Construction 2022

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LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2008
Fifteenth edition
ISBN 978-1-83862-638-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Peckar & Abramson PC

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

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Iraq and Turkey.

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

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

LEXOLOGY
Getting The Deal Through

London
June 2021

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New Zealand

Christina Bryant, Helen Macfarlane and Nick Gillies*

Hesketh Henry

LOCAL MARKET

Foreign pursuit of the local market

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

Some of the key concerns for a contractor setting up business in New Zealand are the following:

- considering what type of structure is most suitable and complying with the relevant regulations to establish any entity chosen. Overseas companies and limited liability partnerships must register with the Companies Office if they are 'carrying on business' in New Zealand. This can be done online through the Companies Office: https://companies-register.companiesoffice.govt.nz/help-centre/starting-a-company/#;
- researching the market and determining how factors such as geographical distance and currency fluctuations may impact business. Statistics New Zealand has information, tables and tools that can help and these are available online at: http://businesstoolbox.stats.govt.nz/IndustryProfilerBrowse.aspx;
- checking licensing and professional qualification requirements;
    - understanding pertinent taxation issues, including the following:
    - goods and services tax of 15 per cent is charged on the sale of goods and the provision of services; and
    - the Accident Compensation Corporation provides no-fault accident compensation for workplace (and other) injuries, funded by employer levies; and
- understanding other factors that may affect the cost of doing business in New Zealand, including:
    - availability of insurance;
    - ensuring compliance with the law regarding employee contracts, labour and human rights;
    - ensuring compliance with health and safety legislation; and
    - ensuring compliance with consumer protection laws.

REGULATION AND COMPLIANCE

Licensing procedures

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

Foreign designers and contractors must follow the same licensing procedures that are required for domestic designers and contractors.

All restricted building work (RBW) (residential building work that is essential to the structural integrity or weather tightness of a building) must be carried out or supervised by a licensed building practitioner (LBP). Holders of Australian design or trade-related licences can apply for a New Zealand licence under the Trans-Tasman Mutual Recognition Act 1997.

Becoming an LBP involves a robust application process consisting of a written application, oral testing by assessors and confirmation of the applicant's work by referees. A contractor carrying out RBW without an LBP (or without supervision by a person holding an LBP) may be fined up to NZ$20,000.

In addition, a plumber, gas fitter, drain layer, electrical worker or architect must be registered in their profession in accordance with the relevant legislation to be able to work in New Zealand. Engineers need not be registered by law to work in New Zealand; however, only qualified persons registered with Engineering New Zealand may use the title 'chartered professional engineer'.

Competition

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

The law does not provide any advantage to domestic contractors over foreign contractors.

Public sector procurement in particular is guided by the Principles of Government Procurement and the Government Rules of Sourcing. 'Being fair to all suppliers' and 'non-discrimination in procurement' are core components of these policies, which aim to encourage competition, treat suppliers from another country no less favourably than New Zealand suppliers and meet New Zealand's international obligations.

In addition to bilateral agreements relating to procurement with a number of other countries (such as Australia, Singapore, Brunei and Chile), New Zealand is a party to the World Trade Organization's agreement on government procurement (GPA). The GPA aims to establish equal conditions of competition in the government procurement markets among countries that accede to it.

Competition protections

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

The government has developed principles and rules for all public sector procurement, which are designed to ensure a fair and effective approach to appointing suppliers. These principles and rules are underpinned by commercial and public law legislation. In addition, the government has five guides to help public sector agencies with procurement strategies for construction projects, which are supported by best practice guidelines, toolkits and rules for sourcing, tendering, contracting, and risk and value management. These are available online at: https://www.procurement.govt.nz/procurement/specialised-procurement/construction-procurement/.

Bid rigging and other anticompetitive behaviours are forms of cartel conduct, which are prohibited by the Commerce Act 1986. The Commerce (Cartels and Other Matters) Amendment Act 2017 (which came into effect in August 2017) has enabled wider collaboration between firms where it is not for the purpose of lessening competition, but has expanded the range of prohibited conduct to include price-fixing, restricting output and market allocation between parties. The Commerce (Criminalisation of Cartels) Amendment Act 2019 came into force in April 2021. This Amendment Act means that individuals convicted of engaging in cartel conduct such as price-fixing, restricting output or allocating markets, will face fines of up to $500,000 or up to seven years' imprisonment or both.

Bribery

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

A contract obtained through bribery is illegal and of no effect.

Bribery in the public sector is dealt with under the Crimes Act 1961, which makes it an offence to give or accept a bribe for an act done or not done in an official capacity. 'Bribe' is widely defined to include money, valuable consideration, office, employment or any direct or indirect benefit. Bribe-givers and bribe-takers are prosecuted; the penalty is imprisonment for up to seven years.

Bribery offences in the private sector are dealt with under the Secret Commissions Act 1910, which makes it a criminal offence to bribe an agent, such as a lawyer, broker or real estate agent, to act in a certain way regarding their client's business or affairs. A person who commits an offence against this Act is liable to imprisonment for a term not exceeding seven years. The wronged party may also bring a civil claim for breach of a statutory duty.

Reporting bribery

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

Bribery offences in the private sector are dealt with under the Secret Commissions Act 1910. Where an employee has knowledge of bribery, but fails to report that knowledge, they are guilty of an offence under the Act. The maximum penalty for this offence is up to seven years' imprisonment.

As for the public sector, bribery offences are dealt with under the Crimes Act 1961. Where a public-sector employee has knowledge of bribery but fails to report that knowledge, they could be regarded as aiding or abetting that offence. It does not appear that this has been tested in New Zealand, although it is suggested that mere knowledge of bribery may be insufficient – the employee may need to have knowledge and then also take steps to 'encourage' the bribery to continue. The maximum penalty for being a party to the offence of bribery is the same as for the principal offence, being a period of imprisonment of up to seven years.

There is no legal obligation to report suspicion of bribery. However, the Protected Disclosures Act 2000 encourages individuals (whether in the public or private sector) to report suspicions or knowledge of serious wrongdoing in their workplace by providing protection for whistle-blowers. An employee of an organisation may disclose information under this legislation if the following is true:

- the information is about serious wrongdoing in or by the employee's organisation;
- the employee believes on reasonable grounds that the information is true or likely to be true;
- the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
- the employee wishes the disclosure to be protected.

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

Where the employee reasonably believes the head of their organisation is involved in the serious wrongdoing, there are urgent or exceptional circumstances, or where they have made disclosure in accordance with their organisation's internal procedures but nothing has been done within 20 working days, they may escalate their disclosure to an 'appropriate authority'. An appropriate authority includes the ombudsman, the commissioner of police and various other government authorities.

Provided the above criteria are satisfied, the disclosure is a protected disclosure and the employee is protected from retaliatory action in their employment and liability from criminal or civil proceedings in relation to that disclosure. The recipient of a protected disclosure is also under a statutory obligation to use their best endeavours not to disclose information that may identify the whistle-blowing employee.

Under the Protected Disclosures Act, the term 'employee' includes former employees, contractors, people seconded to organisations and volunteers.

Political contributions

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

There are no laws that prohibit contractors or design professionals from making donations to political parties or candidates.

However, both the Electoral Act 1993 (national elections) and the Local Electoral Act 2001 (local body or regional elections) require any donor who donates (to either a candidate or a political party) an amount exceeding NZ$1,500 where the donor is a New Zealander, or NZ$50 where the donor is from overseas (whether in a single donation or multiple or aggregated donations) to disclose their identity. It is an offence for a donor or recipient to conceal the identity of the donor for donations over this amount. Should that occur, the recipient must also give back to the donor the entire amount of the donation in question.

Political donations should not be a quid pro quo for any conduct by a public official so as to amount to bribery. Public contracts may not be awarded based solely on political support but require a fair and transparent tender process.

Compliance

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

Where a construction manager or other construction professional (such as the engineer to the contract) is acting as a public entity's representative or agent on a project, he or she will likely be captured by the public entity's own anti-corruption or corporate gifts policies, which may be incorporated into a contract with the manager or other professional. Otherwise, bribery and corruption offences in the private sector are

dealt with under the Secret Commissions Act 1910, which would capture construction managers or other construction professionals who are not strictly public entity employees.

Other international legal considerations

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

There are no particular obstacles to doing business in New Zealand; however, a foreign contractor should be aware of how local laws impact foreign workers and foreign building products.

A foreign worker must hold a working visa. A foreign contractor should confirm that there are no double taxation issues applying to foreign employees. In addition, only foreign workers holding a working visa valid for a minimum of two years will be covered by New Zealand's public healthcare system. Foreign workers suffering a personal injury or work-related health condition while in New Zealand will be covered by the Accident Compensation Corporation (ACC), but this does not cover ordinary illness or emergency travel back home. In the event of serious injuries, the 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. However, this is subject to change owing to the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill, which is likely to come into force near the end of 2021. The amendments to the Building Act 2004 included in this Bill contemplate greater regulation of building products and methods, including the extension of obligations and liability to product manufacturers and suppliers. Greater detail on the changes included in this Bill is provided at 10.1.1.

With respect to personnel, at present, because of the pandemic, only New Zealand citizens, permanent resident holders and some Australian citizens and residents are able to enter New Zealand without a special exemption being granted.

CONTRACTS AND INSURANCE

Construction contracts

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

NZS 3910, NZS 3915, NZS 3916 and NZS 3917 are the most common construction contracts. Other well-known contracts (such as the International Federation of Consulting Engineers contract and NEC3/NEC4) are also used, albeit not as frequently.

NZS 3910 (with an engineer) and NZS 3915 (without an engineer) are intended for traditional procurement arrangements involving only construction work. NZS 3916 is similar to NZS 3910, although tailored for a design-and-build context. NZS 3917 is intended to be used for the provision of services over a defined period of time rather than a fixed scope of work.

Each of NZS 3910, NZS 3915, NZS 3916 and NZS 3917 can be tailored to specific projects and contain special conditions to allow for this.

In addition to the NZS contracts, certain other bodies have produced contracts tailored for New Zealand construction works.

The New Zealand Institute of Architects (NZIA) has produced a series of standard-form construction contracts, some of which are designed for use where the contract is administered by an NZIA architect, others of which may be used when the architect is not contractually involved in the administration of the contract.

The Association of Consulting Engineers New Zealand, Engineering New Zealand, the Auckland Regional Contracts Group, the Institute of Public Works Engineering Australasia New Zealand and the New Zealand Transport Agency have developed standard conditions of contract for consultancy services. These can apply to a wide range of consulting services and for most types of project.

The Registered Master Builders Association and New Zealand Specialist Trade Contractors Federation jointly provide a standard form of subcontract (informally known as SA-2017).

There is no requirement that English must be the language of the contract, although it is the predominant language used.

There are no restrictions on choice of law or venue for dispute resolution in the NZS suite of contracts. If not contractually specified by the parties, established private international law rules will need to be invoked to determine the venue and governing law.

Payment methods

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

Contractors, subcontractors and vendors of prefabricated, customised components for construction projects have a statutory right to progress payments under the Construction Contracts Act 2002. 'Pay when paid' arrangements are barred and have no legal effect.

Contracting parties may agree the number and frequency of progress payments. In the absence of any express agreement, payment claims can be made at the end of each month. Standard construction contracts generally provide for monthly claims, although the due date may vary. There are strict time requirements for responding to, and discharging, payment claims.

The method of payment can be agreed between the parties, although cash payments should be treated with caution and not used as a method to avoid payment of goods and services tax or other tax. Cheques are being phased out by banks as electronic transfers become the norm.

Contractual matrix of international projects

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

Owners and developers typically contract directly with a construction company, rather than through construction managers or trade contractors. For example, under NZS 3910, while a construction manager (the engineer to the contract, but not necessarily a chartered professional engineer) is appointed as the principal's agent to manage the contract, the contractual relationship is directly between the principal and contractor. The contractor then subcontracts directly with specialist subcontractors.

An area that is continuing to develop is the use of alliance contracting, typically for large PPP infrastructure projects. In this regard, major construction companies with local expertise will frequently form joint ventures with foreign companies possessing specialist expertise, which, along with design consultants and key specialist subcontractors, form an 'alliance' of parties that contract with the pertinent public authority for the project.

PPP and PFI

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

There is no specific legislative or regulatory framework for PPPs, which are typically only used for large-scale infrastructure projects. Examples include the construction of the Wiri Prison (completed in 2015), and the development and construction of the Transmission Gully highway near Wellington (scheduled to open to traffic in late 2021).

The Treasury's National Infrastructure Unit provides guidance and advice on PPPs (including project agreement forms) on its website: www.infrastructure.govt.nz. PFI contracts are not typically used.

Joint ventures

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

In New Zealand, the term 'joint venture' (JV) has no precise legal definition and is not a recognised legal entity in its own right. A JV will generally be formed using one of the following legal structures:

- a limited liability company (a company);
- a limited partnership (LP);
- a partnership; or
- a contractual agreement.

The liability of each member of a JV will be determined by the legal structure chosen and the commercial arrangements between its members.

Where a company is established to form a JV, it is this entity that undertakes the project and assumes the legal liability, not the members individually. This allows the members to limit their exposure to liabilities and project losses. Liability for company directors will only arise in circumstances where directors have breached certain duties in the Companies Act 1993.

The situation is similar for LPs registered under the Limited Partnerships Act 2008. In the case of a company or LP, members may nevertheless become liable where they are required to provide guarantees on behalf of the company or LP.

A JV may also take the form of a legal partnership, either created expressly by the members or as deemed by the Partnership Law Act 2019. In contrast to a company or limited partners of an LP, the members of a legal partnership are jointly and severally liable and each member may bind the others subject to the laws of partnership.

Alternatively, a JV may be formed purely on a contractual basis between members. Under this form, the liability of each member will be subject to the provisions contained in the JV agreement together with any other agreements entered into with external third parties and the general law of contract.

Tort claims and indemnity

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

The law permits a contracting party to indemnify the other party against acts, errors and omissions arising from the work of the indemnifying party. Normally, a head contractor indemnifies a principal for losses arising from acts, errors and omissions in the performance of the contractor's scope of work (including the work of subcontractors). Commonly, subcontracts contain back-to-back indemnity provisions mirroring those provided to the principal by the head contractor.

However, to the extent a party's loss is caused by its own negligence, it may not be able to recover that loss from the indemnifying party. A contractual clause that indemnifies a party against loss that it has caused is enforceable (in the absence of fraud), but contracts do not normally contain such provisions. To the contrary, provisions for apportionment of loss are increasingly being incorporated into the more common forms of construction contract.

Liability to third parties

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

Although the law recognises the common law doctrine of privity of contract, there are significant exceptions, both statutory and at common law.

For example, the Contract and Commercial Law Act 2017 permits a person who is not a party to a contract, but upon whom the contract was intended to confer a benefit, to enforce the contract as if that person were a contracting party.

In the specific context of building contracts, the Building Act 2004 implies certain warranties relating to proper performance of contract works into every residential building contract (the warranties are not implied into non-residential building contracts, and subcontracts with the head builder in a residential project are also excluded). A person who is the owner of a building or land to which the provisions apply may bring proceedings for breach of warranty even if that person is not a party to the building contract. Parties cannot contract out of these consumer protection provisions.

For the past several decades, New Zealand has experienced a significant problem with leaky buildings. In response, the law has recognised an extra-contractual duty of care on the part of contractors, subcontractors, suppliers and consultants (among others) to owners and subsequent purchasers of properties to ensure that building design, materials and construction work comply with applicable weather tightness 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, there are proposed changes to building laws in relation to products and materials that are likely to come into force near the end of 2021.

Insurance

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

There is a variety of insurance products available to contractors, including the following.

- Contract works insurance (either project-specific or annual).
- Tools, plant and equipment insurance (generally for market value only).
- Public liability insurance (protection against legal liability to third parties for damage, loss or injury caused by an act or omission of the contractor arising out of the performance of the contract works). Compensation for bodily injury is covered by the Accident Compensation Corporation (ACC).
- Employers' liability insurance (cover for personal injury to employees of the insured, that is not covered by ACC).

- Professional indemnity (PI) insurance (cover for liability costs arising from faulty professional advice or design; used by contractors where design components are the responsibility of the contractor). Most domestic PI (and errors and omissions) insurance policies now exclude coverage for leaky building liability.
- Errors and omissions insurance (similar to PI insurance if a contractor is held liable for third-party loss resulting from an error or omission in performing the contract works, such as failure to follow a design specification or use of the wrong materials). Historically, this type of insurance was difficult for contractors to obtain, but there is now some availability from some specialist insurers and in bespoke policies.
- Statutory liability insurance (cover for legal costs and fines under certain legislation). Fines for breaching health and safety laws cannot be insured but the policy will normally cover legal costs and reparation payments if the contractor is taken to court for breaching health and safety laws.

Contractors' pollution liability insurance is available from some specialist insurers and provides protection against third-party liabilities arising from pollution releases. There are policy exclusions, particularly in relation to pre-existing environmental contamination.

Although not standard, consequential loss insurance may be available from specialist liability insurers to cover financial losses resulting from a contractor's act or omission covered under a liability insurance policy (eg, downtime owing to delays resulting from a contractor's act or omission). Consequential loss insurance, specifically for delays arising from accidental damage to any part of the contract works, is another specialist product available.

Normally, policies exclude liability for liquidated damages. New Zealand's no-fault accident compensation law bars claims for compensatory damages for personal injury or death if cover is available from the ACC. New Zealand law does not generally limit liability for damages, although the parties may agree to a contractual cap.

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

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

There are no laws requiring a minimum amount of local labour, although employers need to be aware that, under the Immigration Act 2009, only New Zealand citizens, New Zealand residents and permanent residents, holders of Australian current permanent residence visas and Australian citizens who enter New Zealand on a current Australian passport, are entitled to work in New Zealand as of right. All other persons must hold a valid work visa issued by Immigration New Zealand (INZ).

Each visa category has its own specific requirements. However, generally, before employing a foreign national, an employer must do the following:

- show that the person's occupation is on one of the immediate, long-term or construction and infrastructure skill shortage lists;
- for an occupation not on a skill shortage list, first advertise for the position locally and demonstrate to the INZ that it could not fill the required role; or
- obtain employer accreditation to supplement its New Zealand workforce with foreign nationals.

At present, most occupations in the construction industry will be on one or more of the skill shortage lists. However, in April 2017, the Minister of Immigration announced a package of changes to New Zealand's immigration laws. These changes, which were implemented in 2017, introduced remuneration thresholds for individuals applying for residence under the skilled migrant category and introduced a maximum duration of three years for lower-skilled and lower-paid essential skills visa holders (after which a minimum stand-down period will apply before being eligible for a further work visa). Essential skills work visa and skilled migrant category resident visa remuneration thresholds were further updated as a part of the 2018 Department of Immigration Review, and have increased from 26 November 2018. The new thresholds are based on the median salary and wage rate of NZ$25 per hour. Further information is available on the INZ website: www.immigration.govt.nz.

Because of the pandemic, only New Zealand citizens, permanent resident holders and some Australian citizens and residents are able to enter New Zealand without a special exemption being granted.

Local labour law

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

Where an employee has been employed on a fixed-term agreement that complies with section 66 of the Employment Relations Act 2000 (ERA), and that employment comes to an end at the conclusion of the specified project, there are no further legal obligations owed to that employee.

To amount to fixed-term employment, the contractor and employee must agree that the employment will end at the close of a specified date, on the occurrence of a specified event or at the conclusion of a specified project. Furthermore, the contractor must have genuine reasons based on reasonable grounds for specifying that the employment will end in one of those three ways.

Where an employee's agreement is one of indefinite duration, their employment will continue beyond the completion of a project. If the contractor attempts to end the employee's employment, it may amount to an unjustified dismissal, unless the contractor can show that the decision to dismiss was one that a fair and reasonable employer could have made in all the circumstances.

Provided that an employee's employment is ended appropriately and lawfully, there are no further legal obligations owed to the employee after that point.

Labour and human rights

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

Provided a foreign construction worker is lawfully entitled to work in New Zealand, he or she will enjoy the same rights and protections at law as local construction workers.

If the foreign construction worker is an employee (as defined by section 6 of the ERA), he or she is entitled to the protections afforded by the ERA, the Holidays Act 2003, the Wages Protection Act 1983 and the Minimum Wage Act 1983 (among others).

Critically, status as an employee entitles a foreign construction worker be paid no less than the minimum hourly wage (NZ$20 per hour as of 1 April 2021), accrue annual holidays and sick leave (a minimum of 20 days and 5 days, the latter increasing to 10 days per annum in late 2021), and raise a personal grievance should the employer unjustifiably disadvantage or dismiss the employee from his or her employment.

Where an employer fails to follow those laws, the consequences vary. In the event of a failure to pay annual holidays or the minimum wage, the employer can be required not only to pay the amounts

properly owing, but also pay a penalty to the government. This process is brought (and paid for) by labour inspectors employed by the Ministry of Business, Innovation and Employment (a government agency).

By contrast, where an employee raises a personal grievance, he or she is required to organise the process themselves – this may entail attending confidential mediation, or proceedings before either the Employment Relations Authority or Employment Court, or both mediation and proceedings. If successful in the authority or court, the employee may receive compensation for lost wages, compensation for hurt, humiliation and distress and, in the case of dismissal, reinstatement to his or her former position.

If the foreign construction worker is an independent contractor, then there are no equivalent laws providing protection, and the parties' rights and obligations are determined by the independent contractor agreement. Independent contractors are normally required to submit invoices for payment and then pay their own tax. They are also normally required to provide their own tools of trade.

Close of operations

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

In closing its operations in New Zealand, a foreign contractor must do the following:

- dissolve any limited liability company formed in accordance with the Companies Act 1993 and seek removal of the company from the Companies Register;
- dissolve any limited partnership formed in accordance with the Limited Partnerships Act 2008 and partnership agreement and seek removal of the limited partnership from the New Zealand Limited Partnerships Register;
- dissolve any legal partnership formed in accordance with the Partnership Law Act 2019 and partnership agreement;
- in the case of a limited liability company and a limited partnership, request written notice from the commissioner of Inland Revenue stating that he or she has no objection to the company or partnership being deregistered; and
- distribute assets (if any), finalise the accounts, and pay any outstanding creditors and taxes due.

Where the foreign contractor has employees, it must consult with potentially affected employees. If the contractor implements its decision to close operations, it will need to give notice to employees that their positions are being made redundant, and pay out any contractual and statutory entitlements under the ERA and related legislation.

Where the foreign contractor is restructuring, for example, selling or contracting out its operations, it must also comply with Part 6A of the ERA. This part is technical in nature and legal advice should be obtained.

PAYMENT

Payment rights

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

A contractor may secure the right to payment through the terms of its contract or, if applicable, the Construction Contracts Act 2002 (CCA).

Under the CCA, parties to a construction contract have a statutory right to progress payments and certain enforcement remedies. Those rights and remedies (except charging orders) also extend to residential construction contracts.

To obtain payment under the CCA, the contractor serves a payment claim specifying the amount it considers is due. If the payer disagrees, it must issue a payment schedule recording the amount that it believes is due. The payer is then liable to pay the amount specified in the payment schedule. If the payer fails to issue a payment schedule in the specified time, it becomes liable to pay the amount claimed in the payment claim. In the event of non-payment, the contractor can apply to the court to enforce it as a debt due or suspend work (without affecting any other rights or remedies).

Where there is a dispute about sums withheld, the contractor may refer the dispute to adjudication, follow the dispute resolution mechanism in the contract if one is specified or otherwise commence proceedings. An adjudication decision may be entered as a court judgment where the decision required payment but the payer has remained in default.

A contractor cannot place a charging order (or lien) on the construction site without a court order. The CCA provides a faster process for obtaining this in construction cases. An appropriately nominated adjudicator should, if requested, grant a charging order where the amount claimed is due and the site is owned by the payer or an 'associate' of the payer. The charging order is lodged once the adjudication decision is entered as a judgment.

'Pay if paid' and 'pay when paid'

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

The CCA prohibits 'pay when paid' and 'pay if paid' arrangements: these are barred and have no legal effect. Parties to a construction contract have a statutory right to progress payments and certain enforcement remedies.

Contracting with government entities

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

No.

Statutory payment protection

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

Contractors have rights of suspension under the CCA and most standard-form construction contracts, which may prevent ongoing loss after an insolvency or pandemic-related event. With the exception of retentions, which are now subject to statutory trust protection under the CCA, contractors have no preferential rights to payment for past work, unless they have an agreement with the principal that grants a security interest over the principal's assets or provides for the retention of an ownership interest in the goods and materials being supplied. To maintain security over other secured creditors, interests should be registered with the Personal Property Securities Register. Other contractual options available to secure payments include bonds and guarantees.

Payments made to contractors by an insolvent principal may be subject to clawback, depending on the circumstances and timing of each payment.

FORCE MAJEURE

Force majeure and acts of God

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

Most standard form construction contracts used in New Zealand contain clauses that outline the consequences of an event beyond the control of the parties, although these are not always expressly identified as force majeure clauses. For example, the most common standard form contract, the NZS suite of contracts, provides that if the performance of the contract has become impossible or the contract has been otherwise frustrated, one party may notify the other party that it considers the contract to be terminated. Similarly, an extension of time may be granted for certain events (such as strikes, industrial action, floods, or volcanic or seismic events) that would fall within a traditional force majeure clause. This approach may vary from other standard form contracts that international contractors may be familiar with, such as the Joint Contracts Tribunal contract (which specifically lists force majeure as a relevant event and potentially grants the contractor an extension of time).

If there is no frustration clause included in a contract, the parties must rely on common law principles to establish that their contract has been frustrated. The court has power under the Contract and Commercial Law Act 2017 to make orders for money to be paid or property to be transferred where it is just to do so.

With respect to the current pandemic, the most commonly used NZS standard construction contract allows for suspension by the engineer to the contract, followed by the possibility of termination by the contractor if the suspension continues for over four months.

DISPUTES

Courts and tribunals

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

There is no specialist court to deal with construction disputes. Claims valued at less than NZ$350,000 are brought in the District Court and claims valued above that are brought in the High Court. Construction disputes are treated by the court like any other civil claim.

Some construction parties favour arbitration, partly because it enables them to appoint a specialist arbitrator. Parties must specifically provide for arbitration in their contract. Statutory adjudication is also available where the contract is a 'construction contract' within the meaning of the Construction Contracts Act 2002 (CCA). Occasionally, specialist project-specific dispute boards are established for large infrastructure projects.

New Zealand's independent bar is supported by a number of barristers with construction expertise who frequently sit as arbitrators, adjudicators and mediators. Retired judges and specialist lawyers from Australia are sometimes also appointed. In addition, a small number of industry organisations are partly or wholly dedicated to the construction sector. They assist in vetting and nominating suitable arbitrators, mediators and adjudicators and in facilitating those alternative dispute resolution processes. These include the Arbitrators and Mediators Institute of New Zealand, the Royal Institute of Chartered Surveyors and the Building Disputes Tribunal.

Dispute review boards

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

Dispute review boards (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 Transmission Gully highway project. They remain relatively uncommon, although there is growing support for their use.

The contractual documents and DRB specifications adopted by the parties will determine whether or when the board's decisions are final and binding, and whether the board can give non-binding advisory opinions. The parties may structure this as they wish.

Mediation

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

Mediation is a widely used method for resolving construction disputes. It is usually attempted in the course of litigation or arbitration and when the dispute has reached a sufficiently mature stage.

There is no legislative requirement for mediators to undertake specific training, although many have both a legal qualification and have undertaken further education in mediation. Some construction professionals (eg, engineers, quantity surveyors and building experts) have also begun to move into this space. They tend to mediate construction disputes where the issues are of a purely financial or technical nature (eg, final account disputes).

Under the High Court Rules, a judicial settlement conference (JSC) is available to the parties to litigation as an alternative to mediation. A JSC is akin to mediation, except that a judge assumes the role of 'mediator'. As a result, they may be able to provide the parties with a 'steer' on the merits in a way that a mediator would not ordinarily do. A JSC is confidential and the judge that conducts it is excluded from hearing the case at trial if the dispute does not settle.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Section 57(1) of the Evidence Act 2006 confers a statutory privilege in respect of communications or information that was intended to be confidential and was made in connection with an attempt to settle or mediate a dispute between the parties. The privilege also applies to confidential documents prepared in connection with an attempt to settle or mediate a dispute. The privilege may be disallowed if the communication or information was given or made for a dishonest purpose.

The privilege in section 57 does not apply to the terms of a settlement agreement, evidence necessary to prove the existence of a settlement agreement or a written cost-protecting offer in the context of awarding costs. Excluding for 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. 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. Parties may agree on 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.

Parties may contract to a shorter limitation period.

There are statutory preconditions for commencing and maintaining proceedings set out in the High Court Rules, such as following the correct procedures and time frames for filing and serving documents and paying the correct court fees.

ENVIRONMENTAL REGULATION

International environmental law

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

New Zealand is party to the Stockholm Declaration of 1972.

Some key pieces of New Zealand environmental legislation that provide for the environment and potentially impact upon the construction industry are as follows:

- the Resource Management Act 1991, which seeks to promote the sustainable management of natural and physical resources, and mandates that certain activities obtain resource consent;
- the Building Act 2004, which sets out the procedure for carrying out building work in New Zealand, including identifying works requiring resource consent under the Resource Management Act;
- the Climate Change Response Act 2002, which provides for the implementation, operation and administration of a greenhouse gas emissions trading scheme in New Zealand; and
- the Environmental Protection Authority Act 2011, which establishes an agency that administers applications for major infrastructure projects of national significance and administers the Emissions Trading Scheme.

In addition, liability at common law for negligence, nuisance or under the rule in Rylands v Fletcher (which imposes strict liability on those who bring onto their land something that may escape and cause harm) may affect the construction industry.

Local environmental responsibility

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

The primary duty affecting the construction industry is to obtain resource consent for proposed projects under the Resource Management Act 1991 and to comply with any conditions of the consent granted.

The Resource Management Act 1991 imposes the following penalties for offences under its provisions:

- for a natural person, imprisonment of up to two years or a fine not exceeding NZ$300,000; or
- for an entity other than a natural person, a fine not exceeding NZ$600,000.

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

The Building Act 2004 provides for fines for a range of offences, including carrying out building work without the required resource consent. These fines range from NZ$10,000 to NZ$200,000 depending on the specific offence.

CROSS-BORDER ISSUES

International treaties

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

New Zealand is party to a number of free trade agreements (FTAs) that protect foreign entities investing in New Zealand, including those with Australia, Chile, China and the Association of Southeast Asian Nations.

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 a 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 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?

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 Accord has identified 'priority areas' for improvement to better New Zealand's construction sector. Government commitments include improved pipeline management, regulatory systems and consenting processes. Industry commitments include enhanced leadership, organisation, business performance and improved collaboration. 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.

One of the examples of the government delivering on their commitment to improve regulatory systems (as noted in the Accord) is the proposed changes to New Zealand's building laws in relation to products and materials. In May 2020, the Ministry of Business, Innovation and Employment (MBIE) introduced the Building (Building Products and Methods, Modular Components and Other Matters) Amendment Bill. This Bill would see new responsibilities relating to building products, strengthened CodeMark regulations, a manufacturer certification scheme for modular construction, and enhanced penalties for non-compliance. Approaching its final stages in parliament, the amendment is likely to be finalised in late 2021, resulting in some of the most significant changes to the building and construction legislative and regulatory framework in the last 15 years.

Construction Contracts 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, after commissioning KPMG to undertake of review of the Regime, the MBIE released a consultation paper including possible amendments to the Regime in February 2020. The MBIE proposed clarification of the trust provision within the CCA to ensure retention is safeguarded through a trust account specifically for retention or a complying financial instrument (preventing co-mingling of payer money) and the addition of a requirement to provide a confirmation receipt of retentions being held on trust. MBIE also proposed to increase penalties for non-compliance with the retention regime. These proposed reforms are aimed at strengthening and clarifying the retention regime to provide benefits to subcontractors, contractors and clients. On 27 May 2020, these proposed changes were formalised in a government announcement. Furthermore, on 7 July 2020, the Minister for Building and Construction at the time, Ms Salesa, released a Cabinet paper formally outlining and proposing these amendments. While this paper sought the amendments be passed in 2020, there has yet to be any change but it is possible we will see this occur in 2021.

Covid-19 vaccination for employees

Under the Health and Safety at Work Act 2015, a person conducting a business or undertaking (PCBU) must ensure the health and safety of workers and eliminate risks to health and safety, so far as reasonably

practicable. If it is not reasonably practicable to eliminate risks to health and safety, then the PCBU must minimise those risks in so far as is reasonably practicable. In construction, the risk of spreading the coronavirus can generally be managed by the employees, and the PCBU, following the government-mandated protocols such as wearing PPE, hand washing, physical distancing and encouraging (or directing) sick employees to stay home.

The availability of the vaccine offers a new layer of protection against the coronavirus; however, it is not compulsory for all New Zealanders to get vaccinated. As a result, if an employee fails or refuses to get vaccinated, the employer must be careful to take steps such as changing an employee's duties, workplace, or location of work before taking any steps to dismiss the employee. This is especially so in the construction sector where the risk of coronavirus transmission is likely lower than, for example, a boarder security worker. Any steps taken by an employer must be fair and reasonable; therefore, the area in which the employee is working and the associated risks of the coronavirus must be a relevant factor in any decision the employer makes. While it is set to be legally tested, it is unlikely an employer could justifiably take action against an employee who refuses to get vaccinated. This means the best approach for employers is to encourage employees to get vaccinated and offer them access to information and support.

Coronavirus

43 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to coronavirus the New Zealand government has implemented a 4-level alert system containing restrictions based on the risk of the coronavirus in the community. At alert level 4, anyone not working in an essential service is required to stay home, resulting in the closure of 'non-essential' construction and infrastructure worksites. This government-led restriction precipitated a number of contract issues. At alert level 3, everyone must work from home unless this is not possible. For the construction sector, this means that 'non-essential' projects are able to continue on-site and performance of works can be resumed subject to health and safety requirements. At alert level 2 and below, the restrictions are significantly eased and there is little to no effect on construction. Contact tracing is still required at all alert levels.

In order to support businesses as a result of the pandemic and these restrictions, the government introduced the wage subsidy scheme. This scheme has been implemented for when New Zealand enters alert level 3 or 4. The wage subsidy is payment of NZ$585.80 a week for each full-time employee (more than 20 hours per week) or NZ$350 a week for each part-time employee (less than 20 hours per week). Businesses eligible for the subsidy are those with a 40 per cent reduction in revenue when compared to the equivalent period in the year previous. The subsidy is paid directly to the employer or self-employed person and a condition of payment is that the employer must commit to retaining the employee. Along with the wage subsidy, there are other support schemes for employees who are unable to work while obtaining a covid-19 test or are directed to self-isolate but are unable to work from home. While there is no guarantee these same support schemes will be kept in place for future alert level changes, based on the previous government response, it appears likely the wage subsidy and other support schemes will continue to be offered.

In response to the alert level measures, the government developed a covid-19 response plan on 5 April 2020, which sets out a three-phase plan to 'maintain, restart, and transform' the construction sector. The response plan includes a temporary shift in the focus of the Construction Sector Accord from industry transformation to resilience and recovery. Additionally, MBIE issued a guidance note for public sector agencies dealing with contractual implications associated with alert level 4 (the guidance note). The guidance note applies to contracts based on NZS 3910:2013, the most commonly used form of construction contract In New Zealand. The key clauses that the guidance note addresses are the 'change in law clause' (clause 5.11.10) and the 'suspension clause' (clause 6.7). The guidance note recommends that where a suspension notice has been issued by the engineer to the contract, government agencies should be discussing the implications of a suspension continuing beyond three months. In respect of the 'change in law clause', a contractor will be entitled to a variation under clause 5.11.10 as a result of the covid-19 alert level measures.

Other contract issues to be aware of that have arisen as a result of the alert level measures include an assessment of whether the pandemic will entitle contractors to an extension of time, a variation, or entitle them to terminate a contract. For example, clause 10.3.1 of NZS 3910:2013 may entitle the contractor to an extension of time on the basis that the impact of the coronavirus was not reasonably foreseeable at the time of tendering. This position may be different for those tendering now given that the coronavirus is a known variable. It is also arguable that the effects of the alert level measures, especially level 4, constitute a variation under the contract. Additionally, if a suspension of the works has been granted, then this suspension may be treated as a variation. The pandemic also gives rise to the potential of termination. For parties that entered into a contract before the pandemic, it may be considered a force majeure event depending on the contract terms (NZS 3910:2013 does not have such a clause). The doctrine of frustration may also be relevant if the effects of government action prevented a party's ability to perform the contract.

* *The authors wish to acknowledge and thank Sarah Holderness, Rob McStay and Gus Gray for their assistance with this chapter.*

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ISBN 978-1-83862-638-9