LEXOLOGY
Getting The Deal Through

CONSTRUCTION 2024

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Jurisdictions

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Introduction

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For the past three years of Lexology Getting The Deal Through: Construction, our introduction has focused on covid-19 and the global effect of the pandemic on the construction industry. Over those years, the industry has faced numerous challenges and even more uncertainty as to the effect it would have on the industry. Governments all over the world enacted legislation and executive orders (or their overseas equivalents) to address the impacts of the pandemic and preserve public health. In the United States, in 2021, President Biden issued several executive orders, including one that ensured that federal contractors and subcontractors have adequate covid-19 safety protocols. Fast forward to 2023, and President Biden has signed into law Public Law No. 118-3 and issued Executive Order EO 14099 declaring that the national emergency associated with covid-19 is terminated, essentially bringing a formal end to the pandemic in the United States.

But is it really over? While there certainly has been a dramatic reduction in hospitalisations and governmental restrictions, as well as requirements associated with the virus to stave off mass infections, the effects of the pandemic on the industry continue to linger on. Supply chain issues for raw materials and labour shortages still persist, and subcontractor pricing is dramatically higher than pre-pandemic levels. Where force majeure clauses were often glossed over as mere boilerplate construction contract provisions that were rarely used, they have now become the focus of redrafting. New consideration is being given to these clauses to provide for a better allocation of the risks and costs associated with such incidents, as well as an expansion of what constitutes a force majeure event entitling a contractor to relief.

Certainly, the pandemic has forever changed how contractors bid and administer their projects. However, for all the chaos and disruption caused by the pandemic, there was an upside. Companies and people were forced to think differently, to work differently, to adapt to a changing and uncertain world and economy. The industry learned to embrace new technologies and to become more efficient. The pandemic certainly created a new paradigm that will remain with us for years to follow. With each end spawns a new beginning. So is true with this issue of Lexology Getting The Deal Through: Construction.

Sixteen years ago, my partner and mentor, Bob Peckar, was asked to serve as the editor of a new publication on construction as part of the Getting the Deal Through series. At that time, I had the privilege of working with Bob and collaborating with him to develop the insightful frequently asked questions contained in this volume, which have been answered by renowned lawyers from numerous countries around the world. And since that time, he and I have worked together to provide the readers of this esteemed publication the benefit

of our knowledge and experience in answering those questions as they pertain to the United States. This year, Bob decided to pass the torch and step down as editor, and while I will miss his collaboration on this publication, I now have the pleasure and opportunity to continue the publication with my partner and friend, Jerry Brodsky, who heads Peckar & Abramson's Latin American Practices Group.

So please join me in thanking Bob for all his hard work and dedication in developing this book and to welcome Jerry on his inaugural issue. Please also join me in thanking the efforts of the excellent team of international lawyers who have contributed to this year's publication to provide you with their knowledge and insight into construction and construction law to assist you in understanding the laws in their jurisdictions.

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Summary

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?

If a foreign designer or contractor intends to establish an operation in Armenia, they should consider the following aspects: the business structure; obtaining a work permit for non-residents; obtaining licences if required; and knowledge of local technical norms in the sphere of construction.

The process of establishing a business structure in Armenia has been simplified. It can be accomplished by forming a legal entity such as an LLC or CJSC, or by acting as an individual entrepreneur. Additionally, a foreign legal entity has the option to open a representative office or branch in Armenia. If standard documents such as the charter of a legal entity and decision on establishment are utilised, the registration process for a legal entity can be completed within a few days.

The general rule is that a work permit is required; however, it is worth mentioning an exception in this context. According to the 'On Foreigners' Law, the following individuals can work in Armenia without obtaining a work permit:

- founders and executive heads of commercial organisations in Armenia with foreign capital, wherein the statute provides for more than half of the voting rights, for the purpose of working within said organisations;

- employees of foreign state commercial organisations working in branches or representative offices located within Armenia; and
- those who are covered under the applicable international agreements of Armenia (countries of Eurasian Economic Union).

As per the provisions stipulated in the law on licensing, it is mandatory for the developers of urban planning documents and parties implementing construction works to obtain a licence to conduct business operations in Armenia under specific circumstances.

Finally, to ensure a seamless process devoid of administrative setbacks, it is important to have knowledge of the local construction regulations and technical norms. It has been observed that certain scenarios may arise where the international standards do not align with the domestic technical norms of Armenia. In such situations, large entities may engage the services of a local consultant to address this issue.

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?

This requirement is applicable to all individuals and companies (whether domestic or foreign) engaging in operations within Armenia. The activities necessitating a licence include:

- elaboration of engineering sections of urban planning documentation;
- assessment of urban planning documentation;
- execution of construction works (except for small-scale buildings); and
- technical quality control of construction.

Conducting licensable activities without the requisite licence may lead to administrative consequences, such as an administrative fine of 300,000 Armenian drams or a tax-relative fine of at least 500,000 Armenian drams, wherein the damages incurred by the state, equivalent to the fees stipulated for obtaining the licence, shall also be factored in. There is also criminal liability: a fine will be imposed as a punishment, and the maximum possible term of imprisonment is three years.

Competition

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

There is no such regulation. In any case, when it comes to public procurement, standard practice is to allow any entity, including foreign ones, to apply for participation in the tender. Nevertheless, the Armenian government may accept specific exceptions related to national security concerns.

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?

These are primarily offered through the Law on Procurement and other decisions established by the government in accordance with that law. The procurement process adheres to the following principles as per the law: competitive, transparent, proportional, public and non-discriminatory organisation of process with standardised regulations; widened participation to encourage competition for contract conclusion; and equity.

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 concluded by a representative of one party with the other party in a malicious conspiracy can be declared void by a court upon the application (claim) of the aggrieved party.

While there is no direct provision in the law regarding the implementation of the agreement after such circumstances, the legal consequences of any unlawful actions committed by either the customer or participant during the procurement process are determined by the Law on Procurement. This law also obligates officials to report any such unlawful actions to law enforcement state bodies upon receiving such information. Additionally, private sector representatives may also bring up such issues through appeals in the procurement process.

Procurement-related contracts contain provisions allowing the unilateral termination of the contract by the state authority in the event of the discovery of illegal actions, including bribery. This termination would not require the state authority to provide any further compensation or payments. The law also establishes that individuals, or their representatives of the executive authority, who have been convicted of bribery, giving a bribe or crimes related to intermediation in bribery within five years prior to the date of application, do not have the right to participate in procurement procedures, except in cases where the conviction has been extinguished or cancelled in accordance with the law.

The law imposes criminal liability in the form of imprisonment for those who give, receive or act as intermediaries in receiving bribes, whether in the private or public sector. The minimum sentence for this offence is two months of imprisonment, while the maximum sentence may be up to 12 years, depending on the amount of the bribe and other circumstances.

There is no legal provision for payments intended to encourage public officials to perform their duties more efficiently.

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. Such a requirement or type of responsibility is not defined by Armenian legislation.

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?

Pursuant to the Civil Code, it is illegal to provide donations to any state employees or officials of local self-government bodies in relation to their official capacity or the performance of their official duties.

According to the law, any kind of legal entity, including foreign legal entities and international organisations, as well as anonymous individuals, is prohibited from making donations to political parties. The term 'donations' should be interpreted broadly to include any type of contribution, and not limited to the transfer of property.

It is important to note, however, that this practice is not considered a legitimate form of conducting business operations in Armenia.

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 the context of the Law on Procurement, it should be noted that the procedures aimed at preventing conflicts of interest and corruption in relation to developers or their representatives are not carried out in the same manner as for public servants (declaration of property, income, interest and expenses for public servants is regulated by law).

For instance, developers are not required to make a declaration regarding their property and income. However, during public procurement, contractors are obligated to provide UBO declarations (any legal entity that intends to participate in the procurement process) and declare any conflicts of interest they may have.

In any case, if the construction manager or other specialist is an employee of a state body and is a public servant under the public service law, then he or she is subject to the same anti-corruption and compliance rules.

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?

Armenia has adopted an open-door policy towards foreign investment. This means that the government welcomes and encourages foreign investment in accordance with the applicable laws and regulations governing foreign investment in Armenia. There are no legal obstacles or hidden dangers that would prevent the implementation or transfer of a business by a foreign contractor in Armenia. However, a foreign contractor may encounter technical or professional challenges when conducting business in Armenia, which they should consider.

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 the context of public procurement, the regulatory and coordination aspects of the procurement process are approved by the authorised body, which is the Ministry of Finance. The Ministry of Finance approves the standard forms of procurement process documents, such as invitations and announcements. The procurement notice package includes the form of contract along with all other essential terms and annexes, if applicable. FIDIC contracts are usually used (or serve as a basis) for concluding construction contracts for major infrastructure projects.

Procurement-related documents are prepared and published in Armenian and Russian, and procurement announcements, including pre-qualification announcements, are also published in English. Applications for participation can also be submitted in English or Russian, in addition to Armenian.

In the private sector, the parties are guided by the principle of freedom of contract and are free to negotiate and define the terms of the contract, as long as they comply with the mandatory provisions of the Civil Code. The contract must be at least in a simple written form.

While it is not mandatory to conclude contracts in Armenian, it is recommended to have at least a bilingual version of the documents, including Armenian text.

In any case, in international matters, including provisions of foreign law in a contract is both possible and frequently employed: when dealing with a foreign party, one can choose the applicable law and mechanism for dispute resolution.

In accordance with the exclusive jurisdiction of the courts of Armenia in cases with foreign individuals or entities, disputes related to rights over immovable property situated within the territory of Armenia can only be resolved by the courts of Armenia. If the parties have agreed on an alternative dispute-resolution mechanism in their contract, the affected party

may still initiate legal proceedings in an Armenian court if the opposing party owns immovable property in Armenia.

However, if both parties involved are residents of Armenia, it is generally recommended that Armenian law govern the contract, although there may be differing opinions among other experts.

Payment methods

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

In the absence of any provision in the work contract for advance payment for work performed or individual stages thereof, the customer is obliged to pay the contractor the agreed price upon the final transfer of the work results, provided that the work has been properly completed within the agreed period or earlier, with the customer's consent.

The contractor may request an advance payment or a deposit only in certain cases and in the amount indicated by law or the work contract.

Payments under a contract should be made in a non-cash form, such as bank 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?

According to the Civil Code, unless there is a legal obligation or a provision in the construction contract requiring the contractor to perform the work personally, the contractor is allowed to engage third-party individuals or entities (subcontractors) to fulfil their contractual obligations. In such cases, the contractor assumes the role of a general contractor.

In large-scale projects, the contractual relationships are typically structured in accordance with the project owner–general contractor–subcontractors matrix. This framework involves the project owner contracting with a general contractor to oversee and manage the project, while the general contractor may then contract with various subcontractors to perform specific portions of the work. The roles and responsibilities of each party are typically defined in the contract, which may include provisions regarding payment, timelines, quality standards and dispute resolution mechanisms.

PPP and PFI

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

Armenia enacted the Law on the Public-Private Partnership on 28 June 2019, with the objective of establishing a legal framework for PPP relationships, outlining implementation

criteria and procedures, setting up an institutional framework of governance and defining applicable principles.

With respect to PFI, there is currently no specific legal framework in place.

Joint ventures

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

As per the provisions of the Law on Procurement, it is possible for participants to take part in the procurement process as a joint activity, which is commonly referred to as a consortium. The procedure for participating in the procurement process as a consortium is determined by the invitation to participate in the procurement process. In such a scenario, all the consortium members bear joint and equal responsibility for the performance of the contract, including the obligations arising from the procurement process. The agreements for public procurement should include regulations, that the withdrawal of a consortium member from the joint activity may result in the unilateral termination of the contract between the client and the consortium, and the imposition of contractual liabilities on the remaining 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?

According to the Civil code, if non-performance or improper performance of an obligation occurred by fault of both parties, the court shall accordingly reduce the amount of liability of the debtor. The court shall also have the right to reduce the amount of liability of the debtor if the creditor intentionally or by negligence facilitated an increase in the amount of losses caused by the non-performance or improper performance or did not take reasonable measures to reduce 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?

According to the Civil code, a debtor (owner) shall be liable for non-performance or improper performance of an obligation by third parties (contractors) to whom performance was entrusted, unless a statute establishes that the liability is borne by the third person who is the direct performer.

The rule states that the seller is responsible to the buyer, making the seller the defendant in such cases.

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 contract for construction work may provide for a duty of the party upon whom lies the risk of accidental loss of or accidental harm to the object of construction, material, equipment and other property used in construction or liability for causing harm to other persons during the conduct of construction to insure the respective risks. The types can be:

- construction works;
- installation work;
- construction site equipment;
- construction equipment;
- any property included in construction works;
- objects belonging to the insured or the customer located on the construction site or near it;
- cleaning costs;
- liability to third parties; and
- life and health of workers from accidents.

The maximum liability amount (insurance amount) can be defined by 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?

There are no specific requirements in place for hiring domestic workers in the implementation of large projects. However, in practice, there may be agreements or understandings that a certain percentage of the labour force should be sourced from the domestic market.

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?

Harm caused to the life or health of an employee in the performance of contractual duties shall be compensated according to the rules provided by the Civil Code unless a statute or contract provides for a higher measure of liability.

Upon termination of an employment contract, and after it, the employer is obliged to make such compensations with the employee.

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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 law on foreigners applies to foreign construction workers, particularly with respect to obtaining residency permits on the basis of obtaining work permits. Foreigners who are exempt from the requirement to obtain work permits under relevant international agreements may work in Armenia without a work permit (these are mainly citizens of the Eurasian Economic Union countries).

One of the principles of the Labour Code is the equality of parties to labour relations, regardless of their gender, race, nationality and so on.

Therefore, from a legal standpoint, a foreign worker has the same rights as a local worker.

Specific requirements have been defined by the law in connection with obtaining a work permit and conducting processes based on it to obtain residency permits for legal residence in Armenia, the violation of which may result in administrative liability and annulment of the person's visa, and may also be the basis for state authorities to initiate deportation proceedings against the foreigner.

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 we apply the reasoning that the foreign contractor has a legal entity or representative office established in Armenia, then the following factors must be considered.

According to Armenian legislation, companies may stay inactive without any time limitations. At the same time, the government has twice enacted an 'inactive company amnesty, which states that any company or individual entrepreneur that is not providing tax reports according to the records and does not have any property may be automatically dissolved, and any tax obligations of up to 10,000 Armenian drams (approximately US$25) shall be considered as resolved. At the same time, during both processes only separate companies and entrepreneurs were subject to the process, but not the branches or representative offices (separated subdivisions).

The closing of a legal entity shall be undertaken in the form of liquidation. The process will take three to four months.

The main aspects of this process are:

- start of the liquidation process: shareholder's authorised person or body resolution on liquidation;
- the period for the submission of claims by creditors;
- expiry of the two-month term and drawing up the interim liquidation balance sheet;

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- satisfaction of the claims of creditors;
- drawing up a liquidation balance sheet; and
- registration of the company's liquidation.

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 the Civil Code, the performance of obligations may be secured by a pledge, penalty, retention of property of the debtor, surety, guaranty, prepayment or other means provided by a statute or contract. In any case, the occurrence of a pledge is not specifically defined by law, and therefore the parties are entitled to include such conditions in the contract.

Payments are often made in stages or through a prepayment arrangement.

Terms may include the payment schedule, the amount and method of payment, the time frame for payments and any penalties for late payments.

'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?

According to the Civil Code, the general contractor is liable to the customer for the consequence of non-performance or improper performance of obligations by the subcontractor, in accordance with articles 351 and 419 of the Civil Code, and is liable to the subcontractor for non-performance or improper performance by the customer of obligations under the work contract.

Therefore, it is not possible to establish the payment options under Armenian legislation for the considered scenarios.

Contracting with government entities

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

The law does not provide such protection measures. Procurement relations are considered civil law relations and are regulated by the legislation governing such relations in Armenia In accordance with the provisions of the Code of Civil Procedure, the state and communities possess equal standing and are treated on a par with individuals and legal entities in matters governed by the code.

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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 the contract for construction work the customer undertakes the duty to create the necessary conditions for the contractor to do the work, to accept the result and to pay the agreed price; that is to say, the responsibility for cancelling or suspending a project in Armenia typically rests with the project owner.

According to the Civil Code, unless otherwise provided by the work contract, the customer may at any time until the submission to it of the result of the work refuse to perform the contract, paying the contractor a part of the established price proportional to the part of the work done until the receipt of notice of the refusal by the customer to perform the contract. The customer shall also be obligated to compensate the contractor for the losses caused by the termination of the work contract within the limits of the difference between the price determined for the whole work and the part of the price paid for the work done.

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 Civil Code defines the consequence of non-fulfilment of the obligation in case of force majeure. In particular, unless otherwise provided by a statute or contract, a person who has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless it proves that proper performance became impossible as the result of force majeure (ie, extraordinary circumstances unavoidable in the given circumstances). Such circumstances do not include violation of obligations by contract partners of the debtor, absence in the market of goods necessary for performance, nor the debtor's lack of the necessary monetary assets.

In construction contracts, the description of force majeure and its terms and regulations are typically given a wider scope.

DISPUTES

Courts and tribunals

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

Construction disputes, like other disputes, are subject to solution in the court of first instance of general jurisdiction, and the decisions of the court can be appealed in subsequent

instances – appellate and cassation review. In Armenia, there are no specialised courts or institutions for the resolution of construction disputes.

Dispute review boards

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

In the context of major government projects, the contracts are typically executed in accordance with the provisions of FIDIC, which include the utilisation of DRBs. As such, parties involved in these projects resort to DRBs as a means of small dispute resolution.

Legislation does not provide specific regulations governing the conclusive status of DRB decisions. However, legislation defines decisions made by other bodies that are final (arbitration and judicial bodies).

Consequently, it can be observed that DRB decisions have an advisory character.

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?

Typically, in Armenia, including the construction industry, parties do not commonly apply for mediation as a means of dispute resolution, even though a separate law on mediation was enacted in 2018. In Armenia, irrespective of the situation, the court has the power to appoint mandatory mediation lasting between two and four hours if there is a high probability of reaching a mutually acceptable resolution to the dispute.

A licensed mediator, as defined by the Law on Mediation, is a qualified individual who is registered in the register of licensed mediators and has obtained the necessary qualification to act as a mediator. To qualify as a licensed mediator, an individual must be over the age of 25 and have higher education.

Confidentiality in mediation

30 Are statements made in mediation confidential?

According to the law, it is the obligation of a mediator to maintain confidentiality during the mediation process. Any information disclosed or expressed during the mediation, as well as the content and nature of the mediation, is considered confidential. However, there may be situations where confidentiality can be disclosed in accordance with the law.

There is no explicit definition for the parties regarding confidentiality. However, it can be determined and regulated by the agreement between the parties regarding the appointment of 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?

When it comes to resolving disputes arising from contracts concluded with standard terms, such internal disputes are predominantly resolved through court proceedings.

However, in the case of megaprojects, where preliminary discussions are held before the conclusion of the relevant agreement, there is a clear preference for international arbitration as the chosen method of dispute resolution.

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 standardised practice exists, and the approach in each case is influenced by various factors, including the financial implications of the dispute, the expenses associated with arbitration and other relevant circumstances.

It is worth noting that the International Chamber of Commerce (ICC) has played a significant role as an arbitrator in numerous prominent disputes that have come to our attention.

Arbitration and the objective of avoiding conflicts of interest play a crucial role in determining the appropriate jurisdiction for the resolution of legal disputes.

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?

Armenia recognises and enforces the decisions of arbitral tribunals from other states party to the New York Convention, and vice versa. The application may be rejected based on the following grounds:

- at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
    - a party to the arbitration agreement has been under some incapacity as per the law applicable thereto; or the said agreement is not valid under the law to which

the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the stated party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, etc;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration by arbitration agreement can be separated from those not so submitted, that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure has not been in accordance with the arbitration agreement of the parties or, failing such agreement, has not been in accordance with the law of the country where the award was made; or
- the award has not yet become binding on the parties or has been set aside or its enforcement has been suspended by a court of the country in which, or under the law of which, that award was made; or

- if the court finds that the award would be contrary to the public order of Armenia, or the subject matter of the dispute is not capable of settlement by arbitration under the law of Armenia.

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, the concept of the statute of limitations generally applies with a standard time frame of three years. However, the specific duration varies for different types of claims, ranging from as short as 10 days or one month to as long as 10 years.

Regarding claims related to the inadequate quality of work performed under a construction contract, the statute of limitations is one year. For claims concerning buildings and constructions, the limitation period is three years.

If the client has accepted the work results in parts as specified in the contract, the limitation period for claims begins from the date of full acceptance of the completed work.

It is important to note that the statute of limitations only bars the initiation of a dispute if the opposing party raises the objection within the prescribed time frame. If no such objection is made, the courts will proceed with the case.

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?

Armenia has not signed or ratified the specific declaration in question. However, Armenia has accepted and adopted other international treaties that are based on the principles outlined in the declaration.

In light of this, the Ministry of Environment is actively engaged in collaboration with international partners, such as UNP-UNEP, to align national legislation with the resolution of current environmental challenges.

Regarding construction and nature conservation, this sector is subject to various regulations, including a legal requirement to conduct an environmental impact assessment (EIA) prior to commencing construction in cases prescribed by law. The law defines relevant cases for an EIA, taking into consideration factors such as the scale of construction, the nature of the intended project and the location of the construction site.

An EIA is mandatory for any construction activity within specially protected environmental areas.

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?

In terms of obligations, the Law on Urban Development and the regulatory legal acts and orders adopted on its basis, which establish technical regulations, regulate the duty of individuals engaged in urban development activities, including environmental obligations.

Furthermore, prior to engaging in any activities within specially protected natural areas, individuals are obliged to conduct an EIA. In the event of a positive conclusion, only the intended activity may be carried out.

The responsibility is determined by the Code on Administrative Offences and the Criminal Code, respectively, in the form of an administrative fine or criminal liability.

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'?

Armenia has engaged in bilateral agreements with 42 countries concerning the promotion and mutual protection of investments, and this process is ongoing.

These agreements provide additional guarantees and protective measures for investors from both parties and their investments, in accordance with international law.

In most of these treaties, the term 'investment' encompasses various types of investments within the territory of one party that are directly or indirectly owned or controlled by nationals or companies of the other party. This includes equity, debt, service and investment contracts. The definition of investment also encompasses:

- tangible and intangible property, including movable and immovable property, as well as associated rights, such as mortgages, liens and pledges;
- ownership of a company or shares of stock, interests in a company or interests in its assets;
- claims to monetary value or claims to performance that hold economic value and are connected to an investment;
- intellectual property; and
- any rights granted by law or contract, as well as licences and permits granted under the 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?

Armenia has ratified international treaties on the avoidance of double taxation with 51 countries, and this process is ongoing. The rules and regulations vary uniquely for each country. These treaties regulate a wide range of legal relationships, including income derived from contract work (such as dividends). For instance, the tax rate applied to dividends in Armenia is 5 per cent.

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 is no law restricting the possibility of foreign currency exchange. However, due to geopolitical or other circumstances, there may be some temporary limitations by the Central bank of Armenia or individual banks regarding the determination of the maximum allowable amount for certain currencies. According to the law on foreign investment, foreign investors

shall be entitled to open current, settlement or other accounts in the banks of Armenia, authorised by the legislation of Armenia as prescribed by the legislation of Armenia. Foreign investors shall be entitled to use, as prescribed by the legislation of Armenia, their legally gained means on the domestic market of Armenia or for the purpose of obtaining goods.

Removal of revenues, profits and investment

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

According to the law on foreign investment, the profit (income) of a foreign investor shall, after paying the taxes and other fees established by legislation, remain under the disposal thereof. Foreign investors and foreign-recruited employees shall be entitled to and shall be provided with the guarantee to freely export their property, profit (income) and other means legally gained, as a result of investment, in the form of investment outcomes or remuneration for work or compensation provided to the foreign investor.

UPDATE AND TRENDS

Emerging trends

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

Armenia encountered significant challenges related to development until 2020–2021. The difficulties emerged when a developer involved in a construction contract obtained the necessary administrative permits and commenced construction, and if an individual (such as the owner of an adjacent property or residents of a building) contested the construction permit in court, and if the court accepted the claim for hearing, the construction would automatically be subject to suspension under the force of law.

Before the amendments to the legislation, it was common for most large construction projects to face the issue of legal disputes. This means that regardless of who was challenging the issuance of the construction permit, no construction work should be implemented until the court case is finally resolved. Multiple lawsuits could be initiated for one construction permit, resulting in a complex legal landscape and potential delays in the construction process.

Consequently, numerous projects faced suspension because of these disputes, leading to legal proceedings with a duration of several years.

The matter has now been addressed through legislative reforms, and amendments have been introduced to Armenian legislation to prevent similar issues from arising in the future.

At present, the suspension of construction (which are relatively rare) can only be implemented through a court decision.

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Australia

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Summary

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 and industry requirements under the following legislation:

- Queensland Building and Construction Commission Act 1991 (Qld) (QBCC Act) and associated regulations; and
- Building Industry Fairness (Security of Payment) Act 2017 (Qld) (BIF Act) and associated regulations.

In New South Wales, the law which deals with regulation of the industry and licensing requirements is:

- The Home Building Act 1989 (NSW);
- The Design and Building Practitioners Act 2020 (NSW); and
- The Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW).

In South Australia, the primary pieces of legislation relating to licensing are:

- The Building Work Contractors Act *1995* (SA); and
- The Planning Development and Infrastructure Act 2016 (SA).

In Tasmania, the legislation regulating licensing and the industry is:

- The Building Act 2016 (Tas);
- The Occupational Licensing Act *2005* (Tas); and
- The Residential Building Work Contracts and Dispute Resolution Act 2016 (Tas).

In Victoria, the law governing licensing and the building industry is as follows:

- The Domestic Building Contracts Act 1995 (Vic); and
- The Building Act 1993 (Vic).

In Western Australia, the applicable legislation for building matters is:

- Building Act 2011 (WA);
- Building Services (Complaint Resolution and Administration) Act 2011 (WA);
- Building Services (Registration) Act 2011 (WA);
- Local Government (Miscellaneous Provisions) Act 1960 (WA); and
- Home Building Contracts Act 1991 (WA).

In the Australian Capital Territory, the primary pieces of law relating to licensing and building are:

- The Building Act 2004 (ACT); and
- The Construction Occupations (Licensing) Act 2004 (ACT).

In the Northern Territory, the law to be aware of with respect to building matters is:

- The Building Act 1993 (NT) and the associated regulations.

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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 adopted a similar legislative response.

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

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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 236G to 236K 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 strongly discouraged by the Australian government. However, this can act as complete defence to foreign bribery under section 70.4 of the Criminal Code 1995 (Cth), though it is noted that it can be extremely difficult to differentiate between facilitation payments and bribery.

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. The unpaid party may also proceed to court.

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Payment terms of between 14 days and 35 days from the date of a progress claim are common, though are usually expressed in business days, not in calendar days.

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.

For Commonwealth and state government agencies, the National PPP Policy and Guidelines apply broadly to offer a consistent framework for delivery of PPPs.

Locally, each government is governed differently. For example, the NSW Local Government are governed by legislation (Chapter 12, Part 6 of the Local Government Act 1993 (NSW)) and are guided by the NSW Public Private Partnership Policy & Guidelines 2022. In the ACT, The Partnerships Framework underpins PPP delivery and, in Queensland, the Queensland PPP Supporting Guidelines apply.

The two primary pieces of Commonwealth legislation which apply on a general basis to PPPs are:

- The Foreign Acquisitions and Takeovers Act 1975 (Cth); and
- The Competition and Consumer Act 2010 (Cth).

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.

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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 proportionality of the negligence is not specifically 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).

In 2020, NSW passed the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (RAB Act), 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 RAB Act 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 as a result of a safety defect.

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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 the 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 and that the sponsoring employer has a strong record of employing local labour.

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 outstanding wages or remuneration owing, 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 are 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;
- retaining important business records;
- 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?

Security of payment legislation provides the ability for contractors to claim for any unpaid construction work or supply of related goods and services.

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, the period is three months, and in Queensland, South Australia and Western Australia the period is six months. The outlier is 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. Therefore, the parties must define a force majeure event in their contract and include relevant clauses as to the impact of such an event.

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 or the Queensland Building and Construction Commission). Where these bodies are unable to resolve these disputes, the tribunal in the state or territory may have jurisdiction to hear these matters. In some instances, the tribunal may not have jurisdiction, in which case the parties may have the matter heard in the relevant court (depending on the monetary value).

While rectification orders can be 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 and the remedy sought.

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 NSW this is NSW Fair Trading. In Victoria, Domestic Building Dispute Review Victoria is available to resolve residential building disputes.

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 the above bodies 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 body, 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 non-compliance.

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.

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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 because 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, as they are generally without prejudice.

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 can involve 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.

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

The current prevailing attitude 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. However, parties must either include an arbitration clause in their contract or come to a separate agreement at the time of the dispute to proceed 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?

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 (though the rules chosen can depend on the place where the arbitration will take place).

The International Arbitration Act 1974 (Cth) alongside the uniform commercial arbitration legislation of each state and territory, allows the UNCITRAL Model Law to have the force of law in Australia. The commercial arbitration legislation includes:

- Commercial Arbitration Act 2013 (Qld);
- Commercial Arbitration Act 2010 (NSW);
- Commercial Arbitration Act 2017 (ACT);
- Commercial Arbitration Act 2011 (Vic);
- Commercial Arbitration (National Uniform Legislation) Act 2011 (NT);
- Commercial Arbitration Act 2011 (SA);
- Commercial Arbitration Act 2011 (Tas); and
- Commercial Arbitration Act 2012 (WA).

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?

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 (Vic)). If a court were 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 1993 (Vic), which has been interpreted to extend this six-year period to 10 years. In Victoria, this 10-year period commences from the date of the grant of an occupancy permit in respect of the building work.

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. Further, in NSW, a claim for defective building works made under the Home Building Act 1989 (NSW) applies a statutory warranty period of six years for major defects and two years for minor defects.

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) ensure that various controls are in place to protect the environment and wildlife when a development is carried out. Importantly, in New South Wales, new amending legislation also now makes it an offence under those Acts to acquire financial or economic benefits from the commission of an environmental offence, and a court can order compensation payments be made by corporations or their directors equivalent to the financial benefit gained from that offence.

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 100 penalty units (A$18,492). In contrast, a person who illegally deposits industrial waste could be fined up to 10,000 penalty units (A$1,849,200). The value of penalty units also often changes.

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.

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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 Investment Agreement between Australia and Hong Kong, which builds on 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.

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. This building rating system has now been achieved and is called the Independent Construction Industry Ratings Tool.

In Victoria, the government has appointed a panel of six individuals to review high-rise regulations. The first task the panel focused on was establishing overarching principles to guide the building system review and identify key themes to be investigated and addressed throughout the reform process. In 2023, the panel will move on to Stage 2 of its review programme, in which it will seek stakeholder input focusing on the following areas for improvement:

- statutory duties;
- dispute prevention and resolution;
- compliance, enforcement and discipline;
- insurance;
- new building technology and information;

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- building maintenance; and
- complex and prefabricated plumbing.

In Queensland, major reform has been led by the Queensland Building Plan, which 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 2021, an updated version of the Queensland Building Plan was released which stated the objectives achieved to date and refocused its attention upon:

- a review of the role of property developers in the sector, including the impact of their financial and operational capacity, ethical behaviour and work practices;
- reviewing the Queensland Home Warranty Insurance Scheme to ensure it is structured to achieve the best possible outcomes in terms of consumer and industry protection, while also balancing other key factors like sustainability;
- reviewing the governance framework of the Queensland Building and Construction Commission to ensure that this framework reflects best regulatory practice;
- addressing the issue of combustible cladding;
- improving energy efficiency in the built environment;
- investigating the potential for buildings to contribute to the government's climate targets; and
- working with industry to facilitate the introduction of accessible housing requirements.

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 the 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.

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Summary

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 and taxation 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. For example, 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 personal 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 federal 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 combating 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 and asset misappropriation in relation to procurement and participation in domestic construction and engineering contracts also serves to enhance the integrity of the industry. As a corollary of the foregoing, facilitation payments are not allowable.

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 the 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-19.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/section-426.html.)

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, for example, on a variety of construction projects. The Canadian Construction Document Committee (CCDC) suite of contract forms are widely used, with the Stipulated Price Contract being the most common standard-form contract used for most projects in Ontario. The Canadian Construction Association also offers a standard subcontract form.

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.

Different levels of government also have their own standard forms, many of which are required to be available in both French and English.

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 typically contractually due and owing 30 to 45 days after submission. The payment mechanism is usually triggered by certification by the registered professional with contractual jurisdiction over the general contract.

In Ontario, for example, 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. Prompt payment provisions have also been implemented in other jurisdictions, such as in Alberta, Nova Scotia and Saskatchewan, and are under consideration in other jurisdictions such as British Columbia and Manitoba.

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, including design-bid-build, design-build, EPC, alliancing and Integrated Project Delivery.

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, Infrastructure Ontario in Ontario, the Public-Private Partnerships Office in Alberta, and the Société québécoise des infrastructures in Quebec), which are entities that comprise various skilled professionals familiar with project development, design and construction.

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 will typically be subject to a dense and comprehensive contractual arrangement (ie, a project agreement) between the public entity and the other project participants.

Specialised federal and provincial government agencies promote and oversee the use of P3 projects – for example, Infrastructure Ontario in Ontario, Partnerships BC in British Columbia, the Public-Private Partnerships Office in Alberta, and the Société québécoise des

infrastructures in Quebec – however, it has thus far not been considered necessary for the provinces to introduce bespoke legislation to allow for PPP projects.

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 joint venture parties based on their private contracting arrangements, which assign both risks and rewards between the partners for the duration of the project; however, it is typical for the members of a joint venture to be required by the contract, or project agreement, to accept joint and several liability to the owner.

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 common law, parties are generally free to seek indemnity or otherwise limit their liability in any way they see fit. There is no statutory prohibition to defining the limit of liability in contracts, although depending on the circumstances, courts may seek to construe such limitation of liability clauses narrowly.

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 generally prevents third parties from bringing a claim under a contract to which they are not a party, although in limited circumstances that are heavily fact-dependent, third parties may be able to rely on the construction contract as the basis for a defence to a claim or to enforce a benefit. In any event, 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 recovery for damages due to negligence on a construction project. The parties are afforded a range of insurance coverage options, including professional liability insurance for consultants, general liability insurance for the builders and

trades, course of construction/builders' risk 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 concerning the nature and extent of the insurance coverage necessary for each project to ensure that owners and contractors have an appropriate 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?

Generally, there are no mandatory laws outlining a minimum amount of local labour required for projects; however, it is not uncommon for governmental authorities to impose local labour requirements in their contracts and there are measures in place that pertain to the hiring of 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 with regard to statutory minimums. Failure to comply with the applicable law regarding termination of employment may attract a claim for damages by the terminated employee against the employer.

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.

For example, 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 Act(s) and regulations, human rights codes and labour relations codes. These laws, which are provincial and therefore vary in certain respects among the provinces, 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 Canada generally 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, lien legislation (such as 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 a number of provinces if properly drafted with clear and precise wording. As a result, courts will often construe ambiguous 'pay when paid' clauses in favour of the party seeking payment, as is the case, for example, under the laws of Nova Scotia.

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. For example, both Ontario (Crown Liability and Proceedings Act 2019) and British Columbia (Crown Proceedings 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 provisions that prevent a lien from attaching to Crown lands 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 some provinces – such as 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.

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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?

Generally, there are no specialist courts to hear construction disputes, although some provinces (such as Ontario) employ associate justices (previously referred to as masters) who specialise in construction lien matters (although for Ontario this is currently limited to Toronto). However, certain provinces have recently implemented adjudication as a supplementary, legislative regime which is summary in nature and which provides interim binding decisions in respect of construction disputes. In adjudication, parties are entitled to appoint an agreed-upon adjudicator, or else request that an appointing authority do so.

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 dispute review boards to efficiently resolve disputes on an advisory or interim binding 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, and benefits from the protection of legal privilege. However, the parties should also specify in their contract and/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 across Canada. The courts tend not to be equipped to hear complex commercial disputes in the construction and infrastructure industries, so mediation and arbitration have, to a significant extent, 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 commonly utilised are the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes, ADR Chambers, and the ADR Institute of Canada. It is also common for arbitrations in Canada to be ad hoc rather than institutional.

Generally, Canadian construction contracts will stipulate that the governing law of the dispute will be the substantive law of the province within which the project is located, along with the federal laws applicable therein. It is also common for the contract to stipulate that hearings (ie, the venue rather than the seat) are to occur in the jurisdiction where the project is situated, although as a result of the covid-19 pandemic, it is increasingly common for hearings to take place virtually.

Dispute resolution with government entities

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

In Canada, it is not uncommon 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. Where a federal government agency is involved, federal arbitration legislation governs (rather than provincial legislation).

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. The overwhelming majority of arbitration legislation in Canada –with respect to both domestic and international arbitrations – is based on the Model Law, and as such, the grounds for refusing enforcement are largely uniform across the country.

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?

Provincial legislation typically provides for a limitation period from the date of discovery of a cause of action, as well as a longer ultimate limitation period from the date of the wrongful act in question. For example, in British Columbia and Ontario, there exists 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. Relevant legislation generally allows parties to toll applicable limitation periods by agreement. In relation to lien rights and remedies, it is more common that parties must first preserve and perfect their lien (including by commencing a court proceeding), following which the parties would then stay or otherwise address the liening party's claim.

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 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 or environmentally sensitive in relation to protected species. 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. For example, in Ontario, the primary legislation is the Environmental Protection Act, which is administered by the Ontario Ministry of the Environment, Conservation and Parks. Of note, the Ontario government is currently in the process of phasing in a regulation pertaining to On-Site and Excess Soil Management, which governs the management (eg, reuse, testing, tracking and disposal) of excess soils. 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 with 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 and Alberta, while potential legislation is under consideration in other provinces, such as British Columbia and Manitoba.

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Summary

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 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 behaviours 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, will not be binding on any party and shall not be performed.

According to articles 163–164, 383, 385–391 and 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 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 business in China. Under Chinese law, no entity or person is 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 articles 163 and 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 become 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 made 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.

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 a consortium 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 articles 592 and 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 articles 21 and 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 on, 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 do participate.

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:

- 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.

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Summary

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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.

The draft Whistleblower Protection Act provides protection for people who report misconduct in certain areas. Companies with more than 50 employees must set up a reporting channel through which employees can safely report misconduct. It must be clear to whom the report is addressed, who has access to it, how inquiries are handled and within what timeframe a response should be made. Reports must be kept anonymous.

A person is protected if, at the time of the report, he or she had reasonable cause to believe that the reported misconduct was true and that the reported misconduct was covered by the law. In contrast, the whistleblower is not protected in the case of intentional or grossly negligent disclosure of inaccurate information. In these cases, the whistleblower is liable for the resulting damage.

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. Furthermore, if the foreign company provides a construction service in Germany (service provider) to an entrepreneur or to a legal entity under public law (service recipient), the service recipient is obliged to deduct 15 per cent tax from the payment for the account of the service provider. The same obligation applies to the recipient of the service if the construction work is performed by a foreign company. However, there is a possibility to avoid the payment of construction tax. The tax does not have to be withheld if the service provider submits to the service recipient an exemption certificate valid at the time of the counter-performance. Every service provider can request this certificate informally from his or her tax office.

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.

Bilateral agreements shall be formulated in German and, if the other contracting party uses one or more foreign languages, in this or these languages; German shall thus always be one of the languages of the contract.

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 the 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 labour law is employee-friendly in this respect, as the employee is not expected to bear the employer's entrepreneurial risk that could result from the sometimes unpredictable duration of a construction project. As a result, termination of employment contracts is very limited. Labour law and case law provide strong protection to employees, especially against unfair dismissal. Fixed-term employment contracts are possible, but there are some things to keep in mind:

- a fixed-term contract cannot be terminated unless contractually agreed;
- a fixed-term contract can be concluded for up to two years without a reason and can be extended three times; and

- in the case of fixed-term contracts that run for a longer period, the employer must provide a valid reason for the fixed term. Under labour law, good cause may exist when a company needs to perform work on a temporary basis. A temporary need for a specific construction project may be 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 a 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 him 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.

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?

With the amendment of the Building Energy Act, the primary energy requirement of residential and non-residential buildings may not exceed 55 per cent of the reference building (efficiency house standard-55). For 2025, it is planned to lower the efficiency house standard to 40.

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Iraq

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Summary

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. The project

owner then 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 the contract 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 of 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 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; and
- 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; or
    - 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; and

- 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 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:

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- 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 their 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 suchlike. 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 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 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 method 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:

- 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 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;
    - 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 to determine 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 take the form of progress payments against the letter of credit opened, based on the allocation of 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 payment; 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 had been working on drafting a law for PPP. In March 2023, the Council of Ministers withdrew the draft partnership law between the public and private sectors from the House of Representatives before starting a discussion of its paragraphs, according to a statement attributed to the head of the Parliamentary Economy, Industry and Trade Committee, that 'the government resorted to withdrawing the draft partnership law between the public and private sectors recently to amend its paragraphs within a package of laws', indicating that 'the committee was in the process of voting on its paragraphs'. Notwithstanding the foregoing, certain practices of PPP 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 (articles 315 and 320 thereof). 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, article 259 paragraph 3, 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 a 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 a 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 specialisation.*

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 2015, which define the contractor as a natural person who practises contracting work and holds the identity of registration and classification of Iraqi contractors. The contracting company 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. 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 on 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 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 coverage 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, 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 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 of employment for an indeterminate 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 during 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 all of these 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 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 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 the chapter regulating the employment of foreign workers is punishable by a fine of three times the worker's minimum daily wage up 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 Iraqi labour law and the labour treaties to which Iraq is a party 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, which should be paid to the terminated employee as the end-of-service payment; and
- pending wages and compensation for 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 contract price or 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 General Conditions of Construction for Civil Engineering Works), 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.

Article 425 of the Civil Code regulates the impossibility of execution of obligation by stating 'An obligation is extinguished if the debtor has established that his performance has become impossible due to a cause beyond his control'. On the other hand, the closest stipulation to force majeure is regulated under article 146/2 of the Iraqi Civil Code, which states:

> *where however as a result of exceptional and unpredictable events of a general nature the performance of the contractual obligation has not become impossible but onerous on the debtor such as will threaten him with exorbitant loss the court after balancing the interests of the parties may if it would be equitable reduce the onerous obligation to a reasonable limit; every agreement otherwise shall be null and void.*

The differentiation between such stipulations would be based on the level of 'impossibility', as force majeure, under Iraqi law refers also to an unexpected accident that leads to the impossibility of implementing the contract. Then, the absolute lack of possibility of executing the contract is a state of a force majeure that leads to ending of the obligation without other cause and the discharge of each party from the implementation. The procedure then is that the contractors shall be restored to the state they were in before the contract conclusion, in accordance with the text of article 168 of the Iraqi Civil Code, which stipulates:

> *if it is impossible for the obligee of a contract to perform his obligations specifically [in full or in part] he will adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation.*

In accordance with the foregoing, if the impossibility of execution is due to force majeure (impossibility of implementation), the two parties shall be discharged from their obligations without the right of either of them to seek compensation. However, if it was found that the impossibility is relatively avoidable and there is a hardship in performance only, then the court may accept a claim to re-balance the contract obligations without invoking termination and, if this cannot be done, to order compensation. Hence, the level of conditions leading to the lack of implementation of obligation is the criterion to decide what type of

measure to apply between exceptional conditions (claim to re-balance or notice for rescission) or the end of obligation under absolute impossibility of performance.

Further to the above, 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 contractor'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 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 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, 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.

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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.

International arbitration is available to the parties to the contract with no restriction whatsoever. It is also available for private parties in contract with a governmental party. Parties to the contract may choose to settle disputes by international arbitration subject

to the Iraqi Investment Law No. 13 of 2006 and the Regulations of Governmental Contracts Implementation No. 2 of 2014.

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 has been subject to increasing recognition in the Iraqi legal system 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 International Chamber of Commerce (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 the Regulations of Governmental Contracts Implementation No. 2 of 2014, Iraqi government entities are permitted to participate in private arbitration, whether ICC or International Centre for Dispute Resolution, 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 it to be 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 redetermine the dispute.

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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 the procedural laws or regulations applied do not conflict with Iraqi arbitration procedural laws, the foreign arbitral award could, in principle, be 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-year warranty mentioned in the Iraqi Civil Code. Instead, it is required from the other litigant to argue or plead 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 prescription 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 and there are several other statutory provisos stated in various Iraqi laws regulating environment protection, including oil and gas, and industrial sectors.

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 resource 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 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 bilateral treaties that Iraq is a signatory to or has ratified by local laws, in addition to collective treaties such as the Transparency Agreement in Treaty Arbitration between Investors and States for the year 2014 and other strategic partnership agreements.

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).

The Iraqi Central Bank circulated formal recognition to the US Foreign Account Tax Compliance Act (FATCA); by which all Iraqi banks and financial institutions are bound by the timelines set by the US Internal Revenue Service to implement and that the above institutions are obligated to take the necessary steps to meet the requirements of this law. For this purpose, the Republic of Iraq has undertaken since 2013 certain steps to make financial institutions comply, and a committee has been formed from several institutions in the country headed by the Central Bank of Iraq to manage this file and follow up on its implementation, leading to the fulfilment of all the requirements mentioned in the aforementioned Act.

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 Central Bank of Iraq (CBI) has established an online platform for the allocation of foreign currency to businesses (including local and foreign contractors) and individuals as part of the measures to combat corruption and money laundering in financial transactions, as well as monitoring cross-border and local movement of funds.

Other than the above, 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?

The simple answer is no. 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 CBI, 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.

As part of the measures to combat corruption and money laundering in financial transactions, the CBI applies a series of measures aiming to achieve stability in the general level of prices and exchange rates and to meet the high demand for foreign currency in the local

markets. These measures are in two packages of facilities: the first was announced on 3 February 2023, while the second was announced on 22 February 2023, both establishing an online platform managed by the CBI for the allocation of foreign currency to businesses and individuals. The CBI also issued Foreign Transfer Regulations on 19 February 2023 for the purpose of fulfilling the CBI objectives through reinforcement of the role of the banking system and non-banking institutions in securing the foreign currency to the beneficiaries in a way that would lead to maintaining the stability of the exchange rate of that currency on the one hand, and meeting the requirements of applying the Anti-Money Laundering and Counter-Terrorist Financing Law No. (39) of 2015 on the other, and based on prerequisites of the best interest of business in line with the reform orientations for the banking sector in Iraq, something which would lead to improvement of the banking business according to international best practices.

On 5 December 2022, the CBI issued a decision to increase the weekly share of dollar cash sales to meet the high demand for foreign currency in the local markets. The CBI also confirms the supply of foreign currencies to all citizens according to the purposes permitted for financing them legally, in addition to financing electronic payment cards that are used in payment operations outside Iraq.

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.

Foreign exchange platform

The Central Bank of Iraq has established an online platform for the allocation of foreign currency to businesses (including local and foreign contractors) and individuals as part of the measures to combat corruption and money laundering in financial transactions, as well as monitoring the cross-border and local movement of funds.

Implementation on a turnkey basis

Under contracts on a turnkey basis, the contractor bears 100 per cent of the risk. This 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 capability.

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).

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Summary

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 must 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.

The Regulation of Providers of Building Works and Miscellaneous Provisions Act 2022 (the 2022 Act) was signed into law on 5 July 2022. Not all sections of the 2022 Act have been commenced yet; however, the majority of sections are now in force. The 2022 Act introduced the requirement for the establishment of a register called the Construction Industry Register Ireland (CIRI) for the regulation of providers of building works (including builders that are subject to the Building Regulations), setting required standards and competences and allowing for complaints against providers to be adjudicated and investigated. Builders will in the future, be prohibited from carrying out works, or representing that they are entitled to carry out works, unless registered with CIRI. CIRI was first established and is currently maintained by the Construction Industry Federation as a voluntary register of builders and contractors. In the interests of public transparency and avoidance of confusion, the current voluntary CIRI register has been renamed as the Voluntary Construction Register and it is intended it will remain in existence until the statutory register is operating.

The 2022 Act 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 2022 Act. The competence criteria are set out in Part 4 of the 2022 Act and the complaints investigations and sanctions procedures are set out in Part 6 of the 2022 Act. It is envisaged that it will be mandatory for builders to join the statutory register from 2025. The first categories who will be required to register will likely be house builders and non-residential builders, and registration for various trades will happen subsequently.

Depending on their specialism, foreign designers or contractors should also be aware of the requirement for and the challenges in procuring professional indemnity insurance in the Irish 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?

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, tradespeople 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 relevant consultant or designer will require a licence under the Property Services (Regulation) Act 2011.

The government's aim is for CIRI to be the primary resource used by consumers in the public and private procurement of construction services, and it is envisaged that it will become mandatory for builders to join the Statutory Register from 2025. A Voluntary Construction Register is currently run by the Construction Industry Federation and it is intended that it will remain in existence until the statutory register is operating.

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.

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 (as amended by the Protected Disclosures (Amendment) Act 2022) (the Act), any employee who makes a disclosure to the Irish police regarding a suspected offence in accordance with the Act 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 €600 in any one year they must disclose this information to the Standards in Public Office 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 fall within the scope of Irish corporation tax, the rate of which is 12.5 per cent. Contractors also need to consider the taxes they will pay on behalf of their employees.

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. 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 (the information that is to be provided has been updated by the Transparent and Predictable Working Conditions Regulations 2022 to include the employee's remuneration and any allowances or reimbursement arrangements).

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. Payment disputes can be referred to statutory adjudication under the Construction Contracts Act 2013.

A new private sector contract, for use in relation to medium to large-scale construction projects and for projects which 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, 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.

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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 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 levels. The National Development Finance Agency (NDFA) and the Department of Public Expenditure and Reform's Central Unit both play key roles in the PPP process in Ireland. The Central Unit provides guidance and the policy and legislative frameworks underpinning PPPs. The NDFA acts as the financial advisor to the state in respect of all public investment projects valued at over €20 million and procures and delivers PPPs in most sectors (excluding transport and local authorities).

In 2006, the NDFA developed a template PPP Project Agreement (based largely on the UK PFI model); however, this is not mandatory for use in PPP 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 (25 years or longer). As of 2023, the PPP pipeline In Ireland remains active, with the Irish government (via the NDFA and sponsoring authorities) prioritising the delivery of PPPs In social infrastructure (such as education, social housing and justice).

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 scenario will depend on the corporate structure used. Entities entering into joint ventures can choose from a number of structures.

If the joint venture is structured as a 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. 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.

Entities could also protect their investment in a joint venture by setting up an Irish Collective Asset-management Vehicle (ICAV). This form of investment vehicle was created under the Irish Collective Asset-management Vehicles Act 2015. An ICAV does not have normal company status and is not subject to certain requirements such as holding annual general meetings. An ICAV can be established as an umbrella structure with segregated liability between sub-funds, protecting the investment within each sub-fund.

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, 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, landlords, 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 and particularly on an each and every claim basis 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 nationality discrimination rules.

On a general level, non-EEA nationals require an employment permit to work in Ireland (subject to certain limited exceptions). The Department of Business, Trade and Enterprise'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 but these eligibility and ineligibility categories are regularly reviewed to reflect skills shortages in certain areas and to ensure an adequate labour market supply where demand requires certain skills and such are not available in the Irish and EEA market.

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, but practically speaking, only 'statements of employment' are now provided, which set out the start and end dates and roles held (and character references are no longer the practice). 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 1998–2021.

Posted workers (ie, employees who normally work in one EU member state that 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 (the 2016 Regulations). To monitor compliance with such requirements, the 2016 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 (the information that is to be provided has been updated by the Transparent and Predictable Working Conditions Regulations 2022 to include the employee's remuneration and any allowances or reimbursement arrangements). 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 2016 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 to the WRC (where an award of compensation may be made or the WRC may direct the employer or contractor to take a particular course of action, as per the relevant and applicable 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 typically vary from contract to contract, but it would be usual that they would 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 for which 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.

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 that 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 be either agreed by the parties or appointed 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.

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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 physical 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 may result in automatic termination of the contract or by a party giving notice of the termination. The contract will usually provide one or both of the parties with a right of suspension or termination, in accordance with the express terms of 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 can be used where the contract so provides. The status of their decision will depend upon the terms of the relevant contract. Conciliation is often used in public works contracts (which are used for infrastructure and other projects funded by the state). Conciliation involves an independent third party encouraging active engagement between the parties. A standing conciliator will be appointed to act in all disputes in a public works contract with a value over €10 million and, if a dispute is referred to the standing conciliator, it will issue a recommendation if there is no agreement between the parties within the agreed time limit. This recommendation will become binding unless either party expresses their dissatisfaction with the recommendation in accordance with the contract within the agreed time limit.

Under certain contracts where a party has been awarded a sum of money by a conciliator's recommendation and puts a financial bond in place, that party is entitled to be paid the sum awarded by the conciliator and to hold that sum pending the outcome of the next stage of the contractual dispute resolution process. If there is no agreement by conciliation, the dispute is dealt with by the next stage of the contractual dispute resolution process.

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 very supportive of arbitration.

While court challenges to an award are possible, the grounds for challenges are very 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.

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.

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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 in 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 cause of action accrued to commence their claim.

Recent case law in Ireland has discussed the issue of when the cause of action accrues. In *Brandley v Deane* [2017] (SC, Unreported), Mr Justice McKechnie set out that the limitation period runs from when the damage (not the defect) becomes manifest – that is, 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:

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- 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 international (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, 74 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.

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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, 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

Government plans and targets, such as the 'Housing for All' plan and the national retrofit plan, have increased the demand for skilled construction workers, already highly sought after as a result of an increase in contracts and secured work and also to backfill jobs, as staff turnover remains an issue in the sector. However, as the employment rate hits a record high in Ireland, 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 Economic Area (EEA), a number of changes have been introduced, with further changes planned.

The Department of Enterprise, Trade and Employment announced changes to permit requirements for construction workers outside the EEA, 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, changes to the Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2019 mean 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.

Additionally, the government has agreed, in principle, to move towards a single application procedure for people seeking to move to the state to work. This proposed single application

procedure will replace the current system for those from outside the EEA who wish to work in Ireland, which first requires an application to the Department of Enterprise, Trade and Employment for a work permit and then a second application to the Department of Justice for immigration permission.

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 about 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 European Union 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 outbreaks (or a similar pandemic) on site or breaches of public health obligations will be the responsibility of the contractor.

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 which 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. Notably, the measures are only applied to projects from 1 January 2022 onwards and do not address the period of exceptional inflation between January 2021 and January 2022. In May 2022, the government subsequently published guidance to parties to public works contracts on establishing and using an Inflation/Supply Chain Delay Co-operation Framework Agreement, which is a discretionary agreement that

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can provide relief to a contractor for increased costs or supply chain disruptions as a result of material, fuel or energy price inflation.

The Construction Industry Federation of Ireland (CIF) has welcomed measures announced by the government to help deal with inflationary costs in public works contracts. However, the CIF is seeking further reforms of the public works contracts, including a revised price variation clause to be included in all public works contracts, 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 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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Summary

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.

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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 could, based on the severity of the offence, 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.

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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.

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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 contract 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 contract 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; or
- 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 to 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 of 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 to voluntary liquidation. Since only a solvent company can go into voluntary liquidation, the company's shareholders and the majority of the company's directors must declare that the company will be able to pay any outstanding debts within 12 months of the date on which the voluntary liquidation commences. This declaration is made by filing a solvency affidavit with the Companies' Registrar. If the company has assets and liabilities, a liquidator will be charged with disposing of the assets and settling the liabilities. In respect of any employees, the employer will be liable to make payment of employees' entitlements that are due upon the termination of employment, such as severance pay, unused leave days and recreation pay.

The Israeli Companies Ordinance (New Version) 1983 provides that the process of voluntary liquidation shall commence with a resolution of the company to wind itself up and cease business barring any actions required for the liquidation of the company. A company may

initiate its voluntary liquidation by a resolution adopted by 75 per cent of the shareholders who will vote at an extraordinary general meeting. Within seven days of the adoption of the resolution, the company must send a notice to Reshumot, the official gazette of Israel, and appoint a liquidator who will assume the powers of the board of directors and manage the voluntary liquidation. This liquidator will notify the Companies Registrar of his or her appointment within 21 days thereof and provide a report detailing how the voluntary liquidation will be conducted, including, inter alia, the distribution of assets (if applicable) and the payment of liabilities.

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

PAYMENT

Payment rights

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

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

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

'Pay if paid' and 'pay when paid'

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

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

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

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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 when 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 of 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 on the government 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?

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

Removal of revenues, profits and investment

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

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

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?

Notwithstanding the fact that several years have passed since the matter of *Bibi Roads and Development Ltd v Israel Railways* 8100/19 was brought before the Supreme Court in November 2019, it is important to nonetheless recognise the significance of the court's ruling owing to the potential impact on the resolution of construction disputes. 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.

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Summary

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 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 the 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 bids 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 limitations of which are 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 are operating 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 setting out the main articles. These guidelines are generally adhered to and PFI contracts have become standardised in practice.

The concession type – under which public entities concede their operation rights of public facilities to private operators – was introduced in 2011. 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?

For 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 themselves 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 towards 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 condition 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.

In cases other than the above, the Construction Business Act stipulates that a main contractor has the obligation to pay a subcontractor, in proportion to the completion of the work, as soon as practically possible, and at the latest, within one month after receiving the payment from the employer. When making such payment, a main contractor has the obligation to consider paying a subcontractor in cash to the extent that covers an amount equivalent to the labour costs to be paid by a subcontractor.

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), which 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 resolve 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. 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 construction 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 a panel of 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 involved in 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.

When it comes to the use of international commercial mediation, the Japanese government has not signed or ratified the Singapore Convention on Mediation. However, the bill for the enactment of the new law that will incorporate the provisions in the Convention into domestic law has passed the Diet and was enacted on 21 April 2023. In addition, the Convention itself has been submitted to the Diet for approval of the conclusions that will be reached by the Japanese government.

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. A bill for the amendment of the Act to reflect the 2006 amendment to the UNCITRAL Model Law has passed the Diet and was enacted on 21 April 2023.

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) stipulates 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 has entered into separate EPAs with the European Union, 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 has 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 71 tax treaties with 79 jurisdictions as of 1 April 2023 to avoid double taxation and to 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 invest

in. 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?

Even before the covid-19 related restrictions, the topic of work and life balance was a hot issue in Japan. As part of related law reforms, the Labour Standards Act (49/1947) was amended, and the application of the reform to the construction industry will take effect in April 2024. Already prior to the amendment, the Labour Standards Act allowed overtime work if an employing company had entered into an agreement with a representative of the employees for overtime work. After the amendment, overtime work in excess of statutory working hours (40 hours per week and eight hours per day) will be in principle be limited to 45 hours per month and 360 hours per year, even if the overtime agreement referred to above is entered into. There will be exceptional circumstances where longer overtime work can be allowed, provided that there are objectively exceptional circumstances and provided that a special agreement has been entered into between an employing company and a representative of its employees. However, it will not be given a free hand, as other statutory limitations will apply against such exceptions. As per the amendments, violations of said Act will become the subject of penalties.

Another recent trend in the construction industry is that, due to a tragic landslide that occurred in 2021, illegal disposal of soil in the guise of embankments has become a social issue. To prevent further such tragedies from occurring, legal regulations governing embankments have been introduced. These require permission from the governor of the relevant prefecture for the carrying out of any civil work involving embankments located in certain restricted areas. The standard terms and conditions for construction work have been revised to reflect said amendment to the regulations.

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Summary

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;
- researching the market and determining how factors such as geographical distance and currency fluctuations may impact business. Statistics New Zealand has information that may help available online (currently only to February 2022);
- 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$50,000.

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 currently 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'. The government is presently developing a new regime that would establish a new registration scheme for engineers, but no draft legislation has yet been introduced.

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.

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 NZ$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 (Protection of Whistleblowers) Act 2022 encourages individuals (whether in the public or private sector) to report suspicions or knowledge of serious wrongdoing in their workplace by providing protection for whistleblowers. Disclosers protected by the Act include not only employees, but also former employees, current and former contractors, people seconded to organisations and volunteers.

An employee of an organisation that is part of the project team may disclose information under this legislation if the following is true:

- the employee believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the employee's organisation;
- the employee discloses information about that in accordance with the Protected Disclosures (Protection of Whistleblowers) Act 2022; and
- the employee does not disclose the information in bad faith.

Such a disclosure, if made to the employee's organisation, must be made either in accordance with internal procedures (public sector organisations are required by law to have internal procedures in place) or to the head or deputy head of the employee's organisation.

Additionally or alternatively, the disclosure may be made to an 'appropriate authority' (as defined by the Act) at any time.

An appropriate authority includes the ombudsman, the commissioner of police and various other government authorities. (There is also provision for further disclosure should the

employee believe on reasonable grounds that the initial receiver has not acted as it should under the Act, or has not dealt with the matter so as to address the serious wrongdoing.)

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. Notably, a discloser is also entitled to protection even if they are mistaken and there is no serious wrongdoing. With limited exceptions, the recipient of a protected disclosure is also under a statutory obligation to use their best endeavours to keep confidential information that might identify the whistleblowing employee.

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 (or, in the case of the Electoral Act 1993, NZ$50 where the donor is from overseas), whether in a single donation or multiple or aggregated donations, to disclose their identity (subject to a mechanism in the former Act which protects the donor's identity from being disclosed to the party concerned and the public generally, but requires the donor to disclose their identity to the Electoral Commission, and the donation may only be up to a certain ceiling). It is an offence for a recipient to intend to conceal the identity of the donor for donations over this amount.

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.

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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.

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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 to 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, the most common standard-form construction contract, 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. 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.

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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. On 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 are 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).

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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, employers themselves may obtain accreditation to use the Accredited Employer Work Visa (AEWV) to hire migrants on visas for up to three years. That said, the employer must first advertise for the position locally and demonstrate to the INZ that it could not fill the required role, unless:

- the position pays at least twice the New Zealand median wage (see calculator); or
- the position is an occupation on the Green List.

At present, the Green List includes various construction professionals.

While entry to New Zealand was restricted during 2020 and 2021 due to the covid-19 pandemic, the international border is currently reopen.

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 Employment Relations Act 2000 (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$22.70 per hour as of 1 April 2023), accrue annual holidays and sick leave (a minimum of four weeks 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.

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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).

In 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, 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.

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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 (with further protections coming into force in October 2023), 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.

Notably, 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. These provisions have been used most recently in relation to the effects of the covid-19 pandemic.

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.

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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 equivalent to 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 were intended to be confidential and were 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, a written cost-protecting offer in the context of awarding costs, or the use in a proceeding of a communication or document made in connection with settlement negotiations or mediation – but the latter only in the very limited circumstance where the court considers that, in the interest of justice, the need for the communication or document to be disclosed outweighs the need for the privilege (taking into account the particular nature and benefit of the negotiations or mediation). 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 current 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.

The government intends to repeal the Resource Management Act 1991 and replace it with three new pieces of legislation, namely the Natural and Built Environment Act (to protect and restore the environment while better enabling development), the Spatial Planning Act (requiring the development of long-term regional spatial strategies to help coordinate and integrate decisions) and the Climate Adaptation Act.

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 key 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 such an offence is a continuing one, the penalties may increase by up to NZ$10,000 for every day during which that offence continues.

Further offences under the Resource Management Act 1991 impose fines of up to NZ$1,500 to NZ$10,000 (with further penalties of up to NZ$1,000 a day for certain continuing offences).

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$5,000 to NZ$1,500,000, depending on the specific offence and whether an individual or body corporate is liable.

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 NZ$10,000 or more, or international wire transfers of NZ$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 global and local covid-19 pandemic response and the Ukraine war. With many building materials imported into New Zealand, the industry is continuing to experience longer than usual lead times (or unavailability) and widespread price rises for products, while the effects of 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.

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. The Building (Building Products and Methods, Modular Components and Other Matters) Amendment Act 2021 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 introduced some of the most significant changes to the building and construction legislative and regulatory framework in the last 15 years.

Further future changes signalled by the Ministry of Business, Innovation and Employment (a government department) are to review and strengthen the Licensed Building Practitioner scheme (changing the way the scheme is administered and the way the complaints and discipline function works), and to establish a new registration scheme for all engineers, as well as a licensing regime for those who can carry out or supervise engineering work in specified fields that have a high risk of harm to the public.

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 were proposed, aimed at strengthening and clarifying the retention regime to provide benefits to subcontractors, contractors and clients. These changes resulted in the Construction Contracts (Retention Money) Amendment Act 2021, which amends the CCA and will come into effect in October 2023.

Pertinently, the changes mean that retention money is both automatically held on trust, and must be held in a bank account that complies with the CCA requirements (including that the party depositing the retention money tells the bank that the account is to hold retention money on trust under the CCA). In an attempt to minimise the risk of a party illegally using retentions as working capital, the changes also require the party holding the retention money to proactively report three-monthly to the party for whom the retention money is held. Moreover, offences are introduced for failing to deposit retentions into a compliant bank account, with fines of up to NZ$200,000 per offence.

Climate change

With the increased focus on sustainability and climate change in recent years, the government is intending an overhaul of key environmental legislation applying to the construction sector, namely repealing the existing Resource Management Act 1991 and replacing it with three new pieces of legislation: the Natural and Built Environment Act (to protect and restore the environment while better enabling development); the Spatial Planning Act (requiring the development of long-term regional spatial strategies to help coordinate and integrate decisions); and the Climate Adaptation Act. The former two were circulated as bills for public submissions at the end of 2022, and the latter is expected to follow as a bill in 2023.

In May 2022, the government also published its Emissions Reduction Plan, which includes policies and strategies for specific sectors, notably building and construction.

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Summary

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 of 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.

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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;
- inter alia war, epidemic, strikes;
- 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 Öresund 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.

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 2023 and it is highly likely that they will also be included in legal disputes and proceedings in the near future.

Also, the standard agreements of AB 04 and ABT 06 are under revision and new, updated versions of the agreements might be published in 2023.

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Summary

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's Agreement on Government Procurement, Swiss public procurement at 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 certain regulated professions. 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. For example, the following six of 26 cantons have specific licensing requirements for foreign architects and civil engineers in place (as at April 2023): Geneva, Vaud, Neuchâtel, Fribourg, Ticino and Lucerne. In these cantons, certain licensing requirements apply when providing services in the relevant cantonal territory. For architects and civil engineers 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 of the 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 of the PPA/rICCP). In addition, bidding rounds – meaning pure price negotiations – are henceforth prohibited at the cantonal and federal levels (article 11, lit. d of the 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 of the 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.

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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 of the 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 (article 102, paragraph 2 of the 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. However, there are legal provisions (since October 2022) on the disclosure of financial support for political parties or candidates.

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 of the 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 of the SCC).

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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 forfeited 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 on 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. In addition, the following six out of 26 cantons have specific licensing requirements for architects and civil engineers in place (as at April 2023): Geneva, Vaud, Neuchâtel, Fribourg, Ticino and Lucerne. In these cantons, certain licensing requirements apply for architects and civil engineers providing services in the relevant cantonal territory. For architects and civil engineers 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 to 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?

While construction disputes can often be resolved more efficiently with arbitration, 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 of the 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 of the 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 must 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.

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.

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.

UPDATE AND TRENDS

Emerging trends

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

In October 2022, based on various motions and after conducting a consultation process for the revision of construction contract law, the Swiss Federal Council adopted the dispatch on the revised Code of Obligations (CO).

In particular, the draft of the revised CO provides for a period of 60 days for complaints about defects in immovable works. This notice period should not only apply to work contracts, but also to property purchase contracts. However, the regulation should remain discretionary law. The contracting parties are therefore free to contractually shorten or extend the notice

period. Unless otherwise agreed, the revision draft mitigates the current severity of the short notice period in combination with the forfeiture of defect rights.

In addition, the draft contains provisions that the existing right to rectify construction defects can no longer be excluded by law if the construction serves personal or family purposes. This is intended to put an end to the widespread practice in which, on the one hand, the liability of sellers of new houses or contractors for defects is excluded and, on the other hand, the rights for defects against subcontractors are assigned to the buyer or builder.

Finally, the Federal Council also wants to improve the situation of the landowner or builder with regard to contractor's liens. The construction company is entitled to such a lien on the owner's property if claims remain unsatisfied. Under current law, craftsmen and entrepreneurs who have provided work (and material) for a building on a property are entitled to a statutory mortgage on that property for their claim. The landowner can prevent a corresponding entry of the property lien in the land register by providing sufficient security (substitute security) for the claim. In the future, such a security shall have to cover the default interest for 10 years and not for an unlimited period as before. This is intended to make it easier for the builder to provide substitute security.

As the next step, the Swiss Parliament will have to debate the proposed changes.

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Summary

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?

Foreign designers or contractors wishing to establish a local presence in Turkey can do so in one of three ways:

- by establishing a company as defined under the Turkish Commercial Code, typically a joint-stock or limited liability company);
- by establishing a branch office (the chief representative of which must be resident in Turkey); and
- by establishing a liaison office (although a liaison office cannot engage in any commercial activity, nor generate income).

Most foreign designers or contractors establishing operations in Turkey do so through a commercial company pursuant to Foreign Direct Investment Law No. 4875.

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 contractors wishing to work locally are not subject to any specific licensing requirements, although project specifications may stipulate qualifying criteria based on financial adequacy or competence. Contractors must also comply with general regulation and practices governing the opening and operation of a business or workplace. Architects and engineers responsible for project management and technical oversight (specifically for the preparation, approval and sign-off of project drawings and plans) must be registered with the Union of Chambers of Turkish Engineers and Architects.

Competition

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

Designed to encourage inbound investment, Turkey's Foreign Direct Investment Law No. 4875 stipulates that (unless otherwise determined under international agreements or specific legislation) foreign entities investing in Turkey shall be subject to the same treatment as domestic investors. Certain local laws can give domestic contractors some advantages under public contracts, however.

For example, Public Procurement Law No. 4734 (the Public Procurement Law) stipulates that the government has the right to restrict a tender to domestic bidders only where the approximate cost is below a certain threshold. Domestic bidders can also benefit from price advantages of up to 15 per cent, which may mean a price discount in certain materials.

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 principles of transparency, competition and equal treatment in public tenders are stipulated under article 5 of the Public Procurement Law, with specific prohibited actions and behaviour outlined under article 17. On this basis, any collusive tendering or bid rigging, bribery, restraint or other anti-competitive behaviour is strictly prohibited, and anyone convicted under article 17 may, depending on the offence, be barred from participating in public tenders for a minimum of one and a maximum of two years.

Anti-competitive behaviour (including bribery and corruption) in public tenders is governed by the Turkish Criminal Code (TCC), as is embezzlement or fraud committed during a tender process or in fulfilling obligations for any government entities thereafter. The maximum penalty for such offences under the TCC is imprisonment for up to 12 years.

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The Law on the Protection of Competition No. 4054 further stipulates that any agreements intended to restrain or distort competition (either directly or indirectly) in any market are illegal and shall be subject to a fine of 10 per cent of the annual gross revenue (income) of the project in question.

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 party (or potential party) to a tender suffering loss of rights due to unlawful procedures or actions during a tender process can file a complaint or submit an appeal to the Public Procurement Authority (PPA); such parties are required to do so prior to launching any legal proceedings. The PPA can order corrective action where this is likely to remedy any issue, and where the offence does not necessitate interrupting the procurement process or terminating the tender (in which case any contract would not be enforceable).

Under article 252 of the TCC, anyone convicted of offering or accepting a bribe is subject to a prison term of between four and 12 years. Facilitation payments are deemed to be a form of bribery under Turkish 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?

Bribery is an offence under the TCC. Any failure to report bribery would constitute an offence under article 278 of the TCC, punishable by up to one year's imprisonment.

Failure to report an offence would also be in breach of an employee's duty of care under the Turkish Code of Obligations as well as a breach of trust and confidence on the part of the employee under the Turkish Labour Law No. 4857, on which basis failure to report an offence could also constitute legitimate grounds for dismissal.

Regardless of legal obligations under the TCC, failing to report any knowledge or suspicion of bribery could result in an employee being dismissed and, moreover, could give grounds for compensation in the event of any damages being sustained by the 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?

Political contributions are neither permitted nor encouraged.

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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?

Yes. A construction manager or other construction professional is subject to the same regulation as government employees when acting as a public entity's representative or agent on a project, and in the performance of official duties. On which basis, all regulations and ethical codes to which government officials are subject – in addition to obligations under the TCC – apply.

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 in many countries, foreign contractors mainly aim to overcome the legal and cultural challenges of entering new markets by investing through joint ventures with local companies.

In line with the Turkish Government's medium-term growth strategy, many incentives are available to international investors, making the country one of the most attractive jurisdictions for foreign investment, particularly for the construction industry.

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?

Public procurement contracts must be compliant with the General Declaration on Public Procurement. Beyond that, consistent with the fundamental principle of freedom of contract governing civil law in Turkey, and consistent with many jurisdictions throughout continental Europe, so long as any contract complies with statutory Turkish law and with public policy more generally, Turkish legislation does not stipulate any specific form of contracts to be used in design and construction works. As regards language, pursuant to the Law on the Compulsory Use of Turkish in Economic Enterprises No. 805, all contracts and any transactional correspondence (and, where a foreign party is involved, all correspondence with government agencies) must be in Turkish.

Aside from some limited exceptions, parties to a contract are generally free to choose any jurisdiction for design and construction contracts. One such exception applies to contracts involving right in rem over immovable property, whereby, pursuant to the Law on International Private Law and Procedural Law No. 5718, Turkish law must apply where the property in question is located in Turkey (lex rei sitae). Parties are free to choose any location for dispute

resolution, subject to these limitations – meaning any disputes relating to immovable property will be subject to domestic legislation.

Payment methods

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

Again, in line with the fundamental principle of freedom of contract, and subject to any cash payments not exceeding a certain threshold, parties to a transaction are free to determine the timing and means of payments under construction contracts.

Parties to a transaction are typically paid on approval of interim payment certificates, with payments usually being effected by electronic transfer or, under supply contracts, through letters of credit. It is usual for a contractor to receive an advance payment for procurement and resourcing.

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?

It is common practice for project owners to engage a turnkey or main contractor who then typically engages multiple subcontractors for specific works. Project owners are not subject to any restrictions in engaging multiple subcontractors directly, however. No obligations (beyond statutory responsibilities regarding employment law) exist between the project owner and any subcontractors engaged by the main contractor. On that basis, however, the project owner cannot enforce (or rely on) any terms agreed between the main contractor and subcontractors.

PPP and PFI

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

While a draft legal framework is currently being developed under the country's Eleventh Development Plan, Turkey currently has no specific legal framework governing PPP and PFI contracts. Certain governing principles are outlined under the Constitution of the Republic of Turkey (the Constitution), however, while PPP contracts are subject to certain laws and regulation, including:

- the Law on the Procurement of Certain Investments and Services under the Build-Operate-Transfer Model No. 3996;
- the Law on the Authorisation of Enterprises other than the Electricity Authority of Turkey for Electricity Generation, Transmission, Distribution and Trading No. 3096;
- the Law on Privatisation Practices No. 4046; and
- the Law on Customs No. 4458.

Tenders for PPP projects are frequently issued by Turkish government agencies including the Ministry of Energy and Natural Resources, the Ministry of Transport and Infrastructure, the General Directorate of State Airports Authority, and the General Directorate of Highways.

Joint ventures

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

Joint ventures and consortia are treated as different kinds of entities under Turkish law. Partners in a joint venture share all risks and liabilities mutually; each partner in a consortium bears different and separate liabilities and risks.

Under the principle of freedom of contract, however, parties are free to agree the terms of a contract consistent with statutory legislation. In this case, joint venture partners are free to allocate risks and liabilities as they wish, with these being treated as a matter of internal regulation between the partners, and with no binding (or other) implications for any third parties. Notwithstanding such allocation of risks and responsibilities among the members of the joint venture, all members of such joint venture bear joint and several responsibilities in respect of third parties (including the project owner).

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 Turkish Code of Obligations (TCO) stipulates that – unless no fault can be proved – a contractor must compensate the project owner (employer) if contractual obligations are not met or are not met in full. There is no exemption from liability for gross negligence and, for works subject to specific licensing requirements (including construction works), any agreement regarding exemption from liability for even slight negligence will be deemed invalid. Compensation may be reduced (or removed entirely) in the event that the first party is found to be negligent.

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?

Contractors' and building owners' responsibilities are regulated specifically under the Turkish Code of Obligations and the Law on Protection of Consumers No. 6502. On this basis, any contractor responsible for construction of a building is liable for any defective works arising in that building for a period of five years from the delivery date. Conversely, the building owner (not the contractor) is held liable for any loss or damage borne by a third party as a result of improper maintenance of a building, or as a result of any construction defects.

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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?

Construction insurance is widely used in Turkish projects to cover unforeseeable risks (such as fire, flood, emergency weather events and sabotage) in line with a project's specific value and risk profile. The most commonly used insurance products include all-risk insurance, third-party liability insurance and building completion insurance. We are seeing increasing use of political risk insurance on major international projects.

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?

Turkey has no legislation directly governing the total number (headcount) of local employees that must be employed on construction projects. Pursuant to International Labour Force Law No. 6735 (the International Labour Force Law) foreign workers are required to secure a work permit unless specific clauses in bilateral or multilateral agreements to which Turkey is a party apply. This law also stipulates that at least five Turkish citizens must be employed for every foreign worker for whom a work permit is requested at any workplace.

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?

As an employer, a contractor must ensure all payment obligations (including wages, payments in lieu of notice and any severance payments) are discharged in respect of all employees on completion of a contract, regardless of nationality.

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 treatment of foreign construction workers is governed by the International Labour Force Law, which determines all procedures and principles, powers and responsibilities concerning the granting of (and exemptions in respect of) work permits for foreigners.

Discrimination on grounds of nationality is strictly prohibited under the Constitution and the Turkish Labour Law No. 4857, and foreign workers benefit from all rights specified thereunder on the same basis as local workers. Fines may be imposed under this legislation where an employer fails to comply with statutory obligations, and in such circumstances, employees have the right to claim compensation.

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 obstacles specific to foreign contractors on terminating their operations, and legal obligations are identical to those applicable to local contractors.

On that basis, foreign contractors terminating their operations are required to fulfil all outstanding obligations to project owners, to terminate or conclude contracts with third parties, to fulfil all obligations to their employees, to close all their subscriptions in the utilities and to discharge their liabilities towards the relevant tax office. As is the case for local contractors, foreign contractors must also cover all public debts, including tax and social security obligations.

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?

Contractors in Turkey typically receive advance payments to cover procurement and resourcing costs arising before a project starts.

Milestone payments, entitling contractors to payment after completion of predetermined stages of a project, are often preferred during procurement and resourcing. Bank letters of guarantee can be used to secure contractors' payment rights.

Turkish law allows contractors to place a lien on the property of a project owner (primary employer) unless specifically excluded under the terms of the applicable contract.

'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' provisions are commonly used in Turkish construction: the enforceability of such provisions remains subject to debate, however.

Consistent with the 'freedom of contract' principle inherent in Turkish civil law, parties are free to agree contractual terms to the extent that these do not contravene existing legislation. On that basis, parties to a contract (or subcontract) have the right to include terms that make a subcontractor's right to payment contingent upon the general contractor's receipt of payment from the project owner.

It is important to stress, however, that all agreements between parties, including contracts or agreements involving 'pay if paid' and 'pay when paid' provisions, will have no legal protection unless they are consistent with statutory law.

Contracting with government entities

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

Foreign states' immunity from the jurisdictions of other countries is limited to transactions under public law, and only in the exercise of sovereign authority. No immunity is available for disputes arising from private law, and a government agency cannot claim sovereign immunity against any claims by contractors.

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?

Consistent with the freedom of contract principles underpinning Turkish civil law, parties are free to draft provisions governing the termination or cancellation of a project or works (with appropriate entitlements) as required. In the event of there being no such specific provisions under a contract, regulations stipulated under the Turkish Code of Obligations or the Civil Code may apply.

As a general principle, under Turkish law, in the event that a construction project is cancelled or interrupted, a contractor will be entitled to payment for works undertaken or performed up to such termination date. A contractor is also entitled to make a claim for any equipment and machinery they own that is retained by the project owner (employer). In addition to these general principles, a contractor is also entitled to a lien on the property on which such works have been undertaken if payment is not made in full.

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?

Turkish law does not explicitly define force majeure or acts of God. Article 136 of the Turkish Code of Obligations (TCO), which governs the consequences of impossibility of performance, can be applied to a force majeure event.

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Contractors may be excused from performing contractual obligations in the face of force majeure events:

- on the basis of any contractual force majeure clause;
- under article 136 of the TCO; or
- on the basis of legal precedent.

Impossibility of performance is governed by article 136 of the TCO, which states that where the fulfilment of obligations becomes impossible for reasons beyond a contractor's control, that contractor cannot be held responsible. Legal precedent from the Supreme Court also suggests that force majeure can be defined as an event resulting in the non-performance of an obligation that:

- could not have been predicted at the time any contractual relationship was entered into;
- was the result of factors beyond the parties' control (such as unforeseen acts of nature (storms, earthquakes, flooding), actions by third parties (such as a general strike) or legal interventions (such as a formal ban); and
- could not have been prevented or avoided through any effort by such parties.

Parties to a contract are also free to regulate contractual force majeure clauses to the extent that these are consistent with statutory law in Turkey.

DISPUTES

Courts and tribunals

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

In contrast to other sectors (such as insurance), Turkey has no specific or industry-sponsored tribunals dedicated to resolving construction disputes. There is an increasing trend for construction-related disputes to be resolved through mediation or arbitration. This can often secure a more timely outcome than action through local courts.

Dispute review boards

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

Yes, DRBs are used in Turkey as a form of alternative dispute resolution in construction contracts.

The decisions of DRBs in Turkey are not final but serve as a recommendation to the parties. The parties may accept the DRB's recommendation, or they may further apply for dispute resolution options, such as arbitration or litigation. Nevertheless, the parties may agree to give the DRB's decision a binding effect. This will require the parties to agree in advance that they will abide by the decision of the DRB as if it was final and binding.

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?

Voluntary participation in mediation is not a generally accepted concept among contractors, although it is becoming increasingly popular as a pre-litigation or pre-arbitration process in construction contracts. The Law on Mediation in Civil Disputes No. 6325 (the Mediation Law) which entered into force in 2013, introduced the concept of mandatory mediation as a prerequisite in commercial disputes prior to any court action. Highly qualified mediators, who shall be registered on the Mediator's Registry of the Ministry of Justice, are available for both mandatory and voluntary mediation, many of which come from engineering backgrounds with vast project experience as well as LLM degrees.

Confidentiality in mediation

30 Are statements made in mediation confidential?

Pursuant to article 4 of the Law on Mediation in Civil Disputes, confidentiality is fundamental to the mediation process and any mediator, and the parties present at mediation meetings are obliged to treat all information and documents submitted or otherwise obtained during such meetings as confidential.

Confidentiality is an essential part of the mediation process, and any statements or documents produced in the course of mediation cannot subsequently be used as evidence or testimony in arbitration or court proceedings. Disclosure of such information cannot be requested by a court, arbitrator or any administrative authority, and cannot be taken into consideration even when presented as evidence. Such information may be disclosed to the extent required by law, however, or where necessary for the implementation and enforcement of any agreement reached as a result of the mediation process.

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 becoming increasingly popular in resolving construction disputes. Given the time pressures common on most construction projects, the ever-changing nature of construction works and the level of technical complexity often involved, arbitration often proves a more timely solution than action through local courts. As Turkey also lacks specialist courts (and, accordingly, experienced judges), court-appointed experts are often required. Heavy workloads, however, mean that even where such experts are appointed, full technical analysis is often lacking. Arbitration is, therefore, becoming increasingly stipulated under International Federation of Consulting Engineers contracts.

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 is becoming an increasingly common practice in settling international construction disputes in Turkey, with the International Chamber of Commerce (ICC)'s international reputation making it the preferred arbitration provider. The Istanbul Arbitration Centre (ISTAC) has also been gaining popularity among Turkish contractors as an alternative to the ICC since its establishment in 2014.

While there is no significant resistance to specific jurisdictions for arbitration, where a jurisdiction other than Istanbul is designated Switzerland (Geneva, Zurich), France (Paris) and the United Kingdom (London) are commonly preferred. Contracting parties in Turkey tend to prefer neutral legislation over the domestic law of either party, with Swiss law typically preferred in the light of its considerable similarities to Turkish law.

Standard forms and contracts issued by the PPA are used in Turkey. These were updated in 2018 and now require contracting parties to submit to the jurisdiction of Turkish courts or to stipulate ISTAC arbitration for the settlement of disputes.

Dispute resolution with government entities

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

Government agencies may engage in private arbitration and contracts can be drafted on that basis, stipulating that disputes may be resolved through local courts or through arbitration.

Any arbitration award issued against a government agency is binding on that agency. Where such an award is rendered through domestic arbitration, enforcement will be made under the Code of Civil Procedure No. 6100 and the Enforcement and Bankruptcy Law No. 2004. Should the award be rendered by an international arbitration tribunal, enforcement is possible through the application of International Arbitration Law No. 4686 (the International Arbitration Law (IAL)). As Turkey is a signatory to the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforcement is likely to be swift.

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?

Any rejection of an international (foreign) arbitration award is subject to regulation stipulated under the IAL. As Turkey is a signatory to the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards the basis of rejecting any foreign arbitration award would be a verbatim adoption of the reasons stipulated under the New York Convention.

On that basis, Turkish courts are required to follow a limited number of reasons stipulated under the New York Convention and the IAL in rejecting the enforcement of any arbitration award. Two of the most frequently used objections for rejecting arbitration awards are that such an award would be contrary to public policy in Turkey; and that there has been some breach of due process or representation.

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 for initiating a lawsuit under Turkish law vary, depending on the nature of the claim. Pursuant to the Turkish Code of Obligations (TCO), the general limitation period in respect of receivables is 10 years unless otherwise provided by law.

Under construction contracts, excluding claims arising from a contractor's gross negligence resulting in a failure to carry out works properly or in full, the limitation period for filing a lawsuit is five years.

Article 478 of the TCO contains specific provisions in respect of claims relating to defective structure, whereby the limitation period is two years in respect of movable property and five years for immovable property. Where any defect is the result of a contractor's gross negligence the statutory limitation period is 20 years, regardless of the nature of the work. The Law on Public Procurement Contracts No. 4735 stipulates a statutory limitation period of 15 years, starting from the date of final acceptance of work.

The main statutory precondition for filing a lawsuit in a Turkish court is to conclude the mandatory mediation process in advance.

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, Turkey has been party to the Stockholm Declaration of 1972 as of 23 May 2001, and to the Rio Conference of 1992 as of 24 February 2004. In line with the principles of the Stockholm Declaration, which encourages individual countries to develop their own environmental policies and protect natural resources and wildlife, Turkey has specific legislation in place to that end, including the Law on the Environment No. 2872, the Forest Law No. 6831, the Animal Protection Law No. 5199, the Bosphorus Law No. 2960, the Coastal Law No. 3830 (amending the Coastal Law No. 3621), and the Turkish Soil Protection and Terrain Law No. 5403, as well as certain protections under the TCC, the Misdemeanours Law No. 5326 and the Constitution.

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?

Pursuant to article 181 of the TCC, anyone convicted of causing harm to the environment by polluting soil, water or air through waste or residue contamination in violation of regulated technical procedures can be imprisoned for a period of up to two years. Where such pollution results in human or animal diseases that are difficult to treat (including infertility and any impact on the natural characteristics of animals or plants) this can result in a prison sentence of not less than five years and a judicial fine (an amount payable to the State Treasury by the offender, which is calculated, unless otherwise stated in law, by multiplying the identified number of days with a specified daily amount) of up to 1,000 days.

The Law on the Environment No. 2872 governs environmental protection in Turkey, and covers, specifically, biological diversity and the ecosystem; the protection of natural structures and wetland ecology; the conservation of endangered and rare plant and animal species; the protection of natural resources and assets; and sea, underground and surface-water resources.

Pursuant to this law, institutions, organisations and businesses that could cause environmental problems as a result of any planned activities are obliged to prepare an Environmental Impact Assessment Report or Project Introduction File. Approvals and permits cannot be given, and no project can be put out to tender, unless a company's environmental impact assessment has been approved, or unless the appropriate regulatory authority has ruled that an Environmental Impact Assessment Report is not required.

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'?

Yes. Turkey is a signatory to and has adopted more than 100 bilateral investment treaties with other countries as of 2023. These agreements aim to promote and protect foreign investment by offering guarantees and protections to foreign investors against various forms of expropriation, discrimination and other risks that may arise in the host country.

Investments are generally defined as covering every kind of asset or investment (connected with business activities) invested in or acquired for the purpose of establishing lasting economic relations in the territory of a contracting party in conformity with its laws and regulations. Some agreements also cover specific provisions for the protection of investments in construction and infrastructure projects, such as provisions on fair and equitable treatment, protection against expropriation without compensation and access to dispute settlement mechanisms.

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, Turkey has concluded treaties for the avoidance of double taxation with many countries. The purpose of these treaties is to avoid the double taxation of income that arises in one country and is received by residents of another country.

General double taxation treaties apply to construction works (on the basis of sites constituting permanent entities) and most treaties are deemed to be contractor-friendly. Practice and exemptions vary according to the nationality of the contractor.

Turkey currently signed double taxation treaties with over 80 countries, including the United States, the United Kingdom, Germany, France, China and Japan, among others.

Currency controls

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

Turkey has no currency controls specific to construction works. Those parties and transactions to which currency regulations apply are specified under the Amendments to Presidential Decree No. 32 Regarding the Protection of the Value of the Turkish Currency (2018). Furthermore, with the amendment made in Communiqué No. 2008-32/34 on Decision No. 32 on the Protection of the Value of the Turkish Currency and published in the Official Gazette dated 19 April 2022, it is prohibited to pay the contract price in foreign currency in movable sales contracts to be concluded among residents of Turkey.

Removal of revenues, profits and investment

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

Generally, there are no restrictions on profit distribution or investments, and these are subject to standard corporate law practices. Tax regulation should be taken into consideration in any transactions, however, since withholding tax or tax exemptions may apply.

UPDATE AND TRENDS

Emerging trends

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

The most pertinent developments in Turkish construction regulation are Presidential Decree No. 5203 of 23 February 2022, and the Eleventh Development Plan (2019–2023), approved by the Grand National Assembly of Turkey on 18 July 2019.

Presidential Decree No. 5203 (on the Principles Regarding the Implementation of the Provisional Article 5 of the Public Procurement Agreements Law No. 4735) gives contractors the right to request additional price differences (price adjustments) that arise from unforeseeable price increases in the majority of raw materials and employment prices, and to assign construction agreements (subject to the approval of the appropriate agencies) provided that the conditions specified in the Decree are met, the appropriate construction contract is executed in accordance with Public Procurement Law No. 4734 (the Public Procurement Law) and the currency of any agreement is in Turkish lira.

On 13 May 2022, the Presidential Decree Determining the Procedures and Principles for the Procurement of Goods and Services to be Made within the Scope (b) of Article 3 of the Public Procurement Law (Presidential Decree) by the Turkish Ministry of National Defence, General Directorate of Military Factories and General Directorate of Shipyards was amended and published in the Official Gazette. With this amendment, a provisional article has been added to Presidential Decree No. 4416 dated 24 August 2021.

Pursuant to the amendment, in contracts made in Turkish lira for the purchase of goods and services, including purchases made through the direct procurement method within the scope of the Presidential Decree, the additional price difference can be calculated and these contracts can be transferred under Law No. 4735, which became effective with the Presidential Decree dated 23 February 2022, and numbered 5203.

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Summary

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 United States 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 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, and the passage of the Infrastructure Investment and Jobs Act in 2021 creates additional opportunities for international contractors. 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 in much 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 have essentially 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, to be paid overtime pay, and 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.

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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, as well as cost considerations.

DRBs, which, by definition, limit the Boards' authority on most public projects to issuing non-binding recommendations, as opposed to decisions, have nevertheless 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 and 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 will often 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 in the United States 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 United States 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.

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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 2023 are the state political and administrative implementation phases following passage of the Biden Administration's US$ 1.2 trillion Infrastructure Investment and Jobs Act (IIJA), adoption of measures to address the continuing impact of material shortages and price increases, the response (domestic and international) to US labour shortages which delay project implementation, and the ongoing 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. During the political and regulatory implementation phases which follow passage of the IIJA that are currently under way at the federal and state levels, individual projects are being selected and prioritised and project delivery methods defined. These elements and requirements of the IIJA are highly relevant to contractors, such as encouraging the use of PPP as a procurement method, Buy America or similar requirements to promote opportunities

for, and prioritising the use of, US resources, the use of unions and DBE businesses with a focus on those led by women and people of colour, and utilising project labour agreements.

The influx of financial assistance from the federal government is helpful to states to launch their construction initiatives and provides a strong incentive for foreign contractors to establish and expand operations in the United States. However, the US construction industry and its projects continue to be challenged by material shortages and price increases, labour shortages, breakdowns in the supply chain and the inflationary effect of these issues. The industry has responded to mitigate these challenges by focusing on and developing new, less vulnerable, supply chains and material sources, with emphasis on domestic and regional supply chains, which have become more competitive and logistically secure. The war in Ukraine and the effect of the economic sanctions imposed on Russia by the United States and other countries continue to exacerbate the strain on material supplies, resulting in further delays and price increases for contractors. These conditions have resulted in an emphasis on drafting and negotiating clauses that spread the risk of unanticipated escalation between the parties in a way that is fair and appropriate, whether resulting from tariffs, the covid-19 pandemic, the war in Ukraine or other similar events, and minimise and mitigate the cost and time impact of the unanticipated events, regardless of who bears responsibility.

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