispute resolution procedure in accordance with Swedish law. In the situation of a foreign contractor insisting on an international arbitration institute, a Swedish employer would normally prefer the SCC, as it is slightly less bureaucratic than the International Chamber of Commerce, which, however, would normally be its second choice.

In addition, according to our experience, dispute resolution is seldom an issue in contract negotiations and drafting. If the parties negotiate and draft the contract without legal assistance, the question is not likely to arise at all. Even when the parties consult lawyers, there is a great reluctance to face the eventuality of a future dispute.

Dispute resolution with government entities

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

Government agencies may participate in private arbitration and be bound by the arbitrators' award, including being subject to enforcement.

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?

Sweden has ratified and implemented the New York Convention of 1958. The main rule in the Swedish Arbitration Act is that foreign arbitration awards are enforceable in the same manner as domestic awards. The exceptions provided for in the Swedish Arbitration Act against the principle of recognition and enforcement of foreign arbitration awards are based on the enumeration in article V of the New York Convention. The main obstacles to the execution of a foreign award are that the arbitration clause is invalid, that the arbitrators have acted outside their competence or that the award is contrary to Swedish public policy. Contrary to the New York Convention, the Swedish Arbitration Act does not require an arbitration clause to be written for it to be valid.

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?

Swedish law contains very few statutory limitation periods for commencing lawsuits, and none of them are relevant for construction lawsuits. There are, however, limitation periods, both statutory and those contained in the widely used standard-contract forms AB 04 and ABT 06, prescribing when a claim can, at the latest, be validly made. The basic statutory limitation period states that a claim must be made (ie, put forward to a party's counterpart) within 10 years of the occurrence of the claim. The standard contract forms contain significantly shorter limitation periods – normally six months. As long as a claim has been validly made, there is no specific period within which legal action must be taken.

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?

Sweden is party to the Stockholm Declaration of 1972. The municipalities have a monopoly with regard to planning and zoning. The decision-making process can take time and people affected by the decision (eg, neighbours) often appeal. Projects of some magnitude will be examined pursuant to the Swedish Environmental Act to establish the environmental consequences. A similar analysis will also be pursued according to specific legislation, such as the Road Act, the Railroad Act, the Natural Gas Act and the Nuclear Engineering Act. In addition, certain activities in the exclusive economic zone and on the continental shelf will be analysed pursuant to that specific legislation. For larger projects, such as railways, substantial road projects and plants for the supply of energy, the examination regarding the environmental consequences will take a substantial amount of time – from one year to several years. The activity cannot start before permission has been granted.

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 liability for environmental hazards and violation of environmental laws is direct for any damage caused. Liability can result in claims for damages, as well as a fine from the municipality or other authorities, or a criminal penalty from the state.

The obligation for environmental hazards is to take action so that damage is limited or stopped. This liability is direct for the party causing it but, depending on the hazard, it can also be the landowner's responsibility.

The responsibility to act in the event of an environmental hazard or the risk of an environmental hazard can be taken voluntarily or can be ordered by the municipality, the County Administrative Board or any governmental authority.

Violation of environmental laws or local regulations can, depending on the severity of the violation and which law has been violated, result in injunctions, fines or a criminal penalty.

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'?

Sweden signed, and in 1967 ratified, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Since then, a considerable number of bilateral investment treaties have been signed. At the time of writing, agreements for the promotion and reciprocal protection of investments (or with similar denominations) exist with approximately 60 countries. A complete inventory of the bilateral investment treaties concluded by Sweden is available on www.regeringen.se.

An investment is defined as every kind of asset established or acquired, including changes in the form of the investment, in accordance with the national laws of the contracting party in whose territory the investment is made and, in particular, includes the following:

- movable and immovable property as well as property rights, such as mortgages, liens, leases or pledges;
- shares in and stock and debentures of a company and any other similar forms of participation in a company;
- rights to money or to any performance under contract with a financial value;
- intellectual property rights, goodwill, technical processes and know-how in accordance with the relevant laws of the respective contracting party; and
- business concessions and other rights required to conduct economic activity conferred by law or under contract, including concessions to search for and extract oil and minerals.

Tax treaties

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

Treaties for the avoidance of double taxation have been signed with approximately 40 states, including Sweden's major trade partners in Europe and North America. A complete inventory of Sweden's double taxation treaties is listed on www.government.se.

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Currency controls

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

Sweden has chosen not to adopt the euro, so the Swedish krona is still the national currency. As a member of the European Union, Sweden respects the freedom of movement of capital stipulated in the Treaty of Rome of 1957 and implemented in the Maastricht Treaty of 1992.

Removal of revenues, profits and investment

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

Property bought in Sweden can be subject to customs duties. Dividends can be distributed to parent companies, although sometimes after deduction of a withholding tax. This varies depending on the double tax agreement. Within the European Union, dividends to parent companies are not subject to withholding tax. A foreign company with a permanent establishment in Sweden is subject to Swedish tax.

UPDATE AND TRENDS

Emerging trends

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

The question of a significant rise in prices regarding materials used for construction has arisen in many construction projects, especially if the works are compensated with a fixed contract sum. The standard agreements of AB 04 and ABT 06 have provisions that enable adjustments of agreed pricing, but it is not clear if such provisions are applicable regarding the observed increase in prices for materials. These questions will be under continued debate between employers and contractors during 2022 and it is highly likely that they will also be included in legal disputes and proceedings in the near future.

Switzerland

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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?

To set up Swiss operations, foreign designers and contractors may establish a fully owned Swiss legal entity. This entity will typically be a corporation or a limited liability company (LLC). To set up a corporation, a minimum share capital of 100,000 Swiss francs is required, whereas an LLC can be established with a minimum quota capital of 20,000 francs. All shares or quotas can be held by one single shareholder or by multiple shareholders. If handled properly, both types of legal entities provide for a limitation of liability in a way that their shareholders and owners are not liable personally towards third parties for any debt incurred by the relevant legal entity.

Both the corporation's and the LLC's supreme management body can be composed of foreign nationals. However, at least one person with single signature authority or two persons with signature authority by two must be resident in Switzerland. These individuals do not necessarily need to be members of the supreme management body.

As an alternative to establishing a Swiss legal entity, foreign designers and contractors may tie up with Swiss designers or contractors on a project-by-project basis. This type of cooperation is quite common in the Swiss market. The parties to such a joint venture do not have to form a separate legal entity but may establish a simple partnership that constitutes a mere contractual arrangement. Even though the Swiss Code of Obligations (Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)) (SR 220; CO) contains provisions that govern the rights and obligations of a partner in a simple partnership (see article 530 et seq CO), it is usually recommended that the members of the consortium enter into a partnership agreement that sets out the relationship among them in detail. In this context, the relevant provisions of the CO are mainly of a non-mandatory nature. Thus, the designers and contractors involved have a lot of flexibility when determining the rights and obligations of each consortium member.

Contractors and designers domiciled in a country belonging to the European Union are entitled to provide cross-border services under the bilateral treaty between the European Union and Switzerland on the free movement of persons, provided that the cross-border services do not exceed 90 days of actual work in a calendar year. However, Switzerland has established regulations on dispatching employees that foreign designers and contractors must observe (minimal requirements regarding wages and labour conditions, work permits for long-term projects, etc).

Swiss public procurement law was very fragmented owing to various international, federal and cantonal regulations. With the adjustments owing to the revision of the World Trade Organization Government Procurement, Swiss public procurement of all levels has been harmonised.

On a more general basis, Switzerland has a federal legal system, which means that laws may be introduced at the federal, cantonal and municipal levels. As a consequence, taxes are typically also levied at all three levels (whereas certain types of taxes may not be levied at all levels; eg, VAT is only levied at the federal level). Therefore, legal requirements and taxation may depend on the place in which a foreign contractor or designer establishes its Swiss business or provides work.

Lastly, Switzerland is a multilingual country, with the main languages spoken being German, French and Italian. Thus, official languages may vary across geographical areas.

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?

There is no general licensing requirement for contractors. However, foreign designers and contractors must observe Swiss regulations on dispatching employees (eg, work permits, minimal wages and work safety). Moreover, there are certain licensing requirements for foreign architects. These requirements are set out in cantonal law only (there are no provisions at a federal level). This results in different licensing regimes being applicable. As at May 2022, only the following six of 26 cantons had specific licensing requirements for foreign architects in place: Geneva, Vaud, Neuchâtel, Fribourg, Ticino and Lucerne. In these cantons, certain licensing requirements apply when providing services in the relevant cantonal territory. For architects domiciled in an EU member state, there is a standardised (simplified) registration process, which needs to be undertaken before providing the relevant services in one of the regulated cantons.

Competition

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

No. Particularly with respect to public procurements, the relevant cantonal and federal law, as well as international treaties, establish that all bidders must be treated equally. However, there are certain restrictions for foreign bidders outside the scope of international treaties. In particular, foreign bidders are only permitted to submit a tender if their countries of origin grant reciprocal rights or if the contracting authority agrees (article 6, paragraph 2 of the Federal Act on Public Procurement (PPA) and article 6, paragraph 2 of the revised Intercantonal Convention on Public Procurement (rICCP)). Furthermore, in the case of contracts outside the scope of international treaties, legal protection is limited for non-Swiss bidders (article 52, paragraph 2, PPA and article 52, paragraph 3, rICCP).

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?

Legal protection in relation to public entities' behaviour with regard to fair and open competition is mainly granted by public procurement rules. Essentially, any violation may be subject to an appeal; for example, unfair tender conditions, bid rigging and unequal treatment of competitors. Contractors must be aware that they have to object to some violations immediately (eg, in the case of unfair tender conditions). Under the revised procurement law, procuring entities are now explicitly obliged to take measures against conflicts of interest, unlawful non-competition agreements and corruption (article 11, lit. b, PPA/rICCP). In addition, bidding rounds – meaning pure price negotiations – are henceforth prohibited at the cantonal and federal levels (article 11, lit. d, PPA/rICCP). Finally, the violation of corruption provisions may lead to the exclusion of a supplier from future tenders by procuring entities for a maximum duration of five years and to revocation of an award (article 44, paragraph 1, lit. e in conjunction with article 45, paragraph 1, PPA/rICCP).

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?

Contracts with unlawful or immoral content are null and void under Swiss law. As a consequence, contracts covering the payment of bribes do not have any legal effects at all. Contracts with lawful content obtained through an act of corruption, on the other hand, are not automatically void (Supreme Court Decision 129 III 320). Nevertheless, these contracts may be voided by one of the contracting parties by claiming a fundamental error when entering into the contract or fraudulent behaviour by the other party. Whether a contracting party is in a position to successfully challenge the contract depends on the facts underlying the specific case.

Bribe-givers and bribe-takers are prosecuted and face imprisonment for up to five years or a monetary penalty (article 322 ter ff. of the Swiss Criminal Code (SCC)). Facilitation payments are also criminal offences for which both the public official and the persons acting on behalf of the contractor may be sentenced to a maximum of three years' imprisonment or a monetary penalty (article 322 quinquies and article 322 sexies, SCC). In addition to the individuals giving bribes or making facilitation payments, the company employing or commissioning these individuals may be prosecuted if it has failed to take all reasonable organisational measures that are required to prevent the relevant criminal offences (art. 102, paragraph 2, SCC).

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?

No, there is no such obligation in the private sector. Government employees, on the other hand, are required to report suspicion or knowledge of bribery of public officials.

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?

The making of political contributions is not part of doing business. Even if political contributions are made, there are no laws in Switzerland that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties.

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 rules as government employees?

A construction manager or other construction professional acting as a public entity's representative or agent will usually not be subject to the same anti-corruption and compliance provisions as a public official. Nevertheless, bribery of or by private individuals (ie, individuals not qualifying as public officials) is also a criminal offence, which may be punishable by imprisonment for up to three years or a monetary penalty (article 322 octies and article 322 novies, SCC). However, the legal situation is different when private individuals fulfil official duties (which may be the case, for example, when an external project manager is called in by a public authority for the main preparation of tender documents and the evaluation of the bids in view of a public procurement). In this case, private individuals may be subject to the same provisions as public officials, which is the case, for example, with respect to the rules on bribery (article 322 decies, paragraph 2, SCC).

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?

There are restrictions in Switzerland when it comes to acquiring non-commercial real estate by foreign individuals, foreign legal entities or Swiss legal entities under foreign control (see the Federal Act on the acquisition of real estate by persons abroad ('Lex Koller')). As such, foreign contractors will typically not be able to acquire the properties they are developing unless these properties are used only commercially (eg, manufacturing premises, offices, shopping centres, retail premises and hotels). Of course, this restriction does not prevent a foreign contractor from developing a non-commercial property owned by a Swiss investor.

As Switzerland is a civil law country, contractors from common law countries should be aware that the rules governing contract interpretation may differ from common law. As such, Swiss courts will establish the real and common intention of the contracting parties in the case of a dispute by interpreting not only the wording of the contract but also considering evidence outside the contract.

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?

In Swiss construction and design contracts, the standard terms issued by the Swiss Society of Engineers and Architects (SIA) are widely used. There are different rules for different types of work. For instance, the SIA Standard 118 is relevant for construction contracts. For contracts with architects or construction engineers, on the other hand, SIA regulations 102 and 103 respectively are used.

Public entities typically use the standard forms established by the Coordination Conference of the Construction and Real Estate Agencies of the Public Principals.

Contracts are typically drafted in the local language spoken at the place of performance (ie, German, French or Italian) or in English. However, the contract parties may opt for any other language as there are no relevant restrictions under Swiss law. If a non-local language is used, the parties need to be aware that the contract and its schedules may have to be translated if a dispute is brought before a Swiss state court.

There are no restrictions on the choice of law or the venue for dispute resolution.

Payment methods

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

Contractors, subcontractors, vendors and workers are typically paid electronically. Cheques are rarely used and cash payments would also be rather unusual.

Payments to contractors and subcontractors are either made in accordance with a pre-agreed payment schedule (typically linked to the completion of certain milestones) or – mainly in cases of smaller contract values – upon completion of the works. Vendors are usually paid within 30 days of delivery of the products ordered. Workers (employees) are paid a monthly salary, which usually becomes due around the 25th day of the month.

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 a major project, the owner typically enters into a total contractor agreement or a general contractor agreement. The relevant total contractor or general contractor then retains its subcontractors as it deems necessary. These subcontractors, however, do not have a contractual relationship with the owner.

Moreover, the owner will regularly appoint an independent consultant who represents the owner on the construction site when dealing with the total contractor or general contractor.

PPP and PFI

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

Cooperation between the public and private sectors has a long tradition in Switzerland. However, formalised forms of cooperation have not yet been established. Accordingly, there is no formal statutory and regulatory framework for PPP or PFI.

Joint ventures

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

A consortium under Swiss law usually has the form of a simple partnership (article 530 et seq of the Swiss Code of Obligations (CO)). As such, it constitutes a contractual relationship and is not itself a legal entity. Absent any agreement to the contrary, members of the consortium are jointly and severally liable and responsible for obligations of the consortium in relation to third parties contracted jointly or through representatives (article 544(3) CO). The members of the consortium may allocate liability differently. However, third parties are not bound to this allocation unless agreed otherwise.

If a legal entity (corporation or limited liability company) is set up to form a joint venture, the relevant entity alone will be liable towards third parties.

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?

Generally, a contracting party is liable for any damage caused to the other contracting party owing to its non-performance or improper performance, unless it can demonstrate that it has not acted wilfully or negligently (article 97 CO). If the injured party has acted with negligence, the damaging party's liability will not be forfeit but the competent court has the right to reduce the compensation owed to the injured party as it deems appropriate.

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?

If a building is sold after its construction, the purchaser will typically ask for the seller's warranty claims against the contractor to be assigned. Consequently, the contractor may become directly responsible towards the purchaser of the building. In addition, if construction defects cause injuries, the contractor may be held liable under criminal law or tort law. Under certain conditions, these claims may be made even if the injured person has no contractual relationship with the contractor.

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?

All of these insurance products are available. Swiss law does not provide for a statutory limit of the contractor's liability for damages. However, contractually, such limitations may be agreed, although they do not apply to third parties or in cases of wilful misconduct or gross negligence.

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. However, foreign companies must observe the requirements on dispatching employees. These requirements are set out in cantonal law only (there are no provisions at the federal level). This results in different licensing regimes being applicable. As at April 2022, only the following six of 26 cantons had specific licensing requirements for architects in place: Geneva, Vaud, Neuchâtel, Fribourg, Ticino and Lucerne. In these cantons, certain licensing requirements apply when providing services in the relevant cantonal territory. For architects domiciled in an EU member country, there is a standardised (simplified) registration process in place, which needs to be undertaken before providing the relevant services in one of the regulated cantons.

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?

The hiring of local labour is governed by Swiss employment law (article 319 et seq of the Swiss Code of Obligations). If the employment is not limited in time, contractors must observe the mandatory requirements in relation to notice periods. Specific provisions apply for temporary work and for freelancers.

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?

Swiss public law provides the general rights and duties of construction workers, including maximum working times and the remuneration of night work. These provisions also apply for foreign workers irrespective of which law governs their employment contracts.

Swiss public employment law (eg, the Federal Act on Labour Law, SR 821.11) primarily aims to protect the health and safety of employees and to ensure decent working conditions.

Construction sites are regularly inspected by the authorities, in particular to prevent undeclared work. In the event of breaches of the regulations, the authority can stop construction and impose administrative fines. Constructors must be aware that they may also be liable for violations by their subcontractors.

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?

If a foreign contractor decides to dissolve its Swiss legal entity by means of voluntary liquidation, statutory rules must be observed. In addition, notice periods must be respected if employment agreements are terminated (typically, three months). If the Swiss entity has more than 20 employees, special provisions governing mass redundancies must be complied with. Further, pension funds legislation may be of relevance.

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?

According to article 839 et seq of the Swiss Civil Code (SR 210), building contractors that have supplied labour and materials, or labour alone, for construction or other works may register legal liens on the property. This right is granted to all contractors, even if they are not in a direct contractual relationship with the principal or property owner (eg, subcontractors of a general contractor).

Furthermore, if the owner does not comply with its payment obligations, the contractor could claim default interest of 5 per cent per annum in addition to damages for non-performance (article 102 et seq of the Swiss Code of Obligations (CO)). Other options would be to simply stop the works and insist on payment before continuing in accordance with article 82 of the CO or withdraw from the contract altogether (article 107 CO).

'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?

Parties are free to agree on 'pay if paid' or 'pay when paid' provisions. However, the right of subcontractors to register a contractor's lien is mandatory and may not be validly waived under subcontractor agreements.

Contracting with government entities

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

No, government agencies may not assert sovereign immunity in court proceedings or, as the case may be, in an arbitration. However, as regards enforcement of a court judgment or an arbitral award, specific rules may apply if the assets against which enforcement is made serve public interests.

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?

If contractors and subcontractors are not paid, they are protected by their right to register contractor's liens on the property on which they have performed work.

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?

Article 376 of the Swiss Code of Obligations provides that if the work is destroyed prior to delivery by a force majeure event the contractor cannot, in principle, demand compensation for its labour nor restitution of its expenditures. In practice, however, this non-mandatory rule is often contracted away.

DISPUTES

Courts and tribunals

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

On the private side, the Swiss Society of Engineers and Architects (SIA) has published rules of arbitration that are dedicated to resolving construction disputes (see www.sia.ch). On the official side, some cantons have established specialised commercial courts and construction courts in which not only lawyers, but also experienced business people from the construction industry, sit as judges (eg, the Construction Appeals Court of the Canton of Zurich). Therefore, these specialised courts are noted for their professional expertise, as well as for the commercial common sense they apply when they strive for – and often find by way of settlement – quick and efficient solutions to construction disputes.

Dispute review boards

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

Dispute review boards have been used in only a few domestic infrastructure projects over the past few years. However, Swiss engineers engaged in international projects face them more often. In Switzerland, only state courts and arbitration tribunals can issue final and binding decisions. The decisions of the dispute boards only have (under certain conditions) a contractual binding effect on the parties. Although the courts are, in principle, bound by binding decisions of the dispute boards, they can carry out a review of the content as well as a procedural review and, in the event of violations, determine that the decision of the dispute boards is not binding. Since the decisions of dispute boards have a purely contractual binding effect, they are not directly enforceable in Switzerland (instead, a corresponding court decision must be obtained).

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?

Switzerland is a country with a rich tradition of mediation and neutrality. Since 2011, the Swiss Civil Procedure Code (SR 272; CPC) has recognised mediation as a form of judicial proceedings at a national level in most civil and commercial cases. There are several leading associations that provide mediation services at a domestic level. These associations also provide lists of certified mediators for civil and commercial mediations. In the field of construction disputes, it is again the SIA that plays a key role; it promotes mediation in its contract templates (see www.sia.ch). Notwithstanding the foregoing, professionally organised mediation has not yet gained a lot of acceptance, possibly because of the good reputation of state courts and arbitration tribunals when it comes to resolving construction disputes by way of settlement.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

If all the parties request it, the conciliation proceedings provided for in the CPC shall be replaced by mediation (article 213 of the CPC). In this scenario, mediation is confidential according to article 205 of the CPC. Other than that, there is no statutory federal law on confidentiality in mediation.

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 many cases, arbitration of construction disputes is considered to be more expensive than litigation in the local courts. Therefore, parties to a domestic dispute tend to prefer litigation over arbitration. However, quite often, parties agree to obtain an expert's opinion on a specific question of a construction dispute. Furthermore, arbitration is popular and widely used in international construction disputes.

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?

The rules of arbitration of the International Chamber of Commerce are well known in Switzerland and widely used in connection with Swiss substantive law in international disputes.

Dispute resolution with government entities

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

Yes, in principle, government agencies may also participate in private arbitration. In this constellation, too, the arbitrators' award has the effect of a legally binding and enforceable judicial decision (article 387, CPC). The tendency, however, is that government agencies tend to prefer state courts for dispute resolution.

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?

The Swiss Federal Act on International Private Law and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Switzerland is a member state, considerably limit the grounds on which enforcement can be refused. These grounds could, for example, be non-compliance with the principle of equal treatment of the parties or non-observance of their right to be heard in an adversary procedure. An arbitral award can also be set aside if it is considered to be incompatible with Swiss public policy.

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?

Yes. On the one hand, the Swiss Code of Obligations (CO) provides limitation periods (of five and 10 years, respectively; see article 127 et seq and article 371 CO). On the other hand, contractual or statutory notice requirements that may impose a much shorter time limit on a party that wishes to assert a claim has to be observed. According to the CO, the client is generally obliged to inspect the quality of the work and to report any defects immediately (ie, within a few days) upon their discovery. A planned revision of the CO provides that a new deadline of 60 days shall apply to the notification of defects in immovable works. The parties may, however, provide for other notice requirements in their contracts.

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?

Yes, Switzerland is party to the Stockholm Declaration of 1972. Moreover, it has enacted a multitude of laws and regulations in relation to the protection of the environment. The basic provisions are set forth in the Federal Act on Environmental Protection (SR 814.01; EPA), which is followed by various detailed regulations, for example, on air pollution, noise protection and hazardous waste.

All infrastructure and building projects must comply with the relevant environmental regulations. The EPA provides for mandatory studies to be prepared to assess the impact of major construction projects on the environment (environmental impact assessment).

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?

Swiss federal environmental law is very detailed and aims to protect human beings, animals and the environment against all types of pollution. Contractors are responsible for compliance with all these regulations. In the event of non-compliance, the contractor must not only bear all costs for the restoration of the legal status but may also be subject to administrative fines and criminal prosecution.

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'?

Switzerland is a signatory to the International Centre for Settlement of Investment Disputes (ICSID) Convention and has one of the largest bilateral investment protection treaty (BIT) networks, with over 100 BITs worldwide.

There is no publicly available BIT model. Arbitration (typically under UNCITRAL or ICSID rules) will be available to the investor in most instances. ICSID arbitration is available in the event of a breach of protection granted in a BIT (eg, discrimination against or expropriation of a foreign contractor). A mere contract violation will only exceptionally qualify as a treaty breach sufficient to establish jurisdiction of the ICSID arbitral tribunal.

Tax treaties

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

Switzerland has entered into various tax treaties to prevent double taxation. These tax treaties usually also provide for a mechanism to claim back all or part of the withholding tax levied on dividends, interests and royalties. A list of Switzerland's double taxation treaties can be downloaded from the website of the Federal State Secretariat for International Finance SIF (www.sif.admin.ch).

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Currency controls

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

In general there are no currency controls in Switzerland. However, specific rules apply under the Russia-Ukraine measures that have been implemented recently (see https://www.sif.admin.ch/sif/en/home/documentation/focus/russland_sanktionen.html).

Removal of revenues, profits and investment

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

Any dividends distributed by a Swiss legal entity are subject to 35 per cent withholding tax. This tax may be refunded in full or in part under the protection of a double taxation treaty. However, the application of a double taxation treaty requires that the foreign shareholder of the Swiss entity qualifies as the beneficial owner of the dividend received and has not only artificially been interposed to benefit from a favourable tax treaty.

Furthermore, specific rules may apply under the Russia-Ukraine measures that have been implemented recently (see https://www.sif.admin.ch/sif/en/home/documentation/focus/russland_sanktionen.html).

UPDATE AND TRENDS

Emerging trends

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

On 1 January 2021, the revised Federal Act on Public Procurement entered into force, regulating government contracts at the federal level. In parallel, all Swiss cantons are expected to join the revised Intercantonal Convention on Public Procurement (rICPP), which applies to procurements at the sub-federal level. The corresponding accession procedures in the cantons have been initiated and in three cantons (Aargau, Thurgau and Appenzell Innerrhoden) the rICPP has already entered into force, while the canton of Bern applies this agreement as cantonal law with its own legal process. These adjustments paved the way for the ratification and implementation of the revised WTO Agreement on Government Procurement (GPA 2012) and for the harmonisation of the Swiss public procurement landscape. The new laws also strengthen competition among suppliers, reduce the complexity of the Swiss procurement regime and allow for new procedural instruments, including electronic auctions and competitive dialogue.

United Arab Emirates

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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?

Engineering consultancy (which, in the UAE, includes architectural design) and contracting are highly regulated activities, and each emirate has its own regulatory regime. A designer or contractor wishing to work in an emirate must be licensed in that emirate. Possession of a design or contracting licence from one emirate does not entitle the licensee to undertake projects in other emirates.

In Dubai, design businesses can generally only operate through a civil company (akin to a partnership) or branches of foreign companies, while in Abu Dhabi they can be undertaken by limited liability companies (LLCs) (see below in respect of the current position relating to UAE ownership requirements), or a branch of a foreign company. Contractors, on the other hand, can be established as LLCs or branches of a foreign company in both Dubai and Abu Dhabi. Further, consultancy (including design) and contracting activities cannot be conducted through the same entity.

Until recently, all LLCs were required to have at least 51 per cent UAE ownership. In September 2020, an amendment to the Commercial Companies Law (CCL) was passed. Among the amendments, article 10 of the CCL, which set this requirement, was cancelled with effect from the end of March 2021 (except in respect of certain strategic sectors). In May 2021, it was announced that the amendments to foreign ownership restrictions would take effect from 1 June 2021. As at 3 June 2021, the Abu Dhabi, Dubai and Sharjah authorities have published guidance in respect of foreign ownership rules. The Abu Dhabi authorities have announced that 100 per cent foreign ownership will be permitted across 1,105 commercial and industrial activities (including some construction activities). The Dubai authorities have announced that there will be more than 1,000 commercial and industrial licence activities that can be conducted by companies that are 100 per cent foreign-owned. In both emirates, professional activities (which include engineering consultancy activities) are excluded from the recent easing of foreign ownership restrictions. The Sharjah authorities have also published that 100 per cent foreign ownership will be permitted for a number of commercial and industrial activities. Accordingly, foreign investors should first establish what activities they are looking to undertake in the UAE and whether they can be conducted through a wholly foreign-owned entity. In the event that foreign ownership restrictions still apply, certain arrangements can be put in place to protect a foreign shareholder's interests, notwithstanding the majority UAE ownership.

In addition, both engineering and contracting companies must go through separate approval processes by the relevant authority in the relevant emirate to tender for both public and private sector contracts – in Abu Dhabi this is known as 'classification' and in Dubai as 'Dubai Municipality approval'.

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?

Any company operating in the UAE must be licensed to undertake business in the relevant emirate. Where businesses operate without an adequate licence, they could be subject to sanctions, including suspension of licences, fines and, in the most serious cases, imprisonment or deportation of the managers.

Competition

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

Domestic contractors (ie, both wholly and majority UAE-owned businesses) could be considered to have an indirect advantage over foreign contractors as they may apply for lower grades of approval and are subject to less stringent criteria for higher grades of approval. This, arguably, enables domestic contractors to enter the market more easily than foreign contractors.

Further, in the case of procurement contracts with the federal government, Ministerial Resolution No. 51 of 1986 and Ministerial Resolution No. 13 of 1986 set out the procedures by which a price preference shall be given to national industrial products (essentially, providing for a price preference of up to 10 per cent for local products if they are of equal quality to foreign products). Each emirate has its own separate procurement laws and is not bound by federal procurement law, and there are also certain sector-specific procurement and tendering laws (such as laws in respect of the power and water sectors). A common feature of these laws is that contracts over a certain value are to be awarded using a competitive tender process, and that when assessing tenders, preference shall be given to the proposed use of construction equipment and other equipment, materials and products produced and manufactured in the UAE and the proposed use of local UAE labour, although no minimum local content requirement is stipulated.

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?

The public procurement and tendering process in the UAE is highly regulated at a federal level and in each emirate. The regulatory regime

will depend on whether the public entity in question is a federal authority or an emirate-specific one and whether certain sector-specific procurement laws apply. For example, each emirate has a dedicated authority responsible for the secure supply of water and electricity to that emirate, and this authority has its own established tendering and procurement laws.

A common theme of both federal and local procurement is that the purchase of all materials and categories, the performance of works contracts or the provision of service should be made through public tenders. Only in certain limited cases, and provided that certain financial thresholds are met, can procurement alternatively be made through selective tenders, bidding, direct orders or external purchases manually or electronically. The tendering process itself is highly regulated and prescriptive, with steps set out in law designed to ensure that a transparent and fair approach is applied. This is supplemented by the UAE's strict laws on anti-bribery and corruption, which are set out in Federal Law No. 3 of 1987 (the Penal Code) (and corresponding local laws), which are coupled with onerous penalties for non-compliance.

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?

Articles 275–287 of the Penal Code set out the bribery and corruption offences applicable to the UAE. The Penal Code prohibits bribery in the public and private sectors and prescribes penalties for those who offer, accept and facilitate bribes.

Additionally, article 66 of the Penal Code provides that legal persons shall be criminally liable for any criminal act committed by their agents or representatives acting in their name or on their behalf. This could be interpreted to mean that the inaction of some figures within organisations could render them criminally liable if such inaction facilitated a crime (in this case, the bribe).

The penalties prescribed by the Penal Code include significant fines and imprisonment terms of up to five years (articles 278–283). The bribe will also be confiscated, and the bribe-giver and bribe-taker will be fined an amount equivalent to or potentially larger than the bribe, in accordance with article 283. In addition, administrative sanctions apply to organisations that commit any bribery and corruption offences, including large fines. Free zones in the UAE may further anti-bribery and corruption policies and may apply sanctions as appropriate.

As regards facilitation payments, in accordance with article 282 of the Penal Code, any person who intercedes to influence the bribe-giver or the bribe-taker to offer, demand, accept, receive or promise a bribe, shall be liable for imprisonment for a period of up to five years.

In addition, article 70 of UAE Law No. 11/2008 regarding human resources in the federal government provides certain provisions on 'gifts and bribes', and article 70(4) provides a list of what would fall under 'facilitating', including accelerating any work that an employee is required – by his or her employer – to do.

Further, the Dubai Economic Security Centre (DESC) is a relatively new government agency with jurisdiction in Dubai and its free zones. The DESC has wide powers, which include requesting the public prosecutor to seize funds, documents or any other things related to the DESC's investigations (although it remains unclear how the DESC will fulfil its role in practice).

As regards the effect on the contract in question, there are no provisions that would render a contract automatically void and null if that contract was procured via bribery, corrupt practices or both, in the UAE. However, the UAE Civil Code allows a party to cancel a contract that was obtained unlawfully. Furthermore, the UAE courts may exercise discretion to nullify a contract on bribery and corruption grounds if the elements of bribery prescribed in the Penal Code are satisfied.

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 UAE Penal Code does not expressly require employees of project teams to report suspicion or knowledge of bribery of government employees. However, article 284 states that 'a briber or bribe-taker who reports the crime to judicial or administrative authorities prior to the discovery of the same shall be exempt from punishment'. As such, there is a good incentive for employees to report their suspicions to avoid any potential personal liability.

As a matter of good practice, companies should have appropriate systems in place that allow team members to report suspicion or knowledge of bribery of both government and non-government employees.

At the Federal level, there is limited whistle-blower protection found under UAE employment law.

Article 47(1) of Federal Law No. 33/2021 on Regulation of Labour Relations states:

> *[an] Employee's service shall be deemed to have been arbitrarily terminated by his Employer if the reason for the termination is irrelevant to the work and, more particularly, if the reason is that the Employee has submitted a serious complaint to the competent authorities or has instituted legal proceedings against the Employer that has provided to be valid.*

Employees in this instance are only protected if they address their concerns to 'competent authorities' and not the media or the general public. The UAE has strict laws on defamation, libel and slander, so whistle-blowers need to exercise caution when discussing matters with anyone other than the 'competent authority'.

In the Emirate of Dubai, the DESC provides for comprehensive whistle-blower protections in the public and private sectors. The DESC is authorised to afford any whistle-blower (defined as a person who collaborates with the DESC or reports to them any matter that prejudices the UAE's national security), the 'necessary protection' which may include protection at the reporter's home address, keeping information about their identity or location confidential, protection at the reporter's workplace and making sure they face no discrimination or mistreatment as a result.

In any case, as self-reporting bribery essentially constitutes a defence under the Federal Penal Code, a person should ensure that the specific elements of what constitutes a bribe under the law have been satisfied before reporting it to the authorities. This could be successfully managed if organisations have adequate reporting systems in place to internally report and investigate suspicious bribery or corrupt offence or activities prior to potentially reporting this to the relevant authorities.

Very recently, however, the DIFC's financial regulator, the Dubai Financial Services Authority (DFSA) launched new whistle-blower regulations to protect employees operating within the DIFC. This is only applicable to those entities regulated by the DFSA and operating within the DIFC. While entities operating outside the remits of the DIFC will not be subject to this regulation, it nevertheless evidences a step forward into creating an environment of transparency and accountability in the DIFC specifically and the UAE generally.

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 political parties in the UAE and political contributions are not generally part of the operating environment.

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 rules as government employees?

A 'Public Official' is defined in the Federal Penal Code and includes Government officials, cabinet members, members of the Federal National Council, members of the armed forces, directors of public authorities and corporations. The term also includes employees of businesses which are partly or wholly owned by the government at both federal and emirate level or someone assigned with a public service.

Furthermore, in a decision by the Dubai Court of Appeal, the meaning of the term 'public officer' was interpreted as sufficiently wide to include employees of state-owned or semi-state-owned private sector entities who receive bribes.

Given the above, a person acting in his or her capacity as a public entity's representative is subject to the same anti-bribery and corruption rules applicable to government employees at a federal level. Those persons could also be subject to other regulations relevant to their specific industry and internal rules relevant to their specific organisation.

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?

It is crucial that correct structuring advice is obtained at the outset to ensure that the right type of entity with the appropriate activities is set up. Additionally, foreign contractors should be mindful of the extraterritorial application of certain foreign anti-bribery legislation, including the UK Bribery Act 2010, the US Foreign Corrupt Practices Act 1977, and bilateral and international sanctions. Where a contractor pays bribes to win contracts in the UAE or undertakes transactions with countries that are subject to sanctions, its actions could be deemed to be offences, not only under UAE legislation, but also under applicable foreign legislation.

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 predominant standard form suite of contracts used in the UAE is the International Federation of Consulting Engineers (FIDIC) suite. For traditionally procured projects (design–bid–build), the FIDIC 1999 Red Book is the most common form, whereas for design-and-build projects, the FIDIC 1999 Yellow Book is employed. Infrastructure and engineering procurement construction (EPC) projects do, in some cases, utilise the FIDIC 1999 Silver Book form; however, bespoke contracts are more common for infrastructure and EPC projects.

While the FIDIC suite is dominant, the standard FIDIC risk allocation is almost always adjusted through particular conditions that allocate more risk to the contractor and remove obligations usually imposed on the engineer or employer. The risk adjustment is often so significant that it creates what is effectively a 'bespoke' contract with a FIDIC badge.

In addition, the Emirate of Abu Dhabi has its own construction contract templates for use on Abu Dhabi projects. Abu Dhabi Executive Decision 1 of 2007 introduced two forms of construction contracts for public construction: a construction works contract based on the FIDIC 1999 Red Book, favourable to the employer, and a design-and-build contract based on the FIDIC Yellow Book. These forms are mandatory when the private sector is contracting with the government of Abu Dhabi.

There is no overarching legal requirement in the UAE for contracts to be drafted in Arabic, and English is the more common contractual and business language. However, in some sectors, federal and local government tenders may stipulate that certain contractual documents must be produced in both Arabic and English and, in such instances, the Arabic version will prevail.

When contracting with certain government entities, there are also laws that prevent or limit parties from referring contractual disputes to arbitration outside the UAE, or a specific emirate, or to submit to laws other than the laws prevailing in the UAE.

While article 19 of the UAE Civil Code recognises the right of parties to agree that foreign law will govern a contract, should parties elect to submit their disputes to the UAE courts, it is most likely that UAE law will be applied in lieu of any chosen foreign law in practice. Conversely, if arbitration is selected, the governing law chosen by the parties will be applied.

Within the UAE there are also a number of free zones that have their own laws and regulations, including the Dubai International Financial Centre and the Abu Dhabi Global Market, which are both common law systems and allow parties to refer matters to them for resolution even where there is no specific connection with these jurisdictions.

Payment methods

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

Payments on construction projects are most frequently made by electronic funds transfer. Payments by cheque remain more commonplace in the UAE than in other international markets, and cash transactions are reasonably rare on major projects.

While payment frequencies vary, payments to main contractors typically follow a process of monthly claim submission, followed by a third-party certification and valuation process with the obligation for payment accruing thereafter. Usually, 14 to 40 days are provided for the certification process, and a further 30 to 45 days for payment following certification of the contractor's claim. Accordingly, the time frame, from the submission of a monthly claim to the receipt of funds, can be between 45 and 90 days.

'Pay when paid' clauses are enforceable and are often incorporated into subcontracts in the UAE. However, the principle of good faith enshrined in article 246 of the UAE Civil Code may limit the enforceability of these clauses.

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?

Owners typically award projects by competitive tender and enter into a main contract with one works contractor or design and construction contractor. The contractor will then be responsible to the owner for the

overall delivery of the project and will enter into separate subcontracts for the provision of specialist works and the supply of materials.

Owners will also typically enter into a consultancy agreement with an engineer or project delivery firm to provide the services of engineers or contract administrators and to manage the main contract effectively on their behalf.

In design–bid–build projects, the owner will also have a direct consultancy agreement with the designer for the completion of design works. It is not uncommon for this consultancy agreement to be novated to the design and construction contractor once appointed.

PPP and PFI

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

There is currently no federal PPP law in the UAE. At a local level, Dubai has the PPP Law (Law No. 22 of 2015 Concerning Regulating Partnership Between the Public and the Private Sector in the Emirate of Dubai); however, this law does not apply to electricity and water projects (which remain governed by Dubai Law No. 6 of 2011). Further, its enabling regulations have not yet been issued. Abu Dhabi has a similar law (Law No. 2 of 2019) that is stated as being applicable to all government entities in the emirate, and, as such, would be expected to apply also to the power and water sector under the Emirates Water and Electricity Company; however, again, as the enabling regulations for this law have not yet been issued, this remains to be seen.

To provide guidance to companies in the private sector wishing to enter PPP projects with the federal government, the Ministry of Finance has issued the Federal Government Public-Private Partnership Provisions and Procedure (the Manual). Implementation of the provisions of the Manual is now mandatory for PPP projects between federal and local governmental bodies, or between the private sector and the federal government (including where the federal government acts jointly with a local government entity). In the case of a local government entity-procured PPP project, the application of the Manual is optional.

Joint ventures

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

In circumstances where an unincorporated joint venture (JV) or consortium signs a contract through each of its individual constituent companies (ie, in circumstances where the JV or consortium is not a separate legal entity), each of the signing parties will be liable to the employer under the contract and required to comply with the contractual obligations of the contractor. In these circumstances, it is common for the contract to contain an express 'joint and several' clause to this effect.

Members of the JV or consortium will commonly enter into a JV or consortium agreement governing their relationship. These agreements will usually contain indemnities between the parties regarding losses suffered by one or more parties on account of the negligence or failure of another. Accordingly, while the members will typically be jointly and severally liable to the employer, this risk can be effectively addressed through the JV or consortium agreement.

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?

Generally, UAE law upholds a party's freedom to contract, so parties are free to agree the limitations of liability providing that they do not conflict with any mandatory provisions of law. However, the UAE courts retain discretion to intervene in the interests of justice, and exclusion of liability for gross negligence or fraud is prohibited pursuant to article 383 of the UAE Civil Code. Further, article 390(2) of the UAE Civil Code allows a court or arbitral tribunal – upon application by one of the parties – to override a contractually agreed compensation arrangement and adjust the agreed compensation to make it equal to the actual loss that has been suffered.

More specifically, in the sphere of construction contracts, article 880 of the UAE Civil Code is a mandatory provision that overrides any provisions in a building contract or the professional appointment. Article 880(2) requires the employer to be compensated for any defect in the land that results in the total or partial collapse of a building, or even any defect threatening the stability or safety of the structure. Liability exists for a period of 10 years from the date on which the works were handed over (although the employer must commence proceedings within three years from the collapse or discovery of the defect).

Article 878 of the UAE Civil Code, also in relation to construction contracts, provides that contractors shall be liable for any loss or damage resulting from their act or work, 'whether arising from their wrongful act or default or not', but liability will not extend to an unavoidable incident (eg, force majeure).

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?

In the absence of an express contractual right, there is very limited scope for a lessee or homeowner to pursue a claim directly against a third-party contractor, who will need to look primarily to its contractual counterparty under the lease or contract of sale, usually the developer.

Where a contractor has caused harm to the third party that results in loss or damage, it may be liable in tort under article 282 of the UAE Civil Code. If there is more than one tortfeasor, the court will look to apportion damages on a joint and several basis, with each party being held responsible 'in proportion to his share' of the tort, pursuant to article 291.

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?

The most common form of insurance in construction contracts cover damage to third parties, injury to workers and third parties, delay damages and negligently performed works, design errors (professional indemnity), and decennial liability. Third-party liability insurance and workers' compensation insurance are very common on construction projects, as is the standard contractors' all risks policy.

Insurance regarding delay damages, decennial liability and contractor negligence in the performance of the works is very rare.

Local law does not limit contractors' liability for damages; however, it is very common for contracting parties to fix the amount of compensation in the contract or a subsequent agreement. Pursuant to article 390(2) of the UAE Civil Code, the court has discretion to adjust the amount payable to reflect the actual loss suffered.

In cases of structural defects, pursuant to article 882 of the UAE Civil Code, it is not possible to limit or exclude the mandatory decennial

liability imposed by article 880 of the UAE Civil Code. Further, tortious acts or losses cannot be excluded within the parameters of article 296 of the UAE Civil Code.

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?

The UAE's Federal Decree Law No. 33 of 2021, as amended (the UAE Labour Law), states that employment in the UAE is primarily the right of UAE nationals and that this shall not be considered as discriminatory. This applies to all industries, including construction.

There are also minimum percentages of Emirati staff required within specific sectors and generally across the private sector. The construction sector is subject to Ministerial Decision No. 41/2005 in accordance with Cabinet of Ministers' Resolution No. 259/2005. Article 1 of the Ministerial Decision stipulates that for companies with more than 50 employees, 2 per cent of the workforce must be Emirati. The rate is cumulative, so the number of UAE nationals employed should increase as follows: 2 per cent in year one, 4 per cent in year two, 6 per cent in year three, and so on. However, in practice, this is not commonly observed.

In the construction and industrial sector specifically, Ministerial Resolution No. 711/2016 requires organisations with 500 or more employees to employ at least one Emirati health and safety officer with effect from 2017.

In practice, these provisions are not always strictly observed.

In addition, specific laws require that Emiratis fulfil particular roles in certain companies (often contingent on the number of staff employed). For example, if an employer employs more than 100 staff, an Emirati or Gulf Cooperation Council (GCC) national public relations officer must be appointed.

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?

In accordance with Ministerial Decree No. 212/2018 on Regulation of Employing Nationals in the Private Sector, UAE nationals working in the private sector have additional protections against employment dismissal.

It is not possible for employees to contract out of their minimum UAE Labour Law entitlements. Accordingly, employees qualifying for end-of-service gratuity must be paid their accrued gratuity in accordance with the statutory formula (based on the period of service and final rate of basic pay). Alternatively, qualifying GCC nationals must be registered for a pension with the relevant pension authority – the General Pension and Social Security Authority in Dubai or the Abu Dhabi Retirement and Pensions Fund in Abu Dhabi.

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?

The UAE Labour Law is applicable to all employees working in the private sector in the UAE, whether they are UAE nationals or foreign workers. Similarly, the particular labour laws in free zones are applicable to both UAE nationals and foreign workers employed in those free zones. Foreign workers are, therefore, entitled to the same minimum protections and rights as UAE nationals, including relating to working hours, health and safety, and overtime.

All foreign construction workers will have the same access to the labour courts as UAE nationals. Any breach of the minimum entitlements under the applicable labour law may result in a claim being brought by the employee.

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?

Employers must provide an employee with a notice of dismissal either 30 days or a number of days stated in the employment contract prior to the date he or she is dismissed.

Any employee that has over one year's continuous service is entitled to an end-of-service gratuity payment upon termination of their employment (irrespective of whether their termination is for gross misconduct). This end-of-service payment calculation varies depending on the duration of service and is prorated up to the final date of employment.

The employee must be paid their full salary and contractual benefits up to the termination date and any accrued but untaken holidays.

If the employee is an expatriate, the employer will be obliged to repatriate the employee to their country of origin unless the employee secures alternate employment sponsorship in the UAE.

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?

At the outset of a project, a contractor may seek to secure any combination of payment guarantees, performance bonds or security cheques from the employer to ensure that payment issues do not arise. It may also look to include a retention of title provision in the contract or ensure greater frequency of interim payments to avoid cash-flow problems or both.

In the absence of an effective express contractual remedy, many options are available to the contractor for securing payment under statutory law, for example, payment of interest, suspension of the works or termination of the contract. By way of example, in the absence of express contractual rights of suspension, article 247 of the UAE Civil Code may allow a party to a contract to suspend performance of its obligations if the other party has failed to perform its own obligations. A statutory lien procedure exists under article 879(1) of the UAE Civil Code, permitting a contractor to withhold handover of property on completion of its works until payment is made.

There are also a number of court orders available to a contractor to secure payment or attempt to prevent a bond call against it, such as payment order applications and attachment orders.

'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?

'Pay if paid' and 'pay when paid' clauses are not prohibited in the UAE. It is common market practice that a subcontractor's right to payment will be conditional upon a payment being made by the employer to the

contractor. Contractors will often pass the risk of non-payment from the employer to the subcontractor by incorporating pay-if-paid and pay-when-paid clauses in the subcontract. Therefore, subcontractors can also be subjected to delays in payment. However, the operation and enforceability of such provisions also need to be considered in the context of the parties' mandatory obligations of good faith, and there may also be limitations on the applicability of pay-when-paid clauses where a subcontractor has completed its works.

Article 891 of the UAE Civil Code also prevents a subcontractor from bringing a claim against the employer for anything due to it from the contractor unless the contractor has made an assignment to the subcontractor against the employer. Assuming the contractor cooperates in assigning its rights, a subcontractor can use this as a safety net by seeking to incorporate a direct payment obligation from the employer into the subcontract to avoid the risk of non-payment inherent in these pay-when-paid clauses.

Contracting with government entities

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

Government entities in the UAE do not have the right to rely on the defence of sovereign immunity to avoid a contractor's claims for payment. However, article 247 of the UAE Civil Procedure Law prohibits the seizure of public property owned by the state or any of the emirates for the purpose of enforcement.

In Dubai, if a party wishes to commence proceedings against the Dubai government or any Dubai government department, in addition to the agreed dispute resolution process, pursuant to the Government Lawsuit Law No. 3 of 1996 (as amended) and the law establishing the Department of Legal Affairs for the government of Dubai (Law No. 32 of 2008), any claims must first be submitted to the government of Dubai Legal Affairs Department for a period of amicable settlement of two months. Article 3-bis of Dubai Law No. 3 of 1996 expressly provides that no debt or financial obligation against the ruler or the government of Dubai may be collected by means of detainment, public auction, sale or possession by any other legal procedures.

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?

Under UAE law, there is no security of payment legislation to ensure that contractors and subcontractors are paid in the event of an interrupted or cancelled project. Under the 1999 International Federation of Consulting Engineers (FIDIC) Red Book (the predominant standard for contracts in the UAE), the protection afforded to the contractor is also relatively limited. Clause 2.4 puts the employer under an ongoing obligation to submit 'reasonable evidence that financial arrangements have been made and are being maintained', which enables the employer to pay the contract price. If the employer fails to do so, under clause 16, the contractor is entitled to suspend the works and an extension of time and payment of its costs or to terminate the contract. These provisions are designed to prevent the employer getting in too deep on a project and being exposed to liquidity issues.

The UAE has also updated its bankruptcy laws with the introduction of Federal Decree-Law No. 9 of 2016 (as amended), which applies to commercial companies governed by the UAE Commercial Companies Law. The legislation introduces a new insolvency test that assists the courts in determining whether a company is insolvent.

The 1999 FIDIC Red Book contains detailed provisions in relation to cancellation. For example, clause 15.5 entitles the employer to cancel a construction contract for convenience. The financial effect of this is dealt with under clause 19.6 and requires payment of the contractor's costs. In the absence of an express contractual provision relating to termination by convenience, as a matter of UAE law, the employer is entitled to terminate for convenience, subject to payment of the contractor's costs and, notably, loss of profits (Dubai Cassation No. 218/2005 dated 20 February 2006).

Urgent remedies are also available from the UAE courts. For example, under the UAE Civil Procedure Law, the contractor may be entitled to apply for a precautionary attachment to prevent the dissipation of funds by the employer, or summary proceedings to obtain an order for payment within 48 hours for debts proved in writing and immediately due for payment (where, for example, sums have been certified by the employer for payment and not paid).

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?

Under article 273(1) of the UAE Civil Code, where a force majeure event makes the performance of a contract impossible, obligations cease and the contract can be 'automatically' cancelled without the need to obtain a court order for termination. Force majeure is not defined in the UAE Civil Code but will usually be interpreted as applying to extreme events, such as natural disasters and civil war, which will render the contract impossible to perform. However, in respect of continuous contracts, as opposed to instant contracts, the part of the contract that was already performed prior to the force majeure event should remain enforceable. Where the force majeure event renders only part of an obligation impossible to perform, article 273(2) of the UAE Civil Code allows only that part of the contract to be extinguished. The remainder of the contract remains enforceable.

Article 249 of the UAE Civil Code also provides relief where performance of the contracting parties' obligations remains possible but excessively burdensome as a result of unexpected events. In these circumstances, the court has the discretion to strike out the obligation and 'reduce the oppressive obligation to a reasonable level'.

In addition, article 893 of the UAE Civil Code, which specifically applies to construction contracts, provides that, if any cause arises preventing the performance of the contract, either of the contracting parties may seek an order from the court to cancel or terminate the contract.

DISPUTES

Courts and tribunals

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

There is no specialist division of the UAE courts dealing with construction disputes.

The Dubai International Financial Centre (DIFC) courts have the Technology and Construction Division (TCD). The TCD is a specialist court for complex engineering and technical cases with rules based on those of the London Technology and Construction Court.

Dispute review boards

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

While DRBs and dispute adjudication boards (DABs) have, historically, rarely been used in the region, their use is growing largely because

of the incorporation of DABs in the 1999 International Federation of Consulting Engineers' terms. These terms provide that decisions are binding pro tem, and amendments in the 2017 edition now mean that a party can refer a failure to comply with a decision to arbitration to enforce the decision, even if a notice of dissatisfaction has been served by the other party.

Article 39 of the Arbitration Law (Federal Law No.6 of 2018) gives tribunals the express power to render interim and partial awards, and article 39(2) provides that interim awards are enforceable before the UAE courts. However, DAB decisions do not fall clearly into either category of interim or partial award and, at the time of writing, there is no established regime for the enforcement of DAB decisions in the UAE.

It is also now more common in the market for parties to agree to contractual expert determination and contractual dispute adjudication (including expert determination before the ICC International Centre for Alternative Dispute Resolution) even when these procedures were not agreed in the contract.

Further, in instances where projects have been procured using a PPP model, there is a growing trend towards the adoption of expert determination processes on technical disputes. The use of alternative dispute resolution mechanisms is also envisaged in the Federal Government Public-Private Partnership Provisions and Procedure (the Manual). The implementation of the provisions of the Manual is now mandatory for PPP projects between federal and local government bodies, or between the private sector and the federal government (including where the federal government acts jointly with a local government entity). In the case of a local government entity-procured PPP project, the application of the Manual is optional.

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 has historically been slow to gain popularity in the region but its popularity is increasing, particularly in the wake of the covid-19 pandemic. In an effort to encourage the use of mediation as a form of dispute resolution, the Dubai government created the Centre for Amicable Settlement of Disputes in Dubai, attached to the Dubai courts. The Dubai Chamber of Commerce and Industry offers a mediation service and, in the DIFC free zone, the DIFC-LCIA Arbitration Centre offers mediation. Conciliation and reconciliation committees also exist at the federal level.

Parties who submit to the Rules of the DIFC courts are encouraged to consider alternative dispute resolution, including mediation, in resolving disputes (Part 27 of the Rules of the DIFC Courts). In June 2021, Practice Note No.1 of 2021 on Referral of Cases to Mediation was issued, noting the DIFC court's general discretion under Rule 27.3 to refer parties to mandatory mediation. During mediation, court proceedings will be stayed. Part 38 of the Rules of the DIFC courts allows the court, when making costs orders, to take into account the efforts made by the parties before and during the proceedings to try to resolve the dispute.

A similar system exists in the Abu Dhabi Global Market (ADGM) courts, which offer court-annexed mediation services (Part 36 of the Court Procedure Rules and Practice Direction 13) pursuant to which mediation can be entered into voluntarily or mandated by order of the court.

At the time of writing, the UAE has announced its intention to accede to the Singapore Convention on Mediation. This will further enhance the UAE's commitment to mediation as an effective method of dispute resolution.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Whether statements made in mediation can be raised in subsequent arbitration or legal proceedings will mainly depend on the terms of the mediation agreement. The concept of 'without prejudice' does not exist under UAE law and, therefore, parties will need to expressly agree at the outset of any mediation that it is to be held on a confidential basis and have this agreement recorded in writing.

In the DIFC courts, the concept of 'without prejudice' communication is upheld and relied on by parties. Practice Direction No. 6 of 2014 provides that the content of all mediation communications (both before or after a claim has been filed with the DIFC courts) shall be treated as having been made on a without prejudice basis, and parties will not be able to rely on them during the course of proceedings before the DIFC courts (although evidence of mediation communications may be admitted in certain circumstances). Similar confidentiality provisions exist under Practice Direction 13 of the ADGM Court Procedure Rules.

Provided a mediation agreement contains a robust confidentiality clause, it is anticipated that the courts will, in general, uphold the parties' agreement that statements made and documents disclosed in mediation proceedings are not to be used in subsequent arbitration or legal 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?

Foreign investors and participants typically elect to have their disputes resolved through arbitration instead of the local courts. Projects that are liable to give rise to complex, technical disputes benefit from an arbitration clause that allows the parties to select a tribunal that they can be confident has the required specialist knowledge to consider the issues. Additionally, in cases where there is a clear reason why disputes need to be dealt with in a non-public forum, parties are also likely to opt for arbitration.

The default mechanism for resolving disputes is the local courts. Local court proceedings are conducted in Arabic and there are limitations on the rights of audience before them. Cases will usually take between six and 12 months to reach first judgment stage and, given the low court costs involved in proceedings, are likely to be subject to more than one round of appeal. In technical matters, the local UAE courts are likely to refer matters to an expert in the relevant field. That expert will consult with the parties and review the evidence presented to him or her. While the court is not bound to follow an expert's decision, in practice, the court will be guided by the expert's findings.

The DIFC free zone has opened the TCD. The TCD is a specialist court for complex engineering and technical-related cases. The TCD Rules are based on the London Technology and Construction Court Rules. The TCD has an active caseload with a number of cases currently in progress.

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?

The UAE hosts a number of well-established arbitration centres, including the Dubai International Arbitration Centre (DIAC) and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), which, along with the ICC, have historically been the preferred choices of

arbitration institution. The ICC remains a popular choice and the institution has now formally established a case management office within the Abu Dhabi Global Market (ADGM) free zone. Arbitrations seated in the ADGM apply the modern ADGM Arbitration Regulations 2015. In recent years, parties have also increasingly elected to seat their arbitrations in the DIFC free zone to benefit from the modern and comprehensive procedural law that applies there (DIFC Law No. 1 of 2008) and where the DIFC Arbitration Centre (the DAI) in conjunction with the London Court of International Arbitration had established an arbitration institution (the DIFC-LCIA). However, by operation of Dubai Decree No.34 of 2021, the DAI was abolished and all rights and obligations transferred to the DIAC. Consequently, the DIFC-LCIA has ceased to exist and cases commenced pursuant to a DIFC-LCIA arbitration clause that were registered before 20 March 2022 are now being administered by the LCIA from London with cases registered on or after 21 March 2022 being administered by DIAC under a new version of the DIAC Rules, which were issued on 21 March 2022.

In 2018, the UAE implemented Federal Law No. 6 of 2018 concerning arbitration (the UAE Arbitration Law). The UAE Arbitration Law is closely modelled on the UNCITRAL Model Law and has now increased the confidence of parties seating their arbitration proceedings in the onshore UAE.

Generally, parties are free to select their seat of arbitration. However, local laws restrict the forum in which disputes with government and quasi-government entities can be resolved.

In practice, most local employers and developers based in Dubai will seek to ensure that arbitration is held within the UAE and that a set of domestic arbitration rules will apply. While it is not unknown to specify the law governing the dispute as being other than the national laws of the UAE, where the project works are based in the UAE and subject to UAE laws and regulations, attempts to do so can lead to conflicting terms.

Dispute resolution with government entities

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

Under Dubai Order dated 6 February 1998, the government of Dubai and its departments and institutions are prohibited from submitting to any laws other than 'local legislations' to govern contracts, unless an exemption from compliance with these rules is ordered. In addition, under another order of the same date, as amended, contracts to which the government of Dubai or any of its departments or corporations are a party may not provide for arbitration outside Dubai or for the referral of disputes concerning arbitration and related proceedings to any laws or regulations other than the applicable laws and regulations of Dubai. The same principles are recorded in Dubai Law No. 6 of 1997, but entities may be granted specific exemptions from the application of these restrictions by order of HH the Ruler of Dubai.

Article 24 of Dubai Law No. 6 of 2011 regarding the contribution of the private sector in electricity and water production also stipulates that contracts made between the private sector and electricity or water authorities or with other local government authorities shall be governed by the applicable laws of the emirate. This same principle is repeated in the Dubai PPP Law, Law No. 22 of 2015, regulating partnerships between the public and private sector, which stipulates that UAE law is the governing law and that these contracts may not provide for arbitration outside the UAE.

As such, government and government-related employers in Dubai have historically requested submission to the DIAC, seated in Dubai. In Abu Dhabi, employers tend to prefer to submit to dispute resolution before the ADCCAC.

While government agencies will be bound by the arbitrator's award, specific requirements will apply when it comes to enforcing that award as a judgment of the court against assets of the government. In particular, article 247 of the UAE Civil Procedure Law prohibits the seizure of public property owned by the state or any of the emirates for the purpose of enforcement.

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?

Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (known as the New York Convention), awards rendered in a country that is a signatory to the Convention can be enforced in any other country that is also a signatory. The UAE acceded to the Convention in 2006 without any reservations. Consequently, the only grounds on which recognition and enforcement of a foreign arbitral award may be refused are the limited grounds contained in article 5 of the Convention. These grounds include the incapacity of the parties and where enforcement of an award would be contrary to domestic public policy.

Since becoming a signatory to the Convention, the UAE courts have enforced many foreign arbitral awards in accordance with the Convention. Procedurally, UAE Cabinet Decision 57 of 2018 regarding the Executive Regulation of the UAE Civil Procedure Law issued welcome clarifications on the procedural rules applicable to the enforcement of foreign arbitral awards.

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?

In the UAE courts, an action is commenced by lodging a claim notice in the appropriate court. Generally, a claim will be time-barred after 15 years unless a specific provision states otherwise. Various exceptions exist to the general rule and are found in several statutes. For example, the following may be applicable to claims for construction work or design services:

- 10 years for claims arising from commercial transactions;
- five years for claims for professional fees;
- three years for acts causing harm (torts); and
- two years for claims for payment for goods or services.

In addition, under article 880 of the UAE Civil Code, claims must be brought against a contractor and architect within three years of discovery of any defect that threatens a building's stability or safety, and no later than 10 years from the date of delivery of the works.

Statutory preconditions exist in relation to the commencement of proceedings against UAE government entities. For example, in Dubai, a claimant is required to submit details of its complaint against a government entity to the Legal Affairs Department in the first instance, and to follow the procedure under Dubai Law No. 3 of 1996 prior to commencing proceedings.

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?

The UAE is not a signatory to the Stockholm Declaration of 1972.

The Ministry of Climate Change and Environment is charged with protecting the environment and all aspects related to climate change, and establishing a strategy and policies. In addition to this, each emirate has created government bodies tasked with implementing the national environment law within its own territory by enacting local regulations.

Federal Law No. 24 of 1999 is the primary environment law covering the protection of water, air and land, as well as wildlife and protected areas, from pollution, natural environmental disasters and the depositing of hazardous waste. Federal Law No. 12 of 2018 on Integrated Waste Management is also applicable and there are various decrees specific to construction, such as Decree No. 39 of 2006 on Banning Importation, Exportation and Use of Asbestos Sheets, Decree No. (137) of 2012 on the Guidelines to Regulate the Activities of Facilities Operating in the Cement Industry and Decree No. (26) of 2014 on the National System on Ozone Depleting Substances.

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?

Federal Law No. 24 of 1999 on the Protection and Development of the Environment, and its executive regulations issued by Cabinet Resolution 37 of 2001 (the Environmental Law) impose penalties for violations ranging from 10,000 dirhams to 100,000 dirhams in fines and possible imprisonment for the responsible offender. The Federal Law on Integrated Waste Management 2018 may also lead to administrative penalties for violating companies if its provisions are breached, such as suspending the company's operational licence or temporarily or permanently closing the business. Fines against violators vary from 20,000 dirhams to 1 million dirhams, and violators may also be liable to bear costs associated with the damage incurred. These penalties apply in addition to their contractual obligations, such as the duty to put in place an environmental management plan and risk register for a project.

Although obligations vary across the emirates, contractors and developers are typically required to obtain an environmental clearance (EC) for a development and infrastructure project. Further, environment impact assessments (EIAs) are required under the Environmental Law, identifying the potential environmental impacts of a project. No project can be started before obtaining an EC licence, which includes provision of the EIA.

Each emirate has a different agency or body in charge of these matters and has implemented specific laws and regulations. For example, the Environmental Agency Department (EAD) is the competent authority for the environment in the Emirate of Abu Dhabi, and Tadweer Centre of Waste Management has been established by the EAD to develop a waste management strategy for Abu Dhabi, alongside responsibility for the issuance of a licence and approval for waste management. The Environment Department of Dubai Municipality has jurisdiction over these matters in Dubai.

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'?

The UAE is a contracting party to the International Centre for Settlement of Investment Disputes (ICSID). The UAE has also signed numerous bilateral investment treaties (BITs), which aim to protect foreign investors by providing, for example, 'fair and equal treatment and protection from expropriation'.

UAE BITs do not share a common definition of the concept of an 'investment'. However, in general, the term 'investment' is defined broadly to include 'any kind of asset', together with a non-exhaustive list of examples, such as movable and immovable property, economic rights under a contract and intellectual property rights. It is also common to exclude from the definition of 'investments' business concession agreements, for example, in relation to the search, cultivation or extraction of natural resources.

In the event of a dispute with the government, a foreign investor in construction and infrastructure projects will have recourse under most BITs to international investment arbitration under UNCITRAL or ICSID rules, rather than bringing a claim in local courts.

Tax treaties

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

The UAE has entered into over 100 double tax treaties (DTTs) with other jurisdictions in which the parties agree to certain terms that aim to stop taxpayers from being subjected to double taxation (either through tax relief up front or refund or credit mechanisms) on trade and transactions that involve both jurisdictions. These DTTs also aim to impose provisions to mitigate against tax avoidance or profit shifting to low tax jurisdictions. Each DTT is specific to the terms agreed between the UAE and the relevant country and, therefore, should be assessed on a case-by-case basis.

Currency controls

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

There are no currency controls in the UAE. However, international sanctions and local boycotts may prevent the purchase of some currencies (eg, Qatari riyals).

While businesses are free to undertake transactions in any global currency of their choosing between the commercial parties, all transactions that are liable to UAE value added tax are required to be converted to UAE dirhams using the UAE Central Bank's daily conversion rate for the purpose of display within a valid tax invoice. However, the parties will most likely still settle the amounts payable under the contract in the original contract currency, and the currency difference will need to be managed as exchange rate differences in the books and accounts of the supplier. Amounts due to the tax authority must be paid in UAE dirhams.

Removal of revenues, profits and investment

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

There are no restrictions on the repatriation or removal of revenues, profits or investments.

From a tax perspective, there is nothing that restricts the removal of profits or investments from the UAE. While the UAE does not have a fully fledged corporate tax or transfer pricing system, it does have some tax provisions that deal with where profits are earned versus where they are taxed and requiring commercial substance behind profit and price allocation.

The UAE has signed DTTs with over 100 countries. A number of these DTTs set out restrictions on the valuation of transactions between related parties. The aim of these provisions is to ensure that the price of

transactions between related parties, or the amount of funds transferred between related parties, does not exceed what would be reasonably expected if the trade had been carried out between unconnected parties. These provisions seek to avoid the shifting of profits to low tax jurisdictions (such as the UAE) to minimise the overall tax burden to the company or corporate group. Therefore, they are more likely to affect the movement of funds into the UAE rather than vice versa.

The UAE implemented Economic Substance Rules in 2019 that require certain businesses to disclose the extent of the relevant activities in the region to the authorities so that they can ensure that businesses have sufficient substance in the UAE to which they are shifting or attributing profits. This is important as, aside from companies in the oil and gas industry and branches of foreign banks, other corporates generally do not pay corporate tax in the UAE and, therefore, this is an incentive for businesses to shift profits to this region.

UPDATE AND TRENDS

Emerging trends

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

The UAE continues to stimulate the construction industry by various measures including the Dubai Building Code, which is designed to promote greater efficiency in the building approval process.

Technology will also continue to play a greater role with the industry embracing digitisation of project management, building information modelling and virtual site inspections.

The difficulties caused to contractors by the mandatory provision of 'on demand' performance bonds remains a topic of debate, as those instruments place a great deal of risk and exposure on contractors. There will be increasing pressure to move away from this security model to attract contractors to projects and thereby stimulate economic activity in the sector, but steps may need to be taken at a legislative level before changes are seen.

In terms of the nature of projects themselves, there is a continuing trend towards renewable energy and energy-efficient buildings with, for example, plans to install rooftop solar energy systems on buildings in Dubai and the issuance of green building codes. We anticipate such trends to continue, particularly in light of the UAE's 'Energy Strategy 2050', which aims to increase the contribution of clean energy in the total energy mix from 25 to 50 per cent and reduce the carbon footprint of energy generation by 70 per cent by the year 2050.

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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?

Few legal concerns arise simply because a company establishing a US operation is foreign. Rather, the primary concerns facing foreign contractors are more of a practical nature, including the following:

- determining whether or not to operate as a union or merit shop (non-union) operation;
- obtaining sufficient bonding capacity with a qualified surety;
- finding qualified domestic executives and supervisors to ensure the cultural transition to US industry practices;
- locating qualified legal counsel and becoming conversant with important legal considerations that regularly challenge and affect contractors;
- establishing relationships with local trade subcontractors; and
- establishing, with the guidance of counsel, an appropriate programme to ensure compliance with US laws and regulations that apply to the contractor's work and to ensure that the company's expatriates comply with US law, instead of relying upon the presumed acceptability of conduct and practices with which they are accustomed. For example, many of the regulations and laws that pertain to a contractor's or designer's entertainment of government employees, as well as certain non-governmental employees who may be governed by the same rules, are not intuitive, and proper legal guidance is essential for a company entering the US market.

Many foreign contractors have entered the US market successfully, employing different models to establish their operations. Two models have worked well for European contractors: purchasing a domestic operation and pursuing business through that operation, and establishing joint ventures with domestic companies. These models eliminate many potential problems in forming a US operation, particularly if the contractor purchases a domestic company, as it 'inherits' an operation already fully integrated into US practices and its target markets. In fact, foreign companies are increasingly pursuing the acquisition of US construction companies, as the condition of the US economy has created new opportunities. Asian contractors, on the other hand, have typically established their operations in the US by initially working with businesses owned by their fellow countrymen and women and then growing domestically from that base. This model requires a greater investment in developing a unit that can succeed in the US markets than the European model. The Asian model, however, has undergone changes over the years as Asian-based companies are now pursuing the purchase of US companies to compete in the US market.

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?

Licensing requirements vary from state to state and even within a state. Architects and engineers typically require local licences by the states in which they provide professional services. All architects must be licensed, and engineers must be licensed to prepare, sign, seal and submit engineering plans and drawings to a public authority for approval, or to seal engineering work for public and private clients. However, engineers do not have to be licensed if they are merely working in an engineering firm and are not making final engineering determinations or filing engineering drawings. Alternatively, the laws in New York and some other states provide that a foreign engineer or architect may be granted a limited permit to perform design services in connection with a specific project.

As for contractors, not all states require contractors to have licences. States such as California have statutes requiring virtually all contractors to be licensed, while others, such as New York, do not require contractor licensing on a state-wide level, but leave contractor regulation to the municipalities. A growing number of states have also begun requiring entities that provide pure construction management services to be licensed, either by procuring a specific construction management licence issued by the state or by requiring the construction manager to possess a general contractor or mechanical contractor licence or an architect or engineering licence. Nonetheless, where a licence is required by state law, the licence must be kept current, which often requires taking continuing education classes, and the contractor must be able to demonstrate that it is properly licensed.

Practising without a licence when one is required by statute, is viewed as illegal and may subject the person to criminal prosecution. In addition, courts will typically refuse to enforce contracts with such persons. For example, the laws in many states provide that if a contractor is not licensed (when required), or if the licence has lapsed without renewal, the contractor is not entitled to compensation for the work it performed and may be required to return monies already paid. There have even been reported instances of public entities scrutinising a contractor's licensing history and, if a technical lapse is found, filing a lawsuit to recover any monies already approved and paid. To overcome such inequities, some jurisdictions have established a 'substantial compliance' doctrine that allows a contractor or designer, in certain limited circumstances, to recover payment for services performed.

Competition

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

Though not intended to disadvantage foreign contractors, various local laws effectively give local contractors an advantage in public contracting. Regardless of nationality, construction companies awarded federal contracts must comply with the Buy American Act, which requires that materials incorporated into the project be made in the United States or in a trade agreement-compliant country. Otherwise, 6 per cent of the cost of the foreign materials is added to the bidder's price proposal. Various other statutes and executive orders impose even more restrictive 'buy American' requirements. More than half of the individual states in the United States, as well as many local governments, have similar 'buy local' requirements. Thus, while foreign and domestic contractors are treated alike, foreign contractors may be disadvantaged by lack of access to domestic material suppliers and competitive pricing in the local market. The government also has a goal of awarding 23 per cent of its procurement budget to small businesses. Additional goals of 3 to 5 per cent are set for preferential classes, such as small disadvantaged businesses and service-disabled veteran-owned small businesses. Foreign contractors are explicitly excluded from these set-aside programmes, as eligibility requires the company to be organised for profit, with a place of business in the United States, and to operate primarily within the United States, or to make a significant contribution to the US economy through payment of taxes or use of US products, materials or labour.

As a consequence of the large number of contractor and designer acquisitions by large domestic and foreign companies, there have been a significant number of situations where companies have been disqualified from competing for a publicly funded project because of the role that a parent or sister company had in the project, which was perceived to create a possible advantage to the competing contractor. With the increasing frequency of contractors and designers serving at times as project managers, and contractors serving as construction managers or general contractors, depending upon the opportunity, the possibility of this organisational conflict is substantial.

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?

The US maintains robust laws, on both the federal and state levels, to promote open competition for public construction works. Federally, the foundation for competitive contracting is the aptly named Competition in Contracting Act (CICA), which is the predicate for the Federal Acquisition Regulations (FARs). While the FARs provide the specific acquisition regulations for each of the various government agencies and departments, the CICA still requires (subject to certain specified exceptions) that only sealed bids are to be evaluated, and that the award of the contract is based solely on the factors specified in the publicly advertised solicitation. If a contractor believes that a bid was not properly awarded in the competitive manner required by the CICA or the FARs, the CICA allows for the contractor to protest and challenge an improper solicitation or an improperly issued award. Other federal competition-promoting laws include the Sherman Act, which prohibits price-fixing, bid rigging, bid suppression and other anticompetitive collusive behaviour; the Anti-Kickback Act, which prohibits contractors from soliciting or receiving kickbacks from subcontractors in exchange for subcontract awards; and prohibitions against payments made by contractors to influence the award of a federal contract, among other similar laws. Violations of these laws can carry serious criminal and civil consequences, including up to 10 years' imprisonment, multimillion-dollar fines and debarment. Moreover, the FARs also obligate federal contracting personnel to report bids that they believe may violate such laws.

Most states have laws that similarly promote open competition for public works by generally requiring awards to go to the bidder that provides the lowest-priced bid and is capable of performing the construction works, thereby removing subjectivity and the potential for favouritism in awarding contracts, and allowing contractors to protest improper solicitations and improperly awarded contracts. The various states also have laws that mirror the federal anticompetition statutes and likewise provide serious consequences for their violation.

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 bribe is generally defined, under state and federal laws, as the giving of money or something of value to a person who can control or influence action favourable to the person making the gift. This would include giving a government contracting officer money to influence the manner in which a contract is awarded. Giving money or something of value to a purchasing agent at a private company to influence the award of a contract is a commercial bribe, but a bribe nonetheless. In this same regard, facilitation payments to expedite or secure the performance of routine government functions are likewise deemed to be impermissible bribes if made to government officials in the United States. However, these same facilitation payments are legal if made abroad by US companies and their subsidiaries, and constitute an exception to the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA). Even though facilitation payments are technically permissible under the FCPA, this exception is very narrowly construed and such payments are closely scrutinised.

Bribery is a crime punishable by imprisonment or fines, or both. Importantly, it can also result in forfeiture of the benefits of the crime, including the right to payment for services provided under the illegally procured contract. The person and the company offering the bribe will suffer criminal prosecution, will likely lose the right to be paid under that contract (even if the work was performed) and may suffer other adverse consequences as a by-product of the illegal activity, such as suspension or debarment from the right to perform work for any government agency. Bribery is taken very seriously in the United States and is zealously prosecuted.

Foreign companies working in the United States need to learn the distinctions between acceptable practice in other jurisdictions internationally and in the United States, as innocent, allowable gift-giving to a government representative in other parts of the world is looked upon harshly in the United States and can have serious legal consequences. Even treating a government employee to dinner can result in disciplinary action against the government official and, at a minimum, the suspicion of illegal bribery by the contractor. Moreover, foreign contractors should be aware that civil and criminal prosecution under the FCPA is not restricted to just US companies working abroad or foreign companies working in the United States or on a US-funded project. Instead, the FCPA is far-reaching and has been successfully used by the US government to investigate and prosecute foreign corporations for corrupt practices occurring in foreign countries on non-US projects, based merely on incidental or tangential contacts with the United States that are unrelated to the project.

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?

Employees of most project teams have no affirmative obligation to report suspicion or knowledge of bribery of a government official or government employee. Similarly, the employee has no obligation to report any fraudulent or criminal conduct by its employer or other project participants. However, on projects performed pursuant to contracts with the federal government or funded by the federal government, there is an obligation to self-report conduct that violates any law, thus requiring that any participation in bribery be reported. Federal contractors are obliged to maintain a compliance programme that includes, among many other elements, policies to encourage employees to report their suspicion or knowledge of such violations. Whistle-blower laws also exist pursuant to both federal and state statutes to encourage employees to voluntarily report incidents of fraud, bribery, criminal conduct and other statutory violations. These laws are designed to protect employees who report these activities against retaliation, such as by demotion or termination of employment. If an employee was retaliated against for whistle-blowing, a court can order the reinstatement of the employee to the same position, and award compensation for all lost wages and benefits, reasonable costs and attorneys' fees, and punitive damages.

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?

Whereas bribery statutes focus on money or gifts given directly to public officials, the federal government and a growing number of states have enacted legislation that addresses attempts to influence public officials through indirect means, by way of political contributions. These statutes are commonly referred to as 'pay to play' laws. Pay to play is the practice of making contributions to elected officials to garner their favour and to influence their awarding of government contracts. Although particular statutory requirements vary, these laws generally prohibit any company from making campaign contributions to a political official, candidate or to a political action committee for up to several years prior to the award of a public contract. These laws further require contractors bidding on public works to disclose all previous political contributions. If the contractor discloses a political contribution during the proscribed period, the contractor will be disqualified from being awarded the contract. In addition, if the contractor intentionally fails to disclose an offending contribution, the sanctions can be severe, including a monetary penalty up to the value of the contract awarded, and the contractor may be debarred from further contracts with any public entity in the jurisdiction for years. Given such extreme sanctions, it would ordinarily be expected that there would have to be a large political contribution. However, in at least one state, the offending political contributions were as little as US$300 over the preceding 18 months.

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 rules as government employees?

A construction manager or other construction professional acting as a public entity's representative or agent on a project is typically not governed by the anti-corruption restrictions that pertain to employees of the public entity, unless those restrictions are expressly made applicable to the representative in its contract with the public entity, or by other applicable statutes or regulations. However, insofar as third parties interacting with that construction manager or construction professional are concerned, they nonetheless would be wise to treat these entities as if they were the employees of the public entity. Thus, by way of example, in many US jurisdictions, a trade contractor under contract directly or indirectly to a public entity would be restrained from giving things of a certain value to the public entity employees to avoid accusations of bribery. Even if the laws and regulations do not explicitly preclude a construction manager or other professional working for that same public entity from accepting things of value from that same trade contractor, giving something of value to that manager or professional that exceeds what the public entity's direct employee can accept could be considered a bribe. Thus, to avoid such potential pitfalls, the wise course for trade contractors is to treat managers and professionals acting on behalf of the public entity as if they were the public entity, and similarly, managers and professionals acting on behalf of a public entity should act as if they are the public entity.

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?

The United States is probably one of the most welcoming jurisdictions for foreign investment or active participation in the construction industry. Although there are few obstacles to doing business in the United States, it is not a single jurisdiction like most other countries. Being a contractor in the United States requires knowledge of a spectrum of issues in the particular states in which the contractor intends to operate, ranging from basic legal principles to cultural and business practices. This is often the reason why some contractors in the United States operate within certain geographical regions and not others. Even within large states, while the law is uniform, the range of cultural issues can be quite varied. For example, Florida is a single state but has at least seven or eight different areas so culturally diverse that each could almost be considered a different state; New Jersey is divided culturally between the north (New York-centric) and the south (Philadelphia-centric); California is equal to the length of seven states on the east coast and offers a diversity of culture that would be expected in different states; and, while New York City has its own unique culture, there other parts of the state that have their own culture, none of them at all similar to New York City.

The cultural and business practices aspect of doing business in the United States is critically important. From labour relations to subcontractor relations, work practices and 'acceptance' of 'out-of-towners' (not least foreign companies), these issues will determine the potential profitability of a newcomer more than any others. Further, the ability of the foreign contractor to adapt to the way business is conducted and individuals behave in the United States is critical to success.

For example, the representatives of foreign companies assigned to work in the United States may not understand or appreciate US laws relating to conduct in the workplace (eg, sexual harassment and age discrimination), which may result in claims, litigation and other serious legal issues. That is why entrance into the market through purchasing an existing and successful US contractor, or joint-venturing with one, is initially the wisest path for a foreign company.

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?

Many different form contracts are utilised. The most widely used form contracts are those published by the American Institute of Architects (AIA), which has developed contracts not only for architectural services but also forms commonly used by owners, contractors and construction managers. Its A201 document, which sets forth general conditions of contract for general construction contracts, is unquestionably the most commonly used document in the industry and is often attached to customised contract forms that are not written by the AIA. In addition to the AIA series of contracts are the 'ConsensusDOCS' construction documents, which were developed jointly by 22 owner, contractor, designer and surety organisations, including the Associated General Contractors of America (AGC). These documents purportedly present a more collaborative approach to contractual relationships, and also have several specialised contractual addenda to address the needs of projects that utilise building information modelling or involve 'green' building. Other available industry form contracts that are less widely used are those published by the AGC, which are generally considered by many to be more favourable to contractors, as well as those published by the Engineers Joint Contract Documents Committee, whose members are representatives of several societies representing professional engineering disciplines and tend to favour the interests of engineers. Moreover, many large owners and developers, governmental entities and contractors also have their own standard form contracts, which they may impose on contractors and subcontractors with little ability to negotiate the terms.

Regardless of the form of contract used, there is no requirement that the contract is written in English, although that is typically the case. In respect of the applicable law and the venue for dispute resolution, federal law and the law of most states generally provide that parties to a contract are free to agree upon the choice of law that governs their contract and the venue for their dispute, as long as the choice of law and venue bears a reasonable relationship to the parties or the dispute. If not, the courts may engage in a conflict of laws analysis to determine the appropriate jurisdiction's law to apply, and as to venue, the court may dismiss or transfer the action to a location that is more convenient for the parties and witnesses. Several states, however, have enacted a special law that prohibits parties to a contract for a construction project being performed within the state from agreeing in their contract to apply the laws of a different state or to require any dispute resolution to be conducted in another jurisdiction.

Payment methods

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

Most construction contracts between owners and general contractors and between general contractors and subcontractors provide for payment on a monthly basis, while labourers are traditionally paid on a weekly basis. Payments are typically made in accordance with the contractor's certified requisition for work completed during the preceding monthly period, minus a withholding of usually between 5 and 10 per cent of the amount payable, which the owner or contractor retains until the final payment requisition as security for the contractor's completion of the contract. On fast turnaround projects, such as tenant fit-outs, which only last a couple of months, it is not uncommon for requisitions and payments to be made on a biweekly basis as a means for the contractor to be paid for the first part of the work before the entire project is completed. There is no uniformity or custom for the manner in which payments are made, but it is standard for payments to be made either by cheque or electronic wire transfer.

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?

The most common contractual structure is where the owner contracts directly with an architect or engineer for the design of the project and with a general contractor for the construction. The general contractor then enters into subcontracts with all of the trade contractors. However, that structure often varies depending upon the needs or desires of the owner, the project delivery method (eg, design–bid–build or design and build) and pertinent laws. For example, sophisticated owners on large private construction projects are increasingly using construction managers on an 'at-risk' basis to hold all the contracts with the trades and to furnish the completed work at a guaranteed maximum price, or on an 'agency' basis, where the owner contracts with each of the trades separately through the construction manager. In addition, several states have laws requiring public entities on certain improvement projects to enter into separate contracts with each of the major trades (ie, mechanical, electrical, plumbing, general contracting and structural steel), as opposed to a single-source contract with a general contractor.

PPP and PFI

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

There is no general statutory PPP or PFI framework applicable to federal procurements. Legislation enabling these partnerships is either project-specific or specific to a federal agency. For example, the Veterans Administration and the Department of Defense regularly enter into PPPs through their enhanced use lease procurement procedures, and now the US Army Corps of Engineers is authorised to undertake a PPP pilot programme for water and navigation projects.

Although the most significant PPP road projects may be perceived as federal projects (owing to the designation of the road as an 'interstate' highway), the reality is that they are state projects administered by the state department of transportation pursuant to state statutes. Nonetheless, there is an important federal component as these projects often rely on federal funding. There is no common statutory scheme or government approach towards PPPs among the 50 states, but the Federal Highway Administration has a model PPP law for private toll roads that allows for both solicited and unsolicited bids from private developers.

PPPs remain a highly political issue, despite all the reasons for them to flourish in the United States. However, as states have a growing need to undertake major infrastructure projects that are frequently estimated to cost in excess of US$1 billion, they are beginning to adopt legislation to permit PPPs on either a state-wide or project-specific basis. At present, there are approximately 39 states that now have some form of P3 legislation, either for transportation or social infrastructure (such as public buildings) or both, and many others have pending legislation. States with a legal framework for PPPs typically exempt them from the traditional procurement rules, which are often too impractical or onerous for PPP proposers and may award a contract based on the best value rather than the lowest bid. Where state agencies consider unsolicited proposals, the PPP laws normally require that final bidding be opened up to other qualified proposers.

Joint ventures

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

Parties to a contract are free to allocate liability as they deem appropriate. Thus, members of a consortium may allocate, in their consortium agreement, the percentage for which each member is responsible for losses or claims against the consortium. Notwithstanding this internal allocation, when contractors choose to operate as a consortium, the consortium is effectively treated, for legal liability and responsibility purposes, as a joint venture or general partnership, which means that each member of the consortium is jointly and severally liable to third parties for the actions of the consortium. Unless a contract with a project owner limits the owner's rights to only seek relief against the assets of the consortium, each consortium member will be liable to the owner (or to any other party with claims against the consortium) for the full amount of the damages claimed. If a consortium member pays more than its allocable share of a claim against the consortium, that member can then seek indemnification from the other consortium members.

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?

Generally, an indemnification provision in a construction contract is valid and fully enforceable. Such clauses, when properly drafted, may require a contracting party to indemnify the other party not only against the contracting party's negligent acts, errors and omissions but against the other party's own negligence as well. In determining the extent to which a party is contractually required to indemnify the other, courts in many states look solely to the intent of the parties as gleaned from the terms of the contract. However, before requiring one party to indemnify the other against the other party's negligence, some states require this intent to be stated expressly in the contract, so the indemnifying party indisputably knows that it is, in effect, insuring the other against its own negligence. Regardless of the language employed, some states have enacted laws proscribing parties to a construction contract from being indemnified against their own negligent conduct. In New York, for example, a party cannot be indemnified against claims for bodily injury or property damage, where that party's negligence wholly or partially caused the damage. By contrast, in New Jersey, indemnification is only proscribed in situations where the indemnitee's negligence was the sole cause of the loss or damage. These laws do not apply, however, to insurance companies that are in the business of taking the risks involved in protecting negligent people, nor do they apply to claims for economic loss.

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?

Whether a contractor bears responsibility to third parties for the work it performed depends upon the nature of the construction and the type of damages sustained by the third party, as well as the state in which the work is performed (as statutes and case law on this issue vary). Typically, in a commercial context, absent privity of contract, a third-party purchaser or lessee does not have any direct recourse against a contractor for claims of defective work, delays in turnover of the work and the like. However, there are some circumstances where the contractor still may be subject to liability in tort for a duty owed to the third party where improperly performed work results in personal injuries, wrongful death or property damage (excluding warranty-related claims). In residential construction, particularly condominium projects, while privity is also the standard requirement for a person to pursue a legal claim against a contractor, several states, especially Florida, Nevada and California, have enacted legislation that provides condominium owners with the right to bring a direct action against a contractor for claimed defective work that it performed in connection with the individual's dwelling. In those states, the right of condominium owners to sue contractors has become a mini-industry unto itself, as the plaintiff's attorneys specialising in representing condominium owners join with forensic engineers to pursue claims on many such projects. Consequently, the contractor (and its insurance carrier) is exposed to liability and significant litigation costs from someone with whom it never contracted or had any dealings.

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?

There are many different insurance products available to contractors and subcontractors in the US construction market. Collectively, these insurance products will cover most types of third-party liability exposure for personal injuries, property damage, environmental damage and, in some cases, economic losses.

Many forms of insurance also are required by contract or by local laws, but, regardless, the most common insurances procured by contractors and design professionals include the following:

- employer liability insurance;
- errors and omissions insurance;
- comprehensive general liability insurance;
- pollution liability insurance;
- property insurance;
- builder's risk insurance;
- owners and contractors protective liability insurance;
- umbrella or excess liability insurance;
- worker's compensation insurance; and
- subcontractor default insurance (SDI).

There is no limit on the quantum of a contractor's liability to a third party, but there may be limits on the amount of coverage that an insurer is willing to provide in respect of a particular risk, such that the contractor is exposed to personal liability for damages sustained by a party in excess of the policy limits. For this reason, depending on the project, some contractors may procure umbrella or excess liability coverage to insure against the risk that the limits of a particular insurance policy are exceeded, but even these excess policies have limits that may conceivably be exceeded on a particular claim. Depending on the specific terms of the policy, insurance coverage may be available to cover delay damages sustained by a third party, but owing to coverage exclusions typically found in most liability policies, a contractor will usually not be able to insure against delay damages or liquidated damages it sustains as a result of its own actions or the actions of its subcontractors. The one exception may be in respect of SDI, which is specifically designed to insure the contractor against damages attributable to the default of one of its subcontractors.

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?

Generally, contractors are free to determine staffing levels for all components of their projects. For public works projects, however, the contracting entity may require contractors to utilise a certain percentage of 'minority' or 'disadvantaged business' enterprises to perform the work. Requirements range from 'best efforts' to recruit such enterprises, with no specific utilisation requirement, to a specific 'set aside', requiring utilisation of such enterprises for a fixed percentage of the work. Collective bargaining agreements, project labour agreements and trade union work rules may oblige contractors to have crews of a certain size depending upon the nature of the work. For example, a labour agreement with an equipment-operating union may require that a mechanic be employed whenever a certain number of machines are operated on a project. On public works projects, applicable prevailing wage laws may incorporate staffing requirements contained in local collective bargaining agreements. Lastly, contractors that are awarded a federal contract or subcontract are required to electronically verify employment authorisation of all employees performing work on the project using the E-Verify internet-based system operated by the Department of Homeland Security and the US Citizenship and Immigration Services.

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?

The only legal obligations towards employees that might remain after the completion of employment are any continuing obligations that may exist under the federal Davis–Bacon Act (DBA), and corresponding state statutes, as well as the Employee Retirement Income Security Act of 1974 (ERISA), for work performed during the course of the employment. The DBA requires payment of locally prevailing wages and fringe benefits to labourers and mechanics employed on most federal government contracts for construction, alteration or repair (including painting and decorating) of public buildings or public works. Under the DBA, contractors and subcontractors must pay all mechanics and labourers employed directly on the site, not less often than once a week, the full amount accrued at the time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual obligation that may exist. Many states have also enacted their own public works statutes, known as 'Little Davis–Bacon Acts', which operate much in the same manner, including their own prevailing wage requirements. Further, to the extent that a contractor, or a union utilised by a contractor, maintains a pension plan on behalf of its employees, ERISA serves to regulate the operation of the plan and would obligate the contractor to fund the plan on behalf of a terminated employee, where the employee's benefits were earned prior to his or her termination. When a contractor enters into a collective bargaining agreement with a US labour union that requires the contractor to contribute towards the union's fringe benefits fund, the contractor assumes the risk that, if and when it terminates a relationship with the union, it will be liable for some portion of the unfunded liability of the union fringe benefits fund. The unfunded liability can be significant and is, therefore, an important issue for all contractors who enter into collective bargaining agreements.

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?

Foreign construction workers that entered the United States legally, and have proper work authorisations from the federal government, essentially have the same rights as any US citizen and are equally protected by local workplace laws and labour laws. While employers cannot legally hire undocumented workers (workers that have not legally entered the country (eg, illegal aliens)), if they do, those workers are still afforded many of the basic rights and privileges guaranteed by the US Constitution and are entitled to many of the same protections secured by the US labour laws, such as the right to be paid minimum or prevailing wages, overtime pay, and the right to be free from discrimination and wrongful termination. These undocumented workers even have the right to press claims and sue for a violation of these laws and to recover proper payment for work performed, but they cannot sue for back pay for work they had not performed, as a US citizen is permitted to do. Moreover, 'work camps' populated with foreign construction workers do not exist in the United States and, therefore, many of the abuses of workers known to exist in work camps also do not exist.

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?

When a contractor decides to cease its operations, there are various laws and other considerations that are implicated in that decision. The primary statute affecting such decisions is the federal Worker Adjustment and Retraining Notification Act (the WARN Act), which protects workers, their families and communities by requiring employers with 100 or more employees to provide at least 60 calendar days' advance written notice of a plant closing or a mass lay-off affecting 50 or more employees at a single site of employment. These requirements do not apply when the lay-offs occur because of unforeseeable business circumstances, faltering companies and natural disasters. Also exempt are workers on a particular building or project, or recurring seasonal work, if the workers understood at the time they were hired that their work was temporary. Advance notice gives workers and their families transition time to adjust to the prospective loss of employment, to seek and obtain other jobs and, if necessary, to enter skill training or retraining that will allow these workers to compete successfully for employment. In addition to the federal statute, some states, such as New York, New Jersey, California, Maryland, Illinois and Tennessee, have their own versions of the WARN Act, which must be adhered to as well.

Additional considerations affecting a company's decision include whether the company has unionised employees and if it contributes to a defined-benefit pension plan. Further, if the employees are unionised, the company may have to bargain with the union before closing its operations. If corporate contributions have been made to the union's defined-benefit pension plan (known commonly as fringe benefit funds), liability may be incurred for a portion of the unfunded pension benefits measured at the time when the employer ceases contributing to the plan.

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?

There are a number of options available to contractors to ensure payment from owners. The simplest means is for the contractor to satisfy itself at the outset that the owner has made adequate financial arrangements to fulfil its contractual obligations. The American Institute of Architects' (AIA) General Conditions (AIA Document A201-2007/2017) provide that, prior to the commencement of the work and upon the contractor's written request, the owner shall furnish reasonable evidence to the contractor that it has made adequate financial arrangements to pay the contractor. Contract documents published by other industry trade groups contain similar provisions. Contractors also may be able to file mechanic's liens (sometimes called construction liens) on the improved property, which would provide them with a security interest in the property to ensure payment. However, the lien laws of each state must be checked and strictly adhered to for a contractor to avail itself of this remedy. The notice and procedural requirements are stringent and there are often penalties for improperly filed liens. Additionally, the federal government and numerous states have adopted 'prompt pay laws' that require payment within a certain specified time period and provide for penalties such as higher interest rates and attorneys' fees if payment is not made in a timely fashion by an owner. Under these laws, the contractor may also have the right to suspend work if payment is not made within the prescribed time. In the absence of such a statute, the contractor may still attempt to include similar terms in its contract. Lastly, if non-payment constitutes a material breach of the contract, the contractor may be justified in terminating its performance.

'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?

In most US states, construction contract clauses that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner are enforceable. The two operative clauses are referred to as 'pay when paid' and 'pay if paid'. A pay-when-paid clause is when the contract simply provides that the subcontractor will receive its payment within a specified period of time after the contractor's receipt of payment from the owner. Under such provisions, the subcontractor bears the risk of the owner's late payment to the contractor, but it is still entitled to payment from the contractor within a reasonable period of time, even if the owner never pays the contractor. Conversely, a pay-if-paid clause is when the contract expressly conditions the contractor's obligation to pay the subcontractor upon the contractor's receipt of payment from the owner. These provisions have the effect of forcing the subcontractor to bear the risk of the owner's solvency and its failure to pay. While pay-if-paid clauses are generally enforceable in most states, they are highly disfavoured by the courts and a clause will only be construed as a pay-if-paid provision if its intent to transfer the risk of non-payment by the owner is clear in the contract. However, in a handful of states, pay-if-paid clauses are expressly illegal or void as against public policy, either by statute or by case law. Notwithstanding, even in jurisdictions where they are enforceable, a contractor will not be protected by a pay-if-paid clause if the actions or inactions of the contractor, unrelated to the subcontractor's performance of its work, were the reason for the owner's non-payment.

Contracting with government entities

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

Historically, government entities were immune from liability arising from the actions of their agents and could be sued only if they granted their consent or otherwise waived immunity. Today, the federal government and most, if not all, state governments have enacted legislation waiving their sovereign immunity, consenting to be sued in respect of certain issues and claims arising under the contracts they enter into.

For federal contracts, sovereign immunity was waived through passage of the Contract Disputes Act (CDA). The CDA identifies the types of actions that can be brought against the federal government and enumerates the procedures that must be followed to bring suit. Specifically, the CDA waives sovereign immunity so that a contractor may appeal the final decision on its certified claim to the Civilian Board of Contract Appeals (or other contract appeals boards) or the United States Court of Federal Claims.

Significantly, waivers of sovereign immunity are limited by the specific terms of the relevant legislation and the government may avoid liability for actions that are deemed sovereign acts, as contrasted with acts undertaken in its contractual capacity. The distinction is whether the government's act affects the public generally or whether it is directed at the contractor only. Although rare, the federal government has attempted to avoid contractor claims on this basis. Also significant is that the federal government and most state governments are protected by sovereign immunity from quasi-contract claims, such as quantum meruit and unjust enrichment. Moreover, where sovereign immunity has been waived, the relevant statutes may also have various notice provisions and deadlines within which legal proceedings must be commenced. For this reason, it is extremely important that contractors strictly adhere to the procedures established in the CDA and its state law equivalents. Failure to do so will likely cause a contractor to forfeit its claim.

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?

Apart from any contractual remedies that may be available to a contractor for the suspension or convenience termination of a project, all states have one or more legal remedies available to unpaid contractors for the work that they performed. The most common legal remedy available to unpaid contractors is the right to file a mechanic's lien. On private projects, it serves as a lien against the improved property for the amount of the unpaid contract work that was performed, and on public projects, it serves as a lien against moneys due to the general contractor. For public improvement projects, state and federal laws require the general contractor to post a payment bond, which guarantees payment to unpaid subcontractors and suppliers. In some instances, payment bonds may also be required by statute for private improvements on public property.

Many states, and even the federal government, also have statutes known as 'prompt pay' laws, which require that subcontractors, and, in some cases, contractors, be paid within a specified number of days after receipt of payment from the employer. Failure to make timely payment in accordance with these requirements can result in significant legal consequences. These laws typically provide the contractor with a right to interest on the unpaid monies and may entitle the unpaid contractor to suspend its future performance on the project (without recourse by the owner) until payment is finally made. On public projects, a common condition for receiving payment from the government is the requirement that the contractor 'certify' on the payment requisition

that all subcontractors have been paid in accordance with the prompt pay provisions. A false certification can result in serious claims by the government, including claims of making false statements, false claims and fraud. The government has been known to make these claims in both civil and criminal contexts, depending upon the circumstances.

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?

The law applicable to construction contracts is very rigid and, absent total impossibility of performance or a specific contractual provision excusing non-performance, a contractor is bound to perform its contract, even if doing so will be more burdensome or less profitable than it had anticipated. If the contract provides a required date of performance, that date generally must be met, irrespective of whether events occur that are beyond the control of a party.

The reason for this is that contracting parties are deemed to have assumed the various risks encountered in meeting their contractual promises. If the parties wish to protect themselves against hardships owing to circumstances beyond their control that can hinder or delay their performance, they must incorporate specific protective provisions into their contract.

Two common protective provisions are the force majeure clause and the termination for convenience clause. A force majeure provision usually identifies the specific delaying events or occurrences beyond a party's control for which it will be entitled to an extension of time to complete its obligations, such as acts of God, fires, floods and acts of the government. A termination for convenience provision allows a party, at its discretion, to prematurely end the contract. This type of clause may be used by a contractor to avoid having its subcontractors complete their work where the owner has abandoned the project. However, termination for convenience clauses typically require the terminating party to pay the other party for the work performed up to the date of termination, costs incurred by the termination (ie, demobilisation costs and subcontractor close-out costs) and sometimes lost profits on the uncompleted work.

DISPUTES

Courts and tribunals

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

With very few exceptions, in most states there are no special courts or public tribunals dedicated exclusively to the resolution of construction disputes. However, the federal government and various states have tribunals dedicated to resolving disputes against public entities, and given the volume of construction-related disputes in the public sector, these tribunals have developed a particular specialisation in such claims.

Under the Federal Claims Act, a contractor has the choice to challenge a contracting officer's final decision in the US Court of Federal Claims (USCFC) or before a board of contract appeals (BCA). The USCFC is the single and central court in which contract claims brought against the federal government are heard. A BCA is a quasi-court within the federal agency that hears disputes resulting from the issuance of a contracting officer's final decision. At present, there only are three BCAs: the Civilian Board of Contract Appeals (CBCA), the Armed Services Board of Contract Appeals and the Postal Service Board of Contract Appeals. The CBCA will hear challenges brought in all the civilian government agencies.

Some states also have special courts that hear claims brought against that state. For example, the New York Court of Claims is the only court that hears contractual and other claims brought against the state of New York. In addition, some state and municipal governments have established specialised boards to hear disputes, similar to the BCAs at the federal level. Further, in New York, some state agencies (such as the Metropolitan Transportation Authority) have established boards to hear disputes, as have some city agencies (such as the New York City Department of Environmental Protection). Accordingly, knowing whether or not there are any specialised courts or other tribunals to resolve construction disputes at the state and municipal level should be checked in the particular jurisdiction.

Dispute review boards

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

The use of DRBs is continually increasing. Major, high-profile projects, such as Boston's 'Big Dig' project and Florida's I-595 PPP project, have used DRBs. Typically, they are used on major infrastructure projects rather than building projects, but are starting to be used on more modest projects as well. There is no particular reason for this distinction, other than the manner in which the use of DRBs has developed.

DRBs have succeeded in avoiding substantial post-completion litigation on complex projects. A wealth of data has been assembled by the Dispute Resolution Board Foundation (DRBF) to measure the success of DRBs and is available at www.drb.org. According to the DRBF, DRBs have been used on more than 2,400 projects in the United States, with total project values exceeding US$155 billion. The use of DRBs in the United States over the last 10 years has grown dramatically. More importantly, it is often reported that more disputes are avoided by ongoing interaction with the DRB than are actually heard.

DRBs are often referred to as 'real-time' dispute avoidance or resolution. Hearings are typically conducted on the project shortly after the dispute arises and while the construction is ongoing. Relationships are preserved and construction delays are kept to a minimum. The North American experience has been that 58 per cent of the projects were 'dispute-free' (ie, no disputes requiring hearings before the DRB) and 98.7 per cent of the projects were completed without resorting to traditional dispute resolution methods, such as arbitration or litigation.

Like other dispute resolution processes, some DRB participants walk away extolling its virtues, while others decry its failure. However, the data assembled by the DRBF indicate, overall, that DRBs have been hugely successful and appear to be gaining in popularity and acceptance by the construction industry.

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 in the United States is defined best as negotiations facilitated by a qualified and trained neutral (the mediator). It is a voluntary process that relies upon the good-faith commitment and desire of the parties to reach a settlement and the skill of the mediator in guiding the parties to that settlement. Crucial to the effectiveness of mediation is that it is a confidential process, which benefits from the application of legal principles of privilege that protect the parties from the disclosure of what is said during the process.

Mediation has become the most favoured alternative dispute resolution technique. The common perception is that 85 per cent of all disputes that are mediated settle during mediation, which explains the popularity of the process. As a result of that popularity, a significant number of specialised and trained construction-dispute mediators have emerged and are available to assist parties seeking to achieve a settlement of their disputes. The majority of mediators are experienced construction lawyers and other industry members.

Mediation is commonly sought, if not mandated by contract, as a pre-litigation or pre-arbitration process. However, even when the process is mandated, the mediator is not a fact-finder, has no authority to impose his or her views upon the parties and cannot dictate settlement terms. Thus, when some use the term 'binding mediation', it only means that the parties either are obliged to engage in mediation or are 'bound' by the terms of the settlement mutually agreed to during the mediation, which typically is memorialised in a signed memorandum.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Mediation, by necessity, is a confidential process, as it encourages parties to be candid with each other and disclose information that the other party might not otherwise have found out. Thus, the law in most US jurisdictions provides that mediation is confidential and that statements made and documents exchanged in mediation, as well as admissions of fault or liability, may not be used in arbitration or a judicial proceeding. Nonetheless, parties to mediation are still well advised to enter into a written mediation agreement that clarifies the confidentiality of the process, particularly if they plan to exchange expert reports that support their position.

While neither a party nor a mediator can be compelled to testify in court or arbitration about a disclosure made in mediation, the adversary is free to seek and use the information, data and testimony in arbitration or trial if it is obtained from other independent sources or if it was ordinarily obtainable as part of the binding dispute resolution process. The reason for this exception is to prevent a party from engaging in mediation as a tool to bar the admissibility of evidence that its adversary was likely to discover anyway.

Arbitration of private disputes

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

Arbitration is certainly a frequently employed means for resolving construction disputes, but it is not necessarily preferred over in-court litigation. The preference of one process over the other will depend on the facts and circumstances of the dispute. Each procedure has its advantages and disadvantages, and it is important to understand these differences in choosing a particular forum.

One advantage of arbitration is the ability to select one or more arbitrators that are experienced in construction or construction law to decide the merits of the dispute. In traditional litigation, a judge cannot be chosen, and it is rare to get a judge (not to mention a juror) with construction experience, whose decision will then be based solely on a battle of the experts. Though arbitration is thought to be cheaper and faster, this is not always the case. It largely depends on the complexity of the dispute. For example, arbitrators are paid by the hour or day. Judges and juries are free. Both forums permit differing levels of pre-hearing or pretrial discovery procedures. In addition, it may be difficult to schedule arbitration hearing dates, as the competing schedules of the parties, their attorneys and perhaps three arbitrators must be accommodated, whereas the court simply dictates the trial dates. One often-touted advantage of litigation over arbitration is that the parties have the right to appeal unfavourable rulings, whereas an arbitration award can only be vacated by the courts where there is demonstrable fraud, partiality, mathematical mistake or if the award exceeds the arbitrator's authority, thereby making an arbitrator's decision virtually sacrosanct. However, some arbitration organisations, such as the American Arbitration Association (AAA), have issued optional appellate arbitration rules, allowing for a limited right of appeal within the arbitration process if the parties adopt those rules as part of their contractual dispute resolution process. The ultimate arbitration award, though, still must first be converted to a judgment by a court of competent jurisdiction before it can be legally enforced.

Notwithstanding, contractors generally favour arbitration because of its finality and because of their ability to plead their case to someone who understands construction, while many lawyers prefer litigation, as they perceive that there is greater control, more structure and because it provides a greater comfort zone.

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?

The International Chamber of Commerce (ICC) is probably the best known of the international tribunals for construction contract disputes and has been considered by many to be the most favoured provider. However, the International Centre for Dispute Resolution, which is part of the AAA, has gained recognition and acceptance as a reliable entity for arbitration among international parties, if for no other reason than it is less expensive than ICC arbitration. If the project is performed in the United States, the foreign contractor should anticipate that US contractors will insist upon arbitration before the AAA pursuant to its Construction Industry Arbitration Rules and often will seek to have the law of a particular state apply to the dispute. This is particularly so if the contract form is derived from one of the familiar standard forms that are generally well understood by US contractors and designed to reflect US legal principles.

The International Federation of Consulting Engineers contract forms are widely used abroad but are rarely used in domestic projects. Further, the US contractor often specifies that the venue for any arbitration be in the United States to minimise the cost of the arbitration, as most or all of the necessary witnesses would be located here and the project site would be more readily accessible for a site inspection if that were necessary.

Dispute resolution with government entities

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

The concept of sovereign immunity applies equally to the arbitration of disputes as it does to suits in court, as arbitration cannot be commenced against a public entity unless that entity has agreed to arbitration as the procedure for the resolution of disputes. Claims against the federal government are generally brought pursuant to the Contract Disputes Act (CDA), which requires that claims be filed before the Civilian Board of Contract Appeals or the USCFC. However, under certain circumstances the federal government has agreed to arbitration as a means of resolving disputes arising under various treaties or under one of the many bilateral investment treaties between the United States and other sovereign nations. If an investor's rights under the treaty are violated, it may seek recourse against the United States by way of international arbitration. Such disputes are often resolved under the auspices of the

International Centre for Settlement of Investment Disputes, rather than suing the host state in its own courts. Individual states and local governments in the United States are not subject to federal treaties and, thus, cannot be compelled to arbitrate unless there is a specific state statute that compels or permits arbitration. An example of such a statute is New Jersey's Local Public Contracts Law, which requires that all construction contracts with local governments provide that disputes arising under the contract shall be submitted to a method of alternative dispute resolution, such as mediation, binding arbitration or non-binding arbitration. If a state or the federal government has agreed to arbitrate a dispute, any arbitration award entered against them would be enforceable in the United States pursuant to either the Federal Arbitration Act or the analogous state arbitration act.

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?

The US is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which has been incorporated into the Federal Arbitration Act. As such, a US court is obliged to honour and enforce foreign arbitration awards to the same degree, and in the same way, as other signatory countries. However, a US court will not enforce an arbitration award issued by a foreign tribunal where the award was voided by a court of the country under whose law the arbitration was brought, or if, upon a party's assertion, the US court finds that the arbitration award does not meet the standards set forth in article V of the New York Convention, such as for lack of capacity to arbitrate, lack of notice to a party, the issues were outside the scope of the arbitrator's authority or improper appointment of arbitrators.

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?

There is generally no specific limitation period applicable solely to construction disputes; many different statutory limitation periods may apply. Which period applies depends on various factors, such as the nature of the legal claim (eg, tort or contract) and the party being sued. Further, there are no uniform limitation periods among all the states, but periods typically range from between two and six years from the accrual of the cause of action. Suits against public entities for breach of contract, such as against the federal government under the CDA, often have a very short limitation period of only one or two years. The consequence of failing to commence a lawsuit or arbitration within the applicable time frame will bar the party's claims.

If a party commences a lawsuit against a design professional for negligence or malpractice, some states also require that the party commencing the action file with the court an affidavit of merit either by, or supported by, an independent professional attesting to the merit of the claims asserted against the designer. The affidavit of merit must usually be filed within a specified number of days after the action is commenced or the designer files its answer. Failure to timely file an affidavit of merit as required will result in a dismissal of the lawsuit, which cannot be cured by refiling the action.

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?

The US was a party to the Stockholm Declaration of 1972, but the action plan and common principles it provided were never incorporated into US legislation. Rather, the federal Environmental Protection Agency (EPA) was established to safeguard human health and conserve the natural environment. Today, there are extensive state and federal environmental laws affecting construction projects, although those most typically encountered are those addressing the traditional environmental media: water, soil and air.

Water is a major permitting concern for construction projects. Potential storm water run-off from the site could adversely affect water quality, and thus requires a project to meet either the requirements of the EPA construction general permit, state-specific general storm water permits or site-specific storm water permits. In addition, if work must be performed in wetlands or US waters, a Clean Water Act (CWA) section 404 permit is typically required. Recent federal court decisions have led to the development of discharge criteria for storm water at construction sites, as well as revisions to federal wetlands rules and guidance. The goal of the CWA is to protect and maintain the nation's waters by prohibiting the discharge of pollutants into those waters.

During a construction project, solid waste generation (hazardous and non-hazardous) is expected and is regulated by the federal Resource Conservation and Recovery Act and by various state statutes, which establish specific requirements for properly handling, storing, transporting and disposing of the waste. Further, air quality related to construction activities is regulated by the federal Clean Air Act and numerous analogous state statutes. These laws are designed to control the generation of particulate and ozone precursor emissions, such as dust, vehicle emissions and burning debris, and release of chlorofluorocarbons (CFCs) (these are contained in refrigerators, air conditioners and chiller units) or other ozone-depleting substances. Emissions from heavy equipment are now being regulated at both state and federal levels, with the recent federal stimulus bill providing funds for retrofitting and updating equipment.

There are also specific regulations applicable to asbestos and lead-based paint abatement in buildings being renovated or demolished.

When engaged in a project for a federal agency, a contractor may also be subject to certain constraints under the National Environmental Policy Act, which requires all federal agencies to prepare environmental impact statements assessing the environmental impact of, and alternatives to, construction and post-construction activities, including water quality impacts, wetlands impacts, air quality impacts, endangered species impacts pursuant to the Endangered Species Act and historic resources impacts.

Lastly, the construction industry has embraced 'green' or sustainable building and development. Many states now have regulatory, permitting and financial incentives that encourage such development. Further, green initiatives and laws are being developed at the federal level that will affect federal projects, as well as non-federal construction.

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?

There are extensive state and federal environmental laws affecting construction projects, though those most typically encountered impose duties and liabilities involving the traditional environmental media: water, soil and air. The main federal statutes, which have comparable state statutes, are: the CWA, which protects and maintains the nation's waters by prohibiting the discharge of pollutants into those waters; the Resource Conservation and Recovery Act, which establishes specific requirements for properly handling, storing, transporting, and disposing of hazardous and non-hazardous solid waste; and the Clean Air Act, which is designed to control the generation of particulate and ozone precursor emissions, such as dust, vehicle emissions and burning debris, and the release of CFCs or other ozone-depleting substances. In addition, the Comprehensive Environmental Response, Compensation, and Liability Act may impose liability on developers and contractors in certain circumstances for the cleanup of hazardous waste. Destruction and disturbance of freshwater wetlands also is a significant concern when improving undeveloped land, as they are protected at the federal level by regulations promulgated under the CWA and by specific statutes in various states. These statutes and regulations are all applicable to construction activities and provide very detailed and exacting obligations on developers and contractors in terms of permitting their construction activities. Violations of these statutes can result in an array of potential liabilities; from a simple fine ranging from a few hundred dollars to several thousands of dollars for each violation and for each day that the statute is violated, to on-site and off-site remediation.

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'?

Although there are some restrictions on foreign investment by certain entities in various commercial areas (eg, atomic energy, certain communications services and activities deemed vital to national security), legally made foreign investments are protected as much as domestic investments. There is no federal statutory or regulatory scheme specifically addressing the protection of foreign investments directly related to construction or infrastructure projects, but the United States is a party to bilateral investment treaties and multilateral treaties, such as the United States–Mexico–Canada Agreement, which confirm the protection of foreign investments, including companies, shares, bonds, contractual rights, real and personal property, intellectual property, licences and other rights conferred by law.

Tax treaties

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

The United States has bilateral income tax treaties with approximately 70 countries. Generally, these treaties do not prevent an individual or company, residing in a treaty jurisdiction, from being subject to US federal income tax on services performed domestically. The same holds true for a US company performing services in a treaty country.

Notwithstanding this, a contractor from a treaty jurisdiction may be exempt from federal taxes on its 'business profits' if it does not have a permanent establishment (PE) in the United States. Typically, any kind of office or workshop will constitute a PE. If the contractor has no office or fixed place of business, and its only contact with the United States is a construction site of limited duration, treaty protection may be available, but many treaties provide that a building site or construction or installation project will not constitute a PE if it lasts for less than the period of time prescribed in the treaty.

If treaty protection is available, a foreign taxpayer is required to file a US tax return to claim the exemption. Significant penalties can be imposed for failure to file a treaty-based return in a timely manner. Nevertheless, while an exemption may be available from federal income taxes, state and local taxing jurisdictions in the United States are not bound by tax treaties and therefore may still impose a tax upon the contractor.

Currency controls

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

No.

Removal of revenues, profits and investment

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

There are generally no restrictions on the removal of profits and investments from the United States. However, there are many reporting requirements relative to the transfer of money and other assets abroad pursuant to the US Patriot Act, other similar statutes and various implementing regulations and protocols established by domestic and international financial institutions. The purpose of these laws and regulations is to halt money laundering and the funding of terrorist groups and activities. If these activities are suspected, the bank may be obliged to freeze the account and the money could be seized by government authorities. Under most circumstances, though, with full disclosure and reporting, as required by the relevant financial institutions and governmental agencies, and payment of federal taxes, the overseas transfer of monies earned on a construction project would not present a problem.

UPDATE AND TRENDS

Emerging trends

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

Among the many trends influencing construction and infrastructure in the United States, perhaps the most significant in 2022 are the Biden Administration's passage of the US$1.2 trillion Infrastructure Investment and Jobs Act (IIJA) and the impact of material shortages and price increases. The latter, and arguably the former as well, has been complicated by labour shortages, breakdowns in the supply chain and the inflationary effect of these issues, as well as the war in Ukraine.

The approved spending plan in the IIJA covers many of the Biden Administration's top priorities, such as new and improved roads, bridges and railways (the most significant share of the investment), the power grid, resiliency and climate initiatives, broadband (particularly in rural areas), public transit and airports, drinking water, and several billion dollars for additional projects. The IIJA earmarks moneys for certain specific projects and allocates other moneys among the states to be used in accordance with the goals of the legislation. For projects

financed by the IIJA, this new law also emphasises several elements that are highly relevant to contractors, such as encouraging the use of PPP as a procurement method, the use of unions and DBE businesses with a focus on those led by women and people of colour, and utilising project labour agreements (PLAs).

While the influx of financial assistance from the federal government is helpful to states to launch their construction initiatives, the construction industry and its projects – in the United States and around the world – are being challenged by material shortages and price increases, labour shortages, breakdowns in the supply chain and the inflationary effect of these issues. There are reports of delays and cost increases for many construction materials – most importantly steel – but also nickel, aluminium and copper, such that construction costs and schedules are now being impacted. The war in Ukraine and the effect of the economic sanctions imposed on Russia by the United States and other countries will likely continue to exacerbate the strain on material supplies, resulting in further delays and price increases for contractors. Contractors and all parties to the contract will do well to negotiate clauses that spread the risk of unanticipated escalation between the parties in a way that is fair and appropriate. Parties may also consider clauses to address delay damages resulting from tariffs, the covid-19 pandemic, the war in Ukraine or other similar events. Finally, consider making best efforts to minimise and mitigate the cost and time impact of the unanticipated events, regardless of who bears responsibility.

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