



Insight #10: Specific Matters for Purchasers of Israeli Companies

Mind your Confidentiality Requirements. Negotiating with an Israeli company trading on the Tel-Aviv Stock Exchange? Note that it might be required to report the negotiations to the public before they are finalized, however the Israeli company may postpone the disclosure if it is significantly detrimental to the transaction. If you require confidentiality during the negotiations and until the transaction is signed, make sure to explicitly inform the Israeli party that confidentiality is a condition precedent to the negotiations. Note also that if the negotiations are leaked and become public knowledge, the Israeli company will no longer be able to postpone public disclosure of this matter.

Do Not Assume that there is a Fiduciary Out Requirement under Israeli Law. Israeli corporate legislation does not include any explicit reference to a requirement that the board act as an auctioneer or hold competitive processes when selling a company, other than in very limited circumstances in which a company is sold to its then controlling shareholder. Israeli legislation also does not include any reference to the fiduciary out principle as part of the directors' duties toward the company or its shareholders. There is also no case law explicitly reviewing these matters in the context of sale of a company to a third party purchaser. Merger and acquisition agreements between Israeli parties only do not always include fiduciary out clauses. When acquiring an Israeli company, note that fiduciary out is not a must but rather a matter for commercial negotiations.

Look Out for Israeli Regulatory Requirements. Acquiring shares of an Israeli company may be subject to review by and approval of the Israel Competition Authority (formerly known as the Israeli Antitrust Authority), and under some circumstances this may be true even if this is your first acquisition of an Israeli company. If the target company participated in certain tax incentive schemes, received certain grants or obtained certain permits or licenses, additional approval or notice requirements may apply. Even a simple matter such as the target company's ownership of real estate in Israel may subject the transaction to notice and approval requirements in the event of a non-Israeli purchaser.

Review carefully with local counsel the applicable requirements and differentiate between notice requirements and approval requirements and between pre and post-closing requirements. Some oversights in these matters might be very difficult to correct after the fact.

Consider the Israeli Law Bring Along Mechanism. Facing minority shareholder dissent in a private Israeli company? Israel's companies law includes a bring along mechanism that, for private companies formed after April 2000, allows 80% of the shareholders to force the remaining 20% of the shareholders to join the sale, subject to court review. Israeli share or option award plans also often include mechanisms that enable the board to force the participants in these plans to join a sale or forfeit their options or shares.

- Note that many Israeli companies include various alternative bring along arrangements in their articles of association, however the validity of such arrangements is uncertain, as the law itself specifically provides that only the percentage holding required to force the minority to sell may be changed and not the other aspects of the mechanism. Make sure you receive the advice of local counsel before agreeing to – and even more so, before implementing – a bring along mechanism which deviates from the mechanism stipulated under law.

Limit Post-Closing Non-Compete Obligations to 4 Years. Israeli law generally disapproves of non-compete obligations and considers them a restrictive trade practice that requires the approval of the Israel Competition Authority. As an exception to this rule, non-compete obligations are allowed in the context of a sale of an Israeli company, provided that the non-compete period is limited to up to 4 years. If the shares are sold in more than one trench, make sure you receive advice of local counsel as to how this period should be calculated.

Replace the Articles of Association Immediately Following the Closing. There are at least two good reasons to do so. The first is that the existing articles will often include elaborate provisions which are unnecessary and possibly even damaging for you as the new sole shareholder. The company can adopt a very simple form of articles better suited for your purposes. The second is that for a long period of time Israeli companies were required to register the binding version of their articles of association in Hebrew. This has changed, and articles may now be filed in English together with a convenience translation into Hebrew. If the company you acquired has articles of association in Hebrew, replace them with articles in English.

Consider Appointing an Israeli Director. Dealing with the Israeli Corporations Authority, the Israel Tax Authority, other relevant local authorities and even local financial institutions may be easier when you have a local, Hebrew speaking member on your board of directors. For example, certain ongoing reporting to the Corporations Authority will need

to be made in Hebrew and to be signed as an affidavit, both more easily achieved when there is a Hebrew-speaking director present in Israel. Both Israeli resident officers of the company and Israeli resident professional directors can be considered to fulfil this role.

- Note: review the tax implications of appointing non-Israeli directors. A company incorporated in Israel will always be considered as resident in Israel for tax purposes by the Israel Tax Authority, but might find itself facing allegations that it is also resident for tax purposes in the jurisdiction in which its directors reside. This might happen because some jurisdictions adopt a “management and control” test under which a company may be deemed to reside for tax purposes in the country of residence of its directors.

Dr. Eyal Raz, Partner, specializes in representing and advising international and local clients in M&A and investment transactions involving Israeli companies.



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