

The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform

Arie Reich*

Oren Shabat**

☞ Causation; Comparative law; Damages; EU law; Israel; Measure of damages; Public procurement; Remedies

1. Introduction

Damages are formally part of the arsenal of remedies available to aggrieved tenderers in a public procurement procedure, in most jurisdictions, such as the EU, the US and Israel. It is also required by the UNCITRAL Model Law on Public Procurement and by the World Trade Organization (WTO) Agreement on Government Procurement (GPA). The damages remedy could have a critical role to play both in the encouragement of potential tenderers to invest in participation in the tender, as well as in curtailing and deterring improper or corrupt behavior by contracting agencies. However, in order for that to happen, this remedy must be effective and deterrent.

In spite of the great promise, that the damages remedy holds in encouraging greater competition in contracting and in reducing impropriety, the current rules that apply to the award of damages both in Israel and in the EU have made this remedy ineffective and non-deterrent. While there are several important differences between the remedies regime of the EU¹ and that of Israel which make the problem a bit less acute in the EU, there are also many similar flaws that both regimes suffer from and that justify to deal with them in one article. After reviewing the rules and key court rulings in this field and presenting the flaws that we have detected, this paper will propose changes aimed at improving the effectiveness of damages in public procurement so as to turn them into a deterrent factor in the fight against corruption and to contribute to the establishment of a more efficient and equitable procurement system, both in Israel and in EU Member States. After discussing the rationales for awarding damages when public procurement rules have been infringed, we argue that where a material infringement of these rules is established, aggrieved tenderers should be entitled to expectation damages, that is, pecuniary compensation assessed according to their lost profits. In order to overcome the difficulty of proving the causal link between the breach of the procurement rules and the claimant's loss of the contract, we propose to adopt an approach

* Professor, Faculty of Law, Bar Ilan University, Israel; Jean Monnet Chair of European Union Law & Institutions. Visiting Professor, Columbia Law School. E-mail: arie_reich@biu.ac.il.

** Practicing Lawyer and Doctoral Candidate, Faculty of Law, Bar Ilan University, Israel. E-mail: oren@shabat-law.co.il.

The research for this article is part of Mr Shabat's doctoral dissertation under the guidance of Prof. Reich. Previous versions of this article have been presented at the International Public Procurement Forum II, at the Central University of Finance and Economics, Beijing, China; the Faculty Seminar of the University of Pennsylvania Law School; the 16th Meeting of the International Academy of Commercial and Consumer Law, Mexico City; the Columbia Law School Visiting Faculty Seminar, New York; the Annual EU-Studies Workshop of the Israeli Association for the Study of European Integration and the First Private Law Consortium, held in Bar Ilan University. The authors wish to thank the participants of these distinguished forums and Benjamin Shmuely for their helpful comments.

¹ Generally speaking, every EU member state has adopted its unique set of rules governing the damages remedy for breach of the EU Public Procurement Directives (for a comprehensive comparative review see: *Public Procurement Law — Damages as an Effective Remedy* (Fairgrieve Duncan & François Lichère, (Eds.) (Oxford: Hart Publishing Ltd., 2011)). However, the EU Directives and the rulings of the European Court of Justice impose basic common standards that must be met by all, so it is not incorrect to talk about the "EU remedies regime". In general, the shortcomings in the field of damages for public procurement violations discussed in the article are found in the legal systems of most EU members.

whereby damages are assessed based on the probability that the claimant's tender proposal would have won the contract.

In other words, the article advocates applying the approach of damages assessment based on probability, which until now has been considered and adopted by some jurisdictions mainly in contract and tort cases, also to public procurement cases. We also propose to reverse the burden of proof in this matter so as to create the proper incentive for the contracting authority to reveal all relevant information to the court, thus making the adjudication process less complex and more efficient.

2. The damages remedy in Israeli public procurement law

Current Israeli law recognizes the importance of actions for damages for infringement of public procurement rules. In certain aspects, Israeli public procurement law even encourages such actions.² Paradoxically, however, damages for infringements of public procurement rules, and in particular damages for loss of profits, are extremely difficult to obtain. This crucial difficulty may be attributed to certain features to be further analyzed below:

- (1) onerous causation proof requirements;
- (2) strict time limits for lodging actions for damages;
- (3) lengthy and costly procedures;
- (4) low amounts of damages; and
- (5) the set-aside remedy requirement.

As hinted above, at least in relation to some of the features mentioned above, Israeli law and EU Member States generally share close similarities.

Therefore, the proposals presented in this paper are relevant and, we believe, valuable for all of these jurisdictions, and perhaps to others as well.

3. The statutory framework

Public tenders in Israel for central government authorities, as well as for various other public entities, are governed by the Tenders Duty Act, 1992³ and the Tenders Duty Regulations, 1993.⁴ These important pieces of legislation set out in detail the tendering rules by which contracting authorities are bound whenever they wish to purchase or sell goods or services.⁵ However, they are silent on the question of the remedies available to an aggrieved tenderer should the pertinent rules be infringed.⁶ This field has been addressed and developed, mainly, by the courts.⁷ The Court for Administrative Matters Act, 2000,⁸ which established the Courts for Administrative Matters, ordains these courts to adjudicate administrative disputes, which were previously confined to the jurisdiction of the Israel Supreme Court, in its capacity as the High Court of Justice. The act provides for two types of actions that are relevant to public procurement: 1.

² As will be shown below, the courts will sometimes reject applications for interim orders against a contract awards based on the reason that if a breach will be proven the aggrieved tenderer can be compensated by an action for damages, thus, implicitly preferring and encouraging such actions over petitions for corrective remedies. See also the very recent Supreme Court ruling in Civil Appeal 3309/01 *Kotlarsky v Tel Mond Local Council* (Nevo, 6.1.2013) [Hebrew] where Judge E. Rubinstein's openly pondered why the damages remedy in public procurement law is used so rarely, thus implicitly encouraging a more ample use of this remedy by aggrieved tenderers. The reasons for this rare use, which Judge Rubinstein found strange, are explained in this article.

³ Hereinafter referred to as: the "Tenders Duty Act".

⁴ Hereinafter referred to as: the "Tenders Duty Regulations".

⁵ It is to be noted, that the rules that apply to public tenders in Israel originate both from Administrative and Private Law. This dual applicability is widely known as the "normative dualism principle".

⁶ The same is correct as for other pieces of legislation governing the area of public procurement law in Israel, which have not been mentioned for the sake of brevity.

⁷ For a review of the development of the damages remedy in Israeli public procurement law see below.

⁸ Hereinafter referred to as: the "Courts for Administrative Matters Act".

“Administrative Petition”, which is a petition challenging a decision of an administrative agency⁹; and 2. “Administrative Action”, which is an action for damages resulting from an infringement of public procurement rules.¹⁰ Administrative Actions are reviewed in accordance with the Civil Procedure Regulations, 1984,¹¹ which provide the procedural framework for most civil actions in Israel.¹² An important and distinctive feature of an Administrative Action is that it cannot be lodged in parallel to lodging an Administrative Petition to the court. Practically, this means, that when an aggrieved tenderer lodges an Administrative Petition it cannot, at the same time, claim for damages. Thus, in order to claim for damages it is required to ask for the court’s approval to convert the Administrative Petition into an Administrative Action¹³ or wait until the Administrative Petition is resolved. However, as will be shown later, the situation is far more complex. It has lately been suggested by the Supreme Court that an aggrieved tenderer seeking damages cannot skip the Administrative Petition review stage.¹⁴ That is, it must first lodge an Administrative Petition and pursue it.

Then, and only if it fails to obtain a setting-aside order, by reasons that are not its fault, it may then proceed with lodging an Administrative Action.¹⁵

4. Key case law on the award of damages

4.1 Early case law on the award of damages

The damages remedy in Israeli public procurement case law dates back to the 1960s, when the Israeli High Court of Justice in the *Construction & Development* case¹⁶ awarded damages for the breach by the Ministry of Defense of its commitment to award a contract for road construction to the petitioner. The unequivocal and convincing reasoning of the *Construction & Development* judgment, as expressed by Judge Berenson, was based on the need to improve public efficiency and to deter against the re-occurrence of such an impropriety:

“to improve the quality and fitness of action of the public system and boost its level of care and efficiency; as well as to provide further caution and agility in the handling of citizens’ matters; and in the responsiveness to their needs. It will also advance and improve the public service level of the State”.¹⁷

Despite the court’s unprecedented willingness to award damages to compensate an aggrieved tenderer in a public tender, the court stressed that in its capacity as High Court of Justice¹⁸ it may only award damages for “the sake of justice”, while the amount of damages to be awarded shall be assessed according to a very general estimate, “without a meticulous examination of the details”.¹⁹ What the court meant was, that it would be willing to award an aggrieved tenderer some limited damages based on the court’s general

⁹ For example, a petition in which the petitioner asks the court to set-aside the contested contracting authority’s contract award decision.

¹⁰ Article 5 of the Court for Administrative Matters. The Court for Administrative Matters is the competent court for adjudicating Administrative Actions. However, some actions for damages in connection with public tenders may be submitted to the Civil Courts.

¹¹ Hereinafter referred to as: the “Civil Procedure Regulations”.

¹² However, in the case of a discrepancy between the provisions of the Courts for Administrative Matters Act and the Courts for Administrative Matters Regulations (Procedure), 2000 on the one hand and the Civil Procedure Regulations 1984 on the other hand, the former will prevail. See r.30 of the Courts for Administrative Matters Regulations (Procedure), 2000 (hereafter referred to as: “Courts for Administrative Matters Regulations”).

¹³ Regulation 30 of the Courts for Administrative Matters Regulations.

¹⁴ Appeal on Administrative Petition 9423/05 *The Broadcasting Authority v Katimora Ltd*, Tak-Al 2007(3) 2403 (2007) [Hebrew].

¹⁵ For example, when the tender became a “fait accompli” not as a result of the petitioner’s fault or when the court applied overriding public policy considerations in refusing to grant a set-aside remedy.

¹⁶ High Court of Justice 101/74 *Construction & Development in Negev Ltd (Binui Uputuach BaNegev) v Minister of Defense*, P.D. 28(2) 449,456–457. [This and all other quotes from Israeli judgments are the authors’ translation from the Hebrew original].

¹⁷ *Construction & Development in Negev Ltd, (Binui Uputuach BaNegev) v Minister of Defense*, P.D. 28(2) 449,456–457 (translation from the Hebrew by the authors).

¹⁸ Which does not act as a fact finder and generally does not conduct cross-examinations of witnesses.

¹⁹ *Construction & Development in Negev Ltd, (Binui Uputuach BaNegev) v Minister of Defense*, P.D. 28(2) 458–459 (translation from the Hebrew by the authors).

and approximate estimate, without conducting a thorough examination of the factual ground which gave rise to the damages claimed. A later case of the High Court of Justice placed a strict limitation on the scope of actions for damages by aggrieved tenderers. Thus, in the *Migda* case, Judge Aharon Barak²⁰ ruled, that only in “extraordinary cases” would the High Court of Justice be willing to exercise its power to award damages to an aggrieved tenderer.²¹ The main reasoning revealed by the court for its sweeping reluctance to award damages, was the lack of procedural means available to the High Court of Justice to conduct the necessary judicial fact-finding and damage assessment tasks, as opposed to the amplitude of procedural tools available to lower judicial instances, namely the Courts for Civil Matters²² the natural province of which is adjudicating complex factual disputes.

In a case decided before the Supreme Court known as the *Beit Yules* case,²³ the court awarded damages for expenses incurred by an aggrieved tenderer in participating in the tender but refused to award him damages for lost profits, holding that he had failed to prove a causal link between the infringement and the claimed damages.²⁴

4.2 The *Malibu* Case—Award of Lost Profits

A significant milestone in the development of the damages remedy for aggrieved tenderers was marked in the Supreme Court’s decision in the *Malibu*²⁵ case. The Supreme Court found, that the Israel Electric Corporation unlawfully deprived a tenderer from being awarded a contract to assemble a part of a power plant in one of its facilities. The contract became a “*fait accompli*” because it had been performed by another tenderer.²⁶

The Supreme Court held, therefore, that the aggrieved tenderer was entitled to recover the profits lost as a result of its unlawful deprivation of the contract award.²⁷ As will be shown below, the *Malibu* judgment was later strictly interpreted in more recent case law and, therefore, fails to fully reflect the current legal situation in this field. Nevertheless, it still remains a landmark decision in the field of Israeli public law, since it was the first occasion whereby damages for lost profits were awarded to an aggrieved tenderer in a public tender.

4.3 Strict interpretation of the *Malibu* judgment

Recent Israeli case law now provides strict interpretation of the *Malibu* judgment, thus narrowing the scope of the damages remedy, even in situations where an aggrieved tenderer successfully establishes an

²⁰ Judge Aharon Barak later presided over the Supreme Court of Israel from year 1993 to 2006.

²¹ High Court of Justice 688/81 *Migda v Ministry of Health*, P.D. 36(4) 85, 100–101 [Hebrew]. Nevertheless, the court held that such an action for damages would normally be referred to a competent court, (i.e., a competent Court for Civil Matters), to adjudicate the action. See also High Court of Justice 2167/90 *Micronet v Ministry of Culture and Education*, P.D. 45(1) 45, 54–55 [Hebrew].

²² *Migda* and *Micronet* cases. At the time, the competent court for adjudicating disputes concerning public tenders was the High Court of Justice. However, this exclusive jurisdiction rule was later relaxed in the High Court of Justice decision 991/91 *David Pasternak v The Minister of Construction and Housing*, P.D. 45(5) 50 [Hebrew], whereby the High Court of Justice granted the Courts for Civil Matters jurisdiction to adjudicate such disputes.

²³ Civil Appeal 207/79 *Raviv Moshe and Partners v Beit Yules*, P.D. 37(1) 533 [Hebrew].

²⁴ This Supreme Court decision was later overturned in Further Hearing 22/82 *Beit Yules v Raviv Moshe and Partners*, P.D. 43(1) 441 [Hebrew] on grounds which are not relevant to this paper.

²⁵ Civil Appeal 700/89 *The Electric Corporation of Israel Ltd, v Malibu Israel Ltd, and others*, P.D. 47(1) 667 [Hebrew]. At the time when the *Malibu* dispute was heard, the Courts for Administrative Matters were not established yet. Actions for damages concerning public tenders were, therefore, brought before the Courts for Civil Matters (in this case it was the District Court); appeals were heard in accordance with the Civil Procedure Regulations. This account reveals why the *Malibu* case was heard by the Supreme Court of Israel in its capacity as a Civil Appeal Court. Nowadays, similar actions are brought before the Courts for Administrative Matters and (generally speaking) are governed by the Courts for Administrative Matters Act and by the Administrative Courts Regulations.

²⁶ It is noteworthy, that the Supreme Court expressly held that causation between the infringement of public procurement law by the Electric Corporation and the unlawful contract award deprivation has been established. Additionally, the contract had already been performed by another tenderer. Under such circumstances the court went on to decide, that it was appropriate to award damages for loss of profits.

²⁷ Civil Appeal 700/89 *The Electric Corporation of Israel Ltd, v Malibu Israel Ltd, and others*, P.D. 47(1) 667. Nevertheless, in upholding the lower instance’s factual findings in this matter, the court refused to award the appellant damages for loss of reputation and for general damages (pp.691–629).

infringement of public procurement law. Thus, in the *Ports Authority* case,²⁸ the Supreme Court overturned the lower instance's decision to award damages to an aggrieved tenderer for lost profits. The court rejected the tenderer's argument, inter alia, that the tender proposals' evaluation method was unreasonable and faulty, thus unlawfully inhibiting this tenderer from winning the tender. The Supreme Court also held that neither bad faith nor improper or arbitrary considerations had been employed by the contracting authority.

The court found, however, that the contracting authority unlawfully failed to, inter alia, publish in advance its calculation method of the tender proposal's economic value. The Supreme Court, therefore, refused to award damages for lost profits and decided to follow the principles laid down in the case of *Construction & Development*²⁹ and awarded the tenderer damages based on a general estimation of the "expenses caused to it as a result of the infringements uncovered in the procurement procedure" at the sum of 150,000 NIS (approximately 40,000 USD). No legal expenses were awarded against the losing contracting authority. The *Ports Authority* case seems to suggest, that only in circumstances of extreme impropriety or bad faith would the court be willing to award damages for lost profits, while in all other cases of a lower degree of impropriety, an aggrieved tenderer may be awarded only limited damages, which may be based on some nebulous criteria and calculation method. Given the lengthy proceedings that took place before the first instance and the Supreme Court³⁰ it is doubtful whether the damages awarded to the tenderer could actually cover her high legal costs, her tender proposal preparation cost and other costs incurred in participating in the tender. Despite the very strict limitations imposed by the courts on the scope of the action for damages, some actions have indeed been successful.³¹ However, such successful actions are very few and mostly predate the *Broadcasting Authority* decision, which will be discussed below.

4.4 Further limitations on the scope of the damages remedy

In the *Broadcasting Authority* case³² the Supreme Court overturned another ruling of a lower instance, the Administrative Court, which awarded damages for loss of profits to an aggrieved tenderer. The Supreme Court held that a causal link between the impropriety that was revealed in the public tender and the aggrieved tenderer's alleged loss could not be established. Furthermore, the court was not convinced that the Broadcasting Authority had accommodated the tender so as to deliberately exclude the aggrieved tenderer and thus award the contract to its commercial rival. In other words, the court was not convinced that there had been bad faith on the part of the contracting authority. In an obiter dictum, Judge Grunis³³ noted that the aggrieved tenderer did not fully pursue its petition before the lower court to obtain a set-aside remedy. In his view, as he clearly expressed it, bringing an action for damages by an aggrieved tenderer, without initially pursuing a set-aside relief could lead to an undesirable result of what he notoriously titled "a virtual winner". The "virtual winner" phenomenon, Judge Grunis feared, will expose contracting authorities to a risk of paying twice (although not the same amount) for the same project: one to the actual winning tenderer and another to the "virtual winner", i.e. the tenderer who should have won the contract but who, in effect, provided no consideration whatsoever.

²⁸ Administrative Petition Appeal 7357/03 *Ports Authority v Tzomet Engineers, Planning, Coordination and Projects Administration Ltd*, P.D. 59(2) 145 [Hebrew].

²⁹ *Construction & Development in Negev Ltd (Binui Uputuach BaNegev) v Minister of Defense*, P.D. 28(2) 449, 456–457.

³⁰ The proceedings before the first instance started in year 2001. The Supreme Court ruling was delivered in September 2004.

³¹ One rare example is a judgment by the District Court of Tel-Aviv in Administrative Action (Tel-Aviv) 124/06 *Avigal Manpower Services Ltd, v Herzlia Municipality*, Tak-Mech 2010(1) 14685 (2010) [Hebrew], where one million NIS were awarded for lost profits, but the court did not elaborate on the reasons which lead it to this decision. See also Administrative Action (Tel-Aviv) 107/02 *Jaljuli Planning and Construction G.L. 1996 Ltd, v Municipality of Al Tira* (Pador, 10.4.2006) [Hebrew]; and Civil File (Jerusalem) 2220/00 *Lighting Factory A. Hecht Ltd, v The Postal Authority*, Tak-Mech 2003(2) 16627 (2003) [Hebrew].

³² Appeal on Administrative Petition 9423/05 *The Broadcasting Authority v Katimora Ltd*, Tak-AI 2007(3) 2403 (2007) [Hebrew].

³³ Currently the President of the Israel Supreme Court.

Interestingly, Judge Grunis referred to the fact that also in the United States, the vast majority of the rulings have denied claims for expectation damages³⁴ and only awarded reliance damages to aggrieved tenderers.³⁵ He also raises a concern, that where an aggrieved tenderer refrains from seeking a set-aside order against the contested decision of the contracting authority, the justice system may run a risk of delivering two contradicting judgments: one judgment in relation to the Administrative Petition ruling that Tenderer A was justifiably awarded the contract, and another—by a different justice in the Administrative Action—ruling that Tenderer B should have won the contract, and therefore is entitled to expectation damages. Judge Grunis seems to suggest, that if we were to require the aggrieved tenderer to pursue, to the end, an Administrative Petition for a set-aside remedy, the risk for such conflict of judgments would be averted, since then all the tenderers for the contract in question would be bound by the first ruling as a *res judicata*.³⁶ However, the Supreme Court in the *Broadcasting Authority* judgment did not, in the end, base its ruling on this consideration, but rather on the failure of the aggrieved tenderer to prove causation. The court, therefore, awarded the aggrieved tenderer only reliance damages, that is, damages for costs incurred in preparing the tender proposal, at the sum of NIS 75,000, instead of the NIS 1.3 million awarded by the Administrative Court for lost profits.

The aggrieved tenderer was also required to pay court expenses and attorney fees to the appellant procuring authority, at the sum of 10,000 NIS.

Nonetheless, the more troubling implication of the *Broadcasting Authority* judgment, in our opinion, is the suggestion by the obiter dictum, that aggrieved tenderers may be required to pursue an action for obtaining a set-aside remedy, before they may claim damages. The then President of the Supreme Court, Judge Beinisch, also expressed in her concurring opinion agreement in principle with this dictum of Judge Grunis. She notes:

“As a rule, it would seem that one should not allow the skipping over the execution phase, that is, lodging a petition to enforce the winning of the tender, to the phase of the Administrative Action for the purpose of obtaining expectation damages.”³⁷

She also held that as a matter of principle only reliance damages should be awarded to an aggrieved tenderer, and only under exceptional circumstances there may be a justification to award expectation damages. In holding so she also referred to a previous decision of hers in the matter of the *Ports Authority*, discussed above, where she held that expectation damages should be awarded only in cases of bad faith on behalf of the contracting authority.³⁸ However, similar to Judge’s Grunis approach, she too prefers to leave these questions for later deliberation, since there was no need to rule on them in the case at hand.³⁹

The Courts for Administrative Matters, which are, at large, the competent courts in Israel for adjudicating legal disputes concerning public tenders, seem to have accepted the obiter dictum expressed in the *Broadcasting Authority* case as a binding ruling and also interpreted it very widely, thereby imposing strict limitations on the scope of the damages remedy. This approach is clearly reflected in the *Power*

³⁴ For example, compensation for lost profits.

³⁵ The court refers to the judgment of the Supreme Court of California in *Kajima/Ray Wilson v Los Angeles County Metropolitan Transportation*, 1 P.3d 63, 2000; Cal. LEXIS 4551.

³⁶ Of course, when lodging an Administrative Petition, as in most jurisdictions, all the potentially affected parties need to be summoned by the petitioner. Therefore, the court’s ruling will, generally speaking, bind all the tenderers in the tender by the *res judicata* rule, in any subsequent legal proceedings between them concerning the same tender.

³⁷ Appeal on Administrative Petition 9423/05 *The Broadcasting Authority v Katimora Ltd*, Tak-AI 2007(3) 2403 (2007) [Hebrew], p.9.

³⁸ Administrative Petition Appeal 7357/03 *Ports Authority v Tzomet Engineers, Planning, Coordination and Projects Administration Ltd*, P.D. 59(2) 145 [Hebrew].p.4.

³⁹ A later decision by the Supreme Court also expressed concurrence with this dictum, although suggested not to implement it stringently: Appeal on Administrative Petition 5487/06 *Supermatic Ltd v Israel Electric Corporation Ltd*, (Nevo, 12.4.2009) [Hebrew]. Judge Naor, who wrote the Supreme Court’s unanimous opinion, tended to agree with the mentioned obiter dictum on the requirement to pursue a set-aside remedy prior to lodging an Administrative Action for lost profits; however she opined that this requirement should not be applied as a “stringent rule”. The appeal was dismissed on the merits of the case. See also Civil Appeal 8835/07 *Ram Shen Services and Investment Ltd, v Jerusalem Municipality* (Nevo, 8.12.2010) where Judge E. Rubinstein also tended to agree with Beinisch’s obiter dictum.

Strength case.⁴⁰ In this case the Courts for Administrative Matters of Tel-Aviv struck out an Administrative Action—an action for damages lodged by an allegedly aggrieved tenderer—without considering the merits of the case. Apparently, the claimant did follow the obiter dictum expressed in the *Broadcasting Authority* case and lodged a timely Administrative Petition for a set-aside remedy with the Administrative Court. The tenderer also applied for an interim order in order to prevent the contract from being awarded to the winning tenderer, thus transforming the tender into a “fait accompli”. However, the tenderer failed to obtain an interim order, which meant for him, that the contracting authority could no longer be prevented from awarding the contract to the winning tenderer.

The tenderer then withdrew its Administrative Petition for a set-aside order, which had seemed obsolete, as the tenderer became unable to stay the contract from being awarded and performed.⁴¹ The tenderer lodged, instead, an Administrative Action. Nevertheless, as aforesaid, the court struck out the action without referring to the merits of the case. In its decision, the court held that the tenderer’s withdrawal of its Administrative Petition for a set-aside order equated to giving up its right to be declared the winner in the tender.⁴² Since, in the view of the court, no proper account was given as to why the tenderer had withdrawn its set-aside petition, the action for damages was due to be struck out.⁴³ As we will explain below, the requirement to lodge an Administrative Petition for set-aside order is a major dissuading cause from bringing actions for the remedy of damages by aggrieved tenderers.

4.5 The set-aside proceedings requirement as a dissuading factor

It will be only rarely possible to obtain damages in Israel for lost profits if the aggrieved tenderer has failed to seek a set-aside remedy prior to lodging an Administrative Action. This rule has the effect of imposing a quite cumbersome constraint on the practical option of pursuing an action for damages. In order to understand this assertion, it is essential to first briefly examine the basic procedural rules governing the lodging of an Administrative Petition, i.e., an action for obtaining a set-aside remedy.

5. Review of the rules for lodging Administrative Petitions

An aggrieved tenderer who wishes to file an Administrative Petition is likely to go through several obstacles and hurdles, which may dissuade it from initiating such proceedings. The main obstacles will be discussed briefly below.

⁴⁰ Administrative Action (Tel-Aviv) 106/07 *Power Strength Ltd, v The State of Israel — Office of Prime Minister*, Tak Mech 2008 (3) 9072 (2008) [Hebrew]. The same approach has since been adopted in various other Administrative Court rulings (for example: Administrative Action (Jerusalem) *Yoka Real Estate v The Israel Land Administration* (Nevo, 12.12.2012) [Hebrew]; Administrative Action (Tel-Aviv) no. 125-08 *Avidar Security Services v Amidar, Israel, National Housing Corp. Ltd*, (Nevo 6.11.2011) [Hebrew]).

⁴¹ Furthermore, as aforesaid, it is not possible for an aggrieved tenderer to bring an Administrative Action as long as an Administrative Petition for a set-aside order is pending.

⁴² Cf. Administrative Action (Tel-Aviv) 42355-02-11 *Ofer and Sons, Farming Company Ltd, v Town Association for Environmental Quality “Drom Yehuda”* (Nevo, 24.1.2012) [Hebrew].

⁴³ See also Administrative Action (Jerusalem) 12/01 *Atir Ltd v The State of Israel* Tak-Mech 2008(4) 13329 (2008) [Hebrew]. The judge explained his judgment as follows: “According to this approach, the expectation from the claimant to timely exhaust its enforcement rights, prior to bringing an action for damages for lost profit, conforms with the public interest in general and with public procurement law in particular in all aspects concerning public efficiency, taxpayers’ money saving, and the interest of certainty and stability in public activities. An aggrieved tenderer’s option to wait on the sideway, that is, to ‘sit on the fence’ while the public agency proceeds to the conclusion and performance of a contractual relationship with the winner in the public tender, and then to bring an action for loss of profits only at a later stage, is unreasonable and leads to harsh results. It has, therefore, been ruled more than once, that damages for lost profit should be used as a residual remedy only, in exceptional circumstances whereby it is not possible anymore to bring legal proceedings aimed at declaring the plaintiff as the winner in the tender, or where it is not possible anymore to annul the tender, particularly in situations of ‘fait accompli’, which are not a result of the claimant’s conduct.” (p.13341).

5.1 *Strict time limits*

According to the Courts for Administrative Matters Regulations⁴⁴ an Administrative Petition must be lodged within 45 days from the publication date of the contracting authority's contested decision.⁴⁵ Such a petition must be brought "in real time"⁴⁶ as the Court for Administrative Matters of Jerusalem held lately.⁴⁷

However, even a petitioner who lodges an Administrative Petition within this statutory time limit still runs the risk of its petition being struck out without judicial review on its merits where the court finds that in light of the "objective" circumstances of the case the petition was lodged in delay.⁴⁸ This "objective" delay rule causes extreme harshness to aggrieved tenderers who lodged timely petitions, but may nevertheless be denied by the courts, for "objective" reasons over which they have no control.⁴⁹

5.2 *Wide judicial discretionary power to deny Administrative Petitions*

The Courts for Administrative Matters Regulations confer on the Court for Administrative Matters a wide discretion to strike out or deny an Administrative Petition, whether partially or entirely, based on the Petition documents alone or sometimes after reviewing the preliminary response of the respondents, if the court considers that the petition reveals no grounds for judicial intervention.⁵⁰ Furthermore, in order to prevent the contract from being awarded and performed by the winning tenderer, and thus becoming a "fait accompli", the petitioner will normally apply for an interim order.⁵¹

Such an application may be struck out by the court without reference to its merits. The regulations do not provide any guidelines on the grounds which may justify such denial.⁵² Administrative Petitions and applications for interim orders are, therefore, subject to a preliminary judicial scrutiny, compounded with wide judicial discretionary power to strike out or deny the aggrieved tenderer from being heard. Although we presume that such judicial powers are almost invariably used by professional judges who apply legitimate considerations, nevertheless, Administrative Petitions and interim order applications may sometimes be rejected for what appears to be arbitrary grounds.

5.3 *Limited cross-examinations of witnesses*

The court may also resolve the dispute on the basis of the parties' written arguments only, with no inter-partes hearing at court. If the court considers that an irreparable damage may be inflicted upon the petitioner until its ruling on the merits of the interim order is delivered, it may grant an ex-parte provisional interim order and summon the parties to an inter-partes court hearing on the application for an interim order within 10 days of the grant of this provisional order.⁵³ However, even if an inter-partes hearing is

⁴⁴ Regulation 3 of the Courts for Administrative Matters Regulations.

⁴⁵ Alternatively, the Administrative Petition has to be presented within 45 days of when the contested decision was presented to the petitioner or from the date when it was known to it.

⁴⁶ For example, it should be brought in close proximity to the delivery of the arguably wrongful decision by the contracting authority.

⁴⁷ Administrative Action (Jerusalem) 202/05 *T.V Three Ltd v The Second Authority for Television and Radio*, Tak-Mach (1)2007, 9805, 9809 (2007) [Hebrew].

⁴⁸ Regulation 4 of the Courts for Administrative Matters Regulations.

⁴⁹ An example is the case of Administrative Petition (Tel-Aviv) 1372/05 *S.L.I Investment Ltd, v Ayalon Routes Corp. Ltd*, (Nevo, 24.7.2005) [Hebrew] where the court struck out the petitioner's petition 16 day only after the contested contract award decision date. In our view, it is doubtful whether 16 days are normally sufficient for preparing and lodging a proper Administrative Petition bearing in mind bureaucratic and other obstacles which an aggrieved tenderer has to overcome during this period, particularly if he is not a "repeat-player".

⁵⁰ Regulation 7(2) of the Courts for Administrative Matters Regulations.

⁵¹ Regulation 9 of the Courts for Administrative Matters Regulations.

⁵² Alternatively, the court may also order the respondents to present their responses to the application and summon the parties to a hearing before the court (r.9 of the Administrative Court Regulations).

⁵³ Regulation 9 of the Administrative Court Regulations.

conducted, cross-examination of witnesses will normally be very time constrained or entirely barred as per the discretion of the judge hearing the case.⁵⁴

Therefore, at this very crucial stage, aggrieved tenderers' chances to bring evidence on impropriety (and obtain an interim order) are extremely limited, since they rely mainly on documentary evidence and oral arguments, making it easy for the respondents to fend off allegations of improprieties.

5.4 Costly procedures

A court granting an interim order may, upon its discretion, require the applicant to provide an undertaking to pay damages (thereby agreeing to compensate the respondents), the purpose of which is to facilitate the recovery of any loss caused to the respondents should the court eventually reach a conclusion that the interim order was unjustified. Applicants for interim orders may also be required, upon the judge's discretion, to provide a guarantee,⁵⁵ which is normally a bank guarantee (at an amount deemed appropriate by the judge), to cover the said losses of the respondents. The bank guarantee requirement is normally a substantial financial burden on the applicant, considering that not only has the contract not been awarded to him, but he is also required to finance an expensive bank guarantee for the full duration of the interim order (the length of which is hard to foresee at the time). This is not the only heavy financial burden imposed on an aggrieved tenderer, who seeks to enforce its rights through a set-aside remedy. According to a recent Israeli Supreme Court decision, a petitioner seeking a set-aside remedy who also claims to be declared the winner in the contested tender, is obliged to maintain a valid tender bond throughout the trial proceedings in order to secure compliance of its tender proposal undertakings should the tenderer win the tender.⁵⁶

Additionally, the petitioner will also incur attorney fees, which are often very high, as well as additional costs ordinarily associated with the handling of a trial.⁵⁷

5.5 The criteria for obtaining interim orders

The court may grant an interim order to maintain the status quo between the parties during the trial proceedings⁵⁸ until the petition is resolved, upon proof of three cumulative requirements: First, the applicant of an interim order must show an arguable cause of action against the contracting authority. Second, it must show, that it is likely to suffer an irreparable harm if the interim order is refused. Third, it must convince the court that, on the balance of convenience, the harm that may be inflicted upon it should the interim order be refused, will be greater than the harm that will be inflicted upon the respondents should the relief applied for be granted.⁵⁹ Furthermore, even if all the above requirements are satisfied, the court may still consider any relevant overriding public policy considerations that weigh against granting the requested remedy. Frequently, the courts refuse to grant interim orders on public interest grounds.⁶⁰

⁵⁴ Administrative Petition (Jerusalem)750/07 *White Snow (1986) Ltd, v Ministry of Health* (12.01.2008) [25.12.2007] [Hebrew]; E. Shraga and R. Shachar, *Administrative Law Procedure & Evidence in Administrative Affairs Courts* (Tel Aviv: Shesh Publishers, 2011), pp.342–350 [Hebrew].

⁵⁵ Regulation 9(f) of Court for Administrative Matters Regulations; Shraga and Shachar, *Administrative Law Procedure & Evidence in Administrative Affairs Courts* (Tel Aviv: Shesh Publishers, 2011), pp.227–228.

⁵⁶ A Civil Appeal 7699/00 *Tamgash Management Company v Kishon Drainage Authority*, Tak-Al 2000(3) 419 (2000) [Hebrew]. Tenderers in Israeli public tenders are normally required to submit, along with their tender proposals, a Tender Bond, i.e., a bank guarantee at a fixed percentage of the value of their tender proposals. The Tender Bond can be forfeited by the contracting authority if the tenderer is later declared the winner, but for some reason refuses to sign the contract.

⁵⁷ Such as court fees, expert fees, etc.

⁵⁸ That is, the court may stay the tender procedure, the implementation of a contract award decision or the performance of an awarded contract (depending on the stage at which the petition was lodged).

⁵⁹ Petition for an Approval to Lodge an Appeal 1557/02 *Megamart Sport Equipment Ltd, v The State of Israel — Ministry of Defense*, Tak-Al 2002(2) 1807, 1808 (2002) [Hebrew].

⁶⁰ See, e.g., Petition for an Approval to Lodge an Appeal 2139/06 *More and Co. (1982) Ltd, v Ministry of National Infrastructures — The Water Commissioner* (Pador, 6.4.2006) [Hebrew]; Appeal on an Administrative Action no. 2803/06 *Meyer & Sons Ltd, v Hagichon Water Factory and Drainage Jerusalem Ltd*, Tak-Al (2)2006 235 (2006) [Hebrew].

As a matter of fact, the vast majority of applications for interim orders in public tenders disputes are denied. Additionally, in recent years, the courts also consider whether perhaps an action for damages is a more appropriate remedy in the case at hand than a set-aside order. This last consideration is often heavily relied upon by the courts in support of their refusal to grant interim orders.⁶¹ In doing so, the courts completely ignore the reality described above whereby a satisfactory remedy of damages against a contracting authority is extremely hard to obtain. One should also remember, that at this very preliminary stage of the proceedings where an interim order is applied for by an aggrieved tenderer, cross-examination of witnesses is extremely constrained (if allowed at all), document disclosure procedures is still not available and the evidence before the court is very limited. It is, therefore, hard to see how the court can rule on the appropriateness of an action for damages as alternative relief to a set-aside order at this stage.

5.6 *Interim conclusions*

Whilst bringing an Administrative Petition is, by no means, inexpensive, chances for success in such legal proceeding are rather slim, since most of these petitions are denied. The cumulative effect of the obstacles and hurdles described above, namely the high expenses coupled with low chances of success, create a dissuasive effect against the filing of Administrative Petitions. Even when an aggrieved tenderer, despite all the above obstacles, does lodge an Administrative Petition but fails to obtain an interim order, under normal circumstances it would mean that the contract will be awarded and signed with the tenderer elected by the contracting authority.

By the time the court will reach its ruling on the merits of the Administrative Petition (and presumably, even prior to that stage), the project for which the tender was carried out, will be deemed a “fait accompli”. If the aggrieved tenderer then elects not to fully pursue the Administrative Petition for a set-aside remedy, where the contract has already been awarded and performed, he runs the risk of later being barred from suing for damages, as explained above.⁶² Needless to say, the strict time limits for lodging Administrative Petitions for set-aside orders are unduly cumbersome and actually force the aggrieved tenderer to initiate immediate legal proceedings in hope of obtaining damages, before the full extent of its damages has crystallized.⁶³ Only very few aggrieved tenderers will be willing to conduct expensive trials to obtain set-aside remedies where the chances to succeed in such trials are inherently low. So much less will they be willing to conduct expensive legal proceedings in an effort to obtain interim orders just for the sake of later being legally entitled to lodge an action for damages, especially considering the inherently low chances of success of such actions, given the onerous causation requirements, not to mention the poor prospects of obtaining damages for lost profits. The main reasoning given by the Supreme Court in support of its observation that aggrieved tenderers should be required to seek a set-aside remedy prior to bringing an action for damages, i.e., avoidance of the risk of causing the contracting authority to pay more than once for the same project - can indeed be understood on some public policy grounds.

However, there are in our view, other, more important, public policy considerations, such as the need to ensure prudence and probity in public procurement that have been compromised as a result of these stringent conditions imposed on the right to obtain damages. We believe that in the long run, an effective damages remedy is likely to save taxpayer’s money. Of course, awarding damages to aggrieved tenderers involves an immediate and sensed cost on the taxpayer’s purse; and in this very narrow sense, the damages

⁶¹ A Petition for an Approval to Lodge an Appeal no. 7306/07 *D.N. Kol Gader Ltd v Local County Council Eshkol and Others* (Nevo, 19.10.2007) [Hebrew]. Cf. Appeal on Administrative Petition 1873/12 *Asum Construction Company Ltd v Ben Gurion University in the Negev and Others* (Nevo, 14.3.2012) [Hebrew].

⁶² Administrative Action (Tel-Aviv) 106/07 *Power Strength Ltd, v The State of Israel — Office of Prime Minister*, Tak Mech 2008 (3) 9072 (2008) [Hebrew].

⁶³ It is not inconceivable that if a longer time-limit is given, perhaps less aggrieved tenderers would lodge actions for damages. This could happen due to changes in circumstances and considerations that transpire only long time after the occurrence of an alleged impropriety (such as crystallization of damages which do not justify the financial expenses involved in initiating legal proceedings). On the other hand, the strict time limit probably filters aggrieved tenderers whose claim for damages is justified, but are unable to meet the deadline for submission.

remedy may be viewed by some as a cost,⁶⁴ rather than as means to save taxpayer's money. Indeed, in a flawless world the damages remedy would not have been necessary, and awarding damages would have justifiably been considered as an unwarranted cost. However, we live in a world of imperfections and public procurement procedures are no exception to this rule. The damages remedy, if deterrent enough, may play a crucial role in incentivizing contracting authorities to respect the objectives of public procurement law which, by and large, are aimed at promoting competition and "best value for money" results,⁶⁵ for the public benefit. If the public procurement rules are not respected, then the competition and "best value for money" objectives may not be achieved, or at best, may not be adequately achieved. This is, therefore, the reason why the damages remedy should be viewed as an indispensable public cost, the aim of which is to economically benefit the same public. For that to happen, arguably, as a general rule, the award of damages should not exceed its long-term public benefits.

We shall, therefore, propose below a reform of the rules applicable to damages in public procurement so as to convert them into a much more effective remedy for aggrieved tenderers on the one hand, and in creating deterrence against infringements of the public procurement rules, on the other hand. While doing so, we keep in mind, that one of the objectives of the damages remedy is to benefit the public as a whole, and for this purpose we also propose to restrict the damages remedy, inter alia, to material infringements of the rules and to cases where a corrective order cannot be obtained.

6. The damages remedy in EU public procurement law

We turn now to the European Union (EU) legal framework and briefly pinpoint some features in EU public procurement law, which share common similarities with its Israeli counterpart. In accordance with art.19 TEU, the EU Member States are subject to a duty to provide: "remedies sufficient to ensure effective legal protection in the fields covered by the Union law". The remedies available for ensuring compliance with the Procurement Directives⁶⁶ need, therefore, to be effective. The term "effectiveness" is not defined by the TEU nor by the relevant Procurement Directives.

Nevertheless, the widely accepted definition of "effectiveness" was established in the Court of Justice of the European Union ("CJEU") *Francoovich* decision, where the court held that:

"it follows from the principle of effectiveness that the conditions for a remedy must not make it virtually impossible or excessively difficult to obtain reparation".⁶⁷

Furthermore, in the *Von Colson* decision, the CJEU held that under EU Law national courts must ensure that compensation is "adequate in relation to the damage sustained" and that the penalty for a breach of EU law "is effective and that it has a deterrent effect".⁶⁸ As will be seen below, it seems doubtful whether the effectiveness principle is met by the EU Remedies Directives, as far as the formulation of the damages remedy is concerned. Subject to certain exceptions, the damages remedy in EU public procurement law suffers from the similar weaknesses as its Israeli counterpart, and as a result this remedy is largely ineffective in the EU as well.

⁶⁴ X. Zhang, "Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: A Critical Perspective" (2007) 5 P.P.L.R. 325, 339.

⁶⁵ Zhang, "Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: A Critical Perspective" 2007, p.327.

⁶⁶ Namely, Directive 2004/18/EC of The European Parliament and The Council of March 31, 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 (hereinafter: "Directive 2004/18") and Directive 2004/17/EC of The European Parliament and of The Council of March 31, 2004, co-ordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors [2004] OJ L134/1 (hereinafter: "Directive 2004/17") (jointly referred to as: "Procurement Directives").

⁶⁷ *Andrea Francoovich and Others v Italian Republic* (Joined Cases C-6/90 ; C-9/90) [1991] E.C.R I-5403 at [43].

⁶⁸ *Sabine von Colson and Elizabeth Kamann v Land Nordrhein-Westfalen* (Case 14/83) [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430 at [28].

6.1 Conditions for awarding damages under the remedies directives

The rules governing the damages remedy for infringements of the EU public procurement rules are governed by Directive 89/665⁶⁹ and Directive 92/13⁷⁰ (the “Remedies Directives”), as amended by Directive 2007/66.⁷¹ Article 2 of Directive 89/665 provides:

- “1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:...
-  Award damages to persons harmed by an infringement....
5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set-aside by a body having the necessary powers.”

Similar provisions are found in art.2 of Directive 92/13.⁷² It follows from the poor wording of the Remedies Directives in respect of the damages remedy, that they provide only very general and extremely limited guidelines on the rules that are to govern the award of damages for aggrieved tenderers. The precise damages remedy formula was left for the Member States to develop and adopt into their national legislation, subject, of course, to the principles underlying the TEU⁷³ and the CJEU’s jurisdiction to enforce compliance with EU’s public procurement policy.⁷⁴ Nevertheless, the approach taken by the Remedies Directives, whereby EU Member States were given only minimal guidance as to how to comply with the damages remedy requirement could imply that the positive contribution of such remedy in preventing infringements of EU public procurement rules has been very much overlooked. Indeed, these provisions have been criticized by legal commentators.

Treumer argues that it is not even clear from the directives whether they require the award of lost profits or not, which is, in Treumer’s view, of crucial importance for the efficiency of the damage remedy.⁷⁵ Treumer also points out that in the absence of EU rules, the very fundamental conditions for awarding damages in the EU Member States are left unclear. Furthermore, in his opinion, even the recent CJEU judgments in the damages remedy field, namely the *Commission v Portugal*,⁷⁶ *Strabag*⁷⁷ and *Spijker*⁷⁸ cases, have contributed more confusion than clarity to this area.⁷⁹ Likewise, Pachnou argues that Directive 89/665 does not give any guidelines on the conditions and extent of the damages remedy while such matters are

⁶⁹ Council Directive 89/665/EEC of December 1989 on the co-ordination of the laws, regulations, and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

⁷⁰ Council Directive 92/13/EEC co-ordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ K76/14.

⁷¹ On December 11, 2007 the European Parliament adopted a new directive, amending the Remedies Directives (Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts). Directive 2007/66 did not introduce any formal changes to the damages remedy. For a further discussion of it, see below.

⁷² “The Member States shall ensure that the measures taken concerning the review procedures specified in art.1 include provision for the powers:...(d) to award damages to persons injured by the infringement. Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may...provide that the contested decision must first be set aside or declared illegal.”

⁷³ Namely, the equivalence and the effectiveness principles.

⁷⁴ As the CJEU clearly pointed out in *Commission v Portugal*: “The failure by the Portuguese Republic to repeal Decree-Law No 48 051, which makes the award of damages to individuals subject to the furnishing of proof of fault or fraud on the part of the Portuguese State or public entities concerned, must be regarded as serious breach since, although it does not render it impossible for individuals to bring judicial actions, it would appear, none the less, as also pointed out by the Advocate General in paragraph 51 of his Opinion, to render those actions more difficult and costly, so impairing the full Effectiveness of the Community’s public procurement policy.” (*Commission v Portuguese Republic* (C-70/06) [2008] E.C.R. I-20 at [42].

⁷⁵ S. Treumer, “Damages for Breach of the EC Public Procurement Rules — Changes in European Regulation and Practice” (2006) 4 P.P.L.R. 159, 170..

⁷⁶ In *Commission v Portugal* (C-275/03) October 14, 2004.

⁷⁷ *Stadt Graz v Strabag AG and others* (C-314/09) [2010] E.C.R I-8771.

⁷⁸ *Van Spijker Infrabou Bv and others v Provincie Drenthe* (C-568/08) [2010] E.C.R I-12687.

⁷⁹ S. Treumer, “Transversal Perspectives: Comparing Across Legal Systems” *Public Procurement Law — Damages as an Effective Remedy* (Fairgrieve Duncan & François Lichère, (Eds.) (Oxford: Hart Publishing Ltd., 2011)).

left for the discretion of Member States.⁸⁰ The approach adopted by the Remedies Directive, in the view of Fernández-Martín, misses the potential deterrent aspect of the damages remedy.⁸¹

6.2 Onerous causation requirements

The requirements of causation present another major difficulty. Caranta⁸² and other legal commentators emphasize the onerous rules of causation, which some EU national courts apply in claims for damages resulting from breach of EU public procurement law. Under the laws of England and Wales an aggrieved tenderer is required to show high probability, almost a certainty that he would have been successful had the relevant laws not been infringed.⁸³ Under German law, apparently, no loss of profit can be claimed for failure to award a contract since as a consequence of the principle of contractual freedom, under normal circumstances no legal obligation lies on a procuring authority to award a contract to a tenderer, even if there is no valid reason for not wanting to award the contract to him. Damages for loss of profits can be obtained where an aggrieved tenderer can prove that he submitted the most advantageous tender proposal, but the contract was awarded to another tenderer. Thus, damages for loss of profits may not be available where the tender was cancelled. The tenderer further has to show that the contract would have been awarded to him had it not been for the infringement claimed.⁸⁴ Under French law, in order to obtain damages for loss of profits an aggrieved tenderer must convince the court that he has a very serious or a serious chance of winning the contract.⁸⁵

Under Swedish law, an aggrieved tenderer has to prove that there is a proper causal link between the infringement and the loss of profits. He is also required to show that he has made a reasonable effort to minimize his losses.⁸⁶ These rules are very difficult to implement and often preclude the award of effective damages.

6.3 Low amounts of damages

Another usual difficulty is the amount of damages. In most Member States, compensation tends to be relatively low; only in very few cases have plaintiffs been successful in obtaining damages for lost profits.⁸⁷ Although, the recovery of costs in most Member States is usually awarded, the question of damages for lost profits is “less certain”,⁸⁸ to say the least. Given the uncertain financial outcome of an action to obtain damages, as Trepte argues, this may have serious consequence on the effectiveness of the damages remedy, whereas aggrieved tenderers may be reluctant to commence such proceedings.⁸⁹

6.4 The set-aside proceedings requirement

A further critique relates to the Remedies Directives provisions which enable Member States to require aggrieved tenderers to ask for a set-aside remedy before lodging an action for damages.⁹⁰ This requirement,

⁸⁰ Despina Pachnou, *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: A Case Study of the Public Works Sector in the United Kingdom and Greece*. Thesis submitted to the University of Nottingham for the Degree of Doctor of Philosophy, March 2003, p.84.

⁸¹ J. M. Fernández-Martín, *The EC Public Procurement Rules: A Critical Analysis* (New York: Oxford University Press, 1996), p.227.

⁸² R. Caranta, “Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses” *Public Procurement Law – Damages as an Effective Remedy* (Fairgrieve Duncan & François Lichère, (Eds.) (Oxford: Hart Publishing Ltd., 2011)), pp.167–184..

⁸³ D. Pachnou, “Bidder Remedies to Enforce the EC Procurement Rules in England and Wales” (2003) 1 P.P.L.R. 35, 57–61.

⁸⁴ A. Rubach-Larsen, “Damages under German Law for Infringement of EU Procurement Law” (2006) 4 P.P.L.R. 179, 188–190.

⁸⁵ It is to be noted, that despite the relatively difficult level of proof required (“very serious” or “serious” chance), it is claimed that as of 2006 in 30 cases out of 53, French courts concluded that there was a serious chance or a very serious chance of winning: F. Lichère, “Damages for Violation of the EC Procurement Rules in France” (2006) 4 P.P.L.R. 171, 174–176.

⁸⁶ Michael Slavicek, “Damages for Breach of the EC Public Procurement Rules in Sweden” (2006) 4 P.P.L.R. 223, 239–240..

⁸⁷ Slavicek, “Damages for Breach of the EC Public Procurement Rules in Sweden” (2006) 4 P.P.L.R. 223, 239–240.

⁸⁸ Pachnou, *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules*, pp.124–125, pp.178–180.

⁸⁹ Peter Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (New York: Oxford University Press, 2007), p.558..

⁹⁰ Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (New York: Oxford University Press, 2007), p.558. This is similar to the requirement introduced by the dictum of Israel’s Supreme Court in the Appeal on Administrative Petition 9423/05 *The Broadcasting Authority v*

as Pachnou argues, increases the legal expenses incurred by an aggrieved tenderer in the process of seeking compensation. Furthermore, it makes the admission of an action for damages dependent on the success of the application to set-aside.⁹¹ Although most Member States do not expressly require aggrieved tenderers to seek a set-aside order as a condition precedent to lodging an action for damages, in practice, failure to do so may have a negative effect on the amount of damages that are awarded.⁹²

7. Factors dissuading lodging claims for damages in EU

A survey conducted by the European Commission found three main factors that are seen as responsible for discouraging aggrieved tenderers from lodging actions for damages in the EU.⁹³ First, it was found that actions for damages are perceived by EU tenderers as remedies lacking real corrective effect. That is, even if an action for damages proves successful, the tenderer will still not be awarded the contract. In the tenderers' view this would mean an unwelcome compromise regarding their future business with the procuring authorities. Secondly, actions for damages are hindered by practical difficulties. Hence chances for winning such an action are viewed as extremely low. These very low chances are attributed to the requirement to prove a causal link as a condition for obtaining lost profits. Thirdly, it was found that, actions for damages tend to be lengthy and costly. Litigation and legal costs are sometimes higher than what can be expected to be awarded for costs incurred in tendering for the contract. A closer look into the consultation papers on which the above study was based, reveals that in addition to the above considerations, aggrieved tenderers are also dissuaded from bringing actions for damages because of the obligation under their national legal system "to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority".⁹⁴

In addition, in another study, conducted by Pachnou, there seems to be strong evidence that tenderers are deterred from enforcing their rights against infringing procuring authorities because of fear of being blacklisted.⁹⁵ No doubt, the combined effect of the practical difficulties inherent in actions for damages, low chances of success, high costs and lengthy processes, coupled with the tenderers' fear of retaliation, has a powerful discouraging effect on them from lodging actions for damages.⁹⁶

Katimora Ltd, Tak-Al 2007(3) 2403 (2007) [Hebrew]. The reader is referred to the discussion in the text there of the problematic nature of this requirement.

⁹¹ Failure to comply with the above procedural requirement will cause the action for damages to be rejected and will preclude the aggrieved tenderer from obtaining compensation. Pachnou, *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules*, pp.87–88). See, for example, the case of Romania (D. Dragos, B. Neamtu and R. Veliscu, "Remedies in Public Procurement in Romania" (in *Enforcement of the EU Public Procurement Rules* (S. Treumer and F. Lichère, (Eds.) (Copenhagen: DJØF Publishing, 2011), p.196.

⁹² For example, in Italy and Portugal. See D. Fairgrieve and F. Lichère, "Procedures and Access to Justice in Damages Claims for Public Procurement Breaches" in *Public Procurement Law — Damages as an Effective Remedy* (Fairgrieve Duncan & François Lichère, (Eds.) (Oxford: Hart Publishing Ltd., 2011)), p.189.

⁹³ Commission Staff Working Document *Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts* (presented by the Commission) {COM(2006) 195} Impact Assessment Report — Remedies in the Field of Public Procurement (pp.12–13). The surveys on which the report was based are found on the EU's website (www.ec.europa.eu).

⁹⁴ The consultation results reveal that this obligation is claimed by the consultees (EU economic operators, lawyers, professional associations and non-governmental organizations) to be one of the causes for their reluctance to bring actions for damages — and where such actions were indeed brought: one of the reasons for their relative lack of success.

⁹⁵ D. Pachnou, "Bidders' Use of Mechanisms to Enforce EC Procurement Law" (2005) 5 P.P.L.R. 256, 258; Treumer in *Public Procurement Law — Damages as an Effective Remedy* (Fairgrieve & Lichère, (Eds.) (2011), p.157; fn. 53.

⁹⁶ Despite its unequivocal recognition, that the current rules governing the action for claiming damages for infringement of the EU public procurement law are dissuasive, the European Commission decided, at an early stage of its assessment of the Remedies Directives, not to propose any changes in this respect. The main reason given in the Impact Assessment Report was that removing or relaxing the rule on claims for damages would increase costs for the taxpayers and will require the adoption of major amendments to Member States' national laws. The European Commission also considered the damages remedy to present only "very few benefits" (see *Impact Assessment Report — Remedies in the Field of Public Procurement*, pp.26–27.

8. The Directive 2007/66 amendments and their impact on the damages remedy

8.1. Brief background

Before considering our proposals for reform, we need to assess the possible impact of some relatively recent amendments to the EU remedy regime introduced by Directive 2007/66, namely the introduction of the mandatory “standstill period” and the ineffectiveness remedy. The primary objective of Directive 2007/66 was to provide tenderers and candidates, whose interests have been adversely affected, the opportunity to obtain an effective review of the contract award decisions before contracts are concluded.

In other words, the aim of Directive 2007/66 was to make pre-contractual reviews more accessible to aggrieved tenderers, in order to facilitate corrections of infringements and prevent illegal contract awards from becoming “fait accompli”.⁹⁷ To the extent that the correction remedy is more effective in the EU than before, the importance of the remedy of damages is reduced. Nevertheless, as we will show below, the “standstill” period and the ineffectiveness remedy are far from solving all the enforcement problems of the EU procurement regime, and hence even in the era of Directive 2007/66, an effective and deterrent damages remedy is still necessary to encourage compliance with the Procurement Directives. Furthermore, in our view, an effective and deterrent remedy of damages may actually be required to reinforce the “standstill” period and the ineffectiveness remedy, because failing to respect these provisions, may expose contracting authorities to substantial liability for damages.

8.2 The mandatory “standstill” period

The first major innovation of Directive 2007/66 is the adoption of a mandatory “Standstill” period which, in general, codifies the CJEU’s judgments in the *Alcatel*⁹⁸ and *Commission v Austria*⁹⁹ cases.¹⁰⁰ Directive 2007/66 inserts a new art.2a into both Remedies Directives.

It provides, that a contract cannot be concluded following the decision to award a contract before the expiry of between 10 to 15 calendar days.¹⁰¹ The purpose of the standstill period is to give aggrieved tenderers the opportunity to challenge the award in court (or in the appropriate administrative tribunal) before the contract is signed and performed. The same provision further provides that the communication of the award decision must contain a summary of, inter alia, the reasons for the rejection of the tender or application¹⁰² (so that the tenderer can decide whether to challenge the award) and a statement of the standstill period applicable. While the mandatory “standstill” period remedy—that is not to be found in Israel’s procurement law¹⁰³—is likely to have contributed somewhat to the effectiveness of the EU enforcement regime, we believe that it suffers from substantial shortfalls, thus still necessitating an effective and deterrent damages remedy in the EU as a means to enforce infringement on the Procurement Directives. We will explain why below.

⁹⁷ Thus, limiting potential claimants to obtaining damages only, provided, of course, that the relevant conditions of the national laws are met.

⁹⁸ *Alcatel Austria and others v Bundesministerium für wissenschaft un verkehr* (Case C-81/98) [1999] E.C.R. I-7693.

⁹⁹ *Commission v Republic of Austria* (C-212/02) June 24, 2004.

¹⁰⁰ In accordance with the proposals contained in: Proposal of the European Parliament and of the Council amending Council Directives 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts {SEC (2006) 557} (“hereinafter: “Proposals with Regard to Improving the Effectiveness of Review Procedures”).

¹⁰¹ The length of the periods depends on the communication means employed (art.2a(2) of Directive 2007/66).

¹⁰² This information requirement is formulated by referral to the arts 41 and 48 of the Public Procurement Directives.

¹⁰³ Admittedly, if an Israeli court discerns that the procuring authority has been too hasty to conclude the contract following an illegal contract award decision; it may ignore the fact that the contract has been signed and partially performed, and award a set-aside order (see e.g., Administrative Petition (Jerusalem) 374/03 *Efforts Entrepreneurship, Agriculture and Investments Ltd, and others v Waste Water Refinement Plants Jerusalem Ltd, and others* (Nevo, 4.11.2003). But this judicial response is considered rare. Additionally, art.1C(a) of the Israeli Tenders Duty Regulations requires contracting authorities to publish direct contract awards decisions within five working days subsequent to their adoption, unless special circumstances apply, thus potentially allowing aggrieved bidders to petition the court rather speedily after the award decision. However, failure to publish the decision does not entail any specific remedy. Also, sometimes the contract award can become “fait accompli” only several days after an illegal contract award decision.

8.3 Derogations from the “standstill” period

Article 2b of the amended Remedies Directives provides that Member States may derogate from the “standstill” period if any of the following cases materialize: (1) where no prior publication of a contract notice in the *Official Journal of the European Union* is required¹⁰⁴; (2) if the only tenderer is the one who is awarded the contract and there are no candidates concerned¹⁰⁵; (3) in the case of a contract based on a framework agreement¹⁰⁶; and the case of a specific contract based on dynamic purchasing systems.¹⁰⁷ In the latter cases, the new art.2b provides that Member States shall ensure that the contract is “ineffective” whenever the special rules pertaining to those kind of contracts have been infringed. Interestingly, most Member States have opted to transpose into their national laws all three derogations.¹⁰⁸ Additionally, one cannot exclude the possibility, that there may be cases where contracting authorities in Member States, which have opted to adopt any or all of the derogations, will exercise their discretion erroneously, arbitrarily or even deliberately, to the effect that the “standstill” period will not be complied with, in contravention of the law. As will be seen below, in many cases failure to observe the “standstill” period will not give rise to any substantial redress, and the only option left to aggrieved tenderers will be to claim for damages.

8.4 The ineffectiveness remedy

At this stage, we will turn to the second innovation of the Remedies Directive, namely the ineffectiveness remedy. Directive 2007/66 inserts a new art.2d into each of the Remedies Directives which, in general, codifies the *Stadt Halle*¹⁰⁹ and the *Waste* case¹¹⁰ CJEU judgments.¹¹¹ It provides, that Member States shall ensure that a contract is considered ineffective by a review body in certain circumstances where a serious violation of the rules have occurred so as to deprive a tenderer of the opportunity to challenge the award of the contract. By imposing ineffectiveness on the illegally awarded contract, the directive aims to deter contracting authorities from awarding such contracts and to invalidate acts performed in clear violation of the procurement rules. These circumstances are listed in art.2d(1).¹¹²

It is however questionable to what extent the ineffectiveness remedy is indeed effective in preventing the listed infringements. Thus, in accordance with art.2d an aggrieved tenderer is required to prove, as a pre-condition for obtaining the ineffectiveness remedy, a linkage between the infringement of arts 1(5), 2(3) or 2a(2) and the tenderer’s deprivation of pre-contractual remedies; and then a second linkage, between the infringement of the substantive procurement law and the tenderer’s chances to obtain the contract.

¹⁰⁴ Article 2b(a) of of Directive 2007/66.

¹⁰⁵ Article 2b(b) of of Directive 2007/66.

¹⁰⁶ As provided for in art.32 of Directive 2004/18 and art.15 of Directive 2004/17.

¹⁰⁷ As provided for in art.33 of the Procurement Directives (art.2b(c) of the Remedies Directive).

¹⁰⁸ Summary results of the survey on the draft transposition of Directive 2007/66 into Member States law (the report was downloaded from www.publicprocurementnetwork.org [Accessed January 6, 2014]).

¹⁰⁹ *Stadt Hall and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall — und Energierverwerthungsanlage Trea Luna* (c-26/03C-26/03) [2005] E.C.R I-26.

¹¹⁰ *Commission v Federal Republic of Germany* (C-503/04) [2007] E.C.R I-6183.

¹¹¹ As later elaborated in the European Commission’s proposals for reforming the Remedies Directives - Proposal of the European Parliament and of the Council amending Council Directives 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [SEC (2006) 557]. For a thorough review of the CJEU case law which preceded art.2d of the New Directive, see S. Treumer “Towards an Obligation to Terminate Contracts Concluded in Breach of the E.C. Public Procurement Rules — the End of the Status of Concluded Public Contracts as Sacred Cows” (2007) 6 P.P.L.R. 371.

¹¹² The cases where ineffectiveness must be ensured by Member States are as follows: (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union*, without this being permissible in accordance with the substantial Public Procurement Remedies; (b) in case of infringement of either of three provisions: art.1(5) (requiring Member States to ensure that a submission for review will result in suspension of the possibility to conclude the contract); art.2(3) (requiring Member States to ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application for interim measures or for review) and of art.2a(2) (the mandatory “standstill” period). However, ineffectiveness in case of infringement of any of these provisions is conditioned upon a few provisos: that the infringement has deprived the tenderer of the possibility to pursue pre-contractual remedies, where such an infringement is combined with an infringement of the substantive Public Procurement Directives, and that this infringement has affected the chances of the tenderer applying for a review to obtain the contract. The final case where ineffectiveness may be claimed is (c) in the case of contracts based on a framework agreements and a dynamic purchasing system, if the Member State has opted to derogate from the “standstill” period in relation to such contracts.

Arguably, this twofold linkage pre-condition for triggering the ineffectiveness remedy would, in many cases, be hard to satisfy and is extremely dissuasive towards pursuing a corrective remedy. Consequently, many aggrieved tenderers may be left with the only option of pursuing a damages remedy. Furthermore, art.2d(2) provides, that the consequences of a contract being considered ineffective shall be provided for by Member States' national law and, that it may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to the obligations which still need to be performed.¹¹³ Thus, an aggrieved tenderer may still need to claim damages in relation to the already performed part of the contract.¹¹⁴

Another potential hurdle is art.2d(3), which allows Member States to provide that review bodies may not consider a contract ineffective, even though it has been awarded illegally, where "overriding reasons relating to a general interest" require the preservation of the contractual obligations.¹¹⁵ Clearly, many contracts may fall within the meaning of this wide category, such as defense contracts, contracts for the erection of socially vital projects, (e.g., construction of hospitals, airports, roads, and schools) and contracts intended to handle a wide spectrum of disasters and emergency situations). Although art.2d(3) rules out the application of "economic interests directly linked to the contract concerned" as overriding reasons relating to a "general interest", it does permit considering economic interests in "exceptional circumstances".¹¹⁶ Another possible weakness of the ineffectiveness remedy is found in art.2d(4). In short, it provides that the ineffectiveness shall not apply even where the contracting authority has illegally awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union*, provided that certain mitigating circumstances existed.¹¹⁷

A similar exception is provided in art.2d(5) with respect to contracts based on framework agreements and dynamic purchasing systems.

8.5 Alternative penalties

Whenever an infringement of some of the rules has occurred so as to deprive a tenderer of the opportunity to challenge the award of the contract,¹¹⁸ but not all of the conditions required for the imposition of "ineffectiveness" have been met,¹¹⁹ then art.2e requires Member States to provide for at least "alternative penalties". Alternative penalties are defined by art.2e(2) as the "imposition of fines on the contracting

¹¹³ Article 2d(2) of Directive 2007/66.

¹¹⁴ Even if the contract is retendered and the new contract is awarded to the same aggrieved tenderer, what has already been performed by the previous contractor can of course not be awarded again. The aggrieved tenderer has therefore suffered a loss of profits from this part, as well as expenses for having to submit a second tender. Cf. M.J. Clifton "Ineffectiveness — The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance With the Substantive Procurement Rules in the Classical Sectors?" (2009) 4 P.P.L.R. 165, where the author argues, that the combination of the ineffectiveness remedy and the alternative penalties are likely to positively impact on contracting authorities' level of compliance with substantive public procurement rules (p.181).

¹¹⁵ Article 2d(3) of Directive 2007/66.

¹¹⁶ If it would lead to disproportionate consequences (see art.2d(3) of Directive 2007/66). It should be noted that art.2d(3) provides that if overriding "general interest" considerations are applied, Member States must provide for alternative penalties within the meaning of art.2e(2). These alternative penalties and their effectiveness are discussed below.

¹¹⁷ Namely, where three accumulative conditions have been met: (1) the contracting authority considers that a contract award without prior publication of a contract notice is permissible in accordance with the substantive Public Procurement Directives (this subjective opinion of the contracting authority must have been erroneous, because if it was permissible not to publish a contract notice, art.2d(1)(a) would in any case not have applied, so there would be no need for art.2d(4)); (2) where it has published a notice as described in art.3a of Directive 2007/66, expressing its intention to conclude the contract; and (3) where the contract has not been concluded before the expiry of at least 10 calendar days with effect from the day following the publication date of the notice (i.e., the standstill obligation has been respected).

¹¹⁸ This refers to infringements of art.1(5), art.2(3) or art.2a(2) (for elaboration of these provisions, see above fn. 112).

¹¹⁹ Article 2e(1) talks about such an infringement "which is not covered by art.2d(1)(b)". Presumably, this could occur where one or more of the additional conditions of art.2d have not been fulfilled, namely: "if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;" Thus, for instance, if the aggrieved tenderer (despite having proved a relevant infringement of the Remedies Directive) is unable to prove to the review body that an infringement of Directive 2004/18 has occurred or even if he did prove that, but didn't manage to prove that it affected his chances to obtain the contract the review body can decide not to declare the contract award "ineffective" and instead look for an alternative penalty.

authority”; or the “shortening of the duration of the contract”.¹²⁰ Obviously, the imposition of a fine or shortening of the duration of a contract, instead of correcting the illegal contract award decision, do not compensate an aggrieved tenderer for his losses. When the “penalty” of shortening the duration of the illegally awarded contract is used, then we also lack sufficient deterrence. Hence, these alternative penalties leave a broad room for the recourse to the damages remedy.¹²¹

If the damages remedy will not be sufficiently effective and deterrent, contracting authorities will have no real incentives to comply with the rules and aggrieved tenderers will not be adequately compensated.

8.6 *Interim conclusions*

To conclude on the above, the “standstill” period is, by no means, a hermetic measure capable of safeguarding that all justified complaints challenging illegal awards are heard before contracts are concluded. Neither is the ineffectiveness remedy effective enough to correct all illegal direct contract awards or infringements of the mandatory “standstill” period. And the “alternative penalties” present no real alternative to corrective remedies or to the damages remedy. One should add to this the simple fact, that a timely presented justified application before a review body, ahead of the contract conclusion, is also not an absolute guarantee to obtaining a set-aside order of the award decision, in particular considering the wide public interest considerations that may be applied by the courts against granting interim and set-aside orders.¹²² Finally, one should point out that under the new art.3 of Directive 2007/66, the Commission’s intervention threshold in award procedures has been raised, so that it can only use the corrective mechanism procedure where there has been a “serious infringement” of the substantive Public Procurement Directives.¹²³

Thus, less serious infringements are outside the scope of the Commission’s’ intervention threshold. In any case, the fact is that the corrective mechanism has been rarely used in the past¹²⁴ and it is not likely that it will be used more frequently in the future. Given all the above considerations, it would seem that the latest amendments to the Remedies Directive do not render the remedy of damages redundant and there is still an acute need for the option of pursuing effective damages. Nevertheless, presumably, the EU situation is preferred if compared to its Israeli counterpart, where no similar “standstill” period nor ineffectiveness remedy are provided for.

9. Proposals for change

It follows from the above, that the rules governing the action for damages in Israel and the corresponding rules in EU Member States, while not identical, share some general common features: The conditions for awarding damages are not entirely clear, actions for damages are severely restricted by onerous causal link rules, chances for success are not impressive and the amount of damages is generally low. The effect of the set-aside prerequisite is also harsh. The proceedings to obtain damages remedy are lengthy and costly. Generally speaking, it may be concluded that both in Israel and in the EU it is hard to obtain significant damages, thus making it an ineffective remedy, lacking of a tangible deterring effect against improprieties in public tenders.

¹²⁰ Subject to such penalties being “effective, proportionate and dissuasive” (art.2e(2) of Directive 2007/66).

¹²¹ While art.2e provides that “[t]he award of damages does not constitute an appropriate penalty for the purpose of this paragraph”, this only means that Member States may not choose damages as a third alternative penalty, instead of the two penalties provided for in the provision. We don’t understand it to mean that an aggrieved tenderer is precluded from suing from damages in such a case.

¹²² Other obstacles in the way of a corrective set-aside remedy are diverse judicial review standards applied by Member States, leading to different approaches to infringements of public procurement law (see Caranta, “Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses” *Public Procurement Law — Damages as an Effective Remedy* (2011), pp.63–67, as well as procedural hurdles and evidentiary difficulties that aggrieved tenderers need to overcome.

¹²³ This is in contrast to the previous provision which spoke of “a clear and manifest” infringement. *Impact Assessment Report — Remedies in the Field of Public Procurement* (p.13).

¹²⁴ J. Holding and P. Henty, “The New Remedies Directive of the EC: Standstill and Ineffectiveness” (2008) 3 P.P.L.R. 146, 154; P. Henty and C. Davis, “When Must the Corrective Mechanism Be Used? *Commission v Greece (Case C-394/02)*”, (2006) 1 P.P.L.R. 9, 10.

9.1 The problems with the current situation

The situation described above, both in the EU and in Israel, where aggrieved tenderers are largely dissuaded from lodging actions for damages even when procurement rules have been infringed and where improprieties in the tendering process have occurred, is a troubling one. If one adds to that our observation that also the alternative remedy of setting-aside wrongful decisions is often not an effective remedy—because of the procedural and financial obstacles facing a petitioner and since often the contract is already a “fait accompli”—it would seem that we have here a systemic lack of deterrence against infringements of the public procurement rules. In other words, this system of judicial supervision over the procurement process is not a very effective tool in ensuring compliance with the rules. Nor is it doing a good job in ensuring confidence on the part of potential tenderers in the system, as is evident from the EU survey mentioned above. If these conclusions are correct, we may have here a significant welfare loss resulting mainly from two sources: 1. Abuse of the procurement rules which lead to inefficient use of public funds: government authorities are not getting the best value for the public’s taxes; 2. Lack of confidence by potential tenderers in the integrity of the procurement system prevent their participation in public tenders. This means that potential Pareto optimal contracts between such tenderers and the government are lost, competition for government contracts decreases and the arena is left open to those tenderers that know how to manipulate or bribe procurement officers to act in their interest.

9.2 What is preferable: a set-aside order or damages award?

When a material infringement of the procurement rules has occurred, which remedy is to be preferred: damages or a setting-aside order of the wrongful act or decision? It is hardly questionable that a remedy that is capable of correcting the infringement is to be preferred over damages. This is clearly the case where the infringement is detected in the pre-award stage (for instance, when the tender includes discriminatory provisions, or when a tenderer has been wrongfully disqualified from the tender). Here, if the court annuls or modifies the wrongful act or decision of the contracting authority, thus forcing it to correct the infringement of public procurement rules, especially if such correction does not cause any undue delay in the procurement process, it will have prevented an infringement and the contract will be awarded under appropriate competitive conditions for the benefit of both the public and the aggrieved tenderer. There will be no burden on the public purse—on the contrary, one would expect the competitive procedure to yield the best value for the contracting authority. Even if the infringement is detected after the award decision (for instance, where the award itself was wrongful) but before a contract has been signed and performed, the process can still be salvaged, whether by a setting-aside order, which forces the contracting authority to retender the contract award procedure, or one ordering to award the contract to a different tenderer.

Such a corrective remedy would usually be preferable over a situation where the contract is wrongfully awarded to one tenderer (who presumably offered a less advantageous tender proposal), and the court ordering the contracting authority to pay damages to the aggrieved tenderer (in addition to the payments made under the contract to the winner).¹²⁵ For this to happen, one would need to have a tender system that is capable of reviewing challenges accurately and to issue efficient corrective measures within a short time frame. If, on the other hand, the court or some other authorized tender protest tribunal is unable to resolve challenges rapidly and accurately, the question of which remedy is preferable becomes far more complex. If, for instance, such a tribunal invariably resolves tender challenges at the post-award stage, then a corrective remedy will usually become irrelevant, and all that is left is the remedy of damages. Very few tribunals are able to resolve challenges in the course of a few days, which are, at best, the time that

¹²⁵ The only exception would be a case where the delay involved in a retendering of the contract would cause excessive costs to the contracting authority.

elapses between a contract award decision and the signing of a contract. Hence, tribunals will usually be petitioned to stay the contract award until the challenge is resolved. They will then have to balance between the petitioner's legitimate interest to preserve the option of correcting the infringement and the contracting authority's legitimate interest in completing the procurement as soon as possible (the so-called "public interest grounds").¹²⁶ The latter will try to convince the tribunal that the costs of a delay are exorbitant and that the contract award must proceed.

However, in the absence of an effective remedy of damages, this is "cheap talk", because the contracting authority is highly unlikely to have to pay for its infringement of the law once the corrective measure has been denied. Only if the contracting authority knows that it may have to pay full compensation to the aggrieved tenderer if the court finds that the award decision was wrongful, will it think twice before asking the court to refuse a stay. Its legal counsel is then likely to examine the lawfulness of the authority's acts, assess its chances to prevail in the legal procedures versus the costs of a delay, and make its decision accordingly. Therefore, an effective remedy of damages is important both to legal systems with fast tribunals and to those with slow ones, although for the latter more so than for the former. We will elaborate on the benefits of an effective damage remedy below.

9.3 *The rationales for an effective remedy of damages*

We are also not convinced by the argument raised by the courts that to award damages, in particular expectation damages, means to force the contracting authority to "pay twice"¹²⁷ for the same product or services. This is in our opinion nothing but rhetoric, because the contracting authority is not really paying twice. It pays only once for the product or service that it has chosen.

However, if it has bluntly infringed the procurement rules and hence caused damage to tenderers who participated in the tender in good faith (expecting the government agency to abide by its own rules), it is only fair and prudent that it should compensate such tenderers for the damage it has inflicted (which amounts to the loss of profits, not the whole price of the product or service). In fact, payment of damages for infringement of public procurement rules serves three main purposes:

1. To compensate the tenderer for the losses it has unjustly suffered as a result of the infringement of the public procurement rules. This is, in essence, a deontological corrective justice rationale, based on the moral abidingness of the contracting authority's declared commitment to respect these rules and of its legal obligation to respect the law. This commitment created a legitimate expectation on the part of the tenderer that indeed the rules will be respected and this expectation ought to be protected. This rationale is somewhat similar to the moral justification for compensation for torts committed or for contracts breached¹²⁸,
2. To restore the confidence of the aggrieved tenderer in the public procurement system, so that the same tenderer and other potential tenderers will continue to participate in public

¹²⁶ See, e.g., Petition for an Approval to Lodge an Appeal 2139/06 *More and Co. (1982) Ltd v Ministry of National Infrastructures — The Water Commissioner* (Pador, 6.4.2006) [Hebrew]; Appeal on an Administrative Action no. 2803/06 *Meyer & Sons Ltd, v Hagichon Water Factory and Drainage Jerusalem Ltd*, Tak-Al (2)2006 235 (2006) [Hebrew].

¹²⁷ An argument based on similar reasoning was made by the European Commission in support of its decision not to propose changes to the old Remedies Directives in order to improve the action for damages: "... cases would be brought ... which would increase costs for the taxpayer, as Awarding Authorities which have signed a public contract without achieving best value for money would have to pay damages more frequently and in a higher amount". (*Impact Assessment Report — Remedies in the Field of Public Procurement*, p.26).

¹²⁸ See e.g., Fried, *Contract as Promise* (1986); E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) 50–53, 136–140; I. Englard, *The Philosophy of Tort Law* (Sudbury, MA: Dartmouth Publishing Company, 1993), Ch.1-6; A. Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford: Oxford University Press, 2004) pp.34–44. For a discussion of the corrective justice rationale in the realm of tort as well as in contract law, see also: C. Bridgeman, "Notes: Corrective Justice in Contract Law: Is there a case for Punitive Damages?" (2003) 56 *Vand. L. Rev.* 237.

tenders. This is a utilitarian rationale similar to those found in the literature on remedies for breach of contracts¹²⁹; and

3. To create a deterrent effect on contracting authorities, that will improve future adherence to the rules.¹³⁰ This too is a utilitarian rationale similar to those found in the literature on tort law and criminal law in connection with the objective of deterrence.¹³¹

By improving adherence to the public procurement rules, the damage remedy will both enhance the economic efficiency objective of public procurement, and ensure the value of equality, which are central principles of Israeli and EU Public Procurement Law alike.¹³²

The courts are absolutely right in asserting that contracting authorities have limited budgets, and that payment of damages is a burden on them. But precisely for that reason such damages will serve as a deterrent against future infringements of the rules and against awarding government contracts to undeserving tenderers. Such imposition is also bound to cause a stir in the agency and to prompt it to investigate the actions and motives of the officers that were involved in such ill-fated procurements. One could expect this to help in preventing further infringements in the future.¹³³

¹²⁹ L. L. Fuller and W. R. Perdue, "The Reliance Interest in Contract Damages" (1936–37) 46 *Yale L.J.* 52 and 373; R. Posner, *Economic Analysis of Law*, 6th edn (New York: Aspen Publishers, 2003) Ch.4.

¹³⁰ In fact, a similar rationale was expressed by Judge Humphrey Lloyd Q.C. in the *Harmon* Case where he held, that a tenderer is entitled to obtain damages for loss of profits as a result of unlawful deprivation of her opportunity to be awarded the contract in a tender procedure: "In my judgment it is not enough that some remedy should be provided for, in my view, it is clear that from the cases culminating in *Brasserie du Pêcheur* that the remedy should be both adequate and a real deterrent. Accordingly, it is necessary always to take care to ensure that the result of applying a national law which purports to implement a directive will sufficiently meet the requirements of Directive 89/665 ... Accordingly Regulation 31(3) must be read or applied in such a way that a contractor will recover all its losses incurred in consequence of the relevant breach even if such losses might not be recoverable under a comparable or analogous provision of national law for in that way the remedy will be both adequate and a real deterrent. The latter objective will not be met if a contracting authority were able to escape paying the full consequences of its breach." (*Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* 67 Con. L.R. 1 (2000) 124 at [306]). See also A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (New York: Kluwer Law International, 1999), pp.336–340.

¹³¹ See for instance G. Williams, "The Aims of the Law of Tort" (1951) 4 C.L.P. 137, 144–151; Salmond, *Law of Torts*, 8th edn (London: Sweet and Maxwell, 1936), pp. 1–11. The deterrent objective was adopted and rejuvenated by the Law & Economics movement, such as in the writings of G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (London: Yale University Press, 1970), and Richard Posner's, e.g., W.M. Landes and R. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987).

¹³² See, for instance, Recital 2 of Directive 2004/18, which refers to the principle of equal treatment and the principle of non-discrimination as one of the basic principles guiding public contract awards in the EU and art.2 of the same directive, requiring contracting authorities to act according to this principle. Increasing efficiency of public spending through more efficient procurement procedures is has been a key goal underlying the reform in EU Public Procurement Directives. See: Proposal for a Directive on of the European Parliament and of the Council on procurement by Entities in the Water, Energy, Transport and Postal Services Sectors {SEC (2011) 1585} {SEC 2011 1586}, p.2; Proposal for a Directive on of the European Parliament and of the Council on public procurement {SEC (2011) 1585 final} {SEC 2011 1586 final}, p.2; Proposal for a Directive on of the European Parliament on the award of concession contracts, pp.1–9. In Israel, the equal treatment principle is embedded in art.2 of the Tenders Duty Act, which requires the state and all public bodies to conduct all procurement through a public tender that grants equal opportunity to every person to participate in it. The provision goes on to prohibit discrimination of any kind, whether based on handicap, gender, sexual orientation, personal status, age, parenthood, race, religion, nationality, country of origin, persuasion or party membership. See also Supreme Court of Justice 368/76 *Eliyahu Gozlan v Beit Shemesh City Council* P.D. 51(1) 505, 511[Hebrew], stating that the underlying objectives of Israel Public Procurement Law are the public objective, i.e., providing equal chance and fair treatment to all member of public; and the economic efficiency objective.

¹³³ Some commentators have questioned whether the payment of damages has a deterrent effect on governments. See in particular D. J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs" (2000) 67 *U. Chi. L. Rev.* 345, who claims that governments do not internalize costs the same way as private actors do. Rather, "government actors respond to political incentives, not financial ones — to votes, not to dollars." While we can see that this may sometimes be the case, we believe that in the procurement context there are good reasons to assume that damages will in fact have a deterrent effect on the government agency who committed the material violation of the procurement rules. The reasons are that such damages are likely to be paid out of the contracting authority's own budget, thus limiting its ability to carry out its programs and to gain the political capital from its constituents that comes with them. In addition to the expenditure itself, the fact that a court of law has publicly criticized the agency's decision and characterized it as a violation of the law to the point of placing a duty of compensation on it, may also draw public attention by the media and by political opponents. These opponents may make use of such criticism — especially if it involves actual findings or hints of corruption — in demanding the resignation of the Minister in charge of the contracting authority or of the entire government. This then would entail a serious political price, not just a financial one. As noted in the text, it may also provoke an investigation against the contracting officers involved and could even cost them their jobs or prevent promotion. Furthermore, in jurisdictions such as Israel, where certain civil servants may be held personally liable towards their employer for financial losses that were caused as result of their wrongful acts (see art.221 of the Municipalities Ordinance [New Version]), the mere existence of accessible damages remedy may be a strong deterrent tool against improprieties in public tenders. While such outcomes are not directly connected to the amount of damages awarded, in the absence of a prospect for significant damages, aggrieved tenderer are unlikely to pursue a damage claim, and thus the improprieties are more likely to go undetected. This does not have to happen every time a damage award is issued for the deterrent effect to be created. Rather, the mere risk that it may happen is also likely to create deterrence against willful infringements, especially if they involve corruption.

Having said that, we do however recognize potential dilemmas where rules are ambivalent or where we deal with technical infringements committed in good faith or by mistake. Given the complexity of the public procurement rules, a procurement officer may make an error in the handling of a tender without any bad intentions. Also the contracting authority may have been convinced that it took the right decision, but the court may think otherwise. At least some of the objectives set out above do not necessarily mandate the award of high damages in such cases. Namely, there is less of a need to deter the contracting authority if it did not act in a reprehensible way, and the damages award is less likely to bring about any specific change in future behavior. The corrective justice justification for the award is also less pertinent where there is no fault on the part of the contracting authority. Therefore, we can understand why some courts require bad faith on the part of the contracting authority before they award damages.¹³⁴ However, it would not be right to be too stringent on this requirement, since to prove bad faith is not an easy task.

To impose on an aggrieved tenderer a strict burden of proof in relation to the state of mind of procuring officers whom he may not even know, and on the dealings of which he has very little information, is likely to serve as an insurmountable obstacle for many damages actions. Instead, the courts should decide about the severity of the infringements based on the objective—not subjective, circumstances of the case—in order to make sure that they impose expectation damages only in cases of clear and blunt infringements of the procurement rules, i.e., such violations that ought to be deterred.

9.4 Assessment of damages based on the aggrieved tenderer's loss of chance

After having established the important functions of the remedy of damages in public procurement and the need to preserve its effectiveness, we need to discuss the question of which type of damages? When should a court award expectation damages, i.e., compensation for loss of expected profits from the government contract? And when should it limit its award to reliance damages, i.e., compensation for the expenses incurred in connection with the preparation of the tender proposal and participation in the tendering process? We believe that in order to promote the deterrent effect of damages, and pursuant to the other objectives of this remedy, an aggrieved tenderer should, in principle, be entitled to expectation damages, whenever it can show that it had a real chance of winning the contract, but for the infringement. The alternative of awarding reliance damages usually results in very modest awards that are unlikely to provide the appropriate incentive for the tenderer to file for damages and the optimal deterrence against breaching the public procurement rules.

However, under the law as it stands now, the requirement to prove causation is a major obstacle for the success of any action for expectation damages.¹³⁵ To prove a proper causal link between the contracting authority's infringement and the aggrieved tenderer's lost profits, based on the sine qua non principle—i.e., that *but for* the infringement the claimant would most likely have won the contract—is rarely possible. The reason is that mostly there are several tenderers competing for a given contract. Even if the court has established that the contract was wrongfully awarded to one of the tenderers, it does not necessarily mean that the claimant is the one who should have won it. High-value contracts are usually not awarded based on one simple criterion—such as the lowest price—but rather based on several criteria, many of which involve the exercise of a certain degree of discretion by the procuring agency. These may include factors such as past experience in performing similar projects; the record and reputation of the tenderer in previous

¹³⁴ See for instance the Israeli Port Authority case, Administrative Petition Appeal 7357/03 *Ports Authority v Tzomet Engineers, Planning, Coordination and Projects Administration Ltd*, P.D. 59(2) 145 [Hebrew] discussed above; and the legal situation in Portugal declared incompatible with EU Law by the CJEU in *Commission v Portuguese Republic* (C-7/2008) E.C.R. I-20 at [42].

¹³⁵ See for example, J.M. Fernández-Martin, "Damages for Breach of Community Law" (1977) 5 P.P.L.R. 145, who writes: "It is unlikely that complainants can overcome the obstacle of proving a better right to the contract, especially with regard to those contracts awarded pursuant to the most economically advantageous offer, which, according to statistics, by far outweighs the lowest price criterion. As for the tenderers, it is a well-known fact that the supply of such evidence is an almost insurmountable obstacle in public procurement cases, unless the award is made on the basis of the lowest offer criterion. National experiences and case law on the matter largely supports this conclusion." (pp.149–150).

contractual relationships with the government; the quality and technological sophistication of the tenderer's product; the duration of its warranty and technical support; the financial standing of the tenderer, etc. One tender proposal may have an advantage over the others in one field, while another may have an advantage in another. We, therefore, agree with Arrowsmith, Linarelli and Wallace who rightfully argue, that where criteria other than price are used, the court cannot easily¹³⁶ draw a conclusion that but for the wrongful decision of the contracting authority, the claimant would have been awarded the contract.¹³⁷ Therefore, strict adherence to the causation requirement where an infringement has occurred in the tendering process means a weakened level of private enforcement of public procurement law. Such a situation may lead to under-deterrence, which could, in turn, result in a low adherence to public procurement rules by procuring authorities (as well as tenderers). This is so, because contracting authorities are repeat players and they can know in advance when courts will be unable to establish a causal connection between their infringements of the procurement rules and the loss of a contract by anyone of the other tenderers. In such situations—namely whenever we have a discretionary or multi-criteria award procedure—they can rest assured that a court is highly unlikely to award expectation damages. Not only the contracting authority knows that, but also the counsel for the aggrieved tenderer, and hence an action for damages—where the most that can be expected is tender proposal preparation costs—is not likely to be filed.¹³⁸

Arguably, tenderers are already hesitant to litigate in courts with contracting authorities, since litigation may result in an irrevocable break of their relations.¹³⁹ Coupled with a situation where a corrective remedy is also unlikely or hard to obtain, for reasons explained above, we are faced with systemic under-compensation and under-deterrence. On the other hand, the contrary argument is that waving the causation requirement may lead to a flood of opportunistic and frivolous actions,¹⁴⁰ which will make the entire public tender process more cumbersome and expensive not only for the relevant procuring authorities but also and particularly for the taxpayer, for whom the public tender is performed. In the authors' view, a compromise-solution should be adopted between a total relaxation of the causation proof requirement and between strict adherences to it. Such a compromise may obtain both deterrence and prevent the risk of frivolous actions. We, therefore, propose that an aggrieved tenderer will be required to prove only a material infringement¹⁴¹ of public procurement rules in order to be entitled to damages for lost profits. However, measure of the damages will depend on an assessment of the aggrieved tenderer's chances to have been awarded the contract but for the material infringement. In other words, under the new regime that we propose, the aggrieved tenderer will no longer have to prove, that but for the alleged infringement he would have won the competition. Rather, he will have to prove that a material infringement has occurred in the tender process and that in itself ought to make the aggrieved tenderer eligible for damages.

The amount of the damages will depend on the chance he had of being awarded the contract, but for the infringement. If, for instance, the court arrives at the conclusion that the aggrieved tenderer had a 50 per cent chance of winning the contract, instead of the suit being dismissed because of failure to meet the required standard of proof, (i.e., preponderance of evidence), it will be entitled to damages at the amount of 50 per cent of its expected profits from the contract. Likewise, if it proved a 33 per cent chance, it will

¹³⁶ We would, however add this, that in many cases it will be impossible to establish the causal link, due to multiplicity of criteria employed in the selection of the tenders.

¹³⁷ S. L. Arrowsmith, J. Linarelli and D. Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, (New York: Kluwer Law International, 2000). See also C. H. Bovis, *EU Public Procurement Law*, 2nd edn (Elgar European Law, 2012), p.197.

¹³⁸ In this respect, we find it hard to agree with Arrowsmith, Linarelli and Wallace, who argue that recovery of costs gives tenderers sufficient incentives to bring legal actions and so to secure compliance with public procurement rules (Arrowsmith, Linarelli and Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, (2000), p.801). Nevertheless, it is important to stress, that under UNCITRAL Model Law the payment of damages to aggrieved tenderer may be limited to "reasonable" costs relating challenge proceedings or tender preparation costs, or both (art.9(i)). A similar approach was adopted by the Revised GPA (art.XVII:7(b), whereas, under the current GPA text, damages may be limited to tender preparation costs or to costs relating to challenge proceedings (art. XX:7(c)).

¹³⁹ Bovis, *EU Public Procurement Law* (2012), p.198.

¹⁴⁰ Bovis, *EU Public Procurement Law* (2012), p.198.

¹⁴¹ In our view, the term "material infringement" should be interpreted to mean infringements of public procurement rules, which are not merely technical infringements.

be entitled to 33 per cent of these profits, and so on. The quantification of damages will, therefore, rely on the degree of chances lost by the aggrieved tenderer as a result of the alleged infringement, multiplied by the amount of her expected profit.¹⁴² A similar approach has been proposed by several scholars in the field of torts¹⁴³ and contracts.¹⁴⁴ Its roots can be traced back to the English Appeal Court case of *Chaplin v Hicks*¹⁴⁵ rendered over a hundred years ago. There, the plaintiff was shortlisted as one of fifty contestants in a beauty pageant in which there were twelve positions. The defendant, in breach of contract, deprived her of the right to be interviewed for one of these positions. The court upheld the jury's decision to award significant damages, although the claimant was unable to prove, on the balance of probabilities, that but for the behavior of the defendant she would have won a position.

The court acknowledged, however, that the claimant had a chance to win and that the defendant deprived her of it. This chance was a valuable right, the loss of which could be compensated. The court held that since the average chance of each competitor was about one in four, the plaintiff should be awarded 25 per cent of what she would have earned had she been selected.¹⁴⁶ This approach has generally been followed by courts in Common Law jurisdictions, especially in cases involving a proven breach of contract.¹⁴⁷ Thus for instance, in several cases involving professional negligence by lawyers, the courts have been faced with situations where clients have failed to prove on the balance of probabilities that, but for the defendant's omissions, the client would have won the case.

The courts invariably refused to reject the claim on this basis, and preferred to assess damages based on the probability of success, even if it was less than 50 per cent, as long as it was real or substantial and not purely speculative.¹⁴⁸ It should be noted that the vagaries of a law-suit that hasn't even been filed are much greater than a tender award procedure. Hence, the exercise of trying to assess the chances of success of an unfiled claim—faced with an abundance of procedural hurdles, unpredictable witnesses and juries, surprise evidence and capricious judges—is usually much more speculative than assessing the chance of a given tender proposal in a given tender. If judges are willing to embark on the former task, one cannot see why they wouldn't be willing to embark on the latter.¹⁴⁹

¹⁴² See also O. Dekel, *Public Tenders* (Israel: Shurat Hadin Publishers, 2006), Vol. II, pp.326–328 [Hebrew].

¹⁴³ See for instance, S. Gold, "Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence (1986–1987) 96 Yale L.J. 376; A. Porat and A. Stein, *Tort Liability under Uncertainty* (Oxford: Oxford University Press, 2001); D. A. Fischer, "Tort Recovery for Loss of a Chance" (2001) 36 Wake Forrest L. Rev. 605.

¹⁴⁴ B. Smith, "Loss of a Chance" (1999) 29 V.U.W.L.R. 225; S. M. Waddams, "The Valuation of Chances" (1988) 30 Can. Bus. L.J. 96.

¹⁴⁵ *Chaplin v Hicks*, (1911) 2 K.B. 786.

¹⁴⁶ It would seem, that damages assessed on the basis of the aggrieved tenderer's loss of chance may also be available in French public procurement law (Arrowsmith, Linarelli and Wallace, referring to a judgment of the Conseil d'Etat of 28 March, *Centre Hospitalier de Seclin* (Arrowsmith, Linarelli and Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, (2000)).

¹⁴⁷ See for instance *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 (C.A.). There the plaintiff sued her lawyers for negligently failing to file a claim in time, thereby depriving her of the chance to succeed in a legal proceeding against the former employers of her late husband. The court held that the claimant had lost a valuable chance for which she must be compensated according to the worth of the chance. Likewise, in *Allied Maples v Simmons & Simmons* [1995] 1 W.L.R. 1602 (hereinafter: "*Allied Maples*"), the English Court of Appeals asserted that it would be willing to award damages for a lost chance, even if it is less than 50 per cent. Stuart-Smith L.J. made a distinction between causation per se and quantification of damages. As regards the former, the court was of the opinion that the question is one of "historical fact" which must be established on the balance of probabilities e.g., did the negligent advice cause the claimant to purchase a property that he would not otherwise have purchased? However, if the question is not one of causation, but rather the quantification of damages and the quantification of the claimant's loss depends upon one or more uncertain events, then the question is not one of balance of probabilities, but of the court's assessment of the risk or the prospect of that event or those events occurring. See also the decision of the House of Lords in *Davies v Taylor* [1974] A.C. 207 HL.

¹⁴⁸ See *Allied Maples*; *Mount v Baker Austin (a firm)* [1998] P.N.L.R. 493, especially on pages 510D to 511C; and *Harrison v Bloom Camillin* [2000] Lloyd's LR PN 89; In the latter case, the court (Neuberger J.) said: "... the fact that the Court may conclude that the claimant is more likely to have failed than to have succeeded in the action, does not prevent the claimant recovering damages." (p.73).

¹⁴⁹ For an example where this was done, see this New Zealand case where the plaintiffs were two out of 241 applicants for a ballot to purchase sections of land: *Markholm Construction Company v Wellington City Council* [1985] 2 NZLR 520. The court assessed the claimant's chance of winning the right to the section, as well as the capital gains they would have earned from the purchase, and awarded damages accordingly. In one case it also awarded moral damages for the disappointment.

9.5 The loss of chances doctrine in Israeli law — the “Recurring Deviations” principle as an additional justification for the application of the doctrine

In Israel, the courts have sometimes been willing to adopt the approach of awarding damages based on assessment of chance (or, better, “probability”) in situations of uncertainty.¹⁵⁰

In the landmark case of *Carmel Hospital v Eden Malul*, the Supreme Court first agreed to award damages at the amount of 20 per cent of the full injury, based on the assessment that there was a 20 per cent probability that the proven negligence of the hospital was the cause of the plaintiff’s brain damage.¹⁵¹ Later, however, the Supreme Court, in a majority opinion by an extended panel, overturned its own ruling, holding that while sometimes it may be justified to depart from the “all or nothing” approach inherent in the “balance of probabilities” criterion, this case did not warrant such an approach.¹⁵² The majority opinion, formulated by the Deputy Chief Judge Rivlin, held that only cases that were characterized by a “recurring deviation” would justify awarding damages where the probability of causation was less than 50 per cent. The court referred to cases where the tortfeasor creates recurring risks and where there is a systemic bias that prevents claimants from proving their case according to the balance of probabilities criterion. The court justified its approach based on both corrective justice and consequentialist efficiency rationales:

“Firstly, when the application of the balance of probabilities rule leads, in a constant manner, to a distortion in the allocation of the tort liability and to erroneous judicial decisions, this conflicts with the principle of corrective justice. Both an underestimated and an overestimated imposition of tort liability are at odds with the principle that the tortfeasor must compensate the injured for the injury that he inflicted upon him. Deficient imposition of liability prevents restitution of injured persons to their situation prior to the wrong. In fact, we are dealing with a broad violation of the rights of injured which remains with no corrective tort response. Thus, the violation remains ‘hanging in the air’.... Secondly, the application of the balance of probability rule on a class of cases where there is a systemic deviation is also undesirable from a deterrence perspective. When the application of the rule consistently leads to non-liability of the defendant, a situation of under-deterrence is created. Under-deterrence grants in practice immunity from tort liability in relation to cases which belong to the relevant category.

Such immunity harms the incentives of the defendant to act with proper care and to minimize the risk created by his activity.”¹⁵³

The court also held that this approach should not be confined to cases of mass torts, where there are already several precedents from many legal systems, but to other categories as well, where these rationales are applicable.¹⁵⁴ We would therefore argue, that “our case”, namely the category of infringement of public procurement law, merits the adoption of this approach, not only under the more expansive minority opinion of *Malul*, which supported the award of partial damages even in the case at hand,¹⁵⁵ but also according to the majority opinion. Here, in the public procurement field, we also have a situation of a “recurring deviation”, where the infringement clearly deprives one of the tenderers from her legitimate right to win the contract and earn the profits arising from it.

If the recurrent difficulty (or even impossibility) to prove exactly which one of the tenderers should have won the tender could be used time and again as an effective defense against actions for damages, this would create a de facto immunity for procurement agencies resulting in a systemic under-deterrence.

¹⁵⁰ See for instance Civil Appeal 231/84 *Kupat Cholim v Fatach* P.D. 42(3) 312; and the *Eden Malul* case discussed below.

¹⁵¹ Civil Appeal 7375/02 *Carmel Hospital v Malul*. P.D. 60(1) 11 [Hebrew].

¹⁵² The decision was determined by a 5-4 majority of the Supreme Court in a reconsideration hearing SCH 4693/05 *Carmel Hospital v Malul* (Nevo, 29.8.2010) [Hebrew].

¹⁵³ SCH 4693/05 *Carmel Hospital v Malul* (Nevo, 29.8.2010) [Hebrew], at [23] of Justice Rivlin’s opinion (translated by the authors).

¹⁵⁴ SCH 4693/05 *Carmel Hospital v Malul* (Nevo, 29.8.2010) [Hebrew] at [35].

¹⁵⁵ The minority opinion was authored by Judge Miriam Naor.

Breach of public procurement rules can be seen as breach of contract—based on the “Contract A–Contract B” theory that has been adopted by courts in some countries¹⁵⁶—or as breach of statutory rules that can be remedied under the law of torts.¹⁵⁷ It can also be seen as a *sui generis* branch of law, specifically regulated by statute. But whether one sees the remedy of damages in public procurement as contractual or tortious in nature, there is, as we have shown, precedent from both branches of law that could support the award of damages for loss of chance. Clearly a tenderer who was wrongfully excluded from a tendering procedure had a valuable right that it was deprived of. One would assume that the tenderer did not invest so much time and expenditures to enter the tender if it didn’t think that the right to participate was valuable and that it had a fair chance to win the contract.

If it was wrongfully deprived of that chance, it ought to be compensated for the loss of this chance and the party that so deprived it thereof should be made to pay. It should be noted that the approach of assessing the chances of winning the contract works both ways, and not only in the tenderer’s favor. Hence, if the aggrieved tenderer has proven a 60 per cent chance of winning the contract, instead of being awarded 100 per cent of the expected profits, as is the case now under the “all or nothing” balance of probabilities approach, it should receive expectation damages at the amount of 60 per cent of those profits.

9.6 Reversal of the burden of proof

In the authors’ view, relaxing the causal link requirement as explained above may still be insufficient to transform the damages remedy into a deterrent one. Proving a loss of a chance to win the tender competition may still be difficult for aggrieved tenderers, the reason being that most of the information regarding the tender process is kept in the hands of the contracting authority, making it extremely difficult for an aggrieved tenderer to prove the degree of these lost chances. Furthermore, proving the chances lost to a tenderer will often require the court to make a thorough study of the winning chances of all the qualified tenderers in the same tender. The contracting authority is, in this case, the most efficient party to prove the tenderers’ chance of winning the competition and to present all the necessary factual background information to the court.¹⁵⁸

We, therefore, propose that whenever an aggrieved tenderer is successful in showing a material infringement of the relevant rules, the burden of proof regarding the degree of chance lost by it (which is essential for the damages quantification) will shift onto the contracting authority.¹⁵⁹ The point of departure for the court will be that the aggrieved tenderer is entitled to 100 per cent of the lost profits, unless the contracting authority discharges its burden of proof and convinces the court that this tenderer’s chances of winning were lower. In such a case, the tenderer will receive the percentage of the expected profits that the court has been convinced better reflects his actual chances of winning. It should be stressed that this proposal does not come instead of the previous proposal of awarding damages based on chance, but rather

¹⁵⁶ For instance in Canada, as held by its Supreme Court in *R in Right of Ontario v Ron Engineering & Construction Eastern Ltd.*, [1981] 1 SCR 111. See also the English case of *Blackpool & Fylde Aero Club Ltd. v Blackpool Borough Council* [1990] 3 All E.R. 25 (CA). This theory deems the publication of a tender as a binding commitment or offer by the contracting authority to conduct the procurement process according to certain rules of fairness and equality. When the tenderer submits its tender proposal, it in effect accepts this offer and a binding contract (“Contract A”) is concluded. Once the tendering procedure comes to an end, and a tender proposal has been selected, a second contract is concluded (“Contract B”) between the contracting authority and the winning tenderer, which is the contract to supply the goods or services procured. Hence, when a contracting authority violates the tendering rules, such as wrongfully discriminating against one of the tenderers, it essentially breaches Contract A.

¹⁵⁷ For example where the defendant, a public authority or a person holding public office commits the tort of misfeasance in public office in relation to applicable contract award regulations (*Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* 67 Con. L.R. 1 (2000) at [241]–[256]).

¹⁵⁸ This is particularly true when only one or a few of the qualified tenderers in a tender decide to bring an action for damages, whereas others decide to refrain from such an action even though, they may be entitled to damages.

¹⁵⁹ A proposal to shift the burden of proof from aggrieved tenderers to procuring authorities was already made in Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (1999), pp.338, and is mentioned in the Thesis paper of Pachnou (Pachnou, *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: A Case Study of the Public Works Sector in the United Kingdom and Greece*, p.122), citing Prof. Sue Arrowsmith in her book: *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell Ltd, 1996), p.894. Here, we develop the proposal to combine it with the doctrine of proportional damages based on the chances of having won the contract.

complements it. In other words, we are not advocating an approach whereby if the contracting authority fails to convince the court on the balance of probabilities that the aggrieved tenderer could not have won the contract, it will be required to pay full expectation damages. Since we are dealing with situations where uncertainty is the rule, to place such a burden of proof on the contracting authority would mean that most damages suits would end with full expectation damages, the exact opposite of the present situation. Such an approach would put an overly heavy burden on the public purse, may give the aggrieved tenderer a windfall, and would encourage frivolous claims.

Rather, we propose that the approach of awarding damages that are assessed according to the chance of winning the contract should be coupled with putting the onus of presenting evidence on the contracting authority, so as to ensure that the court will have full information available when embarking on its task of assessing the chances of the tender proposal.¹⁶⁰ In legal systems where there are effective pre-trial disclosure procedures and where contracting authorities can be made to disclose full information on all competing tender proposals and on the deliberations of the procuring committee, the burden of proof reversal may possibly be unnecessary. But where this is not the case, a reversal of the burden of proof will improve the accuracy of the courts' assessment of damages.

9.7 Damages for tender proposal and participation costs upon proof of material infringement

In certain cases, the contracting authority will be able to prove that the aggrieved tenderer did not have any chance whatsoever to win the contract, or that her chances were so low that the compensation for lost profits will not cover the expenses caused to the tenderer in preparing the tender proposal and in participating in the tendering process. In such a case, we propose that the aggrieved tenderer, who has proven a material infringement, will be able to recover, as a minimum, the full costs it incurred in preparation of the tender proposal and in participating in the tender.

Whether or not the aggrieved tenderer had a chance of winning, it was entitled to expect that the procurement rules would be followed. Therefore, the tenderer ought to be compensated for her tender proposal preparation and participation costs if this was not the case. In other words, reliance damages should be the minimum standard of compensation. This will also serve the objectives of deterrence and the provision of incentives to aggrieved tenderers to monitor infringements.

10. Conclusions

As discussed above, actions for damages in public tenders can serve as an important deterrent against improprieties in the public tendering process and against infringements of public procurement law in general. Nevertheless, Israel and many EU Member States have failed to fully recognize the importance of the damages remedy and have created unnecessary obstacles on aggrieved tenderers' track to obtain damages for profits they lost as a result of infringements of the law—possibly out of fear of forcing the taxpayers to pay more than once for the same project. This paper proposes to transform the damages remedy into a more deterrent instrument that will contribute to the fight against corruption and improprieties in public procurement. The proposal suggests doing so by getting rid of the unnecessary procedural obstacles to actions for damages. An aggrieved tenderer should not be required to first submit and exhaust a set-aside petition, before being allowed to sue separately for damages. Rather, instead of dividing the procedures into two separate legal actions, an aggrieved tenderer should be allowed—and encouraged—to

¹⁶⁰ The difference between the approach we advocate and the one we reject can be illustrated by the following example: Assume that after placing the burden of proof on the contracting authority, the authority convinces the court that the claimant had a 60 per cent chance of winning the contract. Under the reversed "all or nothing approach", since the defendant contracting authority failed to discharge its burden of proof by proving on the balance of probabilities that the claimant would not have won the contract, the claimant will be entitled to 100 per cent of its loss of profits. Under the approach that we propose, the claimant will only be entitled to 60 per cent of its loss of profits.

sue in the alternative for a set-aside order to correct the infringement or damages if such correction is denied for whatever reason.¹⁶¹

We believe that the preferred remedy is a judicial ruling, which forces the procuring agency to correct the infringement. Only if such correction is impossible or impractical, should the court turn to the remedy of damages. As for this remedy, once a material infringement has been proven by the aggrieved tenderer, it should in principle be entitled to expectation damages. In order to overcome the systemic difficulty of proving a causal link between the infringement and loss of the contract, we argue that these damages should be calculated on the basis of the degree of chance lost as a result of the infringement. We propose to place the burden of proof on the contracting authority, which has access to the pertinent information in this regard, to show that the aggrieved tenderer had less than a 100 per cent chance of winning the contract. However, in any case of material infringement, damages should not be less than full tender proposal preparation and participation costs. Arguably, the proposed solution will need to be further elaborated in order for it to adjust to each and every jurisdiction and legal system. However, in the authors' opinion, from a general perspective, the proposed solution presents an improvement to the current rules governing the damages remedy in Israel and in some of the EU Member States, and if adopted will yield more deterrence and adherence to the public procurement law of the said jurisdictions, provide more just remedies to aggrieved tenderers and contribute to the public confidence in the government procurement system.

¹⁶¹ In Israel, this will require an amendment of art.30 of the Administrative Courts Regulations (Procedures) 2000, which can be done by the Minister of Justice.