



Insight #3: Representations, Warranties and Indemnities – Part I

Do Not Assume that Israeli Law is Identical to your Local Law. Israel's contract law is a unique blend. The legislation itself is heavily influenced by German law, while court decisions are mostly influenced by common law – previously English law, and since the 1980s increasingly by US law. The result is a hybrid that is not quite similar to either continental law or common law. If Israeli law applies to your contract, avoid making any assumptions and instead check with local counsel.

Conventional Terms may mean Different Things in Different Jurisdictions. Sometimes they may have no defined meanings at all. Take for example "gross negligence": if you choose to refer to or apply this standard of liability in a contract under Israeli law, note that it has not yet been comprehensively defined by the Israeli courts. In other words, no one knows for sure what this means under Israeli contract law or how it is different from simple negligence. The same is true for "best efforts" and "best knowledge", often used in representations and warranties. Even "Business Day" has a different meaning in Israel, which follows a different weekend and holiday calendar than other countries. If you want certainty, define the terms you use in the contract or avoid using them and instead choose terms that have clear meanings under applicable law.

Note the Way that Damages for Breach of Contract are Awarded under Israeli Law. Israeli contract law does not differentiate between direct and indirect damages. Instead, it uses a test of reasonable foreseeability by the breaching party, i.e. the breaching party is liable for any damages that, at the time the contract was signed, were foreseeable or should have been foreseeable by the breaching party as a reasonable outcome of the breach. This means that all forms of indirect damages can be awarded for breach of contract under Israeli law as long as they are a reasonably foreseeable outcome of the breach. If you agree to be compensated for direct damages only, note that you are settling for less than the general standard under Israeli law. Consider also that in cases of breach of representations and warranties concerning the company, your damages as a shareholder will often be indirect (e.g. diminution of value of your shares).

Note the Long Statute of Limitations Period that Applies to Contracts. Israeli law imposes a relatively long statute of limitations period for contractual claims – generally 7 years. Sellers/ issuers of shares often demand a shorter period applicable to their responsibility and liability for breach of representations and warranties. If you agree to a shorter period, note that 7 years is the benchmark under Israeli law. Note also that some sellers/issuers will agree to longer periods for fraud or intentional misrepresentation.

Consider Liquidated Damages under Appropriate Circumstances. Israeli law allows the parties to agree liquidated damages provided that they are determined based on a reasonably foreseeable outcome of the breach. This can be an effective mechanism in circumstances under which damages will be difficult to prove or quantify. Many contracts under Israeli law include statements to the effect that the parties agree that the amount of liquidated damages agreed between them represents a reasonably foreseeable outcome of the breach. Note that this statement will not stop the court from reviewing this matter and forming its independent opinion.

Do Not Waive your Right to Enforce the Contract. Specific performance of contracts is the default remedy for breach of contract under Israeli law, and will be granted by courts other than in very limited circumstances. If you agree to limit your right to damages for breach of contract to a certain amount or time, make sure you do not limit your right to specific performance. In some circumstances, this can be an effective remedy in its own right regardless of the right to claim monetary damages.

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